

THE EUROPEAN ORDER FOR PAYMENT PROCEDURE

C. M. Gheorghe

Cristina-Marilena Gheorghe

Faculty of Business and Administration

University of Bucharest, Bucharest, Romania

*Correspondence: Cristina-Marilena Gheorghe, University of Bucharest, Faculty Of Business and Administration, 4 – 12 Blvd. Regina Elisabeta, Bucharest, Sector 3, Romania;

E-mail: avocat_cristina_gheorghe@yahoo.com

Abstract

In the spirit of the Treaty of institution of the European Community and considering the need to maintain and develop a space of freedom, security and justice in the purpose of the free circulation of individuals, of goods, services and commodities, the Community considered as opportune the adoption of certain measures in the field of judicial cooperation in civil and commercial field, which to have a cross-border incidence, therefore instituting, on European level, a new freedom, the one of free circulation of the legal decisions. Therefore, it was adopted the (EC) Regulation no. 1896/2006 of the European Parliament and Council as of 12.12.2006 regarding the institution of an European procedure of payment order, of which purpose is the one to simplify, to accelerate and reduce the procedure costs in the cross-border causes regarding non-challenged pecuniary receivables, also ensuring the free circulation of the European orders for payment within all the member states by establishing some minimum standards of which compliance removes any other intermediary procedure in the member state of execution before acknowledging the execution¹.

Keywords: order for payment, payment ordinance, European procedure, non-challenged pecuniary receivable.

Introduction

The institution of the European order for payment is regulated on European level by the provisions of the (EC) Regulation no. 1896/2006 corroborated with the ones of the Regulation (CEE, Euratom) no. 1182/71 of the Council from 03.06.1971 regarding the set out of the rules applied to the terms², of the Decision 1999/468/EC of the Council from 28.06.1999 for setting out the regulations on the exercise of the competences of execution granted to the Commission³, and also of the (EC) Regulation no. 44/2001 of the Council as of

¹ See point (9) from the considerations of the (EC) Regulation no. 1896/2006 of instituting an European order for payment procedure;

² Published in the Official Journal of the European Union L 124 as of 08.06.1971, p.1;

³ Published in the Official Journal of the European Union L 184 as of 17.07.1999, p. 23; This Decision was amended by the Decision 2006/512/EC (Official Journal of the European Union L 200 as of 22.07.2006, p. 11);

22.12.2002 regarding the judicial competence, acknowledgment and execution of the decisions in civil and commercial field⁴.

The extent of instituting an European procedure regarding the order for payment was adopted having in consideration the continuous flow of the legal relations with cross-border nature as also the fact that, in the current context of recovering the receivables, the procedure of execution is an additional procedure which the creditor should cross in order to recover its receivable given that the decision was pronounced by the court of a state other than the one where the execution itself takes place.

The regulation to institute an European procedure for order for payment is applied in civil and commercial area in the *cross-border litigations*⁵, irrespective of the nature of the court, except for the ones that take birth in fiscal, custom or administrative matter. Also, neither the responsibility of the state for actions or omissions committed in exerting public authority is under the incidence of this Regulation (*acta jure imperii*) (art. 2 par. (1) of the Regulation. Also, par. (2) of the same article specifies that there are excluded from enforcing this Regulation: “the matrimonial, testamentary regime, successions, bankruptcy, covenants and other similar procedures, social insurances, the receivables coming from non-contractual obligations, *except for the cases where* these were the object of an agreement between parties or there is a recognition of the debt, or if they refer to liquid debts coming from the common property over a good”. The purpose of this procedure consists in simplifying, accelerating and reducing the costs regarding non-challenged pecuniary receivables. This Regulation shall apply in the above fields to all the member states except for Denmark⁶.

