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Comments on the cross-border enforcement of the EPIL II Generation's Instruments

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I. Introduction - *Statistics*

First generation instruments:

- 1968 Brussels Convention, the Brussels I Regulation and the Brussels I bis Regulation : over 200 judgments

Second generation instruments:

- Regulation n° 805/2004 European Enforcement Order (EEO) – 9 judgments
- Regulation n° 1896/2006 European Payment Order (EPO) – 7 judgments
- Regulation n° 861/2007 European Small Claims Procedure (ESCP) – 2 judgments
- Regulation n° 655/2004 European Account Preservation Order (EAPO) – 1 judgment



II. The implications of the coexistence of Brussels I bis Regulation and the Second Generation's Instruments.

- When the “*Second Generation*” Regulations were adopted, *Brussels I Regulation* was in force. Contrary to the latter, the Second Generation Regulations did not require the exequatur → quicker procedures, thus more effective.
- However, since *Brussels I bis* Regulation abolished the exequatur and provided for rules that can be used by creditors for the same purpose: are the Second Generation Regulations still relevant in this context?
- Creditors can choose between enforcing a claim under *Brussels I bis* or using an instrument provided for one of the Second Generation Regulations.

Example 1: interaction between Brussels I bis and EAPO



K.H.K (C-555/18), judgment of 7 November 2019

- So far the only judgment on *EAPO Regulation*.
- By its three questions, the referring court asks, in essence: 1) whether Article 4(10) of EAPO Regulation must be interpreted as meaning that an order for payment, which is not enforceable, constitutes an ‘authentic instrument’ within the meaning of that provision; 2) whether Article 5(a) of this Regulation must be interpreted as meaning that ongoing proceedings for an order for payment may be regarded as proceedings ‘on the substance of the matter’ within the meaning of that provision; 3) and whether Article 45 of EAPO Regulation must be interpreted as meaning that judicial vacations are covered by the concept of ‘exceptional circumstances’ within the meaning of that provision.
- The Court held that an order for payment, which is not enforceable, does not constitute an ‘authentic instrument’ within the meaning of that provision. Furthermore, ongoing proceedings for an order for payment may be regarded as proceedings ‘on the substance of the matter’ within the meaning of that provision. Finally, judicial vacations are not covered by the concept of ‘exceptional circumstances’.
- The creditor could have also relied on the provisions of Brussels I bis Regulation and asked for the recognition and the enforcement in Sweden of the national order for payment. On that basis, by virtue of Article 35 of Brussels I bis Regulation, the creditor could also have applied for provisional, including protective, measures.
- Problems related to the translation of the Regulation, i.e. BG: (Recital 13) The term “claim” (créance) is erroneously translated by the term “action” (in the sense of a legal action); the term “orders to pay” is translated in the bank term “transfer order”.

Example 2: interaction between Brussels I bis and the European Payment Order



➤ What would have been the consequences if the creditor had used the rules under EPO Regulation instead?

- The rules concerning jurisdiction would be the same of those provided for in Brussels I bis, in line with Article 6 of EPO Regulation.
- However, three fundamental differences between the two instruments are noteworthy:
 - 1) under Article 7 of EPO Regulation, the application states the grounds for jurisdiction;
 - 2) under Article 16 of that same regulation, the defendant may lodge a statement of opposition to the European order for payment with the court of origin and (s)he shall indicate in the statement of opposition that (s)he contests the claim, without having to specify the reasons for this;
 - 3) under Article 22, paragraph 1, of EPO Regulation, enforcement shall, upon application by the defendant, be refused by the competent court in the Member State of enforcement if the European order for payment is irreconcilable with an earlier decision or order previously given in any Member State. Instead, according to Articles 45 and 46 of Brussels I bis Regulation, recognition and enforcement can be refused, inter alia, for violation of rules of jurisdiction in consumer cases.

III. The role of the Court of Justice in upholding the rule of law in cross-border enforcement of the Second Generation's Instruments

Each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, including the rule of law (Art. 2 TEU). This premise implies and justifies the existence of **mutual trust** between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

On the basis of this presumption, each Member State enforces and recognizes the decisions adopted by other Member States in line with the Second Generation's Instruments since they all comply with the rule of law.

