The European Order for Payment procedure from a German point of view

An article on the application of the EOfP, Regulation 1896/2006 (EC) in Germany

Lukas Bühl

ABSTRACT

A steadily deepened and widened European Union creates an ever-greater number of cases with a Union dimension. Until fairly recently the area of civil procedure law had been left untouched, however. A first step towards creating a harmonized and European system of civil procedure has been made in the field of the collection of debts possessing a Union dimension. Instead of establishing a single and exclusive system to collect debts from a debtor in another Member State a parallel system was created – one that spoils potential applicants with choice. Next to a possibly existing national method to collect debts abroad the European lawmaker put a European Order for Payment in place. The potential ad,-as well as disadvantages of the European order shall be elicited in this paper from a German point of view by displaying its differences to the national system of Germany, the Mahnverfahren.

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1. Introduction

The European Union has *ab initio* developed along the lines of the principle of widening and deepening. It is a simultaneous process. One step taken towards the widening of the Union is always accompanied by a step towards the deepening of the Union and vice versa. The Treaty of Amsterdam had among other aims the goal to create an area of "freedom, security and justice"[1]. Of significance in this context is Art.81 of the Treaty on the Functioning of the Europan Union, which can be seen as the ancestor of Art. 65, which was inserted by said Treaty of Amsterdam. The new Art.81 is the uncontestable legal base for action in the area of judicial cooperation in civil matters within the framework of the European Union. This was an area in which the institutions could not intervene until a legal base was put in place on which harmonizing action by the Community that serves the Single Market could be based. The European Council developed an ambitious program to strengthen the new area of judicial cooperation in civil matters between the Member States during a Summit in Finnish Tampere in 1999. It calls among a variety of aspects in the area of freedom, justice and security for a push towards 'better access to justice in Europe'[2]. It highlights the need for common procedural rules for simplified and accelerated cross-border litigation in various sorts of claims cases. The remarkable change of these Tampere Summit Conclusions is that they moved the influence of the European lawmaker from merely removing discriminatory elements of national legislation to removing practical obstacles in cross border cases.[3] Schollmeyer points to the removal of the requirement for applicants from other EC states to pay a security for the costs of the process to the court[4] in this context as an example for the removal of discriminatory aspects of national legislation. The European Order for Payment on the other hand represents the new step towards a harmonized procedure law, at least in the field of judicial cooperation in civil matters, which

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[1] Citation from Dr. Claessen's handout for the course EULS, week 1

[2] Tampere European Council 15-16.10.1999: Conclusions. Point B.V. link: Art.65 is the legal base last checked May 13, 2010

[3] Dr. Eberhard Schollmeyer, LL.M., Berlin, *Europäisches Mahnverfahren* in , IPRax, 2002, issue 6, p.478, paragraph 1

[4] ibid

brings about a uniform procedure common to all thereby bringing down the barriers that existed in cross border debt collection in various respects before.

Numbers disclosed by the district Court of Stuttgart revealed that it was less than 0.2 % of the order for payment applications that had a cross border dimension in 1999, however[5]. These numbers will probably not vary too greatly throughout the Union. It can only be speculated why the fraction of cross border applications turned out this marginal, but the fact that cross border cases demanded more resources and that one may be forced to leave the shelter of his own law may certainly have played a role. In any case "the swift and efficient recovery of outstanding debts over which no legal controversy exists is of paramount importance for economic operators in the European Union, as late payments constitute a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized enterprises, and resulting in numerous job losses"[6]. Harmonization in this field, creating simplified and accelerated means to collect debts in another Member State therefore has to be seen as another step towards deepening and widening the Union. And it wasn't just theory, concrete action followed[7]. Such as the one Regulation that this paper devotes itself to – the European Order for Payment[8].

Interestingly, not all Member States had an expedited or at least simplified procedure to collect debts from a debtor in their national systems, such as the German Mahnverfahren, for instance. Whereas most Member States have such a system in place, creditors in Denmark, Finnland, the United Kingdom, Ireland and the Netherlands do not have such an instrument at their disposal[9]. The Netherlands used to have a Mahnverfahren-like procedure until the early 1990's, but then decided to abolish it in favor of their default judgment procedure. If the European Order for Payment, hereinafter referred to and abbreviated as EOfP by the way, had been constructed as an instrument that could be used in wholly

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[5] Dr. Eberhard Schollmeyer, LL.M., Berlin, *Europäisches Mahnverfahren* in , IPRax, 2002, issue 6, p.479, II

