SIMPLIFICATION OF DEBT COLLECTION IN THE EU: BELGIUM

(European Order for Payment Procedure and European Small Claims Procedure)

By Erik De Caluwé,
Dispute Resolution attorney at Baker & McKenzie Brussels

TABLE OF CONTENTS

I. AVAILABLE SUMMARY PROCEDURES FOR RECOVERY OF PECUNIARY CLAIMS

1) In general

The Belgian Judicial Code (hereinafter "JC") has a number of specific procedure or instruments that allow for rapid decision-making and judicial relief. In practice these procedures and instruments are not always as effective as creditors might desire. This is largely due to the fact that the influx and complexity of cases have, in general grown over the years, causing substantial backlog in several of the major Belgian courts. Although a legislative initiative to reorganize and streamline the course of judicial proceedings was aimed at combating this judicial backlog, the relevant Act of 26 April 2007 has often produced an adverse effect.[1]

Due to the fact that the Belgian judicial system is highly solicited, litigating parties often find it difficult to successfully invoke or make use of the available procedures and legal instruments for obtaining the quick relief which is sometimes necessary.

It is not uncommon for summary proceedings to take six months or more, and courts have (or take) substantial discretion in deciding on the applicability of brief pleadings (art. 735 JC) or intermediate measures (art. 19, par. 2 JC).[2]

Especially where provisional judgments are requested in summary proceedings, at the introductory hearing or as intermediate relief, this means that the same claim is basically reviewed twice by courts of the same instance (or even by exactly the same court or judge), be it from a different perspective and with a different power of appreciation. The decision to grant a provisional judgment in summary proceedings, at the introductory hearing or as intermediate relief, is therefore all the more in anticipation of the final decision to be rendered.[3] The Belgian courts are rather reluctant to grant such provisional judgments.

In general, and except for the summary order for payment procedure for claims up to a maximum amount of EUR 1,860 as described in Paragraph I, 2, Belgium does not have a separate "National order for payment" procedure designed specifically for the speedy recovery of pecuniary claims. The summary order for payment procedure that does exist, has not been successful. This is probably due to a number of reasons: [4]

- the need to submit a "*written document emanating from the debtor*" as proof, and the narrow interpretation of what such written document may be;
- the need to send a comprehensive notice of payment, prior to commencement of the summary procedure;
- the fact that the procedure is not open for debts over EUR 1,860.

---

1 Wet van 26 april 2007 tot wijziging van het Gerechtelijk Wetboek met het oog op het bestrijden van de gerechtelijke achterstand [Act of 26 April 2007 aimed at modifying the Judicial Code in view of combating the judicial backlog]; See e.g.: J. ENGLEBERT (ed.), *Le procès civil accéléré? Premiers commentaires de la loi du 26 avril 2007 modifiant le Code judiciaire en vue de lutter contre l'arriéré judiciaire,* Brussel, Larcier, 2007, 267 p. ; B. MAES et al., "Bestrijding gerechtelijke achterstand" [Combating of judicial backlog], in *RABG* 2007/14, 973-984.

2 *Infra,* Paragraph I, 4.

3 J. MICHAËLIS, *Les référés et la juridiction présidentielle*, Prolegomena 14, Brussel, Editions Juridiques Swinnen, 1989, 53.

4 See also G. CLOSSET-MARCHAL, « La procédure sommaire d'injonction de payer : un nouvel essor », *T. Vred.* 1988, 35 e.v.

In comparison with the French "*procédure sommaire d'injonction de payer"*, the main problem might be characterized as insufficient "*inversion du contentieux*" as it is called in French ("inversion of the procedure")[5]. The success of the order for payment procedures in other Member States seems to be due to the fact that the initiative to seize the court and start adversarial proceedings was shifted to the defendant, as well as to the reduced formalism, whereas the Belgian summary order for payment procedure still requires substantial efforts and formalism from the creditor-claimant.

In view of all these elements, creditors seem to prefer normal adversarial proceedings, whereby they will invoke art. 735 JC for uncontested claims, in order to have the case heard at the introductory (or a nearby) hearing. Where this works, the additional benefit is that (unless the defendant does not appear,) no statement of opposition can be filed by the defendant. Only appeal proceedings will be open to the defendant.

To overcome the difficulties mentioned above, various draft bills have been discussed in the Belgian Parliament to modify the summary order for payment procedure.[6] Especially in recent years, initiatives have been taken in response to the implementation of the European order for payment procedure that was introduced by Regulation (EC) 1896/2006 of 12 December 2006. As the European order for payment procedure is only applicable to cross-border cases[7], these initiatives were also aimed at eliminating discrimination between creditors that can use the European order for payment procedure and those who can not. Companies whose activities are limited to the Belgian territory would be at a disadvantage (assuming the competent court would be a Belgian one) in comparison to companies whose activities extend throughout the European Union. Unfortunately, none of the initiatives have led to actual legislation and the extensive work that was done, was abandoned.

Besides the summary order for payment procedure, creditors can also try to obtain relief through normal summary proceedings as described in Paragraph I, 3. Lastly, the Belgian Judicial Code has a number of procedural "instruments" that can be used in the framework of proceedings regarding the merits of the case, to obtain immediate or intermediate relief. These instruments are described in Paragraph I, 4.

2) Summary order for payment procedure

2.1 Unknown and unpopular

Pecuniary claims up to a maximum amount of EUR 1,860 for which the Justice of the peace (or the Police court in case of damages related to traffic or train accidents[8]) are competent, can be handled in accordance with the summary order for payment procedure as laid down in articles 1338-1344 JC. (In Dutch and French the Justice of the peace is called: *Vredegerecht – Justice de Paix.*) The use of this procedure is purely optional.

---

5 R. PERROT, "La procédure française d'injonction de payer", *T. Vred.* 1998, 467.

6 Wetsontwerp tot invoering van een betalingsbevel in het Gerechtelijk Wetboek [Draft Act on the introduction of an order for payment in the Judicial Code], *Parl. St.* Kamer, 2008-09, nr. 52 1287; Adv. RvS 46.295/2 bij het Wetsontwerp tot invoering van een betalingsbevel in het Gerechtelijk Wetboek [Advice from the Council of State regarding the Draft Act on the introduction of an order for payment in the Judicial Code], *Parl. St.* Kamer, 2008-09, nr. 52 1287.

7 Art. 3 Regulation (EC) 1896/2006: "*For the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seized.*

8 See art. 601bis JC.

The amount of EUR 1,860 corresponds to the competence *ratione summae* of the Justice of the peace as laid down in art. 590 JC. Although certain claims are excluded and pertain to the exclusive competence of other courts (such as specific disputes regarding companies, labour disputes,…), no limitations exist regarding the legal basis of the payment obligation, it may concern contractual claims or claims in tort.

The summary order for payment procedure can only be used (1) if the debtor has his/her residence in Belgium[9] and (2) where the claim is supported by a written document emanating from the debtor (not necessarily a recognition of debt). The latter condition (and the strict interpretation thereof in Belgian case law, in spite of a broader intended concept in the preparatory works[10]) limits to a great extent possible claims, and especially claims in tort. There are no required standardized forms, as long as all compulsory information is included in both the notice of payment and the petition.

This procedure can without any doubt be called a downright failure. It is rarely used before the Justices of the peace and virtually inexistent before the Police courts[11].

This did not go unnoticed by the European Commission, as the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation mentions:

> *"In several Member States, however, a specific payment order procedure has proven to be a particularly valuable tool to ensure the rapid and cost-effective collection of claims that are not the subject of a legal controversy. As of today, eleven Member States (Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, Portugal, Spain, Sweden) know such a procedure as an integral part of their civil procedural legislation[5], the French injonction de payer and the German Mahnverfahren being the most famous examples.*
>
> [5] *With the exception of Belgium where due to some structural defects (e.g. the payment order has to be preceded by a formal notice) the procédure sommaire d'injonction de payer procedure has turned out to be more cumbersome than ordinary civil proceedings and has, therefore, not met broad acceptance among legal practitioners."*[12]

---

9 Art. 1344 JC; This article stems from a time before the European legislative unification efforts (1967). Its formulation does not seem to be ideal. In the draft proposal for reform (*Parl. St.* Kamer, nr. 52 1285), the competence of the court was to be determined on the basis of the domicile or residence of the defendant. This would have also led to the consequence that only claims against debtors with domicile or residence in Belgium could be resolved through the Belgian summary procedure. As the draft reform was inspired on the European order for payment procedure (be it with a number of additional defendant-friendly requirements), this would have thus (at least to a certain extent) levelled the playing field between creditors that can use the European order for payment procedure and those who can not.

10 *Infra*, Paragraph I, 2, 2.2(ii); The preparatory works regarding this provision mentioned an ordering slip, a receipt of delivery signed by the defendant and an accepted invoice as examples of valid documents.

11 C. CAPITAINE, "Réflexions sur la procédure sommaire d'injonction de payer", in *T. Vred.* 2004, 142-147.

12 Green Paper of 20 December 2002 on a European order for payment procedure and on measures to simplify and speed up small claims litigation, 9.

Several attempts to revive the Belgian summary order for payment procedure have been made, including a draft reform by Professor de Leval, that was inspired on French law.[13]

As mentioned above, a number of actual legislative initiatives has been taken (for example: following the implementation of the European order for payment procedure that was introduced by Regulation (EC) 1896/2006 of 12 December 2006), but none of these efforts has ever reached the final phase.

2.2 Stages and elements of the procedure

The existing procedure has therefore remained unchanged and can be summarized as follows:

i) Prior notice of payment

A notice of payment must be sent to the debtor either by bailiff's writ or by registered letter with proof of reception, prior to the filing of the petition.

This notice letter must include:

1) the text of the articles 1338-1344 JC;
2) a notice to pay within fifteen days as from the service or issuance of the letter;
3) the amount claimed;
4) indication of the judge before whom the claim will be brought in the absence of payment.

These requirements are sanctioned by nullity of the notice and inadmissibility of the subsequent proceedings in case of non-compliance.[14]

ii) Petition to the Justice of the peace (or the Police court)

Within a fifteen-day term commencing on the expiry date of the (fifteen-day) deadline the debtor is granted to pay, two written copies of a petition need to be filed with the Justice of the peace (or the Police court). This petition can be submitted directly to the court registry, or can be sent be to the court registry by the lawyer representing the creditor.[15] The petition must include:[16]

1) the exact day, month and year of the petition;
2) the applicant's name, surname, profession and domicile, as well as of his legal representatives;
3) the subject of the claim and a precise statement of the amount claimed, with specification as to the composing elements of the claim and the basis thereof;
4) indication of the competent court;
5) the signature of the applicant's lawyer;
6) optional: the reasons why the applicant is opposed to any deferral of payment.

The following exhibits need to be attached to the petition:

---

13 G. DE LEVAL, "La procédure sommaire d'injonction de payer dans le Code judiciaire belge : propositions de réforme – De Belgische summiere rechtspleging om betaling te bevelen : voorstel tot hervorming", in *T. Vred.* 1998, 468-476.

14 Art. 1339 JC ; Vred. Roeselare 12 April 1994, *T. Vred.* 1994, 392.

15 Art. 1341 JC.

16 Art. 1340 JC.

1) a copy of the written document emanating from the debtor on which the claim is based. Documents that have not been accepted in case law are: order form[17], invoice[18], financing contract, lease contract or insurance contract.[19]

   Considering this narrow interpretation, the applicability of the procedure is very limited.[20]

2) the bailiff's writ or registered letter containing the obligatory prior notice of payment (and where a registered letter was sent: proof of reception or of refusal of the registered letter, and a statement proving that the debtor is registered at the address that is mentioned in the population register).

iii) Decision by the Justice of the peace (or the Police court)

Within fifteen days as from the filing of the petition, the Justice of the peace (or the Police court) renders its decision in closed session (without hearing the defendant).[21] If the petition is granted, the judgment will have the same consequences as a judgment by default.[22]

When the decision is served upon the defendant, the bailiff's writ needs to contain a copy of the petition and must state the deadline by which the debtor should file a statement of opposition, the competent court for such opposition, and the due form that must be respected. Finally, the debtor must be warned that if he/she does not file a statement of opposition or appeal, he/she can be forced to pay by all legal means available. Non-compliance with these requirements is sanctioned by nullity.[23]

The decision is not provisionally enforceable, so in case of timely filing a statement of opposition or appeal, it cannot be enforced upon the defendant.[24]

iv) Possibility for the defendant to file a statement of opposition or to lodge an appeal

A statement of opposition can be filed, or appeal can be lodged against the court decision in accordance with the normal procedural rules as laid down in art. 1047 – 1049 JC (statement of opposition) and art. 1050 – 1072bis JC (appeal).

A statement of opposition is filed by bailiff's writ, comprising summons of the creditor before the original court, or by voluntary appearance. In general, appeal can be lodged by writ of summons or by filing a petition to appeal with the court, or, against all parties present or represented during the appeal proceedings, by submitting a brief of arguments.

---

17 Vred. Fexhe-Slins 26 maart 1981, *JL* 1981, 175, note G. DE LEVAL.

18 Vred. Oostende 28 november 1997, *TWVR* 1997, 44; Vred. Hannut 3 november 1983, *JL* 1984, 247, note G. DE LEVAL.

19 Vred. Wezet 29 juni 1987, *JL* 1987, 1011.

20 Whereas the preparatory works regarding this provision mentioned an ordering slip, a receipt of delivery signed by the defendant and an accepted invoice as examples of valid documents; *Supra*, Paragraph I, 2, 2.1.

21 Art. 1342 JC.

22 Art. 1343§1.

23 Art. 1343§2 JC.

24 Art. 1399, al. 2 JC.

As a specific feature in the summary order for payment procedure, and contrary to art. 1047 JC, a statement of opposition can also be filed by filing a petition, which will be communicated by the court clerk to the claimant and his/her lawyer by judicial letter.[25]

v) Costs of the order for payment procedure

The procedure is introduced via a unilateral petition. This leads to the applicability of art. 269/2 of the Belgian Code of Registration Rights, which provides for a docket right of EUR 31 that must be paid by the claimant.

Furthermore, art. 1017 JC provides that each final judgment orders the unsuccessful party to the costs. Art. 1018 JC provides that these costs comprise:

- all docket and registration rights;
- the price and fees for judicial acts;
- expenses regarding investigative measures, such as expert fees;
- travel and accommodation costs for court magistrates and clerks if their journey was ordered by the judge;
- the procedural indemnity.

The unsuccessful party will therefore also be required/ordered to indemnify the claimant for the docket rights he/she has paid. Furthermore, the unsuccessful party will be required/ordered to pay a procedural indemnity to the claimant as provided under art. 1022 JC. This normally is the most significant judicial cost. The successful party is awarded a procedural indemnity, which is considered to be a lump sum allowance for attorney's costs and fees. This procedural indemnity is only granted in cases where an attorney has intervened.

Although there is discussion on whether or not a procedural indemnity is applicable in case of unilateral petitions, the procedural indemnity definitely applies with regard to the summary order for payment procedure as the Royal Decree of 26 October 2007 mentions this procedure explicitly in its article 5.[26]

Where the claim is denied, as there is no defendant actually appearing in the procedure, no procedural indemnity can be granted to the defendant.

The basic, maximum and minimum amounts of the procedural indemnity have been determined by the Royal Decree of 26 October 2007. The procedural indemnity is determined in relation to the amount of the claim and can be modulated by the judge at the request of the parties on the basis of four criteria:

- financial capacity of the unsuccessful party (only in order to lower the amount of compensation);
- complexity of the case;
- contractually provided compensations for the successful party;
- the apparently unreasonable character of the situation.

The amounts relevant to the summary order for payment procedure are the following:

---

25 Art. 1343§3, al. 2 JC.

26 Art. 5 KB 26 October 2007, *BS* 9 November 2011, 56834-56836; See also H. BOULARBAH, *"Requête unilatérale et indemnité de procédure"*, note under Liège 29 April 2008, *JT* 2008, 367-368.

