

Considerations on Revising the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

Associate Professor Alexandrina ZAHARIA, PhD
"Danubius" University of Galati
alexandrinazaharia@univ-danubius.ro

Abstract: The present study focuses on the need for reviewing the Regulation (EC) nr.44/2001 on removing *exequatur* procedure. On the basis of removing this special procedure it lays the Commission's report and the Green Book on applying the rule. It was meant to be within the legal framework of Europeanization of civil procedure and so far it has proved to be an effective instrument for settling litigations emerged in the Member States of the European Union. The rule is the "Queen" of community legislation as regards the procedure in civil and commercial matter in transboundary litigations. However, in applying the Rule it was found that the given judgments in a Member State are not "rightfully" recognized, but it was needed to go through the *exequatur* procedure, which differs from one Member State to another; it requires costs and time that prevent the creditor to recover its claim within a reasonable time. Therefore, the report on revising the Regulation and the Green Book has proposed, among others, the elimination of the *exequatur* procedure (granting enforcement) on passing judgments in the Member States of the European Union. However, eliminating this procedure requires the maintenance of procedural guarantees, such as special review, for fulfilling the protection right of the defendant. Regarding the special review, we consider that it is needed to focus on legislation harmonization of EU member states, in order to have a good judicial cooperation in civil and commercial matters, so that the European citizens enjoy equal legal treatment in the courts of the Member States.

Keywords: *exequatur* procedure, special review, judicial cooperation, the right of defense

The legal framework on judicial cooperation in civil and commercial matters is the Regulation (EC) no. 44/2001 of the Council, on judicial competence and recognition of judgments in civil and commercial matters (Brussels I), which came into effect on March 1st, 2002, named still in work Regulation. It replaced the 1968 Brussels Convention on judicial competence and enforcement of court judgments in civil and commercial matters. The regulation is compulsory with all its elements, and it is applicable in the Member States under the Treaty establishing the European Community. The Regulation contains norms of private international community law according to conflict resolution of judicial competence of private international law jurisdiction of the courts of Member States, the *exequatur* procedure, and it insures the free movement of court judgments, judicial transactions and authentic documents in the European Union. The Regulation is applied in Denmark since July 1st, 2007,

according to the agreement between the Community and Denmark. Regulation is directly applicable in international civil and commercial law matters and the Law no. 105/1992 on establishing the relation of private international law, continues to apply to the extent that the Regulation or the international treaties to which Romania is a party, do not establish another regulation.

What characterizes the Civil Processual Community Law is its supremacy in relation to national civil processual law. That is, it is directly applicable to European Union Member States, having no relevance at the moment of coming into effect the national civil procedure norm, which comes into a conflict with the community civil procedure norm. In other words, the community legal norms can be invoked directly by the parties in the litigation before national courts. The principle of direct effect of community law has its source the Van Gend en Loos decision of February the 5th 1963, provided that the obligations should be accurate, clear, unconditioned and not to call on additional measures such as national or community ones. In this case, the European Court of Justice stated that "the community law (...), creating obligations for private individuals, aims at giving rise to rights that fall within their legal heritage (...) and gives rise to individual rights that internal courts should be obeyed". The national judge must interpret the internal law in a way according to community law. Therefore, if a national regulation is contrary to community stipulations, it is applied the community stipulation. Therefore, it results the need to obey the supremacy principle of the community law. This principle has its source in court judgment Costa Case against Enel, in July 15th 1964: "EC Treaty established its own legal order, integrated in the legal system of Member States, after coming into effect the Treaty and which required their courts". The courts of the Member States may not invoke the principle of reciprocity to evade the appliance of community law, but they will obey the principle of priority in the application and enforcement of Community law. The occurred incidents on the interpretation of regulations must be solved according to community law.¹

The regulation is the "Queen" of community legislation regarding civil and commercial proceedings within the EU legal area, so their main concern is to assess the application in time and to propose the improvement of its rules. In this respect, article 73 of the Regulation provides that: "After at the latest five years from coming into effect this Regulation, the Commission presents it to the European Parliament and to the Economic and Social Council a report regarding the implementation of this Regulation. The report is accompanied where acquired by adaptation proposals to this Regulation.

