Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 9 April 2014[1]

Joined Cases C‑119/13 to C‑121/13

eco cosmetics GmbH & Co. KG (C‑119/13)
v
Virginie Laetitia Barbara Dupuy,
Raiffeisenbank St. Georgen reg. Gen. mbH (C‑120/13)
v
Tetyana Bonchyk
and
Rechtsanwaltskanzlei CMS Hasche Sigle, Partnerschaftsgesellschaft (C‑121/13)
v
Xceed Holding Ltd
(Requests for a preliminary ruling

by the Amtsgericht Wedding (Germany))

(Judicial cooperation in civil matters — European order for payment — Regulation (EC) No 1896/2006 — Invalid service — Review — Observance of the rights of the defence — Article 47 of the Charter)

1. These requests for a preliminary ruling all have as their legal basis Regulation (EC) No 1896/2006 creating a European order for payment procedure.[2] They raise the question whether, in the event of a failure of service on the defendant of the European payment order, the defendant may claim the application of Article 20 of Regulation No 1896/2006 by analogy.

2. That provision states that, after expiry of the time-limit laid down in Article 16(2) of the regulation, the applicant may, by reason of exceptional circumstances, apply for a review of the European order for payment before the competent court in the Member State of origin ('the court of origin'). In particular, the defendant is entitled to request a review of that order if it was served by one of the methods provided for in Article 14 of the regulation, and if service was not effected in sufficient time to enable the defendant to arrange for his defence, without any fault on his part.

3. In this Opinion, I shall set out the reasons why I consider that Regulation No 1896/2006 must be interpreted as precluding application by analogy of Article 20 to a case in which the European order for payment has not been served on the defendant or service was invalid. In order to ensure observance of the rights of the defence, the defendant must be able to avail himself of an independent right of action before the court of origin, enabling him to show that that order was not served on the defendant and, in an appropriate case, to ask for it to be declared invalid.

1 — Original language: French.

2 — Regulation of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

I – **Legal framework**

A – *EU law*

4. Article 1(1)(a) of Regulation No 1896/2006 provides that the purpose of the regulation is ‘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’.

5. Article 13 states as follows:

‘The European order for payment may be served on the defendant in accordance with the national law of the State in which the service is to be effected, by one of the following methods:

(a) personal service attested by an acknowledgement of receipt, including the date of receipt, which is signed by the defendant;

(b) personal service attested by a document signed by the competent person who effected the service stating that the defendant has received the document or refused to receive it without any legal justification, and the date of service;

(c) postal service attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant;

(d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant.’

6. Article 14 of that regulation, entitled ‘Service without proof of receipt by the defendant’, provides as follows:

‘1. The European order for payment may also be served on the defendant in accordance with the national law of the State in which service is to be effected, by one of the following methods:

(a) personal service at the defendant’s personal address on persons who are living in the same household as the defendant or are employed there;

(b) in the case of a self-employed defendant or a legal person, personal service at the defendant’s business premises on persons who are employed by the defendant;

(c) deposit of the order in the defendant’s mailbox;

(d) deposit of the order at a post office or with competent public authorities and the placing in the defendant’s mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time-limits;

(e) postal service without proof pursuant to paragraph 3 where the defendant has his address in the Member State of origin;

(f) electronic means attested by an automatic confirmation of delivery, provided that the defendant has expressly accepted this method of service in advance.

2. For the purposes of this Regulation, service under paragraph 1 is not admissible if the defendant's address is not known with certainty.

3. Service pursuant to paragraph 1(a), (b), (c) and (d) shall be attested by:

(a) a document signed by the competent person who effected the service, indicating:

 (i) the method of service used;

 and

 (ii) the date of service;

 and

 (iii) where the order has been served on a person other than the defendant, the name of that person and his relation to the defendant;

 or

(b) an acknowledgement of receipt by the person served, for the purposes of paragraphs (1)(a) and (b).'

