THE GERMAN ELECTRONIC ORDER FOR PAYMENT PROCEDURE

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Electronic legal communication or e-Justice is being introduced in more and more countries as part of the daily legal practice. In Germany, e-Justice has been used in the German order for payment procedure for more than two decades. This procedure is aimed at collecting undisputed money claims. It fulfils an important filtering function, as it removes these claims from regular civil proceedings. This procedure is considered to be efficient, cheap and fast. Today, the application to issue an order for payment may be carried out via the internet. This paper provides an overview of the German electronic order for payment procedure with its special characteristics. Additionally, a short overview of the history of this special procedure is also given.

Introduction

The German order for payment procedure has a highly practical relevance in daily legal practice. With more than 9.5 millions applications per year,[1] the German order for payment procedure can only be successfully preformed by the use of information technology. The use of electronic devices provides a substantial rationalisation of the workflow.[2] As a result of which, the German legislator saw the potential to use IT within the German *Mahnverfahren*.[3] The German order for payment procedure is now a fully automated court procedure where the opportunity exists to file applications via the internet. The electronic order for payment has not been introduced into all of the German courts, because the Lander are responsible for legislation. With the exception of the Lander of Saxony and Thuringa, however, all the Lander of Germany provide for an electronic order for payment procedure.[4]

Evolution of the German *Mahnverfahren*

By the end of the 1960s, the constant increase in the number of applications for a *Mahnbescheid* raised the question whether the German order for payment procedure could continue to fulfil its purpose.[5] As early as 1974, the Ministry of Justice of the Land Baden-Württemberg ordered a survey to examine the possibilities of the introduction of an electronic procedure. Based on the results of this survey, the legal basis for an electronic procedure was introduced by the Act to simplify the civil procedure *(Vereinfachungsnovelle)*. On 1 October 1982 the electronic order for payment procedure was initiated in the daily practice at the local courts of *Stuttgart* and *Stuttgart-Bad Cannstadt*.[6]

The way electronic devices were used, together with the way the *Mahnverfahren* was used, changed over the years, as the technology improved. When it first started, the applications to issue an order for payment had to be put in manually into the internal computer system of the courts. Applicants with large numbers of applications were able to file their applications on an electronic data carrier, such as discs or magnetic tapes (the so called *DTA-Mahnverfahren*).[7] When legal procedures were changed by the passing of *Rechtspflege-Vereinfachungsgesetz*,[8] § 690 III ZPO[9] was introduced.

1. Those are the figures for 2004, see Bartosz Sujecki, *Mahnverfahren*, 2007, p 1.
2. See Walter H. Rechberger and Georg E. Kodek, ' Überlegungen zu einem europäischen Mahnverfahren' , in Walter H. Rechberger and Georg E. Kodek, ed., *Orders for Payment in the European Union*, 2001, p 60; Bartosz Sujecki, *Initial steps Towards an Electronic European Order for Payment Procedure, Computer Law Review International*, 2006, 7 p 113.
3. Ministry of Justice Baden-Württemberg, *Soll-Konzept: Automation des Mahnverfahrens*, 1974.
4. See an overview in Bartosz Sujecki, *Mahnverfahren*, 2007, p 87.
5. See Förschler, *Kann das gerichtliche Mahnverfahren seine Aufgaben noch erfüllen?*, Juristenzeitung 1969, p 103.
6. See further over the introduction of the automated order for payment procedure in Germany: Rolf Baschang and Udo Theobald, *Das „perfektionierte" Mahnverfahren, Neue Juristische Wochenschrift* 1974, 1985; Rolf Keller, *Die Automation des Mahnverfahrens, Neue Juristische Wochenschrift* 1981, p. 1184; Bartosz Sujecki, *Das Online-Mahnverfahren in Deutschland, MultiMedia und Recht* 2006, p 370.
7. DTA stands for *Datenträgeraustausch – Electronic data exchange*. See Bartosz Sujecki, *Das Online-Mahnverfahren in Deutschland, MultiMedia und Recht* 2006, p 370.
8. Act of 17.12.1990, Bundesgesetzblatt (German Federal Law Gazette) BGBl. I, p 2847.
9. ZPO stands for *Zivilprozessordnung – the German Act of Civil Procedure*.