In achieving the procedure provided by this Regulation, the competence shall be determined in accordance with the regulations of community right applicable in this field, mainly the (EC) Regulation no. 44/2001. Therefore, according to art. 2, “*subject to the provisions of this regulation, the individuals domiciled on the territory of a member state are summoned irrespective of their nationality, before the courts of the member state in question*” Also, “*the individuals who do not have the nationality of a member state on the territory of which they are established, are subject to the competence regulations applicable to the citizens of the state in question.*”. The interpretation⁷ of the provisions of this article leads to the idea according to which the competence belongs to the member state where the defendant has its domicile or main office, irrespective of its nationality. Therefore results that this

⁴ Published in the Official Journal of the European Union L 12 as of 16.01.2001, p. 1; The Regulation was amended last by the (EC) Regulation no. 1791/2006 of the Commission (Official Journal of the European Union L 363 as of 20.12.2006, p. 1);

⁵ By cross-border litigation in the sense of art. 3 par. (1) of the Regulation it is understood that litigation where at least one of the parties has its usual domicile or residence in a member state other than the member state of the notified court.

⁶ In accordance with Art. 1 and 2 of the Protocol regarding the position of Denmark, attached to the Treaty regarding the European Union and to the Treaty for institution of the European Community, Denmark is not participating in adopting this Regulation, does not have obligations on its grounds and is not subject to it - item (32) from the considerations of the (EC) Regulation no. 1896/2006;

⁷ See G. Răducanu, C. M. Nișă, *the (EC) Regulation no. 44/2001 of the Council as of 22.12.2002 regarding the judicial competence, acknowledgment and execution of the decisions in civil and commercial field (Brussel I). Comentarii și explicații privind aplicarea în dreptul intern și în dreptul european (English: Comments and explanations regarding the enforcement in the domestic and European law)*, Hamangiu Publishing House, Bucharest, 2011, p. 24-25;

procedure can be applied even if the applicant is resident or established on the territory of a third country, as long as the defendant is resident or established on the territory of a member state. In accordance with the provisions of Art. 3 of the Regulation, the individuals established on the territory of a member state can be summoned in court before the courts of another member state only based on the provisions from the sections 2-7 of the 2nd Chapter which regulates the competence. Besides the regulations of general competence, there are also included regulations regarding special competences. Therefore, a person resident in a member state can be summoned in other member state in contractual matter, before the courts from the place where they have the obligation in question, understanding on one side, in case of the sale of goods, the place from a member state where, on the grounds of the contract, have been or should have been delivered the goods, and on the other side, in case of delivery of services, the place from a state where, under the contract, have been or should have been delivered the services. In case that the receivable is born from a contract concluded by a person - the consumer - for a use which might be considered as not connected with its professional activity, and the consumer himself is the defendant, the competence will belong only to the courts from the member state where the defendant is established, as provided by the provisions of art. 59 of the Regulation. “(1) *In order to determine if a party is established on the territory of the member state of which courts are notified, they apply the domestic legislation and (2) In case that one party is not established on the territory of the member state of which courts are notified, the court, in order to determine if the part is resident on the territory of another member state, applies the law of the member state in question*”. The notion of “*domicile - established*”, as shown also in the specific privatistic-international dogma⁸, does not have the same acceptance in the various law systems of the member states.

The procedure of the European order for payment is a written and fully formal procedure. The commencement of this procedure takes place by filling the application by the applicant, using in this purpose the type A form. The application should contain, in general lines, the same information as the⁹ application introduced according to the procedure of domestic law:

- ✓ the name and address of the parties and, as applicable, of their representatives, and also of the notified court;
- ✓ value of the receivable and, if applicable, of the penalties, interests, etc.;
- ✓ the interest rate and the period for which this is requested, in case it is requested;
- ✓ the de facto and de justo reasons for which the application is grounded;
- ✓ description of the probation items in supporting the receivable;
- ✓ the grounds of competence
- ✓ the cross-border nature of the litigation in the sense of art. 3 of the Regulation.

