ECONOMIC AND SOCIAL COMMITTEE

395th PLENARY SESSION, 11 AND 12 DECEMBER 2002

Opinion of the European Economic and Social Committee on the 'Proposal for a Council Regulation creating a European Enforcement Order for uncontested claims'

(COM(2002) 159 final — 2002/0090 (CNS))

(2003/C 85/01)

On 15 April 2002, the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 27 November 2002. The rapporteur was Mr Ravoet.

At its 395th plenary session (meeting of 11 December 2002), the European Economic and Social Committee adopted the following opinion by 79 votes to one with two abstentions.

Gist of the conclusions

The Committee welcomes the proposed regulation, which dispenses with the need for exequatur in the case of undisputed claims. The proposed regulation follows on from existing Community instruments, in particular the Brussels I Regulation and the Service Regulation. The weak point in the proposal is that the Member States are to be free to decide whether to bring their procedural rules into line with the minimum procedural requirements governing the issuing of the European Enforcement Order. In order to create a genuine European judicial area, there must be more far-reaching harmonisation of Member States' legislation.

1. Summary of the Commission document

1.1. The Tampere European Council of 15 and 16 October 1999 endorsed the principle of mutual recognition of judgements and other decisions of judicial authorities as the cornerstone of judicial cooperation within the Union. In civil matters the European Council called for a further reduction of the intermediate measures required to enable the recognition and enforcement in one Member State of a judgement delivered in another Member State. The joint programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters — a programme that was established by the Commission and the Council at the request of the European Council and adopted by the Council on 30 November 2000 (1) — singles out the abolition of exequatur for uncontested claims as one of the Community’s priorities (1).

1.1.1. The joint programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters — a programme that was established by the Commission and the Council at the request of the European Council and adopted by the Council on 30 November 2000 (1) — singles out the abolition of exequatur for uncontested claims as one of the Community’s priorities (1).

1.1.2. The introduction of the European Enforcement Order for uncontested claims forms the pilot project for the abolition of exequatur.

1.2. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition of judgements in civil and commercial matters (hereinafter referred to as ‘Brussels I Regulation’) entered into force on 1 March 2002. This regulation represents a major step forward in streamlining the procedure for obtaining a declaration of enforceability vis-à-vis the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters (hereinafter referred to as the ‘EEC Convention’).

1.3. The Council now wishes to go a step further than the Brussels I Regulation in proposing a regulation creating a European Enforcement Order for uncontested claims.

1.3.1. It must be emphasised that the 'European Enforcement Order' has a twofold significance which reflects its twofold objective. In the strict sense its aim is to abolish exequatur. In the wider sense, it amounts to (the creation of) a simple procedure for obtaining a decision which can be enforced in all the Member States without exequatur. The Commission is actively pursuing both objectives for uncontested claims, albeit not in the same legislative instrument.

1.4. The present proposal seeks simply to achieve the first objective, i.e. the abolition of exequatur as a precondition for enforcement in another Member State of judicial decisions or settlements and authentic instruments that have been attained in the verifiable absence of any dispute by the debtor over the nature or extent of the debt. It is assumed that this passivity on the part of the debtor is a conscious choice based on the fact that he recognises the existence of the debt or on his deliberate disregard of the claim. For creditors, the abolition of exequatur offers the advantage of speedy and efficient enforcement abroad. In this proposal the European Enforcement Order is understood to be a comprehensive and transparent certificate which testifies that a court judgement or settlement or an authentic act fulfills all the conditions for enforcement throughout the Community without intermediate measures.

1.5. For the second, more extensive objective the Commission is preparing a Green Paper on the creation of a uniform or harmonised procedure for a European order of payment, which is likely to be published before the end of 2002.

