
LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest.

We would welcome any comment you might have.

REGULATION (EC) No 1896/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 12 DECEMBER 2006 CREATING A EUROPEAN ORDER FOR PAYMENT PROCEDURE

EC Regulation No. 1896/2006
EC Regulation No. 44/2001
EC Regulation No. 1348/2000
EC Directive No. 93/1999
European Union Treaty, Article 65

INTRODUCTION – On December 30 2006, EC Regulation No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure was published in the Official Journal of the European Union (No L 399/4) and entered into force on the subsequent day.

According to its Article 33, the Regulation shall nevertheless apply from 12 December 2008.

Regulation (EC) No. 1896/2006, in essence, simplifies the procedure for recovery of uncontested claims (i.e. claims where there is no dispute over whether the money is owed or not, but where the debtor is unwilling or unable to pay) between Member States.

The purpose of this Regulation is to simplify, speed up and reduce the costs of litigation in cross borders cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of

enforcement prior to their recognition and enforcement.

It will not apply to Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the EU Treaty.

THE SCOPE OF REGULATION (EC) No 1896/2006 – According with its Article 2, the Regulation shall apply to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal.

Revenue, customs and administrative matters or the liability of the State for acts and omissions in the exercise of its authority are expressly excluded from the scope of the Regulation, therefore European orders for payment cannot be issued in case of claims in those subject matters. As well the Regulation shall not apply to:

- (a) Rights in property arising out of a matrimonial relationship, wills and succession;
- (b) Bankruptcy and winding up proceedings of insolvent companies
- (c) Social security claims
- (d) Claims arising from non-contractual obligations, unless they have been agreed upon by the parties, there is an admission of debt, or they relate to liquidated debts arising from joint ownership of property.

For the purpose of the Regulation, a cross border case is one where at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court pleaded at the moment the application for a European order for payment is submitted.

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The European order for payment procedure has been established for collection of pecuniary claims for a specific amount that have fallen due at the time when the application is submitted.

JURISDICTION – In general, jurisdiction shall be determined in accordance with the relevant rules of Community law, specifically those of Regulation (EC) No 44/2001.

Whenever the claim relates to a contract concluded by a consumer for a purpose which can be regarded as being outside his/her trade or profession, and consumer is the defendant in the claim, only the courts in the Member State where defendant is domiciled have jurisdiction over the case.

APPLICATION FOR A EUROPEAN ORDER OF PAYMENT – An application for a European order of payment shall be made using the standard form annexed to the Regulation. According to Article 7, the application shall report the following information about:

- (a) The names and addresses of the parties, and, where applicable, their representatives, and of the court to which the application is made
- (b) The amount of the claim, including principal, interest, eventual contractual penalties and costs
- (c) The cause of action, including a description of the circumstances laying the ground of the claim
- (d) The description of evidence supporting the claim
- (e) The ground for jurisdiction; and
- (f) The cross border nature of the case.

The application shall be submitted in a paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin.

EXAMINATION OF THE APPLICATION – According to Article 8, the court pleaded shall examine that:

- The application falls within the scope of the Regulation
- A cross border claim exists
- The application reports the above mentioned information; and that

- The claim appears to be founded.

If the application lacks of any of the above mentioned information that Article 7 requires, and unless the claim is clearly ungrounded, the court shall give the claimant the opportunity to complete or rectify the application, by setting a time limit within which the application must be completed or rectified.

In some instances, if only part of the claim meets the requirements of Article 8, then the court shall invite the claimant to accept or refuse a proposal for a European order of payment for the amount specified by the court.

The court shall reject the application if the above requirements that Article 8 sets forth are not met, as well as if the claim is clearly unfounded or the claimant fails to deliver his/her reply to the court within the time limit specified by the court itself.

There is no right of appeal against rejection of the application, though the rejection does not prevent the claimant from pursuing the claim by means of a new application or of any other procedure available under the law of a Member State.

