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# The European order for payment procedure

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## European Implementation Assessment

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### IN-DEPTH ANALYSIS

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**Ex-Post Impact Assessment Unit**

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# The European order for payment procedure (EOP) European Implementation Assessment

## In-depth Analysis

*On 8 December 2015, the Committee on Legal Affairs requested authorisation to draw up an own-initiative implementation report on the European order for payment procedure - Rapporteur: Kostas Chrysogonos (GUE/NGL, Greece). This triggered the automatic production of a European Implementation Assessment by the Ex-Post Impact Assessment Unit, Directorate for Impact Assessment and European Added Value, DG EPRS. This in-depth analysis, written in-house, focuses on the implementation of the European order for payment procedure and, in particular, on its application in the Member States since 2008.*

### Abstract

The objective of this European Implementation Assessment is to form a broad picture of the overall achievements and difficulties recorded with the European order for payment procedure (EOP). The analysis explains, firstly, the background to the procedure and its main objectives, and clarifies how the Regulation establishing the procedure has evolved. It goes on to appraise the work carried out to date, in particular, the findings and recommendations of the Commission's 2015 report on the application of Regulation (EC) 1896/2006 establishing a European order for payment procedure, and the studies which supported the Commission's report. An overview of related EU instruments and relevant European Court of Justice (ECJ) case law is also provided.

Overall, it transpires that the quality of reporting by the Member States on the functioning of the Regulation is not comprehensive. Consequently, the Commission's ability to monitor the application of the procedure has so far been restricted, and the Commission's report, which is already late, lacks detail. In particular, the report is not based on consistent quantitative Member State data providing transparent feedback on the operation of the procedure's various provisions. Nevertheless, the Commission's report establishes that the Regulation seems to be functioning well, with no major problems recorded, in particular, as regards the abolition of *exequatur*. However, importantly, the report also reveals that only a limited number of Member States actively uses the procedure, notably Austria and Germany. Despite issues with monitoring and the limited extent to which the procedure is used, the report considers overall that the Regulation does not require updating. A range of measures to improve its functioning could, however, be considered.

In light of the limited take-up of the procedure, this in-depth analysis critically reviews the Commission's related findings and draws on other sources examining the functioning of the procedure and the broader EU policy of cross-border debt recovery. In this context, an in-house analysis of a number of the Regulation's provisions is also provided, arguing that the effect of certain provisions in the Regulation is potentially detrimental to use of the EOP. Various possible operational improvements to the EOP are identified, which might, in particular, have a positive impact on implementation and monitoring. The analysis concludes that the Regulation may well, in fact, benefit from the roll-out of additional initiatives to improve its functioning. A further review of the EOP is also recommended for the future, in conjunction with a review of the revised European small claims procedure, to ascertain how the application of these instruments has modernised and brought efficiency to the recovery of cross-border debt in the EU. Finally, the EOP is reviewed against key evaluation criteria in a summary table.

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## 1. Methodology

- The analysis in this European Implementation Assessment is based on the study of empirical evidence relating to the evaluation of the EOP published by the European Commission, and on other reports by specialised academics and legal practitioners. However, the extent of available publications covering the background, objectives, functioning, benefits and problems with the EOP is, overall, relatively limited.
- Aside from the Commission's 2015 report on the application of the procedure, and occasional academic articles or short reports by legal practitioners, which furthermore usually refer to the procedure in the context of its broader legislative framework, only two notable books have been published. These also relate to the wider body of EU law on cross-border debt recovery, not just to the EOP:
  - One of these books, by Carla Crifò, dates back to 2008 and focuses on the case law relevant to the cross-border enforcement of debts in the Union.
  - The second notable publication, published in 2014, is a compendium of contributions by academics or legal practitioners covering each Member State to have used the procedure. This more recent publication is part of a broader project co-funded by the Commission as part of its background work relating to the monitoring and evaluation of the area of EU law on civil justice relating to the simplification of debt collection in the EU.
- Accordingly, this analysis focuses principally on the Commission's report in relation to the originally stated evaluation objectives in the Regulation, and assesses the Commission's findings and recommendations, as set out in its report, against findings and arguments made in other publications or developed in-house. The additional in-house conclusions of this analysis are based, for the most part, on the shortcomings observed, or are otherwise extrapolated from the potentially detrimental impacts of certain provisions in the Regulation, which independent practitioners or academics have already suggested.
- This analysis corroborates, in part, a number of the important findings of the Commission's report, particularly as regards the problems identified with the implementation or degree of application of the EOP, although some of its conclusions vary.
- This European Implementation Assessment has taken into account the comments of an internal project team composed of European civil law experts from three other units of the General Secretariat of the European Parliament.

## 2. Legislation on the EOP, and reports covering evaluation

### Legislation:

- [Regulation \(EC\) No. 1896/2006](#) of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.
- [Regulation \(EU\) No. 936/2012](#), which updates the forms annexed to the Regulation.
- [Regulation \(EU\) 2015/2421](#) amending [Regulation \(EC\) No. 861/2007](#) establishing a European small claims procedure and Regulation (EC) No. 1896/2006 creating a European order for payment procedure, which modifies various articles to clarify the Regulation's interaction with the European small claims Procedure.

### Key publications:

- [Report](#) from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure.
- University of Maribor, Graz and Zagreb, Commission-sponsored [collaborative project on the simplification of debt collection in the EU](#), featuring the publication: Simplification of Debt Collection in the EU, edited by Rijavec, Ivanc & Keresteš, Wolters Kluwer Law & Business (2014).
- Carla Crifò, Cross-border enforcement of debts in the European Union, Wolters Kluwer Law & Business, Kluwer Law international (2009).

### Other institutional reports, surveys and publications relevant to evaluation:

- [Commission practical guide](#) for the application of the European order for payment procedure.
- [Special Eurobarometer Survey 351](#), covering *inter alia* the EU order for payment procedure.
- [EESC Opinion \(2014\)](#) on the proposal for a regulation amending Regulation (EC) No. 861/2007 establishing a European small claims procedure and Regulation (EC) No. 1896/2006 creating a European order of payment procedure.
- [Commission Opinion on EP amendments to Council's Common Position of 2006](#).
- [EESC Opinion \(2005\)](#).

### 3. An essential procedure in a broader legal framework for recovering cross-border debt

Following consultations with Member States and stakeholders,<sup>1</sup> the European order for payment procedure (EOP) was introduced by Regulation [\(EC\) No. 1896/2006](#) to allow creditors to recover uncontested civil and commercial pecuniary claims according to a uniform EU procedure that operates on the basis of standard forms.

The Commission's key motive for introducing the Regulation is that 'domestic procedures are often inadmissible or impracticable in cross-border cases and their level of performance varies substantially.'<sup>2</sup> According to Article 1, (1) of the Regulation, the purpose of a dedicated EOP is to 'simplify, speed up and reduce the costs of litigation in cross-border cases'<sup>3</sup> concerning uncontested pecuniary claims.<sup>1</sup> This is achieved by permitting the free circulation of such orders across the EU based on minimum standards concerning the serving of European orders for payment to defendants, in accordance with national law.<sup>4</sup> Notably, the nature of these standards means that any method based on legal fiction<sup>5</sup> is insufficient for the serving of a European order for payment.<sup>6</sup> Furthermore, compliance with these standards removes the need for intermediate enforcement proceedings at the Member State level prior to their recognition and enforcement.<sup>7</sup> Indeed, European orders for payment issued in other Member States, and which have become enforceable, must be treated as domestic orders for payment in terms of enforcement, notwithstanding that the actual procedures for the enforcement of European orders for payment are still governed by the national laws of the Member States.<sup>8</sup> Thus, the principle of mutual recognition is a cornerstone of the EOP.

The Regulation applies to civil and commercial matters in cross-border cases, regardless of the nature of the court or tribunal,<sup>9</sup> and to all EU Member States except for Denmark, which chose not to opt-in, and is therefore not bound by the Regulation or subject to its application.<sup>10</sup> However, the procedure does not apply to all uncontested civil and commercial claims. Claims relating to rights in property linked to successions or matrimonial relationships, claims arising out of bankruptcy proceedings, revenue, customs, administrative matters, social security, claims relating to state liability (linked to the exercise of state authority), and finally, claims linked to non-contractual obligations (except in certain circumstances)<sup>11</sup> all fall outside the scope of the procedure.<sup>12</sup>

In terms of its importance and place in the Community *acquis*, the EOP is a major element of the civil justice aspect of the EU's Area of Freedom, Security and Justice. Furthermore, the EOP is an essential part of a broader system of EU instruments addressing the overall EU policy objective of

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<sup>1</sup> For additional background, see the Commission's Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, [COM\(2002\)746](#).

<sup>2</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, p.2, section 1.1.

<sup>3</sup> According to Regulation [1896/2006 \(EU\)](#), Article 3 (1), 'a cross border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seized.'

<sup>4</sup> The minimum standards are laid down in Regulation [1896/2006 \(EU\)](#), Articles 13, 14 and 15.

<sup>5</sup> See Annex for a definition of legal fiction.

<sup>6</sup> Regulation [1896/2006 \(EU\)](#), Recital 19.

<sup>7</sup> *Ibid*, Recital 9 and Article 1, points (a) and (b).

<sup>8</sup> *Ibid*, Recital 27.

<sup>9</sup> *Ibid*, Article 2 (1).

<sup>10</sup> *Ibid*, Recital 32.

<sup>11</sup> According to Regulation [1896/2006 \(EU\)](#), unless these non-contractual obligations were subject to an agreement, there has been an admission of debt, or if these obligations concern liquidated debts arising from joint property ownership.

<sup>12</sup> Regulation [1896/2006 \(EU\)](#), Recital 19 and Article 2.



ensuring the speedy recovery of debts owed across the Union,<sup>13</sup> principally for the benefit of SMEs. Consequently, in literature published by academia and legal practitioners, the Regulation is often referred to in the broader context of EU legislation covering different aspects of cross-border debt recovery in the EU. In particular, the EOP is one of two key EU instruments, the other being [Regulation \(EC\) No 861/2007](#) establishing a European small claims procedure, introduced to harmonise and facilitate the pursuit of small claims between creditors and debtors across EU borders. An earlier Regulation underpins these two instruments, namely [Regulation \(EC\) No. 805/2004](#) creating a European enforcement order for uncontested claims. With the European enforcement order, for civil and commercial matters, minimum standards permit the free circulation of judgments, court settlements and authentic instruments relating to enforcement across the Union without any intermediate proceedings needing to be brought in the Member State of enforcement prior to their recognition and implementation.