1.6. Exequatur can only be abolished if Member States have trust in each other's legal systems. There must also be strict observance of the requirements for a fair trial in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as Article 47 of the Charter of Fundamental Rights of the European Union. For these reasons the Commission considered that its proposal must lay down a number of minimum procedural requirements with regard to the service of documents (more specifically, the admissible methods of service and the time of service), which guarantee that the debtor is properly informed about the claim against him and can prepare his defence. Only if these minimum requirements are complied with, will it be possible to abolish the checks on the observance of the rights of the defence in the Member State where the judgement is to be enforced.

2. Details of the proposal

2.1. The subject matter is clearly defined in Chapter I (Article 1), viz. the creation of a European Enforcement Order for uncontested claims in civil and commercial matters in order to permit the free circulation of court judgements, court settlements and authentic instruments in all Member States. The scope (Article 2) is identical to that of the Brussels I Regulation.

2.1.1. Article 3 defines the following terms: judgement, claim, uncontested, authority of a final decision, ordinary appeal, authentic instrument, Member State of origin, Member State of enforcement, and court of origin.

2.2. Chapter II deals with the European Enforcement Order. If the conditions laid down in Article 5 are satisfied, a judgement delivered in a Member State by the court of origin at the request of the creditor is to be certified as a European Enforcement Order, with the result that it is recognised and enforced in the other Member States without any special procedure being required. Certification is provided by using the standard form contained in Annex I (Article 7).

2.2.1. The conditions laid down in Article 5 are as follows:

— the judgement is enforceable and has acquired the authority of a final decision in the Member State of origin;

— the judgement does not conflict with sections 3, 4 or 6 of Chapter II of the Brussels I Regulation;

— where a claim is uncontested within the meaning of Article 3(4)(b) or (c) of the proposed regulation, the court proceedings must meet the procedural requirements set out in Chapter III; and
2.2. If a judgement as a whole does not meet these conditions, provision is made in Article 6 for the issuing of a partial European Enforcement Order.

2.2.3. The content of the European Enforcement Order certificate is dealt with in Article 7.

2.2.4. There is to be no appeal against a decision regarding an application for a European Enforcement Order Certificate (Article 8), bearing in mind the guarantees for the debtor set out in Article 13.

2.2.5. When a judgement has not yet acquired the authority of a final decision but all the other conditions in Article 5 are satisfied, a European Enforcement Order can be issued for protective measures (Article 9).

2.3. A European Enforcement Order cannot be issued unless the rights of defence were adequately guaranteed when the court judgement forming the basis for the Order was enacted. For these reasons the proposal lays down minimum procedural requirements which must be satisfied by the court proceedings in the Member State of origin. It is to be left to the Member States to judge whether it is necessary or desirable to adapt their national legislation to these minimum requirements.

2.3.1. The minimum procedural requirements concern first of all the serving of the document instituting the proceedings (or an equivalent document). This must be served on the debtor (the addressee) as soon as possible in order to give him sufficient time to defend himself if he so wishes (Articles 11-15). The debtor should also be duly informed about the claim (Article 16) and about the procedural steps necessary to contest it (Article 17) and to avoid a judgement in default of appearance at a court hearing (Article 18).

2.3.2. If the defendant has become aware of the proceedings against him, he cannot simply rely on a procedural defect at the beginning of these proceedings and on its automatic effect on enforceability abroad. Article 19 specifies how, if necessary, cure of non-compliance with minimum standards can be obtained.

2.3.3. It is feasible that in exceptional circumstances the debtor may not have obtained knowledge of the documents to be served on him without any fault on his part. If the conditions laid down in Article 20 are satisfied, the debtor is entitled to relief from the effects of the expiration of the time for ordinary appeal against the judgement by the competent court of the Member State of origin.

2.4. Chapter IV deals with the actual enforcement. The enforcement procedures are governed by the law of the Member State of enforcement (Article 21). Only a copy of the judgement, a copy of the European Enforcement Order certificate and, where necessary, a translation needs to be provided.

2.4.1. If the judgement is irreconcilable with an earlier judgement given in any Member State or a third country, the Member State of enforcement may make judicial review available to the debtor provided that strict conditions are met. Under no circumstances may the judgement or its certification as a European Enforcement Order be reviewed as to their substance in the Member State of enforcement (Article 22).

