2018 THEMIS COMPETITION - European Civil Procedure

FACILITATING CROSS-BORDER ENFORCEMENT : THE ENACTMENT OF AN IDEAL

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750 bc. Romulus *rex* rules over Rome. His brother Remus provocatively crosses the Roman border – the *pomœrium*. That was his ultimate mistake, earning him nothing but death in the hands of his own sibling.

In 2018, nothing has really changed. Crossing national borders to enforce one's judgment abroad proves almost just as hazardous. Many creditors don't even try, lest they fail.

This is deeply detrimental to individuals and firms throughout Europe, for the right to a fair trial *'would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party*[1]*.'*

With this simple statement, the European Court of Human Rights, (hereinafter referred to as "ECtHR"), first promoted the right to the enforcement of judicial decisions on the basis of article 6§1 of the European Convention on Human Rights (hereinafter referred to as "ECHR"). This case-law is a significant milestone in the emergence of a European law on enforcement, as it established the execution of a court decision as a fundamental right for litigants[2].

Once a judgement is issued, and provided all the remedies available to the parties against this decision have been exhausted, it becomes final and binding. Therefore, the losing party is compelled to respect it and ideally, will enforce it on a voluntary basis.

Nevertheless, in some cases, claimants will face refusal from the opposing party to carry it out. Thus, it may become necessary for parties who previously obtained a ruling in their favour to request the forced execution of the judgement, ensured by the assistance of an enforcement officer and if required, the cooperation of the police.

Enforcement proceedings can be defined as any means through which a person can obtain the execution of either a court decision or an obligation originating, for instance, from an authentic document. These means will affect the debtor's person (e.g. the eviction of a tenant) or their assets (whether they are tangible or intangible).

The refusal to execute a court decision will lead to additional difficulties -both material and legal- every time the lawsuit involves a cross-border element. This is particularly the case in civil matters, if the parties' nationalities differ or if they do not live in the same country.

Indeed, State sovereignty, which can be defined as the nature of a *"power (summa potestas) which is not subjected to any other*"[3], may appear as an obstacle preventing the implementation of a court decision in a foreign territory. First of all, civil procedures of execution are normally regulated

1 Hornsby v. Greece, European Court of Human Rights, 19 March 1997.
2 Thaleia vs. Greece, European Court of Human Rights, 5 November 2010, the right to the enforcement of decisions is now based on article 1, protocol no 1 to the ECHR, (1952).
3 CORNU, G., *Vocabulaire juridique*. Paris, PUF, 2011. Our translation.

by each State's domestic law as they reflect its enforcement power, which is an attribute of the State.

Besides, State sovereignty implies the existence of a principle of territoriality[4]. That is to say, the laws and proceedings in force in one State solely apply to its territory and remain ineffective outside its own borders[5]. Moreover, the organs carrying out the execution of the judgement itself are part of the State and as such, bound to respect the principle of territoriality inherent to their geographical remit. Only the State holds a monopoly of enforcement on its territory.

Initially, the principle of territoriality could be understood as a rule regulating the actions of state organs and preventing anyone from seeking the material implementation of a judicial decision in another territory. It was consequently nothing but a form of "*judicial border*"[6].

However, its influence has gradually been reduced as cooperation between members of the European Union (hereinafter referred to as "EU") has grown stronger. It became an objective in the EU as well as for the Council of Europe to enable European litigants to find a simpler solution for cross-border enforcement.

Abolishing boundaries within the EU has been the very quintessence of the European project for decades, and it still is today. European leaders have been trying to implement that ideal in a variety of fields. We all know the great 'steps' of European construction, with a number of structural reforms which have deeply affected our daily lives, such as the suppression of customs borders or the adoption of a common currency for most Member States.

Consequently, free movement of people, capital, goods and services has led to several cross-border exchanges[7], all of which induce the creation of legal obligations[8]. Hence the necessity to establish common policies in order to overcome differences in Member State legislation.

Judicial harmonisation appears less tangible for the peoples of Europe. Yet it is certainly not a petty matter. In the field of cooperation in civil matters, EU Member States seek an approximation of their laws without, however, intending to change their own domestic civil laws. This is what distinguishes harmonisation policies from unification policies.

Civil and commercial law, and even family law are concerned here[9]. Geographically speaking, all Member States of the EU are concerned, except the United Kingdom and Ireland[10]. As for Denmark, it is considered as a State outside the EU in this matter.

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4 CUNIBERTI, G., Le principe de territorialité des voies d'exécution, *Journal de Droit International* (Clunet), n°4, octobre 2008, doctr. 9.

5 CORNU, G., *op. cit*.

6 COLONNA D'ISTRIA, F., L'exequatur des décisions de justice dans l'espace européen, *Revue de l'Union européenne*, 2016, p. 295.

