Case C-389/23

Request for a preliminary ruling

Date lodged:

27 June 2023

Referring court:

Amtsgericht Wedding (Germany)

Date of the decision to refer:

19 May 2023

Applicant:

Bulgarfrukt – Fruchthandels GmbH

Defendant:

Oranzherii Gimel II EOOD

Order

In the case of

Bulgarfrukt – Fruchthandels GmbH, […] 81373 Munich

— Applicant —

[…]

v

Oranzherii Gimel II EOOD, […] 1839 Sofia, Bulgaria

— Defendant —

[…]

the Amtsgericht Wedding (Local Court, Wedding, Germany) […] ordered as follows on 19 May 2023:

I.

The proceedings are stayed.

II.

The following questions on the interpretation of [EU] law are referred to the Court of Justice of the European [Union] for a preliminary ruling under Article 267 TFEU:

1. Are Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure to be interpreted as precluding a provision of national law which provides that a European order for payment must be annulled by the court in the context of proceedings in the event of failure to serve or to effect proper service on the defendant?

2. If Question 1 is answered in the affirmative: Must the aforementioned regulations be interpreted as precluding a provision of national law which provides that enforcement of a European order for payment must be declared inadmissible in the event of failure to serve the order for payment or to effect proper service on the defendant?

3. If Question 1 is answered in the affirmative: Must Regulation No 1896/2006 be interpreted as meaning that a defendant who is aware that a European order for payment has been issued, but on whom that order has not yet been served or on whom service has not yet been properly effected, cannot yet effectively object to it?

Grounds:

I.

On [4 January 2019], a European order for payment was issued by the Amtsgericht Wedding – Europäisches Mahngericht Deutschland (Local Court, Wedding – German Court for European orders for payment, Germany) at the request of the applicant, established in Germany, against the defendant, established in Bulgaria, pursuant to Regulation No 1896/2006. Service was effected via the Bulgarian authorities, in accordance with Regulation No 1393/2007. The Bulgarian receiving agency then certified that service had taken place on 26 July 2019. However, it was not apparent from the certificate provided for in Article 10(1) of Regulation No 1393/2007 that there had been delivery to a person, service by electronic means, posting in a letterbox or any other form of deposit. Rather, in point 12.2.1.3 of that form, it was stated that the document had been served by another method. Detailed information on the matter was drafted in Bulgarian, translated freely into German; [the German is translated

into English as follows]: ‘Article 50(2) of the GPK (Bulgarian Code of Judicial Procedure): The person has left the address and its [current] address is not entered in the register. The notifications (…) are deemed to have been lawfully served.’ On 24 April 2020, the Mahngericht (German Court for European orders for payment), taking the view that proper service had been effected, issued the declaration of enforceability in accordance with Article 18(1) of Regulation No 1896/2006.

By fax of 1 March 2021, the defendant filed a statement of opposition to the order for payment and applied, by way of alternative, for *restitutio in integrum*. With regard to the substance of the matter, it claimed that it had become aware of the European order for payment for the first time on 24 February 2021 in the context of enforcement measures, attaching a statement in lieu of oath to that effect. Following information from the court concerning the remedies available, it stated, by document of 25 March 2021, that it intended to lodge a complaint concerning service under Paragraph 1092a of the Zivilprozessordnung (Code of Civil Procedure; ‘the ZPO’).

II.

In the present case, the defendant submits that the European order for payment was not served on it.

In all cases, an application for a review under Article 20 of Regulation No 1896/2006 presupposes that proper service has been effected, that the opposition period referred to in Article 16(2) of Regulation No 1896/2006 has started to run and that a statement of opposition has not been lodged within the time limit. On referral by the adjudicating court, the EU Court of Justice ruled, in its [judgment] of 4 September 2014, *eco cosmetics* and *Raiffeisenbank St. Georgen*, C-119/13 and C-120/13, that the procedures for reviewing the European order for payment laid down in Article 20 of Regulation No 1896/2006 are not applicable by analogy where it appears that a European order for payment has not been served in a manner consistent with the minimum standards laid down in Articles 13 to 15 of that regulation. In those cases, the Court of Justice also held that, where it is only after a European order for payment has been declared enforceable that such an irregularity is exposed, the defendant must have the opportunity to raise that irregularity, which, if it is duly established, will invalidate the declaration of enforceability. In the absence of a remedy under EU law, such legal protection has to be ensured within the framework of national rules.

[…] [Considerations on the previous legal situation not relevant in the present case]

Subsequently, the German legislature introduced, in Paragraph 1092a of the ZPO, provisions of national law relating to a specialised legal remedy. It reads as follows:

Remedy in the event of failure to serve or to effect proper service of the European order for payment

(1) 1 The defendant may apply for the annulment of the European order for payment, if the European order for payment

1. was not served on him or her, or

2. was served on him or her in a manner that does not meet the requirements of Article 13 to 15 of Regulation (EC) No 1896/2006.