The basic principles for this body of EU law stem from [Council Regulation 44/2001](#) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, also known as the Brussels I Regulation. The Brussels I Regulation originally introduced the basic principles relating to court jurisdiction, mutual recognition and enforcement, and the abolishment of *exequatur*, governing this body of law. Regulation 44/2001 has now been updated and replaced by [Regulation \(EU\) 1215/2012](#).<sup>14</sup> As a result, the European enforcement order (Regulation (EC) No 805/2004) is now essentially obsolete.<sup>15</sup>

Finally, running on a parallel track, Directive [2011/7/EU](#) on late payments in commercial transactions focuses on tightening EU legislation on late payments to ensure that businesses, in particular SMEs, benefit from strengthened rights for recovering payments owed by the public sector or private debtors. The late payments directive places a general requirement on public sector debtors to process their accounts payable within 30 days, and within 60 days for private sector debtors.<sup>16</sup>

Thus far, the Regulation on the EOP has only been amended to a limited extent. Firstly, [Commission Regulation \(EU\) No. 936/2012](#) updates the forms annexed to the Regulation to specify to defendants that, in addition to the principal claim, interest may be payable under national law from the date of enforcement of the order.<sup>17</sup> Secondly, the more recent [Regulation \(EU\) 2015/2421](#) amends various articles of the EOP Regulation to clarify that, 'where a dispute falls within the scope of the European small claims procedure, that procedure should also be available to a party in an EOP procedure who has lodged a statement of opposition to a European order for payment.'<sup>18</sup>

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<sup>13</sup> Manko, Rafal, [Orders for payment in the EU, National procedures and the European order for payment](#), EPRS Briefing, December 2013, p.1.

<sup>14</sup> For more details on the evolution of the body of European Law on civil and commercial justice, see Rijavec, Ivanc & Keresteš, *Simplification of Debt Collection in the EU*, Wolters Kluwer (2014), Introductory Chapter.

<sup>15</sup> The recast Brussels I Regulation abolishes the *exequatur* procedure for a much wider range of judicial decisions. Applying for a European enforcement order now only makes sense for certain decisions on maintenance obligations, as this is the only area not covered by Brussels I.

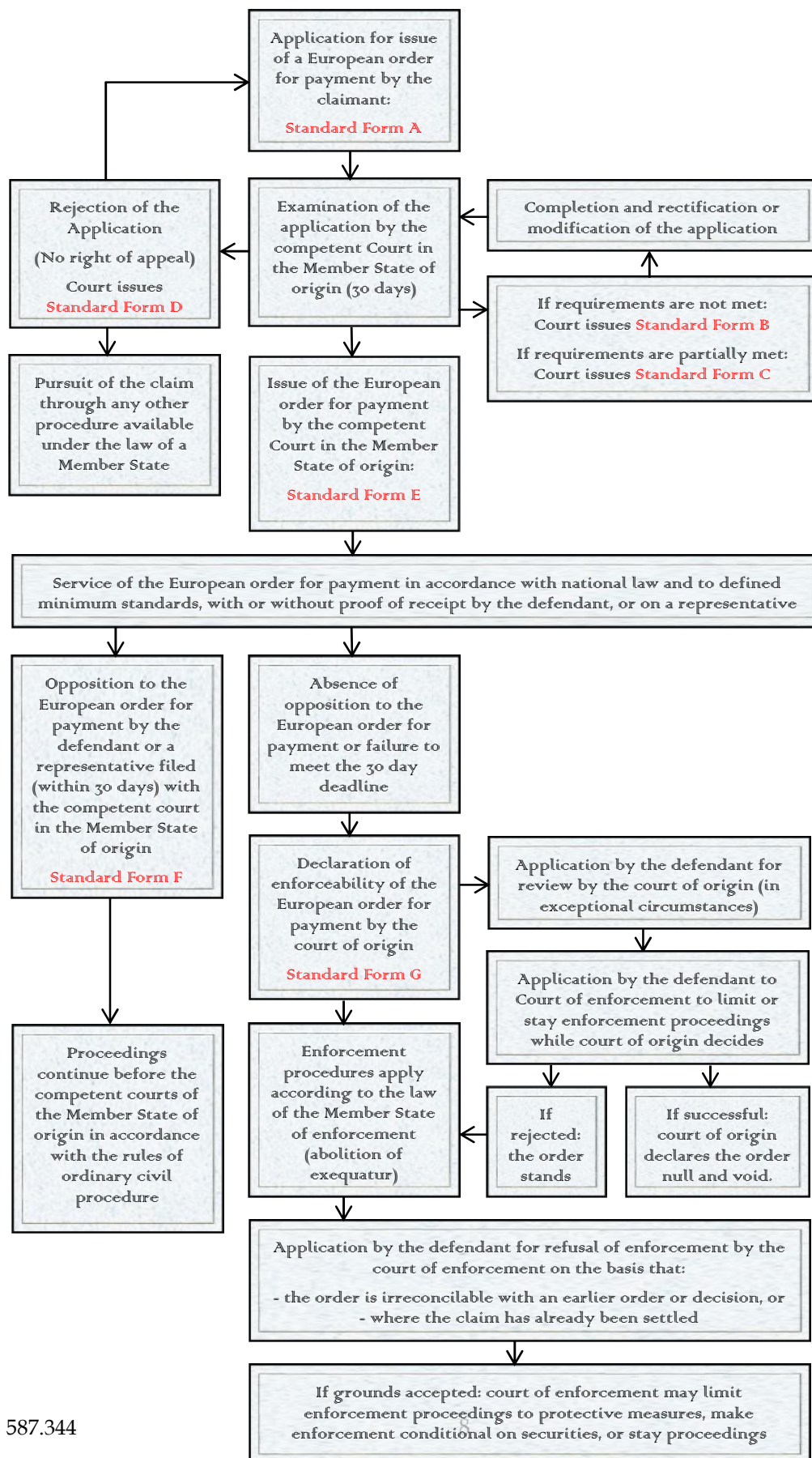
<sup>16</sup> For more details on the implementation of the late payments directive, see Reynolds, Stephane and Davis, Joshua, ['Transposition and implementation of the Directive on Late Payments in Commercial Transactions'](#), Implementation in Action series, EPRS (July 2015).

<sup>17</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.3.1, p.5.

<sup>18</sup> [Regulation \(EU\) 2015/2421](#) amending Regulation (EC) No. 861/2007 establishing a European small claims procedure and Regulation (EC) No. 1896/2006 creating a European order for payment procedure, Recital 22.

## 4. Functioning of the European order for payment procedure

Table 1: Flowchart of the stages in the procedure



## 5. The Commission's report on the application of the EOP

### 5.1. Reporting commitments, coverage, and gaps in supporting data

According to the text of the review clause, the Commission was bound by an obligation to present a detailed report reviewing the operation of the EOP by 12 December 2013.<sup>19</sup> This report would include, as a requirement, an extended impact assessment for each Member State. The exercise was to be supported by information provided by the Member States to the Commission on the cross-border operation of the European order for payment, covering court fees, speed of handling, efficiency, ease of use and the internal payment order procedures of the Member States. Finally, the report would be accompanied, if appropriate, by proposals for adapting the Regulation.

However, the Commission's [report](#) of 13 October 2015 was published almost two years late. At first sight, the reason for this delay is difficult to understand, since no explanations are given in the Commission's report. The date of application of all provisions of the Regulation was 12 December 2008,<sup>20</sup> which theoretically left sufficient time, i.e. five years, for the Commission to carry out an informed evaluation and review. Typically, a sufficient track record exists from which to derive helpful analysis within this timeframe. However, from a full reading of the Commission's report, it transpires that the quality of reporting by the Member States on the functioning of the Regulation is not satisfactory. The Commission's report is not supported by consistent quantitative Member State data covering the application of the various aspects of the procedure. This is apparent in the annex to the Commission's report, which only presents summary data on the application of the EOP. Moreover, the data set only covers 2012 and 2013. Four Member States did not submit any data whatsoever. Noteworthy gaps in data concern Italy, which does not produce separate statistics for European payment orders, and the UK, which only submitted overall figures on the number of applications and payment orders for enforcement.<sup>21</sup> In principle, these two EU Member States should presumably have the administrative resources and systems in place to generate detailed data on the functioning of the EOP. In any case, the generally low quality of Member State reporting might perhaps have merited criticism from the Commission in its report, but this is not the case.

Consequently, the Commission's ability to monitor the impact of the Regulation has been limited, and its report on the application of the procedure lacks detail. In particular, it would have been helpful to produce analysis on the number of European orders for payment, which actually led to the effective and speedier recovery of uncontested claims as compared to the situation before the Regulation was introduced. However, to achieve this, it would be necessary to monitor the effects of the enforcement of EOPs at the Member State level, and the costs associated with monitoring enforcement and compiling information for the Commission might be disproportionate.

In addition, extended impact assessments for each Member State were not carried out in the context of preparing the Commission's report, as required by the Regulation,<sup>22</sup> and there is no corresponding detailed official feedback from Member States annexed to the report. The various aspects of the operation of the procedure for each Member State could have been presented in much greater detail in the report's annexed comparative table. Nor have there been any accompanying legislative proposals for adapting the Regulation in order to improve its functioning, since the Commission's report considers the procedure to be functioning well overall - albeit without the benefit of a detailed view, and despite the fact that the report makes a number of specific and

<sup>19</sup> Regulation [1896/2006 \(EU\)](#), Article 32, first paragraph.

<sup>20</sup> *Ibid*, Article 33, second sub-paragraph.

<sup>21</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order of payment procedure, annex on statistical data on the use of the European order for payment procedure, pp.13 to 15.

<sup>22</sup> Regulation [1896/2006 \(EU\)](#), Article 32, first sub-paragraph.

valuable recommendations for improving the procedure (see section 5.3). However, the requirement to carry out detailed impact assessments for each Member State on the functioning of the EOP was almost certainly too ambitious in light of the expected high costs linked to carrying out such an exercise (typically, several hundred thousand euro per Member State). Furthermore, a number of the improvements to the procedure proposed by the Commission do not necessarily require legislative action.

The general lack of detailed information on usage and the limited take-up of the procedure may explain why more time was required to evaluate the procedure. Nevertheless, even with the additional time taken, the overall quantitative feedback from the Member States is still not satisfactory. Therefore, upon first analysis, a concern arises as to whether the Commission has been able to meet its commitments to ex-post evaluation enshrined in Article 32 of the Regulation. This hypothesis must however be caveated. As stated in the Commission's report,<sup>23</sup> its findings are based on more substantive and broader research, notably, the Commission co-financed project on '[Simplification of debt collection in the EU](#),' which comprises contributions from academics and practitioners covering 14 Member States (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Spain, Finland, France, Italy, the Netherlands, Poland, Portugal and Sweden). This project also delivered [five expert reports](#) and [14 national reports](#). While these sources are rich with relevant information, unfortunately, the findings of the project are not especially accessible. Indeed, two of the five expert reports published are not translated into English, and two Commission working documents mentioned in the context of the project, which formed the basis of relevant discussions at the 45th meeting of contact points of the European Judicial Network in Civil and Commercial Matters of 29-30 May 2013, are apparently not published.<sup>24</sup> Importantly, these studies are not the promised detailed impact assessments. Finally, for transparency purposes, the key findings of this project have not been summarised and translated into a consolidated and readable executive summary annexed to the main print or web publication in all official languages, nor into a chapter presenting overall conclusions. Overall, the target audience of this project appears, as a consequence, to be interested academics or lawyers, leaving it to these experts to draw their own conclusions. As a result, stakeholders and EU citizens can make little practical use of this work, which from the point of view of transparency in evaluation, is rather unsatisfactory.