7 I.e. marriages between nationals of different Member States, European citizens working in a bordering State.

8 CANIVET, G. La construction de l'espace judiciaire européen, *in* Colloque à l'École Nationale des Greffes, 2006.

9 Treaty on the Functioning of the European Union, article 65.

As the execution of legal decisions is a fundamental right, it became increasingly necessary for EU Member States to create a common legal framework to remove certain obstacles: the disparity in legislation and the monopoly of enforcement. As an additional benefit, a common legal framework regarding enforcement ensures the efficiency of the internal market. Economic operators are indeed more certain of recovering their claims.

From the outset, the six signatory States of the 1957 Treaty of Rome, establishing the European Economic Community, sought to provide common mechanisms for the enforcement of civil judgements between all Member States[11] but cooperation remained limited to certain fields and dependent on each State's will to participate until the Treaty of Maastricht[12] .

The Conclusion of the Treaty of Amsterdam forty years later was a significant first step forward, as it allowed the EU to legislate in the area of cooperation in civil matters and set the objective to create an Area of Freedom, Security and Justice (hereinafter referred to as "AFSJ") within the EU. This objective was later achieved with the European Council of Tampere in 1999 which paved the way to wider cooperation between Member States[13]. The Treaty of Lisbon (2007) later highlighted the main objectives of the AFSJ[14].

As regards *recognition* of court decisions, the Regulation was somehow a significant step forward[15]. As a consequence, judgements rendered in a Member State have *by themselves* legal existence in every other Member State, without any further procedure being required. As regards *enforcement*, however, the Regulation did not suppress *exequatur*, though the word itself was not used any more[16].

Thus creditors still had to request enforceability before the competent judicial authorities of the State where they considered enforcing their judgement. Consequently, an initial system implied judicial oversight of the decision based on several criteria: this is called the *exequatur* procedure.

The Brussels I and Brussels IIa Regulations[17] both replaced the *exequatur* process by a declaration of enforceability granted by a judge after a simpler examination of a judgement. This

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10 Both countries have an opting-in possibility so they can decide whether or not to take part in negotiations for cooperation in civil matters.

11 HAZELHORST, M., *Free movement of civil judgements in the European Union and the right to a fair trial*, Asser Press, 2017.

12 www.touteleurope.eu

13 HAZELHORST, M., *op. cit*.

14 Treaty on the Functioning of the European Union, Article 67 : *'the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.'*

15 Regulation (EC) n°44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, article 33: *'A judgement given in a Member State shall be recognised in the other Member States without any special procedure.'*

16 Article 38 reads as follows: *'A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.'*

17 Regulation (EC) No 2201/2003 - jurisdiction, recognition and enforcement of matrimonial and parental judgments. The European Commission is planning the recasting of this regulation: suppression of *exequatur* procedures for all fields of this regulation is being considered.

necessarily means a limitation of State sovereignty. A third system allows the enforcement order simply to be implemented in another Member State without any formality[18].

Thus, declarations of enforceability did not disappear: they have merely been inverted. Before 2012, creditors had to request enforceability. Now it is incumbent on debtors to dispute it.

The change was solely procedural. Without doubt, the 2012 recast was beneficial to cross-border enforcement, but only because of debtors' potential negligence and the practical impediments related to filing a lawsuit on these legal grounds in order to challenge presumed enforceability.

But legally speaking, the substance of *exequatur* remains. The possibility to thwart the effects of a foreign judgement on the grounds of public policy continues to exist.

Consequently, can the harmonisation of civil execution procedures throughout Europe ensure the effectiveness of the right to enforcement?

It appears that thanks to the constant evolution of enforcement proceedings throughout Europe, litigants to a civil claim can obtain the enforceability of a legal title in a foreign country (I). However, the effectiveness of such proceedings remains relative considering the existence of several practical difficulties, which leads us to wonder whether or not the current system could be improved and how (II).

I- The free movement of enforceability throughout Europe or the need to fit the picture to the frame

EU Member States conduct the approximation process of their legislations with regards civil execution procedures. Consequently, cross-border enforcement is greatly facilitated as long as court decisions are final and binding. This is the direct consequence of the development of preconditions in the European law on enforcement proceedings (A).

However, some adjustments are still in order to fit the picture to the frame. Theoretically, it is currently much easier to recover a claim for a European citizen. In practice, this is far from the truth. Complications have arisen regarding the effectiveness of the procedure in itself, as many obstacles still stand in the way of the claimant (B).

A- Preconditions to enforcement proceedings on the path of harmonisation

Enforcement simplification in Europe is illustrated by two main improvements to the former system. In order to ensure free movement of enforcement orders in cross-border litigation, several legal tools are available to the claimant (1). This is one among several preconditions to enforcement

18 Brussels IIa Regulation, no 2201/2003 in the case of child kidnapping, Regulation no 805/2004 (European Enforcement Order), Regulation no 1896/2006 (European Order for Payment) and Regulation no 861/2007 (Small Claims Procedure).

procedures. Moreover, once the enforcement order is obtained, another formality is required: service of this order (2), in order to bring it to the defendant's attention.

1-Multiplication of enforcement proceedings

The idea of an area of freedom, security and justice shows how the notion of territory has been set aside little by little within the EU. Indeed, borders no longer appear as an obstacle for the free circulation of declarations of enforceability[19].