- Through the second generation instruments, the Court of Justice not only contributed to the implementation and the development of the procedural rules (gap-filling and interpretative function), but also **upheld the rule of law by defending the role of the national courts and defining their powers as EU courts within cross-border enforcement.**

Example 1: Mutual trust in the administration of justice and requirements to be a “court” in the EEO Regulation

Zulfikarpašić (C-484/15) judgment of 9 Mars 2017

The **principle of mutual trust** in the administration of justice requires that court proceedings offer the **guarantees of independence and impartiality** and of compliance with the principle of *audi alteram partem*. A writ of execution is adopted without service of the document instituting the proceedings or the equivalent document, and since information about the claim is provided to the debtor in that document, with the effect that a debtor is aware of the claim only when that writ is served on him, it cannot be classified as *inter partes*. Since the proceedings before the notary do not meet these criteria, in contrast with the Opinion of the Advocate General, the Court held that Croatian notaries do not act as “courts” and thereby their decisions are not “judgments”.

- The Court followed the same reasoning in ***Pula Parking (C-551/15)***, a judgment delivered on the same day concerning *Brussels I bis*.

Example 2: Mutual trust and procedural guarantees in the EEO Regulation ***Pebros Servizi (C-511/14), judgment of 16 July 2016***



- The Court held that a claim may be regarded as ‘*uncontested*’, within the meaning of Article 3(1)(b) of *EEO Regulation*, if the debtor does nothing to object against it, i.e. by failing to comply with an invitation by the court to give written notice of an intention to defend the case or by failing to appear at the hearing.
- The conditions according to which, in the case of a judgment by default, a claim is to be regarded as “*uncontested*” must be assessed autonomously, solely in accordance with EEO Regulation.
- Admissibility of the question - CJEU’s examination of the **procedure followed where a court is called upon to give a decision on an application for certification of a court’s decision as a EEO**:
 - 1) the main procedure must ensure the judicial examination of the conditions laid down by EEO Regulation in order to assess whether the minimum standards intended to safeguard the debtor’s rights of defense have been respected, in line with *Imtech Marine Belgium (C-300/14)*;
 - 2) the procedure for the certification 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.

Consequently, the request for a preliminary ruling is admissible.

- It is noteworthy that the Court built its reasoning on a twofold basis: its cooperation with the national court, which is the essential element of the rule of law on which the EU judicial system is founded, and the fact that the procedure for the certification ensures judicial procedural guarantees and is part of the earlier judicial procedure.

Example 3: Role and powers of national courts to protect consumers' rights in the EPO Regulation

Pending joined cases ***Bondora and Bondora*** (C-453/18 and C-494/18)

- Interaction between requirements of *EPO Regulation* and consumers' rights under directive 93/13 and Article 38 of the Charter as regards the role of the courts.
- Bondora is a commercial company which concluded a loan agreement with two consumers and applied for a European order for payment before the referring courts, which requested that Bondora submit documents in support of that claim with a view to assessing whether the terms used in that loan agreement were unfair. However, Bondora refused to produce those documents.
- In essence, the Court is asked whether a judge, seised of an application for a EPO, relating to a contract concluded with a consumer, is required to review of its own motion the possible existence of unfair terms, within the meaning of Directive 93/13? In that context, is that judge entitled to request that the claimant provide it with a copy of the contract supporting his claim, in the context of Article 7(2) of that regulation?
- **Advocate General E. Sharpston's Opinion** of 31 Oct. 2019: The court seised is entitled to review of its own motion the potentially unfair nature of the terms laid down in that contract. For that reason, under Article 9(1) of Regulation No 1896/2006, read in conjunction with Article 7(2)(d) and (e) of that regulation, the court seised may require the claimant to reproduce the contract relied on in support of his claim, with the aim of carrying out the review referred to. Articles 7 and 9 of Regulation No 1896/2006, read in conjunction with Articles 6 and 7 of Directive 93/13, preclude a provision of national law, which regards as inadmissible additional documents submitted by a claimant to the court seised, such as a copy of the contract supporting the claim brought against the consumer.