7. Article 16 of Regulation No 1896/2006 states:

'1. The defendant may lodge a statement of opposition to the European order for payment with the court of origin using standard form F as set out in Annex VI, which shall be supplied to him together with the European order for payment.

2. The statement of opposition shall be sent within 30 days of service of the order on the defendant.

…'

8. Finally Article 20 of the regulation provides for the possibility on the part of the defendant to apply for a review of the European order for payment. The provision thus states:

'1. After the expiry of the time-limit laid down in Article 16(2) the defendant shall be entitled to apply for a review of the European order for payment before the competent court in the Member State of origin where:

(a) (i) the order for payment was served by one of the methods provided for in Article 14,

 and

 (ii) 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.

2. After expiry of the time-limit laid down in Article 16(2) the defendant shall also be entitled to apply for a review of the European order for payment before the competent court … of origin where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances.

3. If the court rejects the defendant's application on the basis that none of the grounds for review referred to in paragraphs 1 and 2 apply, the European order for payment shall remain in force.

If the court decides that the review is justified for one of the reasons laid down in paragraphs 1 and 2, the European order for payment shall be null and void.'

B – *German legislation*

9. Under German law, the Code of Civil Procedure (Zivilprozessordnung, 'the ZPO') lays down the procedure to be followed in regard to order for payment procedures. Thus, in the version of the ZPO applicable to the dispute in the main proceedings, Paragraphs 692(1)(1) and 700(3), first sentence, provide that, after a statement of opposition has been lodged — whether admissible or not, whether it is within the time-limits or not and whether or not it is clear — the order for payment procedure is automatically a matter for the court with jurisdiction to try the dispute.

10. Under Paragraph 690(1)(5) of the ZPO, on requesting the issue of an order for payment, the creditor must state which court would be competent to resolve the dispute in the event of opposition.

11. It is otherwise in regard to the European order for payment, for which the Amtsgericht Wedding (Germany) (Local Court) explains that no provision is made to designate the court with jurisdiction in the event of a dispute. Transfer to the court with jurisdiction to resolve the dispute after a statement of opposition is entered under Article 17(1) and (2) of Regulation No 1896/2006 is governed by the legislation of the Member State of origin alone, that is to say the Member State in which a European order for payment is issued.

12. According to the national court, by virtue of Paragraph 1090(1), first sentence, and Paragraph 1090(2), first sentence, of the ZPO, this means that the European court with jurisdiction for the European order for payment will call upon the creditor to designate the competent court in the event of a dispute. So long as the creditor does not do this — or if he designates no court whatsoever — no transfer will be effected to another court. The national court concludes from this that the applicant has a European order for payment together with a declaration of enforceability in his hands, but the defendant is unable to ask the court to verify whether the statement of opposition was lodged within the prescribed period or even whether that period ever started to run, because the case file has not been transferred to a court in accordance with the general procedural rules and the procedure for review under Article 20 of Regulation No 1896/2006 is not directly applicable.

II – **Facts in the main proceedings**

A – *Case C-119/13*

13. Eco cosmetics GmbH & Co. KG ('eco cosmetics'), domiciled in Germany, applied to the Amtsgericht Wedding for the issue of a European order for payment against Ms Dupuy, who is domiciled in France. In that connection it gave an address in France as being the defendant's domicile. On 22 March 2010, the Amtsgericht Wedding granted the application by eco cosmetics and issued the European order for payment. This was served by registered letter with advice of receipt at the address indicated; the advice of receipt gave 31 March 2010 as the date of service.

14. As Ms Dupuy entered no statement of opposition, the Amtsgericht Wedding, on 20 May 2010, declared the order enforceable in accordance with Article 18(1) of Regulation No 1896/2006.

