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Train 2 EN4CE

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Train to Enforce

INTERNATIONAL TRAINING SEMINAR ON THE EOPP REGULATION
UNIVERSITY OF UPPSALA

8 October 2021 – 14.00 – 17.00

The Regulation (EC) No 1896/2006: Contents, Promises and Challenges in Europe and Italy

by

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Purposes of the Regulation, Art. 1 (Subject matter)

(1) to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims, by creating a **European Order for Payment procedure**; and

(2) to allow the **free circulation** of European Orders for Payments (EOPs) throughout the MSs, by laying down minimum standards, compliance with which renders unnecessary, in the MS of the enforcement, any intermediate proceedings of recognition and enforcement (**Art. 1(1)**).

Art. 1(2): The EOP procedure adds to (and does not substitute) national payment proceedings (regulated in Italy under Arts. 633 ff. cpc (*procedimento per decreto ingiuntivo*).

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Two main problems surround the Reg.:

- Intertwining of EU and national rules: The Reg. governs the procedure to the formation of an enforceable order, only. If, however, an opposition follows, the regulation of the subsequent proceedings in the merits is governed by the national laws of civil procedure ➔ many interpretive problems.

- Different implementations in the MSs: In some MSs the Reg. has been implemented through national provisions (like in Slovenia: introduced in 2007 into the code of civil procedure; the same in Germany in 2008; in Austria in 2009; in the Netherlands in 2009 through a special law); in other MSs, like Italy, there is no national implementation and the only text to be considered is the Regulation. The lack of implementing rules is lamented as one of the strongest obstacles to a full exploitation of the potential of the EU payment procedure.

Info about national implementation, if any, can be found in the E-justice portal of the EU (https://e-justice.europa.eu/content_european_payment_order-353-en.do).

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Substantial scope of the Regulation, Arts. 2 - 4

The Reg. applies only to:

(i) ***pecuniary claims*** *of a* ***'specific amount'*** *that have* ***'fallen due'***;

(ii) claims shall have a ***cross-border nature***: The Reg. does not apply to domestic claims;

(iii) claims shall arise from ***civil and commercial matters***.

'Specific amount': matter of dispute, but doctrine believes that the court cannot retroactively specify the amount, if the claimant failed to do so.

"Fallen due": according to German doctrine, contingent claims on counter-performance are not to be considered as having 'fallen due' to the required degree.

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Meaning of "civil and commercial matters"

Along the lines of Reg. n. 44/2001 (Brussels I), now substituted by Reg. n. 1215/2012 (**Brussels I*bis:* on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**),

Art. 2(1) excludes some specific sectors like **revenue, customs** or **administrative matters** as well as **State liability for acts/omissions in the exercise of State authority** (*acta iure imperii*).

Yet, it is possible to use the procedure for claims against the state arising from a State activity carried out *iure privatorum*.

Furthermore, **Art. 2(2) specifically excludes rights in property arising out of a matrimonial relationship, wills and succession**; claims arising out of **bankruptcy** or **insolvency proceedings**; **social security** and **non-contractual obligations.**

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What remains as included in the expression "civil and commercial matters"?

Basically: contractual claims having pecuniary nature and being determined in their amount at the time of commencement of the procedure: **Art. 4**.

No requirements of minimum/maximum amount for the claim(s) are required.

The ordinary case falling under this Regulation:

➔ contractual claims to the payment of money; the creditor resident in State A asks for an EOP against the debtor resident in State B.

In theory, this factual situation is sufficient to fulfil the conditions of applicability of the Regulation… **But it might not!**

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The above leads us to define the meaning of "cross-border cases"

Art. 3: "a cross-border case is one in which ***at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised***" at the time of the beginning of the procedure (Art. 3(3)).

➔ The fundamental criterion **is not** that parties have their habitual residence in different MSs, nor the cross-border nature of their relationship, ***but the localization of at least one of the parties in a MS different from the MS of the "seised court"***.

According to **Art 5(1) n. 3),** "court" means **any authority in a MS with competence regarding European order for payments**: in some MSs these courts are judges, in other not or not necessarily.