[6] Regulation 1896/2006 / EC, [2006] OJ L 399/1, Reason 6

[7] Concrete Action had actually already been proposed by the Council of Ministers in Straßbourg in 1984: Dr. Eberhard Schollmeyer, LL.M., Berlin, *Europäisches Mahnverfahren* in , IPRax, 2002, issue 6, p.478ff

[8] Regulation 1898/2006 / EC. , [2006] OJ L 399/1, Reason 6

[9] Civil Procedure in Europe 4, *Orders for Payment in the European Union*, Walter H. Rechberger et al, Kluwer Law International, Chapter C. *Rechtsvergleichender Überblick*, page 7

internal situations applicants in these Member States would have gotten to know the true promise of such an expedited procedure. But after long rounds of negotiations a compromise had to be reached and that was to settle with an instrument that requires a Union dimension to be activated.

Thus, as Sujecki notes, with Regulation 1896/2006 the first harmonized civil procedure on a European Union level came true[10]. The Regulation entered into force, as usual on the day following the date of publication in the OJ, which was December 12, 2008. That apart from a few administrative rules[11], which were valid as of June 12, 2008. Significantly, the Regulation, in accordance with the Treaty establishing the EC, is directly applicable[12].

Nevertheless, the European Order for Payment is a facultative alternative to the, if existing, national system.[13] Creditors are therefore given choice to reclaim debts from a debtor who resides in another Member State. One can follow the national instrument's route or – and actually also – the European's . It is the application of precisely this new European procedure that is of interest to this paper. Yet, it will be the application of the European procedure from a German point of view, that will be given protagonistic attention. In order to answer one question beforehand already it must be said that it is the application of the procedure that deserves such a attention, as there are, and that is what will be proven, loopholes in the text that allow for a different application of the 'uniform' European procedure in the various Member States.

2. Choices

From a German point of view, a creditor is given three choices for a simplified process to reclaim a debt from a debtor abroad. Namely the German Mahnverfahren, the foreign order for payment and now the new European Order

[10] Bartosz Sujecki, Rotterdam, *Das Europäische Mahnverfahren* in NJW 23, 2007, p.1622
[11] Arts.28-30 EOfP, 1896/2006 / EC, [2006] OJ L 399/1
[12] Art. 33 EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[13] Reason 10 EofP, 1896 / 2006 / EC, [2006] OJ L 399/1

for Payment, since the European Order for Payment has been established as a facultative alternative to the national system[14].

Obviously no problems occur in claiming debts, if both the creditor and debtor reside in Germany. A German Mahnverfahren can be filed for at one of the competent courts. Even if the debtor moves to another Member State after the creditor has obtained a German Enforcement Order (Vollstreckungstitel) against the debtor, he can easily have the title approved as a European Enforcement Order (EuVTVO) by the court that issued the original and have it enforced. Alternatively a court in another Member State could enforce the German title via the new EuGVVO[15]. The German Mahnverfahren could theoretically also be instrumentalized against a debtor residing abroad, if the German court responsible for the Enforcement Order has jurisdiction over the issue, which would be determined according to Brussels I again and for servicing the European service regulation comes into play.

Secondly, there is always the possibility to go to court at the debtor's residence. However, one can think of many reasons why that is not preferable to many. There may be differences in the language of the court, let alone the price-spiraling factors of time and distance that increase the costs of the process. This is the least efficient method and exactly the explanation for the need for a simplified and expedited process to collect debts.

The new European Order for Payment comes as a third alternative for a creditor in one Member State that wishes to reclaim a debt from a debtor in another Member State. Once the European Order for Payment is serviced to the debtor and the debtor omits to oppose to the claim the court of origin declares the Order for Payment enforceable[16]. The order can then be enforced according to the procedures of the Member State of enforcement[17].

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[14] ibid
[15] Art. 34ff EuGVVO, 44 / 2001 / EC, [2001] OJ l 12/1
[16] Art. 18 EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[17] Art. 21 EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

3. Territorial Scope

The territorial scope of the Regulation is said to have been the cause of the liveliest discussion during the legislative process[18]. The result at the end was to limit the scope of the European Order for Payment to claims with a Union dimension, which the Regulation names 'cross border cases'. A definition of such was inserted and given in Article 3 as a case 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 seized." Also, the moment at which there must have been a cross border case is the moment in time at which the application for a European order is submitted[19]. The actual question that arises when considering a cross border case is the place of residence and how that has to be established. The Regulation also gives the answer to that. It states[20] that Regulation 44/2001 EC and articles 59 and 60 in particular regulate domicile and therefore need to be consulted to determine the place of residence. The result of these findings is that both parties to the claim may be from the same Member State for as long as one of the parties is in another Member State than the court at the time of the application[21]. Additionally, the European Order for Payment may even be filed against a debtor with no domicile within the European Union, for as long as a court of jurisdiction within the EU can be found to file an application against the debtor. At last it should be kept in mind that the EOfP is usable in all Member States with the exception of Denmark[22].