## 5.2. Review of the main findings of the Commission's report

The Commission's main message is to underline that the studies and consultations carried out have not revealed any difficulties in applying the procedure, in particular as regards the abolition of *exequatur*.<sup>25</sup> Furthermore, given that, according to the Commission, the Regulation appears to be functioning generally in a satisfactory manner, and that it has succeeded in simplifying, speeding up and improving the recovery of uncontested cross border claims, it is not considered appropriate to change the fundamental parameters of the European order for payment procedure at this stage.<sup>26</sup>

Despite the lack of detailed figures, the summary data provided by Member States is still sufficient for the Commission to highlight, as a key observation, that only two Member States have extensively used the Regulation since its introduction and that 'in most Member States, the procedure was only applied in a relatively small number of cases.'<sup>27</sup> The Commission explains that, annually, between 12 000 and 13 000 applications for European orders for payment are submitted, and to this effect, the report's annex shows a breakdown by Member State and according to the different stages of the

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<sup>23</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 1.2, p.3.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid, section 2, p.3.

<sup>26</sup> Ibid, section 4, p.12.

<sup>27</sup> Ibid, section 2, p.3.

procedure, from application to issue.<sup>28</sup> The report highlights, from the available data, that use of the procedure is indeed mostly concentrated in only two Member States i.e. Germany and Austria, which account for over 4 000 applications annually each (over two thirds of the total). Belgium, the Czech Republic, France, Hungary, the Netherlands, Portugal and Finland display more modest figures (between 300 to 700 applications annually), and the remaining Member States only make very limited use of the procedure.<sup>29</sup> Nonetheless, the Commission considers the Regulation's main objective to have been achieved i.e. to simplify, speed up and reduce the costs of litigation in the cross-border recovery of uncontested claims through freely circulating European orders for payment. However, the conclusions of the introductory chapter of the Commission's 2014 co-funded research project on simplification of debt collection in the EU convey the state of play on the wider body of law covering, inter alia, the EOP, in less favourable terms. 'In a significant number of Member States, the use of the mechanisms - European enforcement order for uncontested claims, European order for payment and European small claims procedure - is quite low. The number of claims filed under these procedures is small and, in some Member States, especially in Southern Europe, almost inexistent.'<sup>30</sup>

The Commission's report also emphasises that 'late payments are a key cause of insolvencies, in particular for small and medium-sized enterprises.'<sup>31</sup> In this regard, it finds that the 30-day limit for the issue of a European order for payment is only adhered to by some Member States. A majority of Member States miss this mark, including twelve Member States which miss it entirely, with courts of origin taking up to four months or more (on average, about six months) to issue orders for payment.<sup>32</sup> Xandra Kramer underlines the potential severity of this problem: 'If the European order of payment procedure takes six months, the beneficiary effect of the procedure is annihilated.'<sup>33</sup>

The Commission's report otherwise finds that defendants only oppose European orders for payment to a limited extent, with variations from one Member State to another, singling out Austria at the low end of opposition rates (4%) and Greece at the high end (over 50%).<sup>34</sup> It does not, however, propose avenues for further investigating this discrepancy. To this effect, Xandra Kramer points out that 'the general trend is that, in Member States where the procedure is used often, the opposition rate is low, whereas in Member States where the procedure is rarely used, the opposition rate is high.' She stresses, furthermore, that it would be interesting to know more about the root causes, pointing to the varying costs of the procedure per Member State, which are dependent, in part, on the fact that translation requirements have not been harmonised and on the varying costs for calculating court fees from one Member State to the next.<sup>35</sup>

Furthermore, the Commission's report also explains that the lack of transparency of debtors' assets for enforcement purposes in a cross-border context is also problematic, although this is a horizontal problem as it concerns all cross-border enforcement in the EU, not specifically the enforcement of

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<sup>28</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for Payment Procedure, Annex, p.13.

<sup>29</sup> Ibid, p.4. and Annex, p.13.

<sup>30</sup> University of Maribor, Graz and Zagreb Commission-sponsored [collaborative project on the simplification of debt collection in the EU](#), featuring the publication: Simplification of Debt Collection in the EU, edited by Rijavec, Ivanc & Keresteš, Wolters Kluwer Law & Business, (2014), Paragraph 1.12, p. 41.

<sup>31</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 1.1, p.2.

<sup>32</sup> Ibid, section 3.4, p.7.

<sup>33</sup> Kramer, Xandra, [Commission report European order for payment, Conflict of Laws.net](#), December 2015.

<sup>34</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.7, p.9.

<sup>35</sup> Kramer, Xandra, [Commission report European order for payment, Conflict of Laws.net](#), December 2015.

European orders for payment.<sup>36</sup> However, in this regard, Xandra Kramer points out that 'this may be due to the lack of information on the actual enforcement track, which can generally be troublesome in many Member States.'<sup>37</sup>

To conclude this section, it is certainly true that the data breakdown in the annex to the Commission's report reveals that the majority of applications (2nd column) ultimately result in the actual issue of orders for payment (7th column), inferring that the procedure does work. However, and again, there is a significant lack of detailed data for each Member State. This is notably the case for the United Kingdom, Spain, the Czech Republic and Portugal, with other Member State data lacking entirely, namely for Italy, Latvia, Romania and Croatia (although the latter only joined the EU on 1 January 2013). Accordingly, the procedure appears to be working, but this is limited to where it is actually used e.g. for Germany and Austria, more than 90% of payment orders are issued. In relation to the problem of the limited take-up of the procedure by the Member States, the Commission's report makes reference to the results of the [Special Eurobarometer Survey 351](#) in 2010, which covers, amongst other instruments, the EOP. This survey shows that only 6% of respondents were aware of the EOP. In part, for that reason, the Commission reacted to the survey by implementing [a project to support SMEs](#) in understanding the available tools at their disposal for recovering cross-border debt.<sup>38</sup> This analysis would accordingly tend to stress, more clearly than the Commission has done, the need to hold Member States to account for not having provided the Commission with accurate and comprehensive data for effective monitoring and evaluation purposes. This analysis would also strongly support the idea that there is a need to conduct, at the Member State level, information campaigns targeted at SMEs and citizens, to back up [the Commission's information campaign](#) at EU level. Corroborating this, the conclusions of the introductory chapter of the main publication on simplification of debt collection in the EU highlight that 'national reports, mostly answered by legal scholars or legal practitioners, revealed little awareness about the procedures,<sup>39</sup> both at the Law Faculties and the Bar, often more dedicated to the study and use of the so-called national tracks. This is probably an important issue preventing the success of the European tracks for cross-border debt recovery in the EU.'<sup>40</sup>

### 5.3. Recommendations in the Commission's report

#### Rapid processing

Because of the average reported duration of EOPs throughout the Member States, the Commission's recommendations stem, for the most part, from the need to ensure, as a priority, that uncontested claims are quickly recovered, given their high impact on the cash flow of enterprises, in particular of SMEs. Consequently, the report's recommendations focus on the need to reduce the length of the proceedings for issuing European orders for payment. Pursuant to this, a number of related detailed proposals feature in the Commission's report:

- The Commission's report stresses that the EOP does not entail the examination of evidence or hearings, and argues that the defendant's rights are duly safeguarded since the procedure

<sup>36</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.9, p.10.

<sup>37</sup> Kramer, Xandra, [Commission report European order for payment, Conflict of Laws.net](#), December 2015.

<sup>38</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 2.2, p.4.

<sup>39</sup> The procedures referred to are the European enforcement order for uncontested claims, the European order for payment procedure and the European small claims procedure.

<sup>40</sup> University of Maribor, Graz and Zagreb Commission-sponsored [collaborative project on the simplification of debt collection in the EU](#), featuring the publication: Simplification of Debt Collection in the EU, edited by Rijavec, Ivanc & Keresteš, Wolters Kluwer Law & Business, (2014), paragraph 1.12, p. 42.

ensures the effective serving of documents, and furthermore, since opposition to orders for payment can easily be lodged. Accordingly, the report recommends full electronic processing of applications as a means to speed up handling.<sup>41</sup> The report encourages, in particular, the development of electronic submissions of applications and electronic processing in all courts with jurisdiction over EOPs across the Union, and highlights to this effect, the [e-CODEX pilot](#) and the fact that the [e-Justice portal](#) will offer a facility for the general public to submit claims electronically in the near future.<sup>42</sup>

- In order to benefit citizens and reduce costs and timescales, the report also suggests exploring whether additional guidance could be provided on how to fill in the standard forms on the e-Justice portal as well as providing more details about claiming interest, such as is provided for in the European small claims procedure. Accordingly, the report encourages Member States to extend to the EOP the relevant processes already in place for the European small claims procedure.<sup>43</sup>
- Furthermore, the report encourages Member States to accept European order for payment applications in at least one other language than their official national language(s), to cut down on translation costs and delays.<sup>44</sup>
- In this context, the Commission's report also draws attention to whether specialised courts for handling European orders for payment might bring benefits overall, but says that Member State data is inconclusive on the subject, and that this might also depend on the size of Member States.<sup>45</sup> In the light of the analysis in section 6.2, which covers the drawbacks of competent courts' lack of substantive analysis of EOP applications, the introduction of specialised courts may well ensure that dubious or spurious claims are more easily identified by these experienced courts, with the effect of limiting the possibilities for misusing the procedure. The Commission tends to confirm this by stressing that the operation of the procedure could be improved, namely by Member States' consideration of the benefits of further centralising the handling of cases under the procedure.<sup>46</sup>

### Additional points

In terms of other recommendations not relating to efficient and speedy processing, the report makes a number of additional important points:

- It highlights that Form 'E' (Annex V of the Regulation) could be amended again, this time, to ensure that this standard form prescribes an appropriate description of interest to be recovered in addition to the principal claim.<sup>47</sup>
- Furthermore, the report stresses that defendants should be entitled to request, under Union law, a re-opening of the case, when faced with situations of deficient servicing of orders for payment. In this regard, the report calls for a clarification of the conditions for review under Article 20 of the Regulation, in particular, by taking inspiration from the more recent provisions in the [Maintenance Regulation \(EC\) No 4/2009](#) and in the [proposal for a revised European small](#)

<sup>41</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.3.3, p.7.