2.4.2. Only in the exceptional circumstances described in Articles 20 and 22 is it possible to stay or limit the enforcement proceedings (Article 23).

2.4.3. The abolition of exequatur makes it easier to enforce a judgement in another Member State. This does not detract from the fact that there are still considerable differences between Member States’ enforcement procedures. The proposal therefore specifies that Member States should work together to provide information about these procedures, especially via the European Judicial Network (Article 24).

2.5. Chapter V makes provision for the certification of court settlements and authentic instruments as European Enforcement Orders. Standard forms have also been drawn up for this purpose. The provision of suitable information about the direct enforceability of documents in all Member States is also obligatory (Article 26).

2.6. The domicile of both natural persons and companies or other legal persons is to be determined by analogy with the provisions in the Brussels I Regulation (Chapter VI, Articles 27-28).

2.7. Chapter VII lays down detailed provisions specifying when the proposal is to come into force (Article 29).
2.8. Chapter VIII contains provisions about the relationship with other Community instruments, viz. the Brussels I Regulation and Regulation (EC) No 1348/2000, which are still applicable (Articles 30-31). The creditor is still able to opt for a declaration of enforceability under the Brussels I Regulation.

2.9. The standard forms appended to the proposal can be updated in accordance with the procedure provided for in Article 33. The proposal is due to enter into force on 1 January 2004.

3. General comments

3.1. The Committee endorses the aim of the proposal, which offers considerable advantages vis-à-vis the procedure for obtaining a declaration of enforceability under the Brussels I Regulation. As a result of the abolition of exequatur, the intervention of the judicial authorities in the Member State of enforcement is no longer a requirement. The legal delays caused by their intervention are thus avoided and costs are saved. Translations are not required either in most cases, as multilingual standard forms are used for the certification. The economic advantages should also not be scorned, since it is estimated that 90% of court judgements which are enforced in a Member State other than the Member State of origin concern uncontested claims within the meaning of the proposed regulation.

3.2. Member States’ trust in each other’s legal systems is vital for the introduction of the European Enforcement Order. It is necessary to ensure strict respect for the fundamental principles of litigation and in particular for the right of defence. In order to achieve this, the proposal includes minimum procedural requirements.

3.2.1. Special attention is rightly paid to the serving of the relevant legal documents. One feature of judgements about uncontested claims is that the debtor expressly agrees with the claim or does not take part in the court proceedings. In order to be certain in the latter case that this is a conscious choice on the part of the debtor, there need to be sufficient guarantees with regard to the serving of the documents, which must happen at such a time and in such a way as to enable the debtor to defend himself, if he so wishes. Only if the debtor has been duly notified in accordance with the minimum requirements, can his non-appearance at a court hearing be interpreted as a lack of defence against the claim.

3.2.2. The rights of defence are also safeguarded by the obligation to inform the debtor, via the document instituting the proceedings or the equivalent document, of the claim and of the procedural steps necessary to contest the claim and prevent a judgement being issued by default.

3.2.3. The proposal does not opt for the harmonisation of Member States’ procedural rules. Nor are the aforementioned minimum procedural requirements to be mandatory. Each Member State can decide for itself whether to bring its legislation into line with the minimum requirements set out in the proposal. If national legislation does not comply with the minimum requirements, this simply means that the judgments issued in that Member State with regard to uncontested claims cannot be certified as European Enforcement Orders. If Member States’ provisions at present do not satisfy the minimum procedural requirements, it will be up to them to achieve the objective of the proposed regulation. This aim of the draft legislative instrument—which seems modest at first sight—should not cause us to lose sight of the advantages for the inhabitants of Member States whose provisions do comply or have been made to comply. It is likely that the results which the proposed regulation achieves will drive Member States to harmonise their procedural rules.