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Meaning of 'domicile' and 'habitual residence'

Art. 3(2): domicile must be determined according to Arts. 59 and 60 of Regulation n. 44/2001, now Arts. 62 and 63 of Regulation n. 1215/2012 (Brussels I*bis*). However, **Art. 63 Brussels I*bis*** provides for a specific indication for **legal persons** (domicile is **the place where the legal person has its seat or central administration or principal place of business**).

However, for **natural persons** **Art. 62 Brussles I*bis*** **refers to their national law**.

E.g.: Under Italian law (Art. 43 c.c.) **domicile of a natural person is the place in which s/he has established hers/his main head of business and interests.**

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Habitual residence:

E.g.: Under Italian law this expression coincides with the national expression of 'residence' as defined by our civil code (art. 43) as **"the place in which a person habitually lives".**

➔ The determination of 'domicile' or 'habitual residence' of the parties is task of the creditor starting the European procedure: no judicial control whatsoever on this issue is provided for in the Regulation, not even in the case of a debtor's opposition to the issued EOP (Art. 16).

This control, if any, will be left to the ordinary civil proceedings in the merits, governed by the national laws, proceedings that might possibly start only if the defendant has lodged an opposition to the EOP.

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Determining jurisdiction, Art. 6

➔ It is now clear that the fundamental point is determining the competent court, because this allows establishing if the claim is a cross-border one (Art. 3(1)) and – ultimately – if the Regulation is applicable or not.

Art. 6(1): general reference to Brussels I*bis:* "jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Reg. n. 44/2001", now Reg. 1215/2012 (Brussels I*bis*).

Therefore, regard shall be had to the rules of Brussels I*bis* pertaining to contractual claims. These rules state (1) a general criterion and (2) a special criteruion.

(1) General criterion: Art. 4(1): "persons domiciled in a MS shall, whatever their nationality, be sued in the courts of that MS".

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What will normally happen is that:

- the performing part will sue the non-performing one in the court of the place in which the debtor has his/her residence (often residence and domicile coincide),

or,

- the parties may even reside in the same MS, but it can be argued that the debtor has his/her domicile in another MS, the competent authority of which will have jurisdiction (domicile prevails over residence).

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(2) Special criterion: Art. 7 n. 1 Brussels I*bis:*

"**A person domiciled in a MS may be sued in another MS: (1) (a) in matters relating to a contract, in the courts of the place of performance of the obligation;**

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a MS where, under the contract, the goods were delivered or should have been delivered,
- in the case of the provision of services, the place in a MS where, under the contract, the services were provided or should have been provided".

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Art. 6(2) of our Reg.: exception to the general reference to Brussels I*bis* (see above, Art. 6(1)).

In case of a contractual claim arising from a consumer contract enforced by a trader against a consumer:

➔ the consumer defendant is to be sued before the courts of the MS in which s/he is domiciled ('domicile' within the meaning of the Brussels I*bis* Reg.).

This is to safeguard that service is affected according to the laws of the MS in which the consumer is domiciled and in the official language of that state, and that the review procedure is also performed before the courts of that state.

NB: if the consumer is domiciled in a non-MS, the procedure cannot start against him/her, because no MS will have jurisdiction in that scenario! ☜

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Last notice about jurisdiction…

After finding the competent judge, **the identification of the competent national authority is governed by national laws.**

Art. 29 of the Reg. requires MSs to communicate to the EU Commission which courts have jurisdiction to issue a European order for payment.

These communications have been gathered under the **E-Justice Portal**, clicking on European Payment Order: https://e-justice.europa.eu/353/EN/european_payment_order.

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- Italy (Slovenia and France) have given competence to all courts of the national territory, according to the ordinary rules on jurisdiction, depending on territory and monetary value of the claim.
- **In Italy**, depending on the amount of the claim, the jurisdiction will fall either under the Tribunal or under the Justice of the Peace competent according to the territory (to that purpose, Italy is subdivided in *circondari*): see Table A to Law 21.11.1991, n. 374. Offices of Justice of the Peace are much more numerous than Tribunals.
- **This makes it difficult for a non-Italian person to start a EOPP in Italy (without a lawyer)!**
- **When the case relates to goods**, the Justice of the Peace is now competent if the amount of the claim is under **5.000 Euro**, but starting from 31 October 2021 the limit will be **30.000 Euro.**

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Differently, other MSs have opted for an easier way: only one 'central' authority is competent over the whole nation:

- Austria: District Tribunal for commercial matters in Vienna (Bezirksgericht fuer Handelssachen in Wien § 252(2) ZPO).
- Croatia: Commercial Tribunal of Zagreb (Trgovački sud u Zagrebu).
- Germany: District Tribunal of Berlin Wedding (Amtsgericht Wedding in Berlin § 1087 ZPO).
- The Netherlands: Civil Tribunal in den Haag (Rechtbank Den Haag).
- Portugal: Commercial Tribunal of Porto (Juízo Central Cível do Tribunal da Comarca do Porto: Divulgação 06/2010 do Conselho Superior da Magistratura).
- Sweden: Government authority for debt collection of Lulea (Kronofogdemyndigheten): Not a Judge, but an independent government authority!

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Another caveat: The above rules regard the competent court to issue a European Payment order which always coincides with the competent court for the opposition.

However, this court does not necessarily coincide with the court competent for the review or the enforcement of the order!

E.g.: in Sweden, competent for issuing a EOP is the *Kronofogdemyndigheten*, but for the review competent will be the court according to the national rules of civil procedure; for the enforcement of the EPO competent will be again the *Kronofogdemyndigheten*.

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Application for a European Order for Payment, Art. 7

Art. 7. mandates the use of standard form A (set out in Annex I).

There are 7 forms annexed to the Regulation, from A to G. The use of forms is functional to the purposes of simplification and speeding up of the procedure and harmonization of rules of civil procedure throughout the EU (set out in Recitals 1 and 9, and Art. 1).

Advantage of using a standard form: it is easy to fill in, even for the applicant acting without the representation by a lawyer. ➔ **Art. 24** establishes that in this procedure, representation by a lawyer or another legal professional shall not be mandatory for the claimant applying for a EPO, nor for the defendant lodging an opposition to it.

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What language shall be used to fill in in form A?

Normally the language of the seised court. Then, a translation will be needed – this is an added cost.

In Italy, Italian language only is accepted according to Art. 122(1) cpc; the use of foreign language will be sanctioned with nullity of the application.

Germany: German.

Croatia: Croatian.

However, other countries accept more languages beside the national one(s):

Austria: German, Hungarian, Slovenian;

France: French, English, German, Italian, Spanish (NB: that's fake info!!);

Sweden: Swedish or English;

Finland: Finnish, Swedish or English.

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Content of FORM A

According to the **Court of Justice of the EU in *Szyrocka* case 2012**, **form A is *exhaustive:* MSs cannot add further requirements to the application than those established by EU law.**

What stated in the Reg. is complete and directly applicable, save when national law is expressly referred to (as in Art. 26). This is expression of the **principle of autonomy of the European payment order procedure** with respect to the national ones.

☞ **Debated in the MSs: what happens if a national competent court receives an application for EPO in forms different from form A?**

In Italy, the majority opinion considers that **the application cannot be received by the judge** (a new doctrinal category of '*irricevibilità*' has been forged), **but the application can be filed again in the 'right' way (using form A), also in line with Art. 11 on rejection of the application**.

The process of shaping new doctrinal categories at the level of national laws is justified, again, by the principle of autonomy of EU law from the national ones, developed by the EU Court of Justice since famous case *Van Gend & Loos* in 1963.

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Why shall content of form A be exhaustive?

Recital 13: in form A "the claimant should be obliged to provide information that is sufficient to **clearly identify and support the cl**aim in order to place the **defendant in a position to make a well-informed choice** either to oppose the claim or to leave it uncontested".

To that purpose, the requirements of form A are the following (Art. 7):

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(a) Identification of the parties and the court; name and address of the parties are required; telephone number and e-mail address of the parties is voluntary;

It is possible to indicate more parities, provided there is jurisdiction as against all of them; that makes dubious the possibility to apply against parties resident/domiciled in different MSs.

There are no doubts about the possibility to apply for payment of more claims as against the same debtor, if each of the claim has the requirements of the Reg.

(b) The amount of the claim (*petitum*) and its currency (the amount is subdivided in principal and, where applicable, interest, contractual penalties and costs); it is also possible to indicate whether the claimant acts as assignee of a claim originally created between different parties.