4. Material Scope

When considering the material scope of the European Order for Payment it has foremost to be noted that the order is only applicable to civil and commercial matters[23] and exclusively to specific amounts that have fallen due at the time when the application is submitted[24]. It shall, according to Art.2(2) particularly not

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[18] Bartosz Sujecki, Rotterdam, *Das Europäische Mahnverfahren*, NJW 23, 2007, p.1624
[19] Art. 3(3) EOfP 1896 / 2006 / EC, [2006] OJ L 399/1
[20] Art. 3(2)EOfP 1896 / 2006 / EC, [2006] OJ L 399/1
[21] Ass. Iur. Martin Schimrick, *Das Europäische Mahnverfahren* in Neue Justiz, 11/2008, p. 494
[22] Reason 32 EOfP 1896 / 2006 / EC, [2006] OJ L 399/1
[23] Art.2 (1) EOfP 1896 / 2006 / EC, [2006] OJ L 399/1
[24] Art.4 EOfP 1896 / 2006 / EC, [2006] OJ L 399/1

apply to revenue, customs or administrative matters or liability of the State for acts and omissions in the field of *actua iure imperii*. Neither shall the Regulation apply to rights in property arising out of matrimonial relationships, wills and successions, insolvency and bankruptcy, social security, and claims arising from non-contractual obligations. Claims arising from extra-contractual obligations only fall under the material scope of the European Order for Payment, if they have been the subject of an agreement between the parties or there has been an admission of debt[25]. The EOfP can also be utilized for claims from extra-contractual obligations if they relate to liquidated debts arising from job ownership of property. Dr. Einhaus critically asks in this context, whether claims arising from quasi-contractual obligations such as *culpa in contrahendo* should fall under the Regulation or not. He refers to the case law of the ECJ for the meaning of jurisdiction of place of (contractual) fulfillment. The ECJ, as he observes, has come up with an autonomous and wide interpretation of the term "contract or claims arising from a contract", which would speak in favor of the inclusion of quasi-contractual obligations[26]. The EOfP therefore lacks the potential to cover such practical but nonetheless relevant areas of fraud or compensation for accidents for example.

This is worsened by the fact that Sujecki observed, namely that the different incorporations and official translations of the Regulation create difficulties and even differences with regard to the material scope of the order, as the Germans have used the word "intangible property", whereas the Dutch and English have used the word "goederen" and "property" respectively. Property and goederen however include more than the German's notion of intangible property, which creates a different scope for the Regulation in the different Member States, and that should, as Sujecki suggests, be prevented by the Germans by adjusting their terminology[27].

The German Mahnverfahren in contrast has a much wider material scope. It is not restricted in the way that the EOfP is; any claim within the limits of civil law can be packed in a German Mahnverfahren. Thus, non contractual or the

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[25] Art.2(d) i EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[26] Dr. David Einhaus, Freiburg, *Qual der Wahl: Europäisches oder internationales deutsches Mahnverfahren*, in IPRax 2008, Issue 4, p. 324
[27] Bartosz Sujecki, Rotterdam, *Das Europäische Mahnverfahren* in NJW 23, 2007, p.1623

aforementioned quasi contractual claims are included in the German order for payment and is therefore the preferable option for such cases – taken that the German Mahnverfahren is admissible in the first place.

