



**Position paper of the Council of Notariats of the European Union (CNUE)
On the evaluation of Regulation (EC) No 805/2004 of the European Parliament and of the
Council of 21 April 2004 creating a European Enforcement Order for uncontested claims**

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The Notaries of Europe follow with great interest the ongoing work of the European institutions in the context of the evaluation of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (hereinafter *EEO Regulation*). In this context, during a meeting held on 14 September 2020, the CNUE passed on feedback from its members' experiences to Deloitte, in charge of carrying out a study on the evaluation of the instrument on behalf of the European Commission. Individual notaries also provided their responses to the public consultation on the *EEO Regulation*, which closes on 20 November 2020.

In addition to this public consultation, which aims to gather practical experiences and quantitative data, the CNUE wishes to express its view in favour of maintaining the *EEO Regulation* at least as far as authentic instruments are concerned.

1. Enforcing authentic instruments on the national level

As public officer holders, notaries draw up authentic instruments. By placing the State's seal next to the signatures of the parties on the instruments they establish, notaries are responsible for both the content and the form of their instruments (cf. Unibank case law¹, Art.4 (3) of the *EEO Regulation*, etc.):

- They ensure that the authentication process is fully respected.
- The authentic instrument comprises the declarations of its signatories, their correct identity and the date and substance of their commitments.

In their various areas of practice, notaries draw up certain types of contracts where one party commits to a payment obligation to the other party, for example real estate purchase contracts or loan agreements. Such authentic instruments are usually designed as (national) enforcement orders. Naturally, the payment obligation based on an authentic instrument is always per se "*uncontested*", since the parties have agreed in the instrument both on the content of the contract **and the immediate enforceability** of precisely defined obligations explained by the notary.

¹ Judgment C-260/97 — Unibank A v Flemming G. Christensen of 17 June 1999.



In order for these national securities to be able to circulate and produce their effects in other Member States, various procedures are provided for.

2. Issuing European Enforcement Orders under the *EEO Regulation*

Within the scope of the *EEO Regulation*, authentic instruments can be certified as European Enforcement Orders (hereinafter *EEOs*). In order to uplift a (nationally) enforceable authentic instrument to the rank of an *EEO*, the creditor applies to the authority designated by the Member State of origin for the authentic instrument to be certified as an *EEO* (see art. 25 para. 1 *EEO Regulation*). The designated authority uses the standard form (the “*EEO certificate*”) in Annex III of the *EEO Regulation*, a three-page form with about 25 blanks to fill in. This procedure is lean and it does not take a lot of time. The *EEO certificate* is issued in the language of the enforceable authentic instrument (see art. 9 para. 2 *EEO Regulation*).

In many Member States such as France and Italy, the designated authority to issue the certificate is the notary who authenticated the act. Therefore, the notary acts a one-stop-shop for creditors who are in need of an enforcement title usable throughout the EU.

An authentic instrument which has been certified as an *EEO* shall be enforced in the receiving Member State without the need for a declaration of enforceability and without any possibility of opposing its enforceability (see art. 25 para. 2 *EEO Regulation*). Therefore, the *EEO Regulation* offers a smooth way to enforce uncontested claims throughout the European Union. At the same time, it helps implementing the single market and promotes the cross-border taking up of loans since, since banks are more inclined to grant credit because they know that they will be able to act more easily if the debtor defaults.

Today, the enforceable authentic instrument is mainly used in cases of enforceable claims of banks against their debtors who are located in another Member State. A bank claim recorded in a notarial act constitutes an enforceable order within the meaning of this regulation and can therefore circulate and be enforced throughout the EU. We therefore feel it is worthwhile to tap into the potential of the *EEO Regulation*.

The *EEO Regulation* is justified as *lex specialis* in relation to the *Brussels Ia Regulation*. It is clear, concise and contains clear procedural standards. The *EEO Regulation* also sends an important political signal about the importance of the enforcement of uncontested claims within the EU. The use of the authentic instrument as an *EEO* saves both money and time compared lengthy and costly legal proceedings.

3. Comparison between the *EEO Regulation* and *Regulation Brussels Ia*

Due to the entry into force of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as *Regulation Brussels Ia*), the



question has arisen as to whether there is still a need for the procedures provided by the *EEO Regulation* since *Regulation Brussels Ia* offers a procedure comparable to the *EEO Regulation*.

The scope of application of *Regulation Brussels Ia* covers the scope of the *EEO Regulation* almost completely which in consequence means that a notary now can decide if he or she wants to follow the procedures provided by one regulation or by the other at least if the respective authentic instrument was drawn up after 10 January 2015.

However, given that the scope of *Regulation Brussels Ia* is wider than the scope of the *EEO Regulation* since it is not limited to *uncontested* claims, the formalities to comply with are different from the ones under the *EEO Regulation*. A closer look to the prerequisites of both regulations unveils that the procedure provided by the *EEO Regulation* is slightly more advantageous to follow. Therefore, there is still good reason not to abolish the *EEO Regulation* especially in regard to authentic instruments.

