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EFFORTS Policy Recommendations for Germany [DE]

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I. Introductory remarks

Generally, the German legislator has provided highly detailed implementation laws for the European Enforcement Order Regulation (EEOR), European Payment Order Regulation (EPOR), European Small Claims Procedure Regulation (ESCPR), and European Account Preservation Order Regulation (EAPOR), which can be found in the German Civil Procedure Code (*Zivilprozessordnung*, hereinafter: ZPO). They contain extensive provisions on the various procedures, including on the issuance and enforcement as well possible remedies under the various Regulations. This leads to a comfortable position for practitioners, who can rely on statutory provisions when applying for or appealing against the issuance or enforcement of a judicial measure under the relevant Regulations in Germany. Simultaneously, however, the German implementation laws are highly detailed and sometimes difficult to understand even for trained professionals. Against this background, this template intends to point out possible solutions leading to an even more efficient implementation of the various Regulations in Germany.

II. European Enforcement Order Regulation (EEOR)

In accordance with the general observations mentioned above, the German rules providing for the implementation of the EEOR generally foster the workability of the EEOR in practice. Especially the implementation rules' numerous references to corresponding remedies under national law enables legal operators to rely on procedural mechanism with which they are already acquainted. This strategy provides for familiar procedural steps, for example when the application for the issuance of an EEO-certificate

is dismissed (§ 1081 (3) in conjunction with § 319 (2), (3) ZPO), when applying for a stay or limitation of enforcement (§ 1085 in conjunction with §§ 775, 776 ZPO) or when the debtor applies for a termination of the enforcement proceedings by arguing that substantive objections to the claim have arisen after the judgment was handed down (§ 1086 in conjunction with §§ 795, 767 ZPO).

However, this strive for a maximum degree of similarity between the proceedings for issuance and enforcement of an EEO and established national proceedings creates an unfortunate situation regarding the functional competence for the certification of an EEO. In accordance with the national rules concerning the issuance of a certificate of enforceability (*Vollstreckungsklausel*), the judicial competence for the certification of an EEO lies not with a judge, but with a judicial officer (*Rechtspfleger*). Against this background, the CJEU has held in its *Imtech Marine Belgium/Radio Hellenic*-decision[1] that the "*actual certification itself requires a judicial examination of the conditions laid down by Regulation*" (note 46). This raises the question whether the German implementation rules, which provide for a certification by the judicial officer, are in full conformity with the EEOR. In order to appraise this issue, the role of the judicial officer requires further clarification. In short, the judicial officer's competences in civil matters are largely limited to legally uncomplex procedural matters and formalities. The judicial officer is not a judge and has not completed university studies in law (cf. § 2 RPflG). Against that background, the judicial officer is generally neither competent pursuant to national law nor well-equipped to decide on such complex matters as may be necessary in order to issue an EEO-certificate.

Although the EEOR does not explicitly provide for the competence of judge for certifying an EEO, the assumed comparability of the certificate of enforceability under German national law and EEO-certificate has always been flawed. The EEO-certificate may

[1] CJEU 17.12.2015, C-300/14 (*Imtech Marine Belgium/Radio Hellenic*), note 43 et seq.

indeed replace the national certificate of enforceability, however, the procedural steps necessary for obtaining the EEO-certificate prove to be far more complex than those of its national counterpart. For example, Art. 6 EEOR contains an extensive list of requirements for the certification as an EEO. The provision inter alia obliges the issuing authority to examine the proper application of the European rules on jurisdiction, minimum procedural standards and service. This may give rise to complex legal questions, which may be better assessed by a trained judge. Finally, concerns have been voiced whether judicial officers lack the legal expertise necessary to implement the applicable jurisprudence of European courts and therefore to establish a uniform European practice.[2]

