

LEGAL PRACTICE IN APPLYING THE EUROPEAN ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS FROM POLAND'S JUDICIARY PERSPECTIVE

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ABSTRACT

Regulation (EC) No 805/2004² of the European Parliament and of the Council of 21 April 2004 has brought to life a European Enforcement Order (EEO) for uncontested claims³. This general method of enforcing foreign judgments – in this case judgements coming from European Union Member States – within the EU without the need of any intermediate proceedings, for example *exequatur*, offered significant advantages. This regulation has laid down minimum standards to ensure that judgments, court settlements and authentic instruments on uncontested claims can circulate freely. Article 3 of the regulation has established what shall be regarded as an uncontested claim and Article 6 settled requirements for certification as a EEO. These two articles form the backbone of the regulation and also caused most of the problems. As the regulation became immediately enforceable in all Member States,⁴ Polish civil procedure had to be accordingly changed simultaneously. It caused some perturbations but also enhanced the Code of Civil Procedure.

Keywords: European Enforcement Order, judicial co-operation in civil matters, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004, Polish Code of Civil Procedure.

INTRODUCTION

The European Union's area of freedom, security and justice (AFSJ) was created to ensure the free movement of persons and to offer a high level of protection to its citizens. It covers policy areas that range from the management of the European Union's external borders to judicial cooperation in civil and criminal matters. It includes immigration policies, asylum, police cooperation, and the fight against crime (organised crime, terrorism, drugs smuggling, trafficking in human beings, etc.). The creation of the area of freedom, security and justice is mainly based on the Tampere⁵ (1999 – 2004), Hague (2004 – 2009) and Stockholm (2010 – 2014) programmes.

Judicial cooperation⁶ in civil matters aims to establish closer cooperation between the authorities of Member States. It seeks to eliminate obstacles deriving from incompatibilities between various legal and administrative systems, and thus facilitates access to justice. Its

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² This regulation entered into force on 21 January 2005 and became applicable as from 21 October 2005 – this means that, for example, a judgment which has been given by a Polish court on 24 January 2005, can be certified as an EEO after 21 October 2005. The same applies to the court settlements concluded after the date of entry into force or to the authentic instruments drawn up and registered after this date.

³ Here this regulation will be referred to as the EEO regulation.

⁴ In this article a Member States shall mean a Member State of the European Union with the exception of Denmark.

⁵ Due to the differences in the law of civil procedure of the Member States the acceleration of the recognition and enforcement of judgments was and is – as it is stated in the conclusions of Tampere – necessary for proper functioning of the internal European market.

⁶ Judicial cooperation in civil matters contributes to the area of justice, freedom and security, as governed by the Treaty on the Functioning of the European Union (Title V) "Area of freedom, security and justice". The General Framework of the Judicial Cooperation includes: the Stockholm Programme; action plan on the Stockholm Programme; the Hague Programme: ten priorities for the next five years; facilitating judicial cooperation in civil matters; Civil Justice specific programme (2007 – 2013); accession to the Hague Conference on Private International Law (HCCH); the Convention on Choice of Court Agreements; the Convention on Parental Responsibility and Protection of Children; European and international courts; Justice Forum; applying the co-decision procedure to maintenance obligations; and European contract law.

cornerstone is the principle of mutual recognition and enforcement of judgements and of decisions resulting from extrajudicial cases.

In order to enhance mutual trust, development of better judicial cooperation between Member States and to assist them with the enforcement of judgements, different instruments and procedures were adopted within the EU. These include, for instance, mutual recognition of protection measures in civil matters (proposal); maintenance obligations; European small claims procedure; European order for payment procedure; European enforcement order for uncontested claims; jurisdiction, recognition and enforcement of judgments in civil and commercial matters (“Brussels I”); jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (“Brussels II”); insolvency proceedings; alternative dispute resolution: mediation, strengthening cooperation with Switzerland, Norway and Iceland: the Lugano Convention (2007).

