

Response to the Public Consultation on the European Enforcement Order (EEO)¹

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

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1. Introduction

The Regulation creating the European Enforcement Order is intended to simplify the cross-border enforcement of uncontested claims. It was one of the first instruments to abolish exequatur proceedings, consisting of a formal procedure in the Member State of enforcement to obtain permission to proceed to enforcement. It follows from the EU policy to reduce the formalities for the enforcement of judicial decisions in the Member States, as it was introduced over twenty years ago. This is the first time, fifteen years after its enactment, that the European Enforcement Order Regulation is subject to a broad policy evaluation. The area of civil justice cooperation has been developing fast after the European Enforcement Order Regulation (hereafter: EEO Regulation) became applicable in October 2005, and other instruments have been more at the forefront (point 2). The EEO Regulation has been a topic of discussion by academics, but relatively limited and mostly in the first years after its enactment. In addition, there are little empirical data available on the functioning of this Regulation in practice so far; along with existing research the present assessment by the Commission should cast more light on this (point 3). Another development in the area of European civil justice, and also prompted by the need to create coherence and a better underpinning of the separate justice instruments, is the creation of minimum standards of civil procedure and model rules (point 4). This included an initiative by the European Parliament for a Directive on Minimum Standards of Civil Procedure³, and the ELI-UNIDROIT European Model Rules of Civil Procedure⁴. This ties in part with one of the foundations of the EEO Regulation, which relies on minimum standards to secure that a claim is uncontested.⁵ A question that has been posed is whether there is a continued

¹ The ELI Council has commented on the Response.

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³ European Parliament Recommendation 2015/2084(INL) of 6 June 2017, on common minimum standards of civil procedure in the EU, available at https://www.europarl.europa.eu/doceo/document/A-8-2017-0210_EN.html.

⁴ The ELI-UNIDROIT European Model Rules of Civil Procedure were adopted by the European Law Institute and UNIDROIT in August/September 2020. Available here:

<https://www.unidroit.org/english/governments/councildocuments/2020session/cd-99-b/cd-99-b-10-rev-e.pdf>.

⁵ Art 12-19 EEO Regulation.

need for the European Enforcement Order in view of the abolition of exequatur proceedings under the Brussels I (recast) Regulation⁶, and other instruments geared to debt collection (point 5).

2. Interaction and Comparison with Other Civil Justice Instruments

The EEO Regulation was the first to abolish intermediate proceedings required to obtain permission to proceed to enforcement in another Member State. It was a first step towards abolition of exequatur in a number of other instruments in the area of civil justice. The most important other instruments for cross-border debt collection are the mentioned Brussels I (recast) Regulation and three special instruments, the European Order for Payment Procedure (EOP), the European Small Claims Procedure (ESCP) and – to a less extent – the European Account Preservation Order (EAPO).⁷ The Brussels I (recast) Regulation is the key instrument in European civil justice, and though no specific statistics can be provided, it is without a doubt the one that is used most in the practice of the Member States. It is also most developed through the interpretations by the European Court of Justice and looking at the preliminary rulings, most in the area of civil justice cooperation concern the Brussels I (recast) Regulation.⁸ It does not implement minimum standards or other rules of civil procedure, as do the EEO, EOP, ESCP and EAPO Regulations, but provides a cross-border system for judgments based on domestic law, both in uncontested and contested claims. Unlike The Brussels I (recast) Regulation, the EEO Regulation and EOP, ESCP and EAPO Regulations are optional for the claimant. The latter three have introduced uniform European procedures that operate alongside domestic procedures, while the EEO Regulation is optional in relation to the Brussels I (recast) Regulation in the stage of enforcement.

The two special procedures on debt collection enacted a few years after the EEO Regulation became applicable, the EOP and ESCP, have abolished exequatur in a similar way. They are the same as in abolishing not only the exequatur as an administrative procedure but also abolishing the grounds of refusal, with the exception of irreconcilability of judgments.⁹ This also, and most importantly, means that the public policy exception has been abolished. In addition, it includes – as do the uniform European procedures – minimum standards for review in exceptional cases.¹⁰ These grounds of review – to be assessed by the court of the Member State of origin and not the Member State of enforcement – pertain to securing minimum standards of service of documents and implement a *force majeure* rule in case the debtor was prevented from objecting to the claim. In addition to these, the EEO Regulation provides for another ‘safeguard’ in the form of rectification or withdrawal of the EEO certificate that can be requested in case of a material error or when it was clearly wrongly issued, having regard to the requirements laid down in the Regulation.¹¹ While the uniform European procedures provide for a full-fledged procedure – complemented by national law where necessary – the EEO Regulation contains minimum standards for the service of documents and the provision of information about the

⁶ Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) [2012] OJ L351/1.