Claim	Basic amount	Minimum amount	Maximum amount
From € 0 to € 250.00	€ 165.00	€ 82.50	€ 330.00
From € 250.01 to € 750.00	€ 220.00	€ 137.50	€ 550.00
From € 750.01 to € 2,500.00	€ 440.00	€ 220.00	€ 1,100.00

Article 5 of the Royal Decree of 26 October 2007 provides however that the minimum amounts will always apply to the unilateral phase of the procedure.

As a final element, it should be mentioned that in order to obtain the official copy of the judgment (for enforcement purposes) an amount of EUR 1.75 / page must be paid.

* * *

The use of the summary order for payment procedure is entirely optional. Although no statement of opposition can be filed, or no appeal can be lodged by the creditor where the petition is denied, he/she can pursue the entire claim through ordinary proceedings, notwithstanding the rejection of the claim in the course of the summary order for payment procedure. In case of partial rejection of the claim, the creditor can also pursue the entire claim through ordinary proceedings, but only insofar the decision has not yet been served upon the defendant.[27]

3) Summary proceedings

Although this possibility is not explicitly provided for in the Belgian Judicial Code, where urgency is involved, the President of the First instance court or the Commercial court can grant a creditor in summary proceedings a provisional judgment against a debtor when the due and payable nature of the claim cannot be reasonably disputed.[28] (In Dutch and French, summary proceedings are called: *Kort geding – Référé.*)

Provisional judgments can also be granted in relation to liability claims, family allowances,…[29]

Urgency can also be invoked in cases where the creditor is in a precarious financial situation.[30]

In order to obtain a court judgment in summary proceedings, a sufficient "appearance of rights" must be demonstrated (*"fumus boni iuris"*).[31]

---

27 Art. 1343§4 JC.

28 J. LAENENS, Art. 584 Ger. W. in X., *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* [Judicial law. Comment by article with overview of case law and legal theory], 9.

29 D. LINDEMANS, *Kort geding* [Summary proceedings], Antwerpen, Kluwer, 1985, 320-322.

30 Brussels 25 October 2007, *JT*, 2008, 10; G. BOURGEOIS, "De provisie in kort geding, rechtsvergelijkend" [The provision in summary proceedings, comparative], *TBBR* 1988, 232-247.

31 Cass. 16 November 1995, *Arr. Cass.* 1995, 1018 ; E. KRINGS, "Het kort geding naar Belgisch recht" [Summary proceedings under Belgian law], *TPR* 1991, 1059.

Although it is generally accepted nowadays that a judgment for payment of a provisional amount can be obtained through summary proceedings, actual court judgments of this nature remain an exception. Case law and legal theory remain rather hesitant with regard to provisional judgments for pecuniary claims and tend to reserve summary proceedings for mere conservative measures (e.g. suspension of the consequences of a disputed legal operation).

It is prohibited for the summary judge to resolve the dispute in a definitive way and his/her decision does not bind the court that will afterwards have to decide on the merits of the case.[32] No irreparable disadvantage may be caused to the debtor. In order to counter a risk for insolvency of the creditor, the summary court can order the creditor to post security.[33]

4) Brief pleadings at the introductory hearing (art. 735) and provisional settlement between the parties (art. 19 par. 2)

The Judicial Code provides in art. 735 that in cases where only brief pleadings are necessary, these cases can be heard at the introductory hearing or at a nearby hearing where this was requested in the introductory act or by the defendant. Art. 735 JC further provides that the case will be heard on the basis of brief pleadings where the parties agree to this. Where the parties disagree, art. 735 JC still provides that brief pleadings will apply in five specific cases, including the recovery of undisputed claims, requests for deferral of payment and claims as mentioned in art. 19, par. 2 JC.

Art. 19, par. 2 JC refers among others to the possibility for a judge to provisionally settle the situation between the parties before coming to a final decision. A judgment to pay a provisional amount can be granted on the basis of art. 19, par. 2 JC. A request for such intermediate relief can be introduced at any stage of the proceedings, and thus not only at the introductory hearing.

The actual handling by courts of requests to hear a case at the introductory hearing tends to differ from jurisdiction to jurisdiction, as it might prove more difficult to get a case heard on the basis of brief pleadings in jurisdictions with a higher influx of cases. Some courts send claims for which art. 735 JC is invoked to a specific chamber, but this is not general practice.

Art. 19, par. 2 JC on the other hand is mostly used for the appointment of court experts or other investigative measures, rather than for provisional judgments. It needs to be noted that there is a direct correlation to the use of art. 19, par. 2 JC (in combination with art. 735 JC) and the occurrence of summary proceedings. Both procedures/instruments are aimed at obtaining intermediate relief, and although summary proceedings, contrary to a claim under art. 19, par. 2 JC, require that urgency is involved, if a party is unable to obtain intermediate relief under art. 19, par. 2 JC, this party will be inclined to initiate summary proceeding instead.[34]

5) IT operational options

On July 10, 2006 the Act on Electronic Procedure was voted, and on August 5, 2006 the Act on Electronic Evidence, changing several articles of the Belgian Judicial Code relating to

---

32 Art. 1039 J.C.; Cass. 12 January 2007, *DAOR* 2007, 455, *Pas.* 2007, 71.

33 J. MICHAËLIS, *supra n. 3*, 53.

34 E. BOIGELOT, "Les débats succincts et les mesures avant dire droit", in J. ENGLEBERT (ed.), *supra n. 1*, 64; D. LINDEMANS, *supra n. 29*, 322; P. LEMMENS, "De voorlopige regeling van de toestand der partijen door de rechter ten gronde, na een behandeling ter inleidende zitting" [The provisional resolution of the condition of the parties by the judge on the merits, after the handling of the case at the introductory hearing], note under Rb. Antwerpen, 24 mei 1984, *RW* 1984-1985, 2011.

the notification and service of documents by electronic means. In these Acts equivalence is found between electronic and postal mail and reference is made to the judicial data system Phenix (as the IT-project for the Judiciary was called). Unfortunately, after years of investment, the Phenix project failed. It re-emerged from its ashes under the name 'Cheops'. The Act and actual informatization has not yet been implemented and executed in practice. Notwithstanding the fact that this is a valuable legal initiative, the date of commencement of most of the articles in these Acts has been postponed to January 1, 2015, and further postponement is not unlikely.

Currently, no specific IT operational options are available for the recovery of pecuniary debts.

II. BELGIAN NATIONAL ORDER FOR PAYMENT PROCEDURE

Apart from the summary order for payment procedure for claims up to a maximum amount of EUR 1,860 as described above in Paragraph I, 2, Belgium does not have a separate "National order for payment" procedure that is designed specifically for the speedy recovery of pecuniary claims. We refer to Paragraph I, 2 for the description of the Belgian summary order for payment procedure for claims up to a maximum amount of EUR 1,860.

Attempts have been made to introduce a national order for payment procedure in Belgian law, which - alas - all have stranded. The last attempt failed because the Belgian government fell before the adoption of the final text, although significant progress had been made in the legislative process.[35]

Once a new government was in place, the draft bill was not (and has not yet been) reintroduced, although discussions would be ongoing.

III. IMPLEMENTATION OF ORDER FOR PAYMENT PROCEDURE REGULATION (1896/2006) IN BELGIUM

1) Competent court

In its communication to the Commission, Belgium stated that the courts which will have jurisdiction to issue a European order for payment will be:

- the Justice of the peace (*Vrederechter / Juge de paix*)
- the First instance court (*Rechtbank van eerste aanleg / Tribunal de première instance*)
- the Commercial court (*Rechtbank van koophandel / Tribunal de commerce*)
- the Employment Tribunal (*Arbeidsrechtbank / Tribunal de travail*)

Their substantive and territorial jurisdiction is laid down in the Belgian Judicial Code.[36]

Belgium has not centralized the issuance of European orders for payment. The internal territorial competence is governed by the Belgian Judicial Code.

The distribution of jurisdiction does not seem to pose any specific problem relating to access to justice and corresponds with the normal distribution of jurisdiction amongst Belgian courts. The preoccupation regarding access to justice as mentioned in consideration 12 of the

---

35 Wetsontwerp tot invoering van een betalingsbevel in het Gerechtelijk Wetboek [Draft Act on the introduction of an order for payment in the Judicial Code], *Parl. St.* Kamer, 2008-09, nr. 52 1287.

36 Art. 556 to 663 JC.

European Order for payment Procedure Regulation (hereinafter the "Regulation") seems to have been adequately met.

However, the overall amount of different courts that have competence seems too high, and is not user-friendly. Where competence would be more concentrated and attributed to a smaller amount of courts, this would also be beneficial for the acquisition of expertise by the relevant courts.[37]

With regard to the review procedure, no specific procedure exists under Belgian law. In its communication to the Commission, Belgium stated that a review procedure into the Belgian Judicial Code was under discussion and that information on this subject would be communicated at a later date.

So far no legislation has been passed to implement the Regulation into Belgian legislation.

2) Application for the European Order for payment

In the absence of any specific legislation to implement the Regulation in the Belgian legal system, the issues that may arise will need to be examined under the Regulation itself, and where the Regulation itself is silent, ordinary Belgian procedure law will apply.

As no specific legislation is available, nor any guidelines in circular letters or otherwise, the application of the Regulation by the courts and tribunals has been divergent and several questions arise both on a practical level[38] as with regard to matters of principle.[39]

This is why the Belgian High Council of Justice has issued at its own initiative a memorandum with advice on a number of questions.[40] This memorandum does not cover all issues that have arisen, but has the merit of at least making a serious effort to offer avenues and advice with regard to some of the legal uncertainties. The High Council of Justice has even organized a "*tour de table"* (a survey) with the court instances concerned regarding the amount and course of procedures under the Regulation. Although only 75 out of 258 court instances have responded, the information gathered is interesting.[41]

The advice from the High Council of Justice is not binding, but nevertheless very useful as it tackles particularly some of the difficulties that exist in the application of the Regulation. We will therefore refer to this advice at various occasions in the discussions below.

2.1 Accepted means of communication and available to the courts

---

37 See also, Ambtshalve advies over de toepassing van het Europese betalingsbevel, goedgekeurd door de algemene vergadering van de Hoge Raad voor de Justitie op 26 januari 2011 [*Ex officio* advice on the application of the European order for payment, approved by the general assembly of the High Council of Justice on 26 January 2011], via http://www.csj.be/nl (also available in French), (hereinafter referred to as the "**HRJ Advice**"), 4.

38 For example it was not clear how exactly court registries needed to register applications. For this rather technical discussion we refer to G. WAEGEBAERT, "Samenvattende nota aangaande de Europese betalingsbevelprocedure" [Recapitulating note regarding the European order for payment procedure], in A. DE GROEVE et al., *Het Europees betalingsbevel en de geringe vorderingen* [The European order for payment and the small claims], mijnwetboek.be, 2009, 103-104.

39 *Infra,* Paragraph III, 3.

40 HRJ Advice, via http://www.csj.be/nl.

41 HRJ Advice, 17-18.

In its communication to the Commission, Belgium stated that the only means of communication for the purpose of the Regulation and available to the courts are (i) delivering an application for a European payment order using the model form A in Annex I, together with the supporting documents, directly to the registry of the court which has jurisdiction or (ii) sending the application for a European payment order using form A, together with the supporting documents, by registered post to the court which has jurisdiction.

In line with what was mentioned above, the application cannot be submitted electronically, nor does there exist any alternative electronic communication system in the Belgian courts.[42]

2.2 Admissible language of the application

It needs to be noted that the Regulation does not have any specific provision regarding the language of the application, nor does it provide in a comprehensive framework regarding the use of languages. The standard form A does however mention that the form must be completed in the language, or one of the languages that is accepted by the court to be seized.

Furthermore, model form B in Annex II of the Regulation provides for the possibility for the court seized to request the use of the correct language.

In the absence of any specific legislation implementing the Regulation in Belgium, legal theory confirms that the claimant must use the language of the court to be seized.[43]

2.3 Number of copies of the application to be submitted

Submission of one copy of the application is generally accepted by the Belgian courts. Art. 7 as well as model form A in Annex I of the Regulation also suggest that one copy is sufficient.

There is no specific legislation implementing the Regulation in Belgium, so no contrary Belgian law provisions exist in this respect.

2.4 The amount of the penalties in case of deliberate false statements by claimant

No specific Belgian legislation exists with regard to the specific civil or penal sanctions that would arise out of deliberate false statements in the application. The draft act that was aimed at introducing a Belgian order for payment in the Belgian Judicial Code (which was never adopted) indicates that the Belgian legislator only contemplated penal sanctions.[44]

No actual decision on sanctions are known to us under art. 7(3) of the Regulation.

3) Issuance of the European Order for payment

3.1 Examination and issuance of the application

The extent of the examination by Belgian courts that have been seized to issue a European Order for payment tends to vary from jurisdiction to jurisdiction.

---

42 *Supra*, Paragraph I, 5.

43 H. STORME, "Europese betalingsbevelprocedure" [European order for payment procedure], *NjW* 2009, 111; B. HESS and D. BITTMANN, *IPRax* 2008, 307; A. RÖTHEL and I. SPARMANN, *WM* 2007, 1102; B. SUJECKI, *EuZW* 2007.

44 See also H. STORME, *supra n. 43*, 105.

In its advice, the High Council of Justice confirms that the merits of the case should only be examined to a limited extent, as the competent court should only check the merits of the case marginally. Only those applications that are clearly unfounded must be rejected.[45]

Some examples (e.g. those that have been described by bailiff Karolien Dockers) clearly illustrate the varied extent of examination:[46]

i) Procedural representation of claimants by a bailiff or collection agency

A specific discussion has arisen in Belgian legal theory and case law with regard to the possibility for bailiffs (i.e. the Belgian competent enforcement authority) to represent claimants in the framework of an application for a European Order for payment.[47] Art. 7(6) of the Regulation provides that the application shall be signed by the claimant or, where applicable, by his/her representative. Art. 24 furthermore provides that representation by a lawyer or another legal professional shall not be mandatory for the claimant in respect of the application for a European order for payment.

In an effort to open a new market, the bailiffs (who have traditionally always been excluded from representing clients directly before the court) have interpreted the Regulation as authorizing them to sign and submit an application for a European order for payment on behalf of their client, the claimant.

This position has however not always been followed by the courts seized, e.g.:[48]

- the Justice of the peace of the district of Tongeren-Voeren (section Tongeren) issued a model form D (decision to reject) on the basis that a bailiff is not a legal representative under Belgian law;[49]
- the Antwerp Commercial court and the Turnhout First instance court refused the submission of an application by a bailiff;
- the Brussels First instance court used a model form B to request clarifications with regard to the submission by a bailiff of the application.[50]

Some courts use the model form B to notify the claimant of his/her refusal to accept the submission of an application by a bailiff. Most courts however seem to accept the bailiff as a representative of the claimant and thus accept submission of an application by a bailiff.[51]

The Justice of the peace of Mouscron-Comines-Warneton issued a very interesting decision on 29 June 2010 with regard to the representation of a claimant by an attorney, a bailiff or a

---

45 Art. 11 Regulation; HRJ Advice, 8.

46 K. DOCKERS, "Het Europees Betalingsbevel EBB – De praktijk en de visie van de gerechtsdeurwaarder" [The European order for payment - The practice and view of the bailiff], *Tijdschrift@ipr.be* 2010, 111-121.

47 K. DOCKERS, *supra n. 46*, 113-114; M. PERSIJN & K. SLABBAERT, "Verordening sluit deurwaarder niet uit van Europees betalingsbevel" [Regulation does not exclude bailiff from the European order for payment] in *Juristenkrant* 15 juni 2011, 10.

48 K. DOCKERS, *supra n. 46*, 113-114.

49 Justice of the peace of the district of Tongeren-Voeren (section Tongeren), form D dated 27 November 2009, *Tijdschrift@ipr.be* 2010, nr. 2, 72-74.