Nowadays, cross-border enforcement is facilitated by the emergence of several proceedings; some of them are in each State's domestic law, while others originate from European law itself.

First of all, the order to enforce can be found in an authentic instrument or a judgement. In the first case, an authentic act is characterised by its legal formalism and its signature[20].

Once the claimant has obtained such an authentic act, enforcement will depend on the field: it will either imply a declaration of enforceability[21] (given, for instance, in France by the President of the National Chamber of Notaries)[22] or no formality at all, in the case of the European Enforcement Order[23]. Hence the advantage for the claimant to have his/her claim established in an authentic instrument, as it will automatically be considered as uncontested in this case[24].

Moreover, an enforcement order for a debt can also be established by a judgement. In addition to the national civil proceedings that each Member State offers to the claimant-creditor, two mechanisms have been set up by European law. Contrary to the declaration of enforceability or the European Enforcement Order, they are not subject to National procedural rules.

The first is the European Payment Order. This is an *ex parte* procedure, intended to be swift and simple provided the defendant does not oppose the judgement later[25]. It is limited to uncontested cross-border claims only in civil and commercial matters[26]. However, the European Payment Order is sometimes considered as an alternative procedure, according to the National Law[27]. Judicial oversight of this order appears purely formal[28].

19 CANIVET, G., *art. cit.*

20 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, article 4, an authentic act is defined as *'a document which has been formally drawn up or registered as an authentic instrument and the authenticity of which relates to the signature and the content of the instrument and has been established by a public authority.'*

21 As is the case with the Brussels I Regulation, enforcement will imply judicial oversight of the foreign court decision.

22 Article 509-3 of the French Civil Procedure Code.

23 Regulation no 44/2001, article 4: declaration of enforceability is therefore completely suppressed as long as the claim is uncontested.

24 Regulation no 44/2001, article 3.

25 DOUCHY-OUDOT, M., La force exécutoire à dimension européenne, *Procédures* n°8-9, August 2008, 4.

26 Regulation no 1896/2006, article 2.

27 Contrary to France, Italy allows its creditors to use the National Payment Order even in the case of cross-border litigations.

28 DOUCHY-OUDOT, M., *art. cit.*

Furthermore, the small claims procedure embodies a will to create a simpler, faster and less expensive mechanism for claims up to 5,000 Euros[29]. It is a written procedure, like the previous one where the use of standard forms is required. The decision becomes enforceable immediately, even if an appeal is lodged[30]. To be enforced in another Member State, a European certificate will be necessary[31].

A considerable number of mechanisms have been created to allow the creditor to obtain an Enforcement Order. However, this is only the first step in proceedings, as another formality is equally important: service of that order.

2-Importance of service

Service can be defined as the means allowing *"any fact, any act, any draft act"* to be brought to a person's attention *"being of individual concern to them"*[32]. This is an important formality as it will start the time limit within which to lodge an appeal[33].

In cross-border litigation, service is all the more important as the defendant seldom lives in the same State as the claimant. It is all the more crucial in *ex parte* proceedings when the defendant is temporarily set aside from the court.

The ECtHR deems a State responsible for the actions of enforcement officers, as it must take all necessary measures to enable them to ensure the service of court decisions, which is a precondition for the implementation of enforcement proceedings[34].

Each regulation (European Enforcement Order, European Payment Order, Small Claims Procedure) allows several mechanisms for the service of the order, such as transmission through consular or diplomatic channels, notification by mail[35] and in the near future, notification sent electronically[36].

There are also several compulsory statements in the document accompanying notification written in the language of the State concerned by the enforcement order. A lack of any of these elements could render the enforcement order void and impede its implementation.

Most difficulties regarding the implementation of enforcement proceedings originate in the service process, as debtors are rarely notified properly in practice.

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29 Regulation no 861/2007, article 1.
30 Regulation no 861/2007, article 15.
31 Regulation no 861/2007, article 20.
32 CORNU, G., *op. cit.*
33 Regulation (EC) no 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in Member States of judicial and extrajudicial documents in civil or commercial matters.
34 ECtHR, 31st May 2007, Miholapa c/ Latvia.
35 Regulation (EC) no 1393/2007, article 4 sqq.
36 Multi-annual European E-Justice Action Plan, 2009-2013 and the 2017 International Union of Judicial Officers' project entitled *'Enabling Dematerialized Access to Information and Assets for Judicial Enforcement of Claims in the European Union.'* (https://www.uihj.com/fr/-lancement-du-projet-e-justice-enable)

For instance, in the case of the European Payment Order, proceedings do not require the claimant to provide documents in support of his/her application[37]. So, this type of mechanism only works if the debtor is informed later. Consequently, a lack of service will impact the effectiveness of proceedings.

Harmonisation of Member State legislation regarding civil execution procedures may be noted in the preconditions required to obtain an enforcement order. Nevertheless, this harmonisation is not enough as it finds its limits in its implementation.