ISSUANCE OF THE EUROPEAN ORDER OF PAYMENT – If the above requirements of Article 8 are met, the court shall issue – the Regulation states “normally” within 30 days of the lodging of the application, a European order for payment.

The European order for payment shall be issued together with a copy of the application form and must provide defendant with the following information about his/her option to:

- Pay the amount indicated in the order to the claimant; or
- Oppose the order by lodging a statement of opposition with the court of origin within 30 days from The date of service of the order on him/her

The following information shall be provided as well to defendant:

- The order was issued solely on the basis of the information which was provided by the claimant and was not verified by the court

- The order will become enforceable, unless a statement of opposition has been lodged with the court
- Where a statement of opposition is lodged, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of civil procedure, unless the claimant has explicitly requested that the proceedings be terminated in that event.
- Deposit of the order in the defendant's mailbox
- deposit of the order at a post office or with the competent public authorities and the placing in the defendant's mailbox of written notification of that deposit, provided that written notification clearly states the character of the document as a court document or that the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits

SERVICE ON DEFENDANT – According to Article 13, the European order of payment may be served on the defendant in accordance with the national law of the State in which the service is to be effected, by one of the following ways:

- Personal service attested by an acknowledgment of receipt, including the date of receipt signed by defendant
- Personal service attested by a document signed by the competent person who effected the service stating that defendant has received the document or refused to receive it without any legal justification, and the date of service
- Postal service attested by an acknowledgment of receipt, which is signed and returned by defendant
- Service by electronic means such as fax or e-mail, attested by an acknowledgment of receipt, including the date of receipt, signed and returned by defendant.
- postal service attested by a document signed by the competent person who effected the service, if defendant has his/her address in the Member State of origin
- electronic means attested by an automatic confirmation of delivery, provided that defendant has expressly accepted this method of service in advance.

Service in accordance with Article 14 is not admissible if the address of defendant is not known with certainty.

Service pursuant to Articles 13 and 14 may be also effected on a defendant's representative.

OPPOSITION TO THE EUROPEAN ORDER FOR PAYMENT

– Defendant's opposition to a European order of payment shall be made – within 30 days from the date of service on defendant – with the court of origin using the standard form annexed to the Regulation, which shall be supplied to him/her together with the European order for payment.

Defendant shall express in the statement of opposition his/her objection to the claim, without having to specify the reasons for the objection.

The statement of opposition shall be submitted in paper form or by any other means of communication, including electronic, accepted by a Member State of origin and available to the court of origin.

The statement of opposition shall be signed by the defendant or, where applicable, by his/her representative.

According to Article 14, the European order of payment may be also served on the defendant in accordance with the national law of the State in which the service is to be effected, by one of the following methods:

- Personal service at the defendant's personal address on persons who are living in the same household as the defendant or that are employed there
- In case of self-employed defendant or a legal person, personal service at the defendant's business premises on persons who are employed by the defendant

Where the statement of opposition is submitted in electronic form, it shall be signed in accordance with the requirements of EC Directive 1999/93, which provides a Community framework for electronic signatures, unless an alternative electronic communication system exists in the courts or the Member State of origin and such system is available to a certain group of pre-registered authenticated users that permits the identification of those users in a secure manner.

When a statement of opposition is filed, the proceedings shall continue before the court of the Member State of origin with jurisdiction, in accordance with the rules of ordinary civil procedure, unless the claimant has expressly requested that the proceedings be terminated in that event.

In this latter case, nothing – under national law – shall prejudice the position of the claimant in ordinary civil proceedings.

ENFORCEABILITY – If within thirty days from the date of service of the European order for payment no opposition has been filed, the court of origin shall declare the European order for payment enforceable, provided that the date of service has been verified.

The formal requirements for enforceability are governed by the law of the Member State of origin.

The court shall deliver the enforceable European order for payment to the claimant.

To be noticed is that, this above latter rule appears to be in conflict with the Italian rules of civil procedure, and in particular with provision of Article 479 of the Civil procedure code, where the claimant has the burden to serve the enforceable court order on defendant.

