PROBLEMATICAL PROVISIONS OF THE REGULATION CREATING A EUROPEAN ORDER FOR PAYMENT PROCEDURE

PETRA BOHŮNOVÁ
Masaryk University, Faculty of Law
NADĚŽDA ROZEHNALOVÁ

Keywords
Regulation creating a European order for payment procedure, international jurisdiction, application for a European order for payment, form – procedure, remedy

The European legislator decided to create a legal framework for creditors in the European Union for swifter, more efficient and cheaper recovery of probably uncontested pecuniary claims in cross-border cases. The clue shall be a transnationalized "European procedure" with a subsidiary application of national laws, the result of which is a directly enforceable European order for payment. The legal base for it is the Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (hereinafter referred to as „regulation on European order for payment"). The procedure shall relieve also the courts because applications do not have to be necessarily examined by a judge. Although the regulation enters in force only on December, 12 2008, some provisions can be already identified, which will probably cause troubles by their application. The focus of this paper is to analyze these provisions and to suggest some better solutions.

Concerning the **determination of international jurisdiction**, article 6 refers to the regulation Brussels I. However, this does not seem to be suitable for the European payment order procedure. Generally, the defendant has to be sued in the state of his domicile but beside that, the regulation contains many other special and exclusive jurisdiction rules, legal regulation of which is in some cases quite complicated. For that reason, the solution contained in the regulation on European order for payment contravenes the intention to simplify the recovery of probably uncontested claims. The fulfilment of the conditions, that establish the international jurisdiction of a particular court, will have to be examined by a judge and not by

an e.g. clerk of court. It would be more convenient to introduce an exclusive international jurisdiction of the courts of a member state where the defendant is domiciled.

It is questionable, whether **exclusion of the claims arising from non-contractual obligations** was necessary as not pecuniary claims or claims on an unspecified amount are not covered by the regulation. Moreover, the question whether there is a non-contractual obligation or not is qualified differently in various legal orders which will cause dissension in application of the regulation.

The procedure is based on seven **forms** intended for its particular phases which are to be completed by simple ticking off. The forms are translated in all official languages of the EU so that a person responsible for the European order for payment procedure can only compare the form in the official language of the court with the form in the official language of the claimant or defendant. The thing is that some data have to be formulated in whole sentences. That is why the problems with translation can not be completely eliminated which might discourage the creditors.

From the text of the regulation it is not clear, in which way the court has to **examine the application** for the European order of payment. Should it be a formal examination or a material one? Apparently, there is no clear answer to the question in the regulation. I hold the opinion that a formal examination of the application is sufficient. The material examination gives more certainty at law indeed; however, it contradicts the aim of the accelerated procedure. On the other hand, the interpretation in favour of the formal examination should be amended at least with the possibility to reject the application if it is clearly unfounded. This solution would permit firstly, that the examination could be made by e.g. clerks of court and secondly, that the examination could be fully automated. In this way, the procedure would be more effective and the courts would be relieved.

In accordance with article 7 section 3, a claimant shall face **penalties** under national law if he declares **untrue information**. However, the provision does not stipulate, whether they shall be criminal, civil or administrative sanctions? This will probably lead to a different application of the regulation.

Concerning the **lapse** of time, there is no rule regulating the maintenance of the term, interrupting the running of time or the beginning of a new term after the rejection of the application. With regard to the aim of the unified transnational procedure, such a rule would be suitable as in the current situation national legal rules will be applicable.

The legal regulation of the **service of documents** is the same as in the regulation creating a European Enforcement Order despite of the wide criticism expressed by legal experts. Moreover, a situation is not regulated when the European order for payment is served in contradiction to the rules for service of documents but the debtor lodges a statement of opposition though. Does that mean that the European order for payment is completely invalid or can it be considered as a beginning of a civil procedure?

After the lapse of the time for lodging a statement of opposition, the defendant is entitled to apply for a **review** of the European order for payment before the competent court in the Member State of origin if certain conditions are met. The trouble is firstly, that the provision contains too many vague notions the courts will have to cope with. Furthermore, it does not explicitly state, which remedy shall be lodged. Will it be possible to break the legal force of the European order for payment? In this context, the remedy seems to be quite problematical as there is neither a time restriction, nor a limitation of its use on particular cases stipulated by the regulation. Such a rule does not bring much certainty at law either.

To sum it up, the regulation on European order for payment procedure has many negatives. On the other hand, it has to be reflected, that it is the first attempt to establish a really transnational European procedure. However, the real effects in the practice will be evident after the regulation enters in force.

Kontaktní údaje na autora – e-mail: *pbohunova@volny.cz*