15. Only by letter of 28 July 2010, received on 3 August 2010 by the Amtsgericht Wedding, did Ms Dupuy oppose the European order for payment. By letter of 5 August 2010, the Amtsgericht Wedding informed Ms Dupuy that the opposition was out of time and that she was entitled, at most, to request a review of the order for payment under Article 20 of Regulation No 1896/2006. Accordingly, by letter of 7 October 2010, Ms Dupuy requested a review of the order for payment and, by letter of 13 April 2011, submitted a statement of grounds in support of that request for a review.

16. According to Ms Dupuy, the European order for payment was not served on her at any time, since she had left the address indicated by eco cosmetics in October 2009. She also states that it was only as a result of a letter from her bank dated 23 July 2010 that she was apprised of that order. Those statements are refuted by eco cosmetics.

B – *Case C-120/13*

17. Raiffeisenbank St. Georgen reg. Gen. mbH ('Raiffeisenbank'), domiciled in Austria, applied for a European order for payment against Ms Bonchyk, who is domiciled in Germany. On 2 September 2010, the Amtsgericht Wedding upheld that application and issued the order. That court attempted on two occasions to effect service of that order by post to the addresses indicated by the Raiffeisenbank, each time unsuccessfully. The Raiffeisenbank then provided a new address. The European order for payment was then served on that new address by mailbox deposit on 1 February 2011.

18. Ms Bonchyk did not lodge a statement of opposition against that order, which was then declared enforceable by the Amtsgericht Wedding on 10 March 2011. By fax dated 1 June 2011, Ms Bonchyk lodged a statement of opposition to that order. She has also indicated that it was only by chance that the existence of the order was brought to her notice; she had, she said, not lived at the address at which the European order for payment had been served since 2009. Finally, she stated that the order had at no time been served on her.

19. By letter dated 17 June 2011, the Amtsgericht Wedding informed Ms Bonchyk that her opposition was out of time and that she was entitled, at most, to apply for a review under Article 20 of Regulation No 1896/2006. By letter dated 24 June 2011 Ms Bonchyk then made an application for review of the European order for payment.

C – *Case C-121/13*

20. Rechtsanwaltskanzlei CMS Hasche Sigle, Partnerschaftsgesellschaft ('CMS Hasche Sigle'), domiciled in Germany, applied for a European order for payment against Xceed Holding Ltd, domiciled in Cyprus, giving an address in Nicosia (Cyprus). On 4 June 2010, the Amtsgericht Wedding granted that application and subsequently served the European order for payment by registered post with advice of receipt at the address given by CMS Hasche Sigle. It is apparent from the notice of receipt that the order was served at that address on 30 June 2010; the notice of receipt bears a signature and the stamp of a law firm but no cross in the 'delivered' box, or in any other box. On 10 August 2010, the Amtsgericht Wedding declared the order enforceable.

21. By letter of 19 October 2010, received on 20 October 2010 by the Amtsgericht Wedding, Xceed Holding Ltd made an application for review of the European order for payment and, as a precautionary step, lodged a statement of opposition to that order.

22. Xceed Holding Ltd argues, without being challenged on that point, that the order was not served on it at any time. It states that until 18 May 2010 its seat was in Larnaca (Cyprus), and then in Limassol (Cyprus), and that it had never had any contact with the firm of lawyers which received and signed the notice of receipt. It was not until 7 October 2010 that it took cognisance of the European order for payment, following receipt of a formal notice from CMS Hasche Sigle.

23. In all three cases, the Amtsgericht Wedding is experiencing doubts as to the interpretation of Regulation No 1896/2006. The national court is particularly concerned about whether the applications for review brought by the three defendants in the main proceedings afford a valid remedy.

III – **The questions referred**

24. In those circumstances, the Amtsgericht Wedding decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling. I reproduce below the questions referred in Case C-119/13, the first and third of which are in the same terms as those referred in Cases C-120/13 and C-121/13:

‘(1) Must Regulation … No 1896/2006 … be interpreted to mean that a defendant may apply for a review by the competent court of the European order for payment also where the order for payment was not served on him or not effectively served on him? In those circumstances, may recourse be had, by analogy, in particular to Article 20(1) or Article 20(2) of Regulation No 1896/2006?