Anyhow, an enforceable European order for payment shall be recognised and enforced in the other Member States, without the need for a declaration of enforceability and without any possibility of opposing its recognition.

In other words, there is no need for exequatur of the payment order.

REVIEW IN EXCEPTIONAL CASES – After expiration of the thirty days time limit for opposition, defendant shall be entitled to apply for a review of the European order for payment

before the court of the Member State of origin with jurisdiction, where:

- The order for payment was served by one of the methods that Article 14 provides for; or
- Service was not effected in sufficient time to enable defendant to arrange for his/her defence, without any fault on his/her part

provided in each case that defendant acts promptly.

Defendant shall also be entitled to apply for review, whenever the European order for payment was clearly wrongly issued, having regard to the requirements of the EC Regulation 1896/2006, or due to other exceptional circumstances.

If the court resolves that review is justified, then the European order for payment shall be declared null and void.

According to Article 20, where defendant has applied for review, the court with jurisdiction in the Member State of enforcement may, upon his/her application:

- Limit the enforcement proceedings to protective measures
- Make enforcement conditional on the provision of such security as it shall determine; or
- Under exceptional circumstances stay the enforcement proceedings.

ENFORCEMENT – Without prejudice to the provisions of the 1896/2006 EC Regulation, enforcement procedures shall be governed by the law of the Member State of enforcement.

According to Article 21, a European order for payment, which has become enforceable shall be enforced under the same condition as an enforceable decision issued in the Member State of enforcement.

For enforcement in another Member State, the claimant shall provide the enforcement authorities with jurisdiction of that Member State with:

- An authentic copy of the European order for payment, as declared enforceable by the court of origin; and
- Where necessary a certified translation of the European order for payment into the official language of the Member State of enforcement, or if there are several official languages in that Member State, the official language or one of the official languages of the court proceedings of the place where enforcement is sought, in conformity of the law of that Member State, or into another language that the Member State has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the European order for payment.

REFUSAL OF ENFORCEMENT – Upon application by defendant, enforcement shall be denied by the court, if the European order for payment is irreconcilable with an earlier decision or order previously given in any Member State or in a third Country, provided that:

- The earlier decision or order involved the same cause of action between the same parties
- The earlier decision or order fulfils the conditions necessary for its recognition in the Member State of enforcement; and
- The irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin.

Under no circumstances may the European order for payment be reviewed as to its substance in the Member State of enforcement.

LEGAL REPRESENTATION AND COURT FEES – Representation by a lawyer or another legal professional shall not be mandatory for the claimant in respect of the application for a European order for payment, and for the defendant in respect of the statement of opposition to it.

Of course, the assistance of a lawyer will be mandatory in the ordinary civil proceedings subsequent to an opposition filed.

Court fees shall include fees and charges to be paid to the court, the amount of which is fixed in accordance with the national law.

RELATIONSHIP WITH NATIONAL PROCEDURAL LAW AND WITH REGULATION (EC) No 1348/2000 – All procedural issues not specifically dealt with in the Regulation No 1896/2006 shall be governed by domestic law.

The Regulation shall not affect the application of Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters.

CONCLUSIONS – The swift and efficient recovery of outstanding debts over which no legal controversy exists is of paramount importance for economic operators in the European Union, as late payments constitute a major reason for insolvency threatening the survival of businesses, particularly small end medium-sized enterprises, and resulting in numerous job losses, as the European Parliament recognized.

At a Council Meeting chaired by Luxembourg's Minister for Justice, Luc Frieden on 14.4.2005 a large majority of the Ministers stated they were in favor of a European procedure that would be limited to trans-border matters and that in all cases would be accompanied by a description of the evidence.

Moreover, this European payment order procedure would become enforceable throughout the European Union upon issuance by a Member State.

In this way, no declaration acknowledging its enforceability would be required in the executing Member State.

Article contributed by Mr. Riccardo G. Cajola, LL.M.