50 First instance court of Brussels, form B dated 12 March 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 92-94.

51 K. DOCKERS, *supra n. 46*, 115.

collection agency.[52] The court decided that the combined reading of art. 7(6) and 24 of the Regulation can only be interpreted as allowing attorneys and bailiffs to act on behalf of their clients in legal proceedings. In his annotation to this decision, bailiff P. Gielen referred to a considerable amount of unpublished decisions confirming this position.[53]

Besides the bailiffs, the debt collection agencies have also tried signing the application for a European order for payment and act on behalf of their clients in this respect. The said decision from the Justice of the peace of Mouscron-Comines-Warneton rejected however such an application and declared it inadmissible. It is interesting to note that this decision was laid down, not in the standard form D but in an ordinary judgment. The court referred explicitly to consideration 11 and stated that whereas the use of standard forms is desirable, it is not an obligation subject to nullity in case of non-compliance. Given the necessity to motivate the decision thoroughly, the court did not make use of the standard form D in this specific case.[54]

In its advice, the High Council of Justice referred to art. 728 JC, which determines specifically those persons that can represent the parties under Belgian procedural law and which excludes representation by bailiffs, in house lawyers or debt collection agencies. The High Council of Justice believes that this rule would best also be applicable to the application for a European order for payment or statement of opposition and states that this matter should explicitly be resolved in an act implementing the Regulation.[55]

ii) Substantive and territorial jurisdiction

Where under the rules of jurisdiction of Regulation 44/2001, a claimant needs to file an application under the Regulation in Belgium, as the internal Belgian jurisdiction has not been centralized, he/she might make a mistake with regard to Belgian internal jurisdiction rules in view of the following issues: [56]

- *ratione loci*: the application might be filed with a court that lacks territorial jurisdiction (e.g. before the Antwerp Commercial court instead of the Brussels Commercial court), although due to the availability of a tool on the website of the European Judicial Atlas in Civil Matters, such errors should be limited;

- *ratione materiae*: the application might be filed with a court that lacks substantive jurisdiction in view of the (1) subject matter (e.g. before the First instance court instead of before the employment tribunal), (2) the capacity of the parties (e.g. before the Commercial court instead of before the First instance court in case the defendant is not a merchant), or (3) the amount of the claim (*ratione summae*: e.g. if a claim exceeding 1,860 EUR is filed with the Justice of the peace).

Under Belgian procedural law, a judge can only raise *ex officio* his/her lack of jurisdiction in case:

---

52 Vred. Mouscron-Comines-Warneton 29 June 2010, *JT* 2010, with annotation by P. GIELEN, "L'injonction de payer européenne: premières applications en Belgique", 522-524.

53 P. GIELEN, "L'injonction de payer européenne: premières applications en Belgique", annotation to Vred. Mouscron-Comines-Warneton 29 June 2010, *JT* 2010, 523-524.

54 It is interesting to note that the Labour Tribunal of Tournai also used the same argument to issue an ordinary judgment, rather than using standard form D to reject the application for a European order for payment: Arbrb. Tournai 25 October 2010, *JT* 2011, 38.

55 HRJ Advice, 6.

56 See also *Infra*, Paragraph V, 3, 3.1(ii)

- a rule on jurisdiction was violated that is considered as a rule of public policy / public order. This is the case for rules of jurisdiction *ratione materiae;*[57] *or*

- where the defendant does not appear (even if the rule on jurisdiction that was violated is not considered as a rule of public policy / public order).

  Where a judge raises such lack of jurisdiction argument *in absentia,* under Belgian procedural law, he/she must refer the case to the *"Arrondissementsrechtbank / Tribunal d'Arrondissement"*, who will have to take a decision with regard to jurisdiction.[58]

Under art. 11(1) of the Regulation, where the claim appears to be clearly unfounded, the application shall be dismissed. Art. 9(1) also refers to inadmissibility. According to consideration 16 of the Regulation the court should examine the application, including the issue of jurisdiction, on the basis of the information provided in the application form. This would allow the court to examine prima facie the merits of the claim and inter alia to exclude clearly unfounded claims or inadmissible applications.

Under Belgian law however, no preliminary (*prima facie*) review by the court exists. Whereas "*clearly unfounded*" seems to concern the merits of the claim, will a claim be considered inadmissible in case of lack of jurisdiction? Art. 26 refers to national law for all procedural issues not specifically dealt with in the Regulation. Under Belgian procedural law, there is a clear difference between inadmissibility and lack of jurisdiction. Inadmissibility concerns the conditions for exercising rights, which might be affected by e.g. statutes of limitations, the principle of *res iudicata*,…[59] Jurisdiction concerns issues as described above (*ratione loci, ratione materiae*).

We therefore believe that if an application was submitted to a court that lacks (internal) jurisdiction in view of national procedural rules and such lack of jurisdiction should be raised *ex officio*, the judge should give the claimant the opportunity to explain itself (or even, suggest to withdraw the claim) under art. 9 of the Regulation, by sending him the standard form B. Lack of internal jurisdiction does not seem to be a cause for dismissal due to inadmissibility under art. 9(1) or 11(1) of the Regulation however, whereas lack of jurisdiction under Regulation 44/2001 might be viewed otherwise.

The Regulation precludes in our view the obligation for the court seized to refer the case to the *"Arrondissementsrechtbank*". The aim to create a level playing field taking into account the principles of simplicity, speed and proportionality indeed seems contrary to such obligation.

If a jurisdictional problem occurs, according to the High Council of Justice, it should be possible to use the standard form B to establish this problem and to allow the claimant to take position in this respect. The High Council of Justice considers that it should be possible for the court seized to refer the claim to the court with jurisdiction in accordance with article 660 JC.[60]

Such a solution could be seen as a rectification of the indication of the court in the application.[61] Although such referral does not seem to be a mechanism that is available under the Regulation, the general Belgian rules on jurisdiction are applicable and referral is not

---

57 Rules of jurisdiction *ratione loci* are considered to be non-peremptory rules.

58 Article 640 JC.

59 B. MAES, *Overzicht van het gerechtelijk privaatrecht*, Die Keure, 1998, 107.

60 HRJ Advice, 10.

61 If the jurisdiction *ratione summae* is concerned, standard form C could be used to request the claimant to limit his/her amount in order for it to fall within the scope of the Justice of the peace.

explicitly excluded by the Regulation. A referral to the court with jurisdiction would obviously make things easier for a claimant and would thus be in line with the goals of the Regulation, i.e. a swift and efficient recovery of outstanding debts. If the Regulation is interpreted in a flexible way, and considering article 26 of the Regulation, where available, a referral seems to be an elegant solution to internal jurisdictional problems.[62]

In a more rigid interpretation of the provisions of the Regulation, the same problem would probably either lead to a rejection of the application under art. 11(1)(a) or (b) (and/or art. 9(1)), or otherwise, to the withdrawal of the application by the claimant further to the issuance of a standard form B in which the claimant is requested to explain itself regarding jurisdiction. In this respect it needs to be remembered that although there is no right of appeal against the rejection of the application (art. 11(2)), such rejection shall not prevent the claimant from pursuing the claim by means of a new application for a European order for payment.[63]

iii) Exhibits

Some courts (e.g. Justice of the peace of the ninth district Antwerp[64], Brussels Commercial court[65], First instance court Turnhout[66]) have requested the claimant to provide a detailed report regarding the claim or its supporting exhibits. Model form B of Annex II was used for this purpose, except in the case of the Brussels Commercial court, where a letter was sent by the court clerk requesting (1) a copy of all supporting exhibits, as well as (2) a list containing information on a number of elements (principal amount, interest amount, amount of contractual penalties, amount of costs and aggregate amount).

The aforementioned Justice of the peace of the ninth district of Antwerp, after receiving the said information, issued a form C (proposal to modify the application), refusing claimed collection costs.[67]

Another issue that has arisen, is the possibility for the court to require the claimant to provide evidence with regard to the indicated address of the defendant. The High Council of Justice states that it is unclear whether or not the court is allowed to require submission of such evidence and states that for a correct and smooth application of the Regulation, this is of great importance and not unreasonable. The High Council of Justice advises to seek a modification of the Regulation in this respect.[68] This preoccupation needs to be seen also in the context of the distinct rules on service under the Regulation.[69]

iv) Multiple claimants, multiple defendants

---

62 See also H. STORME, "Uniform Europees procesrecht: Europees betalingsbevel en Europese procedure voor geringe vorderingen" [Uniform European procedural law: European order for payment and European procedure for small claims] in A. DE GROEVE et al., *supra n. 38*, 66.

63 Art. 11(3) Regulation.

64 Justice of the peace of the ninth district of Antwerp, form B dated 8 February 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 87-88.

65 Commercial court of Brussels, letter from the head clerk dated 19 January 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 89.

66 First instance court of Turnhout, form B dated 26 January 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 90-91.

67 Justice of the peace of the ninth district of Antwerp, form C dated 30 March 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 95-96.

68 HRJ Avice, 8.

69 *Infra*, Paragraph III, 3, 3.2.

The Antwerp First instance court used the model form B to state that it could not determine which amount was due to each claimant in an application by two claimants (and furthermore requested an attestation of domicile and posed various questions regarding the amount due).[70]

v) Interest calculation

The Antwerp Commercial court used the model form B to request details regarding the aggregate amount of interests.[71]

Such requests should not be surprising in view of the discrepancy between the model form A (the application) and model form E (the European Order for payment itself).

In model form A, the claimant must fill in the applicable interest rate, the amount this interest rate must be applied to and the date as of which it must be applied.

Model form E only provides room to fill in the aggregate amount of interests and the total amount due, implying that it is the court itself that needs to calculate the interests. This is not always straightforward and might be an obstacle for smoothly obtaining a European Order for payment. A possible solution might be found in the claimant submitting a (partly) completed form E along with the application, avoiding the need for the court to make further calculations.[72]

On the other hand, another solution could be to act like the Justice of the peace of Tongeren. As "total amount" in model form E the principal amount, it mentioned: "*to be increased with the interest of 12.54% on* [amount] *as from* [date]*".*[73]

* * *

Depending on the court, the form E is signed by either the judge(s) or by a court clerk. Normally, it will be the judge or clerk of the chamber of the court which has internally been attributed requests for obtaining a European Order for payment, that will sign the form E.[74]

It has occurred that the form E was signed by three judges: the President and two laymen judges, as well as by the head clerk, as if it were an ordinary judgment. This is however an exception.[75] The High Council of Justice is of the opinion that in the absence of any Belgian procedural rules allowing someone other than a judge to examine and issue a court decision, this is a judicial act which should be reserved to a judge. As the Regulation however specifically allows the examination of the application by someone other than a judge, and the Regulation stands higher in the legal hierarchy, it does not seem to be a real issue to allow for designated court staff to examine the applications under the Regulation and issue the decision

---

70 First instance court of Antwerp, form B dated 7 December 2009, *Tijdschrift@ipr.be* 2010, nr. 2, 82-84.

71 Commercial court of Antwerp, form B dated 22 March 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 85-86.

72 K. DOCKERS, *supra n. 46*, 116.

73 Justice of the peace Tongeren, form E dated 9 December 2009, *Tijdschrift@ipr.be* 2010, nr. 2, 78-79.

74 Internal organization of the court is in accordance with art. 88 *et seq.* JC.

75 Commercial court of Turnhout, form E dated 8 March 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 99-101.

(i.e. sign the standard form E). As it concerns more a formal verification than the actual resolution of a dispute, this does not seem problematic.[76]

From the practical examples mentioned above, it appears clearly that courts seized tend to be rather skeptical when it comes to applications for a European order for payment. There seems to be a tendency to handle such applications as if it were claims introduced through ordinary proceedings, requiring submission of exhibits and other clarifications. This tendency, which is also reflected in the advice of the High Council of Justice, might be explained by the fact that the so-called "*inversion of contentieux*", from the perspective of Belgian procedural law, is somewhat of a paradigm shift. Genuine concern for loss of judicial protection and review to the benefit of e.g. consumers on the one hand and legal conservatism on the other, probably also explain the sometimes vigorous opposition to the introduction of a national order for payment procedure in Belgian law.

Regarding the issuance of the European order for payment, the High Council for Justice stated that for the simplification and speeding up of recovery proceedings, it would be recommendable to issue the order, not only in the language of the court of origin, but also in the language of the defendant.[77] If the defendant would have his/her domicile or habitual residence in another Member State or a third country in which one of the languages of the Member States is spoken, this would indeed be helpful. Considering the tools that already available through the European E-Justice Portal, this should not be too difficult either.

The High Council for Justice also correctly indicated that no provisions of Belgian national law exist with regard to the situation as contemplated under article 10(2) of the Regulation.[78] This article concerns the modification of the application and provides that if the claimant accepts the court's proposal, the court shall issue a European order for payment for that part of the claim as accepted by the claimant. The consequences with respect to the remaining part of the initial claim shall be governed by national law. No relevant provisions exist under Belgian law however.

3.2 Service of the European order for payment

Some discussion exists as to the way the European order for payment needs to be served on the defendant. It is indeed from the perspective of Belgian procedural law unusual to expect the court to serve a judgment on the defendant. Usually, the service of a judgment is the responsibility of the parties and as such the first step towards the enforcement thereof. In unilateral proceedings, the court registry will usually notify (as opposed to "serve") the court decision upon the parties (art. 1030 JC). The concepts of respectively "service" and "notification" under Belgian law have been defined by article 32 JC. Under the Regulation, these concepts have somewhat merged, which might explain the interpretational difficulties in a Belgian context.

Several courts (have) require(d) the service of the European order for payment (form E and A and a copy of form F) to occur by a bailiff (and if the defendant lives in another Member State, in accordance with Regulation (EC) 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000).[79]

---

76 See also H. STORME, *supra n. 43*, 108.

77 HRJ Advice, 12.

78 HRJ Advice, 12.

79 E.g. Commercial court of Bruges, First instance court of Neufchâteau, First instance court of Namur, Justice of the peace of Waregem.

Other courts serve the European order for payment on the defendant living in Belgium by judicial letter (*gerechtsbrief / pli judiciaire*) in accordance with art. 1030 JC. Such a judicial letter is a registered letter sent by the court to the defendant with an acknowledgement of receipt that must be signed by the defendant. This acknowledgement of receipt is thereafter sent back to the court. In case of refusal by the defendant to sign, this is mentioned in the acknowledgement of receipt. If the judicial letter cannot be delivered, a message is left for the defendant that he/she can recover the letter during a period of eight days at the postal office.

If the defendant lives in another Member State, the court will make sure that service is in accordance with Regulation 1393/2007.

In our view both methods of service (by bailiff's writ or by judicial letter) meet the minimum requirements set forth by the Regulation, and the service through judicial letter is definitely sufficient. It does not seem to be in line with the Regulation for the court to require the service by bailiff, although this is obviously the method of service which presents most guarantees for the defendant. The fact that the Regulation does not guarantee the actual reception by the defendant of the European order for payment, as well as the uncertain character of control in this respect have however been criticized at several occasions in Belgian legal theory.[80]

Another element that needs to be taken into account if the service by bailiff would be required, besides costs that may vary, are the possible difficulties this may generate with regard to the verification of the date of service by the court in view of the declaration of enforceability under art. 18 of the Regulation, as well as in view of checking timely lodging of the statement of opposition.

In order for the court to be able to verify this date, this requires the claimant to send the writ of service to the court or otherwise requires some communication by the bailiff to the court with regard to this date. Such additional communications seem to interfere with the mechanical and low-formality vocation of the European order for payment and are not provided by the Regulation. It also seems undesirable to allow for the emerging of diverging procedures in the different Member States and even within the Member States, whereas the aim was to have a uniform procedure throughout the European Union.

It has been noted by P. Gielen that if it was served on the defendant by the court by judicial letter, (or more in general, for a European order for payment issued in another Member State than Belgium, if it was served in any other way as by bailiff's writ), in order for the European order for payment to be enforced in Belgium, an additional and prior service by bailiff's writ of the European order for payment would be required. This "second service" would need to include also the standard form G (the declaration of enforceability) at that time. Such requirement would be based on art. 1495 JC, which states that no judgment that condemns a party can be enforced unless it was served on that party, subject to nullity of the acts of enforcement.[81]

The applicability of art. 1495 JC could be linked to art. 18(2) and art. 21(1) of the Regulation, which state that, without prejudice to the provisions of the Regulation, the formal requirements for enforceability and enforcement procedures shall be governed respectively by the law of the Member State of origin and the Member State of enforcement.