(c) If interest on claim is demanded, the interest rate and time for which interest is demanded, except if the legal rate applies; if period of time for which the interest is demanded is not specified, the court can complete the application, because the CJ of the EU has established that interest is due till the time of payment of the principal: case *Szyrocka* 2012.

(d) The cause of action (*causa petendi*), including a description of the circumstances invoked as the basis of the claim and, where applicable, of the interest demanded;

(e) A ***description*** of the **evidence** supporting the claim; ←

(f) The grounds for jurisdiction, and

(g) The cross-border nature of the claim (Art. 3).

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Moreover (2 Appendixes):

(1) the **bank account data of the applicant** shall be indicated in Appendix 1 to form A, for payment of court fees by the claimant (in Italy, *contributo unificato*).

How are court fees determined in Italy? *Testo Unico delle spese di giustizia*, D.P.R. 30.5.2002, n. 115 (TU court fees) applies, determining that «*contributo unificato*» shall be paid. This Law, however, applies with the following exceptions:

- **art. 16 para 6 of the TU court fees is not applicable** (determines a sanction if the application lacks of a declaration about the monetary value of the claim; but this declaration is not needed for the EOPP)**.**
- **The competent court will have to check whether a correct amount has been paid (ex art. 248). The correct amount derives from value of the claim and the thresholds stated in art. 13 para 3 of TU court fees (established for Italian *decreto ingiuntivo*).**

E.g. for a claim between 26.000 and 52.000 Euro, court fees for *decreto ingiuntivo/EOP* will be about 260 Euro.

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(2) **Declaration by the applicant that in case of opposition by the defendant**, **s/he requests that:**

(1) the proceedings discontinue;

(2) the proceedings continue according to rules on the European Small Claims Procedure, if applicable;

(3) the proceedings continue in accordance with any appropriate national civil procedure. This being appendix 2 to form A.

These appendixes will not be served on the debtor when the EPO is issued and served together with form A: Art. 12(2).

Form A shall be signed by the creditor/applicant or by his/her lawyer, if any.

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Problematic point is lit. e) requiring a description of the evidence supporting the claim.

In form A, this description is typified as follows:

Written evidence, oral evidence (**NB: in Italy *testimonianza* is not admitted in the national procedure**), expert evidence, inspection of an object or site, other.

The choice in lit. e), requiring only a description of the evidence, and not its presentation to the court by attachment to the application, makes clear that the EPO procedure has been designed as a so-called PURE procedure.

Across Europe we have, roughly speaking, two models of payment order procedures:

INJUNCTIONS WITH EVIDENCE or SPURIOUS

vs

INJUNCTIONS WITHOUT EVIDENCE or PURE.

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SPURIOUS INJUNCTIONS: Belgium, France, Luxembourg. Spain, Greece, Italy are hybrid (a surrogate/substitute of proof is enough).

A written evidence of the claim is required (and, of course, what evidence is admitted differs according to the various national laws).

The court operates an *ex ante* control of the probability that the legal basis of the claim is valid. Advantages/disadvantages: reduced the number of oppositions; however, not every kind of claim can be protected through this model because of the law of evidence; certain types of credit will have to be protected only through the ordinary civil procedure in the merits → High number of ordinary proceedings.

PURE INJUNCTIONS: Austria, Germany, Portugal, Sweden, Finland. No *ex ante* control on the valid legal basis of the claim. **if the formal requirements of the application are given, the court shall issue the injunction.** An *ex post* control is preferred and it is based on the defendant's initiative of raising the opposition. S/He can do it without any grounding/motivation. Disadvantages/advantages: high number of oppositions, but only for the grounded ones (a few) an ordinary proceeding will start → Reduced number of ordinary proceedings.

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The divergencies regarding the national laws of evidence have induced the European legislation to choose the PURE model.

However, the requirements under lit. e) is not directly consequential to it. The applicant has to describe the evidence, but to this evidence no legal value is given.

NB: Debtor's protection in form A is not given by the requirements under lit. e), but by the **declaration of truth**: *"I declare that to the best of my knowledge and belief the information provided is true. I acknowledge that any deliberate false statement could lead to appropriate penalties under the law of the MS of origin"* = MS in which the EOP is issued (definition in Art. 5).

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What might be the penalties for false statements in form A under national law?