2 The application must be filed within one month from the time at which the defendant had or could have had knowledge of the issuance of the European order for payment or the lack of service. 3 Should the court allow the application for one of the reasons set out in the first sentence, the European order for payment shall be annulled.

(2) 1 Should the court already have declared the European order for payment enforceable pursuant to Article 18 of Regulation (EC) No 1896/2006 at the time of the application under the first sentence of subparagraph (1), and should it now allow the application, it shall declare the compulsory enforcement under the order for payment to be inadmissible. 2 The third sentence of subparagraph (1) shall apply accordingly.

(3) 1 The decision shall be delivered by court order. 2 The court order shall not be open to appeal. 3 Paragraph 1092(2) to (4) shall apply *mutatis mutandis*.

III.

Consideration of the first question referred:

1 In the view of the referring court, service of the European order for payment was not properly effected. It is true that the Bulgarian receiving agency assumed that service had been effected in the certificate of service; as regards the substance, however, after translation of the information that it contains, it does not follow that service took place in an effective form under [EU] law. Rather, the receiving agency stated that the defendant had already left the address indicated and assumed solely on the basis of still-existing commercial register entries that service was nevertheless deemed to have been properly effected. The receiving agency therefore considered service to have been effected exclusively on the basis of a legal fiction (clearly) derived from Bulgarian national law. The stricter minimum conditions for service to be effected, as laid down in Articles 12(5) and 13 to 15 of Regulation No 1896/2006, have therefore clearly not been met; contrary to what the position may be under Bulgarian national law, those provisions do not provide for a fiction of service based solely on entries in the commercial register.

2 As a preliminary point, the referring court wishes to point out that it considers that the rule laid down in Paragraph 1092a of the ZPO is, in principle, also problematic from the point of view of EU law on the ground that the remedy is time-limited and the time limit is linked to a point in time at which a defendant is merely aware of the issue of the order for payment or of the lack of service, without necessarily having received the order for payment in the meantime, or without necessarily even knowing at which court or under which case number he or she could bring an action. Furthermore, the period must also begin to run where the defendant only could have had such knowledge, that is to say, also in the case of slightly negligent ignorance of the existence of the order for payment.

The referring court cannot make this aspect the subject of the present question referred for a preliminary ruling, however, since it is not relevant to the decision. The defendant has stated and credibly explained that it first became aware of the order for payment on 24 February 2021. Not only its pleading of 25 March 2021, by which it expressly brought the action under Paragraph 1092a of the ZPO, but also its pleading of 1 March 2021 (objection and 'application for *restitutio in integrum*') had to be interpreted as a legal remedy under Paragraph 1092a of the ZPO. As regards the substance, its reasoning relied exclusively on an absence of service. The pleading of 1 March 2021 complied with the time limit laid down in the second sentence of Paragraph 1092a(1) of the ZPO, with the result that the question whether the rule is also inapplicable because of the time-limit rule cannot be relevant to the decision in the present case.

3 The question as to which legal consequence must be determined by the court is, however, relevant to the decision.

In the [judgment] in *eco cosmetics* and *Raiffeisenbank St. Georgen*, the Court of Justice held that a national remedy by which the defendant successfully claims that the European order for payment was not served, or was not effectively served, on him or her must have the result of invalidating the declaration of enforceability. It is true that the present court understands this only as a minimum requirement which does not generally exclude derogating national rules. However, the present court has doubts as to whether the German legislation thus created, which is significantly more stringent than the decision of the Court of Justice, can be upheld. In accordance with the third sentence of Paragraph 1092a(1) of the ZPO, if the European order for payment has not been served at all or has not been effectively served, the court must, on application by the defendant, annul a European order for payment.

a. In the view of the referring court, Paragraph 1092a(1) of the ZPO infringes the provisions of Regulation No 1896/2006, in particular Articles 16 and 17 thereof. Paragraph 1092a(1) of the ZPO covers the case where the European order for payment has not yet been served at all or has not been effectively served, that is to say, a situation in which the objection period has not yet started to run. In general, there should be no legal interest in creating a specific remedy enabling a defendant to oppose a European order for payment if no objection period has

started to run to his or her detriment. In the view of the referring court, that constitutes at the same time an infringement of the provisions of Regulation No 1896/2006. That regulation provides, as a legal remedy against a European order for payment, only for the statement of opposition provided for in Article 16, the consequence of which is that, under Article 17, the proceedings are to continue before the competent courts of the Member State of origin. By contrast, Paragraph 1092a(1) of the ZPO provides that the defendant, well before that date, may initiate a legal remedy other than the statement of opposition, enabling him or her, in addition, to have the European order for payment annulled in its entirety. The defendant is thus in a position to prevent the case, in its entirety, from being examined before an ordinary civil court as provided for in Article 17. The referring court therefore considers that that legislation is contrary to the primacy of the provisions of EU law.