In the present study we make some considerations on the Commission Report to the European Parliament, Council and Economic and Social Committee on implementing the Regulation and the Green Book on the amendment of Regulation

¹ Octavian, Manolache (2003). *Drept comunitar*, Bucharest: Editura All Beck. p. 164.

(EC) no 44/2001 of the Council on judicial competence and the recognition of court judgments in civil and commercial matters, recently elaborated to its review under the above-mentioned laws. Green Book aimed at consulting the interested parties on how to improve the application of the Regulation regarding the specified matters in the report.

The report was prepared by the Commission on the basis of studies on: the practical application, such as causes deduced from judgment of the Regulation; the analysis of national competence norms, applicable in the case where the defendant does not have its residence in Member State (subsidiary competence); evaluation of possible ratifications by the Hague Community Convention on court choice agreements; enforcement of court judgments in the European Union. This report is accompanied by the Green Book, which contains a total of eight questions relating to the above mentioned studies. The deadline for answering to these questions and proposals, for revising Regulation was established on June 30th 2009. The purpose of reviewing the regulation is to ensure a better judicial cooperation in civil and commercial matters. The report shows that from the beginning (March 1st, 2002) and until the elaboration of the report (regarding its appliance and necessity to improve its rules), through its norms, the regulation was a good start in terms of judicial cooperation in solving transboundary litigations.

Regarding the removal of *exequatur* procedure we will attempt in this paper to answer the questions of the Green Book regarding the elimination of *exequatur* procedure.

Among the principles that are the basis of the judicial cooperation in civil and commercial matter, there are also the recognition of court judgments. By judgment in the sense of regulation it means a given decision in a Member State, regardless the name: decree, decision, order, closure, executory title. The principle of mutual trust in the judicial systems of the Member States of the European Union, requires that court judgments in one Member State should be recognized "by right" in other Member States, without requiring a special procedure. In this respect, Article 33 paragraph 1 of the Regulation provides that "a decision given in a Member State is recognized in other Member States without having to use any special procedure." But in article 34 the Regulation sets out cases in which "a court is not recognized if:

1. the recognition is manifestly contrary to public policy of the requested Member State;
2. if the notification act of the court or any other equivalent act was not communicated or notified to the defendant, who did appear in time and in a manner that would enable them to prepare their defense, if the defendant has not presented an appeal against the decision, when given the opportunity to do so;
3. if it is irreconcilable with a court judgment in a previous litigious in another member state or in a third state of the same party with a cause of the same object, under the condition that the previous court judgment would meet the necessary conditions to be recognized in the origin of the Member State".

Also, in article no 35, the Regulation states other situations where an issued decision by a court of a Member State is not recognized in other Member State. Therefore, the above-quoted text of article 33 paragraph 1, though implying that it was removed the *exequatur* procedure, on the recognition and enforcement of judgments given by courts of EU Member States, in reality, the practice has proved that the interested parties in performing such judgments cannot put into compulsory execution, until the completion of these special procedures. For example, if a creditor of a Member State has a claim to be enforced in Romania (EU Member State) must submit an application for *exequatur* (granting enforcement) to a court in Romania. The creditor of the Member State may elect the residence within the range of activity of the seized court as provided in the Code of Civil Procedure. The financial competence in solving this demand belongs to the court (article 2 paragraph point 1, letter i) in the Code of Civil Procedure). In this sense, there are the stipulations of Government Emergency Ordinance no. 119/2006 on certain measures necessary to apply some community regulation from the date of Romania's accession to the European Union, approved by Law no. 191/2007, under which "the requests for the recognition and granting enforcement of jurisdiction on Romanian territory of judgments in civil and commercial matters, given in another Member State of the Union, under the stimulations of Regulation no. 44/2001 are of the Court competence and jurisdiction" (Article II Article 1). We ask ourselves the question, to which court does the territorial competence belongs to, in settling a recognition request of a decision given in a Member State, following the main procedure? The territorial competence belongs to the court whose constituency resides in whoever refused to recognize the foreign court judgment. The Code of Civil Procedure Project expressly provides that in the case where the competent court cannot be determined due to the fact of not knowing the defendant's residence, the competence belongs to the Bucharest Court. And the Code of Civil Procedure Project uses the term "foreign court judgments are fully recognized by law in Romania", but unlike the Regulation, it expressly stipulates that it is valid only for decisions to which it is not applied the *exequatur* procedure. Therefore, any interested party may apply to the Romanian court by the main or incidental way recognition and enforcement of a granted enforcement of a court judgment made in a Member State. The court with such a request assigns it randomly, it disposes of summoning the parties and it gives its decision, which is subject to appeal. After recognizing that decision, it produces the same effect in the State where it was recognized and where the decision was given, in the initial State. The effects¹ that a court judgment produces are: suppress the court to judge the case; in terms of proving power, the court judgments are treated as authentic instruments; there are enforceable titles (right to seek compulsory execution being submitted to a limitation regulation period) it has