The application can be introduced both on paper media as also by any means of communication accepted by the member state of origin and which can be used by the court of origin, including on electronic path¹⁰. The court, in the shortest time from receiving the

⁸ See G. Răducanu, C. M. Nișă, *op. cit.*, p.25-26 apud I. P. Filipescu, A. I. Filipescu, *Tratat de drept internațional privat (engl. Treaty of private international law)*, Universul Juridic Publishing House, Bucharest, 2007, p. 82, 283 – 285;

⁹Art. 7 par. (1) of the (EC) Regulation no. 1896/2006;

¹⁰ When the application is filed on electronic path, this will be signed in accordance with art. 2 par. (2) of the Directive 1999/93/EC of the European Parliament and Council, from the 13th of December 1999 regarding a

application whereby it was notified, will analyze to see if the conditions mentioned in art. 2, 3, 4, 6 and 7 from the Regulation are met and if it appears to be grounded. If the court determines that the application was not appropriately filled in has available the possibility to ask to the applicant to fill it or rectify it, using in this sense the type B form. In this sense, the court will establish a term that it can also recess if will consider this useful.

In case the conditions from art. 8 of the Regulations are met for only one part of the application, the court will inform the applicant about this, using form C, inviting him to accept or reject the proposal of European order for payment for the about established by the court, and also notifying him about the consequences of his decision. Depending on the attitude of the applicant, the following possibilities appear:

1. *The applicant admits the proposal of the court.* In this situation the court will issue an European order for payment for the part proposed and accepted by the applicant;
2. *The applicant does not send the answer requested by the court within the established term.* The court entirely rejects the application for European order for payment;
3. *The applicant rejects the proposal of the court.* The court entirely rejects the application of order for payment.

The court will also reject the application if the application is obviously motiveless. In any case, the applicant will be informed with regard to the reasons of rejection by the D type form. The rejection of the application cannot be challenged with appeal but the applicant will have open the possibility to try to value his receivable by a new application of European order for payment or by any other procedural mean provided by the legislation of a member state.

If the application meets all the requirements provided by law, the court will issue the European order for payment in the shortest time, in principle within a term of 30 days from the date of introducing the application, using the E type form. In this term of 30 days is not included the term required for the applicant to fill in, rectify or amend the application.

By the European order for payment, the defendant will be informed with regard to the possibilities of action as regard to the application of the applicant:

1. To pay to the applicant the amount written in the order;
2. To oppose to the order for payment making counteraction with the court of origin, counteraction which must be sent within 30 days from the date when the order was communicated or notified to them.

The European order for payment will be communicated or notified to the defendant according to the national legislation of the state where the communication or notification should be made, existing the possibility of being accompanied by confirmation of receipt from the defendant, or not.

In case that the debtor does not counteract, the procedure will continue in accordance with the common law from the member state of origin, except for the case where the applicant demanded expressly, or by request, at the latest before the issuance of the European order for payment, that the procedure to be ended in such a case. The counteraction of the defendant will be made by using the F type form which will be transmitted by the court once with the European order for payment, the defendant being free of the obligation of specifying the reasons of his appeal. There are three cases where, even after the expiry of the 30-day terms established by art. 16 par. (2) of the Regulation, the defendant may demand the re-

community frame for electronic signatures, published in the Official Journal as of 19.01.2000, p. 12. This signature will be recognized in any member state of origin without being subject to any additional conditions.

examination of the European order for payment before the competent court from the member state of origin:

1. The European order for payment was communicated or notified in accordance with one of the ways provided in art. 14 of the Regulation and this communication or notice did not occur in useful time in order to allow him to prepare his defense, without this being imputable to him;
2. The defendant was prevented in appealing the receivable of the applicant by causes of force majeure or because of some extraordinary circumstances, without this being imputable to him;
3. The order for payment was issued wrongfully.

It can be observed that in all these 3 cases, the intention of the legislator was to remove the fault of the defendant, exactly this being the consideration for which he receives another chance to challenge the application of the creditor by filing the application of reexamination of the European order for payment issued. Contrarily, we interpret that the request of reexamination filed by the defendant would not be acceptable. Of the request for reexamination of the defendant will be rejected, the European order for payment remains valid. In exchange, if the court will consider that the reexamination request of the defendant is justified, the European order for payment will be null and void.