In Italy, the majority opinion argues that the penalties would be those set out in art. 96 cpc.: when the judge decides on the costs of the proceedings, he can impose, on the losing party, an additional equitable sum, if the party acted in the proceedings (as claimant or defendant) with willful misconduct or gross negligence.

➔ However, this rule requires the parties to be under a national proceeding on the merit, the opening of which is not a certainty, but only a possibility!

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Furthermore, **the description of the evidence requires the debtor's knowledge about the national law of evidence of the state of origin, and this most probably requires professional legal aid.**

☞ **For that reason, in Italy, if there is written evidence of the claim, it is preferred to make recourse to the national payment procedure and to have the payment order certified as European enforcement order!**

NB: Form A contains a last part, no. 11, dedicated to "Additional statements and further information (if necessary)": there is a place to copy and paste documents, contract texts, elements of proof, etc. **This might be, again, in contrast with the pure character of the EPO procedure…**

We will soon come back to this part under Art. 8!

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How to submit the application?

Art. 7(5): in paper form or **by any other means of communication, including electronic, accepted by the MS of origin and available to the court of origin.**

The E-Justice Portal provides info about the means of communications accepted by each MS.

About Italy: either in paper form manually submitted, or by ordinary mail (which is excluded for ordinary proceedings that from 2014 need to be submitted only electronically by way of a specific system open to the legal profession, public law bodies and enterprises only).

Italian legal doctrine debates whether it is possible for an applicant without representation by a lawyer to send the application via ordinary e-mail…

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Examination, completion and rectification, modification and rejection of the application, Arts. 8-11

Art. 8: the court seised shall examine, as soon as possible and on the basis of the application form, whether the requirements of scope, cross-border nature of the claim, EPO procedure, jurisdiction are met and "whether the claim appears to be founded. This examination may take the form of an automated procedure".

A sort of textual ambiguity might be noticed, because the EU legislator puts together two conflicting aspects:

examination whether the claim appears to be funded **vs** automated examination.

Many doctrinal doubts (and important case law) have arisen about the nature of this examination.

➔ **Majority opinion** agrees that this **is a merely formal control. What does this mean?**

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According to a view, it is merely a plausibility check: the alleged legal basis of the claim shall potentially be suited to justify payment.

Different view: court is to examine whether the conclusions are warranted by the facts of the matter; the facts cited in the application shall justify the claim and also admissible evidence should be identified for all facts (to protect the debtor).

This view is supported by the argument that the EPO procedure was shaped on the model of the Austrian one and that Austrian law requires an examination of whether the conclusions are warranted by the facts of the matter (art. 244(2)(no. 4) Austrian Code of Civil Procedure).

In any case, no substantial law control is required, in line with the PURE model chosen by the European legislator. The solution of a merely formal control is the only in line with the competence of non-judicial authorities in some MSs.

An automated procedure exists in Germany: *Mahnverfahren bei maschineller Bearbeitung* § 689 Abs. 1 ZPO by the Berlin Wedding administrative court. The order is issued within the day of submission!

➔ However, the requirement to check whether the claim appears to be founded creates doubts in countries, like Italy, where a SPURIOUS model exists and the judge has to effect a substantial control on the legal basis of the claim.

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Despite what stated above regarding the formal control of the seised court, the **Court of Justice of the EU,** in its decision ***Bondora* of 2019** (C-453/18 e C-494/18, EU:C:2019:1118), has specified that:

➔ **the seised court has to control *ex officio* unfair terms in consumer contracts, according to Directive 93/13/EEC.**

To that aim, it can require further documents by way of completion and rectification of the application, through submission of form B in Annex II (Art. 9).

Therefore, **part 11 of Form A might be used to provide the court with the relevant info (also contract terms) that substantiate the claims**.

After the *Bondora* case, it appears that it shall be so for B2C contracts in order to protect consumers.

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A **modification of the application** is allowed according to **Art. 10**, using **form C** in Annex III, **in case the requirements the court has to check according to Art. 8 are met only in part.**

E.g. the application requires payment of a plurality of claims, but only part of them is supported by description of the evidence. **In Italy,** this Art. has been used to **reduce the amount of the claim, excluding from the amount stated in the application the part devoted to legal aid which is not covered by this Regulation** (see Arts. 24 and 25).