This paper first presents some general information about EEOs and then presents the decision matrix for courts that were developed by the European Commission. Finally, the paper analysis the position of the EEO in terms of the Polish Code of Civil Procedure and the main obstacles that are faced in issuing the certificate of EEO.

EUROPEAN ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS

According to recital 8 of the Preamble of the EEO regulation, the European Council in its Tampere conclusions considered that access to enforcement in a Member State other than that in which the judgment has been given should be accelerated and simplified by dispensing with any intermediate measures to be taken prior to enforcement in the Member State in which the enforcement is sought. A judgment that has been certified as an EEO by the court of origin should, for enforcement purposes, be treated as if it had been delivered in the Member State in which enforcement is sought. In Poland, for example, the registration of a certified foreign judgment will therefore follow the same rules as the registration of a judgment from another part of Poland and does not imply a review as to the substance of the foreign judgment. Arrangements for the enforcement of judgments should continue to be governed by national law.⁷

The EEO is a certificate which accompanies a judgment, a court settlement or an authentic instrument and which allows this judgment, settlement or instrument to be freely circulated in the European Union. As such, this certificate constitutes a “European judicial passport” for decisions, settlements, and authentic instruments.⁸ The EEO is a very useful device for cross-border enforcement. It allows a creditor to enforce a judgment in another EU state without needing to undertake another court proceedings.⁹ It is however worth noticing that the EEO is only one of a few tools available to creditors looking for protection of their claims in other Member States¹⁰ so-called state of EEO execution.¹¹

Article 2 of EEO regulation has determined its scope by pointing out that it shall apply in civil and commercial matters,¹² whatever the nature of the court or tribunal. In particular, it shall not extend, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). The mentioned article

⁷ 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 [2004] OJ L143/15.

⁸ European Commission Directorate-General Justice, Freedom and Security, European Judicial Network in civil and commercial matters, Practice Guide for the Application of the Regulation on the European Enforcement Order, <http://ec.europa.eu/civiljustice/publications/docs/guide_european_enforcement_order_en.pdf> accessed 10 June 2015

⁹ David Carter, European enforcement orders (12 November 2012), <<http://thesheriffsoffice.com/articles/european-enforcement-orders>> accessed 10 June 2015.

¹⁰ A judgment on an uncontested claim may be obtained through the civil procedures foreseen in national law.

¹¹ E Marszałkowska-Krzyż and I Gil, *Code of civil procedure*, (1st edn, Wolters Kluwers 2011) 203.

¹² Although family law matters are excluded from the scope of the EEO regulation, it is to be mentioned that maintenance matters do fall within the scope of it.

also provides exceptions by stating that this regulation shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; and (d) arbitration.

Clarification on what “civil and commercial matters”¹³ mean according to EEO regulation may be required.

The European Court of Justice (ECJ) has consistently held that the term “civil and commercial matters” must be given an autonomous meaning derived from the objectives and scheme of the Community legislation concerned and the general principles underlying the national legal systems as a whole.¹⁴ The ECJ pointed out that two elements are relevant for deciding whether or not a dispute is of a civil and commercial nature:

- the subject matter of the dispute; and
- the nature of the relationship between the parties involved.

From the ECJ decisions we may conclude that generally:

- a matter is not “civil or commercial” when it concerns a dispute between a public authority and a private person when the first acted in the exercise of public power;¹⁵
- the concept of “civil matters” encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations;¹⁶
- loss or damage caused in wartime by government troops is not encompassed by “civil matters”.¹⁷

One could argue, to an extent that by the certification of a judgment as an EEO, the judgment becomes equal to the judgment of a court of the Member State of enforcement. But in order to ensure full respect of the right to a fair trial principle, the EEO regulation takes into account the fundamental rights with regard to civil procedure, especially the principle of fair trial. This is realised by the introduction of a system of minimum standards for uncontested claims procedures.