Example 4: Role and powers of national courts in implementing the EPO within the national system and protect the rights of individuals

Joined cases eco cosmetics and Raiffeisenbank

(C-119/13 and C-120/13), Judgments of 4 September 2014

- The Court held that **the defendant should receive all the information necessary to enable him to decide whether or not to oppose that order.**
 - Since *EPO Regulation* is **silent as to the possible remedies** available to the defendant if it only becomes apparent after a European order for payment has been declared enforceable that that order has not been served in a manner which complies with the minimum standards laid down in Articles 13 to 15 of that regulation, **those procedural issues are governed by national law** in accordance with Article 26 of *EPO Regulation*.
- Balance between the *principle of effectiveness* and the *rights of defense in the European Order for Payment*: the Court intervened to assist the national judge in implementing the EPO within the national system and protect the rights of individuals.



IV. The Romanian Special Procedures For Debt Recovery



- The New Romanian Civil Procedure Code (NCPC), adopted on 15 July 2010 and entered into force on 15 February 2013, found its inspiration in international sources such as Quebec or French law, as well as the EU Regulations such as Brussels I bis, EOP and ESCP.
- The **EPO** and **ESCP** have the equivalent of *procedura ordonanței de plată* (order for payment procedure) and *procedura cu privire la cererile de valoare redusă* (small value claims procedure). These special procedures regulated in Articles 1014-1025 NCPC and Art. 1026-1033 NCPC facilitate the debt recovery at a national level, provided that certain conditions are met.



1. The Romanian order for payment procedure

- ***Inter partes* procedure** for which it is **essential that the claim is a monetary one** and the national procedure **does not require that the debt is uncontested**.
- **Mandatory pre-trial phase**: the creditor needs to send a payment notice (*somație*) requesting the debtor to pay off the debt within a period of 15 days of notification [Art. 1015 (1) NCPC]; only after this period, if the debtor does not pay, the creditor can initiate court proceedings. There is **no written procedure preceding the oral one**. The **debtor is simply notified** and if he decided to challenge the claim, the law establishes a limitation period of at least three days before the hearing. **In case he omits to do so, he loses his rights to raise exceptions and bring evidence**. In the situation of non-payment, a presumption of tacit recognition of debt operates, which however the judge *can*, but does not necessarily *need* to take into account
- **A similarity with the EOP** is that the Romanian legislation does not establish any threshold in order to initiate the proceedings.
- **Another characteristic** is that the **claimant is not notified** as to **whether the defendant had submitted a statement of defense**. It is his duty to inquire and actively follow the case.



2. The Romanian small value claims procedure

- Inspired by the ESCP Regulation, the national procedure is applicable to claims of a value not exceeding **10.000 RON** (aprox. 2.083 euro, the limit for the Regulation being **2000 euros** (Art. 2 para. 1)).
- The small value claims procedure is an alternative to the ordinary one, and the claimant can **choose** between the two of them. The procedure is **mainly written** and **a hearing is not compulsory**, but can be held if the judge sees it fit.
- General principles related to recognition and enforcement of judgments are provided for in art. 1094 to 1109 NCPC. These provisions apply only to judgments not covered by international Conventions or EU Regulations.



3. Competent Courts and enforcement in Romania

- In Romania, for the ESCP, the legislator established an exclusive jurisdiction for the **first instance courts** handling small claims (*judecătorii*).
- **For the EOP**, on the other hand, the competence is **divided between these first instance courts and the first instance courts handling higher value claims** (tribunal), the **division criterion being the amount of the claim** (i.e. for first instance courts, the claim must be up to 200.000 lei, approx. 42 000 EUR).
- **Similar to the EOP and the ESCP, national judgments are immediately enforceable.** This is, in principle, the case even if the defendant introduces an appeal. However, if an appeal is filed, the judge can, if the appellant requests it (for the order of payment) or if the judge himself deems it necessary (for the small value claims and against the payment of a security), suspend the execution during the appeal.



V. Conclusions

- Interplay between the Court of Justice and the EU lawmaker: instruments interpreted by the Court, and permanently reviewed and reformed by EU lawmaker.
- Lawmaker identified the need for efficient and unified procedures – thus created the Second Generation instruments.
- The Court's role is to assure their efficiency and uniform application through interpretation (e.g, paras. 43,44 of KHK, C-555/18) .
- A report of the Commission on the *Brussels I bis Regulation* is due for 2022 – process of improvement still ongoing.



Thank you for your attention!