3.3. The term ‘claim’ is defined rather narrowly in the proposed regulation as ‘a pecuniary claim for a specific amount that has fallen due’. This implies that the amount of the claim must be fixed prior to the court proceedings, i.e. a precise estimate must be indicated in the authentic instrument on the basis of which it will be possible to apply for a European Enforcement Order certificate. In view of the numerous guarantees required for obtaining a European Enforcement Order, this raises the question of whether pecuniary claims for an undetermined amount should not be included, too. In this case, it would suffice if the document or documents on which the claim is based were to allow the precise amount to be fixed.

3.4. In keeping with a modern and constructive attitude towards procedural rules, it is not the intention in the proposal to adopt a purely formalistic approach to the strict formal requirements. In particular, Article 19 exemplifies the concern that the obtaining of a European Enforcement Order should not be thwarted by formal requirements which have been interpreted too strictly and which prompt the debtor to show bad faith. This attitude also accords with the development set in train by the transition from the EEX Convention to the Brussels I Regulation (1).

(1) In the course of the court proceedings the debtor either expressly agrees with the claim or acknowledges the existence of the debt or reaches a settlement which is approved by the court. Agreement with the claim may also not involve any proceedings, for example it may take the form of an authentic instrument.

(2) See Article 34(2) Brussels I Regulation and compare with the ruling of the Court of Justice of 12 November 1992, Minalmet versus Brandeis (case C-1233/91, European Court Reports 1992, I-5661).
3.5. The proposal takes due account of, and follows on directly from, the new Community legislative instruments that have come into being since the amending of the European Union’s competences, in particular the Brussels I Regulation and the Service Regulation.

3.6. The proposed regulation does not make any provision either for the harmonisation of Member States’ provisions with regard to enforcement. The mandatory execution of the European Enforcement Order will have to accord with the enforcement provisions in force in each Member State. For the plaintiff this is not very transparent and probably difficult to comprehend. In addition, there are appreciable differences between Member States’ bankruptcy and overindebtedness provisions, and the protection offered by them to debtors. Although harmonisation of all these provisions is clearly outside the scope of the present proposal, the Committee would like to draw attention to this difficult problem.

4. Specific comments

4.1. A court judgement can only be certified as a European Enforcement Order if the judgement is enforceable and has acquired the authority of a final decision in the Member State of origin (Article 5(a)). The term ‘ordinary appeal’ is given a special Community content in the proposal (Article 3(6)), based on the wording of the ruling issued by the Court of Justice in the case Industrial Diamond Supplies versus Riva (1). There is a reference in this wording to national law with regard to the period laid down by law for lodging an appeal. This definition offers too little legal certainty with regard to the moment from which this period starts to run. It should therefore be amended as follows in the light of the lesson learnt from the aforementioned judgement: ‘Ordinary appeal means any appeal which may result in the annulment or the amendment of the procedure of being certified as a European Enforcement Order the lodging of which is bound, in the Member State of origin, to a period which is laid down by the law and which starts to run by virtue of the judgement itself or by virtue of the service of the judgement’.

4.1.1. In order to specify more clearly what type of appeals should be covered here, the definition given in the proposal should be more precise, in line with the definition given in the aforementioned judgement of the Court of Justice, namely that an ordinary appeal is ‘any appeal which forms part of the normal course of an action and which, as such, constitutes a procedural development which any party must reasonably expect’ (2). The inclusion in the proposed regulation of the negative definition given by the Court of Justice in the aforementioned judgement, could also avoid discussions and difficulties with regard to certification as a European Enforcement Order. Thus, the Court specified (3) that appeals which are dependent either upon events which were unforeseeable at the date of the original judgement or upon the action taken by persons who are extraneous to the case and who are not bound by the period for entering an appeal which starts to run from the date of the original judgement cannot be considered as ‘ordinary appeals’. If amplified in this way, the definition satisfies the aim of the regulation, viz. the swift enforcement of judgements, and also takes account of the ultimate fate of the judgement to be enforced.