In certain cases a judgment can only be certified if the procedure in which the judgment has been rendered, fulfils these standards. According to the 19 recital of the preamble to the EEO regulation, the regulation does not imply the obligation for the Member States to adopt the minimum standards in their national laws of civil procedure. However, the Member States are recommended to do so as to make available a more efficient and rapid enforcement of judgments in other Member States. If the national law of a Member State will not comply with the standards set out in the Regulation, the judgments rendered in that Member State cannot be certified as an EEO.¹⁸

It is important to underline the fact that the EEO regulation does not require the debtor to be a resident in any Member State of the EU. Every judgment of a court of a Member State can be certified as an EEO if the requirements laid down in the Regulation are met. This means

¹³ In general the term ‘civil and commercial matters’ is to be interpreted in the same way as under the Brussels I Regulation; P Stone, *EU Private International Law* (3rd edn, Elgar European Law 2014) 29-32.

¹⁴ Case C-29/76 *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol* [1976] ECR 1541; ECJ distinguishes between *acta iure imperii*, which are excluded from the notion of ‘civil or commercial matters’, and *acta iure gestionis*, which are, a contrario, included in such notion.

¹⁵ Case C-172/91 *Sonntag v Waidmann* [1993] ECR I-1963.

¹⁶ Case C-271/00 *Gemeente Steenberg v Luc Baten* Case [2002] ECR I-10489.

¹⁷ Case C-292/05 *Lechouritou and others v Germany* [2007] ECR I-1519.

¹⁸ Marek Zilinsky, ‘Abolishing Exequatur in the European Union: The European Enforcement Order’ (2006) 53 *Netherlands International Law Review* 475.

that a judgment rendered by a Polish court against a Russian company can be certified by a Polish court as an EEO. If this company has assets in Germany or France, the certified judgment can be easily enforced in those countries under the EEO regulation.¹⁹

The certification procedure under the EEO regulation is an *ex parte* procedure. This means that the debtor is not heard on the application for the EEO certificate. According to Article 10 of the EEO regulation the debtor is given a possibility to challenge the certificate. However, these possibilities are strictly limited.

UNCONTESTED CLAIM

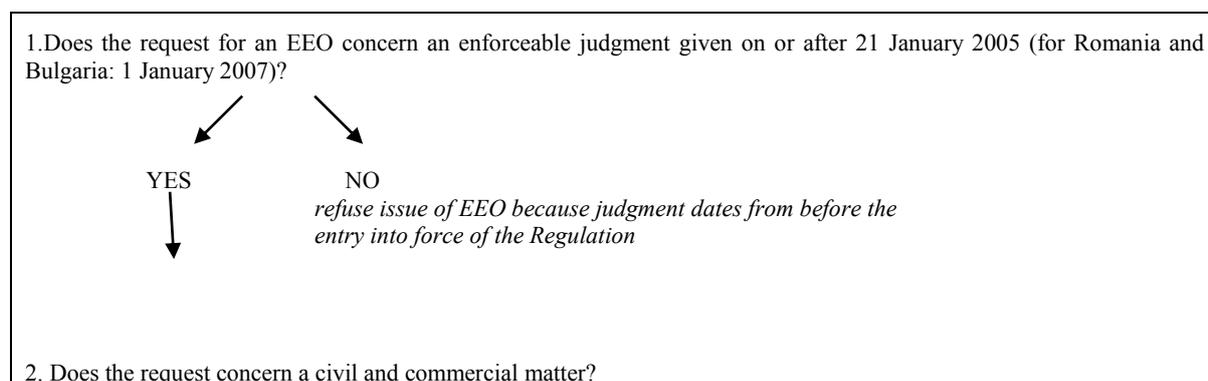
Eligible judgments are those made on or after 21 January 2005 and which arise from uncontested civil or commercial claims. ‘Uncontested’²⁰ means a claim in which, during the course of the court proceedings, the debtor has:²¹

- a) expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or
- b) never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or
- c) not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or
- d) expressly agreed to it in an authentic instrument.²²

DECISION MATRIX FOR THE COURTS²³

The below presented matrix was created by the Commission Services in consultation with the European Judicial Network in Civil and Commercial Matters. It is a very well-adjusted tool for courts which helps them to follow the necessary steps and also assists judges’ with the overview of the EEO procedure.