¹ Alexandrina, Zaharia (2009). *Drept procesual civil. Partea specială*, Revised and enlarged edition. Galați: Editura Universitară Danubius.

declarative effect, in principle; it enjoys judged working authority. If the application is accepted, it may be required compulsory execution, which will take place according to the rules established by the Romanian Civil Procedure Code. It may be noted that the enforcement of a given judgment in a Member State takes time, there are costs incurred for translating the decision, lawyer's fees, but also the costs generated by the compulsory execution. It is therefore necessary to revise the Regulations, that is to remove the special procedure. The Regulation expressly provides that a foreign decision may not be revised by the Romanian court on *exequatur* procedure.

Regulation (EC) no. 1896/2006 of 12 December 2006 establishing a European procedure of an order payment specified in Article 19 entitled "Removal of *exequatur* procedure", a European payment that becomes enforceable, without requiring a statement of finding executorial force, both in the initial State and the other Member States. But in this matter, it was covered by the established procedural guaranty in the favor of the defendant to exercise, under the law, the reexamination being possible in exceptional cases. The defendant as reasons may appeal to: not receiving the communication or notification in time to allow the prepare its defense, and that is not imputable; he was prevented from contesting the claim because of force majeure or due to extraordinary circumstances, without being imputed, under the condition that, in both cases, would act promptly. From a simple reading of these reasons it can be seen that although we are in a European payment order, which takes place after a special and fast procedure, to increase its efficiency, the European legislator does not explain the terms "not intervened in useful time", "without ... being able to be imputable", "extraordinary circumstances", "to act promptly". Therefore, the defendant has the opportunity to exercise the reexamination in the courts of the State of origin, which gave the European payment order. In the legal practice of the Romanian courts it was found that the defendants pleading (in bad faith) all sorts of reasons in exercising extraordinary ways to attack (rejected as unfounded and sometimes as inadmissible) manage slow down the completion of the civil trial. Regarding the execution of European payment summons, the regulation provides that the execution procedures are governed by the laws of executing Member State and the conditions under which the defendant may refuse the execution at the competent court of the executed Member State.

Exequatur procedure is eliminated also from disputed and unchallenged claims, the protection and the defense of rights being provided by special reviewing procedure specific to each Member State, which started at the request of the defendant. Regulation (EC) no. 4/2009 of 18 December 2008 on competency, applicable law, recognition and enforcement of judgments and cooperation in matters relating to maintenance obligation, eliminated the procedure of recognition and granting enforcement of judgments in matters relating to maintenance obligations given in a Member State that has obligation according to Hague Protocol of 2007 (article 17).

In matters of insolvency procedure the European Insolvency Regulation (EC) no. 1346/2000 provides that any decision to open insolvency procedure, issued by a court of a Member State competent under the article no 3, is recognized in all other Member States as soon as it produces its effects in "the opening state" (Article 16). Also the closing judgment of the insolvency procedure is recognized in the Member States without fulfilling any formality.