4.2. The explanation with regard to Article 7(3) specifies that the number of copies of the European Enforcement Order certificate must correspond to the number of enforceable originals of the judgement which are supplied to the creditor in the Member State of origin. However, the proposal itself talks about ‘authenticated copies’ whereas ‘enforceable instruments’ is clearly meant. The text should expressly refer to the enforceable original of the judgement, which can be certified as a European Enforcement Order. On the one hand, various types of copies of court judgements are provided for in the legislation of different Member States and these cannot always serve as a basis for mandatory enforcement (4). On the other hand, the aim is rightly to supply as many copies of the European Enforcement Order certificate as there are enforceable originals of a judgement. In addition, the term ‘enforceable original’ should also be defined more precisely in Article 3.

4.3. In Article 11(1)(b) and (c) the phrase ‘or has refused to take receipt of the document’ should be added. Refusal on the part of the debtor to take receipt of a document served on him should not stand in the way of the judicial process leading to a judgement which satisfies the requirements to be certified as a European Enforcement Order (5). The same problem also arises in connection with Article 11(1)(d), for which a suitable solution should also be found, with due regard to the special features of the technology referred to therein and future technological developments (as a result of which, for example, an automatic acknowledgement of receipt could be generated).

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(1) Court of Justice judgement of 22 November 1977, Industrial Diamond Supplies v. Riva, case 43/77, European Court Reports 1977, I-2175, points 37 and 38.
(2) Court of Justice judgement of 22 November 1977, Industrial Diamond Supplies v. Riva, case 43/77, European Court Reports 1977, I-2175, point 37.
(4) Under Belgian law a distinction can be made between unsigned copies, certified copies and an enforceable original of a judgement. In principle only one enforceable original of a ruling or verdict is supplied to any one party (see Article 1379 of the Belgian Legal Code).
(5) See Article 13(a), which rightly fails to mention the case provided for in Article 11(1)(b). Compare with Article 13(b)(iii): ‘if the document has been served on a person other than the debtor, .....’.
4.4. For the sake of the cross-border serving of documents, the terms 'statutory legal representative' and 'authorised representative' in Article 11(2) should be defined in Article 3 in line with the explanations given in the explanatory memorandum. Neither of these terms is defined in the Service Regulation.

4.5. A number of vague terms are used in Article 12(1). If these are not defined more precisely, they could be interpreted differently, at least in the case of the cross-border serving of documents. The terms in question are: 'reasonable efforts to serve the document' (Article 12(1), introduction) and 'adults' (Article 12(1)(a)). Here, too, a uniform definition should be found. The expression 'if the mailbox is suitable for the safe keeping of mail' (Article 12(1)(d)) is also vague and could be interpreted differently. The remarks made above about Article 11(2) also apply to Article 12(2).

4.6. The draft Article 15(1) spells out what is meant by 'service in sufficient time to arrange for defence'. This period must be calculated 'starting from the date of service of the document which institutes the proceedings or of an equivalent document' (Article 15(1) in fine). Similar terms and timeframes are to be found in Article 15(2). Depending on the details of the court action, the precise time at which the document is served and the way in which these timeframes must be calculated will be governed by either the law of the Member State empowered to judge on the claim (when the document is served on the debtor in the same Member State) or the law of the Member State which is requested to do the serving (in the event of cross-border serving). The explanation given in Article 9(1) of the Service Regulation with regard to this time will prove useful in the latter case. This does nothing to detract from the fact that, in order to avoid all discussions and legal uncertainty, the proposed regulation must specify which law is to be used — in the event of cross-border serving — to calculate the 28-day timeframe (the law of the Member State where the proceedings initiating the European Enforcement Order are conducted, or the law of the Member State which is requested to do the serving).

4.7. There should be no mention of a court in Article 18. There are major differences between Member States' laws with regard to the drawing-up of summons and the intervention of the judge or the court. The proposed regulation does not seek to harmonise procedural law in the Member States and the information to be supplied under Article 18 can just as well come from another source apart from the court (e.g. the creditor himself or the bailiff acting on his behalf) (1).