In ten steps the matrix presents a seemingly obstacle-free way of issuing the EEO certificate:



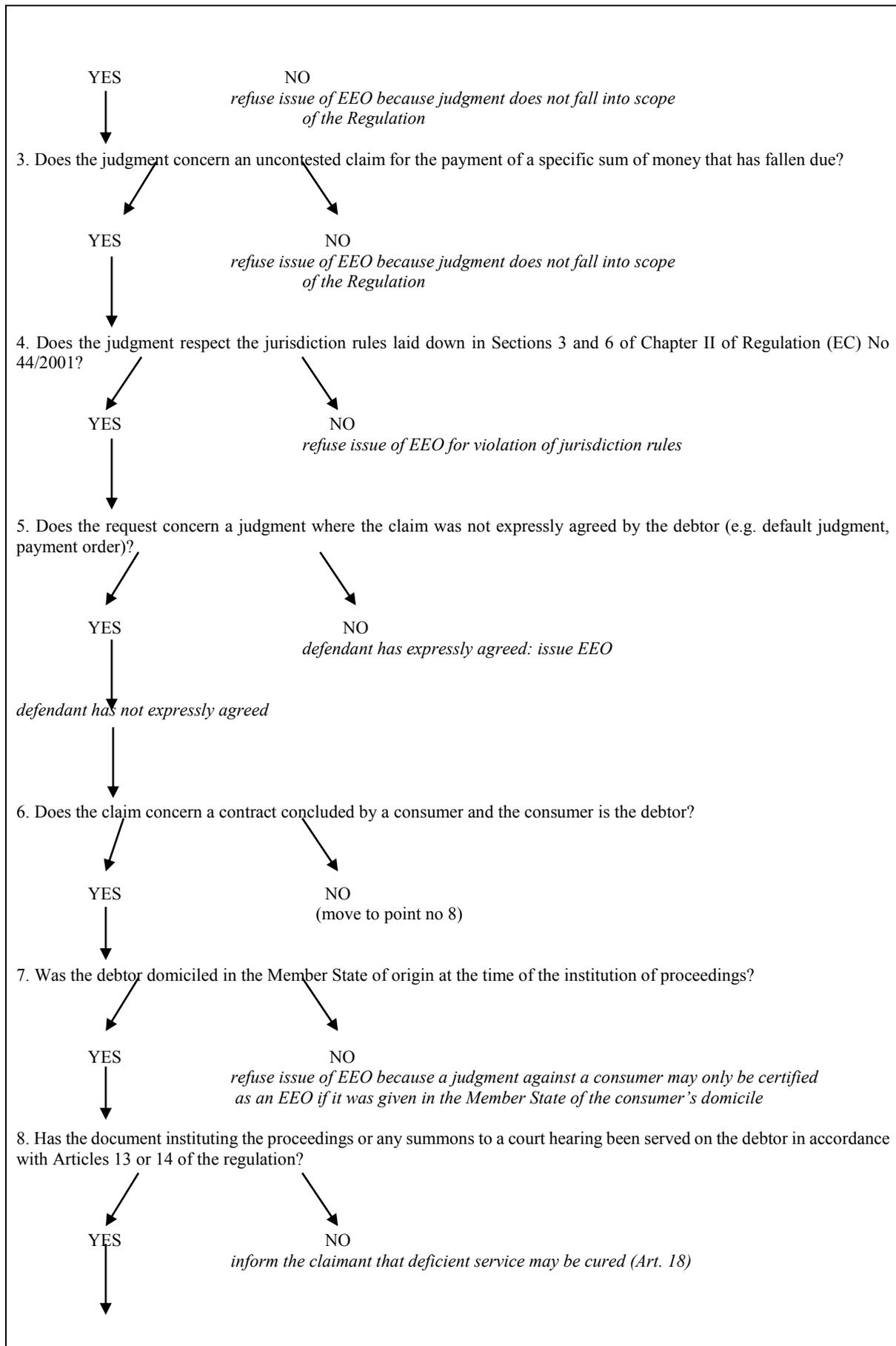
¹⁹ *ibid* 478.

