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## REFUSAL OF ENFORCEMENT OF A EUROPEAN ORDER FOR PAYMENT

### Abstract

*This article is devoted to the institution of enforcement refusal of the European order for payment pursuant to Article 22 of Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12<sup>th</sup> December 2006 creating a European order for payment procedure. This question has not been developed in the Polish literature yet. In Polish law an application for enforcement refusal of the European order for payment is called a legal action for refusal of enforcement order under the enforcement clause of the European order for payment. This article has been written with a view to analyzing Union and national regulations pertaining to enforcement refusal of the European order for payment. This article consists of a comparative legal analysis of the following tasks: the legal basis for applying for enforcement refusal, the entity authorized in the application, the national judicature of a competent court to consider the application and proceedings in which a defendant shall be entitled to enforcement refusal of the European order for payment. What is more, the legal character of this remedy of defense of the rights of a debtor and his attitude towards other legal remedies of defense of a debtor under the Civil Procedure Code have been taken into consideration in this article.*

*The final chapter concludes the detailed analysis of the thesis. It has been concluded that the introduction of a legal action for enforcement refusal to the Civil Procedure Code has not deprived a debtor of his right to other legal measures defined in the Code. This legal action is meant to eliminate so called "titles collision" which could not be prevented earlier by a debtor.*

### Keywords

*European orders for payment – enforcement refusal – member State of origin – member State of enforcement – abolition of *exequatur**

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## I. INTRODUCTORY NOTES

The European order for payment was introduced in the European Union Member States based on Regulation (EC) No. 1896/2006 of the European Parliament and Council of 12<sup>th</sup> December 2006, creating proceedings on a European order for payment<sup>1</sup>. Pursuant to Article 19 of Regulation No. 1896/2006, the European order for payment which became enforceable in the Member State of origin is recognized and enforced in other Member States without a necessity to certify the enforceability and without a possibility to object to its recognition. However, it may not be excluded that such an order may be issued in a case which has already been solved between the parties, and its content would not be agreeable with the judgement rendered earlier. For these reasons, Article 22 was introduced into Regulation No. 1896/2006, based on which the defendant may submit a request for the refusal of enforcement of an order for payment. In this provision were set out exclusively the bases to lodge such an application, the subject having the right to lodge it, as well as the domestic jurisdiction of the competent court to examine it, as to the remaining processual issues, they were left to be determined by the national legislature of the Member States.

Speaking about the Polish legislature, it introduced to Part three of the Code of Civil Procedure dedicated to enforcement proceedings, Title one, Division six entitled, 'Anti-enforcement Claims' – Article 840<sup>3</sup> of the C.C.P.<sup>2</sup>. This provision makes up the domestic processual basis to request a refusal of enforcement of judgements mentioned therein issued by courts of the Member States. It refers only to such judgements in relation to which the obligation to be granted an *exequatur* was removed or else the European enforcement title

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<sup>1</sup> O.J. L 399 of 30.12.2006, pp. 1-32, referred to hereinafter as the Regulation 1896/2006. The Regulation is in force in all Member States with the exception of Denmark. The Regulation is applied with some exclusions set out under Article 33 subpara. 2 of this Regulation from 12.12.2008 and on that day relevant changes introduced into the Code of Civil Procedure came into force. The changes were introduced by the 5.12.2008 Act on changes to the Code of Civil Procedures and some other Acts (Dz. U. [Journal of Laws] No. 234, item 1571).

<sup>2</sup> The 17.11.1964 Code of Civil Procedure, Dz. U. [Journal of Laws] No. 43, item 296 as amended, referred to hereinafter as C.C.P.

for undisputable claims (Article 1153<sup>1</sup> C.C.P.)<sup>3</sup>, the European order for payment (Article 1153<sup>4</sup> C.C.P.), the judgement issued in the European procedure on small claims (Article 1153<sup>7</sup> C.C.P.)<sup>4</sup>, and also the judgement rendered in a maintenance case by a court of the Member State which is a party to the Hague Protocol of 23<sup>rd</sup> November 2007 on Law Competent for Maintenance Obligations<sup>5</sup> (Article 1153<sup>10</sup> C.C.P.)<sup>6</sup>.

The application for the refusal of enforcement in the Polish law has been referred to as a claim for the refusal of enforcement of an enforceable

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<sup>3</sup> More on the European enforcement title and the refusal to enforce it in Polish law, among others, M. Arciszewski, *Europejski tytuł egzekucyjny w teorii i praktyce* [The European Enforcement Title in Theory and Practice], Warszawa: C.H. Beck 2007, p. 171 and K. Weitz, *Europejski tytuł egzekucyjny dla roszczeń bezspornych* [The European Enforcement Title for Undisputable Claims], Warszawa: LexisNexis 2009, p. 432. Confer with T. Rauscher, *Der Europäische Vollstreckungstitel für unbestrittene Forderungen*, München, Heidelberg: Sellier. European Law Publishers 2004, p. 73. More on granting the declaration of enforceability to the European enforcement title by a Polish court: A. Harast, *Nadanie zaświadczenia Europejskiego Tytułu Egzekucyjnego* [Granting the Declaration on Enforceability of a European Enforcement Title], *Monitor Prawniczy* [Legal Journal] 2009, no. 2, p. 68 et seq.; Z. Miczek, *Europejski Tytuł Egzekucyjny – postępowanie sądowe* [European Enforcement Title – Court Proceedings], *Prawo i Podatki Unii Europejskiej* [Law and Taxes of the European Union] 2006, no. 9, p. 49 et seq.

<sup>4</sup> More on the European procedure in the case of small claims and the refusal of enforcement of a judgement rendered in this procedure, among others: R. Frey, *Europejskie postępowanie w sprawie drobnych roszczeń* [The European Procedure in Small Claims Cases], *Prawo i Podatki Unii Europejskiej* [Law and Taxes of the European Union] 2008, no. 4, p. 10 et seq.; Ł. Goździaszek, *Europejskie postępowanie w sprawie drobnych roszczeń* [The European Procedure in Small Claims Cases], *Monitor Prawniczy* [Legal Journal] 2009, no. 9, p. 471 et seq.; A. Laskowska, *Europejskie postępowanie w sprawie drobnych roszczeń* [The European Procedure in Small Claims Cases], *Przegląd Prawa Egzekucyjnego* [The Review of the Enforcement Law] 2010, no. 5, p. 5 et seq.; M. Manowska, *Postępowania odrębne w procesie cywilnym* [Separate Procedures in the Civil Process], Warszawa: LexisNexis 2010, p. 390 et seq. Confer also R. Freitag, S. Leible, *Erleichterung der grenzüberschreitenden Forderungsbeitreibung in Europa: Das europäische Verfahren für geringfügige Forderungen*, *Betriebs Bareter* 2009, no. 1-2, p. 2 et seq.; I. Jahn, *Das europäische Verfahren für geringfügige Forderungen*, *Neue Juristische Wochenschrift* 2007, b. 40, p. 2890 et seq.

<sup>5</sup> O.J. L 331 of 16.12.2009, p. 17, referred to hereinafter as the Hague Protocol of 2007.

<sup>6</sup> The refusal of enforcement of judgements in relation to which the obligation to obtain the so-called exequatur is cancelled has been also dealt with in other regulations: in Article 21 of Regulation No. 805/2004 of the European Parliament and Council of 21.04.2004, creating the European Enforcement Order for Uncontested Claims (O.J. L 143 of 30.04.2004, pp. 15-39); in Article 22 of Regulation (EU) No. 861/2007 of the European Parliament and Council of 11.07.2007 establishing the European Small Claims Procedure (O.J. L 199 of 31.07.2007, pp. 1-22) and in Article 21 of Council Regulation (EU) No. 4/2009 of 18.12.2008 on Jurisdiction, Competent Law, the Recognition and Enforcement of Decisions and the Cooperation in the Fields of Maintenance Obligation (O.J. L 7 of 10.01.2009, pp. 1-79).

title in form of a judgement rendered by a court of a European Union Member State provided with a *feri facias* clause set out under Article 1153<sup>1</sup>, 1153<sup>4</sup>, 1153<sup>7</sup> and Article 1153<sup>10</sup> of the Code of Civil Procedure.<sup>7</sup>

In this paper, it is worthy of dedicating a few comments to selected issues related with both the enforcement of the European order for payment, with the legal nature of an application/a claim for the refusal of enforcement of a European order of payment and with the subject having the right to submit such an application. The bases of refusal of enforcement with reference to the European order for payment also require a closer discussion.