5. Jurisdiction

Jurisdiction, and thus the court at which an EOfP has to be submitted, is to be determined according to Community law, in particular as Article 6 of the EofP Regulation states, with Regulation 44/2001 EC. In case a claim relates to a consumer only the courts in which the defendant is domiciled have jurisdiction[28]. The problematic issue of domicile is to be solved according to Art. 59 of Regulation 44/2001 EC. This is all the European lawmaker decided to put down in words leading to a few points that are worth paying attention to. *Sujecki* notes the rules regulating jurisdiction of the Regution 44/2001 EC are too complicated and complex to be used in a claim procedure and bases his proposition on various other authorities[29] that have lifted their voices in favor of an exclusive rule of jurisdiction for the European Order for Payment. *Einhaus* in turn, welcomes the reference to Regulation 44/2001 for its moderness and well-arrangedness and as a regulation that has proven its practicability in most instances. Calling for a separate set of rules for jurisdiction for the order for payment would bear the risk of an unnecessary fragmentation of the European rules for jurisdiction[30]. More between the lines is Einhaus's following observation. At first sight, Art.6 calls for the exclusive jurisdiction for the court where the consumer is domiciled, but, as Einhaus lays out, 44/2001 and the EoFP see a contract that has been concluded for a purpose which can be regarded as being outside his trade or profession as a consumer contract as a consumer contract, for which, as said above, jurisdiction would be with the court where the consumer is domiciled. He then continues to clarify that this regulation is false in itself, as the plaintiff, the creditor, always has the option to sue at the court of the performance of the contract or at the court where the defendant had his former place of residence. He draws this conclusion by considering Art.5 1) a of Regulation 44/2001 EC, which gives jurisdiction to

[28] Art. 6 2) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[29] Bartosz Sujecki, Rotterdam, *Das Europäische Mahnverfahren* in NJW 23, 2007, p.1623
[30] Dr. David Einhaus, Freiburg, *Qual der Wahl: Europäisches oder internationales deutsches Mahnverfahren* in IPRax 2008, Issue 4, p. 325ff

the court where performance of the contract took place. The place of performance, he explains, is to be determined according to the ECJ's Tissili formula, which states that the place of performance is to be found autonomously according to national law[31]. A German court that is called upon by a creditor in Germany in its search for the applicable law will have to draw on Art.28 of the EGBGB, which looks at the characteristic of the contract. In a order for payment the special characteristic is not the actual payment but the consideration of the debtor for which reason German law will be applicable. Art.269 of the BGB reads that 'performance must be made in the place where the obligor had his residence *at the time when the obligation arose.*' Thus, and that is the important conclusion, should the debtor decide to flee from his obligation to another Member State, German courts still have jurisdiction and German law is applicable. That result should be welcomed, as it does not afford exaggerated protection to the debtor, but serves the fair interest of the creditor to an acceptable extent. Obviously, the creditor can opt to file for an EofP at the new place of residence, as explained above in the territorial scope section and also for the national claims procedure of the Member state where the debtor has his current residence, if one exists.

As a last point regarding jurisdiction, the EofP and Germany, it should be noted that the Germans have neatly incorporated the new EOfP in their 7th book of their civil code of procedure, the ZPO. §1087 ZPO gives jurisdiction over the EOfP against a defendant in Germany to the AG Wedding in Berlin, exclusively. This is in accordance with Art. 29 I a) which called upon the Member States to have communicated to the Commission the courts that have jurisdiction to issue a European Order for Payment by 12 June 2008.

6. Application for the European Order for Payment

In its quest for simplification and to overcome the language hurdles throughout the courts of the different Member States of the European Union, the lawmaker chose for standardized forms available in all languages of the European Union to

[31] ibid

file for a payment order[32]. Annex 1 contains the Form A that has to be filled out and signed with details regarding the parties to the claim, the court that's called upon (grounds for jurisdiction), the cause of the action, the presence of a cross-border claim, whether the claim relates to a consumer contract as well as the amount of claim itself and possible interest rates. One major difference between the European and the German system is that the European system knows no limit for the amount of interest rate. The German system allows a maximum of 12% above the base-interest[33]. As said under the material scope section above, the German system is not as handicapped when it comes to the areas of application. Also, the European system is foreign-currency-phillic whereas the German system is in principle restricted to claims in Euros[34], unless the order serviced abroad. Interestingly, especially from a German point of view is that a 'description of evidence supporting the claim'[35] has to be submitted as well. Not just is that not the case in a German Mahnverfahren, a description can hardly be standardized and is hence counter-productive for a simplified, eventually even completely computized procedure. Also, as soon as words have to be instrumentalized to communicate a claim a translation may have to be made into one of the called courts official languages, which costs unnecessary resources on all sides. Nevertheless, the use of codes for the EofP makes things generally a lot easier as it overcomes the language difficulties of the European Union. Another important aspect is that the European Order for Payment can already be filed for when consideration from the debtor has not yet become due. The German Mahnverfahren depends upon the consideration having become due before it can be utilized to claim a debt. Somewhat like the German system the claimant can tick that he opposes to a transfer to an ordinary civil trial in case the defendant opposes to the claim in the EofP. The German system is different in that the claimant can already assign the court to which he wishes to transfer the claim to, in case of opposition by the defendant. He still has the option to have the claim fought out in a civil trial after the claimant has opposed, however. In either way, the result is that a claimant does not inevitably have to go through with his claim, but that he can opt to live with the loss. Also the fact that the cause of the action

