

## The rise of the European Enforcement Order procedure

The use of the European Enforcement Order procedure has increased by 798%, according to the data contained in the Report on the status, functioning and activities of the General Council of the Judiciary and the courts and tribunals in 2018.

For those who this information has not gone unnoticed, it has been for some of the courts of first instance that have seen how the use of the referred instrument of cross-border debt claim increased exponentially, unknown until now by most legal operators.

Pending the conclusions of the Advocate General - Mrs Eleanor Sharpston - on the questions referred for a preliminary ruling by the Courts of First Instance 11 in Vigo and 20 in Barcelona in relation to that procedure, little has been said about them, despite the fact that the decision to be given will be decisive for the handling of these cases by our national judges.

The Court of Justice of the European Union (hereinafter the ECJ) shall rule in cases C-453/18 and C454/18 -which shall resolve in a cumulative manner- on the possibility of carrying out an ex officio control of the abusive clauses existing in consumer contracts, in accordance with the current wording of Regulation 1896/2006 of 12 December, establishing the European order for payment procedure.

The boom in the use of the European order for payment procedure can be found in the assignment of credits, mainly consumer credits, banking operations, credit card derivatives and telephone companies, to companies from other countries of the European Union.

Despite the fact that those transactions originated in Spain and that the consumers concerned are Spanish, the subsequent assignment to the abovementioned undertakings, residing in a Member State other than the national territory, may be construed as converting the case into a cross-border case in the light of the wording of Article 3 of Regulation No 1896/2006.

As we are facing a supposed cross-border case, in civil matters, the European order for payment procedure could be raised in our country to claim from those Spanish consumers the pecuniary claims that are the object of assignment.

What are the reasons for requiring these claims through the European order for payment procedure and not through their national approval?

The first of these is to avoid examining the possible abusive clauses that may be contained in the contracts on which the debt in question is based. The second is to avoid providing evidence of the existence of the claim.

Article 815.4 of the Civil Procedure Law (hereinafter CPL) obliges the judge, in our order for payment procedure, to appreciate the possible abusive nature of any clause that constitutes the basis of the request or that has determined the amount payable, before requesting payment from the consumer or user.



The ex officio control of the existence of abusive clauses in consumer contracts has been imposed on all judges in the European Union in view of the public order status of consumer protection (article 38 , article 6.1 EU Treaty, articles 6.1 and 7.1 of Directive 19/93 and the jurisprudence of the ECHR interpreting them).

However, in the European order for payment procedure it is impossible to carry out such an abuse control if the national judge does not have access to the contract and/or can know the specific terms of the contract on the basis of which the consumer's debt is claimed.

Under Article 7.2(d) of Regulation 1896/2006, the application for a European order for payment, which must be submitted on form A, must include "the grounds for the request, including a description of the circumstances invoked as the basis of the claim and, where appropriate, of the interest charged".

However, the current regulation does not allow national judges to request any kind of clarification or to claim any evidence beyond the information that may be included in the aforementioned form, in order to be able to assess the possible abusive nature of the clauses that would have constituted the basis of the request.

In this sense, Final Provision 23.2 of the CPL prevents the contract from being applied for in the European order for payment procedure by establishing that the petition will be presented without the need to provide any documentation, being inadmissible in its case.

The non-contribution to the contract process and/or, where appropriate, of all the documents supporting the request, prevents the consumer from formulating the due opposition to the request for payment, since he does not know whether the amount object of the claim is demandable and whether it brings about stipulations that are abusive in nature.

Consequently, the use of the European order for payment procedure to claim from a Spanish consumer a debt originating in our territory should not lead to an effective reduction in the rights and guarantees that the consumer would have if processed.

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