If the application does not contain any defects, the court grants the order for payment (Mahnbescheid), which has to be served on the defendant.

This rule established the legal basis for an electronic transfer of an application by means of remote data transmission (so called *DFÜ-Mahnverfahren*).[10] This form of application can be seen as a precursor for an on-line application, since in this instance, intangible data for the application of an order for payment was transmitted directly to the competent court.[11] The remote data transmission did not receive wide acceptance with the courts. The reason for this was the fact that the software and hardware were very costly, complex and out-dated.[12]

The German *Mahnverfahren*

Before the electronic order for payment procedure is discussed in detail, it is necessary to give a general overview of the German *Mahnverfahren*.[13] This procedure provides a means by which the creditor can take action to enforce pecuniary claims by an ex parte procedure. The *Mahnverfahren* applies, in accordance with the provisions of § 688 ZPO, applicable to all pecuniary claims resulting from contractual as well as non-contractual relationships. It begins with an application of the claimant. This application contains all relevant information on the parties and the competent court. The claim does not need to be sufficiently described in the application, but the claim has to be distinguishable from others through its specific designation, in order to be the basis of an enforceable title. It is not necessary to submit evidence. For this purpose the application contains a catalogue of 46 standard types of claim, out of which the claimant may choose the one that describes his claim the most accurately. The application is then filed to the competent court. This can take place either by means of a form, or electronically. Within the German order for payment procedure, the jurisdiction as to the subject matter falls within the scope of a local court. For the

determination of the local jurisdiction, the domicile of the claimant is essential. The Lander are, however, in accordance with the provisions of § 689 ZPO, empowered to introduce central courts that are exclusively competent within their region. Finally, the *Rechtspfleger* has the functional jurisdiction within the German order for payment procedure. This is a senior court officer with a legal education, but is not a judge.[14]

After the application enters the competent court, it will be examined. This examination of the application is limited to purely formal aspects. Therefore, the merits of the claim are not examined within the German order for payment procedure. This examination of the application is carried out electronically. If the application does not contain any defects, the court grants the order for payment (*Mahnbescheid*), which has to be served on the defendant. In the order for payment, the defendant is asked either to pay the claim or to object to it within a period of two weeks starting with the service of the order. The objection of the payment order does not need to contain any ground or any evidence. It is sufficient that the defendant indicates that he contests the claim. This can be done by filling out a form that the defendant receives together with the order for payment. If the defendant neither pays nor objects to the order, the claimant may apply to the court for an enforcement order. This enforcement order serves as an enforceable title and as a matter already judged. The defendant can file an objection against the enforcement order. Here, again, the defendant is only required to indicate that he wants to contest the claim. The filing of the objection against the order for payment, as against the enforcement order, leads to the opening of the regular court procedure. However, in case of the objection against the order for payment, the regular procedure starts only on the application of either party. However, the objection against the enforcement order starts the regular procedure automatically.

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[10] DFÜ stands for Datenfernübertragung – Remote data transmission.

[11] Bartosz Sujecki, Das Online-Mahnverfahren in Deutschland, MultiMedia und Recht 2006, p 370; Hess, Das automatische Mahnverfahren, Computer und Recht 1991, p 248.

[12] The problems of the DFÜ-Mahnverfahren are

discussed in Bartosz Sujecki, Das Online-Mahnverfahren in Deutschland, MultiMedia und Recht 2006, p 370.

[13] See for an extensive overview of the German Mahnverfahren: Bartosz Sujecki, Mahnverfahren, 2007, p 12; Grozdana Sijanski and Jimmy Barber, The German order for payment procedure

(Mahnverfahren), German Law Archive to be found on-line at http://www.iuscomp.org/gla/index.html.