Although the judicial officer's competence under German law to issue the mentioned EEO-certificate has been questionable from the very beginning, the *Imtech Marine Belgium/Radio Hellenic*-decision puts this problem under a new spotlight. As the CJEU has clearly emphasized in its judgement that under the EEOR only a judge can be competent to issue such certificate, the German implementation rules seem to be in sharp contrast to EU law. The CJEU's argumentation closely mirrors the concerns presented above: "*The legal qualifications of a judge are essential to the correct assessment — in a context of uncertainty as to the observance of the minimum requirements intended to safeguard the debtor's rights of defence and the right to a fair trial — of the remedies under national law in accordance with paragraphs 38 to 40 of the present judgment. Moreover, only a court or tribunal within the meaning of Article 267 TFEU is capable of ensuring, by means of a reference for a preliminary ruling to the Court of Justice, that the minimum requirements laid down by Regulation No 805/2004 are interpreted and applied uniformly throughout the European Union.*"

[2] For further arguments, see *Bittmann*, IPRax 2016, 563, 565 et seq.

Therefore, the German legislator would be well advised to implement the CJEU's ruling immediately in order to avoid EEO-certificates which have not been issued in accordance with European standards. In accordance with the implementation laws of other European countries, a judge seems to be far better equipped to deal with possible problems arising from the issuance of an EEO-certificate than a judicial officer. The German legislator has overlooked major differences between the EEO-certificate and the national certificate of enforceability and thus created a solution that cannot fit the standards required under the EEOR. By transferring the judicial competence to issue an EEO-certificate to a judge, the German legislator would remedy an otherwise efficient and elaborate implementation system.

III. European Payment Order Regulation (EPOR)

The German legislator's choice for a concentration of jurisdiction for all EPOR proceedings in Germany at the local court (*Amtsgericht*) of Berlin-Wedding is generally to be acclaimed. The choice for the local court of Berlin-Wedding is especially justified since it is also the designated court for the domestic payment order proceedings in the event that the applicant does not have a place of residence in Germany (cf. § 689 (2) ZPO). This provides for a high level of expertise resulting from already well-established structures fostering workability and practicability of the EPOR-procedure in Germany. It allows for the processing of EPO requests by personnel that routinely deals which such applications and are, therefore, likely to be better equipped. Consequently, concentration of jurisdiction may result in a greater degree of expertise and experience. Especially in view of the complexity of the European regulations and the fact that many legal operators are not likely to be well-acquainted with the various instruments, the concentration of jurisdiction at a single court arguably is to be welcomed.

Certain efficiency gains may, however, be achieved by putting more emphasis on the opportunities of digitalization. Especially regarding the manner in which requests for an

EPO are handled, further steps towards a fully digitalized application system seem promising. Although the request form can already be completed digitally as a PDF-file at present, it will subsequently generally have to be submitted to the court via regular mail. All theoretically possible digital ways of communication (such as sender-authenticated De-Mail, via the special electronic lawyer's mailbox (*elektronisches Anwaltspostfach*), via the notary's mailbox (*Notarpostfach*), via the public authority mailbox (*Behördenpostfach*) or via the electronic citizens' and organisations' mailbox (*elektronische Bürger- und Organisationspostfach*)) are either inaccessible or at least rather complicated to use for ordinary citizens. A solution providing for an uncomplicated digital way of communication with the court, such as via regular email, would therefore close an existing gap and be a relatively simple way to further enhance the workability of the EPOR-procedure in Germany.

The legal framework for such improvement could easily be provided by the state (*Land*) of Berlin, which is explicitly authorized to do so by the federal implementation rules in the ZPO (§ 1088 (2) ZPO). Unfortunately, the state of Berlin has not yet passed any legislation implementing such policies. Therefore, a change of attitude and an increased interest of the state legislator in the foreseeable future would be welcomed.

IV. European Small Claims Procedure Regulation (ESCPR)

Regarding the competence for the ESCP, it can be observed that hitherto only relatively few states (*Länder*) have made use of the possibility of concentration of competence provided for in § 1104a ZPO. Until now, only five out of sixteen German states have opted for a concentration of jurisdiction in one way or another (Baden-Württemberg, Hesse, Northrine-Westfalia, Saxony-Anhalt and Schleswig-Holstein). The assessment of the little use of concentration by the states largely coincides with the appraisal of specialisation in general. Frequently mentioned arguments against such concentration

include the risk of lacking proximity to citizens as well as a general aversion against concentrations of jurisdictions within the German court system.