<sup>42</sup> *Ibid*, p.6.

<sup>43</sup> *Ibid*, p.7.

<sup>44</sup> *Ibid*, section 3.3.2, p.6.

<sup>45</sup> *Ibid*, section 3.2, p.5.

<sup>46</sup> *Ibid*, section 4, p.12.

<sup>47</sup> *Ibid*, section 3.3.1, p.5.

[claims procedure](#),<sup>48</sup> which would furthermore improve consistency between the various EU instruments relating to civil law procedure.<sup>49</sup> This recommendation is very pertinent, particularly in view of the potential problems with certain provisions of the articles relating to servicing orders for payment (see section 6.3), and in view of the jurisprudence in ECJ joint cases C-119/13 and C-120/13 (see section 5.4 below for more details on these cases). Indeed, Xandra Kramer also backs this position by stressing that 'it is clear that not all situations where a remedy should be available due to defect service are covered by the Regulation. The Court of Justice ruled that national law should provide such remedy. This is clearly a shortcoming of the Regulation also considering that remedies in the Member State of enforcement are limited if not absent, and it (further) undermines uniform application.'<sup>50</sup>

- Finally, the Commission's report also recommends additional awareness-raising of the EOP among businesses, citizens, practitioners and courts, both at the European and at the Member State levels,<sup>51</sup> although, as argued at the end of section 5.2, this proposal is perhaps not given the profile it deserves.

#### 5.4. The Commission's analysis of ECJ jurisprudence

In sections 3.8. and 3.10. of the report, the Commission provides an analysis of the preliminary rulings of the European Court of Justice (ECJ), which relate directly to the interpretation of the Regulation,<sup>52</sup> namely cases [C-215/11](#), [C-324/12](#), and joined cases [C-119/13](#) and [C-120/13](#). These cases concern the proper application of the procedure.

- For case C-215/11, the ECJ ruled, essentially:
  - o that all requirements of Article 7 are to be met by applications for use of the procedure;
  - o that court fees are determined by national courts, provided that national rules do not prevent use of the procedure *de facto* through the charging of excessive fees as compared to similar domestic actions; and
  - o that applicants are entitled to apply for interest on the payment due.
- For case, C-324/12, the ECJ ruled that failure to observe the time limit for lodging a statement of opposition to a European order for payment, owing to the negligence of the defendant's representative, does not justify a review of that order for payment.
- The ECJ judgment of joint cases C-119/13 and C-120/13 underpins the principle that the procedures laid down in Articles 16 to 20 of the Regulation (covering opposition, enforceability and review) do not apply if the minimum standards for serving orders on defendants (laid down in Articles 13, 14, and 15) have not been applied correctly, even if the European order for payment in question has been declared enforceable in the interim.

<sup>48</sup> [Regulation \(EU\) 2015/2421](#) amending the European small claims procedure has since been adopted. As compared to Article 20, paragraph 1, point a) (ii) of the EOP Regulation, Articles 18 and 19, paragraphs 1, points (a) of, respectively, the amending European small claims regulation and the Maintenance Regulation both feature the additional words 'and in such a way'. The effect is that, if the serving of an order or a judgment is carried out in a manner preventing the defendant from organising his defence (and not just 'in good time'), the decision can also be reviewed.

<sup>49</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.8, pp. 9 and 10.

<sup>50</sup> Kramer, Xandra, [Commission report European order for payment, Conflict of Laws.net](#), December 2015.

<sup>51</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 4, p.12.

<sup>52</sup> *Ibid*, section 1.2, p.3.



Finally, the Commission's report also draws attention to case [C-618/10](#), given that questions had been raised as to whether this jurisprudence affects the functioning of the EOP Regulation. Case C-618-10 concerns the scope of national court case-examination powers in the context of a national order for payment procedure, at the stage before the consumer (debtor) has lodged an objection. Specifically, the case concerns the definition of the national court's right to examine whether a term relating to interest on a late payment in the contract concerned is unfair, in view of the relevance of the rules laid down in [Directive 93/13/EEC](#) on unfair terms in consumer contracts. The ECJ ruled that the principle of effectiveness in European Union law<sup>53</sup> supersedes national order for payment implementing procedures, which prevent the assessment of a case's merits prior to an objection having been made. Accordingly, the ECJ ruled that the relevant unfair contract clause (which was a 29% interest rate on a consumer credit contract) could be scrutinised, up front, by the competent court. The Commission's report on the application of the EOP concluded that the Regulation complies with this ECJ ruling. The Commission argues this on the basis that, in any case, the Regulation allows, upon the initial examination of whether the case appears to be founded,<sup>54</sup> for courts of origin to issue partial orders to the claimant<sup>55</sup> if they have doubts as to the justification or part of the justification of a claim (including on the amount of interest claimed).<sup>56</sup>

None of these cases are especially important to the evaluation of the functioning of the procedure, in that they merely clarify certain aspects of its operation. Nevertheless, these judgments clearly do contribute to ensuring that the procedure's operation is not hindered and, furthermore, that the procedure operates more fairly for claimants and defendants alike. However, joint cases C-119/13 and C-120/13, which relate to situations where European payment orders that were not served, or not effectively served, on defendants because they had changed domicile,<sup>57</sup> perhaps highlight the existence of a problem with certain aspects of the Regulation's provisions on serving orders for payment. This theme is covered in more detail in section 6.3. Furthermore, despite the Commission's assertion that the Regulation complies with the jurisprudence of case C-618/10, this case draws attention to the potentially negative impact on defendants of certain provisions of the Regulation, namely the absence of detailed scrutiny of case merits, a subject covered in more detail in section 6.2.

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<sup>53</sup> The principle whereby national rules which make it impossible or excessively difficult to exercise, in this case, EU-established consumer rights, do not comply with EU law.

<sup>54</sup> Regulation [1896/2006 \(EU\)](#), Article 8.

<sup>55</sup> *Ibid*, Article 10.

<sup>56</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.10, p.10. and p.11.

<sup>57</sup> *Ibid*, section 3.8, p.9.

## 5.5. Overall remarks on the Commission's report

- The Commission's report is not supported by comprehensive Member State data covering the application of the procedure's various aspects. Consequently, the Commission's ability to monitor the impact of the EOP has been limited. The report lacks, in particular, data on how EOPs have delivered the speedier recovery of uncontested claims as compared to the situation before the Regulation was introduced. Member States could improve monitoring and feedback on the functioning of the EOP. However, monitoring activities that are helpful to understanding the procedure's detailed impact on recovering uncontested claims would require monitoring the enforcement of the EOP at the Member State level, and the costs may be disproportionate.
- Although there appears to have been no extended impact assessment for each Member State as required by the Regulation, the Commission's findings are based on the detailed qualitative research of the Commission co-financed project on '[Simplification of debt collection in the EU](#)'. However, the key findings of this project have not been summarised and translated into a useful executive summary in all official languages, which does not aid transparency.
- Overall, the Commission considers the EOP to be functioning well, although this assessment is based on the lack of complaints and does not benefit from detailed observations. Therefore, the Commission's positive general conclusion on the performance of the procedure should perhaps be treated with some caution. Firstly, only two Member States have extensively used the procedure since its introduction and most Member States only used the procedure in a relatively small number of cases, if at all. However, the EOP is not a compulsory procedure: it is only an optional step in the various national procedures available for debt recovery. Nevertheless, a need to conduct information campaigns at the Member State level may be relevant, targeting SMEs and citizens, to back up [the Commission's information campaign at EU level](#). Secondly, only a few Member States respect the 30-day limit for the issuing of a European order for payment. Most Member States miss this mark, with courts of origin taking up to four months or more to issue orders for payment. Twelve Member States miss it entirely. The risk is that the observed lack of speed in issuing European orders for payment would put into question the procedure's overall beneficiary effect.
- Although the report is not accompanied by a legislative proposal to amend the Regulation, its key recommendations on speeding up case handling procedures for the benefit, in particular, of SMEs, may in fact justify additional measures, most of which do not require legislative intervention, namely:
  - Encouraging the increased electronic processing of applications;
  - Additional guidance on how to fill in the standard forms on the e-Justice portal;
  - Providing more details about claiming interest, such as in the European small claims procedure. Form 'E' could also be amended again to ensure it provides an appropriate description of interest to be recovered;
  - Encouraging Member States to accept applications in more than one language to cut down on translation costs and delays;
  - Envisaging the further centralisation of case handling, namely specialised courts.
- In addition, the report argues that defendants should be entitled to request a re-opening of the case in situations of deficient serving of orders for payment and calls for the conditions for review under Article 20 to be clarified. The report suggests aligning the EOP's review clause to the more recent wording of the Maintenance Regulation and the revised European small claims procedure. This would also improve consistency between the various EU instruments relating to civil law procedure.
- Finally, ECJ Jurisprudence may highlight a problem with certain aspects of the Regulation's provisions on serving orders for payment.

## 6. Analysis of the provisions of the EOP Regulation

This section endeavours to highlight the potentially limiting effects of a number of aspects of the Regulation's provisions, which may further explain the relatively low, and certainly inconsistent, take-up of the EOP across the Union, and identifies possible solutions to address these deficiencies.

### 6.1. Administrative ambiguities and procedural weaknesses

According to the requirements of Article 29 of the Regulation, information relating to jurisdiction has been made available by the Member States on the Commission's [e-Justice portal](#) (and formerly, on the [European Judicial Atlas in civil and commercial matters](#)). This helps users of the EOP to establish, in particular, the competent court to which their claims should be sent (as well as providing information on review procedures, means of communication and languages), but it assumes that first time users are already aware of the portal. Accordingly, all national competent court websites would need to advertise the existence of the EOP and point applicants to relevant guidance on the use of the procedure and to the information concerning jurisdiction on the e-Justice portal. Interestingly, the Commission noted in its report, at least for Germany, the Netherlands and Sweden, that a high proportion of applications were returned to applicants for completion or correction.<sup>58</sup> This tends to imply that applicants' understanding of the procedure is far from perfect. It may even justify action to improve practitioners' general understanding of the application process, since improving the initial quality of applications would help to improve the procedure's efficiency.

Furthermore, applications must 'be transmitted in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin.'<sup>59</sup> Use of the wording 'accepted' and 'available' may well leave room for courts with a heavy case load to delay or refuse applications on the basis that they were not submitted in an accepted format, or that the means of transmission are incompatible with the court's available means of case registration or case processing. Streamlining the European order for payment application procedure further is likely to entail modernising application formalities in the Regulation by encouraging all competent national courts to be equipped with the means to receive and process applications according to a harmonised electronic format.