To eliminate the abuse of defendants to prevent the enforcement of court judgments, we consider that their applications must be considered with caution and strictly in the legal provision relating to infringement of defense (as covered in Article 6 paragraph 1 of the European Convention on Human Rights) for the lack of notification or communication. Green Book proposes the elimination of *exequatur* procedure of Regulation, on the grounds that almost all applications with the recognition and enforcement of judgments given by EU Member States are accepted and that the continuation of these stipulations for attending the special procedure would prevent access to justice.

As regards invoking the plea that the decision is contrary to "public policy", in the practice of the Member States' courts it was rarely invoked and accepted. It maintained the text article 35 paragraph 1 point 1 on the public policy protecting the rights of the defendant. For example, case C-7/1998 Krombach.

The reason regarding the judgments given in a litigious between the same parties in the addressed Member State are irreconcilable; also it does not require analysis and nuances, as these issues linked to the prorogation of seized court competence shall be solved by applying the rules of civil procedure relating to *lis pendens* and connectivity. Returning to the addressed theme in this paper, Green Book proposes two questions about the disposal of *exequatur* procedure, namely, whether all the court judgments in civil and commercial matters of EU Member States courts must move freely, without an *exequatur* procedure and, if it eliminated this procedure, it is appropriate to maintain some guarantees, if so, which are these?

We believe that this special procedure must be eliminated so that the judgments in the Member States should be recognized without the *exequatur* procedure, which often requires costs and delays in completing of the civil trial in a reasonable time. When we refer to maintaining the security that allows the removal of *exequatur* procedure, we consider the extraordinary attack ways provided by the Romanian Civil Procedure Code, the legal contest for usual annulment and revision. The ways of attack provided by the regulations are reviewing and reexamination.

Code of Civil Procedure provides in article 317 paragraph 1 point 1 that it can be exercised the legal contest for usual annulment when the summoning procedure of the party for the day when it was judged the case and it was not fulfilled according to the requirements of the law. The summons procedure¹ should

¹ Alexandrina, Zaharia, *op. cit.*, p. 294.

understand the entire complex of operations to be performed: issuing summons, handing it, proof of delivery and submitting the evidence on record. The summons procedural irregularities prior trial is not a reason for exercising the annulled summon. Restricted sense – not summoning for the day the case was judged - it presumes, but also the general one, on total lack of summons. This reason includes communication and decision irregularity.

According to Article 322 paragraph 1 point 8 Civil Procedure Code "the review of final judgments in courts of appeal or non-appeal, a judgment given by a re-appeal court when evokes the fund it may be required... If the party was prevented to appear in court and to notify the court about it, in circumstances beyond his will.

So the part that makes the request for reviewing under point 8 must be the proof of fulfilling all the following conditions: to prove that he was prevented to appear at court and to inform it about such circumstances, it was due to circumstances beyond the party's control. If one of these two conditions is fulfilled, the review request will be rejected as inadmissible. Circumstance beyond the control of the party, raised by reviser, is assessed by the revision court, but the party will have to bring evidence.

Conclusions

By revising the Regulation it aims at simplifying the formalities in the Member States, to which they are submitted in member state, the judgments given in another Member State. Regulating recognition and granting execution of judgments without *exequatur* procedure aims to ensure an efficient legal protection of persons' rights, who have residence in the community area, and also a fluent circuit without their barriers. By eliminating this procedure it seeks to eliminate the costs and time costs. It is important that all the EU Member States have the same standards of competence recognition, granting enforcement of judgments, the direct effect is that of free movement of court judgments, on the base of the principles of mutual recognition, mutual trust to strengthen legal security in the community space. The lack of harmonization of special review procedures in EU Member States results in a degree of uncertainty, for the defendant could not exercise his right of defense against foreign court. Therefore, the review of Regulation is necessary to explain certain terms, such as special review, security guarantees to insure, in every sense of the word, the solution of the case, within a reasonable time and respecting the right of defense of the parties involved in the litigation.

References

Octavian, Manolache (2003). *Drept comunitar*. Bucharest: Editura All Beck.
 Alexandrina, Zaharia (2009). *Drept procesual civil. Partea specială*. Revised and enlarged edition. Galați: Editura Universitara Danubius.