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[32] Art. 7 1) EOfP 1896 / 2006 / EC, [2006] OJ L 399/1
[33] ZPO §688 (2)1
[34] ZPO §688(1)
[35] Art.7 e) EOfP 1896 / 2006 / EC, [2006] OJ L 399/1

has to be described, an element of the process that the German system doesn't know of either by the way, sets the defendant in a better position to prepare his defense and prevents unwanted, ungrounded or even malicious applications. Also, as said, the application has to be signed by the claimant or his representative. Alternatively, if the application is submitted in electronic form, it has to be accompanied by an electronic signature in accordance with Article 2(2) of Directive 1999/93/EC, the framework for electronic signatures within the EU[36]. No electronic signature is needed for courts that have a special system available to certain pre-registered users that allows the submittal of applications in a secure manner[37]. Lawyers in Germany for instance may not submit German order for payment files in paper form anymore. No such rule has been enacted with regard to the European order until now, however. As a last drawback it should be noted that the entire applications sums up to seven pages. That is not exactly the simplified and standardized application one would have hoped for. Bigger companies employ electronic systems offering a simplified and easy access interface to file for a German order for payment. The European order is not as trouble-free and supports the allocation of these tasks to legal advisors. Thus, the targeted quick and efficient instrument to collect debts abroad has not yet truly come about, at least in comparison to the German Mahnverfahren, as Einhaus remarks critically[38].

7. Judicial Examination of the Application by competent court

The court handling the application for European Order for Payment shall, according to Article 8, 'examine, as soon as possible and on the basis of the application form' whether the requirements of the EOfP[39] are fulfilled. It shall also examine whether the claim appears to be founded. This sentence reveals two problems for a uniform, European process already. The first is that the court seized shall examine "as soon as possible", which may then be fairly sluggish

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[36] Art.7 (6) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

[37] ibid

[38] Dr. David Einhaus, Freiburg, *Qual der Wahl: Europäisches oder internationales deutsches Mahnverfahren* in IPRax 2008, Issue 4, p. 326

[39] Arts.2,3,4,6,7 EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1, in particular

here and there. It does not contribute to the creation of a uniform system in either case. What is set however is that the court shall issue the order within 30 days after the lodging of the application[40], but how long the court may take for the examination is not set. It may have to be said that creating rules fixing such times for the courts in the Union would be a manifest intervention with the civil procedural codes of the Member States – an intervention yet a step too far. Einhaus lists the issue of sanctioning a court that failed to comply with such rules as an example. There is yet no basis for such harmonization. One could see and take this as a pro argument for the creation of a European Code of Civil Procedure. More significantly is the second issue born by the first sentence of Article 8. It calls for the examination of the formal requirements and whether the claim seems to be founded. The formal requirements pose no problem. A court usher or even a computer could be used to see whether formal details are correct. That of course with the exception of the description of the cause of action and the description of the evidence supporting the claim, as explained above. The expression 'whether is founded' could lead to two possible means of interpretation for the examination. One could interpret an examination of the evidence and the description of the cause of action to be one of mere plausibility or one of conclusiveness. An obligatory examination of the conclusiveness of the evidence submitted would be detrimental to the creation of an efficient order for payment as court ushers could not take over these tasks; at least not more problematic cases, where the interpretation of evidence as to its conclusiveness must be left to a judge. This then, does not contribute to the easy system envisaged and certainly not one that can be computized entirely. More shockingly, if the examination has different degrees in the different Member States, as there is no clear rule as to the extent of the examination, then there is no true European instrument, no European Order for Payment. It is left to the usus of the differently thinking courts of the Member States to decide how an examination as to "whether is founded" is to be done. It should therefore be come to the conclusion that the lawmaker did not envisage an examination as to its conclusiveness, but merely to its plausibility. This would be in harmony with reason 16 of the Regulation that ushers should be able to assist in the process as

[40] Art. 12 EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

much as possible to realize the creation of a rationalized order for payment. Schimrick sees it as a sound compromise; the extent of examination goes further than a mere plausibility examination, as evidence has to be desribed, which is more than the German Mahnverfahren demands, but that allows a certain prognosis whether the evidence can be put forward in an ordinary civil trial and whether that evidence would be admissible according to the lex fori of the Member State[41]. Taken the nature of the claims-process, whether the evidence is de facto admissible would only be checked if and when the process is transferred into an ordinary civil trial.