4.8. The Dutch version of the draft Article 20(1)(a)(i) — 'de schuldenaar heeft buiten zijn schuld niet tijdig genoeg van de beslissing tot instelling van een gewoon rechtsmiddel kennis kunnen nemen' is an infelicitous and inaccurate rendering (2) of what the text is meant to say and which in English reads 'did not have knowledge of the judgement in sufficient time to lodge an ordinary appeal' (cf the French version 'n’a pas eu connaissance de la décision en temps utile pour exercer un recours ordinaire'). The phrase ‘tot instelling van een gewoon rechtsmiddel’ should be deleted.

4.9. The draft Article 20 deals with relief from the effects of the expiration of time for lodging an appeal against a judgement regarding an uncontested claim, but the conditions governing this, as set out in the introduction to Article 20(1) and in Articles 20(1)(a)(ii) and (iii) and Article 20(1)(b), seem to be contradictory. It is difficult to see how the requirement in Article 20(1)(b) ('the debtor has disclosed a prima facie defence to the action on the merits') can be satisfied if the debtor did not have knowledge of the document instituting the proceedings or equivalent document in sufficient time to defend himself (Article 20(1)(a)(iii)) or did not have knowledge of the summons in sufficient time to appear at a court hearing (Article 20(1)(a)(ii)). This applies even more so to the case mentioned in Article 3(4)(b), to which Article 20(1) refers in its introduction.

4.10. The term 'court settlement' (Article 25), which has already been used in Article 58 of the Brussels I Regulation without being defined, should for the sake of clarity be included in the definitions in Article 3 (where it is already referred to implicitly in Article 3(4)(d)).

4.11. In contrast with other recent Community instruments in the field of procedural law, this proposed regulation makes no provision for reports on its application or any proposals for amendments (cf. Article 73 of the Brussels I Regulation and Article 24 of the Service Regulation). The very fact that the draft regulation is the first step in a programme for improving the effectiveness of the measures for enforcing judgements, is a good enough reason for recommending the inclusion of such a provision.

(1) Under Belgian law a judge or a court does not intervene before a summons is served on a defendant.
(2) See also the explanatory memorandum on Article 20: 'If the debtor did not receive the judgement in time ...'.
5. Conclusions

5.1. The Committee welcomes the proposed regulation:

— The introduction of a European Enforcement Order has considerable advantages vis-à-vis the existing exequatur procedure. There is no need for the judicial authorities in the Member State to intervene, and this saves time and money. As a result of the extensive guarantees with regard to the rights of defence, it is possible to abolish checks. Another simplification is that translations are unnecessary in most cases, since multilingual standard forms are used for the European Enforcement Order certificates.

— The proposed regulation makes allowance for, and accords with, the Brussels I Regulation and the Service Regulation, which are being used as the basis for creating a European judicial area.

5.2. The weak point in the proposal is the freedom which the Member States have to decide whether to adapt national procedural rules to the minimum requirements laid down in the proposed regulation. It is to be hoped that Member States will quickly realise that a European Enforcement Order can offer creditors nothing but advantages with the result that, where necessary, provisions will be adjusted swiftly and fittingly in the light of the minimum procedural requirements.

5.3. Though the proposed regulation undoubtedly represents a new step towards the creation of a European judicial area, it must be emphasised that there is still a very long way to go before this area is created. More far-reaching harmonisation of national procedural laws (including enforcement laws) is vital. The Committee is well aware of the challenges involved here, because of the impact of these rules on difficult and delicate issues such as the equal treatment of creditors, consumer protection and the provisions on crisis-ridden, bankrupt and overindebted companies.

5.4. The Committee recommends that the possibility of framing similar provisions for alternative dispute resolution (ADR) be examined. ADR is quite rightly a political priority for the EU institutions, and the publication of the Green Paper on alternative dispute resolution in civil and commercial law (Brussels, 19 April 2002 (1)), is a clear indication of the renewed interest in such procedures.


The President

of the European Economic and Social Committee

Roger BRIESCH