Procedure for the modification, Art. 10(1): "the claimant shall be invited to accept or refuse a proposal for a EOP for the amount specified by the court and shall be informed of the consequences of his decision. The **claimant shall reply by returning standard form C sent by the court within a time limit specified by the court** in accordance with Article 9(2)" ('appropriate time')

Art. 10(2): "If the claimant accepts the court's proposal, the court shall issue a EOP, in accordance with Article 12, for that part of the claim accepted by the claimant. The consequences with respect to the remaining part of the initial claim shall be governed by national law.

Here, again, national differences might arise! For instance, **in Italy for the part left outside the partial injunction, a new application can always be lodged. In France and Belgium, the partial injunction will imply that the remaining part of the claim will be considered waived.**

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Art. 10(3): "If the claimant fails to send his reply within the time limit specified by the court or refuses the court's proposal, the court shall reject the application for a EOP in its entirety."

Art. 11: If the requirements for the issuance of a EPO are not met, the **application will be rejected** using **form D**. This form contains a typification of the reasons for rejection (divided in: application outside scope, lack of cross-border nature of the case; lack of 'pecuniary claim for specific amount fallen due'; lack of jurisdiction; lack of requirements of Art. 7; claim clearly unfounded; application not completed/rectified within time limit; application not modified within time limit).

Despite these typification, rejection cannot be appealed.

➔ However, **Recital 17°** (and **form D** also): **"this does not preclude a possible review of the decision rejecting the application at the same level of jurisdiction in accordance with national law".** This is possible in **Germany** and **Portugal**: this possibility opens the gate to national diversities.

In any case, rejection does not prevent the creditor from pursuing other legal means; he can also re-apply for a EPO (Art. 11(3)).

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Issue of a EPO, Art. 12

Art. 12: "if the requirements referred to in Article 8 are met, the court shall **issue, as soon as possible and normally within 30 days of the lodging of the application**, a **European order for payment** using standard **form E**".

This **30-days deadline is not mandatory** and does not include the time used by the applicant to complete or modify the application.

Form E is issued together with a copy of form A. Both form a unique act that cannot be sub-divided. Therefore, **if form E is issued without the copy of form A, it is null and void.**

In this case, (i) the debtor can lodge opposition; (ii) he can also apply for review ex Art. 20, if the judge declaring the enforceability of the title did not raise this nullity *ex officio*; (iii) moreover, in case an enforcement has started in Italy, the defendant can raise an opposition to the enforcement according to Italian law (art. 615 cpc), because the enforcement title is objectively unsuitable for the enforcement.

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In the EPO the defendant shall be advised of his options to:

(a) pay the amount indicated in the order to the claimant; or

(b) oppose the order by lodging with the court of origin a **statement of opposition**, to be sent **within 30 days of SERVICE of the order on him**.

Only after the elapse of this deadline without an opposition having been raised it will be documented that the claim is uncontested and the EPO will become enforceable.

SERVICE of the EPO is governed by Art. 12(5) and shall meet the minimum standards of Arts. 13-15. The fundamental principle at the basis of the Reg. is that **SERVICE SHALL BE EFFECTIVE** (**Recitals 19 and 20**).

How service is to be performed, is left to the national laws of the MSs, which vary greatly, but must meet minimum standards established by the Reg.

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Artts. 13 and 14 establish minimum standards of service as guarantee of an effective knowledge of the EPO by the debtor, also in line with requierment ex Art. 47 Charther of Fundamental rights of the EU: effective right to defence.

Art. 13: service directly to the defendant: (i) in his hands, (ii) ordinary mail, (iii) telefax, (iv) e-mail (if accepted): all these methods purport the absolute certainty that the EPO has been effectively received by the defendant. Here there is proof of receipt by the defendant.

Art. 14: so-called cases of substitutive service, that is not in the hands of the defendant, but at his address (physical or electronic); this service purports a high probability that the EPO has been effectively received by the defendant. Here there is no proof of receipt by the defendant. It is possible only if the defendant's address is known with certainty. The receiving person (different from defendant) shall sign a recepit.

Example: service to persons living in the same house or employed there; deposit in the defendant's mailbox; postal service without proof of receit (never in Italy); telefax or email if the defendant had previously accepted this form (in the contract from which the claims specified in the EPO arise).

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Who is charged with the task of serving the EPO? The court of the applicant?