B-Implementation of enforcement proceedings on the verge of ineffectiveness

Regarding the implementation of enforcement proceedings, a simple observation can be made. If progress has truly been made in the means through which a claimant can obtain an instrument allowing enforcement, there is still room for improvement regarding how to implement enforcement mechanisms, the effectiveness of which is relative. Effectiveness will indeed depend on the nature of the enforcement instrument chosen – whether it is a protective or an enforceable measure – (1). Besides, whatever instrument is chosen, several practical obstacles still stand in the way of material execution (2).

1- Relative effectiveness depending on the nature of the enforcement instrument

Several instruments have gradually been adopted by EU Member States under judicial cooperation in civil matters.

On the one hand, protective measures have recently been included in the European law on enforcement. Indeed, a European Account Preservation Order has been in effect since January 18th, 2017[38]. This is a fund-freezing procedure, ordered by a judge in one Member State[39] and destined to be enforced in another Member State: so it only applies to cross-border litigation when the debtor's bank account is located in a different place to the creditor's.[40]. It is immediately enforceable.

Designed to be swift and simple, this *ex parte* procedure prevents debtors from spending, hiding or moving their money. Once again, several standard forms are available to start proceedings.

This is of significant benefit to creditors who no longer have to wonder which national proceedings they need to use or whether they will face bank secrecy. This procedure is nevertheless limited to civil and commercial debts.

37 Court of Justice of the European Union, 13th December 2012, Iwona Szyrocka (C-215/11).
38 Regulation (EU) no 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross border debt recovery in civil and commercial matters.
39 Except in the United Kingdom and in Denmark.
40 www.e-justice.europa.eu/

Moreover, the progress made has been slowed down by several obstacles. Indeed, the regulation leaves many matters to national law, proving how difficult harmonisation can be in this field[41].

On the other hand, enforceable measures in themselves depend on each State's domestic law. So enforcement will be governed by different legislation according to the whereabouts of the debtor's assets.

This is the reason why several obstacles still stand in the way of the implementation of any enforcement order. Indeed, a creditor living in one Member State is oblivious to a debtor's financial situation and the location of his/her assets and so is his/her enforcement officer.

Consequently, the European Commission adopted a Green Paper on the effective enforcement of judgements in the EU regarding the transparency of debtors' assets[42]. Its aim is to help any creditor obtain reliable information about the debtor's assets and whereabouts within a reasonable period of time.

Thus, several measures are taken into account, such as measures relating to the debtor's declaration, improving access to registering or exchanging information between enforcement authorities[43]. All of which would greatly improve a creditor's knowledge of a debtor's solvency.

The principle of territoriality regarding enforcement instruments also means that a creditor needs to respect the legal framework of the administering State. Rules can vary from one State to another. For instance, the property to be distrained and included in the seizure is not the same depending on the assets' whereabouts; or the costs of proceedings are not unified[44].

The implementation of enforcement proceedings seems to be characterised by its relative effectiveness. Indeed, it all depends on the nature of the enforcement procedure. Moreover, enforcement is subject to several material limits, impacting its efficiency.

2-Material limits to actual enforcement

How does the implementation of enforcement take place in practice? The answer to this question leads to a fundamental distinction in civil execution procedures. Indeed, material constraints differ from material execution[45].

The former can be understood as "*the legal means offered and guaranteed by the State to ensure the enforcement of obligations and the respect of rights*"[46], so this generally implies material intervention by authorities entitled to use public force.

41 TIRVAUDEY, C., L'harmonisation des voies d'exécution, *Revue de l'Union européenne*, 2016, p. 301.
42 COM(2008) 128 , March 6th 2008.
43 COM(2008) 128 , March 6th 2008.
44 TIRVAUDEY, C., *art. cit.*
45 CUNIBERTI, G., *art. cit.*

According to International public law, public authorities can only act in their geographical remit and consequently, must respect the principle of territoriality. So, they cannot intervene in another State without jeopardising State sovereignty.

As a famous principle states : "*the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State* ». [47]

The latter also implies an intervention by the enforcement authorities; however, they are not entitled to use public force. They can only require the State authorities empowered to do so. This is notably the case for the French "*huissier de justice*" or the English High Court enforcement officer in order to enter into a debtor's home.[48]

Consequently, this considerably limits their ability to pursue a debtor across European countries in order to recover claims. Thus, the principle of territoriality "*was understood as prohibiting attachments purporting to reach foreign assets*"[49].

International public law suggests that the enforcement officer's role is played by consular authorities in foreign countries[50]. Article 5 (f) states that "*consular functions consist in* […] *acting as notary and civil register and in capacities of a similar kind*" and article 5 (j) also refers to "*transmitting judicial and extrajudicial documents".*

However, enforcement officers cannot intervene directly on another State's territory. Foreign authorities will also necessarily oversee the action of consular authorities on their territory. This is a very restrictive system, which seems inappropriate due to the mutual trust and recognition mechanisms between European Member States.

Moreover, obstacles to extraterritorial enforcement go beyond the enforcement officers' simple geographical remit. Indeed, when an attachment concerns a cross-border claim and the aim is to recover money, the risk is that the creditor could be paid twice.