The Regulation could perhaps provide for indicative deadlines linked to the introduction of the technology required for electronic processing, taking inspiration from, to take a recent example in another field of European law, [Directive 2014/55/EU on electronic invoicing in public procurement](#). In this directive, the provisions on transposition set deadlines for different categories of contracting authorities to equip themselves with the systems required to handle e-invoices conforming to the relevant European standard. Given that the EOP is an optional procedure, firm deadlines are not appropriate, but a recommended implementation timeframe for electronic submissions could be envisaged. In this regard, although the Commission's report also recommends the full electronic processing of EOP applications, it does not do so for the same reasons (see section 5.3), and does not propose a roadmap. The fact that the Commission does not propose to take a further step towards encouraging electronic submissions is not necessarily consistent with the report highlighting the Commission's investment in this field, namely that the e-Justice portal will offer a facility for the general public to submit claims electronically in the near future (see section 5.3.).

<sup>58</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.3.4, p.6.

<sup>59</sup> Regulation [1896/2006 \(EU\)](#), Article 7, (5).

Finally, there is no legally binding deadline for processing applications, given the flexibility which the wording of the Regulation provides i.e. 'as soon as possible and *normally* within 30 days of the lodging of the application.'<sup>60</sup> According to this wording, there is, strictly speaking, no maximum deadline for reacting to applications. The introduction of a firm 30-day deadline would most likely be rejected by the Member States, given the optional character of the EOP; however, for those Member States that chose to opt-in and make use of the EOP, the issue of how to respect the 30-day turn-around time could at least be discussed. Alternatively, Member States could consider imposing penalties on the competent courts for non-compliance with the deadline.

These administrative ambiguities or procedural weaknesses relating to the application process may decrease the Regulation's effectiveness and efficiency, particularly given that it does not feature a right of appeal against the rejection of an application,<sup>61</sup> although fresh applications may be submitted.<sup>62</sup>

## 6.2. The inevitable drawbacks of not examining substance

As regards the examination of applications by the court seized<sup>63</sup> (the court of origin),<sup>64</sup> the requirements of the Regulation do not prescribe a rigorous process. Under the terms of the Regulation, the court of origin's assessment is limited to verifying whether the case is cross-border, whether, furthermore, it concerns an uncontested overdue pecuniary claim of a specific amount (including, as appropriate, interest, penalties and costs), whether the Regulation's Annex A has been properly completed, and finally, whether the jurisdiction proposed by the applicant is correct.<sup>65</sup> Although, under the terms of the Regulation, the initial assessment of an application has the ambition of ascertaining whether the claim *appears* to be founded, the additional provisions of the Regulation do not properly support this assessment for the following reasons:

- Firstly, no documentary evidence is required to support the application.
- Secondly, the initial verification of applications can take the form of an automated procedure. While automation clearly serves to speed up the procedure, automation is very likely to preclude carrying out any reliable analysis of the merits of the claim up front and therefore further contributes to the propensity for making mistakes.
- Thirdly, this initial examination of applications need not even involve a judge.<sup>66</sup>

Therefore, while the Regulation ensures the swift handling of applications, arguably, it does not provide for a professional assessment of the merits of a claim, in particular, ascertaining with sufficient certainty whether a claim appears to be founded. Although national law may set penalties for deliberately providing false statements in the application,<sup>67</sup> the lack of analysis on the substance of applications by courts of origin can lead directly to the serving of orders of payment upon defendants, which might result in undue credence being given to spurious claims. Without a basic analysis of the substance, some claims might, in fact, be unsupported. Where the defendant is then

<sup>60</sup> Regulation [1896/2006 \(EU\)](#), Article 12 (1).

<sup>61</sup> *Ibid*, Recital 17 and Article 12 (2).

<sup>62</sup> *Ibid*, Recital 17 and Article 12 (3).

<sup>63</sup> *Ibid*, Article 8.

<sup>64</sup> The competent court where an application for an European order of payment is received.

<sup>65</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, p.2, Section 1.1.

<sup>66</sup> Regulation [1896/2006 \(EU\)](#), Article 8 and Recital 16.

<sup>67</sup> Manko, Rafal, [Orders for payment in the EU, National procedures and the European order for payment](#), EPRS Briefing, December 2013, p.3.

slow to react, or does not react, and fails to lodge a statement of opposition, the order for payment is then automatically declared enforceable. Where the defendant cannot apply for a review of this decision, the case is transferred to the competent court in the Member State of enforcement.

The problem is that case transfer to the court of enforcement occurs at a stage where it is too late to take corrective action. Indeed, applications to the court of enforcement for staying the procedure are limited to cases where the European order for payment is incompatible with an earlier order, or to cases where the claim has already been settled.<sup>68</sup> Therefore the absence of detailed scrutiny of a case's merits may be regarded as problematic, in particular, in light of the absence of *exequatur* by the competent court in the Member State of enforcement.

One solution could come from encouraging the establishment of specialised courts, which are likely to be better equipped for a rapid yet sufficient examination of the merits of applications. Specialised courts may also minimise the problem that the Regulation does not feature requirements on filing evidence. In this regard, it is particularly interesting to note that Germany and Austria, which are noted for the highest use of the procedure, each have one national specialised court for handling EOPs.<sup>69</sup> Alternatively, a more efficient legal process, which is furthermore less prescriptive on Member State choices on organising their judiciaries, might still be for courts of origin to try to vet applications more thoroughly and assess their merits in greater detail upon initial review. However, the Commission's counter argument is fundamental: doing so 'would imply a substantial risk to the uniform application of the Regulation as to what types of documents are considered satisfactory proof of the claim.'<sup>70</sup> Furthermore, although the development of a minimum standard-set of acceptable types of evidence of an uncontested pecuniary claim, to be agreed at EU level, does not appear *prima facie* to present unsurmountable difficulties, it is very likely to meet with stiff resistance from the Member States, to the extent that such harmonisation is likely to be unrealistic. As regards the development of dedicated software for EOP applications, making it less possible to submit dubious claims, such a tool would continue to foster automation and would also ensure that oversights upon initial review could not easily be made by the competent court. As mentioned in sections 5.3. and 6.1, the development of dedicated informatics for the submission of applications is already the subject of a pilot project by the Commission; rolling out the relevant dynamic forms would have to be voluntary, however, in order to be accepted by the Member States, in keeping with the optional character of the EOP.

The gradual introduction of technological aids to ensure the sound verification of the merits of claims up front would also lessen the need for the disclaimer embedded in Article 12 (4), point (a) of the Regulation. This provision states that defendants should be informed that European orders for payment are issued solely on the basis of the information provided by the claimant and not verified by the court of origin. This undoubtedly incentivises defendants to contest orders, and likely contributes to damaging the procedure's overall efficiency. Ultimately, downstream, Article 7. Paragraph (4) of the Regulation could also become redundant, since it allows claimants to oppose a transfer to ordinary civil proceedings in the event of opposition by the defendant. Indeed, this provision may encourage use of the EOP by claimants intent on submitting spurious or doubtful claims, since these can simply be dropped without consequence when, and if, opposed.<sup>71</sup> With the current system, the only remaining deterrent to misuse of the procedure is the initial cost of filing a case, and this naturally encourages cross-border 'shopping' by unscrupulous claimants for the

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<sup>68</sup> See Regulation [1896/2006 \(EU\)](#), Article 22 (1) and (2).

<sup>69</sup> Manko, Rafal, [Orders for payment in the EU, National procedures and the European order for payment](#), EPRS Briefing, December 2013, p.4.

<sup>70</sup> [Proposal for a regulation](#) creating a European order for payment procedure, COM(2004)173 - 2004/0055 (COD), p.10.

<sup>71</sup> See [Proposal for a Regulation](#) creating a European order for payment procedure, COM(2004)173 - 2004/0055 (COD), Article 8, p.13 and Regulation [1896/2006 \(EU\)](#), Article 17 (1), first sub-paragraph, last provision.

cheapest national case filing fees. Given that, with the EOP, the intention is to reduce court costs overall in the recovery of cross-border debts, this problem therefore arguably represents a more fundamental shortcoming in the functioning of the procedure. Finally, with a more efficient system relying increasingly on the use of dedicated technology, where claims would be vetted more thoroughly up front, over time there would be less justification for absolving defendants from the need to justify their reasons for opposing EOPs - contrary to the current situation, where defendants are not required to specify their reasons.<sup>72</sup> The Regulation would then be likely to have a more marked effect.

However, for the time being, given significant differences in Member States' national approaches and legal traditions and the resulting complexity of modernising the system, it is paramount to preserve the existing fundamental equilibrium in the functioning of the Regulation. This balances on the one hand, the need only to provide information on the existence of evidence in support of a claim, and on the other, the possibility for defendants to lodge statements of opposition without justification, with the effect of ending the procedure and transferring the case to ordinary civil proceedings.

### **6.3. Problems with the rules on serving EOPs on defendants**

Xandra Kramer pointed out that, with the EOP, 'a range of more than ten different ways of service of documents is included, which allows Member States to stick to their own (maybe inefficient) systems of service of documents.'<sup>73</sup> This interesting hypothesis could benefit from further analysis in the future. In any case, it is an appropriate introduction to this section, which singles out one of the permissible means of serving of orders of payment in particular as being potentially problematic, namely where proof of receipt by defendants is not required.<sup>74</sup>

#### **Service to defendants *in absentia***

For European orders for payment, service to the defendant is permitted *in absentia*. The detailed rules on serving orders on defendants in their absence mainly include the service of the order to the defendant's personal address, on persons living in the same household, or at the defendant's business premises, and by simple deposit to the defendant's mailbox or to the post office with written notification of the deposit sent to the defendant's mailbox. This flexibility tends to favour the claimant, in particular where the defendant and all other household members or business associates are on leave, away on business, or working off-premises, and particularly so in the case of extended closures or holiday periods.

There is also a possibility that claimants making spurious or dubious claims might deliberately submit applications to courts of origin about one month before holiday periods, to increase the chances of servicing taking place *in absentia*, and therefore increasing the chances that orders for payment are overlooked by defendants. This is a concern, firstly because this method of servicing will, in such circumstances, significantly reduce or even eliminate the time available to the defendant for lodging a statement of opposition to the European order for payment with the court of origin.

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<sup>72</sup> Regulation [1896/2006 \(EU\)](#), Article 16 (3).

<sup>73</sup> [A major step in the harmonisation of procedural law in Europe: the European Small Claims Procedure: Accomplishments, new features and some fundamental questions of European harmonisation](#), The XIIIth World Congress of Procedural Law, The Belgian and Dutch Reports, Kramer, Xandra, 2008, p. 16.

<sup>74</sup> Regulation [1896/2006 \(EU\)](#), Article 14.