## II. EUROPEAN ORDER FOR PAYMENT

The European order for payment is a decision positive to the claimant (adjudicative) rendered pursuant to Regulation No. 1896/2006 in a case which fulfils cumulatively the following conditions: this is a trans-border case, civil or commercial, as understood by the Regulation, it relates to a monetary claim of a laid-down amount, indisputable and mature at the moment when the claim for the European order for payment has been submitted<sup>8</sup>.

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<sup>7</sup> In the further part of this paper, I shall refer to this claim in abbreviation as “claim for refusal of enforcement”.

<sup>8</sup> More on the European order for payment and the refusal to enforce the European order for payment, among others M. Arciszewski, *Europejski nakaz zapłaty* [European Payment Order], *Monitor Prawniczy* [Legal Journal] 2008, no. 1, p. 7 et seq.; R. Frey, *Postępowanie w sprawie europejskiego nakazu zapłaty* [Proceedings on the European Order of Payment], *Prawo i Podatki Unii Europejskiej* [Law and Taxes of the European Union] 2007, no. 6, p. 49 et seq.; A. Harast, *Europejski nakaz zapłaty – cz. I* [European Order for Payment – Part I], *Monitor Prawniczy* [Legal Journal] 2008, no. 16, p. 850 et seq.; A. Laskowska, *Europejskie postępowanie nakazowe* [European Order Proceedings], *Przegląd Prawa Egzekucyjnego* [The Review of the Enforcement Law] 2010, no. 4, p. 87 et seq.; Manowska, *supra* note 4, p. 369; J. Pisuliński, *Europejski nakaz zapłaty* [European Payment Order], *Europejski Przegląd Sądowy* [European Judicial Overview] 2008, no. 1, p. 4 et seq. Confer also R. Freitag, S. Leible, *Erleichterung der grenzüberschreitenden Forderungsbeitreibung in Europa: Das Europäische Mahnverfahren*, *Betriebs Berater* 2008, z. 51-52, p. 2750 et seq.; N. Preuß, *Erlass und Überprüfung des Europäischen Zahlungsbefehls*, *Zeitschrift für Zivilprozess* 2009, b. 1 (vol. 122), p. 3 et seq.; K. Rellermeyer, *Grundzüge des Europäischen Mahnverfahrens*, *Der Deutsche Rechtspfleger* 2009, b. 1, p. 11 et seq.; A. Röthel, I. Sparmann, *Das europäische Mahnverfahren*, *Wertpapiermitteilungen Zeitschrift für Wirtschafts- und Bankrecht* 2007, b. 24, p. 1101 et seq.; B. Sujecki, *Das Europäische Mahnverfahren*, *Neue Juristische Wochenschrift* 2007, z. 23, p. 1622 et seq. The problems of refusal of enforcement

The European order for payment shall be enforced pursuant to the domestic law of the state of enforcement and also on the same terms as decisions of the courts of the state of enforcement (Article 21 subpara. 1 of Regulation No. 1896/2006). The party who had the decision enforced in another state than the state of its origin, need not however, grant any security, bond or deposit, arising from the fact that he is a foreigner or has no domicile or residence in the Member State of enforcement (Article 21 subpara. 3 of Regulation No. 1896/2006). As to the enforcement of the European order for payment, pursuant to Article 21 subpara. 2 of Regulation No. 1896/2006, to have an order enforced in another Member State, the following documents shall be presented to the enforcement authorities: an original copy of the European order for payment whose enforceability has been confirmed by the court of origin<sup>9</sup> and which fulfils the requirements necessary to ascertain its authenticity, and if needed a certified translation of the European order for payment into an official language of the state of order enforcement or another language accepted by this state (Article 21 subpara. 2 of Regulation No. 1896/2006)<sup>10</sup>.

Relating these provisions to Polish law, we shall claim that the application to which the mentioned documents are to be attached is an application for granting a European order for payment a *fiery facias* clause. This judgement, pursuant to Article 1153<sup>4</sup> of C.C.P., shall be provided by a Polish court with a *fiery facias* clause and only then, does it become an enforcement title pursuant to which judicial enforcement proceedings may be initiated in the territory of the Republic of Poland<sup>11</sup>.

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of a European order for payment has been presented by A. Harast, *Postępowanie w sprawie europejskiego nakazu zapłaty* [*Proceedings on European Order for Payment*], Warszawa: C.H. Beck 2013, pp. 361-379.

<sup>9</sup> Pursuant to Article 18 subpara. 1 of Regulation No. 1896/2006, if the defendant does not lodge his opposition in time, the court of origin shall issue immediately *ex officio* the declaration of the enforceability of the European order for payment with the application of form G set out in Attachment VII.

<sup>10</sup> The information on languages accepted by European Union Member States for the needs of the European order for payment required pursuant to Article 29 subpara. 1 d) in conjunction with Article 21 subpara. 2 b) of Regulation No. 1896/2006 can be found on the Internet page: [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/epo\\_communicationsHTML\\_it\\_pl.htm#epo\\_communicationsHTML3](http://ec.europa.eu/justice_home/judicialatlascivil/html/epo_communicationsHTML_it_pl.htm#epo_communicationsHTML3).

<sup>11</sup> In German law, these judgements may be enforced without a *fiery facias* clause (§ 1082, 1093 and 1107 ZPO). Confer also W. Jennissen, [in:] W. Schuschke, W. D. Walker, *Vollstreckung und Vorläufiger Rechtsschutz nach dem achten und elften Buch der ZPO*

### III. LEGAL NATURE OF APPLICATION/CLAIM FOR REFUSAL OF ENFORCEMENT

Taking up an attempt at defining the legal nature of the application/claim for refusal of enforcement of a European order for payment, it is worth analysing the features of this defence remedy for the debtor's rights. In the light of Regulations No. 805/2004, 1896/2006, 861/2007 and 4/2009, the following conclusions may be formulated: 1) the application/claim for refusal of enforcement is a debtor's defence remedy; 2) this is not a remedy at law as it may not serve to a judgement revision as to its merits, it is neither intended to repeal nor to change this judgement; 3) it is not a formal defence remedy as it does not serve to eliminate irregularities of processual nature; 4) it may be initiated only in cases where the judgement was issued by a court of another state than the state of its enforcement; 5) it was placed by the European Union legislature in this part of Regulations No. 805/2004, 1896/2006, 861/2007 and 4/2009, which is dedicated to enforcement of judgements; 6) the principle for judgement enforcement is such that the law of the state of enforcement is applied therefor and thus, the claims initiated by debtors do not exclude their chance to avail themselves of other remedies of defence.

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*einschließlich der europarechtlichen Regelungen*, Köln-München: Heymanns 2008, p. 1975 et seq. In Polish literature it was controversial whether judgements certified as European enforcement orders shall be given a *feri facias* clause to become a basis to initiate judicial enforcement in Poland or whether the function of this clause is fulfilled by the certification. Confer K. Weitz, *Europejskie prawo procesowe cywilne*, [in:] A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy [European Process Law in Application of European Union Law by Courts]*, Kraków: Zakamycze 2005, p. 637 et seq.; A. Okońska, *Europejski tytuł egzekucyjny dla roszczeń bezspornych [European Enforcement Order for Undisputable Claims]*, Rejent [Notary] 2007, no. 2 (190), p. 117; J. Gołaczyński, *Współpraca sądowa w sprawach cywilnych i handlowych [Judicial Cooperation in Civil and Commercial Cases]*, Warszawa: Wolters Kluwer 2007, p. 89 et seq.; D. Zawistowski, [in:] J. Gołaczyński (ed.), *Kodeks postępowania cywilnego. Postępowanie zabezpieczające i egzekucyjne. Komentarz [The Code of Civil Procedure. Securing and Enforcement Proceedings. Commentary]*, Warszawa: Wolters Kluwer 2012, p. 425 et seq. This issue was presented at comparable background by P. Grzegorzczak, *Automatyczna wykonalność orzeczeń sądowych w sprawach cywilnych w Unii Europejskiej – geneza, stan obecny i perspektywy [Automatic Enforceability of Judicial Judgements in Civil Cases in the European Union – Genesis, Current State and Prospects]*, [in:] P. Grzegorzczak, K. Weitz (eds), *Europejskie prawo procesowe cywilne i kolizyjne [European Civil Process Law and Competence Norms]*, Warszawa: LexisNexis 2012, pp. 167-168, in particular in footnote 206 on p. 168.