---

80 H. STORME, *supra n. 43*, 113; K. DOCKERS, *supra n. 46*, 120; P. GIELEN, "Guide pratique de la procédure européenne d'injonction de payer", in *JT* 2009, 667-668; See also *supra*, Paragraph III, 3, 3.1(iii).

81 P. GIELEN, "Guide pratique de la procédure européenne d'injonction de payer", in *JT* 2009, 667 & 671.

The requirement provided by art. 1495 JC is as such self-evident. The defendant who is ordered to pay, must be served the decision that will be enforced upon it. However, a combined reading of the Regulation and art. 1495 JC seems to lead to the conclusion that if the European order for payment, issued in Belgium or any other Member State, is served in accordance with art. 13 to 15 of the Regulation, the decision must be considered served, without a second service upon the defendant being required.

The position of P. Gielen can only be understood on the basis of the difference there is in Belgian procedural law between a notification by the court (*kennisgeving / notification*) and the actual "service" of a document (*betekening / signification*) as mentioned earlier. From a merely Belgian perspective, a notification by judicial letter or other means of service would indeed not be considered as service under art. 1495 JC. However, in the context of the Regulation, which has explicitly provided what is to be considered as adequate service, and which thus overrules Belgian law, such interpretation can in our view not be upheld. A notification of the European order for payment (form E and form A) by judicial letter (or, in general, service in accordance with art. 13 to 15 of the Regulation) should thus be regarded as service under the Regulation, but also under art. 1495 JC, even if in a strictly Belgian context this would not be the case.

It is therefore in our view not required to first perform a second service of the European order for payment on the defendant by bailiff's writ if the European order for payment had first been "served" by judicial letter, even if at the occasion of such second service the standard form G would be attached to it, and although this form G has not been previously served on the defendant.

As from the moment the court has issued the declaration of enforceability, the claimant should be able to start actual enforcement without any further need to first serve the European order for payment once more.

A clear legislation to implement the Regulation in Belgian law would have obviously been more elegant to avoid such discussions.

As far as this is not the case, problems may arise and acts of enforcement may possibly be declared null and void in Belgium on the basis of art. 1495 JC in the absence of a service by bailiff's writ of the European order for payment. Even if only a limited number of courts would require a service by bailiff's writ before enforcement, this might lead to a practice where, in order to be safe, such service becomes the standard option and best practice. This would often require a second service of the European order for payment once the declaration of enforceability has been obtained, adding further complexity and costs to what is supposed to be a lean and swift procedure.

The High Council of Justice has taken a pragmatic position with regard to the service of the European order for payment.[82] In general, the High Council of Justice prefers that the service is done by the court by judicial letter. Only in the following cases it states that the claimant should have the European order for payment served upon the defendant by bailiff's writ:

- in case of doubt as to the effectiveness of the service, if the court requests it;
- if the claimant requests it in accordance with article 46§4 JC;[83] or,
- to reach defendants in countries that have not acceded to Regulation 1393/2007 or that have declared not to apply the relevant provisions thereof.

---

82 HRJ Advice, 11.

83 This concerns the situation in which a claimant has requested that notification by judicial letter is replaced by service by bailiff's writ, which needs to be requested in the introductory act or in written form, at the latest at the time of the first appearance before the judge.

However, "*doubt as to the effectiveness of the service*" hardly seems like a clear criterion and seems to refer to the fact that the requirement for adequate service under the Regulation do not always guarantee the actual reception by the defendant of the European order for payment. It seems difficult to reconcile such additional service with the Regulation, as service under the Regulation has in such case already occurred. It does not seem desirable to require more from claimants in a Belgian procedure under the Regulation than in another Member State. Either the Regulation is modified, or the service as performed under the Regulation is accepted. *Ad hoc* requirements by Belgian courts are to be avoided.

4) Opposition to the European order for payment

In the absence of any specific legislation to implement the Regulation in the Belgian legal system, the issues that may arise must be examined under the Regulation itself, and if the Regulation itself is silent, ordinary Belgian procedural law will apply.

4.1 Form of the statement of opposition

i) Decision Commercial court of Hasselt of 21 December 2010

In the absence of any specific Belgian legislation on the matter, the Commercial court of Hasselt was called to decide on the acceptable form of a statement of opposition.[84] It concerned a case where a Belgian claimant had introduced a European order for payment procedure before the Hasselt court against a French defendant. The European order for payment was issued and sent to the defendant by registered letter on 24 November 2009.

On 15 December 2009 the defendant sent a letter to the court explaining in detail why it refused to pay the outstanding amount to claimant.

On 7 January 2010, the defendant filed a form F (statement of opposition) at the registry of the court.

In the subsequent discussions before the court, the claimant argued that the statement of opposition was filed (1) too late and (2) in the wrong language (in French in stead of Dutch).

The French defendant argued that it had been served the European order for payment on 1 December 2009, and had filed on 15 December 2009 a clear and timely statement of opposition.

The court was thus called to decide on three interesting questions regarding (1) timing, (2) form and (3) language of the statement of opposition under art. 16 of the Regulation.

The court decided that it appeared from the stamp mentioning "*reçu le 01 DEC 2009*" (applied by the defendant) on the letter from the court that the defendant had been served the European order for payment on 1 December 2009. The 30-day term of art. 16(2) of the Regulation therefore started on 1 December 2009.

Furthermore, the court considered that a statement of opposition is normally lodged using standard form F, as provided in art. 16(1) of the Regulation, but that according to consideration 23 of the Regulation the courts should take into account any other written form of opposition if it is expressed in a clear manner.

---

[84] Kh. Hasselt, 21 december 2010, *Limb. Rechtsl.* 2011, 383-388.

The court therefore decided that the letter of 15 December 2009 could in principle be accepted as a valid statement of opposition.

Remained the question in which language the statement of opposition should be filed. Although the procedure had been in Dutch, the statement of opposition was filed in French. If it had been a mere Belgian procedure, this would be sanctioned by nullity under the Belgian Act on the use of languages in judicial proceedings. The court had to examine if this would apply also to a statement of opposition under the Regulation.[85]

The court decided that this is not the case and that the opposition could validly be done in French.

ii) Form and language of the statement of opposition

Whereas the decision of the Commercial court of Hasselt of 21 December 2009 should be approved insofar that it accepts a letter comprising opposition expressed in a clear manner as a valid statement of opposition, the solution given to the problem regarding use of language can be questioned.[86]

In a similar case, the Commercial court of Ghent decided differently. The statement of opposition had been filed in time, but in the German language, whereas all other procedural documents and the language of the court seized was Dutch. The Commercial court of Ghent therefore ruled that the documents in German were null and void, and the European order for payment was confirmed.[87]

The basis of uncertainty as far as the language of the statement of opposition is concerned is obviously that the Regulation is absolutely silent about this. In general, the Regulation does not clearly regulate in a comprehensive way the use of languages, which in an international context can only be considered as a problem. Even within a single country like Belgium, which has three official languages, this may raise legal issues. Only with regard to enforcement, the Regulation contains a specific language requirement.[88]

A further basis of uncertainty is the absence of any legislation to implement the Regulation into Belgian law. Art. 17(2) of the Regulation provides that the transfer to ordinary civil proceedings that is the consequence of lodging a statement of opposition, shall be governed by the law of the Member State of origin. Implementation legislation could contain explicit provisions on the use of languages.

Since art. 26 of the Regulation states that all procedural issues not specifically dealt with in the Regulation shall be governed by national law, it can be argued seriously that the language of the statement of opposition should be the language of the court seized for the European order for payment, contrary to what was decided by the Commercial court of Hasselt.[89] On the other hand, it can be argued that national law only regulates the procedure as from the moment it was transferred to ordinary civil proceedings, i.e. after the lodging of the statement of opposition.

---

85 Wet van 15 juni 1935 op het gebruik van talen in gerechtszaken [Act of 15 June 1935 on the use of languages in judicial proceedings], *BS*, 22 juni 1935.

86 The statement of opposition will in any case need to be submitted in a written form. In line with what was mentioned above, the statement of opposition cannot be submitted electronically, nor does there exist any alternative electronic communication system in the Belgian courts, supra 7.

87 Kh. Gent 23 april 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 35-37.

88 Art. 21(2), b Regulation

89 Also in this sense: H. STORME, *supra n. 43*, 111.

This would mean that the language of the statement of opposition would as such fall outside of the scope of national law.

The High Council of Justice advised that the use of a standard form F in another language should as such not be a problem since the use of the form is by definition a statement of opposition. This does not however solve the language problem if the statement of opposition is done by another type of document such as a letter. The High Council of Justice also stated that it would be opportune to pass legislation on the issue as well.[90]

The conclusion of this matter seems to be that a more comprehensive regulation of the use of languages by the Regulation is desirable in order to avoid legal uncertainty and inconsistencies in the application of the Regulation throughout the European Union. In the absence thereof, at least national legislation should bring more clarity.

4.2 Consequence of the opposition to the European order for payment

As stated before, in Belgium the transfer to ordinary civil proceedings, nor any other aspect of the Regulation, has been regulated by Belgian law. This generates several practical questions, such as:[91]

- how will parties be summoned for the introductory hearing?
- what happens if a party does not appear at a hearing?

The court registry will normally send a registered (judicial) letter to the parties to inform them about the statement of opposition (in accordance with art. 17(3) of the Regulation) and will summon the parties to a hearing. The seized court will rule upon the initial claim and any incidental claims and will issue a decision that will replace the European Order for payment.[92]

In a case before the Justice of the peace of Bree, after the defendant had filed its statement of opposition in a timely manner, the claimant had filed a petition on the basis of article 747§2 JC, which is a standard petition to obtain a court calendar. The judge approved of this method, but as the petition was written in Dutch and had to be notified to the defendant under Regulation 1393/2007, it also needed to be translated, whereby the costs were incumbent on the claimant. The judge therefore dismissed the petition for a court calendar at that time.[93]

If a party does not appear at the introductory hearing, or a later hearing, it should be possible to issue a default judgment as provided in articles 802-806 JC.[94]

If a statement of opposition is filed, and pending the outcome of the opposition proceedings, the court does not issue a separate decision to revoke or annul immediately the European order for payment it previously issued. The European order for payment might be considered to cease to be in force, by virtue of law. In any case, there is no specific Belgian legislation on this matter. The legal provisions applicable to ordinary opposition proceedings further to a judgment by default could be considered applicable. In essence, a judgment by default is considered to benefit from *res iudicata,* as long as it has not been reformed or revoked. At the same time, the enforcement of such a judgment is suspended, unless it has been declared provisionally enforceable.

---

90 HRJ Advice, 13.
91 HRJ Advice, 15.
92 See also: http://www.europe-eje.eu/sites/default/files/pj/dossiers/ipe_belgique_english.pdf
93 Vred. Bree 4 november 2010, *Tijdschrift@ipr.be* 2011, nr. 1, 148-151.
94 HRJ Advice, 15.

The matter seems to be of rather theoretical importance only, as it will in any case be impossible to enforce a European order for payment if it has not been declared enforceable under art. 18 of the Regulation.

4.3 Legal remedies against a court decision on opposition

Art. 17(1) provides that the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure (unless the claimant has explicitly requested that the proceedings be terminated in that event). The ordinary legal remedies are thus available to a court decision that was rendered on opposition.

This means that appeal is open against all decisions from the First instance court and the Commercial court on amounts that exceed the amount of EUR 1,860. The same applies to decisions from the Justice of the peace on amounts that exceed the amount EUR 1,240.

The period for submitting the petition for appeal is one month as from the moment of service of the judgment. This period is extended if one of the parties has no residence, abode or elected domicile in Belgium.

5) Absence of a timely statement of opposition

5.1 Description of the certificate procedure

If within the time limit laid down in art. 16(2), no statement of opposition has been lodged with the court of origin, the court of origin shall without delay declare the European order for payment enforceable using standard form G. The court shall verify the date of service.

The High Council of Justice confirms that no additional request by the claimant is necessary.[95]

The difficulties that may arise in this context have already been described above under Paragraph III, 3, 3.2 where the service of the European order for payment was discussed.

If service by bailiff's writ is required by the court, in order to obtain the declaration of enforceability, the court will indeed need to verify the date of service in order to make sure that the deadline of 30 days to file a statement of opposition has lapsed, which requires further interaction between the claimant (and/or his/her bailiff) and the court that has not been provided for in the Regulation.

For this specific situation, the High Council of Justice proposes to provide by law that the bailiff should submit a copy of the writ of service to the court, which would allow the court to automatically proceed with the declaration of enforceability at the appropriate time.[96]

It is obvious that this adds further complexity to the procedure and is the seed for further divergence between the various national flavors of the European order for payment procedure.

5.2 Formal requirements for enforceability

Article 18(2) of the Regulation states that (without prejudice to the first Paragraph) the formal requirements for enforceability shall be governed by the law of the Member State of origin.

---

95 HRJ Advice, 13.
96 HRJ Advice, 13-14.

Furthermore, article 21(1) provides that (without prejudice to the provisions of the Regulation,) enforcement procedures shall be governed by the law of the Member State of enforcement.

The High Council of Justice refers to article 1386 JC which provides that judgments can only be enforced upon production of the certified copy ("*grosse" / "expédition")* of the judgment or of the minute (the original). The issuance of a certified copy occurs in accordance with article 790 JC.[97]

The lack of Belgian legislation to implement the Regulation also generates diverging court practices in this respect.[98]

Some courts provide certified copies of the standard forms E and G and issue these to the claimant.[99]

The Brussels Commercial court however just delivers the original standard form G, without formally issuing it as a first and authentic copy. The head clerk of the court is of the opinion that as the Regulation does not provide this, such formality is not required.[100]

Under Paragraph III, 3, 2 above, the service of the European order for payment was discussed, as well as the requirement that would exist according to P. Gielen on the basis of art. 1495 JC to serve the European order for payment (form E) and the declaration of enforceability (form G), before proceeding without any act of enforcement, subject to nullity of further enforcement acts. It was stated above that this is not in line with the Regulation and that therefore, once the standard form G has been issued by the court, the claimant may immediately proceed with enforcement, without a prior second service including form G.

5.3 Effects of absence of a timely statement of opposition

It is a known issue in legal theory on the European order for payment that the Regulation is silent on the exact effects and legal force of the European order for payment in the absence of a timely statement of opposition.[101] As Belgian legislation to implement the Regulation is inexistent, a clear answer as to the legal effects in the absence of a timely statement of opposition, is unavailable.

---

97 HRJ Advice, 14.

98 See also G. WAEGEBAERT, "Nota voor de werkgroep die de praktische gids zal uitwerken aangaande de Verordening (EG) Nr. 1896/2006 betreffende de invoering van de Europese betalingsbevelprocedure en de Verordening (EG) Nr. 861/2007 betreffende de vaststelling van de Europese procedure voor geringe vorderingen" [Note for the working group that will elaborate the practical guide concerning Regulation (EC) Nr. 1896/2006 creating a European order for payment procedure and Regulation (EC) Nr. 861/2007 establishing a European Small Claims Procedure] in A. DE GROEVE et al., *supra n. 38*, 90-91.

99 e.g. Justice of the peace Waregem, First instance court Hasselt.

100 K. DOCKERS, *l.c.*, 120-121; Commercial court of Brussels, letter from the head clerk dated 29 March 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 102.

101 E. GUINCHARD, « Règlement (CE) n° 1896/2006 du Parlement européen et du Conseil du 12 décembre 2006 instituant une procédure européenne d'injonction de payer », in J-F VAN DROOGHENBROECK (ed.), *Droit judiciaire européen et international*, la Charte, 2012, 579 ; A. CARRATE, "Il procedimento ingiuntivo europeo e la 'comunatirazzazione' del diritto processuale civile", *Rivista di diritto processuale* [The injunctive European procedure and the 'communitarization' of civil procedural law], 2007, n° 11 *in fine*; M. LOPEZ DE TEJADA RUIZ and L. D'AVOUT, « Les non-dits de la procédure européenne d'injonction de payer (Règlement (CE) n° 1896/2006 du 12 décembre 2006 », *Rev. crit. dr. intern. Privé,* 2007, 717.

