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

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Abstrakt

Příspěvek se zabývá problematickými ustanoveními nařízení o evropském platebním rozkazu. V úvodu jsou stručně uvedeny charakteristické znaky nařízení. Poté jsou analyzována jednotlivá ustanovení, o nichž se dá předpokládat, že v praxi budou působit potíže při aplikaci: pravomoc soudů, vyloučení nároků z mimosmluvních závazkových vztahů, struktura formuláře, rozsah kontroly návrhu a sankce za nepravdivé informace v něm uvedené, promlčení, doručování a nejasnosti týkající se opravného prostředku. V závěru je nařízení krátce zhodnoceno.

Klíčová slova

Nařízení o evropském platebním rozkazu, mezinárodní pravomoc, návrh na vydání evropského platebního rozkazu, formulářové řízení, opravný prostředek

Abstract

This paper deals with the problematical provisions of the regulation creating a European order for payment procedure. First, the characteristic features of the regulation are briefly sketched. Then, the particular provisions of the regulation, which are supposed to cause troubles in practice, are analyzed: international jurisdiction, exclusion of the claims arising from non-contractual obligations, structure of the forms, extent of the examination of applications and sanctions for untrue information given, lapse, service of documents and obscurities related to the remedy. In the end, the regulation is assessed in short.

Keywords

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

1. Introduction

The European legislator decided to create a legal framework for creditors in the European Union (hereinafter referred to as „EU“) for swifter, more efficient and cheaper recovery of probably uncontested pecuniary claims[1] in cross-border cases. The clue shall be a transnationalized “European procedure” with a subsidiary application of national laws. 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“).[2] The scope of application concerns only pecuniary claims for a specific amount which have fallen due. At the end of the procedure there shall be a “European” title, i.e. a title issued in the procedure which falls under the same regulation in all member states of the EU. Moreover, such a title does not need to be recognized, to be declared enforceable or to be confirmed as a European enforcement order. In this way, a free circulation of European payment orders shall be ensured and the creditors shall have guaranteed the same level of a playing field. The next typical feature of this regulation is a broad use of standardised forms which are mostly to be filled in by marking off of the relevant data. Then, the procedure shall relieve also the courts because applications do not have to be necessarily examined by a judge.

For creditors, the European order for payment procedure shall be a further alternative for a debt recovery. It is an optional means additional to the European enforcement order, which can be issued under the Council Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims (hereinafter referred to as „regulation creating a

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[1] The article 6 of the enacting clause as well as the article 1 section 1 lit. a) of the regulation mention „uncontested pecuniary claims”. In reality, whether a claim is really uncontested will be clear as late as in the course of the European payment order procedure. It depends on the fact, whether the defendant will lodge a statement of opposition to the European order for payment (article 16) or whether he/she requires its review. For that reason, it is better to speak about “probably uncontested debts”.

[2] The idea to establish a European accelerated procedure for recovery of claims is not a new one. The Council of Ministers recommended it already in 1984. The first concretization of the suggestion came in 1987 at the VIII. International Congress on Procedural Law in Utrecht. Here, a working group was created consisting of experts on the procedural law coming from the twelve member states of the EU. In 1993, they introduced the Model Law on European Civil Procedure. Its articles 11.1. – 11.9. contained provisions concerning the European Payment Order Procedure. Although the Model Law has never entered in force, it remains an important master for activities in the area of procedural law. In 1998, the first law-making initiative arose and resulted in a proposal of the Directive on the fight against defaults with payment in commercial relations. As it was not sure, whether the article 95 of the Treaty Establishing the European Community (hereinafter referred to as „EC – Treaty“) creates competences of the European Community in this field, again, it has never entered in force. The present regulation was issued after the EC obtained the competence in the field of civil procedure (article 61 lit. c) in conjunction with the article 65 of the EC-Treaty). The aim to establish a European payment order procedure was included in the action plans from Vienna and Tampere and in the related Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. Sujecki, B. Europäisches Mahnverfahren. ZEuP, 2006, No. 1, p. 127 – 129.

European Enforcement Order"), a decision declared enforceable under the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as „regulation Brussels I), in particular cases to the "European" decision issued under the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, and to accelerated procedures embodied in some[3] national legal orders.

Regarding the fact that the regulation enters in force only on December, 12 of this year we have not had any response about its use in praxis yet. Therefore, we can not say for a certainty how efficient it will be. Notwithstanding, some provisions can be currently 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 course of the European order for payment procedure I refer to the texts already published in legal journals.[4]

2. International Jurisdiction of the Courts

Concerning the determination of international jurisdiction article 6 refers to the article 59 regulation Brussels I. If a defendant is a consumer, a claim can be lodged only by courts in the state, in which the defendant is domiciled. This means, that an exclusive jurisdiction of the courts of a defendant's home state applies in such a case.