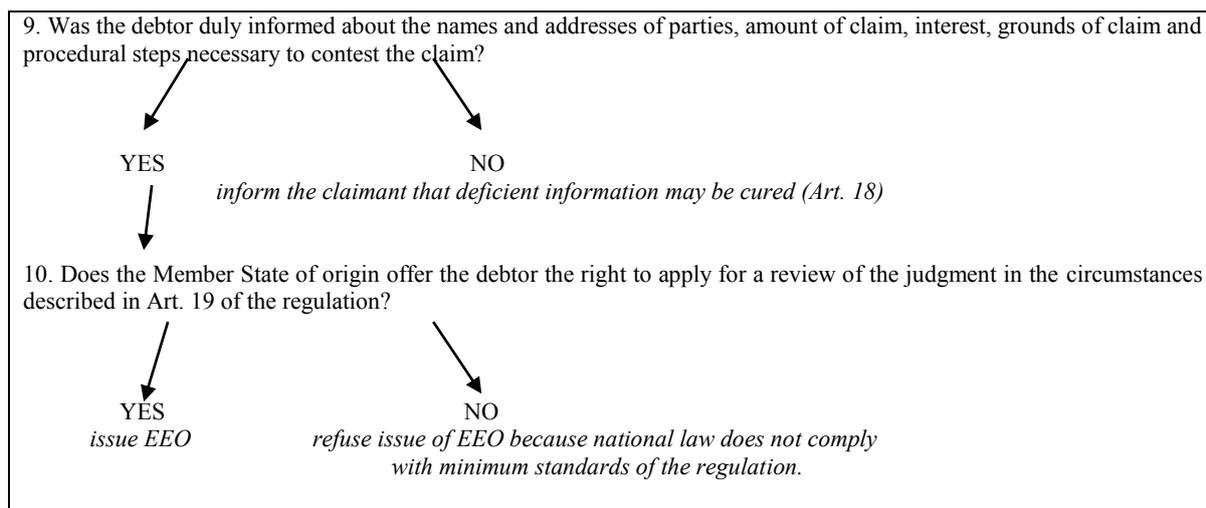
²⁰ The concept of ‘uncontested claims’ should cover all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained either a court decision against that debtor or an enforceable document that requires the debtor’s express consent, be it a court settlement or an authentic instrument. The absence of objections from the debtor as stipulated in Article 3(1)(b) can take the shape of default of appearance at a court hearing or of failure to comply with an invitation by the court to give written notice of an intention to defend the case (see: recital 6 of the Preamble of the EEO regulation).

²¹ Zilinsky (n 18) 477.

²² 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 [2004] OJ L143/15, Article 1.

²³ European Judicial Network in civil and commercial matters, *Practice Guide for the Application of the Regulation on the European Enforcement Order* (European Communities 2008) 52-53, <http://ec.europa.eu/civiljustice/publications/docs/guide_european_enforcement_order_en.pdf> accessed 10 June 2015.





POLISH PERSPECTIVE²⁴

First of all, it is important to mention that the Polish legal system and civil procedure differ significantly from the procedures in countries whose legal systems follow common law patterns. If one were looking for similarities with foreign legal systems, the German and Austrian civil procedures would need to be indicated as influencing Polish law in this regard, both in the past and nowadays.

The main body of law related to the civil procedure is included in a single statute – the Code of Civil Procedure²⁵ of 1964 that was subsequently amended. It is a voluminous book with slightly over 1200 articles regulating contentious and non-contentious procedures, enforcement proceedings and domestic rules regarding arbitration.

After joining the EU in 2004, the Polish courts began forming a part of the European Court network in civil matters and began applying the respective provisions of the EU laws related to civil procedure that have priority over the domestic C.o.C.P.

What is important from an EEO perspective is that Polish civil procedure also recognises a collection of simplified proceedings related to claims documented by ‘official’ documents or documents in which the debtor recognised the claim. Court verdicts are enforceable after they are affixed with the so-called enforcement clause (an official statement that the verdict is final, binding and may be enforced). Enforcement proceedings are conducted by bailiffs under the supervision of the judges of District Courts. The effectiveness of the enforcement, as in any other country, depends mainly on the financial standing of the debtor and the presence of easily accessible assets.