As stated above however [102], under ordinary Belgian procedural law, in essence, a judgment by default is considered to benefit from *res iudicata,* as long as it has not been reformed or revoked. At the same time, the enforcement of such a judgment is suspended, unless it has been declared provisionally enforceable.

6) Safeguarding the debtor's rights

6.1 Description of the procedure for rectification or withdrawal of the declaration of enforceability

In case of discrepancy between the European order for payment and the certificate (form G), or if the certificate was unduly granted (e.g. if it was granted before the period for filing opposition has lapsed), the need could arise for the certificate to be either rectified or withdrawn.

i) Rectification

In the absence of any specific provision in the Regulation or any Belgian legislation in this respect, we would assume that in case there would be a need for rectification, the court would fall back on the art. 794 – 801bis JC, which concern the rectification of judgments.

In general these provisions are however not very appropriate for the specific situation where a standard form G would need to be rectified, as it supposes both parties to appear before the court that issued the decision in the first place (art. 796 JC).

Art. 801bis JC however describes the procedure that is applicable in case of clerical errors or miscalculations in a certificate issued under Regulation (EC) 2201/2003 of 27 November 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.

Although this has not occured yet, this article can in the future also be declared applicable by Royal Decree to certificates issued under other international instruments. The following procedure is provided:

- If the clerical error or miscalculation only appears on the certificate, the claim for rectification is introduced through unilateral proceedings;
- If the clerical error or miscalculation in the certificate was caused by a clerical error or miscalculation in the decision (rendered by the judge) on the basis of which the certificate was issued, the rectification of the certificate is claimed, together with the rectification of such decision in accordance with the procedure as laid down in art. 794 to 801 JC.

The court clerk will send a copy of the rectified certificate to all parties to the proceedings by ordinary letter.

This procedure would indeed fit perfectly in case the certificate (form G) would need to be rectified. As no legislation is available and since the above procedure has not been declared applicable to certificates issued under the Regulation, the exact way such a problem would be handled remains uncertain.

---

[102] *Supra*, Paragraph III, 4, 4.2.

ii) Withdrawal

In case a certificate would need to be withdrawn, the issue is more complex, as no similar procedure exists at all in Belgian procedural law.

A possible (but very unlikely) situation where such need for withdrawal of the certificate could arise would be if a certificate was wrongly granted (e.g. in view of a court decision that was not rendered under the Regulation).

It might be expected that realistically, the problem only really occurs if in spite of the issuance of a certificate, the defendant timely files an admissible statement of opposition. In other words, the certificate would have been issued too early in view of article 18(1): "*the time limit laid down in Article 16(2), taking into account an appropriate period of time to allow a statement to arrive*".

If the claimant would still proceed with enforcement in spite of a timely statement of opposition, the defendant could always file a claim with the attachment judge to stay the enforcement proceedings or declare any enforcement act to be null and void, as long as the opposition proceedings are pending.

It would seem difficult for a court to just withdraw a certificate it previously issued, without any legal basis for such withdrawal. However, in the absence of any clear provisions, it can be imagined that a court would do exactly that, e.g. by sending a withdrawal letter to the claimant (and possibly also the defendant). We do not however see any legal basis for such withdrawal in the Regulation, nor in Belgian law (which traditionally does not know the use of certificates).

To the extent that a court decision to issue a certificate, although the time to file a statement of opposition has not lapsed, would be considered as a decision falling outside of the scope of the Regulation, one could consider that ordinary opposition or appeal proceedings under Belgian law could be filed. However, this seems to be a bit farfetched. A claim before the attachment judge to stay the enforcement as long as the opposition proceedings are pending would seem to be the most elegant solution to this particular problem.

6.2 Description of the review procedure and competent courts

Although in accordance with art. 29(1)(b), Belgium declared to the European Commission that legislation to introduce a review procedure into the Belgian Judicial Code was under discussion, such legislation has to date not been enacted, nor is it currently under discussion to our knowledge.

Only two published decisions could be found in Belgian case law which concerned the review procedure. The information that can be derived therefrom is therefore limited.

In the absence of any legislation, it is likely that the review procedure itself will take place in accordance with ordinary Belgian procedural law, be it with a number of *ad hoc* modifications if necessary.

In the absence of any communication from Belgium to the Commission in this respect, and in the absence of any legislation, the court competent to hear the claim for review cannot be determined with absolute certainty. It is however likely that the court which issued the European order for payment, will also consider itself competent to decide on the claim for review.

These assumptions (on the applicable procedure and the competent court) are confirmed in the two published cases.

The first one concerns a judgment of the Ghent Commercial court that was issued on 8 November 2011.[103] It was alleged by the original defendant that as the Belgian legislator has omitted to pass legislation on the modalities of the review procedure, the European order for payment that had been issued was null and void.

The court stated that although the alleged omission is indeed a fact, this does not mean that the European order for payment would be null and void. The court stated that normal procedural law applies and that for the review procedure, inspiration needs to be sought in the Belgian Judicial Code as far as methods of introduction of the procedure are concerned. This is exactly what the original defendant had done by introducing the review procedure through a normal writ of summons before the court that had issued the original European order for payment. The rights of defense had thus been guaranteed according to the court.

This decision can be approved as far as the method of introduction is concerned, and also as far as the court that issued the original European order for payment declares itself competent for the review procedure, in the absence of any other court that was attributed competence in this respect by the Belgian legislator. However, with regard to merits, the further decision of this court seems problematic.

The original defendant appears to have argued that the claim that had been introduced was in fact contested and this for several years. The court stated as follows (translated from French):

> *"The facts of the case show that the claim that was made in the application for the order for payment is indeed contested and that it has even been contested since several years. […] It is thus by abusing the court that the original claimant has been able to obtain the issuance of the litigious order. The fact that the claimant has knowingly provided false information to the court, which has led to the issuance of the order, constitutes indeed one of the exceptional circumstances as provided in article 20.2 of the regulation.*
> *The order for payment that was issued is thus null and void and declared without object."*

This motivation seems to refer to consideration 25 of the Regulation which provides that the other exceptional circumstances could include a situation where the European order for payment was based on false information provided in the application form.

However, the fact that a claim is "uncontested" under the Regulation, is a quality the claim only acquires in the course of the order for payment procedure. The fact that a claim is to be considered uncontested will therefore depend upon the attitude and (lack of) initiative of the defendant. The fact that, between the parties, the claim had been contested is as such irrelevant.

Furthermore, the application form A does not require any information to be provided in this respect. The only space that could be used for such information is field 11, although from the guidelines for filling in the application form it appears that this is not the type of information that is sought.

The Ghent Commercial court has thus unduly declared the original European order for payment to be null and void. This case clearly demonstrates how the review procedure can be

---

[103] Kh. Gent, 8 November 2011, *JT* 2013, 180-182, with note by P. GIELEN, "*La problématique du réexamen de l'injonction de payer européenne dans des cas exceptionnels*".

used by defendants to attack a European order for payment without any deadline. As the review procedure is a novel feature from a Belgian perspective, it is not surprising that Belgian courts will struggle somewhat in applying the rules correctly. In any case, the limited and restricted character of the review procedure should be made clear, in the first place by the Belgian legislator. In his note, P. Gielen stated that in the absence of any initiative from the Belgian legislator, it could even incur liability as a consequence of the current legal insecurity.[104]

The second published case was handled by the Justice of the peace of Genk, which issued a judgment on 22 November 2011.[105]

The Justice of the peace of Genk had issued on 22 January 2010 a European order for payment which was served upon the defendant by bailiff's writ on 12 February 2010. The declaration of enforceability by the court clerk occurred on 9 February 2011 (one year later).

On 7 June 2011, the defendant filed for review proceedings by serving a writ of summons to appear before the same Justice of the peace of Genk on the claimant (i.e. thus the same way as the review procedure had been introduced before the Ghent Commercial court as discussed above).

The court (implicitly) decided it was competent to know of the case, and decided that the European order for payment should not be reviewed, as it was not clearly wrongly issued, and no exceptional circumstances existed. Three arguments needed to be rebutted:

- the claimant had indicated in the application form that the grounds for the court's jurisdiction could be found in the choice of court agreed by the parties (option 12 in chapter 3 of the application form). It appears that the defendant had stated that the indication of the court as competent court was *apparently unreasonable* (in Dutch "*kennelijk onredelijk*", which seems to refer to the Dutch wording of article 20(2) of the Regulation: *"kennelijk ten onrechte*", in English "*clearly wrongly*", but "*kennelijk*" literally translates as "apparently"). The court dismissed this argument stating that under art. 5(1)(a) of Regulation (EC) 44/2001, the court was competent as the assignment had been executed in Genk;
- the court also decided that it was not *apparently unreasonable* to grant an indemnity of 10% and late payment interests of 8% to the claimant;
- finally the court decided that although the claimant had omitted to report that the defendant had disputed the claim (e.g. in field 11 of the application form), this might have been a valid ground for filing opposition, but does not qualify as an *exceptional circumstance* under art. 20(2) of the Regulation.

The Justice of the peace of Genk therefore decided that the European order for payment it had previously issued, remained valid. Contrary to the Ghent Commercial court, the Justice of the peace of Genk correctly dismissed the request for review.

From the above it is quite obvious that, as Belgium has already declared itself to the European Commission, it is necessary to pass legislation to implement the review procedure into Belgian law in order to avoid legal uncertainty.

---

104 P. GIELEN, "*La problématique du réexamen de l'injonction de payer européenne dans des cas exceptionnels"*, note under Kh. Gent, 8 November 2011, *JT* 2013, 181-182.

105 Vred. Genk 22 November 2011, *RW* 2011-12, 1312-1313.

The High Council of Justice also stated that the problem of introduction of a review procedure should urgently be solved, and that inspiration could be sought in a draft bill relating to the modification of the Belgian Judicial Code in view of the European Enforcement Order for uncontested claims.[106]

It would indeed be best if a uniform review procedure would be introduced in Belgian law.

7) Costs of the procedure

As the procedure to obtain a European order for payment is introduced via a unilateral petition, this leads to the applicability of art. 269/2 of the Belgian Code of Registration Rights, which provides for docket rights of EUR 31 (Justice of the peace and Police Courts) and of EUR 60 (First instance court, Employment Tribunal and Commercial court) that must be paid by the claimant.[107]

Article 25 provides that for the purposes of the Regulation, court fees shall comprise fees and charges to be paid to the court, the amount of which is fixed in accordance with national law. Consideration 26 of the Regulation furthermore provides that court fees covered by article 25 should not include for example lawyers' fees or costs of service of documents by an entity other than a court. Although this consideration does not provide that the defendant cannot be ordered to pay the claimant's lawyer's fees, it might be read as an indication thereof.

As explained earlier [108], art. 1017 JC provides that each final judgment orders the unsuccessful party to the costs. Art. 1018 JC provides that these costs comprise:

- All docket and registration rights;
- The price and fees for judicial acts;
- Expenses regarding investigative measures, such as expert fees;
- Travel and accommodation costs for court magistrates and clerks if their journey was ordered by the judge;
- The procedural indemnity.

Under article 1017 JC, the successful party is thus awarded a procedural indemnity, which is considered to be a lump sum allowance for attorney's costs and fees, the amount of which was fixed in the Royal Decree of 26 October 2007.[109] This means that this indemnity is only granted in case an attorney has intervened. In ordinary proceedings, the unsuccessful party would thus be ordered to pay a procedural indemnity to the claimant as provided under art. 1022 JC if the claimant was represented by an attorney.

Considering article 25 and consideration 26 of the Regulation, it is unclear whether a procedural indemnity will be granted in the European order for payment procedure. The High Council of Justice has also noted this uncertainty and stated its opinion that it should be

---

106 HRJ Advice, 15-16; Wetsvoorstel tot wijziging van het Gerechtelijk Wetboek wat de invoering van een Europese executoriale titel voor niet-betwiste schuldvorderingen betreft [Draft Act for the modification of the Judicial Code concerning the introduction of a European enforcement order for uncontested claims], *Parl. St.*, Kamer, nr. 52 1646; See also *infra*, Paragraph V, 5, 5.2.

107 This was confirmed in a letter of 22 June 2009 sent by the Federal Government Service of Finance (Mr. Walter Vande Velde) to the Attorney-Generals, as published in A. DE GROEVE et al., *supra n. 38*, 121-122.

108 *Supra*, Paragraph I, 2, 2.2(v).

109 KB 26 October 2007, *BS* 9 November 2011, 56834-56836;

possible to grant a minimum procedural indemnity in the unilateral phase of the proceedings (as is the case in the Belgian summary order for payment procedure[110]).

It should be indicated that from a number of published decisions, it seems that courts indeed grant a procedural indemnity. [111] It is not unlikely that these courts did not take into account consideration 26, as obviously a claimant will not direct the court's attention thereto.

The procedural indemnity is determined in relation to the amount of the claim and can be modulated by the judge at the request of the parties on the basis of four criteria:

- financial capacity of the unsuccessful party, in order to lower the amount of compensation;
- complexity of the case;
- contractually provided compensations for the successful party;
- the apparently unreasonable character of the situation.

Claim	Basic amount	Minimum amount	Maximum amount
From € 0 to € 250.00	€ 165.00	€ 82.50	€ 330.00
From € 250.01 to € 750.00	€ 220.00	€ 137.50	€ 550.00
From € 750.01 to € 2,500.00	€ 440.00	€ 220.00	€ 1,100.00
From € 2,500.01 to € 5,000.00	€ 715.00	€ 412.50	€ 1,650.00
From € 5,000.01 to € 10,000.00	€ 990.00	€ 550.00	€ 2,200.00
From € 10,000.01 to € 20,000.00	€ 1,210.00	€ 687.50	€ 2,750.00
From € 20,000.01 to € 40,000.00	€ 2,200.00	€ 1,100.00	€ 4,400.00
From € 40,000.01 to € 60,000.00	€ 2,750.00	€ 1,100.00	€ 5,500.00
From € 60,000.01 to € 100,000.00	€ 3,300.00	€ 1,100.00	€ 6,600.00
From € 100,000.01 to € 250,000.00	€ 5,500.00	€ 1,100.00	€ 11,000.00
From € 250,000.01 to € 500,000.00	€ 7,700.00	€ 1,100.00	€ 15,400.00

110 *Supra*, Paragraph I, 2, 2.2(v).

111 Justice of the peace Tongeren, form E dated 9 December 2009, *Tijdschrift@ipr.be* 2010, nr. 2, 78-79; Commercial court of Turnhout, form E dated 8 March 2010, *Tijdschrift@ipr.be* 2010, nr. 2, 99-101.

From € 500,000.01 to € 1,000,000.00	€ 11,000.00	€ 1,100.00	€ 22,000.00
Above € 1,000,000.01	€ 16,500.00	€ 1,100.00	€ 33,000.00

With regard to translation costs, under Belgian procedural law, these can be reclaimed under art. 8 of the Act of 15 June 1935.

In Belgium, the transfer to ordinary proceedings does not lead to further court or docket fees to be paid.[112]

Whereas under article 1017 JC provides that the unsuccessful party is ordered to pay the docket rights that have been paid by the claimant, the Regulation does not have any provisions in this respect. As article 26 provides that all procedural issues not specifically dealt with in the Regulation shall be governed by national law, it seems acceptable to order the defendant to pay the docket rights and other costs as provided under article 1017 JC with a certain reservation as to the lawyers fees, and this in view of consideration 26 of the Regulation.

In practice it appears that courts often use standard form B to require further information from the claimants with respect to the costs.

Once more, the practical application of the Regulation generates various questions and uncertainty with regard to the applicable costs. Legislation to implement the Regulation is in any case desirable, also from this perspective.

8) Enforcement

8.1 Competent authorities

In Belgium, in accordance with art. 506 JC, only bailiffs (*gerechtsdeurwaarder / huissier de justice*) have the authority to enforce judicial decisions. The competent enforcement authority in Belgium (as mentioned in art. 21(2)) of the Regulation is thus the bailiff.