In Italy, (Nota 1 Sept. 2010 Department of Justice, General Affairs): **service is task of the parties; the court shall communicate to the applicant the issuance or refusal of the EPO with express information that if the EPO has been issued, service is his task.**

➔ This makes the EOPP complicate for a stranger applicant who is charged of the task of knowing the Italian service rules! **Therefore, data show that in most cases of EPO proceedings in Italy, the applicant was represented by a lawyer.**

In **Germany** and **Spain** service of the EPO is a task of the judge (exactly as it is for the national payment order procedure (in Germany, ex § 166 ff. ZPO for all proceedings as a default rule (except as otherwise specified), and ex § 693 Abs. 1 for the EPO proceeding).

In the Netherlands, the parties have the task of service in the national proceedings, but in the European proceeding the judge has this charge.

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Opposition to the EPO, Art. 16

Art. 16: the defendant may lodge a **statement of opposition** to the EPO with the court of origin using **form F, which shall be supplied to him together with the EPO (form E).**

The use of form F is NOT mandatory (as stated by Recital 23)!

Confirmed by case law: CJEU, Goldbet Sportwetten GmbH v Massimo Sperindeo, 13.6.2013, C-144/12 No. 40; even if the opposition is in a different from than form F, its only content shall be impeding that the EPO becomes enforceable; Trib. Mantova 25-2-2014; Rechtbank van Koophandel Hasselt, 21.12.2010 no. 10/118.

Consequently, the lack of allegation of form F to the EPO served on the defendant (form E + A) shall not be reason for nullity of the order.

However, since form F facilitates the lodgment of an opposition for the debtor (even without a lawyer), if the debtor can prove that the lack of allegation of form F has caused him an effective damage making his legal defence more difficult, this will be ground for review according to Art. 20.

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The statement of **opposition shall be sent within 30 days of service of the order** on the defendant: **This time limit is mandatory!**

Relevant time is **when the opposition is sent** and not when it is received by the court (not even when it is sent to the creditor: Tribunal Milan, 18.7.2011).

Consequently, **Art. 18(1): "an appropriate period of time" beyond the end of the 30 days period be taken into account to allow the corresponding statement to arrive. After that undefined period of time, the judge may declare the order enforceable using standard form G**.

The uncertainty of the "appropriate period of time" may cause many differences across the MSs and hamper quick EPO proceedings!

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The enforceable EPO shall be recognised and enforced in the other MSs without the need for a declaration of enforceability and without any possibility of opposing its recognition (**Art. 19: abolition of exequatur**). It is equal to a European enforcement order established by Reg. no. 805/2004.

An enforceable EPO should be considered final as to determination of the existence of the claim (a review in the merits should be foreclosed).

➔ The defendant does **not have to specify the reasons for his opposition** (**Art. 16(3)**).

➔ The opposition shall be **signed manually by the defendant or his lawyer, or electronically** – if it is electronically submitted – according to Art. 2(2) Directive 1999/93/EC (Art. 16(5)), otherwise it is void.

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The (only possible) **effects of the opposition** are those stated by **Art. 17**: **the proceedings shall continue before the competent courts of the MS of origin, unless the claimant has explicitly requested that the proceedings be terminated in that event.**

The opposition shall not have any other effect. In particular, it cannot contain any contestation of jurisdiction nor other defense of the opponent based on substantive law (CJEU, Goldbet Sportwetten GmbH v Massimo Sperindeo, 13.6.2013, C-144/12 No. 40).

The contestation of jurisdiction is left to the following ordinary proceeding governed by national law.

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Continuation of the proceeding before the competent court of the MS of origin

After the opposition has been lodged, coordinating the two proceedings – the European one and the national on e– may become a difficult task especially in the countries, like Italy, where no national implementing rules have been issued.

In Italy, **United Chambers of the Supreme Court of Cassation** have ruled in 2019 that **the judge HAS NOT to identify the rules for the prosecution of the judgement.**

He only has to service to the applicant creditor that the opposition has been raised and assign a mandatory time limit to sue the debtor according to the procedural means open to him under the national law (time limit not shorter than 1 month and not longer than 3 months)**. After this time, the proceedings will extinguish (art. 307(3) cpc;** Cass., S.U., 31.1.2019, n. 2840 and n. 2841**).**

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Review in exceptional cases, Art. 20

The EPO becomes enforceable if no opposition is raised after 30 days of service of the order on the defendant. From this time on, it **becomes final**.