However, the use of mentioned provisions of the regulation Brussels I seems not to be suitable for the European payment order procedure. Beside the general rule in article 2 stipulating that a judicial procedure has to take place at a court of the member state where the defendant has his domicile, the regulation contains many other special and exclusive jurisdiction rules, legal regulation of which is quite complicated in some cases. They have to be interpreted partly in conformity with judicial decisions of the European Court of Justice, partly according to national rules on jurisdiction. 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

[3] E.g. the Czech legal order regulates both the payment order procedure and the procedure on the bill of exchange order and the cheque order. On the contrary, the Dutch law does not know an accelerated procedure at all. Sujecki, B. op. cit. p. 2 (footnote), p. 131.

[4] See e.g. Horák, P., Zavadilová, M. Evropský platební rozkaz a jeho role v českém civilním procesu. Právní rozhledy, 2006, No. 22, p. 803 – 810; Sujecki, B. Das Europäische Mahnverfahren. NJW, 2007, No. 23, p. 1622 – 1625.

international jurisdiction of a particular court, will have to be examined by a judge and not by an e.g. clerk of court.[5]

Unfortunately, the proposal to introduce an exclusive international jurisdiction of the courts of a member state where the defendant is domiciled (which corresponded to the article 2 section 1 of the regulation Brussels I) did not carry through. This solution would make the European order for payment procedure more accessible and definitely easier. In such a case, an electronic examination of an application for a European order for payment would be possible.

3. Exclusion of the claims arising from non-contractual obligations

The recovery of debts arising from non-contractual obligations in the way of an European payment order is possible only if they have been the subject of an agreement between the parties or there has been an admission of debt or if they relate to liquidated debts arising from joint ownership of property (article 2 section 2 lit. d)).[6]

It is questionable, whether such a rule was necessary. If there is no pecuniary claim or if its amount is not specified, they would not have to be particularly excluded from the scope of application of the regulation. As already mentioned, the regulation applies only to pecuniary claims for a specific amount.

Moreover, the question whether there is a non-contractual obligation or not is qualified differently in various legal orders (e.g. culpa in contrahendo) which will cause dissension in application of the regulation.[7]

4. Structure of the forms

There are seven forms intended for particular phases of the procedure. They contain a broad catalogue of items with codes which are to be completed by simple ticking off. The forms are translated in all official languages of the EU, which should eliminate the problems with translation: a person responsible for the European order for payment procedure can only

[5] Sujecki, B. Erste Überlegungen zum europäischen elektronischen Mahnverfahren. MMR, 2005, No. 4, p. 214 – 215.
[6] Furthermore, from the scope of application are excluded revenue, customs or administrative matters, liability of the State for acts and omissions in the exercise of State authority („acta iure imperii"), rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, compulsory composition and similar proceedings and social security.
[7] Sujecki, B. op. cit. p. 3 (footnote), p.1623.

compare the form in the official language of the court with the form in the official language of the claimant or defendant.

Unfortunately, this practice is not possible in all cases as some data have to be formulated in whole sentences.[8] The form has to be unconditionally filled in the official language of the state where the court, which has an international jurisdiction, has the residence, or where the person, whom it is served, is domiciled. This might discourage creditors to make an application for a European order for payment in another state than where he is domiciled. It is a complication also for a court which has to use the language of a state, where a creditor or a defendant has his domicile.[9]

5. Extent of the examination of applications

Article 8 stipulates that the court seized of an application for a European order for payment shall examine, as soon as possible, whether the formal requirements (articles 2, 3, 4, 6 and 7) are met and whether the claim appears to be founded. This examination may take the form of an automated procedure. If the formal requirements are not met, and unless the claim is clearly unfounded or the application is inadmissible, the claimant shall be given the opportunity to complete or rectify the application (article 9). On the contrary, the application can be completely rejected if the legal formal requirements are not met, if the application is clearly unfounded, if claimant fails to send his reply to the court's proposal of modification (rectification or completion) of the application or if he does not accept it (article 10). The claimant is given no right of appeal against the rejection of the application. However, there are no obstacles to lodge the application again.