No communication to the Commission regarding the competent courts for enforcement issues was requested from the Member States in art. 29 of the Regulation (contrary to the Small Claims Regulation, where article 25(e) provided for such communication) and no Belgian legislation exists to implement the Regulation. Furthermore, no published Belgian case law could be found with regard to applications under art. 22 and 23 of the Regulation. Therefore, the below is an analysis based on the law applicable to ordinary civil proceedings, which is however confirmed by Belgium's communications under article 25(e) of the Small Claims Regulation.

In accordance with art. 569(5) JC, the First instance court has jurisdiction over disputes regarding the enforcement of judgments.

Under art. 1395 JC, the attachment judge (*beslagrechter / juge des saisies*), operating within the First instance court, has jurisdiction over all claims regarding enforcement. For the sake of completeness, it should be noted that some interference does exist between the competence of

---

[112] Letter of 22 June 2009 sent by the Federal Government Service of Finance (Mr. Walter Vande Velde) to the Attorney-Generals, *l.c.,* 121; G. WAEGEBAERT, *supra n. 98*, 98.

the attachment judge and the competence of the President of the First instance court to take urgent decisions in case of 'factualities' (art. 584 JC).[113]

We believe that on the basis of these legal grounds, the said courts are competent to hear claims under art. 22 and 23 of the Regulation.

This conclusion is reinforced by the communication made by Belgium to the Commission under the Small Claims Regulation 861/2007. In this communication Belgium has stated that the authority with competence to apply article 23 of that Regulation is *first and foremost* the attachment judge of the place where the attachment is carried out. Pursuant to article 1395 JC, the attachment judge has competence in respect of all actions for precautionary (conservatory) attachment and the means of enforcement and his/her territorial competence is defined in article 633 JC. It was also stated that the First instance court also has competence in this respect under article 569(5), and furthermore has full jurisdiction pursuant to article 566 JC.[114]

8.2 How to enforce in practice - Acceptable languages

Under art. 18(3) of the Regulation, the enforceable European order for payment will be sent to the claimant. The claimant will be obligated to contact a bailiff and provide him/her with the documents stipulated in art. 21(2) of the Regulation in order to enforce the order. It will be the bailiff who will be in charge of the further enforcement proceedings, in accordance with applicable Belgian law.

We further refer to what we have explained above under Paragraph II, 3.2 with regard to whether or not a second service of the European order for payment by bailiff's writ would be required if it was first served by judicial letter to the defendant.

Art. 21(2) furthermore states that the claimant shall provide the competent enforcement authorities of that Member State with a copy of the European order for payment, as declared enforceable by the court of origin, which satisfies the conditions necessary to establish its authenticity. In Belgium the court registry, as well as a bailiff can certify that a copy corresponds to the original.

With regard to the acceptable languages, we also refer to Paragraph II, 4, 4.1(ii) above concerning the use of languages.

In its communication to the Commission, Belgium stated that pursuant to art. 21(2)(b), it does not accept any languages other than the official language or one of the official languages of the place of enforcement, in accordance with Belgian national law.

All acts of enforcement and notifications will indeed have to comply with the Act of 15 June 1935 on the use of languages in judicial proceedings.[115]

As Belgium has three official languages (Dutch, French and German), the territory of which has been defined precisely (including the bilingual territory of the Brussels Region), it needs to be carefully checked on which territory service must occur. Where necessary, a translation must be served together with the original document. It is very important to comply with the

---

113 S. BRIJS, "L'intervention du juge des référés dans l'exécution- l'exécution des décisions du juge des référés" in *Le référé judiciaire*, Brussel, 2003, 309-362.

114 Communication of Belgium to the European Commission in accordance with article 25 of Regulation (EC) Nr. 861/2007 of 11 July 2007 establishing a European Small Claims Procedure.

115 Wet van 15 juni 1935 op het gebruik van talen in gerechtszaken, *BS*, 22 juni 1935.

Act of 1935, as non-compliance is sanctioned by nullity, to be pronounced *ex officio* by the judge.[116]

8.3 Legal remedies under art. 22 (1) and (2) and 23

In case the European order for payment is irreconcilable with an earlier decision or order previously given in any Member State or in a third country and the conditions of art. 22 (1)(a, b & c) have been fulfilled, or to the extent that the defendant has paid the claimant the amount awarded in the European order for payment, the defendant may apply to the competent court in the Member State of enforcement that the enforcement of such European order for payment be refused.

As explained under Paragraph II, 8, 8.1 above, such a request should be made to the attachment judge. The defendant would need to summon the claimant by issuance of a writ of summons. A voluntary appearance would also be acceptable to introduce the case (art. 706 JC). These proceedings are not summary proceedings, but will be treated as such (art. 1395 JC).

Under art. 23 of the Regulation, if the defendant has applied for a review in accordance with art. 20, the competent court in the Member State of enforcement may, upon application by the defendant: (a) limit the enforcement proceedings to protective measures; or (b) make enforcement conditional on the provision of such security as it shall determine; or (c) under exceptional circumstances, stay the enforcement proceedings.

We believe that the attachment judge would also be the competent judge to decide on such an application by the defendant, and the procedure will be introduced in the same manner, through a writ of summons or by voluntary appearance of the parties.

IV. BELGIAN SMALL CLAIMS PROCEDURE

Apart from the summary order for payment procedure for claims up to a maximum amount of EUR 1,860 as described in Paragraph I, 2, Belgium does not have a separate “National order for payment” procedure or "Small claims procedure" that is designed specifically for the speedy recovery of (small) pecuniary claims. We refer to Paragraph I, 2 for the description of the Belgian summary order for payment procedure for claims up to a maximum amount of EUR 1,860.

V. IMPLEMENTATION OF SMALL CLAIMS REGULATION (861/2007) IN BELGIUM

1) Competent court

As is the case with the European order for payment procedure, Belgium has not issued any legislation to implement the Small claims regulation (hereinafter the “Regulation”) in its national legislation.

In its communication to the European Commission, Belgium stated that the courts which will have jurisdiction to issue a judgment under the Regulation are:

- the Justice of the peace (*Vrederechter / Juge de Paix*)
- the First instance court (*Rechtbank van eerste aanleg / Tribunal de première instance*)
- the Commercial court (*Rechtbank van koophandel / Tribunal de commerce*)

---

116 Art. 40 Act of 1935.

Their respective material and territorial jurisdiction is laid down in the Belgian Judicial Code.[117]

It should be noted that pecuniary claims in case of damages related to traffic or train accidents are the competence of the Police court.[118] Such claims do not fall outside of the scope of the Regulation (art. 2), the Police court therefore also seems to have jurisdiction under the Regulation.[119]

As far as territorial jurisdiction is concerned, a tool has been made available through the website of the European Atlas in Civil Matters to indicate those courts that are territorially competent.[120] Although this resolves possible questions of claimants regarding territorial competence, no information is available on the material competence of the various courts.

This is somewhat problematic for Belgium as competence for claims under the Regulation is divided amongst four courts. The bulk of these claims can be handled by the Justices of the peace which have competence for claims up to an amount of EUR 1,860. For amounts between EUR 1,860 and EUR 2,000, either the First instance court or the Commercial court (or the Police court) will be competent. Especially for these clearly delineated claims up to EUR 2,000, this lack of centralization seems to be another obstacle for a wider use of this procedure in Belgium, where its application may at best be called limited.

It can be questioned if the availability of a search tool for territorial competence alone is sufficient, especially since under the Regulation, cost effectiveness and easy accessibility of justice are important.[121] Although assistance of the parties is provided in articles 11 and 12(2) of the Regulation, this assistance has not been clearly regulated and is contrary to the traditional role of court registry staff and court magistrates under the Belgian Judicial Code.[122] It is unclear how such practical assistance will work in practice and how it will be enforced.[123]

It is important to note that a draft bill was adopted by the House of Representatives on 20 July 2011 and sent to the Senate according to which the competence *ratione summae* of the Justices of the peace is raised to an amount of EUR 3,000.[124] This measure is part of a more comprehensive judicial modification (mainly concerning the introduction of a genuine family- and youth court). This draft bill has been pending in the Senate since that time. As the political balance has shifted in the meanwhile, the fate of this draft measure is uncertain.

---

117 Art. 556 to 663 JC.

118 Art. 601bis JC.

119 See also A. BERTHE, "La procédure européenne de règlement de petits litiges en pratique" in P. LECOCQ and M. DAMBRE (eds.)., *Rechtskroniek voor de vrede- en politierechters 2012* [Law Chronicle for judges of peace and police judges 2012], Die Keure, Brugge, 301.

120 http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_information_en.htm?countrySession=7&

121 See considerations 7 and 8, and article 1 of the Regulation; M.E. STORME, "De verhouding tussen de Europese procesrechtelijke verordeningen (in het bijzonder geringe vorderingen) en het interne Belgische procesrecht"[The relationship between the European Regulations on procedural law (in particular small claims) and the internal Belgian procedural law], *Ius & actores*, 2009, 8.

122 See art. 297 JC for the role of the court registry staff and art. 828(9) JC for court magistrates; S. VERBEKEN en L. WINKELMANS, "De Europese procedure voor geringe vorderingen (small claims)" in A. DE GROEVE, et al., *supra n. 38*, 32.

123 H. STORME, *supra n. 61*, 79: H. Storme also states that in providing for practical assistance, without giving any specific indications as to how this should occur or what should be the result thereof, the difference between a Directive and a Regulation becomes very thin.

124 Wetsontwerp betreffende de inrichting van een familie- en jeugdrechtbank [Draft Act concerning the installation of a Family and youth court], *Parl. St.* Kamer, 2010-11, nr. 53 0682.

The court competent to handle an appeal lodged against a decision under the Regulation taken in first instance will be explained below in Paragraph V, 4.

2) Application for a judgment under the Regulation

2.1 Formal prerequisites for the introduction of the procedure

In its communication to the European Commission, Belgium stated that the means of communication for the purpose of the Regulation and available to the courts are restricted to the (i) direct submission of the standard claim form A, as set out in Annex I, and the relevant supporting documents to the registry of the First instance court with territorial jurisdiction AND (ii) the posting by registered mail of claim form A and the relevant supporting documents to the First instance court with territorial jurisdiction.

In line with what was mentioned above, the application cannot be submitted electronically, nor does there exist any alternative electronic communication system in the Belgian courts.[125] The modernization and implementation of IT related communication systems in the Belgian justice system is indeed proving to be a slow and difficult process. In this respect there is a clear difference in access to justice as far as the ease of introducing a claim in the different Member States is concerned, depending on whether or not electronic communication systems are available.[126]

As far as processing by court registry staff is concerned, the application under the Regulation needs to be considered as an adversarial petition under the Belgian Judicial Code (and such application must thus be listed in the register of petitions), although these two documents cannot be entirely assimilated.[127]

2.2 Admissible languages under article 6(1)[128]

Belgium has three official languages (Dutch, French and German), the use of which in legal procedures is strictly regulated by the Act of 15 June 1935 (as subsequently modified).

In general, the northern part of Belgium (Flanders) is Dutch-speaking, the southern part is French-speaking, a small area close to the German border is German-speaking, and in Belgium's capital city of Brussels, both French and Dutch are official languages.

In essence, the language that must be used for lodging a claim is the official language of the territory where the court seized is situated. In Brussels, the language spoken by the defendant(s) will play a role. The application of these rules is not always uniform, and it is not unlikely that certain claims would be dismissed due to incorrect use of languages.

Under the Act of 15 June 1935, the defendant can obtain under certain conditions a change of language. This possibility seems to be limited under the Regulation, as the claimant cannot be forced to appear before a different court further to a change of language.[129]

---

125 *Supra*, Paragraph I, 5.

126 See also A. BERTHE, *supra n. 119*, 303.

127 S. VERBEKEN en L. WINKELMANS, *supra n. 122*, 25; Kamer, 27 January 2009, http://www.dekamer.be/doc/CCRA/pdf/52/ac430.pdf.

128 For a number of difficulties and possible issue the Regulation poses in view of the use of languages, we refer to S. VERBEKEN en L. WINKELMANS, *supra n. 122*, 30-31.

129 M.E. STORME, *supra n. 121*, 10; A. BERTHE, *supra n. 119*, 303.

Under article 21(2)(b), Belgium does not accept any language other than the official language or one of the official languages of the place of enforcement in accordance with national law.[130]

3) Conclusion of the procedure

3.1 Issuance of a judgment - Procedural issues

i) Representation of the claimant

Article 10 of the Regulation provides that a claimant under the Regulation may be represented by a lawyer or "*another legal professional*". However, who exactly can be considered as another legal professional under the Regulation? Although the Regulation does not explicitly state that the application shall be signed by the claimant or, where applicable, by his representative (as is provided in article 7(6) of Regulation 1896/2006) , it is not hard to imagine that the same discussion would arise with regard to the possibility for e.g. bailiffs or debt collection agencies to sign the application.[131]

It seems advisable that either on a European level, or at least on a national level, it is clarified who can represent a claimant under the Regulation.[132]

ii) Multiple claimants, multiple defendants

As is the case under Regulation 1896/2006, the Regulation and forms seem to be modeled to the situation of a single claimant and a single defendant (with their respective representatives). Whereas the application form to request for a European order for payment refers parties to the very limited space in field 11, in the Regulation it is requested to use additional sheets. Belgian legal theory has criticized the lack of clarity and the forms definitely seem to be susceptible of improvement in this respect.[133]

iii) Lack of jurisdiction - Competence

As is the case with an application for a European order for payment,[134] if under the rules of jurisdiction of Regulation 44/2001, a claimant must file an application under the Regulation in Belgium, he/she might make a mistake with regard to Belgian internal jurisdiction rules in view of the following issues:

- *ratione loci*: the application might be filed with a court that lacks territorial jurisdiction (e.g. before the Antwerp Commercial court instead of the Brussels Commercial court), although due to the availability of a tool on the website of the European Judicial Atlas in Civil Matters, such errors should be limited;

---

130 Communication of Belgium to the European Commission in accordance with article 25 of the Regulation.

131 *Supra*, Paragraph III, 3, 3.1(i); It needs to be noted that this discussion only concerns representation *ad litem* in the framework of legal proceedings, and not normal representation (by proxy) which is possible if it is clearly indicated that a party is acting as representative.

132 A reference can be made here to Regulation (EC) 290/2001 in which '*legal practicioners'* was defined. This definition comprised e.g. judges, prosecutors, court officers and court interpreters, and would therefore not be adequate in the framework of the Regulation. However, it shows that it is perfectly conceivable to define a number of categories that would qualify as '*legal professional*' on a European level.

133 M.E. STORME, *supra n. 121*, 3, S. VERBEKEN en L. WINKELMANS*, supra n. 122,* 26.

134 *Supra*, Paragraph III, 3, 3.1(ii).

- *ratione materiae*: the application might be filed with a court that lacks material jurisdiction in view of the (1) subject matter (e.g. before the First instance court instead of before the police court (as the police court has an exclusive material competence)), (2) the capacity of the parties (e.g. before the Commercial court instead of before the First instance court in case the defendant is not a merchant), or (3) the amount of the claim (*ratione summae*: e.g. if a claim exceeding 1,860 EUR is filed with the Justice of the peace).

As explained above, under Belgian procedural law, a judge can only raise *ex officio* his/her lack of jurisdiction in a limited amount of cases.[135]

Under article 4(4) of the Regulation, where the claim appears to be clearly unfounded or the application inadmissible, the application shall be dismissed. However, under Belgian law, no such preliminary (*prima facie*) review by the court exists. "*Clearly unfounded*" seems to concern the merits of the claim. Will a claim however be considered inadmissible in case of lack of jurisdiction? According to consideration 13 of the Regulation the concept of inadmissibility should be determined in accordance with national law. As explained above, there is a clear difference in Belgian law between inadmissibility and lack of jurisdiction.

We therefore believe that if an application was submitted to a court that lacks (internal) jurisdiction in view of national procedural rules, and such lack of jurisdiction should be raised *ex officio*, the judge should give the claimant the opportunity to either explain itself or to withdraw the claim under article 4(4) of the Regulation, by sending him the standard form B. Lack of internal jurisdiction does not seem to be a cause for dismissal due to inadmissibility under article 4(4) of the Regulation however, whereas lack of jurisdiction under Regulation 44/2001 might be viewed otherwise.