Analysing our national legislation in this field, we may add that the claim for refusal of enforcement is a kind of suit for discontinuance of enforcement and the refusal of enforcement has the effect of removing the enforceability from the enforcement title. Allowing this remedy by a Polish court means that the judgement may not be enforced by Polish enforcement authorities. In Polish scholarship, this claim is treated either as a particular form of a suit for discontinuance of enforcement<sup>12</sup>, or as a form of debtor's suit against enforcement<sup>13</sup>. There is also a view that this is a claim for establishing that the judgement is not liable to recognition in the state of enforcement<sup>14</sup>.

The application/claim for refusal of enforcement does not deprive the debtors of their right to avail themselves of the national remedies at law dealt with in the Code of Civil Procedure for the needs of enforcement proceedings. The remedies at law serve to remove processual irregularities committed by enforcement authorities while carrying out enforcement procedures. These remedies are not directed against the enforcement title. There are doubts at the background of the defence of the debtor, against whom an enforcement title was issued in the form of European order for payment with a *fiery facias* clause – by a suit for the discontinuance of enforcement. Amongst the representatives of scholarship, it is disputable

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<sup>12</sup> Thus K. Flaga-Gieruszyńska, [in:] A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz* [The Code of Civil Procedure. Commentary], Warszawa: C. H. Beck 2012, p. 1364; K. Golinowska, [in:] J. Jankowski (ed.), *Kodeks postępowania cywilnego. Postępowanie egzekucyjne. Komentarz do artykułów 758-1088* [The Code of Civil Procedure. Enforcement Proceedings. Commentary to Articles 758-1088], Warszawa: C.H. Beck 2011, p. 572; A. Jakubecki, O. Marcewicz, [in:] A. Jakubecki (ed.), *Kodeks postępowania cywilnego. Komentarz* [The Code of Civil Procedure. Commentary], Warszawa: Wolters Kluwer 2012, p. 1110; J. Jankowski, [in:] K. Piasecki (ed.), *Kodeks postępowania cywilnego. T. II. Komentarz do Art. 506-1088* [The Code of Civil Procedure. Volume II. Commentary to Art. 506-1088], Warszawa: C.H. Beck 2006, p. 817; Weitz, *supra* note 4, p. 372; H. Pietrkowski, [in:] T. Erciński (ed.), *Kodeks postępowania cywilnego. Komentarz. Postępowanie egzekucyjne* [The Code of Civil Procedure. Commentary. Enforcement Proceedings], Warszawa: LexisNexis 2012, p. 293.

<sup>13</sup> Thus A. Marciniak, *Sądowe postępowanie egzekucyjne* [Judicial Enforcement Proceedings], Warszawa: LexisNexis 2011, p. 304 et seq. Confer also Zawistowski, *supra* note 11, p. 426; A. Laskowska, *Powództwo o odmowę wykonania tytułu wykonawczego w postaci zaopatrzonego w klauzulę wykonalności orzeczenia sądu państwa członkowskiego Unii Europejskiej (art. 840<sup>3</sup> k.p.c.)* [Claim for Refusal of Enforcement of an Enforcement Order in Form of Judgement of European Union Member State with a *fiery facias* clause (Art. 840<sup>3</sup> C.C.P.)], [in:] K. Lubiński (ed.), *W poszukiwaniu prawa dobrego i sprawiedliwego. Księga pamiątkowa ku czci Jana Tredera* [In Search for Good and Just Law. Commemorative Book Dedicated to Jan Treder], Warszawa: LexisNexis 2013, p. 292 et seq.

<sup>14</sup> Thus Gołaczyński, *supra* note 11, p. 91.

whether the debtor's suit against enforcement from Article 840 of C.C.P. may be initiated to remove the enforceability of one of the titles set out under Article 840<sup>3</sup> of C.C.P.<sup>15</sup>. The wide scope of the problems which go beyond the framework of this paper taken into account, I would like to make only a few remarks related to the problem raised. In the literature, there dominates the justified position, allowing for the possibility to initiate the debtor's suit against enforcement to deprive the enforcement title mentioned under Article 840<sup>3</sup> of C.C.P., of its enforceability in cases not covered by the basis to refuse its enforcement<sup>16</sup>. The debtor, against whom the enforcement title was issued, mentioned under Article 840<sup>3</sup> C.C.P. should not, for this reason, be in a "worse" processual situation than a debtor against whom another enforcement title than that mentioned

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<sup>15</sup> This issue has been thoroughly discussed at the background of the European enforcement order for undisputable claims of Weitz, *supra* note 3, p. 394 et seq., and the literature cited there. This author not only did present the views expressed in Polish literature but also in foreign literature. In turn at the background of the European order for payment, this issue was discussed at the comparative law background by Harast, *Proceedings...*, *supra* note 8, pp. 379-393. Confer also Harast, *European...*, *supra* note 13, p. 916; Okońska, *supra* note 11, p. 118; Pisuliński, *supra* note 8, p. 13; Grzegorzczuk, *supra* note 11, pp. 168-170. This issue is disputable not only in Polish scholarship. Confer also the views expressed in German literature at the background of suits for discontinuance of enforcement: A. K. Fabian, *Die Europäische Mahnverfahrensverordnung im Kontext der Europäisierung des Prozessrechts*, Jena: JWV 2010, pp. 229-230; Freitag, Leible, *supra* note 4, p. 6; Freitag, Leible, *supra* note 8, p. 2755; B. Hess, *Europäisches Zivilprozessrecht*, Heidelberg: CF Müller 2010, p. 571; Preuß, *supra* note 8, p. 29 et seq.; Rellermeier, *supra* note 8, p. 15; Röthel, Sparmann, *supra* note 8, p. 1105; B. Sujecki, *Europäische Verordnung zur Einführung eines Europäischen Mahnverfahrens*, [in:] M. Gebauer, T. Wiedmann (eds), *Zivilrecht unter europäischem Einfluss*, Stuttgart-München-Hannover-Berlin-Weimar-Dresden: Richard Boorberg Verlag 2010, pp. 2047-2048. Confer also the views expressed in Austrian theory: W.H. Rechberger, [in:] B. König, P.G. Mayr (eds), *Europäisches Zivilverfahrensrecht in Österreich II*, Wien: Manz 2009, p. 45. In the opinion of this author, the national legal provisions on the suit for discontinuance of enforcement fills in the legal gap in the field of provisions on the application for refusal of enforcement.

<sup>16</sup> Thus, among others Harast, *Proceedings...*, *supra* note 8, p. 381; Pisuliński, *supra* note 8, p. 13; Weitz, *supra* note 3, p. 394 et seq. Confer also in German literature at the background of § 1096 ZPO in conjunction with § 767 ZPO: R. Geimer, [in:] R. Zöllner (ed.), *Zivilprozessordnung. Kommentar*, Köln: Verlag Dr. Otto Schmidt 2010, p. 2359; W. Gierl, [in:] I. Saenger (ed.), *Zivilprozessordnung. FamFG. Europäisches Verfahrensrecht. Handkommentar*, Baden-Baden: Nomos, 2011, p. 2196; Sujecki, *supra* note 15, pp. 2047-2048. That author indicates that German legislature introducing § 1096 ZPO excluded the idea on admissibility of initiating a national suit for discontinuance of enforcement against the European order for payment. Confer also views expressed on this subject in Austrian literature by B. Kloiber, *Das Europäische Mahnverfahren*, *Zeitschrift für Europarecht Internationales Privatrecht & Rechtsvergleichung* 2009, no. 12, p. 78.



in the provision, was rendered. The premises for a refusal of enforcement related to a European order for payment do not contain all prerequisites from Article 840 C.C.P. Therefore in the case, a different concept than the above-presented one has been accepted and one of the events set out under Article 840 § 1 C.C.P. occurs (with the exception of the payment of the amount adjudicated by the order), as for instance, time prescription of the claim, release from debt or deferment of the deadline for payment, the debtor would be deprived of his defence remedies from which he could have availed himself before the initiation or during the enforcement proceedings. Furthermore, quoting Article 21 subpara. 1 and Article 26 of Regulation No. 1896/2006, it is indicated in the literature that it results from these provisions that the enforcement of the European order for payment shall take place on the same terms as the enforcement of the order rendered in the Member State of enforcement. In consequence, we come to the conclusion that the debtor against whom an enforcement title was rendered, the European order for payment included, may defend in the scope not covered by the application/claim for refusal of enforcement by the debtor's suit against enforcement but this defence may not intend to have a re-examination as to the merits in the state of enforcement of the European order for payment, (Article 22 subpara. 3 of Regulation No. 1896/2006), which means that in this claim, the debtor may not invoke events which took place before the European order for payment was rendered<sup>17</sup>. Furthermore, an argument is raised that in the debtor's suit against enforcement, the debtor may not raise the plea of setting off, if the court competent to examine the debtor's suit against enforcement has no jurisdiction in the case for the claim presented for setting off<sup>18</sup>.