The most important element introduced by this procedure of European order for payment remains *the removal of the procedure of exequatur*. Therefore, according to art. 19 of the Regulation, an European order for payment becoming enforceable in the member state will be acknowledged and will be executed in all the other member states without being needed any statement to determine the enforceable force and without its acknowledgment to be challenged. The court of origin will immediately declares that the European order for payment is enforceable, using in this sense the G type form. The formal conditions required to acquire the enforceable force will be regulated by the legislation of the member state of origin. The European order for payment hence becoming enforceable will be forwarded by the court and to the defendant.

If the enforcement is to be made in a member state other than the state of origin, the applicant will make available for the competent enforcement body from that member state a copy of the European order for payment as it is declared enforceable by the court of origin and, if applicable, the translation of the European order for payment in the official language of the member state where the enforcement shall take place. The translation shall be certified by a person authorized in this respect in one of the member states.

The European order for payment can never make the object of a background reexamination in the member state of enforcement, but its enforcement can be rejected in the member state of enforcement at the request of the defendant, in the following cases:

1. The European order for payment is incompatible with a decision given or an order issues previously in any member state or in a third state, given that these will not cover the same parts in a litigation having the same object and, in the same time, the decision given or order issued previously to fulfill those conditions required to acknowledge it in the member state of enforcement, and the incompatibility could not have been invoked during the legal procedure in the member state of origin;
2. If the defendant paid to the applicant the amount established in the European order for payment.

In case that the defendant requested to the court of origin the reexamination of the European order for payment, the competent court from the member state of enforcement may, at the request of the defendant to limit the procedure of execution at insurance measures, to subordinate the execution of the constitution of a security which will determine or, under exceptional circumstances, to suspend the enforcement procedure.

Conclusions that can be drawn after the analysis of the European order for payment procedure are the ones that, as we were saying, by this regulation was followed to simplify, accelerate and reduce the procedural costs in cross-border causes regarding the non-challenged pecuniary receivables, the approval and enforcement of this regulation in member states being based on the mutual trust between the institutions of these states.

Nevertheless, in reality, we agree with the opinion according to which,¹¹ in reality, the numerous differences between the regulations of civil procedures from the member states, but also the ones of substantive law, are not fully solved by instituting some minimum applicable standards, being necessary an ample example of dogma as regard to the particularities that create major impediments of interpretation. Possibly, by enforcing the new Code of civil procedure starting with 01.09.2012 next to the new Civil Code already in force as of 01.10.2011, more of these differences to be mitigated, but the practice will be the one that will show us, along the way, which of them will be mitigated or not.

Bibliography

Răducan Gabriela, Niță Carolina Maria, Regulamentul (CE) nr. 44/2001 of the Council as of 22.12.2002 regarding the judicial competence, acknowledgment and execution of the decisions in civil and commercial field (Brussel I). Comentarii și explicații privind aplicarea în dreptul intern și în dreptul european (English: Comments and explanations regarding the enforcement in the domestic and European law), Hamangiu Publishing House, Bucharest, 2011;

Angheni Smaranda, Răducan Gabriela, *Issues regarding the European order for payment*, in *Analele Universității Titu Maiorescu, Seria Drept*, Bucharest 2007;

Filipescu P. Ion, Filipescu I. Andrei, *Tratat de drept internațional privat (English: Treaty of private international law)*, "Universul Juridic" Publishing House, Bucharest, 2007;

(CE) Regulation no. 1896/2006 of the European Parliament and Council from the 12th of December 2006 *for institution of an European order for payment procedure*, published in the Official Journal of the European Union L399/1 as of the 30th of December 2006;

(CE) Regulation no. 44/2001 of the Council from the 22nd of December 2000 *regarding the legal competence, acknowledgment and execution of the decisions in civil and commercial field*, published in the Official Journal of the European Union L 12 from the 16th of January 2001.

¹¹ See S. Angheni, G. Răducan, *Aspecte privind procedura europeană a somărilor de plată (English: Issues regarding the European order for payment)*, in *Analele Universității Titu Maiorescu, Seria Drept*, Bucharest 2007, p. 30.