The European lawmaker included the possibility to complete and rectify the application in Article 9. Of course, standardized forms are available again[42].Unless the claim is 'clearly unfounded' or if the application is inadmissible, the court shall give the claimant the opportunity to complete or rectify his application. Interesting is sentence two of Article 9 in connection with the aforementioned point of court-deadlines in so far as the lawmaker could not set a deadline for the completion or rectification of the application by the claimant, once more. The courts are free to set a deadline 'they deem appropriate' and even extent that time-limit at their discretion[43]. The courts will reject the completed or rectified application though, if the claimant responds outside the time-scope specified by the court, or if he refuses the court's proposal[44]. In this context it should be said that the court can, again with a standardized form, inform the claimant that the claim can only be accepted in part. Then, if the claimant doesn't accept that offer or if he replies too late, the court will reject his application. There is no right of appeal against the rejection of the application[45], but the rejection does not prevent from submitting a new application[46] or to try the national procedures of the relevant Member State, of course.

[41] Ass. Iur. Martin Schimrick, *Das Europäische Mahnverfahren* in Neue Justiz, 11/2008, p. 492
[42] Form C, Annex 3 EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[43] Art. 9(2) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[44] Art. 11(3) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[45] Art. 11(2) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

[46] Art.11(3) EOfP

8. Issue of the European Order for Payment

Provided that the examination of the application by the competent court was successful, Article 12 calls upon the court to issue 'as soon as possible and normally within 3o days of the lodging of the application a European Order for Payment'. This is done with Form E of Annex V. If the court gave the claimant time to complete or rectify his application then that time shall not be included in the 30 days period. The defendant gets informed about his two options in the European Order for Payment. He can either, pay the amount to the claimant[47], or oppose to the claim 'within 30 days of the service of the order on him'[48]. The defendant is further informed about a variety of aspects regarding the European Order of Payment against him in Article 12(4)a-c; namely that the order was issued solely on the basis of the information provided by the claimant, that the order will become enforceable unless he appeals and that the proceedings – ordinary civil proceedings - will take place at the court of origin of the order. That unless the creditor has opted for no transfer into a civil trial when he submitted his application, as explained under "Application".

9. Service of the European Order for Payment

The service of the European Order for Payment needs to be devoted a special section to, as it touches on a burning issue in the field of European legal praxis. The EOfP regulates that the courts shall ensure that the 'order is served on the defendant in accordance with national law by a method that meet the minimum standards'[49] of Arts. 13,14 and 15. Sujecki can be referred to again, who believes that these can basically be categorized in service "with" and "without proof of receipt by the defendant" and service on a representative. The service itself, nevertheless, is regulated according to national law. Sujecki also states that

[47] Art. 12 (2) a EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[48] Art. 12 (2)b EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[49] Art. 12(5) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

Regulation 805/2004 EC , on service, remains applicable[50]. From a German point that means that a German court that's called upon must take care of an effective service ex officio. In other Member States, such as Italy, the service of documents is left to the parties and is not done ex officio[51]. In cross border cases Regulation 805/2004 EC will have to be used by courts and parties. The EOfP sets a higher threshold with its special requirements than the German Mahnverfahren, which is only subject to Regulation 805/2004 EC. Art.6 has to be observed in this context again; if the defendant is a consumer (and German courts do not manage to find jurisdiction) then the courts in Germany cannot service an order on him, but the court where the debtor resides will have to be called upon with a new application.

10. Contesting the European Order for Payment

Articles 16 and 17 of the EOfP Regulation are concerned with the opposition of the European order for payment and the effects of the lodging, respectively. The debtor, by making use of form F of Annex VI[52], may lodge a statement of opposition to the order with the court of origin[53], within "30 days of service of the order on the defendant"[54]. The defendant contesting the claim does not have to give reasons for his opposition[55]. He or his representative have to sign the opposition, either on paper or electronically in accordance with Artciel 2(2) of Directive 1999/93/EC. As before with the application of the order, such an electronic signature can be left out, if the court has another electronic system, which is accessible to clearly identifiably pre-registered users[56]. The effect of the lodging of a statement of opposition, if entered within the time limit of 30 days, is that it will continue the proceedings before the competent court of the Member State of origin and the lex fori of that Member State[57], unless the 'claimant has

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[50] Bartosz Sujecki, Rotterdam, *Das Europäische Mahnverfahren* in NJW, 23, 2007, p.1624

[51] Dr. David Einhaus, Freiburg, *Qual der Wahl: Europäisches oder internationales deutsches Mahnverfahren* in IPRax 2008, Issue 4, p. 326

