UNIVERSITÀ DEGLI STUDI DI MILANO
DIPARTIMENTO DI STUDI INTERNAZIONALI, GIURIDICI E STORICO-POLITICI

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EFFORTS Policy Recommendations for national legislators [HR]

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A. GENERAL RECOMMENDATIONS

I. Recommendations related to visibility

1. Establishing a dedicated official information portal with detailed information on all available instruments under the EFFORTS regulations, with practical tools and guidelines for the parties, lawyers, and other professionals

Current state of affairs: Currently, information about available European legal instruments in the field of enforcement is hardly accessible, insufficient and fragmentary. Some courts publish a few lines on their websites. Notarial chamber and national bar association do not share any information on this topic. All in all, locally available information is even more limited than the information presented at the website of the European Commission. Thereby, the intention to create a set of useful instruments which will facilitate access to justice has not been fulfilled and the users are not encouraged to use these instruments.

What should be done: The information should cover detailed information on the purpose of each instrument, its relation to other similar instruments, and general information on the method of initiation, competent courts, course, as well as costs of those proceedings. The information should be clear and comprehensive. Graphic presentations, such as roadmaps and checklist, need to complement textual content, with simple and easy to use explanations of available options, advantages and disadvantages of each proceeding, ways to initiate it, and foreseeable duration and costs. The dedicated information portal should also present comprehensive statistical and other data on initiated and completed cases per each category (see Recommendation 2), as well as provide an interface with the online case management systems in which relevant parts of proceedings may proceed online (see Recommendation 3).

II. Recommendations related to collection and presentation of information

2. Systematic collection of data on the use of EFFORTS regulation

Current state of affairs: At present, it is rather difficult to obtain information on the practical use of the EFFORTS regulations. The best proof are the attempts of the Zagreb research team to get reliable data from official sources. This proved to be an enormous

effort, as the information is scattered in many local sources. In spite of the fact that Croatia has a digital case management system ("e-spis"), it is not possible to simply extract usable information related to cases conducted under European civil procedure instruments. The cross-border cases where EFFORTS regulations are applied can be traced, to certain extent, within the special court register (P-eu, Gž-eu, Ovr-eu, R1-eu, Pom-eu). However, the judgments are not easily accessible, as most of the decisions are decisions of first instance courts and, as such, they have not been published in publicly available case law databases (*Supra* database, see: http://sudskapraksa.vsrh.hr) , which include most of the decisions of the Supreme Court and appellate courts. Additionally, some cases do not fall within those registers (e.g., the cases involving the application of Brussels Ibis Regulation), which means they are basically untraceable. The cases in which notaries are involved are also practically invisible, as neither Chamber of Notaries nor individual notarial offices do not regularly and officially track and publish information on such cases.

What should be done: The existent case-management system should be reviewed and altered in order to enable simple and easy tracking of information on case-law and the use of EFFORTS regulations. The authorities and the public need to have an easy and instant access to aggregate data (statistics on aggregate number of cases initiated; on their progress and outcome; on average duration, in total and per stage of proceedings) with regular comparisons and systematic tracking of developments. This information needs to be available both in regular official reports and on the dedicated information portal (see Recommendation 1). The individual decisions and relevant case law should also be easily trackable and accessible online in the national portal for publication of judicial decisions. There should be an obligation of the external providers and assistants (such as public notaries) to track and publish all relevant information on the outsourced segments of the proceedings. Their decisions (e.g. certifications of European enforcement orders etc.) must be supplied and included in the national databases and portals. All decisions in such national databases need to be easily accessible, in particular to judges, lawyers, parties and academic researchers. This would not only facilitate the effective use of enforcement mechanisms under EFFORTS regulations, but also contribute to the uniform application of these rules.