Another option could be for the court to refer the application itself to the court it considers to have jurisdiction (cfr. art. 660 JC). Although such referral does not seem to be a mechanism that is available under the Regulation, as would be the case for the application for a European order for payment, it could be an elegant solution to internal jurisdictional problems.[136]

The Regulation precludes in our view the obligation for the court seized to refer the case to the *Arrondissementsrechtbank*. The aim to create a level playing field taking into account the principles of simplicity, speed and proportionality indeed seems contrary to such obligation.[137]

Furthermore, the ordinary national rules on competence and referral will apply. This means that the defendant can only decline the jurisdiction of the court seized insofar that he/she indicates which court he/she considers to have jurisdiction over the claim.[138]

iv) The judgment

Under article 7 of the Regulation, the procedure is concluded by the court or tribunal giving a judgment. No standard form is provided for the actual judgment. The judgment will therefore take the form of a standard judgment of the relevant court.[139]

---

135 *Supra*, Paragraph III, 3, 3.1(ii).

136 *Supra*, Paragraph III, 3, 3.1(ii).

137 See also A. BERTHE, *supra n. 119*, 307.

138 Article 855 JC.

139 S. VERBEKEN and L. WINKELMANS speak of "*beschikking / ordonnance*", rather than of "*vonnis / jugement*", *supra n. 122*, 35.

In accordance with article 15, the judgment shall be enforceable notwithstanding any possible appeal and the provision of a security shall not be required.

3.2 Service of documents upon the parties

Article 5(2) provides that a copy of the claim form, and where applicable, of the supporting documents, together with the filled in (Part I of the) answer form (Annex III, standard form C), shall be served upon the defendant in accordance with article 13. Similarly, articled 6(6) on a possible counterclaim and article 7(2) on the service of the judgment, refer to service upon the claimant/parties. It might be noted that article 5(4) provides that a copy of the response from the defendant will be '*dispatched*' to the claimant, together with any relevant supporting documents. In article 5(6) the term '*dispatched'* is also used, but as a synonym for 'served'. This is not particularly clear.

The provision of the Regulation on service of documents (article 13) is - unlike the provisions of Regulation 1896/2006 (articles 13-15) - very short. Article 13 provides that documents shall be served by postal service attested by an acknowledgement of receipt including the date of receipt. If such service is not possible, reference is made to service as provided in articles 13 and 14 of Regulation 805/2004. The methods of service provided in these articles is similar to the methods of service described in articles 13 and 14 of Regulation 1896/2006. It is in general unfortunate that differences exist in methods of service under the various Regulations.[140] It would improve consistency and clarity if the rules on service of documents under all relevant Regulations would be identical.

Belgian courts (and in fact it concerns the court registries and staff) generally serve these documents by registered letter with an acknowledgement of receipt or by judicial letter, whereby some of them verify if the address of the defendant is correct if this is possible.[141]

Some courts serve the forms on the basis of article 1030 JC which concerns the article that is applicable to the service of national court decisions issued further to *ex parte* applications. However, as mentioned above, the consensus in Belgium seems to be that an application under the Regulation must be considered as an adversarial petition under the Belgian Judicial Code, although admittedly, these two documents cannot be entirely assimilated.[142]

As the Regulation has priority over Belgian procedural legislation, the courts in fact do not need any reference to Belgian law in order to serve documents under the Regulation.

Furthermore, courts would best refrain as much as possible from sending cover letters, as this may generate further translation issues and local disparities.[143]

3.3 Certificate procedure

Art. 1 of the Regulation provides that it eliminates intermediate proceedings necessary to enable recognition and enforcement in other Member States. In case enforcement is sought in another Member State, the party seeking enforcement has to produce:

- a copy of the judgment;

---

140 *Supra*, Paragraph III, 3, 3.2.

141 A. BERTHE, *supra n. 119*, 309.

142 S. VERBEKEN en L. WINKELMANS, *supra n. 122*, 25; Kamer, 27 January 2009, http://www.dekamer.be/doc/CCRA/pdf/52/ac430.pdf

143 S. VERBEKEN en L. WINKELMANS, *supra n. 122*, 33.

- a copy of the certificate referred to in art. 20(2), and where necessary the proper translation thereof.

It has been questioned whether the certificate must be made up by a judge or by a court clerk. Under Belgian law this would have an influence as to costs.[144] However, art. 20(2) of the Regulation explicitly provides that the certificate is issued at the request of one of the parties at no extra cost, and thus the certificate must be delivered at no extra cost.

It has also been questioned if the standard form D (the certificate) should not be considered as the certified and enforceable copy of the judgment (*uitgifte / expedition*), which under national law can only be delivered by the court clerk.[145]

We believe that in this respect the certificate and its issuance should be considered as an EU procedural document, existing autonomous from national law. Adding a national nametag might be helpful for comparison reasons, but is not desirable as it adds unnecessary complexity. These kinds of discussion are of course typical practical problems arising due to a lack of legislation to implement the Regulation into Belgian law.

As an appeal can be lodged under Belgian law, the decision to be taken by the court of appeals will also constitute a decision under the Regulation and can therefore also be certified by issuance of the standard form D.[146]

If the judgment rendered in the appeal proceedings is different than the one rendered in the first instance proceedings, the certificate contains the following wording that must be completed by the appellate court: "*This judgment supersedes the judgment given on ___/___/_____, case number _____, and any certificate relative thereto."*

This resolves possible problems and issues that might arise if a claimant wants to enforce a decision rendered in first instance, although this decision was quashed in the appeal proceedings. This means that a separate withdrawal of the certificate issued further to the first instance proceedings is not necessary.

4) Appeal against judgment

Pursuant to Belgian civil procedural law it is possible to lodge an appeal under art. 17 of the Regulation. This appeal must be lodged with the First instance court, the Commercial court or the Court of appeals with material and territorial jurisdiction under the Belgian Judicial Code.

However, art. 617 JC also provides that judgments of the First instance court or the Commercial court on claims not exceeding the amount of 1,860 EUR are rendered in last instance, so no appeal is possible. Judgments of the Justice of the peace and the police court (under art. 601bis JC) not exceeding an amount of 1,240 EUR are also rendered in last instance, so no appeal is possible. It seems problematic that this important limitation on the right of appeal was not mentioned by Belgium in its communication to the European Commission in accordance with art. 25 of the Regulation. As no specific legislation was adopted in view of the Regulation, general Belgian procedural law is applicable, including these limitations.[147]

---

144 S. VERBEKEN en L. WINKELMANS, *supra n. 122*, 36.

145 Art. 791 and 1380 JC.; S. VERBEKEN en L. WINKELMANS, *supra n. 122*, 36.

146 H. STORME, *supra n. 62,* 82.

147 Communication of Belgium to the European Commission in accordance with article 25 of the Regulation.

Under the draft Act that was approved by the House of Representatives and that is currently pending before the Senate, the threshold for the right of appeal was set at 2,000 EUR. This would mean that, if adopted, decisions under the Regulation could no longer be appealed.[148]

Pursuant to art. 1051 of the Belgian Judicial Code, the time limit within which an appeal must be lodged is one month as from the moment the judgment is served or notified in accordance with art. 792(2) and (3) of the Belgian Judicial Code. By analogy, the time limit within which an appeal must be lodged in the context of the European Small Claims Procedure is one month as from the moment the judgment is served or notified by the competent court in accordance with art. 13 of the Regulation.[149]

Although art. 1057 JC provides that, subject to nullity, the act by which the appeal is lodged contains an overview of the grievances against the appealed decision, no further arguments must be given to substantiate them.[150] In general it is required, but also sufficient, to mention the grievances in a sufficiently clear and accurate way so as to allow the defendant to prepare his/her brief of arguments and the appeal judge to appreciate the scope thereof.[151] As such there is thus no limitation with regard to the grounds on the basis of which an appeal can be lodged.

It might be noted that in its communication to the Commission, Belgium did not mention the legal remedy of statement of opposition under art. 1047 to 1049 JC (application to set aside). M.E. Storme states that an "ordinary" statement of opposition would not be possible, but that a statement of opposition would only be possible if the conditions of art. 18 of the Regulation (review procedure) would be fulfilled.[152]

However, consideration 26 of the Regulation states:

> *"Any reference in this Regulation to an appeal should include* ***any possible means*** *of appeal available under national law."* (emphasis added)

Although both the English as the Dutch text of consideration 26 and art. 17 of the Regulation seem to refer to the specific legal remedy of "*appeal"* (in Dutch "*beroep*"), which would thus seem to exclude an ordinary statement of opposition, the French text mentions "(*voie de recours*)", which is the generic term for any legal remedy including both appeal and statement of opposition. In view thereof, the "ordinary" statement of opposition should also be available under article 17 in case the defendant has not manifested itself in time further to receiving the claim (by not filing a response in time). As national procedural law applies to determining the availability of legal remedies, there is no reason why the ordinary statement of opposition would be excluded.

A statement of opposition should be filed within one month as from the moment the judgment is served or notified in accordance with art. 792(2) and (3) of the Belgian Judicial Code, and must be filed with the court that rendered the original judgment.[153]

---

148 E. VAN DEN EEDEN, "Knelpunten bij toepassing van de EPGV-VO in Belgisch procesrecht" [Difficulties in the application of the European Regulation on small claims in Belgian procedural law], available at http://www.cecbelgique.be/ (website European Consumer Center Belgium); Wetsontwerp betreffende de inrichting van een familie- en jeugdrechtbank [Draft Act concerning the installation of a family and youth court], *Parl. St.* Kamer, 2010-11, nr. 53 0682.; *Supra*, Paragraph V, 1.

149 Communication of Belgium to the European Commission in accordance with article 25 of the Regulation.

150 Cass. 7 September 2000, *Arr. Cass.* 2000, 1321.

151 Cass. 2 May 2005, *P&B* 2005, 215; Cass. 7 September 2000, *Arr. Cass.* 2000, 1321.

152 M.E. STORME, *supra n. 121,* 12.

153 Art. 1047 & 1048 JC.

5) Safeguarding the debtor's rights

5.1 Description of the procedure for rectification or withdrawal of the certificate

i) Rectification

In accordance with Regulation 1896/2006, in the absence of any specific provision in the Regulation or any Belgian legislation in this respect, we would assume that for the rectification, the court would fall back on the art. 794 – 801bis JC, which concern e.g. the rectification of judgments.

Contrary to Regulation 1896/2006 however, the fact that under this specific procedure both parties must appear before the court that issued the decision in the first place, is not more of an issue as in any other adversarial procedure. Unlike the procedure to obtain a European order for payment, the small claims procedure is indeed adversarial.

Art. 801bis JC, describing the procedure that is applicable in case of clerical errors or miscalculations in a certificate issued under Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) Nr. 1347/2000, would also be appropriate for the rectification of a form D (certificate) under the Regulation.[154]

However, as no legislation is available, and since the above procedure has not been declared applicable to certificates issued under the Regulation, the exact way such a problem would be handled remains uncertain.

ii) Withdrawal

Although such situation seems very unlikely, if a certificate would have been wrongly granted (e.g. in view of a judgment that was not rendered under the Regulation), the need to withdraw the certificate could arise.

If such need would arise, the issue is more complex as a rectification, as no similar procedure exists in Belgian procedural law.

We do not see any legal basis for such withdrawal in the Regulation, nor in Belgian law (which does traditionally not know the use of certificates).

To the extent that a court decision to issue a certificate would be considered as a decision falling outside of the scope of the Regulation, one could consider that ordinary opposition or appeal proceedings under Belgian law could be filed. However, this seems to be a bit farfetched. A claim before the attachment judge to terminate enforcement that would have been initiated on the basis of an irregular certificate would seem to be the most appropriate solution to this particular problem.

5.2 Review procedure

Art. 18 of the Regulation sets out the "minimum standards" for review of the judgment. In this regard the Regulation is different from Regulation 1896/2006 where the review procedure is an autonomous European legal remedy.

---

154 *Supra*, Paragraph III, 6, 6.1(i)

Art. 18(2) provides that the judgment shall be null and void if the court or tribunal decides that the review is justified. As this provision is a minimum standard, it is allowed that under the relevant national procedure not only the judgment is held to be null and void, but that also a new decision is taken to replace the one that is declared null and void.[155]

Contrary to Regulation 1896/2006, no communication was necessary by the Member States to the European Commission on the review procedure. Under Belgian law, the applicable procedure in which the judgment under the Regulation could be reviewed would in our view be the opposition procedure. We refer also to what we have written above on the availability of an "ordinary" statement of opposition.[156]

A reference must be made to Regulation 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims. Under article 19 of that Regulation, a judgment can only be certified as a European Enforcement Order if the debtor is entitled, under the law of the Member State of origin, to apply for a review of the judgment if it is confronted with conditions that are similar to the conditions as provided under art. 18 of the Small Claims Regulation.[157]

In its communication to the Commission under article 30(1)(a) of Regulation 805/2004 regarding the procedures for review, Belgium mentioned the statement of opposition as provided in art. 1047 *et. seq.* JC and also referred to art. 1132 *et. seq.* JC, which is the very specific procedure of "withdrawal of *res iudicata*" (Dutch: "*herroeping van gewijsde*", French: "*requête civile*"). In a limited number of situations, a writ of summons may be issued to obtain the withdrawal of *res iudicata*. These situations involve e.g. an aspect of fraud with the evidence (e.g. evidence was wrongfully kept from the adverse party, false testimonies).[158]

Belgium thus considered that because of the availability in Belgian law of these two procedures (statement of opposition & withdrawal of *res iudicata*), the Belgian legal system met the minimum standards for review under Regulation 805/2004.

It should however be noted that several courts have already ruled that, contrary to the communication by Belgium to the Commission, Belgian law in fact does not have any review procedure, and that subsequently, a Belgian judgment on an uncontested claim cannot be certified as a European Enforcement Order.[159]

Mutatis mutandis this entire discussion is also applicable to the review procedure under the Small Claims Regulation.

In view of the Regulation and Belgium's communication to the Commission, it is likely that Belgium will consider the statement of opposition & withdrawal of *res iudicata*-procedures as meeting the minimum standards of art. 18 of the Regulation.[160] However, it is likely that a

---

155 H. STORME, *supra n. 62,* 83.

156 *Supra,* Paragraph V, 4.1.

157 See also A. SMETS, "Het Europese betalingsbevel: VO. nr. 1896/2006 van 12 december 2006 tot invoering van een Europese betalingsbevelprocedure en het recht op tegenspraak van de schuldenaar" [The European order for payment: Reg. nr. 1896/2006 of 12 December 2006 creating a European order for payment procedure and the principle of an adversarial process] in *T. Vred.,* 2010, 65-66.

158 Art. 1133 JC.

159 Kh. Antwerpen 15 October 2008, nr. 08/6869; Kh. Hasselt 10 May 2006, *Limb. Rechtsl.*, with note, 262-275.

160 M.E. STORME, *supra n. 121,* 12.

number of courts will consider otherwise and would thus consider that Belgian law does not meet these minimum standards.

In our view, even if the statement of opposition (a claim to set aside) is filed on the basis of art. 18 of the Regulation at a time the deadline for filing a statement of opposition has lapsed, if the conditions of art. 18 are fulfilled and provided the defendant acts "promptly", such *sui generis* review-opposition should be declared admissible. It should indeed be recognized that the Regulation has priority over Belgian law, and in the face of inadequate Belgian legislation, courts will have to respect the minimum standards as set by the Regulation and find creative solutions as long as the Belgian legislator has not adequately solved these issues.