The EEO is regulated in articles 795¹ – 795⁵ C.o.C.P. Polish civil procedure also provides minimum standards that are required to issue an EEO and as it is required by Chapter III of the EEO regulation. According to Polish law it should be considered that judgments including the uncontested claims and authentic instruments in which the debtor has recognised the claim within the meaning of the EEO regulation are:²⁶

- 1) judgments concerning recognised claims (Art. 213 § 2 & Art. 333 § 1.2 C.o.C.P.);
- 2) judicial decisions by default (Art. 339 C.o.C.P. and Art. 333 § 1 point 2 C.o.C.P.);
- 3) settlements concluded in the course of the judicial settlement proceedings (Art. 223 C.o.C.P.);

²⁴ J Horobiowski and G Karaś, *Examples of Polish judgments with EEO certificate* <www.wroclaw.so.gov.pl/grant2007/data/Claim-Poland-EN.ppt> accessed 3 June 2015.

²⁵ Kodeks postępowania cywilnego [Code of Civil Procedure - C.o.C.P.].

²⁶ G Karaś, 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 – applying it in the Polish court practice, <www.wroclaw.so.gov.pl/grant2007/data/App805-Poland-EN.ppt> accessed 1 June 2015.

- 4) settlements concluded within the settlement proceedings conducted prior to the institution of the disputable proceedings (Art. 184 C.o.C.P.);
- 5) settlements concluded through mediation and subsequently approved by the court;
- 6) writs of payment issued in order proceedings (Art. 485 C.o.C.P.);
- 7) writs of payment issued in warning proceedings (Art. 498 C.o.C.P.);
- 8) notarial deeds, in which the debtor submitted himself to enforcement;
- 9) banking execution titles (however this one quite recently was held as unconstitutional).

In connection to the EEO regulation new provisions implementing the above regulation have been introduced into the C.o.C.P.. The Act of 17 February 2006 has amended the C.o.C.P. the new provisions entered into force on 5 May 2006.²⁷

Provisions of the C.o.C.P. concerning procedure of issuing an EEO certificate introduced by the Act of 17 February 2006: Art. 206 § 2 C.o.C.P., Art. 795¹ – 759² C.o.C.P., Art. 820¹ and 820² C.o.C.P., Art. 825 point 5 C.o.C.P., Art. 840³ C.o.C.P., Art. 1153¹ and 1153² C.o.C.P.²⁸

The EEO regulation establishes two fundamental principles of enforcement in the state in which enforcement is sought:

1) abolition of *exequatur* – Art. 5 “A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.”

2) a judgment that has been certified as an EEO by the court of origin should, for enforcement purposes, be treated as if it had been delivered in the Member State in which enforcement is sought – Art. 20.2 and recital 8 of the Preamble to the EEO regulation.

In Poland according to Article 776 C.o.C.P.²⁹ an execution document shall be the basis for the execution. The execution document is an enforceable title complete with the execution formula. Giving the enforceability clause is necessary for the possibility of enforcement procedure in Poland. In Poland the executive body is a court executive officer who can start the enforcement upon the application of a creditor after submitting the enforcement title with enforceability clause by the creditor. Procedure of giving the enforceability clause to enforceable titles with EEO certificate from the state of origin is specified in Article 1153¹ and 1153² C.o.C.P.

Court judgments from EU Member States, settlements concluded before these courts or approved by these courts and authentic instruments made in EU Member States, provided in these countries with an EEO certificate, are execution titles and are subject to enforcement in Poland after providing enforceability clause. An enforceability clause is given to the execution titles from Art. 1153¹ C.o.C.P. by a District Court of a debtor’s general jurisdiction and if this jurisdiction cannot be determined, – a District Court in which circuit the enforcement must start.