### **Deadline to submit a statement of opposition**

If, furthermore, the defendant misses the 30-day deadline to submit a statement of opposition, the only remaining means to contest the order is to request that the enforceable order for payment be reviewed, which is only allowed in defined exceptional circumstances.<sup>75</sup> The Regulation states that if within this 30-day time limit no statement of opposition has been lodged, 'the court of origin shall without delay declare the European order for payment enforceable.'<sup>76</sup> The exceptional circumstances defined in the Regulation are already very difficult to invoke, and the problem should perhaps be addressed as a priority in view of the number of micro-enterprises in the Union. For such companies, in today's business environment, moving domicile or business premises, taking long holidays or working off-premises for extended periods, no longer constitute 'extraordinary' practices. Therefore, the EOP Regulation somewhat unreasonably places the onus on the defendant to react quickly or, failing that, to prove he was prevented from objecting to the claim by reason of force majeure or due to 'extraordinary' circumstances.

As long as the wording of the Regulation's review clause has not been aligned with the Maintenance Regulation and the revised small claims court procedure (see section 5.3.), this issue will remain a concern. Notably, these more recent instruments allow courts to consider, as a justification for requesting review, the serving of an order for payment 'in such a way' as to prevent defendants from arranging a defence, whereas the EOP does not. Finally, if the Regulation's specific provisions on servicing 'without proof of receipt' were removed, there might be scope for shortening the 30-day timescale for filing oppositions to orders of payment before the competent court of the Member State of origin,<sup>77</sup> since the receipt of the order of payment would be established in all cases. Accordingly, the examination of possibilities for serving orders of payment via electronic means could also be envisaged.

### **Transmission of enforceable orders for payment to defendants**

Moreover, the Regulation does not feature any detailed requirements in relation to the transmission of enforceable orders for payment to defendants, nor on informing defendants of the transfer of cases to ordinary civil proceedings in the Member State of origin in situations where defendants filed oppositions to orders for payment. This may also play to the advantage of claimants, giving them a head start in preparing civil proceedings because of the lack of a specific obligation, in the Regulation, on the courts of origin to inform defendants (as well as claimants) promptly of the automatic transfer to ordinary civil proceedings. Defendants can only assume that the transfer has taken place if they have read the 'important information notes' attached to Form E of the Annexes to the Regulation.<sup>78</sup>

In addition, since there is no obligation for defendants to seek counsel, defendants wishing to avoid the costs of representation might also not be aware of the guidance available to them, which is relevant to the continuation of the case in ordinary civil proceedings. Indeed, for orders of payment which have been issued, there is no statutory obligation in the Regulation to include information on the functioning of the procedure, nor on the rights of defendants, nor to point defendants to the e-Justice portal for further information.

<sup>75</sup> Regulation [1896/2006 \(EU\)](#), Article 20.

<sup>76</sup> *Ibid.*, Article 18, (1).

<sup>77</sup> *Ibid.*, Article 16 (2).

<sup>78</sup> See Regulation [1896/2006 \(EU\)](#), Article 17 (3), and form E.

## The Commission's efforts to address servicing problems

To conclude this section, although certain reforms of the EOP's servicing provisions may at first seem appropriate, abolishing specific servicing rules is not compatible with the optional character of the procedure. Therefore, it would be more relevant to encourage Member States to take steps towards cooperating on the electronic transfer of enforceable orders of payments to defendants in order to minimise the problems identified with the rules on serving EOPs. Furthermore, the issue of servicing is a horizontal one, which is not limited to the EOP, but to civil procedures in general. Accordingly, the Commission is carrying out an [evaluation study](#) of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law. Part of this study will cover the service of documents and the results are expected to feed into a forthcoming review of [Regulation \(EC\) No 1393/2007 on the Service of judicial and extrajudicial documents in civil or commercial matters](#).

### 6.4. The downside of restrictive justifications for review

Presumably in order to address the potential problems which might be caused by the limited assessment of claims by courts of origin, in particular, the absence of a possibility for appealing European orders for payment,<sup>79</sup> the Regulation includes a provision allowing defendants to apply for review of a European order for payment. However, this can only be relied upon in specific, strictly defined, circumstances. These cases are where orders for payment are served without proof of receipt *and* are not effected in sufficient time to enable defendants to arrange for their defence, or where defendants cannot object in due time by reason of force majeure or owing to extraordinary circumstances. In all such cases, defendants must also act promptly and demonstrate that there is no fault on their part. Alternatively, defendants may be entitled to apply for a review if the order for payment is wrongly issued, or due to other exceptional circumstances.<sup>80</sup>

On the one hand, the Regulation's wording sets restrictions on what constitute acceptable grounds for review, solely limited to matters concerning procedural handling, with no assessment of the substance of the claim or of the statement of opposition. On the other hand, the rules leave establishing evidence for complying with the restrictive procedural exceptions open to interpretation by the courts of origin. Indeed, establishing whether or not there was any fault on the part of a defendant in organising his defence in good time, proving that he acted 'promptly,' or otherwise proving 'force majeure' or extraordinary circumstances, are likely to generate varying interpretations by different national courts. This analysis supports Xandra Kramer's view, which stresses that 'it is not clear what exactly is to be understood by 'extraordinary circumstances'<sup>81</sup> in the Articles of the European small claims, European enforcement order and European order for payment procedures.' This analysis also supports her conclusion that, since the exact nature and purpose of review is not clear, 'a further explanation of what 'review' within the context of European procedural law entails, is desirable.'<sup>82</sup>

An additional problem with the current review system is that, since the court seized typically corresponds to the home Member State of the claimant, and not of the defendant, a national bias is

<sup>79</sup> [A major step in the harmonisation of procedural law in Europe: the European Small Claims Procedure: Accomplishments, new features and some fundamental questions of European harmonisation](#), The XIIIth World Congress of Procedural Law, The Belgian and Dutch Reports, Kramer, Xandra, 2008, p. 14.

<sup>80</sup> Regulation [1896/2006 \(EU\)](#), Article 20 (1) and (2).

<sup>81</sup> [A major step in the harmonisation of procedural law in Europe: the European Small Claims Procedure: Accomplishments, new features and some fundamental questions of European harmonisation](#), The XIIIth World Congress of Procedural Law, The Belgian and Dutch Reports, Kramer, Xandra, 2008, p. 10.

<sup>82</sup> *Ibid*, p. 14.



more likely to be present in favour of the claimant than not. The EOP's detailed rules on the permissible grounds for review might well, therefore, benefit from further clarification. Conversely, assuming that a foreign court of origin can fully appreciate a defendant's circumstances, if a defendant's request for a review is accepted by the court of origin, the European order for payment is simply annulled, which appears somewhat disproportionate for claims which are, in fact, justified. Such annulment takes place solely on the basis of a procedural challenge (not being able to organise one's defence in time), without due consideration of the substance of the claim or of its defence.

To conclude, this section corroborates the Commission's report, in particular the recommendation that defendants should be entitled to request, under Union law, a re-opening of the case, when faced with situations of deficient servicing of orders for payment, by calling for a clarification of the conditions for review under Article 20 of the Regulation (see section 5.3.).<sup>83</sup> As explained above, the issues identified otherwise remain a matter of concern, in respect of defendants' rights, for as long as the wording of the Regulation's review clause has not been aligned to the Maintenance Regulation and the revised small claims court procedure. These more recent instruments allow courts to consider a more general justification for invoking review, namely the servicing of an order for payment 'in such a way' as to prevent defendants from arranging their defence in addition to 'in sufficient time.'

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<sup>83</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.8, pp. 9 and 10.

## 6.5. Overall remarks on deficiencies in the provisions of the EOP

### Addressing administrative hurdles

- To further facilitate the application process, in addition to the Commission's efforts to advertise the EOP and provide guidance on its functioning, all competent court websites could helpfully advertise the existence of the EOP and point applicants to the [e-Justice portal](#) for guidance on the use of the procedure, and in particular for information concerning court jurisdiction.
- The Regulation would be strengthened if Member States implemented policies to adhere more strictly to the 30-day turn-around time for courts of origin to process applications.

### Minimising the drawbacks of the unavoidable limited analysis of claims and opposition statements

- The limited initial review of applications, and the subsequent serving of orders of payment upon defendants, carries a potential risk, in particular that of giving undue credence to dubious claims, which is problematic in light of the absence of exequatur.
  - This risk could be mitigated by encouraging the centralised processing of applications in more experienced specialised courts and by the voluntary roll-out of the dynamic forms for completing EOP applications developed in the [e-CODEX pilot](#) project. This would make it more difficult to file unsubstantiated claims, would minimise mistakes in the initial review of applications, and would streamline the procedure further.

### Modernising modalities for serving documents

The array of permissible means of serving documents would benefit from an evaluation as to whether this has perpetrated inefficient national systems. In particular, problems have been identified with servicing standards in view of the evolution towards a mobile business environment, notably for micro-enterprises: the rules on serving orders for payment are rapidly becoming obsolete.

- The trial and roll-out of electronic solutions could also potentially address the problems identified. However, this is a horizontal issue for all civil law procedures, which is already the subject of a Commission work stream: a [study](#) is underway covering, in part, servicing standards, and will likely provide input into the forthcoming legislative proposal on revising [Regulation \(EC\) No 1393/2007 on the service of judicial and extrajudicial documents](#).

### Safeguarding defendants' rights to invoke a review

- The possibilities for applying for the review of an EOP are restricted to specific, strictly defined circumstances,
  - This issue remains a concern in respect of defendants' rights for as long as the wording of the Regulation's review clause has not been aligned with the Maintenance Regulation and the revised European small claims procedure, allowing courts to consider another justification for requesting review - namely the serving of an order for payment 'in such a way' as to prevent a defendant from arranging a defence, in addition to the condition that servicing did not provide 'sufficient time' to organise a defence.

## 7. Underlying factors impeding the take-up of the procedure

### 7.1. The lack of harmonisation of national court proceedings and fees

A [2011 report](#) by the Belgian law cabinet, Monard D'Hulst, on debt collection in Europe, demonstrated that the debt recovery procedures in Europe were still far from uniform and that the costs (fees) and the time required to pursue a cross-border debt in a court due to unfamiliar processes would be particularly prohibitive for small businesses. Furthermore, in this regard, the report also noted that the EOP and the European small claims procedure are only used and known in a few Member States.<sup>84</sup> The variations in procedures and fees involved in a selection of Member States for the pursuit of a commercial debt, which were cited in the D'Hulst report, are presented in the table below. This table was originally published by DG EPRS in July 2015, in an in-depth analysis in relation to '[the transposition and implementation of the directive on late payments in commercial transactions](#),' in order to show how limitations on the proper functioning of that directive were partially based on problems with the implementation of other related European regulations, namely the EOP and the European small claims procedure.