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<sup>17</sup> Weitz, *supra* note 3, p. 406.

<sup>18</sup> The judgement of ECJ of 4.06.1985, C-220/84, *AS-Autoteile Service GmbH v. Pierre Malhé*, ECR 1985, p. 2267 and A. Okońska, *European Enforcement Title – Polska jako państwo wykonania [Poland as a State of Enforcement]*, *Problemy Prawa Prywatnego Międzynarodowego [Problems of International Private Law]* 2007, vol. 2, pp. 174-175; Weitz, *supra* note 3, pp. 407-408; Harast, *Proceedings...*, *supra* note 8, p. 383.

#### IV. ENTITY ENTITLED TO REQUEST THE REFUSAL OF ENFORCEMENT OF A EUROPEAN ORDER FOR PAYMENT

It results from the provisions examined in this study that the refusal to enforce can take place only at the request of “the defendant” (Article 22 subpara. 1 of Regulation No. 1896/2006)<sup>19</sup>, or else of the person against whom the European order for payment has been issued. Given the wording of Article 21 subpara. 1 of the Regulation, which for the enforcement of the decision refers to the national rules of the State of enforcement, it shall be assumed that it is the debtor who can initiate the action for the refusal of enforcement, or else that who has been referred to in the enforceability (*fieri facias*) clause as such. Therefore, this may be initiated by the defendant mentioned in the European order for payment or its successor if covered by the clause. According to Polish law, an action for the refusal of enforcement can be also initiated by the prosecutor (Article 7 of the C.C.P.) or any other entity to whose participation in civil proceedings shall be applied the provisions on the public prosecutor, acting on behalf of the debtor. The court of enforcement will never be able to refuse *ex officio* to enforce<sup>20</sup>.

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<sup>19</sup> There is no uniformity in the scope of terminology used by the European Union legislature in Regulations No. 805/2004, 1896/2006, 861/2007 or 4/2009 to denominate the person authorised to request a refusal of enforcement which is visible not only in the case of their translation into Polish. Regulation No. 805/2004 uses in German – *der Schuldner*, in French – *le débiteur*, in English – *the debtor*. Regulation No. 1896/2006 in German uses – *der Antragsgegner*, in French – *le défendeur*, and in English – *the defendant*. In turn, in Regulation No. 861/2007, the following names are referred to: in German – *die Person gegen die Vollstreckung gerichtet ist*, in French – *la personne à l'encontre de laquelle l'exécution est demandée*, in English – *the person against whom enforcement is sought*. As to Regulation No. 4/2009, in German – *die verpflichtete Person*, in French – *le débiteur*, in English – *debtor*.

<sup>20</sup> In the literature, it is alleged in unison that the court of the state of enforcement shall never have the right to refuse the enforcement *ex officio*. Thus, T. Rauscher, S. Pabst, [in:] T. Raucher (ed.), *Europäisches Zivilprozessrecht. Kommentar*, B. II, München: Sellier European Law Publishers 2006, p. 1557 at the background of Regulation No. 805/2004; J. Kropholler, J. von Hein, *Europäisches Zivilprozessrecht. Kommentar zu EuGVO, Lügano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, Frankfurt am Main: Recht und Wirtschaft 2011, p. 1037; Kloiber, *supra* note 16, p. 78; Harast, *Proceedings...*, *supra* note 8, p. 362.

## V. GROUNDS OF THE ACTION FOR REFUSAL OF ENFORCEMENT

The grounds of the action for refusal of enforcement were not regulated in Article 840<sup>3</sup> of C.C.P. In this regard, the national legislature refers to separate regulations, which in the case analysed in the study will be Article 22 subpara.1 and 2 of Regulation No. 1896/2006. Similarly did the German legislature in § 1084, 1096 and 1109 of its Code (ZPO)<sup>21</sup>.

In Article 22 subpara. 1 of Regulation No. 1896/2006 are listed grounds for refusal of enforcement, which should be fulfilled together. Another prerequisite for refusal of enforcement was dealt with in Article 22 subpara. 2 of Regulation No. 1896/2006. The European Union legislature has not added any deadline for the institution of this action<sup>22</sup>. Restrictions in this regard may result indirectly from national law, such as under Polish law where such action may be brought only after the enforceability clause has been granted to the European order of payment, but not later than by the end of the enforcement proceedings conducted under it.

The basic premise for the refusal of enforcement of a European order for payment, dealt with in Article 22 subpara. 1 of Regulation No. 1896/2006 is the existence of an earlier decision or order issued in any Member State or third country, which cannot be reconciled with the European order for payment. German literature speaks of the so-called “Collision of titles” (*Titelkollision*)<sup>23</sup>. The “earlier decision” should have been issued in the Member State of enforcement or fulfilled the conditions necessary for its recognition in the Member State of enforcement<sup>24</sup>. This “earlier decision” would justify a refusal to enforce a European order for payment only if it is issued in relation

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<sup>21</sup> More on § 1096 ZPO (German C.C.P.) related to the European order for payment: Geimer, supra note 16, p. 2359; Gierl, supra note 16, pp. 2195-2196; Hess, supra note 15, p. 570. As to for instance Austria, there is no particular national regulation related to the enforcement of the European order for payment, thus G.E. Kodek, [in:] H.W. Fasching, A. Konecny (eds), *Kommentar zu den Zivilprozessgesetzen*, vol. 5, part 2, Wien: Manz 2010, p. 707.

<sup>22</sup> Fabian, supra note 15, p. 228.

<sup>23</sup> Thus, Jennissen, supra note 11, p. 1985; Rellermeyer, supra note 8, p. 15.

<sup>24</sup> More also Preuß, supra note 8, p. 25 et seq.; Rauscher, supra note 3, p. 68 et seq.; Rellermeyer, supra note 8, p. 15 et seq.; Röthel, Sparmann, supra note 8, p. 1104 et seq.

to “the same subject of dispute/claim” and refers to the “same parties” and the irreconcilability was not and could not be raised in an objection in the court proceedings, in which the European order for payment was rendered.

It should be noted that the above-mentioned grounds for the refusal of enforcement stated in Article 22 subpara. 1 of Regulation No. 1896/2006, just like the grounds for refusal of enforcement governed by Regulations No. 805/2004 (Article 21) and 861/2007 (Article 22), are similar to the grounds for the refusal of recognition in Article 34 points 3 and 4 of Regulation No. 44/2001<sup>25</sup> and Article 22 points c) and d), and also Article 23 points e) and f) of Council Regulation No. 2201/2003<sup>26</sup>. These grounds are also examined in the proceedings for declaring the enforceability<sup>27</sup> of a decision. A significant difference between Article 34 points 3 and 4 of Regulation No. 44/2001 and Article 22 points c) and d) of Regulation No. 2201/2003, on the one hand, and the provisions governing the refusal of a decision enforcement, on the other hand, is limited to the fact that Regulations No. 44/2001 and 2201/2003 distinguished the situation where one of the decisions was rendered by the court of a Member State in which an application for recognition/enforcement of a decision was placed from that where there were decisions given by the courts of other countries, third countries included, and not the court of the State of recognition/enforcement. In the first of these situations, the priority of enforcement is always vested with the decision given by a court of the Member State

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<sup>25</sup> Council Regulation (EC) No. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 12 of 12.01.2001, pp. 1-23; Polish special edition: chapter 19, vol. 04, pp. 42-64, referred to hereinafter as Regulation No. 44/2001.

<sup>26</sup> Council Regulation (EC) 2201/2003 of 27.11.2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, O.J. L 338 of 23.12.2003, pp. 1-29; Polish special edition: chapter 19, vol. 06, pp. 243-271, referred to hereinafter as Regulation No. 2201/2003.

<sup>27</sup> This examination was carried out pursuant to Regulation No. 44/2001, if the decision on ascertaining the enforceability was appealed against (Article 34 in conjunction with Article 45 of this Regulation), but pursuant to Regulation No. 2201/2003 in proceedings for the ascertainment of enforceability conducted in the first instance (Article 22 and 23 in conjunction with Article 31 subpara. 2 of this Regulation).

of recognition/enforcement of the decision, while in the other the priority of recognition/enforcement is vested with the decision which was rendered earlier<sup>28</sup>. However, in Article 23 points e) and f) of Council Regulation (EC) No. 2201/2003, the decision given later is entitled to priority.