However, several years of practical experience with the concentration of competence in regard to the EPOR-procedure have underlined the advantages of such a strategy (see above). In view of the complexity of the European instruments and the necessity of expert knowledge, a compelling case for concentration of jurisdiction can be made also with regard to the ESCPR. Especially from a European point of view, such concentration enables a more uniform application of the ESCP due to the accumulation of necessary expertise and the practical experiences gained by dealing with a larger number of proceedings.

Against this background, the current situation can indeed be criticized, and it may be advisable that other states that have refrained from directing ESCPs to a limited number of courts accordingly enact legislation to that effect. Additionally, it has to be emphasized that proximity to citizens is still facilitated through the federal legislator's mechanism of leaving the precise form of concentration of competence to the various states. Therefore, a uniform one-size-fits-all-solution is effectively avoided, paying respect to the German regional differences and leaving enough space for different approaches tailored to the various local needs. This may already be observed by the different concentrations of competence in existence, which range from the concentration of the competence with a single court in the whole state (Saxony-Anhalt, Northrhine-Westfalia), to the division of the competence between different instances of one specific court (Hesse), to several designated courts (Baden-Württemberg, Schleswig-Holstein). Although a number of reasons may be brought forward in support of (or against) each of these implementations, all of them are in principle able to realize the above-described advantages and are therefore preferable to the still predominant absence of any concentration of competence.

A welcomed improvement compared to other implementation systems are the possibilities for communicating with the court through video-conferencing for oral

hearings (§§ 1100 (1), 128a (1) ZPO) and the use of electronic documents with a digital signature (§ 1097 (1) ZPO). Both means of communication are not a novelty for German civil procedure but were rather pre-existing instruments. However, they are in line with the ESCPR's objective to "*encourage the use of modern communication technology*" (Recital 20). Besides these first, welcomed, steps towards a more digitalized proceedings, however, it appears that there is still room for additional use of IT in order to expedite and simplify proceedings.

V. European Account Preservation Order Regulation (EAPOR)

Generally, the German legislator appears to have made arrangements for the vast majority of matters arising under the EAPOR. The national implementation rules have laid down a detailed framework especially in regard to the matters of competence for the various remedies under the said regulation. In practice, competence largely lies with the local court (*Amtsgericht*). However, for the collection of account information as one of the most important characteristics of the EAPOR the German legislator has opted for a two-tier structure. The Federal Office of Justice (*Bundesamt für Justiz*) is the central authority, which in turn has to forward information requests to the tax authorities. While this strategy does result in additional administrative expenditures, it nonetheless seems to be a sensible approach, as the Federal Office of Justice serves as the central authority for many instruments in the field of international legal cooperation and therefore routinely deals with matters of the kind at hand. Therefore, this two-tier structure provides for an efficient allocation of competences.

Although the position of the German rules implementing the EAPOR within the ZPO's chapter about enforcement (§§ 946 et seq. ZPO) seems understandable with regards to the regulation's content, it may have been preferable to place them in the chapter concerning international judicial cooperation along with the rules implementing the other regulations examined in this report. This may have made the implementation rules more

easily detectable for practitioners within the ZPO's framework as well as provided a less disruptive overall impression. After all, the EAPOR (as well as its German implementation rules) are also concerned with international judicial cooperation, even though they also provide provisions dealing with enforceability.

Unfortunately, the German legislator has not implemented any rules concerning the liability of the bank laid down in Art. 26 EAPOR. Although crucial for the effet utile of the EAPOR in practice, this problem has received insufficient attention in the preparation of the implementation rules and is not being addressed in the legislative materials whatsoever. As a consequence, matters pertaining to Art. 26 EAPOR are surrounded by a great degree of legal uncertainty in Germany. This is all the more regrettable, because the liability of the bank is arguably of quintessential importance for the effectiveness of the system created by the EAPOR as a whole. In lack of sufficient incentives, banks may be reluctant to comply with their obligations under the EAPOR altogether or at least in a timely manner, thus allowing the debtor to withdraw or transfer funds. Various ideas as how to make use of general, existing structures of the German legal system in order to fill the existing void have been circulated in legal scholarship and remain the subject of debate.