The perfect example is when a third party, and in most cases, a bank, is entitled to pay its creditor's creditor on the basis of a foreign enforcement order and is later asked to pay its own client[51].

Remedies against enforcement orders are finally the greatest obstacle to free circulation of enforceability. It seems only fair that a debtor against whom *ex parte* proceedings were conducted can defend himself/herself and oppose an order for payment, for instance.

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46 CORNU, G., *op. cit*.
47 Permanent Court of International Justice, Twelfth Session, Judgement no 9, The case of the S.S Lotus, 1927.
48 ZUCKERMAN, A., *Zuckerman on Civil Procedure*, 2006, p. 22-130.
49 CUNIBERTI, G., *art. cit.*
50 Vienna Convention on Consular relations, April 22nd 1963. 179 countries are parties to this agreement, among which many European Union Member States.
51 CUNIBERTI, G., *art. cit.*

Nevertheless, the protection of a debtor's rights will necessarily limit the effectiveness of enforcement mechanisms. Enforced recovery of claims has been greatly improved by the suppression of the *exequatur* procedure.

However, all forms of judicial oversight of the enforced order have not disappeared. The logic has only been reversed, as it is no longer up to the claimant seeking the enforcement of a decision to ask for its supervision, but the defendant .

That is to say "*a judgement given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required*"[52].

Nowadays, it is up to the defendant to seek a remedy against such a decision. Debtors are given several remedies against either the authentic act or the judgement called into question.

First of all, they can lodge an appeal or any statement of opposition, depending on the nature of the court decision.

Concerning the European Payment Order, a debtor may lodge an appeal against it within 30 days of being served. Thus, the case can either be transferred to a national civil law court and dealt with under national law, dealt with in accordance with a European Small Claims procedure or discontinued[53].

Regarding the European Small Claims procedure, the defendant has the possibility to form counter-claims. If it exceeds €5,000, both the main claim and the counter-claim will be dealt with in accordance with the law applicable in the country in which the action is taken[54]. This can be a way for a debtor to slow down the enforced recovery of a claim.

Defendants can also apply for a review in exceptional cases, if, for instance, the defendant was never notified of the decision taken against him/her[55]. A stay or a limitation of enforcement can also be set as part of this remedy[56]. The refusal of enforcement can impede the free movement of enforceability. This will happen every time the order is "*irreconcilable with an earlier decision or order previously given"* for instance[57].

Finally, the ECtHR deems a State responsible due to the action of its enforcement authorities or its lack of action. For example, a violation of the right to the enforcement of court decisions can be noted when the defendant never received notification of a court decision[58].

52 Regulation (EU) no 1215/2012 of the European Parliament and of the Council, December 12th, 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, article 39.
53 www.e-justice.europa.eu
54 Regulation (EC) no 861/2007, articles 1 sqq.
55 This is possible with the European Enforcement Order, the European Payment Order and the European Small Claims procedures: article 19, 20 and 18 of each concerned regulation.
56 Possible with the European Enforcement Order, the European Payment Order and the European Small Claims procedures: article 23 of each concerned regulation.
57 Article 22.
58 EctHR, Miholapa vs. Latvia, May 31st 2007.

Even if the free movement of enforceability across Europe has greatly improved regarding the procurement of an enforcement order, its implementation still needs to be bettered.

Thus, both legal and practical changes must be considered in order to guarantee that the right to the enforcement of court decisions will never become theoretical.

II – Reinforcing the effectiveness of the right to cross-border enforcement within the European judicial area or completing the framework

Reinforcing the effectiveness of civil execution procedures means rethinking the current system. Indeed, even if EU Member States have set up several common procedures to allow the claimant in a cross-border litigation to obtain an enforcement order, difficulties still stand in his/her way to implement it.

This is the reason why two improvements could be considered. First of all, the creation of a label for judicial officers who would be qualified to intervene in cross-border litigations (A) and secondly, the creation of an on-line platform containing all the information needed for enforcement (B).

A- Creating a "European Judicial Officer Label"

Cross-border litigation is a source of difficulty for claimants. In this context, any European citizen or corporation needs to find a reliable and qualified professional to guide them through the proceedings. Consequently, a European judicial officer appears to be the solution. An overview of the label is necessary (1) before describing the skills required to obtain such a label (2).

1-Overview of the label

Being confronted with a need for cross-border justice within the EU implies most of the time that European citizens and firms must first be advised by a qualified professional in their Member State.

However, this always implies that they must be able to identify those whom they can trust and who will be entitled, as regards local legislation, to enforce the creditor's judgements in the requested Member State.

In order to allow these legal professionals to comply with cross-border execution requests from citizens and firms within the European Union, European legislation now offers a variety of legal tools giving the possibility of having a valid writ of execution within the EU for instance, or similarly a European Account Preservation Procedure[59].

59 Under the provisions of EU Regulation n° 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

Therefore, it appears useful to ponder over the question of whether these legal professionals are *really* in a position to use these specific procedures, inasmuch as these procedures are complex, diverse, and in fact, rarely used.

Indeed, the legal professionals entitled to enforce judgements in cross-border matters, chiefly bailiffs, have very limited knowledge of these European tools, which they can theoretically use.