b. The present court also has concerns regarding the rule laid down in Paragraph 1092a(1) of the ZPO on the ground that the question whether the European order for payment is annulled or whether, as provided for in Article 17 of Regulation No 1896/2006, litigation is conducted ultimately depends on fortuitous events: If the Mahngericht (German Court for European orders for payment) finds, of its own motion, that the European order for payment has not yet been served at all or has not been effectively served, it will (as a matter of course) effect a new service of its own motion, which may then trigger the subsequent legal consequences provided for in Articles 16 and 17 of Regulation No 1896/2006 or also, in the absence of a statement of opposition, lead to a legally binding order for payment. On the other hand, if, in such a situation, the defendant becomes aware by chance in advance that a European order for payment has been issued (for example, because of service on an incorrect addressee who notifies him or her, or by service which is not accompanied by the required translation) and has recourse to a remedy provided for in Paragraph 1092a of the ZPO, the order for payment as such would have to be set aside in its entirety by the court and the proceedings would be definitively terminated in favour of the defendant. However, in the view of the referring court, if it is merely a matter of chance whether the court itself recognises the absence of service, whether the order for payment is subsequently annulled or whether litigation takes place at a later date, this would amount to an unequal treatment of legal consequences which is not objectively justified.

c. It is apparent from recital 9 of Regulation No 1896/2006 that the purpose of that regulation is to simplify and speed up the possibility of pursuing and clarifying civil claims in cross-border cases. In accordance with recitals 1 and 2 of the regulation, it seeks to promote the proper functioning of the internal market by eliminating obstacles to the functioning of civil proceedings. The referring court also sees evidence for the concern that the legal remedy provided for in Paragraph 1092a of the ZPO may also preclude the practical effectiveness of the regulation to achieve those objectives. Where a creditor is faced with the question whether he/she intends to assert his/her rights in the context of normal proceedings or in that of a European order for payment procedure, he/she must

also, if Paragraph 1092a of the ZPO remains in force, consider the risk that the order for payment, even if it has not yet been implemented with legal effect against the defendant, may be definitively set aside. This would not only have the effect of charging applicants the costs of the European order for payment procedure, but would also mean that they have to assert their rights in new proceedings with potentially long delays. Depending on the case, applicants may even be totally excluded from enforcing their rights, namely where the limitation period has already expired when new proceedings are initiated. The rule in Paragraph 1092a of the ZPO may therefore, as the case may be, lead to the possibility that enforcement of a claim by means of the European order for payment procedure may be used only rarely.

d. The referring court also considers itself to be supported in its concerns regarding Paragraph 1092a of the ZPO by the current case-law of the Court of Justice. In its judgment of 2 March 2017, *Henderson*, C-354/15, the Court of Justice held that the omission of the standard form set out in Annex II to Regulation No 1393/2007 does not render the earlier service invalid in its entirety, but can result only in the requirement that the court correct such an omission. In its judgment of 6 September 2018, C-21/17, *Catlin Europe SE*, the Court of Justice ruled that this principle also applies to service in the European order for payment procedure. If service is not to be void in its entirety merely on account of problems encountered in its implementation, such a legal consequence should be excluded entirely *a fortiori* for the document to be served. It also seems that it is to be understood as meaning that the Court of Justice also stated in *Catlin Europe SE* (paragraph 49) that incorrect service cannot render the document to be served invalid either.

The fact that the more recent Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters now provides, in Article 12(5) and (6), for regularisation in the event of non-service, but not for the invalidity of service as a whole or, as in the present case, of the entirety of the document to be served, also militates in favour of the concerns of the referring court with regard to the rule laid down in Paragraph 1092a of the ZPO.

IV.

The second question:

Where, as in the present case, the court has already issued the declaration of enforceability to the European order for payment, Paragraph 1092a(2) of the ZPO provides that the court, in addition, is also to declare that the enforcement of the order for payment is inadmissible.

If, in the context of the first question referred for a preliminary ruling, the Court of Justice takes the view that a provision such as that laid down in

Paragraph 1092a(1) of the ZPO is not compatible with [EU] law, the provision of Paragraph 1092a(2) of the ZPO is also rendered unnecessary in the event of direct application. This is because it presupposes that the court has granted the application under subparagraph 1 and indicates – consistently, even if it may only have a declaratory function – that it must be held that the enforcement of the order for payment must then also be declared inadmissible.