III. Recommendations related to improvement of proceedings

3. Enabling online initiation and conduct of proceedings under EFFORTS regulations

Current state of affairs: In the past few years, there was a surge in the use of electronic communication in the context of national and local judicial proceedings. The circle of professional users (lawyers, court experts) as well as legal persons established under Croatian law must use electronic communication instead of paper-based communication, and this circle was gradually expanded. In particular in respect of some forms of

enforcement (issuing of enforcement writs based on qualified documents, i.e. issuance of specific payment orders) the use of electronic forms is mandatory. However, the "e-enforcement" proceedings do not cover cross-border proceedings, in spite of the fact that these proceedings would be even more suitable for digitization, as clearly noted in European policy documents and the very text of the EFFORTS regulations.

What should be done: Within the overall process of digitization of judicial proceedings, special emphasis should be put on the comprehensive digitization of cross-border proceedings under EFFORTS regulations. The users need to be able to initiate online all relevant proceedings, send and receive documents, read files, and monitor the proceedings in electronic form. The online proceedings need to be simplified and must be user-friendly, and their digitization should draw conclusions from negative experiences of the current "e-enforcement" system for national cases, which is neither user-friendly nor effective. In the process of digitization, the role of particular agents needs to be reviewed, in particular with respect to the use of public notaries in enforcement/payment order proceedings, as they are becoming redundant and unnecessary by the use of digital technology.

4. *The implementation rules should be simplified, but also use the discretion the EFFORTS Regulations left to member states*

Current state of affairs: The implementation rules do not constitute an operative basis for broader use of the instruments under the EFFORTS Regulations. They are scattered in different laws and regulations. They were never made a priority, and they formed only a part of the legislative procedural reforms, done mostly to satisfy the minimum requirements required by EU law. In fact, even the EU procedural rules are fragmented, partial, inconsistent, poorly drafted, unnecessarily duplicative and user-unfriendly.

What should be done: The domestic implementation rules should be thoroughly reviewed and re-regulated. They must establish a clear framework for the use of the EFFORTS regulations. They should use the discretion left by the EFFORTS regulations to the member states, which has not been done so far. Finally, the revision of the implementation rules and their perfection should be opened to a wider discussion, and it should take into account the issues faced during the application of the EU rules. Concrete recommendations regarding the desirable changes in the implementation of the individual EFFORTS Regulations are contained in the special part of these Policy Recommendations (see infra, Part B.).

B. RECOMMENDATIONS REGARDING PARTICULAR EFFORTS REGULATIONS

I. General remarks on all implementation rules

Current state of affairs: The implementation rules pertaining to ESCP, EPO, EEO, EAPO and Brussels 1 *bis* Regulations are neither systematic nor well-thought and well-written. They were mainly drafted hastily, with little efforts engaged for consultation of leading academic lawyers or discussion with legal professionals. At the same time, even the text of the EU regulations is difficult to follow and comprehend. The problem is exacerbated by the often catastrophically inaccurate translation of EU regulations into Croatian language (sometimes leading to a situation in which judges need to consult several language versions as Croatian "official" and "authentic" text fails to grasp the key provisions and legal institutes under the regulations). This is because the legislative processes up to 2013 (when Croatia joined the EU) sought to hastily adopt the *acquis*, not paying much attention to the form, and implementing provisions. The implementing rules regarding EFFORTS regulations were simply attached to the national procedural statute which is closest to a particular field. If the regulation established procedural rules for (small) litigation proceedings, implementing rules are generally contained in the act regulating civil litigation; if the regulation deals with enforcement, the rules are in the act that deals with enforcement. However, the quality of implementing rules is at best mediocre: the rules are inconsistent, divergent, and sometimes hard to understand or even contradictory. Further on, implementation of particular regulations was entrusted to various bodies (different ordinary and specialized courts, public notaries, special agencies etc.).

What should be done: Such situation will be difficult to change without a coordinated action both from the national and the EU side. The EU law of civil procedure is rightly perceived as fragmented, partial, inconsistent, poorly drafted, unnecessarily duplicative and user-unfriendly. It takes more than enthusiasm and intrinsic motivation of the national implementers to remedy these deficiencies. If the originally drafted EU law is not user-friendly, it is difficult to expect from national authorities to have pro-active and consistent implementation policies.