[52] Supplied with the order for payment

[53] Art. 16(1) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

[54] Art. 16(2)EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

[55] Art. 16(3) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

[56] Art. 26(5) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

[57] Art. 17(1) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1

explicitly requested that the proceedings be terminated in that event'[58]. Also the transfer to an ordinary proceeding will be governed by the lex fori of that Member State[59]. The claimant is to be informed whether the defendant has lodged a statement of opposition and of the transfer to ordinary civil proceedings[60]. Should the debtor miss the 30 days time frame to lodge his statement of appeal he still has one last stroke at his disposal; namely Article 20 titled "review in exceptional cases". The defendant may be entitled to a review, if the order was serviced without proof of receipt (which alone would naturally not be enough) and 'if the service was not effected in sufficient time to enable him to arrange for his defense, without any fault on his side'[61]. This would be the case where the letter had really not ever reached the sphere of influence, the "*Einfluss* or *Machtbereich*" of the debtor and that without his fault. One could think of someone who had recently moved, has noticed all relevant parties thereof, but somewhere in the line the change of address had not been communicated though. Article 20 b lists the obligatory *force majeur* as another criterion that may entitle a defendant to have his order reviewed, if it was serviced without proof and provided that he acts promptly[62]. Extraordinary circumstances are categorized under the same heading and may allow for a review as well. Also, a defendant is entitled to review where the order was clearly 'wrongly issued'[63]. If the court rejects the application for review, the European Order for Payment remains in force intact[64]. However, should the court find that the reasons for review are in fact justified, then the European Order for Payment shall be 'null and void'[65]. A major difference between the European and the German system comes to the surface with regard to opposition. It has to be realized that the European system is a one-step system, whereas the German system consists of two phases. Two phases in which the defendant can lodge a statement of opposition and hence two stages at which the Mahnverfahren can be transferred into a real ordinary civil trial – again, if the credtitor has opted for the automatic transfer into a civil trial in the first place. In

[58] ibid
[59] Art. 17(2) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[60] Art. 17(3) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[61] Art. 20(1)a ii) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[62] Art 20 (1)b EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[63] Art. 20(2) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[64] Art. 20(3) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[65] ibid

a German Mahnverfahren, the debtor is given the chance to oppose for the first time after he receives the order for payment and again, a second time, on service of the actual enforcement order. In the European system the debtor is only given the chance to oppose once; namely on service of the European order for payment within 30 days. The two system do share the aspect that the defendant does not have to give reasons for his opposition; he merely has to declare that he opposes.

11. Enforceability of the European Order for Payment

If the defendant has not lodged a statement of opposition within 30 days 'taking into account an appropriate period of time to allow a statement to arrive'[66], then the court of origin declares the European Order for Payment enforceable and that 'without delay'. It uses yet another standard form, in this case form G from Annex VII, to declare the order enforceable and to verify the date of service. It also sends the order for payment to the claimant[67].These rules allow for differences to occur between the various Member States. An appropriate time to for the statement to arrive will have to be rather different throughout the Member States to account for reality in these Member States. The postal services vary greatly across the Union. It will thus have to be concluded that this is a price one will have to pay if one wants to keep the Union "united in diversity". The EOfP also abolished the exequatur procedure, as a European order, that has become enforceable in the Member State of origin is recognized and enforceable in other Member States without the need for a declaration of enforceability and without the possibility for the debtor to oppose to the recognition, as Article 19 guarantees. Reason 27 underlines this idea by stating that a order for payment that is issued in one Member State should be regarded for the purpose of enforcement in another Member State 'as if it had been issued' in that Member State. The actual enforcement is 'governed by the law of the Member State of enforcement'[68] and 'under the same conditions as an enforceable decision issued in the Member State of enforcement'[69]. For the actual enforcement the claimant

[66] Art.18(1) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[67] Art.18(3) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[68] 21(1) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[69] ibid

will have to show the competent authorities in charge of enforcement orders 'a copy of the European order for payment, as declared enforceable by the court of origin[70]' and 'where necessary', and this is where problems begin, 'a translation of the …order into the official language of the Member State of enforcement …or…the court's official language(s)[71]'. Neither will the claimant from another Member State, who has no residence in the Member State of enforcement be obliged to pay a security for the enforcement[72]. The only reasons to refuse enforcement are that there is an earlier decision involving the same action and parties, that there is an earlier decision that fulfills the conditions necessary for its recognition in the Member State of enforcement or that 'the irreconcilability could not have been raised as an objection in the court proceedings in the Member State of origin.[73]'. Also, to the extent that the debtor has paid the claimant the enforcement may be refused. Importantly, the European order for payment may under no circumstances be reviewed as to its substance in the Member State of enforcement[74].