**Table 2: Variations in national procedures and fees involved in debt recovery**

Member State	Examples from a selection of EU Member States' procedures
<b>France</b>	<ul style="list-style-type: none"> <li>- Registration of an injunction charge of €38.87 and of €99.64 in case of opposition.</li> <li>- Fixed bailiff fees set at 12% for debts up to €125, at 11% for debts from €126 to €610, at 10.5% for debts from €610 to €1525 and at 4% for debts from €1 525.</li> </ul>
<b>Germany</b>	<ul style="list-style-type: none"> <li>- Legal costs and fees depend on the value of the dispute. These are not based on a percentage of the debt, but fixed in a fee scale.</li> <li>- The professional costs and fees also depend on the value of the dispute. Negotiated fees are possible, but they cannot be lower than the statutory rate.</li> </ul>
<b>Italy</b>	<ul style="list-style-type: none"> <li>- In summary proceedings, there are fixed costs and court taxes, depending on the amount claimed, which vary from €100 to €500.</li> <li>- Lawyer fees vary, from €1 000 for smaller claims to higher sums for more substantial claims.</li> <li>- The fees rise if the debtor contests the debt.</li> </ul>
<b>The Netherlands</b>	<ul style="list-style-type: none"> <li>- The costs and fees for a national procedure are between €71 and €5 894, depending on the amount of the claim and the court instance (court of first instance, court of appeal, Supreme Court) and the financial capacity of the parties.</li> <li>- The costs of debt collecting agencies or lawyers can be based on an hourly rate or on graduated rates. Costs for formal bailiff services are based on a decree on tariffs for bailiff actions.</li> <li>- For the enforcement of a foreign judgement, the costs for an exequatur<sup>85</sup> are €568 when the creditor is a company and €258 when the creditor is a physical person (or €71 when the creditor is considered to be indigent).</li> </ul>

<sup>84</sup> Attorneys-at-law Mestdagh, Tillo and Lahousse, Arthur, Debt collection in Europe, Monard-D'Hulst, 2011, p.23.

<sup>85</sup> The legal instrument enabling the enforcement of a foreign judgement.

Member State	Examples from a selection of EU Member States' procedures
<b>Poland</b>	<ul style="list-style-type: none"> <li>- The court fees vary from 30 Polish złoty<sup>86</sup> to 300 złoty (€7 to €70) when the subject of the litigation amounts to respectively 2 000 złoty (€470) and 7 500 złoty (€1 780) or more.</li> <li>- In general, for procedures above 30 złoty (€7) and not exceeding 100 000 złoty (€23 700), court fees amount to 5 % of the claim value.</li> <li>- In the event a claimant wins, the defendant shall pay the costs.</li> <li>- In payment order procedures (not less than 30 złoty or €7), court fees amount to 1.25% of the claim value. If the debtor brings objections to the order for payment, he shall pay court fees of 3.75% of the claim value.</li> <li>- In writ proceedings (not less than 30 złoty or €7 and not exceeding 100 000 złoty or €23 700), court fees are also set at 5% of the claim value. However, if in writ proceedings, the order of payment becomes final and enforceable, the court shall return 3.75% of the court fee and the remaining part of this fee shall be returned by the defendant.</li> </ul>
<b>Spain</b>	<ul style="list-style-type: none"> <li>- Flat rate costs and fees for a national procedure.</li> <li>- There are taxes ranging between €90, for debts of less than €6 000, and €600 in case of a high court appeal.</li> <li>- To determine lawyer fees, two variables have to be taken into consideration: the type of proceeding and the amount involved in the proceeding. For example, when the claim reaches €50 000 in an ordinary proceeding, lawyer fees are recorded at €8 800.</li> <li>- Professional and legal fees are recoverable and the amount is fixed by law and administered by the court, according to bar association rules. In the case of a late payment, the debtor will be charged with the legal fees as well as interest on late payment.</li> </ul>
<b>United Kingdom</b>	<ul style="list-style-type: none"> <li>- The fees in the County Court and High Court vary from £30 (€42) for debts up to £300 (€420), to fees of £1 530 (€2 132) for debts above £300 000 (€418 030)<sup>87</sup>.</li> <li>- Attorney fees and court fees can be claimed back. The interest can also be recovered at the maximum rate of 8% above the bank base rate. Suppliers can also charge a business a fixed sum for the cost of recovering a late commercial payment on top of claiming interest from it. There are no other penalties for late payments. The recoverability of attorney fees and court fees varies.</li> </ul>

The Commission's report tends to confirm the hypothesis that the lack of harmonisation in court fees hinders the take-up of the EOP. It highlights that, although the EOP Regulation requires combined court fees for European payment orders and ordinary proceedings not to exceed those for ordinary proceedings alone,<sup>88</sup> court fees still vary considerably from one Member State to another. This has occasionally led citizens to complain about the rate of fees in some Member States. Furthermore, the lack of transparency of such court fees was a major problem for potential applicants. However, addressing in part the problem, the report also points out that the Commission has published information on court fees on the e-Justice portal.<sup>89</sup>

<sup>86</sup> 1 Polish złoty = €0.24 at time of writing.

<sup>87</sup> 1 British Pound = €1.39 at time of initial publication.

<sup>88</sup> Regulation [1896/2006 \(EU\)](#), Article 25, paragraph 1.

<sup>89</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.6, p.8.

In relation to this, another analysis supports the argument that the degree of harmonisation of the Regulation is insufficient. The 2012 [study](#) by the [Polish Institute of Justice](#) on the EOP in judicial practice, exemplified the 'many discrepancies relating to how the EOP functions'<sup>90</sup> from one competent court to the next (at least in Poland). This study explained, furthermore, that 'the rules of the Regulation are interpreted and applied in divergent ways, often contrary to the purposes of the Regulation.'<sup>91</sup> These discrepancies range from differences in requirements for supplying documentation supporting claims, to the detailed breakdown of court fees.

Furthermore, Member States' own rules on the permissible means for serving orders for payment also vary from one Member State to another, for example, only via an enforcement officer in France, whereas in Poland the serving of orders by post is allowed, and with various Member States accepting electronic means while others do not.<sup>92</sup> Accordingly, these discrepancies between national court proceedings and fees are an impediment to the harmonised application of the EOP, and are likely to affect the effectiveness of the procedure from the outset.

## 7.2. The procedure's cross-border scope, excluding domestic cases

The Commission's original intention for the scope of the EOP was to make no distinction between what constituted the cross-border and the domestic contexts. The Commission warned European legislators that not making the procedure available in all cases of recovery of uncontested claims might generate problems, especially for those Member States that do not provide efficient tools for the collection of undisputed debts. Indeed, the Commission argued that, for those Member States concerned, creditors and debtors alike would be subject, following the introduction of the EOP, to a more efficient mechanism in cross-border proceedings than for domestic claims.<sup>93</sup> This analysis was based on the Commission's interpretation of Article 81 TEU, which provides that measures can be taken in civil matters 'having cross border implications.' Xandra Kramer pointed out that the Commission's standpoint was that this article should not be interpreted restrictively, since it would create new obstacles to access to justice. She also highlighted the Commission's argument that procedural law, by nature, may have cross-border implications. 'However 21 of the 25 Member States did not support the view of the Commission and neither did the European Parliament. The scope of the European small claims procedure is therefore limited to cross-border cases, as is the European order for payment procedure.'<sup>94</sup>

Furthermore, the introductory chapter of the Commission co-funded publication on simplification of debt collection in the EU, stresses in this regard that 'one cannot but recall suggestions from various stakeholders, when questioned by the House of Lords European Committee, on occasion of the inquiries leading to the adoption of the 23rd Report of Session 2005-2006, the European Small Claims Procedure Report with Evidence, that the scope of the procedure should not be restricted to cross-border pleadings. In fact, all the special procedures under review (including the European order for payment procedure) could, in our view, replace, with advantage, national procedures of

<sup>90</sup> [Europejski nakaz zapłaty w praktyce sądowej](#) [The European Order for Payment in Court Practice], Rylski, Piotr, *Prawo w Działaniu – Sprawy Cywilne*, 2012, vol. 12, p.190.

<sup>91</sup> Manko, Rafal, [Orders for payment in the EU, National procedures and the European order for payment](#), EPRS Briefing, December 2013, p.5.

<sup>92</sup> Ibid.

<sup>93</sup> [Proposal for a regulation](#) creating a European order for payment procedure, COM(2004)173 - 2004/0055 (COD), p.8.

<sup>94</sup> Kramer, Xandra, [A major step in the harmonisation of procedural law in Europe: the European Small Claims Procedure: Accomplishments, new features and some fundamental questions of European harmonisation](#), The XIIIth World Congress of Procedural Law, The Belgian and Dutch Reports, 2008, p. 7.

similar nature and, in some countries, would even introduce a brand new way of debt collection, insofar as there is no special national track for it.<sup>195</sup>

Therefore, the Commission is now faced with a dilemma. It would appear that their initial analysis was correct. As a result, the EOP has not been able to foster the harmonisation of debt recovery procedures across the Union, and has furthermore perpetrated the practice of 'shopping' across EU borders in order to make use of the most efficient national civil proceedings for recovering debts using the EOP - all because the EOP was not given, up front, its full originally intended scope. Such a full scope would arguably have given the procedure the necessary domestic traction and not resulted in such misuse.

Unfortunately, instead of adhering to its original assertion that this is a problem, in its report on the application of the procedure, the Commission now only regards the cross-border shopping practices of certain applicants as 'perceived effectiveness' of the procedure. To quote the report: 'This is confirmed by some companies artificially creating a cross-border scenario as envisaged in the Regulation in order to benefit from its advantages, for example by assigning their claim to a foreign company.'<sup>196</sup>

In fact, the practice of cross-border shopping for efficient procedures tends to point mainly towards a degree of misuse of the procedure: certain claimants deliberately lodge claims in another Member State, in order to avoid the inefficiencies of the domestic proceedings for uncontested claims in their home Member State, and to exploit the speedier processes of other Member States. However, as explained previously in this analysis, with the current system, a court's efficiency in handling EOPs may well also result in the procedure being misused to a greater extent in that court, because less attention is devoted to ensuring that claims are justified.

It might have been more appropriate for the Commission to attempt once more to convince the co-legislators to broaden the scope of the Regulation, given that the practices recorded since the introduction of the EOP suggest that it was right to have originally proposed a domestic as well as a cross-border scope for the procedure. However, the Commission is likely to have legitimate doubts about raising this issue again, given that many Member States and the European Parliament already opposed the idea at the time, and particularly in the current overall 'less is more' European legislative climate.

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<sup>95</sup> University of Maribor, Graz and Zagreb Commission-sponsored [collaborative project on the simplification of debt collection in the EU](#), featuring the publication: Simplification of Debt Collection in the EU, edited by Rijavec, Ivanc & Keresteš, Wolters Kluwer Law & Business, (2014), paragraph 1.12, p. 42.

<sup>96</sup> Commission [Report](#) on the application of Regulation (EC) 1896/2006 creating a European order for payment procedure, section 3.1, p.4.