⁷ Regulation (EU) 2015/2421 of 16 December 2015 amending Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No. 1896/2006 creating a European order for payment procedure [2015] OJ L341/1; Regulation (EU) 655/2014 of 15 May 2014 establishing a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59.

⁸ X.E. Kramer & J. Hoevenaars, ‘European Civil Procedure and the Dialogue between National Courts and the European Court of Justice’, in B. Hess and K. Lenaerts (eds.), *The Fiftieth Anniversary of the European Law of Civil Procedure*, Nomos 2020, 175 at 185-186.

⁹ Art 21 EEO Regulation.

¹⁰ Art. 19 EEO Regulation.

¹¹ Art. 10 EEO Regulation.

claim to the debtor, coupled with the possibility of asking for rectification or withdrawal and review in exceptional circumstances.

Following the outcome of the negotiations on the recast of Brussels I, the traditional grounds of refusal – including public policy – have been retained in the Brussels I (recast); only the *exequatur procedure* was abolished.¹² The difference between Brussels I-bis and the EEO Regulation, and perhaps an advantage of using the EEO Regulation for uncontested claims, is that the EEO Regulation goes a step further in also abolishing the grounds of refusal.

3. Academic Assessment and Functioning in Legal Practice

As remarked above, relative few in-depth academic analyses of the European Enforcement Order have been made and most of the academic work is of a technical nature. It can be observed that the EEO Regulation is rather complex in comparison to the other instruments, as it combines elements of a uniform European procedure by including minimum requirements for the service of documents (listing eleven ways of service) and the provision of information to the debtor, with features of an ‘enforcement-only’ system similar to Brussels I (recast) since it concerns the certification of a judgment obtained in a procedure based on domestic law. Unlike the Brussels I (recast) Regulation it did not retain the traditional grounds of refusal, but has a two-tiered system of safeguards as described above.

The case law of the European Court of Justice has revealed at least two difficulties in relation to this Regulation. The first is the certification of a national judgment as an EEO under Art 6 of the Regulation. From the CJEU ruling in *Imtech Marine Belgium NV v Radio Hellenic SA* it is clear that the certification can be carried out by a judge only.¹³ This follows from the consideration that the legal qualifications of a judge are essential to a correct assessment of the ‘observance of the minimum requirements intended to safeguard the debtor’s rights of defense and the right to a fair trial’, as the CJEU clarified.¹⁴ While the EEO is often requested at the start or during proceedings, and thus automatically issued by a judge as part of the ordinary procedure, the certification can also be requested after judgment has been rendered. In a number of Member States the public notary, court clerk or similar officer was tasked with the certification,¹⁵ and it seems that this practice has not come to an end in all Member States after the *Imtech* ruling.¹⁶ In the case *Pebros Servizi Srl v Aston Martin Lagonda Ltd* the CJEU confirmed that the certification itself (unlike the issuance of the certificate as an administrative act) is a final stage of the procedure and should thus be done by a judge.¹⁷

The second issue is the limitations of safeguards in place as the traditional grounds of refusal as retained in Brussels I (recast) have no place in the Regulation. Instead a rather complex system of safeguards is in place, and ultimately the ‘review in exceptional circumstances’ laid down in Art 19

¹² Art. 45 Brussels I (recast) Regulation.

¹³ Case 300/14 *Imtech Marine Belgium NV v Radio Hellenic SA* [2015] ECLI:EU:C:2015:825.

¹⁴ *Imtech*, para 47.

¹⁵ X.E. Kramer, ‘Specific Instruments’, in: B. Hess & P. Ortolani (Eds.), *Impediments of National Procedural Law to the Free Movement of Judgments*, Verlag C.H. Beck München 2019, 207 at 209-201;

¹⁶ T. Kruger & F. van Overbeeke, ‘European Enforcement Order’, in: J. von Hein & T. Kruger (eds.), *Informed Choices in Cross-Border Enforcement*, Intersentia 2020, 51 at 55-56. This is particularly commented in relation to Poland, see A. Frąckowiak-Adamska; A. Guzewicz & A. Lewestam-Rodziewicz, ‘Poland’, in J. von Hein & T. Kruger (eds.), *Informed Choices in Cross-Border Enforcement*, Intersentia 2020, 338 at 246, but also in other Member States the position of certain authorities is not clear.

¹⁷ Case C-511/14 *Pebros Servizi Srl v Aston Martin Lagonda Ltd* [2016] ECLI:EU:C:2016:448, para. 29. The CJEU ruled that “the procedure for the certification of a court decision as a European Enforcement Order appears, functionally, not as a procedure which is distinct from the earlier judicial procedure, but as the final phase of that procedure, necessary in order to ensure that it is fully effective, by allowing the creditor to proceed with the recovery of his debt”.