In turn, in Article 22 of Regulation No. 1896/2006, the European Union legislature uses the notion of “earlier decision” which refers to all decisions, irrespective of the state of origin (whether this is the State of enforcement, or another Member State or a third country). The scholarship studies aptly note that the adopted regulation of the application for the refusal of enforcement makes up a balance for the liquidation of the possibility of invoking the contradiction of decisions in the proceedings for the award of *exequatur* (Article 34 points 3 and 4 of Regulation No. 44/2001), abolishes the differentiated treatment of decisions from the Member States or from third countries, and introduces a mandatory principle of decisions priority (*Prioritätsprinzip*)<sup>29</sup>, also known as the principle of time priority<sup>30</sup>.

Regulation No. 1896/2006 has not clarified the term decision. However, in Article 22 subpara. 1 a) of the Regulation, a distinction is made between the concept of “earlier decision” and “earlier order”. Therefore, it must be assumed that, as in the case of the concept of “civil and commercial matters”, the term “decision” will be interpreted autonomously<sup>31</sup>. This interpretation may refer to the definition

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<sup>28</sup> Confer Weitz, supra note 3, p. 368 et seq.; Harast, *Proceedings...*, supra note 8, p. 364.

<sup>29</sup> Thus, Rauscher, supra note 3, p. 68 et seq.; Rauscher, Pabst, supra note 20, p. 1557 et seq.; A. Pernfuß, *Die Effizienz des Europäischen Mahnverfahrens*, Baden-Baden: Nomos 2009, p. 338; B. Ringwald, *Europäischer Vollstreckungstitel nach der EuVTVO Und Rechtsbehelfe des Schuldners*, Baden-Baden: Nomos 2011, p. 160. Thus, Okońska, supra note 10, p. 115. Although, this author expressed this view at the background of Regulation No. 805/2004, but because of similarity of factors for refusal of enforcement of a European order of payment and a decision rendered in the European proceedings for small claims, it remains in force also related thereto.

<sup>30</sup> Confer Weitz, supra note 3, p. 368.

<sup>31</sup> More K. Weitz, *Autonomiczna wykładnia europejskiego prawa procesowego cywilnego – wprowadzenie i wyrok ETS z 14.10.1976 r. w sprawie 29/76 LTU Lufttransportunternehmen GmbH und Co. KG przeciwko EUROCONTROL* [Autonomous Interpretation of the European Civil Processual Law – Introduction and ECJ Judgement of 14.10.1976 in case 29/76 LTU Lufttransportunternehmen GmbH und Co. KG against EUROCONTROL], *Europejski Przegląd Sądowy* [European Judicial Overview] 2007, no. 10, p. 52 et seq.

of the decision contained in other regulations, such as Article 32 of Regulation No. 44/2001<sup>32</sup>. According to the latter provision, the term “decision” should be understood as any decision given by a court of a Member State, irrespective of whether it is defined as a judgment, a decision, an order for payment, or a writ of enforcement, including the decision on costs or expenses issued by an officer of the court. The earlier decision may have been issued by a court or an authority of any State, a court or authority of the State of enforcement included<sup>33</sup>. This earlier decision must exist and the party applying for refusal of enforcement, should prove it. The European Court of Justice at the background of Article 27 subpara. 3 of the Brussels Convention<sup>34</sup>, which is the equivalent of Article 34 points 3 and 4 of Regulation No. 44/2001, stated that the court settlement was not within the concept of “decision” because the term “decision” meant a decision, coming from the judicial authority which has the power to shape the legal relationship of the parties<sup>35</sup>. The literature indicates that the earlier decision should have settled the merits of the case (dismissed or allowed the action). Such process decisions, as for instance, the rejection of the claim, or the discontinuation of the proceedings are not covered by the concept of a decision within the meaning of Article 22 subpara. 1 of Regulation No. 1896/2006<sup>36</sup>.

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<sup>32</sup> Pernfuß, supra note 29, p. 338; U.P. Gruber, [in:] T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht. EuZPR/EuIPR. Kommentar*, München: Sellier European Law Publishers 2010, p. 373; Kodek, supra note 21, p. 702; Kropholler, von Hein, supra note 20, p. 1037; A. Dietzel, *Probleme des Europäischen Mahnverfahrens*, [in:] M. Ahrens, V. Lipp, I. Varga (eds), *Europäisches Zivilprozessrecht. Einfluss auf Deutschland und Ungarn*, Göttingen: Universitätsverlag Göttingen 2011, p. 127.

<sup>33</sup> Confer Rauscher, Pabst, supra note 20, p. 1556.

<sup>34</sup> The Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters signed in Brussels on 27.09.1968, which after ratification by all members of the European Economic Commonwealth of that time entered into force on 1.02.1973 (O.J. C 27 of 26.01.1998, pp. 1-27) and which was replaced by Regulation No. 44/2001 in the relationships between the European Union Member States with the exception of Denmark. In the relationships with Denmark since 1.07.2007, the agreement on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters has been in force (O.J. L 299 of 16.11.2005, p. 62).

<sup>35</sup> Thus, ECJ in the judgement of 2.06.1994, *Solo Kleinmotoren GmbH v. Emilio Boch* C-414/92, ECR 1994, pp. I-02237.

<sup>36</sup> Harast, *Proceedings...*, supra note 8, p. 366.

In the literature it is disputed, what is meant by an “earlier order” – whether this is just a European order for payment, a domestic order for payment or a foreign order for payment<sup>37</sup>. Proponents of the view that the concept of “earlier order” does not include a European order for payment, based on Article 22 subpara. 1 point b) of Regulation No. 1896/2006 refer to the wording of Article 19 of that Regulation, under which the European order for payment which has become enforceable in the Member State of origin shall be recognized and enforced in other Member States without the need for a declaration of enforceability and without any possibility to oppose its recognition<sup>38</sup>. According to these authors, Article 22 subpara. 1 of Regulation No. 1896/2006 does not protect the defendant in the case competitive European orders for payment exist. In such a situation, the defendants can defend their case with an application for the European order for payment to be quashed (a request for a re-examination of the order) on the basis of Article 20 subpara. 2 of Regulation No. 1896/2006<sup>39</sup>. The view that the term “earlier order” can be understood not only as the European order for payment, but also as a domestic order for payment<sup>40</sup> and payment orders, originating from third countries should be considered justified<sup>41</sup>. From the wording of Article 22 subpara. 1 points a) and b) of Regulation No. 1896/2006, in which the legislature uses the phrase an “earlier order” and not a European order for payment, too far-reaching conclusions must not be drawn, the more so that point c) of the provision cited refers only to orders and similarly, for example, in Article 20 or 21 of Regulation No. 1896/2006 orders for payment are mentioned.

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<sup>37</sup> Kropholler, von Hein, *supra* note 20, p. 1038.

<sup>38</sup> Confer R. Freitag, *Rechtsschutz des Schuldners gegen den Europäischen Zahlungsbefehl nach der EuMahnVO*, Praxis des Internationalen Privat- und Verfahrensrechts 2007, book 6, p. 512; Dietzel, *supra* note 32, p. 127.

<sup>39</sup> Gruber, *supra* note 32, pp. 376-377.

<sup>40</sup> Confer Kodek, *supra* note 21, p. 702; Kropholler, von Hein, *supra* note 20, p. 1038.

<sup>41</sup> B. Kloiber (*idem*, *supra* note 16, p. 78) does not analyse the notions used in Article 22 subpara. 1 of Regulation No. 1896/2006, but claims that in this provision it may refer both to the earlier decision and to an earlier European order of payment, which were rendered in the Member State or in a third party. In Polish literature, such a concept was expressed by Grzegorzcyk, *supra* note 11, p. 160, footnote 180. Compare Harast, *Proceedings...*, *supra* note 8, pp. 366-367.

In consequence, the allegation that the incompatibility of the European order for payment with an earlier European order for payment may be raised firstly by opposition, and then, in an action for refusal of enforcement shall be deemed justified<sup>42</sup>. The content of Article 22 subpara. 1 point b) in conjunction with Article 19 of Regulation No. 1896 /2006 does not undermine this thesis either. It results from the provision of Article 22 subpara. 1 point b) that the earlier decision should at least satisfy the conditions necessary for its recognition in the State of enforcement. If it has already been recognized in the State of enforcement either by operation of law or pursuant to a court decision, the more does it satisfy the requirement of Article 22 subpara. 1 point b) of Regulation No. 1896/2006.

