AG Pikamäe on the time limits for lodging an objection against a decision on enforcement, in the context of the Service and Brussels I bis Regulations, in the case LKW Walter, C-7/21

This Thursday AG Pikamäe delivered his Opinion in the case LKW Walter, C-7/21. The request for a preliminary ruling originates in the proceedings on a litigation malpractice action, between a company established under Austrian law and the lawyers established in that Member State, who represented the said company in the proceedings in which it acted as a defendant.

By this request, the referring court seeks the interpretation of the Brussels I bis Regulation, of the Service Regulation and of the Article 18(1) TFEU (interdiction of discrimination on the grounds of nationality).

Legal and factual context

In litigation malpractice actions, a court seized with such action has usually to establish the hypothetical outcome of the litigation within which the malpractice allegedly had place, assuming that it did not happen. Thus, these actions have the potential of giving rise to a so-called “litigation within litigation” scenario.

The particularity of the case LKW Walter, C-17/21, results from the specific object of action brought before the Austrian courts. Here, the alleged malpractice is supposed to result from the negligence that, according to the claimant, have occurred in the proceedings pending before Slovenian courts.

In fact, a decision on enforcement, in Slovenian, adopted in these proceedings, has been served, by post, to the Austrian company. Under Slovenian law, a

reasoned objection against such decision on enforcement must be lodged within eight days.

However, the lawyers – now the defendant lawyers – failed to lodge the reasoned objection within the time limit provided for in Slovenian law. It happened within twelve days of service of the decision. Ultimately, the Austrian company settled in full the debt established by the decision on enforcement.

The Austrian company brought the action against its lawyers before the courts of that Member State. Here, the defendant lawyers argue, in particular, that the time limit set by the Slovenian legislator is not compatible with EU law.

Faced with that line of defence, the Austrian court decided to request a preliminary ruling from the Court of Justice. As an outcome, by its preliminary questions, the referring court in the present case seeks the interpretation of EU law in order to benchmark against it the provisions of Slovenian law. That configuration may bring to mind the judgment of the Court in the case Werynski, C-283/09.

Preliminary questions

The referring court in the present case asks:

> *1) Are Articles 36 and 39 of [the Brussels I bis Regulation], read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union and the principles of effectiveness and equivalence [principle of sincere cooperation under Article 4(3) TEU], to be interpreted as precluding a provision of a Member State [under which] an objection [against a decision of enforcement] must be lodged within eight days in the language of that Member State, even if the decision on enforcement is served in another Member State in a language which the addressee does not understand, and the objection is already rejected as being out of time if it is lodged within twelve days?*
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> *2) Is Article 8 of [the Service Regulation], read in conjunction with the principles of effectiveness and equivalence, to be interpreted as precluding a national measure which provides that, upon service of the standard form set out in Annex II informing the addressee of his or her right to refuse to accept the document within a period of one week, the period also begins to run in respect*

of bringing the appeal provided for against the decision on enforcement served at the same time, for which a period of eight days is laid down?

3) Is Article 18(1) TFEU to be interpreted as precluding a provision of a Member State which provides for, as the remedy against a decision on enforcement, an objection, which must be lodged within eight days, and that time limit also applies where the addressee of the decision on enforcement is established in another Member State and the decision on enforcement is not written either in the official language of the Member State in which the decision on enforcement is served or in a language which the addressee of the decision understands?

Assessment of the preliminary questions provided for in the Opinion

In his Opinion, AG Pikamäe proposes to the Court to address, in the first place, **the second preliminary question** on the interpretation of Article 8 of the Service Regulation.

In his view, Article 8(1) and (3) of the Service Regulation, read in conjunction with Article 47 of the Charter, does not preclude a provision of a Member Stater under which the time limit for lodging an objection against a decision embodied in a judicial document served in accordance with Service Regulation begins to run from the time of service of the document in question, and not only after the expiry of the one-week time limit provided for in Article 8(1) for refusing to accept the document (point 56).

As a reminder, Article 8(1) of the Regulation provides that it is possible to refuse to accept the document at the time of service or by returning the document to the receiving agency within one week if it is not written in, or accompanied by a translation into, a language which the addressee understands or the official language of the Member State addressed. The Austrian company, represented by the defendant lawyers, did not exercise such right of refusal after being served with the Slovenian decision on enforcement (see point 99).

Concerning **the first preliminary question**, AG debates the admissibility of the question. He considers that the Court should answer it: the question benefits from the presumption of its relevance and the referring court seeks the interpretation of EU law in order to pronounce itself on the line of defence put forward by the defendant lawyers (point 59). I can speculatively imagine that the defendant lawyers could argue that it was not necessary to satisfy the debt established by the decision on enforcement as it was not enforceable in Austria or, in the alternative, it was possible to contest its enforcement in that Member State (and, thus, in the extension of this logic, the Austrian company prematurely settled the debt and/or contributed to the damage it incurred).

In any case (and maybe in that vein), according to AG, the first preliminary question calls for its reformulation. He considers that the referring court in actuality seeks the interpretation of Articles 45(1)(b) and 46 of the Brussels I bis Regulation (ground for refusal of enforcement, based on the improper service of the decision), read in conjunction with Article 47 of the Charter (point 62). In essence, he proposes to consider that these provisions call for a refusal of enforcement of the decision in circumstances such as those of the present case (point 93).

Finally, as to **the third preliminary question**, AG takes that view that Article 18(1) TFEU does not apply to a situation in which the addressee of a judicial document has waived his (her) right to refuse service of that document in accordance with Article 8(1) of the Service Regulation (point 101).

The Opinion can be consulted here (no English version yet).