- a) Since the scope of *Regulation Brussels Ia* is wider than the scope of the *EEO Regulation*, the procedure to issue a certificate under *Regulation Brussels Ia* is a little bit more time-consuming if you compare Annex III of the *EEO Regulation* with Annex II of *Regulation Brussels Ia*. The latter is more extensive and the designated authority is asked to fill out more blanks than in case of a EEO certificate. In practice, this might discourage creditors from using the procedure offered by *Regulation Brussels Ia*.
- b) In addition, Annex II of *Regulation Brussels Ia* is more complicated, in particular with regard to interest rates. No. 5.2.1. of Annex III of the *EEO Regulation* is easy to understand and the blanks can be filled in quickly. It simply refers to the interest rate set by the European Central Bank (ECB) which is known all over the EU. This way, it offers a very practical way of indexation. Considering that cross-border enforcement is a matter mostly for banks, financial and credit institutions that economically rely on interest payments, this should not be left unconsidered.

Annex III of *Regulation Brussels Ia*, however, refers to the agreement on interest rates in the authentic act itself (no. 5.2.1.5.1.2.) which might nudge the enforcement authority towards looking into the authentic act itself which in turn might prolong the enforcement process. In addition, the practical reference to the interest rate set by the ECB is not provided by Annex III of *Regulation Brussels Ia*. The absence of an easy way to also enforce due interested rates in a cross-border scenario via *Regulation Brussels Ia* hinders the access to justice in this context. Instead of trying to fill out the Annex III with regard to the interest rates, the creditor will most probably simply forgo the interest rates and focus on the main claim. Under the *EEO Regulation*, the creditor is therefore better served.

- c) According to art. 42 para. 4, art. 58 para. 1 of *Regulation Brussels Ia* the competent enforcement authority can ask for a translation of the authentic instrument (not only the certificate!) under certain circumstances. This provides the debtor with an opportunity to slow down the enforcement procedure. The debtor can claim the existence of



inconsistencies between the certificate and the authentic instrument itself and therefore demand the enforcement authority to ask for a translation.

In contrast, the *EEO Regulation* does not provide for the requirement to translate the authentic instrument. Given that the *EEO regulation* is applicable only for uncontested claims regarding financial payments, there is no need for translation because the relevant information is limited to names and figures. The absence of a translation obligation concerning the authentic instrument in the *EEO Regulation* does not mean, however, that the debtor is not sufficiently protected against unjust enforcement proceedings. In contrast, the absence of such translation obligation accelerates the enforcement process.

Ultimately, the procedures provided by the *EEO Regulation* are easier to understand and easier to handle. At the same time, they are justified when taking into account that they are used only for uncontested claims regarding money payments (scope of the *EEO Regulation*). Any problems discussed in the legal scientific community in relation to the *EEO Regulation* are based on the provisions regarding the enforcement of judgements given in default of appearance. This default of appearance of the debtor is often caused by errors in serving documents such as official invitations to court hearings. However, these situations where the service of documents is in question are not comparable to claims arising from authentic instruments where both parties agreed to certain obligations in a procedure that guarantees the physical presence of both parties. We therefore at least suggest to consider keeping the EEO for authentic instruments.

4. Enhancing knowledge about the EEO

The CNUE and its members note a lack of information on the EEO as well as a lack of demand from economic actors.

In order to better promote the benefits of the *EEO Regulation* especially in comparison to *Regulation Brussel Ia*, we would like to suggest to make access to information on the *EEO Regulation* easier and more precise.

As an example and in order to underline the current lack of information on the EEO, we would like to point out that the information available on the EEO on the European e-Justice Portal, which is the reference for obtaining information on European legislative instruments and their implementation in the EU Member States, is difficult to find. The information relating to the EEO should be in the category “Monetary claims” next to the payment order. The information on the EEO is currently contained only in the category “Taking legal action” in the sub-category “online forms”, and is not accessible to the Internet user who does an intuitive search on the European e-Justice Portal. We consider it essential to review this information in order to make the EEO more accessible and, in particular, to update the information on the enforcement of monetary claims with an emphasis on the enforcement of authentic instruments.

In addition to the availability of information on the European e-Justice portal, it seems important to us to provide interprofessional training on the EEO (in partnership with magistrates, bailiffs and



the banking sector) in order to ensure that all actors can fully benefit from the advantage of an effective EEO.

5. Concrete suggestions to improve the application of the EEO Regulation

For the European notariat, the issuing of the European Enforcement Order certificate for authentic instruments, in accordance with Annex III of the instrument, is the cornerstone of the effective application of the EEO, as it ensures not only rapid application, but also control by the person who has received the authentic instrument and who is responsible for verifying the legality of the instrument. This control in the State of origin, by the issuing authority, further facilitates the cross-border enforcement of uncontested claims arising from authentic instruments.

This competence of the notary to issue the certificate contained in Annex III is already a reality in several Member States, such as France and Italy (see 2. above). The CNUE considers it appropriate to give this competence to the notariats in the Member States where this is not yet the case.

Finally, the geographical scope of the EEO Regulation could be extended to the States party to the Lugano Convention to ensure application, inter alia, in Switzerland.

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