(2) If Question 1 is answered in the affirmative: if the order for payment was not served on him or not effectively served on him, must the defendant respect certain time-limits in bringing his application for review? In that connection, must recourse be had in particular to the scheme established in Article 20(3) of Regulation No 1896/2006?

(3) Also if Question 1 is answered in the affirmative: what are the legal consequences for the procedure if the application for review is successful; may recourse be had in that connection, by analogy, in particular to Article 20(3) or Article 17(1) of Regulation No 1896/2006?’

IV – **Analysis**

25. By its first question, the national court is essentially asking whether Regulation No 1896/2006 must be interpreted as meaning that, when the European order for payment has not been served on the defendant, or service has been ineffective, the defendant may apply for a review of that order in reliance, by analogy, on Article 20(1) or (2) of that regulation.

26. In the three cases in the main proceedings, the national court proceeds on the basis that service of the European order for payment either had not been effected or was invalid inasmuch as it had not been effected in accordance with the minimum rules laid down by that regulation.

27. In fact, the present cases raise the question as to the remedy available to defendants against a European order for payment, which has not been served on them, or not effectively served on them, but which has become enforceable. Regulation No 1896/2006 is silent as to any remedies available to the defendant in such circumstances and thus creates a legal vacuum. The question at issue therefore concerns the legal consequences of a failure of service or of ineffective service.

28. The national court, in common with most of the parties to the proceedings, seems to consider that the only remedy is a review of the European order for payment under Article 20 of the regulation. I cannot share that view.

29. Under Article 1(1)(a) thereof, the purpose of the regulation is 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. That procedure might be described as a ‘unilateral procedure’ inasmuch as no oral argument is presented to the court of origin, and the defendant appears only at a later stage once the European order for payment has been issued by that court and has been served on the defendant.

30. In that connection, Regulation No 1896/2006 establishes two categories of minimum requirements concerning modes of service.

31. First, Article 13 of the regulation provides for methods of service with proof of receipt by the defendant. That certifies that the defendant will have been given notice of the European order for payment issued against him and thus will have been informed of it, and that the mechanism provided for by that regulation will then be able to take effect.

32. Thus if the defendant decides to lodge a statement of opposition to the European order for payment under Article 16 of Regulation No 1896/2006, the procedure will be conducted before the court of origin in accordance with the ordinary rules of civil procedure unless the applicant has expressly requested that the proceedings should be terminated in that event.[3] If, on the other hand, the defendant remains silent in the face of that order, once the period provided for in Article 16(2) of that regulation has expired, the order is to be declared immediately enforceable by the court of origin in accordance with Article 18(1) of Regulation No 1896/2006; Article 19 thereof specifically states that a European order for payment that has become enforceable in the Member State of origin is to be recognised and enforced in the other Member States.

33. Only exceptionally can the defendant apply for a review of the European order for payment either because he was prevented from contesting the claim by reason of *force majeure* or due to extraordinary circumstances, without any fault on his part,[4] or because the European order for payment was clearly wrongly issued, having regard to the requirements laid down in that regulation, or due to other exceptional circumstances.[5]

34. Secondly, Article 14 of Regulation No 1896/2006 sets out the methods of service without proof of receipt by the defendant where the European order for payment is entrusted to a third party. In that case the EU legislature proceeds on the assumption that the defendant is temporarily absent when attended upon by the enforcement officer or the postman. That means that, in using those methods of service, it is only presumed that the defendant has been notified of the European order for payment issued against him and has therefore been duly informed of his rights and of the legal effects which would flow from opposition or a failure to respond within the prescribed period, in that case the declaration of the enforceability of that order under Article 18 of that regulation.

35. The EU legislature has, however, here again provided for the possibility of a delay to be taken into account by permitting the defendant to apply for a review of the European order for payment under Article 20(1) and (2) of the regulation.