12. Time Limitation of Claim

The EOfP has no regulation as to the time limitation of a claim and when that time stops running. Assuming that German law is applicable we see that the clocks stop ticking on receive of the application by the court, if the claim is "sufficiently individualized"[75], §167 ZPO. Should the claimant not continue the proceedings, a 'stillstand of proceedings' follows, which holds the proceedings for six months (§204, 2 sentence 1 and 2 BGB). After these six months the clocks starts ticking again and the time-limitation for the claim runs again.

[70] Art. 21(2)a EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[71] Art.21(2)b EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[72] Art.21(3) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[73] Art22(1)c EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[74] Art.22(3) EOfP, 1896 / 2006 / EC, [2006] OJ L 399/1
[75] Ass. Iur. Martin Schimrick, *Das Europäische Mahnverfahren* in Neue Justiz 11/2008, p. 492

13. Costs

The issue of costs is neatly covered by the Regulation. Article 25 states that the court fees for a European Order and of ordinary proceedings may not exceed the court fees of ordinary civil proceedings without a preceding European order for payment. Lawyer and Inkasso fees are not regulated by the Regulation however. These will have to be drawn in accordance with national law. For a German lawyer that would mean that the mere filing of forms would create costs. Schimrick notes that for the execution abroad, costs can only be recovered to the extent of the relevant *lex fori* of the other Member State[76].

14. Conclusion

In conclusion it can be summarized that the European Order for Payment is a truly European instrument. It aims high when attempting to create a simplified method to reclaim debts in another Member State without having to make use of a foreign legal instrument be it the simplified order for payment of another Member State – taken that one exists – or the exequatur procedure. Both cost unnecessary resources. The European order fails short if being a completely uniform instrument in all Member States, though. It leaves great room for interpretation when it comes to the extent of examination of the evidence in the application. Also, the instrument cannot be entirely machinized as codes cannot be used for all fields on the form. Evidence and the cause for action have to be described in words, which creates obstacles on the way to a uniform and eventually completely automatic order for payment. In particular, this paper attempted to display the major differences between the European and the German system. It revealed that there are quite a few differences, such as the material scope, the content of application and the different number of stages of the two instruments, between the European and the German system. And these differences need to be taken into consideration when having to make a choice

[76] Ass. Iur. Martin Schimrick, *Das Europäische Mahnverfahren* in Neue Justiz 11/2008, p. 494

between these two systems. Luckily, the European system does not replace the German system – it comes as an add-on to the existing national systems.

15. Future Prospects

The idea of the Regulation was to create a simplified system for uncontested claims. Praxis and current numbers prove the success of the concept. The *Amtsgericht Berlin-Wedding,* quite against the usual bureaucratic attitude, freely disclosed the amount of applications for the European order[77]. Whereas the Order "had a snail start, it has now become a real burner". In 2009, the *Amtsgericht* had 2260 submissions for a European Order for Payment. Until the day of writing, early June 2010, more than 1300 applications were filed for, already. That is an increase in the number of applications of more than 14%. The euphoric expression "burner" seems concretely founded and the European lawmaker may fairly celebrate the order for payment procedure as a success and enter it on the credit side of the balance.

Nevertheless, in a steadily growing Union clients will have to be informed that there is only one stage to oppose to the claim, however. It will have to be seen whether there will be lot of oppositions. A lot of oppositions would be contrary to the creators' idea to create a simple system for uncontested claims. Also, as was laid out above, there are still numerous loopholes in the Regulation that create differences across the Member States. These will have to be fixed. In either way, the Regulation is one sound step towards a uniform European civil procedure, which assists Europe in one of its most vital areas. A quick claim-process may help to prevent insolvencies, which is in turn beneficial to Europe. Problems remain as said, but one small problem should be fixed rather soon. As noted, the costs of legal representation in another Member State abroad will only be recovered to the extent that the *lex fori* of the Member State of execution grants recovery of these costs. That is a problem of immense proportion as it may clearly hold a claimant back from pursuing his good right. Article 32 calls for an evaluation report – it will certainly be interesting see how the problems and

[77] Amtsgericht Berlin-Wedding Tel: +49 – (0)30 – 90156-0; station -314, Mrs. Born.

loopholes are going to look like in other Member States and what ideas there will be to fix them.