This limited knowledge is partly due to the fact that requests for cross-border enforcement are not as frequent as requests for domestic enforcement. Besides, the specific rules implied by each procedure of this kind are so complex that one has to use these tools quite frequently in order to master them properly.

In these circumstances, the bailiff, uncertain of what he has to do, and perfectly conscious of his own professional responsibility, will not be very much inclined to respond favourably to such cross-border enforcement requests. Most of the time, these professionals will actually refuse to do what they are asked, lest they should fail or make some mistake.

This situation is terrible for European citizens and firms, feeling they are being abandoned by the legal professionals whom they deemed qualified. This can make them feel that the European Union fails to do what should be done to ensure the enforcement of their rights.

These citizens and firms should definitely be able to rely on enforcement professionals in relation to cross-border execution.

Consequently, all these reasons are grounds for the creation of a European Judicial Officer label, which we propose. This would allow citizens and firms to identify the qualified professionals entitled to enforce judgements in cross-border matters, and effectively able to do it.

Furthermore, the European legislator is competent in this respect, as shown by the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU") of 2007.

First of all, article 74 of that Treaty provides that the Council adopts all measures to ensure administrative cooperation between the concerned administrations of Member States in the field of the European Union's Area of Freedom, Security and Justice. In each Member State, the enforcement officer is the public official entitled to enforce writs of execution.

The creation of a European Judicial Officer label will lead to the bettering of administrative cooperation between these different enforcement officers in different Member States. Indeed, such a label would allow the identification of the qualified legal professionals entitled to enforce cross-border matters. Consequently, it is clear that the European legislator is legitimate and legally entitled to adopt this set of measures creating a label for enforcement officers.

Moreover, article 81 of the same Treaty FEU provides that the European Union can implement judicial cooperation in civil matters, notably, regarding cross-border litigation.

Said article indicates that such cooperation can include measures meant to ensure the effectiveness of the right to justice. An effective right to justice naturally implies the effective right to resort to proper legal professionals.

That is the reason why, in this respect, creating the European Judicial Officer label would allow European citizens and firms to have effective access to legal enforcement professionals as regards cross-border enforcement.

As a consequence, the European legislator is also legally entitled to adopt the measures proposed on the grounds of article 81 TFEU.

Besides, giving this label to enforcement officers within the European Union implies the acknowledgement of a specific qualification. Therefore, it will have to be taught and assessed. This matter can be addressed through an e-learning programme, organised by the European Judicial Training Network already in place.

Article 81 precisely indicates that the European Union implements judicial cooperation in matters having cross-border implications, and that such cooperation may include measures pertaining to the training of legal professionals.

Creating qualified training for cross-border enforcement is directly related to the training of legal professionals as referred to in article 81 of the Treaty FEU.

Therefore, the European legislator is again legally entitled to create this European Judicial Officer label, inasmuch as it would include training organised by European authorities.

Once the need to create a label for a European judicial officer is established, it is all the more important to determine what kind of skills should be expected from this professional. Consequently, the content of the label must be highlighted.

2- Content of the label

The European Judicial Officer Label would be granted to those who have passed an examination following an e-learning programme. The fundamental notions that would have to be mastered are numerous.

First of all, the European Judicial Officer would have to know the European Small Claims Procedure[60], the European Order for Payment procedure[61], the European Enforcement Order for Uncontested Claims[62] and finally, the European Account Preservation Procedure[63]. In addition, knowledge of the domestic legislation of the Member State where the legal professional is based would have to be assessed.

60 REGULATION (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure.
61 REGULATION (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure.
62 REGULATION (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims.
63 REGULATION (EU) No 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

For instance, in the case of French domestic law provisions as regards the enforcement of a foreign EU judgement, articles 509 to 509-9 of the French Civil Procedure Code would have to be considered, since these provisions are inspired by a number of European treaties and regulations. There is a distinction as regards the nature of the writ of execution.

A second distinction is also made as to whether the judgement pertains to property or to individuals. A judgement pertaining to property (for instance, concerning a debt) that has been rendered in an EU Member State may be directly enforced in France. In order to do this, one has to make a request before the foreign judge in the foreign Member State so that the judgement becomes a *'European Execution Order'*. The court decision will then be enforced in France without even resorting to a French judge.

For instance, a German European Enforcement Order may be used directly by the creditor to enforce payment against a French debtor. However, the judgement will need to be translated into French by a certified translator. A specific procedure is necessary for the enforcement of judgements in France in specific matters[64].

A foreign judgement given in a Member State in matrimonial matters and parental responsibility matters (divorce, custody, etc.) will need no *exequatur* to be enforced in France. The President of the French '*Tribunal de Grande Instance*' (regional court) will only have to check whether or not foreign judgements may legally be enforced in France.

The creditor will have to file a request in order to have enforceability duly acknowledged. There is no need to be represented by an attorney. The competent Regional Court is that of the residence of the person requesting the enforcement.