Some authors support the application of the general provisions on the liability of a third-party debtor by analogy in the event of an attachment of a claim the enforcement debtor has against the third-party debtor to the benefit of the enforcement creditor. In such a situation, the court directs the third-party debtor to refrain from paying to the debtor (§ 829 (1) ZPO) in order for the creditor to be able to collect the amount owed (§ 835 (1) ZPO). Moreover, the third-party debtor has various information duties with regard to the creditor. For their violation, the third-party debtor is liable vis-à-vis the creditor (§ 840 (2) ZPO). Whether this provision can indeed be applied, appears to be questionable.

Other authors argue in favour of the applicability of the general German rules on liability in damages. According to these rules, a person is liable to make compensation to the other

party for the damage arising from the breach of a statute that is intended to protect the injured person (§ 823 (2) *Bürgerliches Gesetzbuch*, hereinafter: BGB). However, it remains unclear whether Art. 26 EAPOR may be characterized as such a rule intending to primarily protect the personal interests of the creditor.

A more radical approach views the absence of any implementation rules as a decision made by the legislator to exclude any liability of the banks altogether. However, this raises the question if such a decision of the national legislator is still within the European framework provided by Art. 26 EAPOR or if this provision obliges the national law to acknowledge the creditor's possibility to hold banks liable in case they do not fulfil their legal duties resulting from Art. 24, 25 EAPOR in a satisfactory manner. It can indeed very well be argued that the mere existence of Art. 26 EAPOR demonstrates the European legislator's intention to create a system providing for a liability of banks in order to efficiently enforce their duties under Art. 24, 25 EAPOR. Therefore, an exclusion of any liability seems to undermine the effet utile of the EAPOR.

A final point of critique concerns the implementation rules on time limits. While not of the greatest significance, the rules may nonetheless negatively affect the user-friendliness of the EAPOR under German law. § 953 (2) ZPO implements Art. 21 (2) EAPOR (to which it also explicitly refers) and, by means of declaratory statement and in line with the EAPOR, sets the time limit for an appeal against a refusal to issue the EAPO at 30 days. In the event that the creditor fails to instigate the main proceedings, the court revokes the EAPO in accordance with Art. 10 EAPOR, which leaves procedural matters to the laws of the Member States (Art. 20 (2) EAPOR). In this respect, § 953 (3) ZPO provides for the remedy of a complaint against the revocation within one month. Consequently, within the implementation provision of § 953 ZPO, two time limits are laid down, i.e. 30 days and one month. On first sight, 30 days and one month appear to be a similar time limit, yet upon closer inspection, they may slightly deviate, at least in some months. The matter is particularly confusing, because different sets of rules apply to the calculation of these

time limits. While time limits in European primary and secondary law are calculated in accordance with the Regulation (EEC, Euratom) No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits – for the present purposes, therefore, also Art. 20 (2) EAPOR and § 953 (2) ZPO –, the calculation of domestic time limits, i.e. also § 953 (3) ZPO, is governed by national law, i.e. in Germany, by §§ 187 et seq. BGB (Civil Code).

VI. Conclusion

All in all, the German implementation rules generally provide for a more than satisfactory implementation regime, fostering workability and effectiveness of the mentioned regulations in Germany. Therefore, room for improvement is only left in respect of specific topics, not concerning the general implementation strategy. However, it has been shown that some potential for improvement indeed exists under German law. In order to bolster the workability and effectiveness of the various European Regulations on cross-border enforcement examined in this study, the German legislator would be well advised to finalize its implementation regime by remedying the described uncertainties.

Summary

The German legislator has provided highly detailed implementation laws for the European Enforcement Order Regulation, European Payment Order Regulation, European Small Claims Procedure Regulation, and European Account Preservation Order Regulation in the German Civil Procedure Code. However, some limited room for improvement remains, especially regarding various uncertainties resulting from the German implementation provisions.

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