EEO Regulation will have to prevent the violation of minimum standards of civil procedure. Most important in this regard is the right to be heard. Under the EOP Regulation, the *eco Cosmetics* case¹⁸ at the CJEU illustrated that the safety valve of the review mechanism under that Regulation¹⁹ does not cover all instances where fundamental procedural rights are at stake. In that case, service was not effected in line with the minimum standards of the EOP – which refer and are identical to those of the EEO – but the EOP was nevertheless declared enforceable. The CJEU ruled that this situation is not covered by the review grounds under the EOP Regulation and that national law should ultimately remedy this. While the EEO is constructed somewhat different from the EOP, it cannot be ruled out that cases where the right to be heard was violated will slip through the net of the safeguards of the EEO Regulation, also in absence of a general (procedural) public policy exception.

Information on the functioning of the EEO Regulation in the Member States' legal practice is limited. Member States usually do not keep statistics on the number of cases in which a European Enforcement Order is requested and/or issued. The Order can be requested at the start or during proceedings and be part of an otherwise ordinary procedure, and will in that case be issued together with the national judgment itself. It can also be requested after judgment is given and the claimant wishes to proceed to enforcement in another Member States. Particularly in the former case, keeping track of the number of cases, or duration of the issuance is difficult as it goes alongside the ordinary procedure.²⁰

The two most extensive studies so far where empirical data have been collected on the EEO, among other instruments,²¹ are: (1) a large scale EU-wide study on national procedural law, the free circulation of judgments and the protection of consumers under EU law, commissioned by the European Commission and directed by the Max Plank Institute Luxembourg²²; (2) an academic project, involving research institutes in eight Member States, *Informed Choices in Cross-Border Enforcement*, funded by the European Commission.²³ In the first, it was concluded that general problems are concerns for the right of defense, the application of the service rules and rules on translation of documents as well as the review mechanism of Art 19.²⁴ The most notable issues arising in specific Member States identified are the interpretation of the concept 'uncontested claim' under Art 3 EEO and the competence as to certification of the judgment, as discussed above.²⁵ In this research, conducted in 2016 and 2017, it was commented already by participants in the surveys and interviews that it was expected that the EEO Regulation would become less important in view of recast of the Brussels I Regulation. The second study, conducted in 2018-2019, which focused on the 'second generation' instruments (EEO, EOP, ESCP and EAPO) also contains data on the number of published cases in the eight Member States that were studied and included in the database (234 cases in total). However, because it only concerns published cases that could be traced, it is not conclusive for the

¹⁸ Joined cases C-119/13 and 120/13, *eco cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy* [2014] ECLI:EU:C:2014:2144.

¹⁹ Art 20 EOP Regulation.

²⁰ The reporter informed at the Rotterdam District Court (one out of the eleven District Courts, and one of the biggest) in the Netherlands, where it was confirmed that they don't keep count of cases where an EEO was requested at the start of the proceedings, while those where it is requested after judgment are five to ten cases per year.

²¹ The present reporter was involved in both these studies.

²² An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission, JUST/2014/RCON/PR/CIVI/0082. The first part of the reports, focusing on free movement of judgments is also published as: B. Hess & P. Ortolani (eds.), *Impediments of National Procedural Law to the Freedom of Judgments*, Volume I, Hart/Beck/Nomos 2019.

²³ J. von Hein & T. Kruger (eds.), *Informed Choices in Cross-Border Enforcement*, Intersentia 2020.

²⁴ X.E. Kramer, 'Specific Instruments, in Hess & Ortolani 2019 (note 21), 212-214.

²⁵ X.E. Kramer, 'Specific Instruments, in Hess & Ortolani 2019 (note 21), 213.

use in practice and the study does not provide information as to whether the number of applications is decreasing. Problems identified in this study coincide with those in the Commission study, including the qualification as uncontested claim, the competence for certification, the review mechanism and interaction with national law, and the service rules. In some Member States the EEO is not used often, including in Belgium, France, Italy and Poland.²⁶

While the studies and published case law do not reveal pressing structural problems in the operation of the EEO Regulation, both academics and practitioners are of the opinion that since the exequatur has been abolished in the Brussels I (recast) Regulation, the EEO Regulation has become less important.