Nonetheless, *exequatur* remains necessary and inevitable in certain cases, such as when the foreign judgement is being disputed or when the judgement needs to be materially enforced. *Exequatur* is requested before a Regional Court judge and here it is necessary to be represented by an attorney. The competent court is that of the creditor's or debtor's residence. The judge will check the judgement is lawful[65].

In this respect, knowledge of domestic law reinforces European citizens' and firms' confidence in European enforcement officers and in the European institutions supposed to ensure an effective right to justice within the European Union.

Enforcement professionals are likely to receive requests from European citizens and firms in order to make cross-border enforcement in their own Member State or in another Member State. In the latter case, the former will act as a national reference directing operations in the foreign Member State where a local enforcement officer will conduct those operations.

64 It is quite notably the case for French divorce.

65 Whether or not the judgement is definitive in the Member State where it was given; if the procedure applied in the foreign Member State has overlooked the rights of defence; if the judgement is contrary to the principles pertaining to the protection of the person and his or her dignity.

Therefore, one of the main difficulties in cross-border litigation appears to be the lack of knowledge for litigants. For instance, they might not know to whom they should make a request in order to obtain the enforcement of a judgement. In such circumstances, the solution would be to create a label for enforcement agents.

Besides, according to the principle of territoriality, it is also difficult to determine which professional is competent to implement the enforcement of any legal title in a foreign country. Consequently, a way to help judicial officers communicate with each other must be put into place.

B-Creating a "European judicial enforcement" e-Portal

Enforcement professionals will need to communicate easily with their European counterparts. What better way to do so than create a dematerialised means of communication?

A European judicial enforcement e-Portal could help agents intervening in the implementation of cross-border enforcements (1) and this portal would function according to several principles (2).

1-Overview of the portal

Despite the progress that has been made regarding the circulation of judgements within the EU, enforcement in another Member State very often implies major practical impediments when it comes to conducting operations.

Indeed, enforcement officers in European Union Member States, such as the '*Huissier de Justice*' in France, are frequently requested by European citizens and firms to enforce a judgement in another Member State.

Thus arises a series of questions which often leads to embarrassment on the part of enforcement officers[66].

National legislation differs and enforcement officers rarely know foreign legislation. Therefore it appears necessary to enhance communication between different enforcement officers.

A communication tool that aims to organise enforcement proceedings very practically between the creditor's Member State and the requested Member State, and between the requesting Member State's officers and the requested Member State's officers, should be created[67].

66 These practical questions are of the following type: What is the foreign authority entitled to enforce in the foreign Member State concerned? Are there any formalities that need to be carried out before enforcing? In other words, is my judgement enforceable as such? What can I hope to obtain from my debtor's property? What is seizable and what is not? What is the economic attractiveness of the enforcement proceedings I am contemplating in that foreign Member State?

67 We therefore propose a web portal to be accessed from the website: https://www.e-justice.europa.eu.fr, where one will be able to transmit the judgement.

An electronic, simple and unique window solution has already been implemented by the EU as part of the European judicial enforcement project[68]. However, this website remains in draft form. Indeed, only a few Member States took part in the project and the information sheets presented do not include all the information needed.

On the grounds of the Treaty FEU, the European legislator appears competent to take measures of this kind, just as with the creation of the European Judicial Officer label.

Indeed, article 74 of the Treaty provides that the Council adopts measures to ensure administrative cooperation between the concerned administrations of Member States in the field of the European Union's *Area of Freedom, Security and Justice*.

The enforcement officer in each Member State is the competent public authority for enforcement. Creating a European Judicial Enforcement e-Portal would naturally allow the improvement of administrative cooperation between enforcement officers throughout Europe.

As a consequence, the European legislator is legally entitled to create such an e-Portal. Moreover, article 81 of the same Treaty provides that the EU implements judicial cooperation in civil matters that have cross-border implications. Said article indicates that this cooperation may include measures tending to ensure an effective right to justice.

Consequently, the European legislator is, again, legally entitled to create this e-Portal on the grounds of article 81. European citizens and firms would therefore be able to make a request, in their mother tongue and in their own country, to their usual legal professional, to direct enforcement proceedings from their own Member State in a foreign Member State where operations would be conducted by a local enforcement officer, both officers being in contact through the e-Portal.

Once the framework for the e-Portal is set up, it is then necessary to determine how this means of communication could function.

2-Functioning of the e-Portal

In order to ensure the correct functioning of the e-Portal, several rules must be put in place. Indeed, in practice, it would certainly help avoid different risks. For instance, the risk of double payment to the creditor[69] could be avoided if a European citizen or firm, (that is to say, the claimant) provided the domestic judicial officer with the original of the legal title to be enforced.

This would allow the enforcement agent to make sure that the prerequisites for enforcement are met. In this case, it would be necessary to verify several pieces of information. First of all, the writ of execution would need to be valid[70].

68 http://www.europe-eje.eu/en/eje-project : The EJE (European Judicial Enforcement) project's aim is to improve the execution of court decisions in Europe and communication between judicial officers – the enforcement agents.