## 8. Conclusions

One of the key premises for the EOP, stemming from a survey of Member States carried out in 2004, before the adoption of the Commission's initial proposal for a regulation, is based on the fact that national court statistics revealed a significant proportion of cases concerning the recovery of outstanding debts (50% to 80%) to be uncontested claims.<sup>97</sup> However, it may very well be that the contentious nature of a claim is only revealed when the matter proceeds to court and, conceivably, particularly so in a cross-border context. As such, from one perspective, **the Regulation is rather draconian, as it clearly assumes the defendant's tort or guilt** by virtue of the claim being *thus far* uncontested.

The Regulation places the onus on defendants to lodge statements of opposition to the court in the Member State of origin, or, if they forego this opportunity for whatever reason, to ask for a review of the order of payment, which, in any case, is limited to strictly defined circumstances. The Commission acknowledged this '**shift of responsibility (...) as opposed to normal procedural rules** (...) which is referred to in French as *inversion de contentieux*,' in the initial proposal for a regulation,<sup>98</sup> but without recognising that this might generate problems. Nor did it seek to assess, ex-ante, the relative merits of introducing such a system for cross-border, and *apparently* uncontested, claims. Indeed, the Commission's initial proposal was not accompanied by an ex-ante impact assessment. The Commission argued instead that the need to alleviate national courts of the full burden of handling cases concerning uncontested claims is the single most important factor in the equation, although the evidence it relied upon apparently concerned domestic cases, and not cross-border cases. Therefore, an impact assessment should perhaps have been carried out in this regard.

However, it is also essential to recognise that the Treaties have inevitably constrained the real-world impact of the EOP, since the area of EU law (namely, judicial cooperation in civil matters) into which this procedure falls, is a shared EU competence. This was already clear in the text of the Commission's original proposal.<sup>99</sup> Therefore, the EOP was limited to the acceptable extent of *cooperation* in civil matters for EU Member State governments and **the principle of subsidiarity was applied to the scope of the Regulation. Accordingly, the procedure is optional.** Xandra Kramer, in particular, also draws attention to the fact that 'these limitations primarily result from the principles of subsidiarity and proportionality' as laid down in Article 5 TEU, as well as the interpretation of Article 81 TFEU. She explains that, for the European order for payment and small claims procedures, these limits delivered **minimum harmonisation**, an optional character, and a focus on cross border cases for both instruments.<sup>100</sup> As a consequence, with the EOP, the loci of the court of origin and the court of enforcement have been strictly bound to the processing of European orders for payment and to their recognition and enforcement.

Nevertheless, the findings of this assessment would tend to support the analysis by Carla Crifò, that **a surprising amount of space has been left to national law, and that 'the Regulation is too vague on some points,'**<sup>101</sup> which can create the risk of divergent application of the Regulation across the

<sup>97</sup> [Proposal for a regulation](#) creating a European order for payment procedure, COM(2004)173 - 2004/0055 (COD), p.4. and p.5.

<sup>98</sup> *Ibid*, p.6.

<sup>99</sup> *Ibid*, section 2.2.3, p.8. and p.9.

<sup>100</sup> [A major step in the harmonisation of procedural law in Europe: the European Small Claims Procedure: Accomplishments, new features and some fundamental questions of European harmonisation](#), The XIIIth World Congress of Procedural Law, The Belgian and Dutch Reports, Kramer, Xandra, 2008, p. 15.

<sup>101</sup> Crifò, Carla, Cross-border enforcement of debts in the European Union, Wolters Kluwer Law & Business, Kluwer Law international (2009), Chapter 3, p.143.

EU.<sup>102</sup> The findings in this assessment also tend to support Xandra Kramer's analysis that **certain key procedural concepts, such as 'review,' are not well developed yet and that procedural law and practice differ substantially per Member State**, which has a negative impact on the implementation of the EOP as well as on the European small claims procedure.<sup>103</sup>

It is also hard to disagree with Carla Crifò's prediction, in 2009, that **the European order for payment procedure 'will instead have achieved not much more than some harmonisation of domestic rules**, in a particularly strong claimant-friendly manner.<sup>104</sup> Indeed, **varying national implementation is already evident** from the Commission's application report. These differences regarding the manner in which the European order for payment has been implemented in Member States is a likely result of the flexible character of a number of the provisions in the Regulation. It has allowed, in particular, for 'goldplating' the Regulation as regards application and transmission procedures, application assessment modalities, and differences in the servicing of orders.

These barriers to the effectiveness, efficiency, and coherence of the procedure have furthermore been aggravated by the continued **lack of convergence in court fees from one Member State to another**. In Kramer's paper, she explains that, although the recitals of the European order for payment Regulation make it clear that harmonisation is not the objective, this is at odds with the fact that such European procedures are established to respond to the problems of cross-border litigation and to guarantee a level playing field. She even questions whether the EOP and its related instruments, namely the European small claims procedure, go far enough to guarantee equal standards, and she questions their European rationale given that so many issues are still decided by national law.<sup>105</sup>

In this context, once the revised European small claims procedure has been in operation for a reasonable period, a future review could helpfully seek to understand how this instrument and the European order for payment procedure have worked together in delivering the effective and efficient recovery of cross-border debt in the EU. Such an exercise could also concentrate on reviewing progress towards modernising the legal framework, namely as regards **the take up of electronic tools to increase efficiency and effectiveness**.

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<sup>102</sup> Manko, Rafal, [Orders for payment in the EU, National procedures and the European order for payment](#), EPRS Briefing, December 2013, p.5.

<sup>103</sup> [A major step in the harmonisation of procedural law in Europe: the European small claims procedure: Accomplishments, new features and some fundamental questions of European harmonisation](#), The XIIIth World Congress of Procedural Law, The Belgian and Dutch Reports, Kramer, Xandra, 2008, p. 14.

<sup>104</sup> Crifò, Carla, Cross-border enforcement of debts in the European Union, Wolters Kluwer Law & Business, Kluwer Law international (2009), Chapter 3, p.144.

<sup>105</sup> [A major step in the harmonisation of procedural law in Europe: the European Small Claims Procedure: Accomplishments, new features and some fundamental questions of European harmonisation](#), The XIIIth World Congress of Procedural Law, The Belgian and Dutch Reports, Kramer, Xandra, 2008, p. 16.



Table 3: The EOP reviewed against key evaluation criteria

	Statutory requirements	Commission Analysis	Conclusion
<b>Effectiveness</b>	<p>No requirements on Member States to measure a reduction in debt recovery timescales for cross border uncontested claims.</p> <p>Consequently, the Commission has not produced the expected detailed impact assessments for each Member State.</p>	<p>Argues the overall effectiveness of the EOP despite its limited take-up, and despite the lack of comprehensive data on various aspects of the functioning of the procedure.</p>	<p>Strengthened reporting requirements - in particular monitoring data to demonstrate how the procedure has delivered as compared to the baseline scenario - are likely to be opposed by Member States as too costly.</p> <p>The lack of speed in issuing EOPs might call the procedure's beneficial effect into question: Application turn around times could be improved by electronic tools based on the existing pilot project, which could be deployed on a voluntary basis.</p>
<b>Efficiency</b>	<p>Absence of requirements relating to the need to modernise Member State's application of the Regulation, in particular by the voluntary introduction of electronic means for submitting and possibly processing applications and issuing orders for payment.</p>	<p>Quantitative analysis on efficiency is mainly limited to the experience of two Member States. Furthermore, analysis of the benefits of specialised courts is inconclusive.</p> <p>The electronic processing of applications is encouraged, as well as the receipt by competent courts of EOPs in one other language to reduce translation costs and timescales.</p>	<p>An indicative roadmap for implementing electronic processing and servicing would likely be beneficial, but has not been proposed since Member States may oppose the costs. Electronic improvements should therefore be encouraged on a voluntary basis.</p> <p>The centralisation of EOP applications (specialised courts) would bring benefits.</p>
<b>Relevance</b>	<p>The Regulation responds to a clearly identified problem ascertained on the basis of structured consultations. However, ex-ante impact assessment was not conducted on certain key preconditions to ensuring that the EOP works well, namely the initial degree of harmonisation in court proceedings across the EU.</p>	<p>The Regulation remains relevant, since, overall, it appears to be functioning well, in particular as regards the abolition of exequatur, and in light of the absence of complaints.</p>	<p>The procedure remains relevant although adaptations are likely necessary. Non-harmonised national court proceedings remain an impediment.</p> <p>Extending the scope of the procedure to domestic as well as cross-border cases might be re-investigated, in view of the limited take up and misuses.</p>
<b>Coherence</b>	<p>The EOP fits into a wider body of EU law, and certain aspects have been coherent from the outset (abolition of exequatur and enforcement) or rendered coherent subsequently (adaptation to the small claims procedure).</p>	<p>The procedure is coherent with ECJ jurisprudence, and with the European small claims procedure, and complements national systems, providing a clear and light procedure to facilitate the speedy recovery or cross border debts.</p>	<p>Adaptations to the procedure would be of benefit. The EOP is not fully coherent:</p> <ul style="list-style-type: none"> <li>- because the rules on servicing orders of payment need modernising (evolving working patterns);</li> <li>- as regards safeguarding defendants' rights (limited possibilities for review).</li> </ul>

## Annex - Definitions

**Legal fiction:** A legal fiction is a fact assumed or created by courts,<sup>106</sup> which is then used in order to apply a legal rule. Typically, a legal fiction allows the court to ignore a fact that would prevent it from exercising its jurisdiction, by simply assuming that the fact is different. Legal fictions derive their legitimacy from tradition and precedent, rather than formal standing as a source of law. Owing to variations in Member States' rules of civil procedure concerning the service of documents, with the European Order for Payment Procedure (EOP), legal fictions should not be relied upon by the courts<sup>107</sup> as methods for fulfilling the minimum standards laid down in articles 13, 14, and 15 of the Regulation for serving such orders on defendants.

**Exequatur:** An exequatur is a legal document issued by a sovereign authority allowing a right to be enforced in the authority's domain of competence, or a judgment by which a tribunal states that a decision issued by a foreign tribunal should be executed in their corresponding jurisdictions. The EOP abolishes the need for exequatur. Article 19 of the Regulation states that 'A European Order for Payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.'

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<sup>106</sup> Black's Law Dictionary, p. 804 (5th ed. 1979).

<sup>107</sup> Regulation [1896/2006 \(EU\)](#), Recital 19.



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This European Implementation Assessment aims to present an assessment of the functioning of the European order for payment procedure since its introduction, highlighting the main achievements of the procedure and the key implementation problems and concerns. Accordingly, this in-depth analysis examines the European Commission's report on the application of the procedure and other published material on the subject by academics and practitioners, critically reviewing the overall findings. It has been drafted to support the European Parliament's Committee on Legal Affairs' own-initiative Implementation Report on the EU order of payment procedure, rapporteur: Kostas Chrysogonos (GUE/NGL, Greece).

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