It remains to consider what determines which decision is earlier: the date of its rendering or of coming into force of law. In the analysed Regulation, there is no information on the subject. Given that decisions become enforceable, not only at the moment of coming into force of law, but also at the moment of obtaining an immediate enforceability or by law, or by virtue of the court's decision, in my opinion, it should be accepted that the date to be taken into account shall be the date of rendering the decision<sup>43</sup>. Anyway, the EU law also allows for the possibility of enforcement of a decision before the decision given in the European procedure for small claims comes into force of law (Article 15 of Regulation No. 861/2007), while in the case of a decision, which is to be certified as a European Enforcement title, this may be certified, depending whether the decision is enforceable in the state of origin (Article 6 subpara. 1 point a of Regulation No. 805/2004). The decisions mentioned can also be "earlier decisions" referred to in the grounds for refusing to enforce a European order for payment. The fact of appealing against the "earlier decision" shall not affect the admissibility of filing an action for refusal of enforcement, it can only be the cause for a Polish court to suspend proceedings in the action

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<sup>42</sup> Confer Kodek, *supra* note 21, p. 702.

<sup>43</sup> Thus, Gruber, *supra* note 32, p. 377; Weitz, *supra* note 3, p. 368. K. Weitz states that in the literature, there are also other positions presented according to which the decision shall be of force of law or cause effects. Thus, also Harast, *Proceedings...*, *supra* note 8, p. 367.



for refusal of enforcement of a European order for payment pursuant to Article 1098<sup>1</sup> C.C.P. 44.

Turning to the other of the phrases, the irreconcilability of decisions, it should be noted firstly that this phrase is not defined, either in Regulation No. 1896/2006, or in Regulations No. 805/2004, 861/2007 and 4/2009. Yet, the European Court of Justice in its decision of 4<sup>th</sup> February 1988<sup>45</sup> at the background of Article 27 subpara. 3 of the Brussels Convention, expressed the view that met with the approval of scholars<sup>46</sup>, that while assessing the non-compliance of decisions, examining the case the court shall take into account the consequences of the decisions. Decisions are incompatible if their legal implications mutually exclude each other. In the scholarly studies, example situations are indicated in which inconsistency of decisions can occur, such as when in the State of enforcement of the European order for payment, the action for adjudication of the amount, to which the order relates was dismissed or it was established that there existed no legal relationship on the basis of which the European order for payment was based. Decisions are also mismatched when in the State of enforcement of the European order for payment, in judicial proceedings, firstly, the nullity was ascertained of the contract under which the claimant obtained the order awarding thereto the amount of damages for non-performance of the contract<sup>47</sup>. At the background of Article 22 subpara. 1 of Regulation No. 1896/2006,

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<sup>44</sup> More on the suspension of proceedings on this legal basis confer A. Laskowska, *Zawieszenie sądowego postępowania rozpoznawczego w sprawach cywilnych* [*Suspension of Judicial Proceedings in Civil Cases*], Warszawa: Wolters Kluwer 2009, p. 289 et seq.

<sup>45</sup> C-145/86 *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECR 1988, p. 645.

<sup>46</sup> Thus, N. Półtorak, *Uznanie i wykonalność orzeczeń zagranicznych według konwencji brukselskiej i lugańskiej* [*Recognition and Enforceability of Foreign Decisions According to the Brussels and Lugano Convention*], *Kwartalnik Prawa Prywatnego* [The Private Law Quarterly] 1997, book 4, p. 677; R. Ch. Versuur, *Uznanie i wykonanie orzeczeń zagranicznych* [*Recognition and Enforceability of Foreign Decisions*], *Kwartalnik Prawa Prywatnego* [The Private Law Quarterly] 1999, book 4, p. 766; K. Flaga-Gieruszyńska, *Konwencja o jurysdykcji krajowej i wykonalności orzeczeń w sprawach cywilnych i handlowych* [*The Convention on Domestic Jurisdiction and Enforceability of Decisions in Civil and Commercial Cases*], *Rejent* [Notary] 2000, no. 1 (105), p. 83; Weitz, supra note 3, p. 367 et seq. Thus, also Pernfuß, supra note 29, p. 338; Gruber, supra note 32, p. 374; Ringwald, supra note 29, p. 160.

<sup>47</sup> Gruber, supra note 32, p. 374. Thus, also Kodek, supra note 21, p. 702. The author gives also as example; when in the state of decision enforcement, the initial question was settled otherwise than in the European order proceedings.

another justified view prevails that this provision applies not only to a situation in which there is irreconcilability, but also another one in which two decisions are of exactly the same wording. The purpose of this provision is not only to provide legal protection to the debtor in the case of the existence of two irreconcilable decisions, but also in the case of threat that two enforcement titles could be enforced related to the same claim (*Doppelvolstreckung*)<sup>48</sup>.

The existence of an earlier decision can be the basis for refusal of enforcement of a European order for payment if both decisions refer to the same cause of action<sup>49</sup> and the same parties, or else there occurs the same objective and subjective identity of the cases<sup>50</sup>. These concepts have to be explained autonomously, referring in this regard to the *acquis* of both the doctrine and the jurisprudence, created at the background of, among others, Article 21 subpara. 1 of the Brussels Convention, Article 21 of the Lugano Convention of 1988<sup>51</sup>, Article 27 subpara. 1 and 34, point 4 of Regulation No. 44/2001<sup>52</sup>. According to K. Weitz, decisions relate to the same “object in dispute” when they relate to the same “claim”<sup>53</sup>. The European Court of Justice

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<sup>48</sup> Gruber, supra note 32, p. 374; Dietzel, supra note 32, p. 127; Kodek, supra note 21, p. 702. See also Póltorak, supra note 47, p. 677; Freitag, supra note 38, p. 512.

<sup>49</sup> In Article 21 of Regulation No. 805/2004 in the German version, there is a notion *Streitgegenstand*, in French – *litige ayant la même cause*, in English – *cause of action*, the same notions occur in Article 22 of Regulations No. 1896/2006 and 861/2007. In turn, in Article 27 subpara. 1 and 34 point 4 of Regulations No. 44/2001 there are differences in German version – *Anspruch* and in French version – *litige ayant le même objet et la même cause*. In turn, in Polish version of the above-mentioned articles in Regulations No. 805/2004 and 1896/2006 there occurs the notion *przedmiot sporu* [the object of litigation], and in Regulation No. 861/2007 – *roszczenie* [claim].

<sup>50</sup> Thus, Weitz, supra note 3, p. 369 et seq.

<sup>51</sup> In relations between EEC and EFTA states, there was a convention on jurisdiction and recognition and enforcement of judicial decisions in civil and commercial matters, signed on 16.09.1988 in Lugano (O.J. L 319 of 25.11.1988, pp. 9-48). On 1.01.2010, the new Convention on Jurisdiction and Recognition and Enforcement of Judicial Decisions in Civil and Commercial Matters signed in Lugano on 30.10.2007 came into force (O.J. L 147 of 10.06.2009, p. 5). This Convention is in force in the relations between the Member States and Norway, Switzerland and Island.

<sup>52</sup> See Pernfuß, supra note 29, p. 339; Gruber, supra note 32, p. 373; Dietzel, supra note 32, p. 127; Ringwald, supra note 29, p. 161.

<sup>53</sup> Weitz, supra note 3, p. 370.

made a broad interpretation of the concept<sup>54</sup>. The identity of cases shall be determined, according to the Court, taking into account not only their factual and legal bases, but also their subject matter. Cases relate to the same claim when their object, understood as the goal of the action and the basis, including the factual and legal relationship from which the case arose, or the legal provision on which they are based, are identical<sup>55</sup>. Whereby, the purpose of the request is understood broadly and applies to key issues specific for both actions, such as, for instance, an action for enforcement of an obligation and for establishing a non-existence of a legal relationship, regardless which of the cases was pending before the court earlier<sup>56</sup>.