[14] On the status of the Rechtspfleger within the German procedure: Bartosz Sujecki, Mahnverfahren, 2007, p 19.

Characteristics of the German order for payment procedure

In comparison with other payment procedures in the different Member States of the European Union, the German model distinguishes itself by two features, which were introduced in order to facilitate electronic workflow. First, the rules on jurisdiction are relevant. According to these rules, the jurisdiction is determined by the domicile of the claimant and not the defendant. The second characteristic is the broad use of information technology. Within the German *Mahnverfahren*, information technology is not only used in a pure supportive way, but for the examination of the application to issue an order for payment.

Concentration of jurisdiction within the German *Mahnverfahren*

Since the introduction of the Act to simplify the civil procedure (*Vereinfachungsnovelle*), the local jurisdiction for the payment procedure is determined not by the domicile of the defendant, but in accordance with § 689 II ZPO, that is, by the domicile of the claimant. Additionally the Lander received the power to create central courts in § 689 III ZPO, which are solely competent to issue the order for payment.[15]

This jurisdiction within the German order for payment procedure is unique in Europe. But its introduction was considered to be necessary, especially for claimants with a high number of applications. Such a regulation makes it possible for these claimants to complete their applications on their own computer systems and file these applications to the competent court. This method permits a claimant to make as many applications as it wishes on one electronic data carrier to one competent court. This system not only improved access to justice, it rationalised the workflow, and reduced the costs of the infrastructure. These are strong arguments when considering the introduction of a European order for payment procedure. It is, however, doubtful if the European payment procedure will make an exception to the principle that a defendant can only be sued before their own court.[16]

Scope of the electronic data processing within the German *Mahnverfahren*

The second characteristic of the German order for payment procedure is how the application is dealt with in the computer system prior to release as an order for payment by the court. Applications are examined by the computer system of the court in charge. As a result, an order for payment can be released without the interference of a human decision-making body, like the *Rechtspfleger* or the *Urkundsbeamter*.[17] This extensive scope of data processing has been achieved because an examination of the merits is not necessary within the German order for payment procedure (see § 690 I nr. 3 ZPO). The applications for an order for payment are only subject to formal examination, which is carried out by the internal computer system of the competent court. With this form of examination in place, only the claim that is obviously without merits is rejected by the court. This so called 'Abolition of the examination of the merits'[18] was initially highly criticized in the legal literature.[19] The abolition of the examination of the merits has also caused problems in judicial practice. Claimants have used the order for payment procedure to get an executorial title for claims that could not ordinarily have a substantive legal basis. This trend eventually caused the introduction of § 688 II nr. 1 ZPO. According to this norm, the use of the German *Mahnverfahren* is restricted in cases of consumer loan contracts in terms of §§ 491-504 BGB.[20] Additionally, in these cases, a limited examination of the merits takes place in accordance with § 690 I nr. 3 ZPO.[21]

In spite of the critique expressed against, and the problems connected with the abolishment of the examination of the merits, this step was necessary, since an examination of the merits would not allow for such extensive data processing within the German *Mahnverfahren*. If applications were to be examined, it would have required more personnel to be employed to examine applications. It would also have taken longer. On the other hand, from the perspective of the debtor, one should not expect too much from the examination of the merits within an order for payment procedure. As can be seen in the Austrian procedure, under the

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[16] Hanns Prütting, Auf dem Weg zur einer Europäischen Zivilprozessordnung, in: Hanns Prütting, ed., Festschrift für Gottfried Baumgärtel zum 70. Geburtstag, 1990, p 467; for a different view: Eberhard Schollmeyer, Europäisches Mahnverfahren, Praxis des Internationalen Privat- und Verfahrensrechts 2002, p 482. See also: Bartosz Sujecki, Europäisches Mahnberfahren, Zeitschrift für Europäisches Privatrecht 2006, p 135;

Bartosz Sujecki, 'Initial steps Towards an Electronic European Order for Payment Procedure', Computer Law Review International, 2006, p 114.
[17] For the functional competence within the German order for payment procedure: Grozdana Sijanski and Jimmy Barber, The German order for payment procedure (Mahnverfahren), German Law Archive to be found on-line at http://www.iuscomp.org /gla/index.html.