The question is, how to interpret the world “examine” in the article 8. Which examination is meant here – a formal or a material one? It seems to me that the text allows both possibilities: The issue of fact has to be described and descriptions of evidence supporting the claim have to be stated in the application. Accordingly, article 16 of the enacting clause mentions the examination of the application including the issue of jurisdiction and the description of evidence. This would indicate a material examination. Conversely, the mere formal examination is supported by the fact that in the European order for payment the defendant

[8] E.g. Form A – Application for a European order for payment - article 7 (interests), article 8 (contractual penalty), article 11 (additional statements and further information).
[9] E.g. Form B – Request to the claimant to complete and/or rectify an application for the European order for payment – completion or correction of the application in particular points.

shall be informed in conformity with article 12 section 4 lit. a) that the information provided by the claimant was not verified by the court. Furthermore, an electronic examination of an application shall be possible, which is very difficult to imagine if there is a requirement of a material examination. Last, but not least, in compliance with article 16 of the enacting clause the examination of the application by a judge should not be necessary.

Apparently, there is no clear answer to the question in the regulation, although such an explicit rule stipulated directly in the regulation would be more than useful. In respect to the mentioned facts 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. In addition, one of the features of the accelerated procedure is that the guarantee of the debtor's right of audience is shifted in the phase after lodging a statement of opposition when the European order for payment procedure continues before the courts of the Member State of origin in accordance with the rules of ordinary civil procedure. The advantage is, that such a rule makes the debtor to behave more responsible – he is obliged to really deal with the European payment order and to decide – after forethought – whether he will lodge a statement of opposition. Besides, the debtor is entitled to make use of a remedy in particular cases.

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 (i.e. it would be examined materially in such a case).[10] This solution would permit firstly, that the examination could be made by e.g. clerks of court, and secondly, the examination could be fully automated. In this way, the procedure would be more effective and the courts would be relieved. If the single member states regulate this issue in their national legal orders, it would lead to discrepancy with the aim of the regulation to establish a uniform European order for payment procedure how it is embodied in article 1.[11]

6. Sanctions for untrue information in an application

[10] For example, if doubts about the rightness of information provided by the creditor arise in an Austrian payment order procedure, the court can examine the application materially. This concerns e.g. the cases where creditors try to stake too high interests as a part of their claim. Sujecki, B. Kritische Anmerkungen zum gerichtlichen Prüfungsumfang im Europäischen Mahnverfahren. Das Europäische Mahnverfahren. ERA Forum (2007) 8:91–105, p. 96 and 94.
[11] Ibid., p. 91 – 105.

In accordance with article 7 section 3, a claimant shall declare that the information provided is true to the best of his knowledge and belief and shall acknowledge that any deliberate false statement could lead to appropriate penalties under the law of the Member State of origin.

This provision explicitly refers to sanctions stipulated by the national legal orders but it is not clear which sanctions the European legislator meant – criminal, civil or administrative ones? We have to be aware of the fact that in the single member states sanctions of various characters may be imposed and moreover, these can be applied differently by the courts.[12] Here the regulation is again shifting away from the idea of a uniform transnationalized European order for payment regulation.

7. Lapse

In the paragraph 5, the conditions for rejection of the application for a European order for payment are listed (article 11). However, there is no rule concerning the maintenance of the term, interrupting 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.[13]

8. Service of documents

Unfortunately, the legal regulation of the service of documents is not ideal. The European legislator probably overheard the loud criticism of the regulation of the service of documents in the regulation creating a European Enforcement Order (articles 13 and 14),[14] which are exactly the same as in the regulation on European order for payment (including the numbering of the articles).

Except that, it would be desirable to regulate the situation 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?[15]

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[12] Sujecki, B. Europäisches Mahnverfahren - Geänderter Verordnungsvorschlag. EuZW, 2006, No. 11, p. 330.
[13] Sujecki, B. op. cit. p. 3 (footnote), p. 1624.
[14] For more details see Bohůnová, P. Nařízení o evropském exekučním titulu. Je dlužníkovi garantováno právo na spravedlivý proces? Evropský exekuční titul. Právní rádce, 2008, No. 3, p. 28 – 36.
[15] Considering the aim of the regulation to ensure an efficient recovery of the debts, I think the second solution would be more convenient as it constitutes a parallel to the regulation Brussels I and the regulation creating a European Enforcement Order. Under the former, a formal mistake in the service of documents can not lead to the

9. Remedy

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. It is a compromise between a one – and a two-stage procedure. The conditions are stipulated in article 20:

1. The order for payment was served by one of the methods provided for in Article 14, and service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part, or
2. the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part.

In either case, the defendant has to act promptly (article 20 section 1).