69 CUNIBERTI, G., *art. cit.*

70 The executing Member State must check the enforceability of the order, the existence of a European certification, the validity of the notification or the fact that all the legal remedies are no longer available to the defendant.

Secondly, the creditor seeking the enforcement of a judgement or any order would have to have the legal capacity to do so[71]. Finally, it would be impossible to seek the enforced recovery of a claim without the correct amount and the certainty of the claim to be enforced, including both interest and costs.

Only then would the European judicial officer request the enforcement of the order, thanks to a standard on-line form, on behalf of the distraining creditor[72].

This form should necessarily be accompanied by a certified copy of the enforcement order and transmitted by the enforcement officer located in the Member State of origin to the enforcement officer in the executing Member State. This operation would then be carried out through the e-Portal, allowing the identification of the competent enforcement agent for cross-border litigation depending on the location of the enforcement, duly selected in the portal.

This request would lead to the interruption of the time limit of the enforcement order. Considering the difference between the European Member States' legislation, the procedural impact would have to be determined according to each national civil procedure law. All enforcement officers would be able to report on the progress of the procedure through the e-Portal[73]. Consequently, they would be able to inform the creditor on the progress made.

The EU internal market sets out a principle of freedom of pricing, competition and economic cohesion[74]. Thus, it would seem appropriate to ensure contractual freedom on the rate applicable to the cross-border implementation of a European enforcement order. An agreement on that rate should intervene beforehand between all the enforcement officers concerned. In order to achieve economic cohesion, an indicative scale of charges must be considered depending for instance on the amount of the claim that has to be recovered[75]. This indicative scale must be adapted depending on each State of execution's currency.

Besides, in the case of a debtor's insolvency, enforcement agents could be invited to invoice 300 Euros for the work carried out. Legal aid could also be required by the claimants[76]. The « EUROPEAN JUDICIAL ENFORCEMENT » e-Portal would include several forms helping claimants to ask for the enforced recovery of their claim.

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71 For example, the creditor must be an adult

72 This request could be implemented thanks to a standard form, see annex.

73 Several pieces of information could be exchanged: return receipt after notification, debtor's insolvency, payment, payment agreement.

74 Treaty on the European Union - Article 3.

75 Fees due to the enforcement agent should be shared between the agents in the State of origin and the State of execution. Fees should be determined depending on the amount of the claim to recover. For information, the following scale could be used : 10 p. 100 up to 125 Euros ; 6.5 p. 100 from 125 Euros up to 610 Euros ; 3.5 p. 100 from 610 up to 1,525 Euros ; 0.3 p. 100 from 1,525 Euros to 7,000 €.

76 Directive 2003/8/CE January 27th 2003.

The EU[77] has established the recognition of the effect of court decisions between Member States regarding the declaration of insolvency of a person or a firm, even if this is a precautionary measure. Registers of insolvency do exist in Member States. Thus, it would be very useful if the e-Portal could include this kind of information which would be available to European enforcement agents. Their work would only be facilitated.

This portal could also be a useful tool for the setting up of electronic notification of European judicial and extrajudicial documents[78]. The European judicial enforcement portal would then become a unique, safe and *de rigueur* instrument for enforcement agents.

Finally, the e-Portal appears to be the first step towards wider cooperation between Member States in the field of enforcement. However, several other questions still exist, such as the matter of a common language in the enforcement of judicial documents.

77 Regulation (EU) no 2015/848 of May, 20th 2015.
78 In this context, a central file could gather European citizen's consent to e-notification.

ANNEX

REQUEST TO ENFORCE A DECISION SETTLEMENT OR AN ENFORCEABLE TITLE

1. Nature of the document - Enforceable title /Date and reference number[79]

2. Court of origin / Authority (Notary) – Name, Address, Member State, Telephone/Fax/E-mail:

3. Claimant(s) (*), (Person A identity elements). (*) If the decision/court settlement concerns more than three claimants or three defendants, attach an additional sheet.

4. Defendant(s) (*) - Identity elements. (**) If the decision/court settlement concerns more than three claimants or three defendants, attach an additional sheet.

5. Terms of the enforceable title

5.1. Currency - Euro (EUR) or Other (please specify ISO code).

5.2. Claim (*) Claim A - maintenance is to be paid By - Person for whom maintenance is owed.

5.2.1.2. Interest (if specified in the decision/court settlement)

If the maintenance claim is subject to interest, please indicate the rate:

Interest due as from:

(dd/mm/yyyy)

5.2.1.3. Payment in kind (please specify):

5.2.1.4. Other form of payment (please specify):

5.3. Costs and expenses - The decision/court settlement provides that (surname and given name(s)) must pay the sum of to (surname and given name(s)).

6.3 Solvency known - Bank details, Employer, Estate, Claim (rent…), Vehicle (Car, motorbike)

6.4 Enforcement agent of the Member State of origin who is certified to hold the original enforceable title- Identity elements.

Signed in:

on

(dd/mm/yyyy)

Signature and/or stamp of the enforcement agent of the Member State of origin:

79 The title is recognised and enforceable in another Member State without any possibility of opposing its recognition and without the need for a declaration of enforceability.