36. The foregoing demonstrates, in my view, the considerable importance attached to valid service in the European order for payment procedure. It ensures that defendants will have access to all information necessary to them to defend themselves and thereby secures observance of the rights of the defence.[6] Already in its preparatory documents the European Commission had highlighted this

3 — See Article 17(1) of the regulation.

4 — See Article 20(1)(b) of Regulation No 1896/2006.

5 — See Article 20(2) of the regulation.

6 — See, on service of an originating application, judgment in *Trade Agency*, C-619/10, EU:C:2012:531, paragraphs 32 and 33. See also judgment in *Alder*, C-325/11, EU:C:2012:824, paragraphs 34 to 36.

point, stating that '[i]n order to secure a fair trial the defendant has to be properly put in the picture about his procedural rights and obligations along with the order for payment. … Therefore, concise yet comprehensive information is a prerequisite for short deadlines and for the assumption that within these time-limits the defendant can take a decision on whether or not to contest the claim in full knowledge of the consequences without having to obtain legal advice.'[7]

37. That is the point of significant interest in the procedure introduced by Regulation No 1896/2006, namely reconciling the speed and efficiency of a judicial procedure with observance of the rights of the defence in cross-border disputes concerning uncontested pecuniary debts. Once informed and apprised of the information contained in the documents which are required to accompany the service, defendants may than exercise their rights in full knowledge of what is at stake. That explains why, subsequently, they have only limited means to oppose enforcement of the European order for payment.

38. None the less, because he was personally alerted to the issue of that order, his rights, and specifically his rights of defence, were fully observed.

39. Does the same apply when the implementation of that order issued in accordance with the procedure in Article 14 of Regulation No 1896/2006 discloses that in fact, and through no fault on his part, the alleged debtor has not been apprised of the order?

40. Certainly not.

41. As has been seen, service under the system established by Regulation No 1896/2006 seeks to preserve the rights of the defence. It constitutes a presumption that the European order for payment has been received by the defendant, which is an eminently important step under that system. Observance of those conditions in the European order for payment procedure is of prime importance in maintaining a balance between the different objectives pursued by that regulation.

42. Observance of the rights of the defence cannot be secured by a presumption when enforcement of that order discloses that that presumption is false. It would then be necessary to make it into an irrebuttable presumption which, in terms of the rights of the defence, would make no sense.

43. In seeking excessively to simplify the mechanism provided for in Regulation No 1896/2006, it is precisely the rights of the defence and thus Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') that would be prejudiced.

44. First of all, to apply Article 20 of that regulation by analogy would be to deprive of his most basic rights the defendant acting in good faith who, because the European order for payment was not served on him in disregard of the minimum rules, was not informed of the possibility open to him of contesting the order whereas a person who on the contrary has been served in due form with such an order would have been able to exercise those rights. Apart from the fact that such an interpretation would be contrary to observance of the rights of the defence guaranteed by Article 47 of the Charter, there would also be an infringement of the principle of equal treatment as between those two defendants acting in good faith.

45. Moreover, failing service of the European order for payment on the defendant the debt at issue cannot be said to be an uncontested debt given that, in the absence of such service, the defendant has at no time been able to contest it. Consequently, not only would it be going against the very objective of Regulation No 1896/2006 which, let it be recalled, establishes a European order for payment procedure for 'uncontested debts' but also and above all that would again be a clear breach of the

7 — See p. 35 of the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation importance [COM(2002) 746 final].

rights of the defence which additionally would have serious legal consequences for the defendant. If, under an application by analogy of Article 20 of that regulation to the cases that are the subject of this Opinion, review is to be rejected the European order for payment would continue to be enforceable because it remains valid under Article 20(3) of that regulation.