We would like to refer once more to the proposition of a bill that was submitted to solve this issue with regard to Regulation 805/2004 as mentioned above, and which concerns the described issues.[161]

6) Costs of the procedure

The application under the Regulation must be considered as an adversarial petition under the Belgian Judicial Code. Therefore, the docket rights that are usually due under such procedure must be paid by the claimant. As is the case with a unilateral petition, this leads to the applicability of art. 269/2 of the Belgian Code of Registration Rights, which provides for docket rights of EUR 31 (Justice of the peace and Police courts) and of EUR 60 (First instance court and Commercial court) that must be paid by the claimant.[162]

Art. 16 of the Regulation provides that the unsuccessful party shall bear the costs of the proceedings. However, art. 16 also provides that the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim. Consideration 29 of the Regulation further provides that the costs of the proceedings should be determined in accordance with national law.

As explained above, art. 1017 JC provides that each final judgment orders the unsuccessful party to the costs. Art. 1018 JC provides that these costs comprise:

- All docket and registration rights;
- The price and fees for judicial acts (e.g. bailiff's costs);
- Expenses regarding investigative measures, such as expert fees;
- Travel and accommodation costs for court magistrates and clerks if their journey was ordered by the judge;
- The procedural indemnity.

Under art. 1017 JC, the successful party is thus awarded a procedural indemnity, which is considered to be a lump sum allowance for attorney's costs and fees. This means that this indemnity is only granted in case an attorney has intervened. The amounts relevant to the summary order for payment procedure are the following:[163]

---

161 Wetsvoorstel tot wijziging van het Gerechtelijk Wetboek wat de invoering van een Europese executoriale titel voor niet-betwiste schuldvorderingen betreft [Draft Act for the modification of the Judicial Code concerning the introduction of a European enforcement order for uncontested claims], *Parl. St.*, Kamer, nr. 52 1646; *Supra*, Paragraph III, 6, 6.2.

162 This was confirmed in a letter of 22 June 2009 sent by the Federal Government Service of Finance (Mr. Walter Vande Velde) to the Attorney-Generals, as published in A. DE GROEVE et al., *supra n. 38*, 121-122.

163 KB 26 October 2007, *BS* 9 November 2011, 56834-56836;

Claim	Basic amount	Minimum amount	Maximum amount
From € 0 to € 250.00	€ 165.00	€ 82.50	€ 330.00
From € 250.01 to € 750.00	€ 220.00	€ 137.50	€ 550.00
From € 750.01 to € 2,500.00	€ 440.00	€ 220.00	€ 1,100.00

As the amounts of the procedural indemnity have been determined in relation to the amount at stake, these should in our view by definition be considered as proportionate to the claim.[164]

With regard to translation costs, under Belgian procedural law, these can be reclaimed under art. 8 of the Act of 15 June 1935.

7) Enforcement

7.1 Competent authorities[165]

Contrary to art. 29 of Regulation 1896/2006, art. 25(e) of the Regulation provided that the Member States must communicate which authorities have competence with respect to enforcement and which authorities have competence for the purpose of stay or limitation of enforcement (art. 23).

In its communication, Belgium has stated that the authority with competence to apply art. 23 of that Regulation is *first and foremost* the attachment judge of the place where the attachment is carried out. Pursuant to art. 1395 JC, the attachment judge has competence in respect of all actions for precautionary (conservatory) attachment and the means of enforcement and his/her territorial competence is defined in art. 633 JC. It was also stated that the First instance court also has competence in this respect under art. 569(5), and furthermore has full jurisdiction pursuant to art. 566 JC.[166]

As described above with regard to Regulation 1896/2006, in Belgium, in accordance with art. 506 JC, only bailiffs (*gerechtsdeurwaarder / huissier de justice*) have the authority to enforce judicial decisions.

7.2 How to enforce in practice - Acceptable languages

The claimant will be obligated to contact a bailiff in order to enforce the judgment rendered under the Regulation. If enforcement takes place in another Member State as the one in which the judgment was rendered, standard form D (certificate) will have to be provided to the bailiff. It will be the bailiff who is in charge of the further enforcement proceedings, in accordance with applicable Belgian law.

If a judgment rendered in another Member State under the Regulation is enforced in Belgium, the same discussion on whether or not a second service would be required (including standard

---

164 See also A. BERTHE, *supra n. 119*, 311-312.

165 See also *Supra,* Paragraph III, 8, 8.1.

166 Communication of Belgium to the European Commission in accordance with article 25 of the Regulation.

form D) can occur as with regard to the enforcement under Regulation 1896/2006.[167] Article 7(2) of the Regulation provides that the judgment will be served on the parties in accordance with art. 13.

Art. 21(2) furthermore states that the claimant shall produce a copy of the judgment, which satisfies the conditions necessary to establish its authenticity. In Belgium the registry of the court, as well as a bailiff can certify that a copy corresponds to the original.

With regard to the acceptable languages, we refer to Paragraph V, 2, 2.2 above with regard to the use of languages.

In its communication to the Commission, Belgium stated that pursuant to art. 21(2)(b), it does not accept any languages other than the official language or one of the official languages of the place of enforcement, in accordance with Belgian national law.

All acts of enforcement and notifications will indeed have to comply with the Act of 15 June 1935 on the use of languages in judicial proceedings.[168]

As Belgium has three official languages (Dutch, French and German), the territory of which has been defined precisely (including the bilingual territory of the Brussels Region), it must be carefully checked on which territory service must occur. Where necessary, a translation must be served together with the original document. It is very important to comply with the Act of 1935, as non-compliance is sanctioned by nullity, to be pronounced *ex officio* by the judge.[169]

7.3 Legal remedies under art. 22 and 23

In case the judgment is irreconcilable with an earlier judgment given in any Member State or in a third country and the conditions of art. 22(1)(a, b & c) have been fulfilled, the defendant may apply to the competent court in the Member State of enforcement that the enforcement of such judgment be refused.

As explained under Paragraph V, 7, 7.1, such a request should be made to the attachment judge. The defendant would need to summon the claimant by issuance of a writ of summons. A voluntary appearance would also be acceptable to introduce the case (art. 706 JC). These proceedings are not summary proceedings, but will be treated as such (art. 1395 JC).

Under art. 23 of the Regulation, if the defendant has applied for a review in accordance with art. 18, the competent court in the Member State of enforcement may, upon application by the defendant: (a) limit the enforcement proceedings to protective measures; or (b) make enforcement conditional on the provision of such security as it shall determine; or (c) under exceptional circumstances, stay the enforcement proceedings.

We believe that the attachment judge would also be the competent judge to decide on such an application by the defendant, and the procedure will have to be introduced in the same manner, through a writ of summons or by voluntary appearance of the parties.

---

167 *Supra*, Paragraph III, 3, 3.2.

168 Wet van 15 juni 1935 op het gebruik van talen in gerechtszaken, *BS*, 22 juni 1935.

169 Art. 40 of the Act of 1935.

VI. FINAL CRITICAL EVALUATION OF EU REGULATIONS ON SIMPLIFYING CROSS-BORDER DEBT COLLECTION

1) The Belgian context - Lack of implementation - Regulation vs. Directive

Any evaluation of the European order for payment Regulation and the Small claims Regulation in the Belgian context needs to start from the observation that there is no national legislation to implement these Regulations into the Belgian judicial system.

As a number of elements of the proceedings under the Regulations are novel features that do not have any real equivalent in Belgian procedural law (inversion of contentieux, service of documents by the courts, review procedure, assistance to be offered by court services,…), the absence of any implementation has generated procedural uncertainties and questions regarding (e.g.) these novel aspects.

This can only be considered as problematic, as the prime vocation of procedural law is to provide a clear and reliable framework for the judicial resolution of disputes.

It seems that the choice in favor of Regulations to introduce these new procedures throughout the European Union, and the fact that they have binding legal force throughout every Member State, has led Belgium to sit back and abstain from taking any further action itself.

Although strictly speaking, national governments do not have to take any action themselves to implement EU Regulations, it might still be required from a practical point of view to align a Regulation with national law. It is in that sense noteworthy that with regard to the European order for payment, Belgium has communicated to the European Commission that legislation to introduce a review procedure into the Belgian Judicial Code was being discussed. Although the need for such legislation has thus clearly been acknowledged, no legislation was passed since.

All this is relevant if one considers the limited success of both the European order for payment and the European small claims procedure. Although no clear figures are available, it seems that whereas the European order for payment procedure is being used in a limited way, the European small claims procedure is hardly ever used and virtually unknown.

The lack of knowledge and information regarding the availability of these procedures is certainly one of the major problems that is at the basis of the lack of success. The absence of any electronic tools to process applications for a European order for payment (which could be another driver for success) is not helpful either. However, legal uncertainty and diverging court practices due to a lack of clarity are at least equally deadly for the success of a procedure.

This problem has clearly been felt by the High Council of Justice, which stated that "*the application of the European order for payment Regulation has led to a lot of questions both practical as in principle, and diverging practices*". According the High Council of Justice this "*stands in the way of the good functioning of the courts and the equal treatment of citizens*".[170] Therefore the High Council of Justice has decided to render *ex officio* a (non-binding) advice regarding the application of the European order for payment Regulation.

Whereas this initiative can only be applauded, it is only because of the omission of the Belgian legislator, that such initiatives have become necessary.

---

[170] HRJ Advice, 2.

We therefore tend to agree with P. Gielen when he states that this could under certain conditions lead to liability of the Belgian State.[171]

Although the choice for Regulations as legal act for the rollout of European procedures is perfectly understandable, the Belgian example shows that a Directive might have led to better end results as this would have at least obliged Belgium to actively think about the full and functional implementation and insertion into the Belgian legal system and pass legislation in this respect.[172] In this context it might be noted that originally, in 1993, professor M. STORME had submitted a draft Directive, aimed at harmonization between the various Member States.[173]

In case further European procedural law would be implemented through Regulations, it seems advisable to at least confer implementing powers on the European Commission as is allowed since the Lisbon Treaty.[174]

2) Do Regulations 1896/2006 and 861/2007 simplify, speed up and reduce costs of litigation in cross-border cases concerning pecuniary claims and ease cross-border enforcement of judgments

If used and applied properly, the Regulations certainly offer the possibility of actual improvement. It must be noted however that the use of the standard forms may require some getting used to and may not immediately be very straightforward for creditors.

The fact that two different procedures exist (European order for payment & small claims), both using standard forms, but then again different in respect of various aspect, is in our view also somewhat confusing and problematic.

Due to the inversion of contentieux, that is offered by the European order for payment procedure, in comparison with the Belgian procedures, this is definitely an advantage that should be considered by creditors. However, if it is highly unlikely that a claim would remain uncontested, it seems to be of little use to opt for the European order for payment procedure, as this just adds a preliminary phase to the actual proceedings. From a Belgian perspective, it is likely that creditors in such case would opt for a national procedure and use the typical Belgian instruments to obtain quick judicial relief at the introductory hearing of shortly after.[175]

As far as the Small Claims Regulation is concerned, this procedure also has clear potential, but it seems that both courts and creditors need to get acquainted with it and that a certain critical mass must be reached in order for this to really kick off. In Belgium, considering the lack of clarity regarding various issues, the ideal conditions to reach such critical mass seem to be absent.

As obtaining exequatur in a European context has become rather easy under Regulation 44/2001, this will not in our view be the determining factor in the overall balance of choice.

---

171 P. GIELEN, "*La problématique du réexamen de l'injonction de payer européenne dans des cas exceptionnels*", note under Kh. Gent, 8 November 2011, *JT* 2013, 181-182.

172 For the sake of completeness, it must be mentioned that under art. 291(1) of the Treaty on the Functioning of the European Union, Member States are obligated to adopt all measures of national law necessary to implement legally binding Union acts.

173 M. STORME (ed.), *Rapprochement du droit judiciaire de l'Union Européenne - Approximation of judiciary law in the European Union,* Dordrecht, Martinus Nijhof, 1994.

174 Art. 291(2) of the Treaty on the Functioning of the European Union.

175 *Supra,* Paragraph I, 4.

Furthermore and in general, we refer to the lack of clear implementation into Belgian law as described under Paragraph VI, 1 above and the legal uncertainty regarding various aspects of the procedure. It is not unlikely that this plays a significant role and could be an element for creditors to opt for the safe haven of a national procedure.

As far as costs are concerned, the main legal cost seem to be lawyers fees, which are in general directly related to the duration of proceedings and the number (and size) of procedural documents that need to be drafted (briefs, submissions, petitions, writs,…). As Belgian proceedings tend to be rather descriptive, the European procedures will probably indeed have a positive effect on the costs involved, due to the fact that it concerns standardized applications.

It is noteworthy that especially a number of bailiffs have been eager to make use of the European order for payment and in this way open a new market that had been reserved mainly to lawyers before.[176] In any case, unless creditors are familiar with the procedure, the intervention of lawyers and/or bailiffs will in our view always be a factor, since the standard forms and the procedures involved are not always that straightforward.

3) Are the national procedures frequently impracticable in cross-border cases, considering e.g. direct or indirect discrimination on grounds of nationality? Do the advantages of Regulations 1896/2006 and 861/2007 outweigh potential obstacles in national procedures?

In our view the Belgian national procedures cannot be considered as impracticable in cross-border cases and especially in a European context, this is not the case.

The main benefit of the Regulations is that a uniform recovery procedure exists throughout the European Union. Especially for truly European players, this is an interesting development and should facilitate recovery of pecuniary claims.

Another valuable aspect of Regulation 1896/2006 is the mere introduction into Belgian law of a workable "order for payment" (unlike the Belgian summary procedure for payment procedure). Although it has not yet been done, we expect that a revamped national order for payment procedure will be introduced in the nearby future. Hopefully, this will also be an occasion to tackle the various issues that exist with the implementation into the Belgian legal system of Regulations 1896/2006 and 861/2007.

In this sense, from a Belgian procedural law perspective, the Regulations are mainly an important element in the overall evolution and convergence of the procedural law of the various Member states, rather than a solution to specific obstacles present in Belgian procedural law.

4) From the creditor's point of view, which is the most convenient alternative in Belgium in case of (EU) cross-border collection of debts?

In case there is a high likelihood of actual contestation of the claim (e.g. if there have been ongoing discussions between the creditor and the debtor), the application for a European order for payment will probably only add a preliminary phase to the actual proceedings. Under such circumstances it might be more convenient to opt for the ordinary national procedures.

If it concerns a claim that does not exceed EUR 2,000, the European small claims procedure might be an interesting option, e.g. because of the fact that in accordance with art. 15 it leads to

---

[176] See also *supra,* Paragraph III, 3, 3.1(i).

an enforceable decision. However, as long as uncertainty subsists regarding e.g. the review of the judgment, and there is a risk of abuse, creditors might prefer to stick with national procedures. The mere fact that some courts may not even know that such procedure exists, might also be a serious impediment for its success. As mentioned above, a certain critical mass needs to exist in order for creditors to feel comfortable enough to opt for the use of this procedure. The fact that by introducing a counterclaim that exceeds EUR 2,000, the procedure will be dealt with in accordance with national law, can also be of importance in opting for the European small claims procedure or not.

Finally, if the place of enforcement would be Belgium, this might also be an element of consideration for creditors to opt for an ordinary Belgian procedure. Considering their limited occurrence, the practical enforcement of decisions taken further to proceedings under Regulations 1896/2006 and 861/2007 might generate problems due to intervening parties (bailiffs, attachment judges,…) not being acquainted with such decisions and the legal consequences thereof. However, this should become less and less of a problem with the passing of time.

5) Other suggestions for improvement

We believe that it should be tried to maintain a high level of consistency between the various European procedural instruments. This means that to a maximum extent possible, rules on e.g. service of documents should be the same for the various procedures.

We also believe that the very limited provisions on the use of languages are problematic. Especially in a country like Belgium, where the use of languages (e.g. in legal proceedings) is very much regulated, the absence of clear rules is felt as a weakness of the European instruments, as this raises certain practical issues that must be tackled *ad hoc* by national courts. As the use of language touches the essence of the rights of defense, a more comprehensive framework is necessary and needs to be considered, especially in view of further developing European procedural laws.

Lastly, as already suggested above, the lack of any implementation by Belgium of the Regulations, and the limited, incomplete and outdated communications by Belgium to the European Commission demonstrate in our view that where necessary the European Commission should be able to intervene by e.g. conferring implementing powers upon them.[177]

---

[177] Art. 291(2) of the Treaty on the Functioning of the European Union.