However, **in certain exceptional cases the defendant should be entitled to apply for a review of the European order for payment.**

Review can be defined as an exceptional means of appeal.

Recital 25: "Review in exceptional cases should not mean that the defendant is given a second opportunity to oppose the claim. During the review procedure, the merits of the claim should not be evaluated beyond the grounds resulting from the exceptional circumstances invoked by the defendant."

The exceptional cases for review set out by **Art. 20 are exhaustive and cannot be interpreted extensively or by analogy**.

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Art. 20(1): the defendant shall apply for a review **where:**

(a) the EOP was **served** by one of the methods provided for in **Article 14** (service without proof of receipt by the defendant, can be used only if the address of the defendant is certain), and **service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part,**

or

(b) 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**,

provided in either case that he acts promptly.

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Furthermore, according to **Art. 20(2):** the defendant shall also be entitled to apply for a review where the **EPO was clearly wrongly issued** either

(c), having regard to the requirements laid down in this Regulation, or due to **other exceptional circumstances (d)**.

Recital 25 also states: **Art. 20(2) could include a situation where EOP was based on false allegations** by the creditor in the application.

Famous German case of the MALTA INKASSO in 2015/2016: a group of right-wing extremists considering themselves citizens of the Reich and not of the Federal Republic tried to bring proceedings against German bailiffs and execution judges, because they wanted them to enforce EPO issued in Malta in their favour on the basis of fictitious claims.

➔ The actual enforcement has been avoided not through the means of the Regulation (art. 20(2)), but through diplomatic channels!

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According to **Italian case law** (Cass., S.U., 26.5.2015, n. 10799), the defect of jurisdiction cannot be a ground for review.

It can be noticed by the debtor from form A, therefore it can be raised through an opposition ex Art. 16, and analyzed in the ordinary proceeding starting at the national law level, exactly as it happens in case of other points in the merits or concerning the admissibility of the order.

The **competent judge for the review** is communicated by the MSs to the Commission and can be found on the E_Justice Portal.

For Italy: it is the same judge issuing the EPO, according to art. 650 cpc.

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A problem may be the time limit to apply for a review, because the Regulation states that the defendant shall **"act promptly" (Art. 21(1)).**

For the **Italian Court of Cassation** (Cass., 20.3.2017, n. 7075), in the lack of a specification in the Reg., **the time limit for the application for review shall be that provided for in art. 650 cpc** (*opposizione tardiva*), being this a national law proceeding analogous to the European one in Art. 20.

➔ This means that:

- **if the enforcement of the EPO has not yet started, the time limit is 40 days;**
- **if enforcement has started, the time limit is 10 days from the first act of enforcement.**

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Effect of an application for review:

Differently from the opposition, **the application for a review does not stop enforcement.**

In exceptional circumstances the defendant can ask the enforcement judge to suspend or limit enforcement, or to subordinate it to the creation of a deposit (Art. 23).

If, after the review, the review judge rejects the grounds for review, the EPO remains enforceable without any need to ask or declare its enforceability.

➔ According to Italian doctrine, the order rejecting review can be appealed according to the rules of the national laws.

If the review is grounded, the EPO shall be null and void (**Art. 20(3)**).

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Enforcement, Art. 21-23

The enforcement rules are a *lex specialis* to Brussels I*bis* – especially insofar as they follow its path of abolishing the "*exequatur*" (see also Art. 19).

This implies that Brussels I*bis* can supplement the EOP Reg. only insofar as the EOP Reg. is not conclusive.

Recital 27 and Art. 21: "a EOP issued in one MS which has become enforceable shall be enforced under the same conditions as an enforceable decision issued in the MS of enforcement".

The enforceable EPO equals to a European enforcement order.

➔ **The enforcement title needed to enforce the EPO is made by standard forms A, E and G.**

Without prejudice to the provisions of this Regulation, in particular the minimum standards laid down in Article 22(1) and (2) and Article 23, the procedures for the enforcement of the EPO should continue to be governed by national law (Art. 21).

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Further illustration on enforcement will now follow in the presentation by Prof. Sara Tonolo.

THANK YOU FOR YOUR KIND ATTENTION!