46. I also note that the EU legislature was at pains to state that the court of origin has a duty to ensure, when issuing a European order for payment, that it be served on the defendant in accordance with national law and under arrangements conforming to the minimum standards laid down in Articles 13 to 15 of Regulation No 1896/2006.[8] Article 14 of that regulation, providing for methods of service on the defendant of the European order for payment without proof of receipt, is yet more illuminating on this point because it states in paragraph 2 that '[f]or the purposes of this Regulation, service under paragraph 1 is not admissible if the defendant's address is not known with certainty'.

47. By emphasising the duty of the court of origin to ensure observance of the minimum rules relating to service, the Union legislature made clear its intention to ensure that the rights of the defence will be observed in unilateral proceedings in which the defendant in the end only belatedly has an opportunity to asset his rights.

48. What, then, is the purpose of the procedure under Article 14 of Regulation No 1896/2006? It seems to me to be free from doubt. It creates a presumption allowing the procedure to follow its course and, if no statement of opposition is lodged, the European order for payment to be declared enforceable. That is logical inasmuch as the method of service renders it likely that the order will reach its addressee. In the interests of efficiency, that likelihood will justify initiation of the subsequent stages of the procedure, because in a very great number of cases, the presumption will have been borne out by reality. Conversely, in the statistically less frequent occurrence where the presumption is not borne out by the facts, service or notification must be regarded as not having been effected. From a global perspective, the efficiency of the system will have been safeguarded and individual freedoms will have been upheld.

49. Moreover, it is only on this interpretation that the procedure under Article 14 of Regulation No 1896/2006 can, it seems to me, escape criticism, such as, is levelled, in particular, in academic writings.[9]

50. Accordingly, I consider that application by analogy of Article 20 of Regulation No 1896/2006 to cases such as those that are the subject of the present cases complies neither with the wording of that regulation nor with its spirit and runs counter to Article 47 of the Charter. In my view, the regulation cannot tolerate such an imbalance between the rights which it seeks to protect.

51. I also consider that the defendant cannot be deprived of a remedy on the ground of a mere likelihood that service or notification has taken place where in his challenge he proves that he was not informed of the European order for payment. He must therefore have an effective remedy of that kind in order to be able to demonstrate before the court of origin that that order did not reach him. In the event that the court of origin were to find that no service had been effected, the only legal consequence to flow therefrom would in my view be that the order would require to be declared invalid.

8 — See Article 12(5) of the regulation.

9 — Academics have pointed to this weakness in the regulation. See, in that connection, Guinchard, E., 'L'Europe, la procédure civile and le créancier: l'injonction de payer européenne and la procédure européenne de règlement des pandits litiges', *Revue trimestrielle de droit commercial and de droit économique*, 2008, p. 465, and Miguand, J., 'Procédure d'injonction européenne', *Jurisclasseur commercial*, fascicule 185, 2008. See, also, Lopez de Tejada, M., and d'Avout, L., 'Les non-dits de la procédure européenne d'injonction de payer', *Revue critique de droit international privé*, 2007, p. 717.

52. In light of the foregoing, I am therefore of the view that Regulation No 1896/2006 must be interpreted as precluding an application by analogy of Article 20 to a case in which the European order for payment was not served on the defendant, or service was ineffective. In order to ensure observance of the rights of the defence, the defendant must have available to him an independent remedy before the court of origin allowing him to prove that he did not receive notification of the order and to seek a declaration if appropriate of its invalidity.

53. In light of the reply proposed to the first question given, it is not in my view necessary to reply to the second and third questions.

V – **Conclusion**

54. I therefore propose that the Court reply to the questions referred by the Amtsgericht Wedding as follows:

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure must be interpreted as precluding application by analogy of Article 20 to a case in which the European order for payment was not served on the defendant, or service was ineffective.

In order to ensure observance of the rights of the defence, defendants must have available to them an independent remedy before the competent court of the Member State of origin, allowing them to prove that they did not receive notification of the order and to seek, if appropriate, a declaration of its invalidity.