3. Order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances (article 20 section 2).

By this provision, the courts will have to cope (or to wait for judicial decisions of the European Court of Justice) with undefined notions such as "promptly", "extraordinary circumstances" or „clearly wrongly".

In relation to the article 20 section 1 lit. a) ii doubts arose,[16] whether a situation can occur, that the service was not effected in sufficient time to enable the defendant to arrange for his defence as the term for sending a statement of opposition starts not until the European order for payment is served. This distinguishes the European order for payment procedure from an ordinary civil procedure, where the date of proceeding is appointed and between the service of the document giving notice about that and the proceeding itself a little time can be left for the defendant to arrange for his defence. According to the diction of article 20 section 1 lit. a), the legislator meant the case when the European order for payment is served in accordance with the rules for service but without proof of receipt by the defendant. I.e. the document taken

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rejection of the recognition and of the declaring the decision enforceable if the debtor was aware of it (article 34 section 2). In its article 18, the latter makes the debtor to deal with the procedure in which he was invalidly served. If he gets knowledge of the procedure at least upon the service of the decision and if he does not lodge a remedy, the decision can be confirmed as a European Enforcement Order. Lodging a remedy is an active conduct that shows that the European order for payment was served to the defendant.

[16] Sujecki, B. op. cit. p. 2 (footnote), p. 146.

over by another person than the defendant and the defendant gets knowledge about it too late and is not able to lodge the statement of opposition in the given term.

The negative of this provision is that 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[17], nor a limitation of its use on particular cases stipulated by the regulation[18]. Hence, there is a danger of a too broad scope of application of the remedy and of its conflict with the institute of material legal force.[19] Such a rule does not bring much certainty at law either.

10. Conclusion

The regulation on European order for payment procedure has surely many insufficiencies as well as the other regulations issued recently[20]. On the other hand, its positives have to be reflected for it is the first attempt to establish a really transnational European procedure. Although some provisions cause interpretation difficulties and sometimes contradict the aims of the regulation itself, the real effects in the practice will be evident after the regulation enters in force. Nevertheless, after five years, the commission will draw a report which will review the operation of the European order for payment procedure (article 32) and according to its findings the regulation can be novelized.

Literature:

[1] Sujecki, B. Europäisches Mahnverfahren. ZEuP, 2006, No. 1, p. 127 – 129.

[2] Horák, P., Zavadilová, M. Evropský platební rozkaz a jeho role v českém civilním procesu. Právní rozhledy, 2006, No. 22, p. 803 – 810.

[17] The regulation maybe does not stipulate any term because in some member states, the enforcement of judicial decisions is possible only in a fixed period after the decision was issued (e.g. England und Wales six years, the Netherlands thirty years). If the term for lodging a remedy would be limited e.g. for three years from the issuing of the European order for payment and the debtor would get knowledge about the proceeding without any fault on his part only together with the enforcement of the decision, he would be deprived of the possibility to get use of the remedy. In consequence, he could not apply for a stay or limitation of enforcement that are provided for in article 23. Joy, M. European Enforcement Order. Seminar on Cross Border Litigation, p. 8.
In such a case, the remedy would break the legal force of the European order for payment. On the other hand it is a question, how such a remedy is compatible with the idea of an accelerated and effective procedure.
Joy, M. European Enforcement Order. Seminar on Cross Border Litigation, Kroměříž, 26. 6. 2006, p. 8.

[18] I.e. consumer affairs.

[19] Sujecki, B. op. cit. p. 7 (footnote), p. 333.

[20] Particularly the regulation on the European Enforcement Order.

[3] Sujecki, B. Das Europäische Mahnverfahren. NJW, 2007, No. 23, p. 1622 – 1625.

[4] Sujecki, B. Erste Überlegungen zum europäischen elektronischen Mahnverfahren. MMR, 2005, No. 4, p. 213 – 217.

[5] Sujecki, B. Kritische Anmerkungen zum gerichtlichen Prüfungsumfang im Europäischen Mahnverfahren. Das Europäische Mahnverfahren. ERA Forum (2007) 8:91–105, p. 91 - 105.

[6] Sujecki, B. Europäisches Mahnverfahren - Geänderter Verordnungsvorschlag. EuZW, 2006, No. 11, p. 330 – 333.

[7] Bohůnová, P. Nařízení o evropském exekučním titulu. Je dlužníkovi garantováno právo na spravedlivý proces? Evropský exekuční titul. Právní rádce, 2008, No. 3, p. 28 – 36.

[8] Joy, M. European Enforcement Order. Seminar on Cross Border Litigation.

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