In Poland quite a few difficulties have been encountered with the procedure. The first one is that the measure is relatively new for some judges especially those without any EU law training or practice. So broadly speaking, in legal terms, there is a certain lack of familiarity with the provisions of the EEO regulation and reluctance to certify a judgment as enforceable against a debtor where the debtor has not defended the proceedings. Furthermore when a judgment has been certified as an EEO, difficulties are encountered in the jurisdiction of enforcement where local agencies are equally unfamiliar with the procedure and can be reluctant to enforce the certificate as against the debtor. These difficulties have operated, to some extent, to undermine the “spirit” behind the EEO certificate regime.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

Another issue is the delays in having the EEO issued. As an example of one of the causes of delay is when figures in the original judgment do not correspond to those in the EEO certificate of the originating court. For example, the accrued interest up to a certain date may be calculated differently in each document so that the receiving court does not really know what sum is to be “enforced”. Even though Article 21 (2) of the EEO regulation states that neither the original judgment nor the certification as EEO may under any circumstances be reviewed as to their substance by the enforcing Member State.

An interesting legal dispute arose in France, where on 6 January 2012, the French Supreme Court for Private and Commercial Matters (*Cour de cassation*) ruled for the first time on the EEO. The issue before the court was whether an EEO certificate could stand and justify enforcement measures after the certified decision had been set aside in its legal order of origin. The true legal issue could be put into a question: is the EEO certificate autonomous or not?

The French court held that it could not despite the fact that the certificate had not been withdrawn in its legal order of origin (Germany). The court also pointed out that in many of its provisions, the EEO Regulation provides that certificates wrongly issued must be withdrawn by the court of origin (see: Article 10). Article 6 of the EEO regulation even provides so for cases when the certified decision has ceased to be enforceable. The French Court observed that a possible interpretation of these provisions could be that certificates only stop producing their effects when they are withdrawn, and that they stand autonomously until this happens. However, another interpretation is that EEO certificates only facilitate the circulation of judgments, and they are therefore not autonomous. If such judgments disappear, they cannot stand anymore. This interpretation was seemingly endorsed by the *Cour de cassation*, which relies on the provision of Article 11 of the EEO regulation, which states that: the EEO certificate shall take effect only within the limits of the enforceability of the judgment.

That was the reason why the French court ruled that the EEO certificate could not find enforcement measures in France after the German court of appeal had ruled that the German certified judgment was not enforceable anymore and existing enforcement measures had to be lifted.³⁰

The French decision was interesting from a Polish perspective, because in Poland, like in France, creditors seeking to enforce EEO certificates after the underlying judgment has been finally set aside are thus committing a wrong.

CONCLUSIONS

The question must be stated as follows: is it possible to tell how popular these orders have been since they were introduced? Definitely not in Poland; However, based on the research conducted by this paper, it can also reasonably argued that there is no hard data about it in other EU countries as well. This may be because there are no official or even unofficial numbers about how many EEO certificates have been issued. Unfortunately, therefore, it is difficult to find hard and fast figures on this matter. Nonetheless, the paper is optimistic that this situation might change in due course when issuance of EEO orders will become more organised.

Based on the research of this paper, it is argued that EEOs are not widely popular, not only in Poland, and the reason for that is probably the relative lack of EEOs being applied for by judgment creditors in Member States. It can be put down to a reluctance – general reluctance to get involved in cross-border litigation or just a general lack of knowledge about the existence of the EEO process. When it comes to general reluctance, the reason for that might be the uncertainty as to how much it would cost to pursue execution procedure in the country of enforcement.

³⁰ Gilles Cuniberti, *French Supreme Court Rules on European Enforcement Order* (26 March 2012) <<http://conflictflaws.net/2012/french-supreme-court-rules-on-european-enforcement-order/>> accessed 20 June 2015.

It could be assumed that the existence of the EEO would be a great boon to those who are owed money as the result of foreign purchases or trade deals that have gone wrong. Sadly because there is no statistical data available, it is hard to say if that's the case or not. Perhaps the legal authorities in Poland and other Member States need to do a bit more to raise awareness of this very useful tool and start collecting and presenting data about its use.