In turn, the subjective identity of the parties is considered by the European Court of Justice through the prism of their interests, which should be identical and inseparable. The same parties occur, despite of missing formal identity, if in regard to the subject matter of the two cases, the interests of various entities are identical and so inseparable from each other, that the decision rendered against one of them would be effective against the other<sup>57</sup>. However, in the case when in one procedure, there are several entities on one or both sides, and in the other proceedings only some of them are involved, the identity of the parties occurs only in relation to those who/which are involved simultaneously

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<sup>54</sup> ECJ in its judgement of 8.12.1987, in C-144/86, *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, ECR 1987, p. 04861; ECJ in its judgement of 6.12.1994, in C-406/92, *Tatry v. Maciej Rataj*, ECR 1994, p. I-05439. More: J. Łopuski, *Konwencja lugańska o jurysdykcji i wykonywaniu orzeczeń sądowych w sprawach cywilnych i handlowych* [Lugano Convention on Jurisdiction and Enforcement of Judicial Judgement in Civil and Commercial Cases], Bydgoszcz: Oficyna Wydawnicza "Branta" 2001, p. 92; K. Sznajder, *Stan zawisłości sprawy w konwencji z Lugano i w prawie wspólnotowym – pojęcie spraw tożsamyh* [The Pending Cases in Lugano Convention and in Community Legislation – the Notion of Identical Cases], Rejent [Notary] 2003, no. 5, p. 138.

<sup>55</sup> Weitz, supra note 11, p. 565 et seq.; Łopuski, supra note 54, p. 92; Sznajder, supra note 54, 138 et seq.; M. Pertegas-Sender, *Zawisłość sprawy oraz sprawy związane* [Pending of a Case and Related Matters], *Kwartalnik Prawa Prywatnego* [The Private Law Quarterly] 1999, book 4, p. 743 et seq.; J. Ciszewski, *Lugano Convention. Commentary*, Warszawa: C.H. Beck 2001, p. 155.

<sup>56</sup> ECJ in its judgement of 8.12.1987, in C-144/86, *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, ECR 1987, p. 04861; ECJ in its judgement of 6.12.1994, in case C-406/92, *Tatry v. Maciej Rataj*, ECR 1994, p. I-05439.

<sup>57</sup> ECJ in its judgement of 19.05.1998, in C-351/96, *Drouot assurances S.A. v. CMI industrial sites, Protea assurance et Groupement d'intérêt économique (GIE) Réunion européenne*, ECR 1998, p. I-03075 and Sznajder, supra note 54, p. 132 et seq.; Łopuski, supra note 54, p. 93.

in both cases, regardless of the fact on which side they appear<sup>58</sup>. The identity of the parties follows also the case of legal succession<sup>59</sup>.

Another condition that should have been met by this “earlier decision” for the refusal of enforcement to be justified is that it should have been issued in the Member State of enforcement or met the conditions necessary for its recognition<sup>60</sup>. It should be recalled that decisions endorsed with the European enforcement order certificate, decisions given in the European proceedings in the cases for small claim, and decisions in matters related to maintenance rendered in a Member State, a party to the Hague Protocol of 2007, which can also be “earlier decisions” are under the same conditions, as decisions issued by the courts of the Member State of enforcement. In addition to a European order for payment, they do not need to have a declaration of enforceability and opposing against their recognition is not allowed. To be enforceable in the Member State of enforcement, other decisions shall be the object of proceedings for enforceability declaring. Separate provisions, to which refers Article 840<sup>3</sup> of the C.C.P. do not introduce the condition of enforceability of an “earlier decision” in the Member State of enforcement, limiting the condition to meeting the requirements necessary for its recognition in the State of enforcement.

The last of conditions that the court seized by an action for refusal of enforcement pursuant to Article 22 of Regulation No. 1896/2006 shall take into account is whether the irreconcilability of decisions was not nor could not be raised as an objection in the court proceedings in the Member State of origin. The literature shows that the notion of judicial proceedings within the meaning of Article 22 subpara. 1 point c) of Regulation No. 1896/2006

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<sup>58</sup> ECJ in its judgement of 6.12.1994, in C-406/92, *Tatry v. Maciej Rataj*, ECR 1994, p. I-05439 and Sznajder, supra note 54, p. 134; Łopuski, supra note 54, p. 92; J. Ciszewski, supra note 55, p. 157.

<sup>59</sup> Thus, Weitz, supra note 3, p. 370.

<sup>60</sup> The conditions for decision recognition in the states of enforcement depending upon the state of origin of the decision may be differentiated, they may be regulated either by the European Union law or by international treaties, or else by national legislation of the state of enforcement. Confer Pernfuß, supra note 29, pp. 339-340; Gruber, supra note 32, p. 374; Ringwald, supra note 29, p. 161. In Poland, the recognition of a decision independently from the state of its origin takes place by force of law. Confer also Harast, *Proceedings...*, supra note 8, p. 370.

shall be understood as the proceedings initiated by lodging the opposition against the European order for payment referred to in Article 16 and 17 of Regulation No. 1896/2006<sup>61</sup>. In Article 22 subpara. 1 point c) of Regulation No. 1896/2006 the legislature does not speak of raising an objection in the proceedings on the European order, but of the judicial proceedings in the state of the order origin<sup>62</sup>. The burden of proving this condition fulfilled charges the claimant in the case on refusal of enforcement, who earlier in the proceedings on the European order for payment acted as a defendant. His failure to undertake the defence in the proceedings, in which the European order for payment was rendered, must not be treated as a non-fulfillment of this condition, if he proves that at the time of the judicial proceedings in the state of order origin, he did not know about any other proceedings against him or he learned about the existence of “an earlier decision” only after the deadline for filing an opposition against the European order for payment expired. Therefore, this is a situation in which the claimant in the case of refusal of enforcement – the defendant in the proceedings on the European order for payment – shall not be blamed for failure to file the objection in the specified deadline. The literature indicates that Article 22 subpara. 1 point c) of Regulation No. 1896/2006 introduces preclusion for filing this objection<sup>63</sup>.

In the case of a European order for payment, on principle, the defendant does not know on the initiation of proceedings on this order. He learns on the initiation of these proceedings only after the European order for payment was rendered, when served this order, together with a copy of the application form (Article 12 of Regulation No. 1896 /2006). This situation makes it difficult, or even impossible for the defendant to file any objections in the proceedings on the European order for payment. He can raise these objections against the order only in the statement of opposition or in another letter submitted in the deadline

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<sup>61</sup> Pernfuß, supra note 29, p. 340; Gruber, supra note 32, pp. 374-375; Dietzel, supra note 32, p. 128.

<sup>62</sup> Freitag, supra note 38, p. 512.

<sup>63</sup> Röthel, Sparmann, supra note 8, p. 1104 et seq.; Gruber, supra note 32, p. 375; Ringwald, supra note 29, p. 162. Confer also Kodek, supra note 21, pp. 702-703; Dietzel, supra note 32, p. 128.

for the statement of opposition<sup>64</sup>. It is worthy of noting that when it comes to the opposition, according to Article 16 subpara. 3 of Regulation No. 1896/2006 the defendant should indicate that he contests the claim, without having to specify the reasons. However, if the defendant knows on the existence of an earlier decision, referred to in Article 22 subpara. 1 of Regulation No. 1896/2006, an appropriate objection shall be raised, either in the opposition or in another document lodged within the time limit for filing the opposition. In Poland, an effective opposition filed causes that the order is quashed by operation of law pursuant to Article 505<sup>19</sup> § 1 C.C.P. If the defendant raises the opposition after the deadline, the measure shall be rejected, without any examining of the allegations raised, related to the claim. At this background, the question arises whether in such a situation, the defendant, who raised in the rejected remedy an objection referred to in Article 22 subpara. 1 point c) of Regulation No. 1896/2006 can then successfully bring an action for the refusal of enforcement. In my opinion, the question should be answered in the affirmative, if the defendant demonstrates that within the deadline to raise the opposition, he did not know of the existence of an earlier decision. Besides, the objection raised by the defendant in a belated opposition was not examined by the court in the state of origin of the European order for payment. Therefore, the examination of this objection by the court of the state of enforcement in the proceedings for refusal of enforcement shall not raise doubts in terms of the ban on re-examination of the merits of the decision which is to be enforced, binding in these proceedings (*non-revision au fond*).