4. Minimum Standards and the ELI-UNIDROIT European Model Rules of Civil Procedure

The functioning and a possible revision of the European Enforcement Order and the further development of European civil justice, can benefit from the recent efforts to establish minimum standards of European civil procedure and Model Rules. The most advanced set of rules is that of the ELI-UNIDROIT European Model Rules of Civil Procedure that were adopted by the respective institutes in August/September 2020.²⁷ The project aimed to transform the ALI-UNIDROIT Principles on Transnational Civil Procedure (2004) in order to make them suitable for the European regional context. The goal is the establishment of a set of coherent model rules that can be used by European and national legislators and the European community as a whole. The Steering Committee, nine content working groups, the horizontal structure group tasked with coordinating the work of the different working groups, filling the gaps, and securing a coherent set of model rules, a final drafting team and translation task force consisted of around fifty academics and practitioners from a great variety of European countries. In addition, it involved advisory members from all over the world as well as European and international institutions as observers. The Model Rules consist of a set of main principles and rules covering a wide array of topics in the area of European civil procedure. It contains 245 rules in twelve parts, dedicated to general provisions, rules on parties, case management, commencement of proceedings, proceedings preparatory to a final hearing, access to information and evidence, judgment, *res iudicata* and *lis pendens*, means of review, provisional and protective measures, collective proceedings and costs.

The ELI-UNIDROIT European Model Rules of Civil Procedure (hereinafter: EMRCP) can serve as a general framework to improve European civil procedural law at the horizontal level, and help implementing harmonised rules in the different instruments, including the EEO Regulation. First, the general provisions laid down in Rules 2-28 EMRCP, including main principles of civil procedure and the European fundamental rights, can serve to underpin and further explicate the right of the creditor to an efficient and effective procedure of debt collection and to protect the rights of the debtor. For instance, the EMRCP contains more detailed rules on translation of documents, both in this general part and in the rules on service of documents. The translation of documents under the EEO is one of the issues that has been designated as problematic in some of the Member States.²⁸ Second, a bottleneck in the EEO Regulation is the application of the minimum standards relating to service of documents and provision of information.²⁹ The EMRCP contains advanced rules on the service of

²⁶ National reports included in Von Hein & Kurger 2020 (note 22).

²⁷ For a brief overview, see X.E. Kramer, *Adoption ELI-Unidroit Model European Rules of Civil Procedure*, conflictoflaws.net, 2 November 2020.

²⁸ See point 3.

²⁹ See point 3.

documents (Rules VI, Rules 68-86 EMRCP) that can aid in improving the service rules in the EEO Regulation, which are also relevant for the EOP Regulation. Incidental provisions included in the refined set of rules on information and evidence (Part VII, Rules 87-129) may also be useful. Third, the EMRCP includes rules on means of review (Part IX, Rules 153-183 can be of use in streamlining and concretizing the review mechanism in the EEO Regulation.

5. Concluding Remarks

The EEO Regulation was a first step in easing the enforcement of cross-border debt collection and enforcement by abolishing the exequatur. While this was a breakthrough fifteen years ago, at present most EU Regulations dealing with cross-border enforcement have abolished exequatur proceedings. Most directly related to the EEO are the EOP Regulation and the Brussels I (recast) Regulation. The first provides for a uniform European order for payment procedure and full abolition of exequatur, while in the Brussels I (recast) Regulation exequatur proceedings were abolished, but the grounds of refusal – to be invoked in a national procedure in the enforcement stage – have been retained. The added value of the EEO Regulation thus is that it provides an alternative to the route of the Brussels I (recast) Regulation, in case the debt collection case was conducted on the basis of a domestic procedure. Whether this is substantially beneficial for creditors and legal practice in the Member State can, also considering the complexity of the EEO Regulation and the need to request certification, be doubted. While in most Member States the operation of the EEO Regulation seems not be problematic, the limited scope of the EEO Regulation, and problems in applying specific rules of the Regulation, may not outweigh the potential benefits. Moreover, while the EEO does not contain a public policy exception, it is also clear from the *Imtech* ruling that the right to be heard cannot be violated, even if it is not captured by the review mechanism. The Brussels I (recast) Regulation applies to both uncontested and contested claims, does not require the certification of the judgment in order to proceed to enforcement in another Member State and provides a clear-cut system of grounds of refusal. From the perspective of coherence in European civil procedure and easy access to justice, the plurality of instruments with overlapping scopes and different procedural requirements and enforcement regimes, may be undesirable as well.

Should it be decided to retain the EEO Regulation, the operation of the Regulation will benefit from a clarification of the concept of uncontested claims, improved and harmonised rules of service of documents, and a clear-cut mechanism of safeguards securing the rights of the debtor. In improving the EEO Regulation and aligning the various instruments of European civil procedure and their advancement, the work on developing minimum standards of European civil procedure and the new ELI-UNIDROIT European Model Rules of Civil Procedure can be a source of reference.