However, should the Court of Justice conclude that Paragraph 1092a(1) of the ZPO is inapplicable, the adjudicating court asks whether it could be held that the enforcement of the order – in isolation – could be declared inadmissible in the context of the national remedy by analogy with Paragraph 1092a(2) of the ZPO. The referring court would also have concerns about that. In its [judgment] in *eco cosmetics* and *Raiffeisenbank St. Georgen*, the Court of Justice merely stated that the judicial decision had to invalidate the declaration of enforceability. If, on the other hand, the court were to declare, by analogy with Paragraph 1092a(2) of the ZPO, that the enforcement of the order for payment was inadmissible, that wording would permanently preclude enforcement, although it is possible to envisage situations in which, following effective service at a later date, a European order for payment then becomes enforceable.

V.

The third question:

In *Henderson* and *Catlin Europe SE*, the Court of Justice held that, in the event of failure to effect service, the court must remedy the missing service or part thereof.

In the main proceedings in the present case, service of the European order for payment of 26 July 2019 was, in the view of the referring court, ineffective, as has already been stated. The defendant lodged a statement of opposition, by letter of 1 March 2021, against the European order for payment, in addition to the legal remedy which was interpreted in the present case as an application under Paragraph 1092a of the ZPO. On that date, the period for filing a notice of opposition had not yet started to run. However, the court did not subsequently formally serve the order for payment on the defendant again, since the latter was already aware of it from the enforcement proceedings. By its third question, the referring court seeks to ascertain whether a defendant may validly lodge a statement of opposition to an existing European order for payment before that order has been effectively served on him or her in all respects.

The present court considers it necessary to obtain clarification of this matter, since in its judgment in *eco cosmetics* and *Raiffeisenbank St. Georgen* (paragraph 42) the Court of Justice held that ‘an application of the opposition procedure laid down by Articles 16 and 17 of Regulation No 1896/2006 cannot be appropriate in circumstances such as those at issue in the main proceedings.’ The Court of Justice further stated (in paragraph 49): ‘Having regard to the foregoing considerations, the answer to the first question is that Regulation No 1896/2006

must be interpreted as meaning that the procedures laid down in Articles 16 to 20 thereof are not applicable where it appears that a European order for payment has not been served in a manner consistent with the minimum standards laid down in Articles 13 to 15 of that regulation.'

Some German legal commentators have inferred from this wording that the Court of Justice thereby also intended to state that a defendant on whom the order for payment has not yet been effectively served cannot file a statement of opposition to it within the time limit, not even as a precautionary measure, despite being aware of its existence.

If the Court of Justice, as some have understood it, wished to exclude the defendant's right to file a statement of opposition at that time, the referring court would see the procedural rights of the respective defendant as being restricted to the point of significantly limiting the legal protection provided for by Regulation No 1896/2006, inter alia in Article 16. Thus, a defendant on whom a European order for payment has been served without the required translation, but who, as a precautionary measure, has already lodged a statement of opposition, could be the subject of a final judgment by virtue of subsequent service of the translation (in accordance with the judgments in *Henderson* and *Catlin Europe SE*), without lodging a second statement of opposition because he or she considers that he or she has already effectively done so, since his or her first statement of opposition would be treated as not yet admissible.

In other European order for payment procedures, due to the lack of clarity as to how the decision of the Court of Justice is to be understood, the court meanwhile proceeds by carrying out a new service in the event of an objection to the effectiveness of enforcement, while actively indicating to the defendant that he or she should, by way of precaution, lodge a new statement of opposition within a period of 30 days, in order not to suffer any legal disadvantages. As a general rule, defendants will not, of their own motion, realise they are required to lodge a fresh statement of opposition after the supplementary service in spite of the fact that they have previously lodged one. In the view of the referring court, the possibility for the defendant to oppose the European order for payment cannot depend on the eventuality that a court has issued such a notice and/or on whether a statement of opposition is actually lodged within the time limit.

The referring court therefore wishes to know, also on account of the debate in the specialised literature, whether the Court of Justice intended, in paragraphs 42 and 49 of the abovementioned judgment, to treat a premature right of objection as inadmissible.

In so far as the Court of Justice reaches the conclusion that, in that situation, the statement of opposition may already be lodged within the time limit before service has been effected, the referring court therefore also considers, in so far as the case in the main proceedings is concerned, that, to the extent to which the order for payment is upheld in the context of the first and second questions referred for a

preliminary ruling, but the declaration of enforceability has to be set aside, it may, in accordance with Article 17 of Regulation No 1896/2006, transfer the proceedings directly for litigation in a national court without the need for a new service or another statement of opposition by the defendant.

VI.

Under the third paragraph of Article 267 TFEU, the referring court is obliged to refer the matter for a preliminary ruling to the Court of Justice. This follows from the fact that, under the second sentence of Paragraph 1092a(3) of the ZPO, no legal appeal is available to challenge decisions of the Amtsgericht Wedding – Europäisches Mahngericht Deutschland (Local Court Wedding – German Court for European orders for payment).

[…]