II. Brussels I bis Regulation

Current state of affairs: There are no special implementation rules on Brussels I *bis* Regulation in Croatian legislation. The lack of explicit implementing provisions into national procedural law may hamper the visibility of the available remedies and threaten the effective application of the Regulation in the Member State of enforcement.

What should be done: It would be beneficial to prescribe the rules on the person or body competent to certify outgoing domestic titles, on the procedure applicable to the issuance of certificates provided for in the Regulation (procedure *ex parte* and maybe other

procedural aspects regarding the issuance of the certificate such as details relating to the exact scope of the verification carried out by the certifying authority), and the available remedies in case of an erroneous or wrongful decision by the certifying authority, all in accordance with the research outputs of the EFFORTS Project.

III. EEOR

Current state of affairs: Bad drafting of the national implementation rules and initially misleading translation of the term EEO into Croatian, misunderstanding that EEO is the European counterpart of the Croatian enforcement order pose a problem in understanding of the aim of the Regulation and its adequate implementation before Croatian courts.

What should be done: The existence of explicit implementing rules is widely regarded as a helpful tool to enhance predictability and law consistency in the application of the Regulation. As current provision is not clear, it would be useful to define which entity is competent to issue EEO certificates considering that a certification of a judgement is not a mere administrative task but rather an exercise of judicial power. It would be useful to remove some uncertainties regarding the creditor's right to appeal against a refusal to issue certificates under the Regulation.

IV. EOPR

Current state of affairs: The biggest flaw of the proceedings under the EOPR is lack of automated processing, which is already partially available in domestic cases. Since in 2019, there are no specialized courts that deal with the requests for issuance of the EOP, which hinders the unified application of domestic rules. The application of the rules on service may be problematic in case when registered postal service is used, because Croatian post (*Hrvatska pošta d.d.)* applies its own rules, instead of statutory ones. As a result, contrary to the minimum requirements set forth in Arts. 14 and 15 EOPR, in cases when the addressee is not at the address of service, the post officer cannot leave the court document in the addressee's mailbox, nor does the notification that the document can be collected at the local postal office clearly state that the document is a court documents and that certain statutory time limits may have started to run.

What should be done: As explained earlier in general comments (see supra A.III.3), a customized e-filing system should be provided, along with automated system of processing such claims. The decision to abolish the general delegation of EOP proceedings to one particular court should be reconsidered, especially after the e-filing system becomes available. The issues with service by using postal office, which also trouble the domestic proceedings, should be appropriately addressed in the upcoming Act on service in court proceedings, that is currently being drafted.

V. ESCPR

Current state of affairs: Ministry of Justice did not provide for an adequate dedicated office and website which could assist the parties in European small claims proceedings. The legislator did not use its discretionary powers regarding the elements of procedure which could have been further simplified. For instance, there are no special evidentiary rules for the ESCP. The Croatian courts conduct all available evidence proposed by the parties. Furthermore, there are no special interpretative rules on costs allowing for decrease of some of them (e.g., representation where it is in fact not needed). Finally, the appeal against the judgment, which could have been excluded, was made available almost without any restrictions, as in domestic small claim proceedings.

What should be done: As explained earlier in general comments (see supra A.I.1), a dedicated website should be established to facilitate the use of the instruments under EFFORTS regulations, especially regarding the ESCP. The implementation rules should reflect the principle of proportionality emphasized throughout the Preamble of the ESCPR and elaborate on the legal standard of "the simplest and least burdensome method of taking evidence" (Art. 9 ESCPR). The notion of the costs which "were unnecessarily incurred or are disproportionate to the claim" could also be further elaborated, especially in connection with the rules on representation. The decision to allow for an appeal should be reconsidered in accordance with the best European practices. One of the possible options it to make the appeal dependent on the approval of the court, so far the rules contain the appropriate criteria for the court to follow.

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