Commission report European Order for Payment

In October 2015, the long awaited Commission Report on the application of Regulation No 1896/2006 creating a European Order for Payment Procedure (that was due December 2013) was published. It generally and optimistically concludes that:

> *Overall, the objective of the Regulation to simplify, speed up and reduce the costs of litigation in cases concerning uncontested claims and to permit the free circulation of European payment orders in the EU without exequatur was broadly achieved, though in most Member States the procedure was only applied in a relatively small number of cases.*
> *From the studies and consultation carried out, it appears that there have been no major legal or practical problems in the use of the procedure orin the fact that exequatur is abolished for therecognition and enforcement of the judgments resulting from the procedure.*

On the basis of a limited and somewhat outdated set of data the following observations are made. Annually, approximately 12.000 to 13.000 applications for the procedure are received. Most orders are issued in Germany and Austria (approx. 4.000). In seven other Member States, the number of applications is between 300-700, while in the remaining Member States the use of the procedure is very limited.

The time lapse between the application and issuing the order (that should normally not be more than 30 days according to Art. 12 of the EOP Regulation) varies considerably per Member State. Some Member States are able to issue the order within one or several weeks, while the majority of the Member States take several months and up to nine months. Only six Member States have an average length of the procedure lower than 30 days, according to available data upon which the report is based. Another important element for assessing the effectiveness of the procedure is the number of oppositions against the European order for payment; if opposition is lodged the case should proceed according to domestic procedural rules (Art. 16 and 17 EOP Regulation). This percentage varies largely, from approx. 4% (in Austria) to over 50% (in Greece). Looking at the numbers, the general trend is that in Member States where the procedure is

used often the opposition rate is low, whereas in Member States where the procedure is rarely used the opposition rate is high. It would be interesting to know what causes what – the chicken and egg dilemma.The costs of the procedure vary considerably per Member State as well, and when translation of documents is required (which is the case in most countries, as the majority only accepts documents in the domestic language), the costs of the procedure are high. Furthermore, Member States have varying methods to calculate court fees.

The report rightfully concludes that Art. 20 of the EOP Regulation requires clarification as has been proposed for the European Small Claims Procedure (see our earlier post). From national case law and a number of cases that have reached the Court of Justice, notably *eco cosmetics and Raiffeisenbank St. Georgen* (joined cases C-119 and C-120) it is clear that not all situation where a remedy should be available due to defect service are covered by the Regulation. The Court of Justice ruled that national law should provide such remedy. This is clearly a shortcoming of the Regulation also considering that remedies in the Member State of enforcement are limited if not absent, and it (further) undermines the uniform application. On a positive note, the report concludes that generally no problems were reported in the enforcement of EOPs, except for the general lack of transparency of debtors' assets for enforcement purposes in a cross-border context. This optimistic conclusion may, however, also be due to the lack of information on the actual enforcement track, which can generally be troublesome in many Member States. Regarding the *Banco Español* case (C-618/10) addressing the issue of order for payment and unfair contract terms (it concerned a clause on interest), the Report concludes that Art. 8 of the EOP Regulation requiring the court to examine whether the claim appears to be founded on the basis of the information available to it, the courts have sufficient room to take account of the principle of effectiveness. They can, for instance, on the basis of Art. 10 issue only a partial order. In addition, a full appreciation takes place after opposition. One might still question whether this satisfactorily resolves the issue, especially how this relates to the encouraged full automatization and digitalization of the procedure and how it shifts the burden to the consumer.

The report urges to raise awareness of the procedure, and suggests that the electronic processing should be maintained and improved; most Member States do not provide electronic submission possibilities for (all) parties yet. Concentration of jurisdiction, as some Member States have done, is advised, as

this contributes to a swift resolution of the procedure. Swiftness in general is a problem; the report once again stresses the fact that late payments are a key cause of insolvencies in small and medium-sized enterprises. If then the EOP procedure takes 6 months, the beneficiary effect of the procedure is annihilated.

Happy holidays!