If the defendant does not object within the time limit, the European payment order becomes of force of law. Referring to the reasons contained in Article 20 subpara. 1 or 2 of Regulation No. 1896/2006 in conjunction with Article 505<sup>20</sup> of the C.C.P., the defendant may submit in the Member State of origin the application for quashing the European order for payment. The submission of this application on the basis of Article 20 subpara. 2 of Regulation No. 1896/2006

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<sup>64</sup> Confer Kropholler, von Hein, supra note 20, pp. 1038-1039; Dietzel, supra note 32, pp. 130-131.

is not time-limited. The literature has expressed the view that the defendant may seek legal protection alternatively or cumulatively either pursuant to Article 22 subpara. 1, or Article 20 subpara. 2 of Regulation No. 1896/2006, in particular, when the claimant filed firstly his claim before a court of another State, which dismissed his action, and then, initiated the action in the European order proceedings and obtained the order<sup>65</sup>. Pursuant to Art 20 subpara. 2 *in fine* of Regulation No. 1896/2006 the defendant is entitled to apply for the revision of the European order for payment before the competent court in the Member State of origin, when the European order for payment was clearly erroneous in the light of requirements laid down in the Regulation, or due to other exceptional circumstances. The literature points to the vagueness of “other exceptional circumstances” and due to this, the danger of making inconsistent interpretations. It is reported that it may refer to the case when the claimant based its claim on false circumstances<sup>66</sup>. In the event, when the defendant uses simultaneously both means of defence, the court of the State of enforcement, if it is Polish, conducting the proceedings for refusal of enforcement may consider a suspension of the proceedings on the basis of Article 1098<sup>1</sup> of C.C.P., based on the above-mentioned reasons.

Other doubts may arise in the situation where on the day the European order for payment is issued, there has been already an earlier decision, which cannot be reconciled with the order, but at the same time, the decision is the subject of proceedings to determine whether it can be recognized in the State of enforcement. In this case, the defendant who has not pleaded the irreconcilability of the European order for payment with the earlier decision, cannot be denied the right to bring an action for refusal of enforcement of the European order for payment, if it was established in the State of enforcement that the earlier decision was liable to recognition, and the relevant establishing decision was issued after the deadline expired for the defendant to file opposition to the European order for payment. The literature has also examined the case where

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<sup>65</sup> Gruber, *supra* note 32, p. 376 and 379.

<sup>66</sup> Fabian, *supra* note 15, p. 221; Dietzel, *supra* note 32, p. 124; Harast, *Proceedings...*, *supra* note 8, pp. 310-311.

the defendant knows of the existence of an earlier decision, which does not meet the conditions to be recognized in the State of origin of the European order for payment and in judicial proceedings in the State of origin of the European order, the irreconcilability is raised of the European order for payment with the earlier decision that does not meet the conditions for recognition in the State of origin of the order. It is indicated that in such a situation, this plea raised by the defendant is pointless, as the court of the State of origin shall not be able to allow it, due to the effects of non-recognition of the earlier decision. Raising the plea that the earlier decision does not fulfil the conditions for recognition in the State of origin of the European order for payment causes also some practical problems. The court of the State of origin of the European order for payment does not have to examine whether the earlier decision fulfills the conditions for recognition in this State. The court of the State of enforcement of the order shall run the examination in the field of recognition of the earlier decision<sup>67</sup>.

In Article 22 subpara. 2 of Regulation No. 1896/2006 yet another basis for refusal of enforcement of the European order for payment has been introduced in the form of the payment by the defendant to the claimant of the amount adjudicated in the order. It is a basis independent from that set out in subpara. 1 of Article 22 of Regulation No. 1896/2006, in particular, Article 22 subpara. 1 point c) of that Regulation does not apply thereto<sup>68</sup>. What matters here is the fact that the defendant has raised the plea of having discharged the obligation in whole or in part. Undoubtedly, this plea may be raised by the defendant in its application/action for refusal of enforcement if he has discharged the obligation after the deadline to file the opposition. If the defendant had discharged the obligation before the European order for payment was issued, then he should have raised this fact in the opposition<sup>69</sup>. A controversy has appeared in the literature whether the defendant may raise this objection in the application/action for refusal of enforcement, if he discharged the obligation after the issuance or service of the European

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<sup>67</sup> Confer Gruber, *supra* note 32, p. 375; Kropholler, von Hein, *supra* note 20, p. 1038. Confer Freitag, *supra* note 38, p. 512; Pernfuß, *supra* note 29, p. 341.

<sup>68</sup> Pernfuß, *supra* note 29, pp. 343-344.

<sup>69</sup> Gruber, *supra* note 32, p. 380; Kodek, *supra* note 21, pp. 703-704.



order for payment on him, but before the lapse of the deadline to file the opposition, whether he should lodge the opposition in such a situation<sup>70</sup>. Article 12 subpara. 3 of Regulation No. 1896/2006 stipulates that the European order for payment shall instruct the defendant that the latter may pay the claimant the amount indicated in the order or oppose the order by lodging with the court of origin his statement of opposition within 30 days of service of the order on him. The defendant is therefore entitled to choose one of the options. If the defendant pays the amount indicated in the order, then, filing his opposition is pointless because there is no justification for a further examination of the case, there is no longer any dispute about rights. Such a dispute may arise between the parties only if, despite the payment by the defendant, the claimant tries to enforce the order in enforcement proceedings. In this case, it is appropriate, in my opinion, to allow the debtor to defend by way of the application/claim for refusal of enforcement<sup>71</sup>. Moreover, as has been stated above, Article 22 subpara. 1 point c) of Regulation No. 1896/2006 does not apply to the grounds for refusal of enforcement dealt with in Article 22 subpara. 2 of the Regulation cited. Furthermore, when the defendant paid the claimant the amount awarded by the European order for payment after the order was issued, but before it was served, then he cannot use the application, referred to in Article 20 subpara. 2 of Regulation No. 1896/2006, because the payment took place after the issuance of the order. In summary, it is clear that the defendant may bring an action for refusal of enforcement under Article 22. subpara. 2 of Regulation No. 1896/2006 if he paid the claimant the amount awarded by the European order for payment after the issuance or service of the order<sup>72</sup> on him. The provision cited does not apply to other events, leading to the extinction of obligations,

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<sup>70</sup> Confer Freitag, Leible, *supra* note 8, p. 2754 et seq.; Preuß, *supra* note 8, p. 26 et seq.; Gruber, *supra* note 32, p. 380; Kodek, *supra* note 21, p. 704; Grzegorzcyk, *supra* note 11, pp. 162-163; Harast, *Proceedings...*, *supra* note 8, p. 373.

<sup>71</sup> Confer Freitag, Leible, *supra* note 8, p. 2754 et seq.; Preuß, *supra* note 8, p. 26 et seq.; Gruber, *supra* note 32, p. 380; Kodek, *supra* note 21, p. 704.

<sup>72</sup> Confer Gruber, *supra* note 32, p. 381. Thus, Grzegorzcyk, *supra* note 11, p. 163. Compare Harast, *Proceedings...*, *supra* note 7, p. 373.

such as raising the plea of set-off or placing the performance at a court deposit<sup>73</sup>.

According to Article 22 subpara. 1 of Regulation No. 1896/2006, the national jurisdiction of the State of enforcement is competent in this case<sup>74</sup>.

## VI. CONCLUSIONS

The application for refusal of enforcement of a European order for payment referred to in Polish law as the action for refusal of enforcement of an enforcement title in the form of a European order for payment with a *feri facias* clause is a specific legal remedy, serving primarily to protect the rights of the debtor. The special nature of this measure, on the one hand manifests itself in the fact that it does not apply to all debtors nor to all enforcement titles, on the other hand, the grounds for this application/claim, the entity entitled to initiate it, as well as, the legal consequences of this initiation are governed by the law of the European Union, and thus have been introduced into the legal systems of the Member States of the European Union in a uniform way.

The national legislature by introducing “action for refusal of enforcement” and not as defined in the European Union law “application for refusal of enforcement”, prejudged by the same the mode of procedure in which it is to be recognized, which should be appreciated. The national legislation for the action is quite terse, but in the context of EU regulations and the principle of procedural autonomy applicable within the European Union it seems to be sufficient. And thus, all questions of interpretation going beyond the issues covered by the EU regulation shall be explained on the basis of national legislation. The introduction of the action for refusal of enforcement to the Code of Civil Procedure does not deprive the debtor of his right to use other legal remedies

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<sup>73</sup> Gruber, supra note 32, p. 379; Pernfuß, supra note 29, p. 342; Sujecki, supra note 15, p. 2047.

<sup>74</sup> Pursuant to Article 5 point 2 of Regulation No. 1896/2006 the notion “the Member State of Enforcement” shall be understood as the Member State, in which the European order for payment is requested to be enforced.

provided for in this code. The action seeks to eliminate first and foremost the so-called “collision of titles”, which the debtor was not able to prevent earlier.