[18] In German: „Wegfall der Schlüssigkeitsprüfung".
[19] See Bartosz Sujecki, Das Online-Mahnverfahren in Deutscheland, MultiMedia und Recht 2006, p 371.
[20] The German Civil Code.
[21] Implemented by the Act of Consumer Loans of 17.12.1990, Bundesgesetzblatt (Federal Law Gazette), BGBl. I, p. 2840; see further Peter Bülow, Das neue Verbraucherkreditgesetz, Neue Juristische Wochenschrift 1991, p 133.

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procedural reform of 2002,[22] the examination of the merits was introduced in § 244 II nr. 4 Austrian Code of Civil Procedure. This examination is very restricted in judicial practice, due to the limited facts included in the application forms, as well as the high number of applications. Additionally, this examination is not carried out by a judge, but by a clerk of the court.[23] Thus, it is necessary that the defendant examines the accuracy of the claim. Therefore, it appears to be necessary to abstain from the examination of the merits within an order for payment procedure. Applications for an order for payment can be then examined electronically by the computer system of the court, which makes the procedure fast and cheap. However, it should be possible for the court to reject claims that are obviously without merit.

The German *Online-Mahnverfahren*

In first instance, the electronic order for payment procedure was aimed at the improvement of the access to justice for creditors with high numbers of claims. The second aim was to handle large volumes of applications in the most efficient way as possible.[24] Over the course of time, the electronic order for payment procedure has been extended to include claimants with small amounts of claims. This led to changes in the form of the electronic procedure to be used by the different groups of claimants. The *ProfiMahn*-procedure is aimed at claimants with high number of applications, while the *Online-Mahnantrag*-procedure is aimed at those with a small number of applications.

The *ProfiMahn*-procedure

The *ProfiMahn*-procedure allows a web-based, electronic data exchange mostly between professional applicants, such as insurance companies, post-order companies and banks, and the courts within the German order for payment procedure. The electronic data exchange is carried out in both directions, from the applicant to the court, and in the other direction. Therefore, the applicant can receive information from the court over the internet.[25]

Besides the necessary software and hardware,[26] the participation on the *ProfiMahn*-procedure is only possible with an electronic signature card with a qualified signature and a card reader. Additionally, it is necessary to apply to participate in the *ProfiMahn*-procedure. During the application process, the compatibility of the software used by the applicant is tested with the software used by the court. If the application is granted, the claimant will receive an eight digit identification number (so called *Kennziffer*), which encrypts all personal data, such as the name, address or the banking account of the applicant or his representative. The applicant can then use the identification number in his application instead of writing down the required data. The complete data can be found in the documents composed by the court.[27] With this identification number, the applicant receives an electronic mailbox upon which all court messages are saved. The application for participation in the *ProfiMahn*-procedure has to be carried out separately in every court.

After the applicant receives the authentication data he can then compose the application for an order for payment by using his software. The data to be transmitted to the court has then to be selected. Afterwards, the electronic document has to be signed electronically and can be sent encrypted to the competent court. The applicant receives form this transmitting process an electronic protocol on his personal computer. Additionally, the applicant will be informed by the court after his application is being processed. With the transfer of the application data, the applicant receives all court messages saved into the electronic mailbox. However, the applicant may choose to empty the mailbox separately. After the application data is transmitted to the court, it will be then handled by the court computer system.

The *Online*-application for an order for payment (*Online-Mahnantrag*)

To give applicants with small numbers of claims (so called single applications) the advantages of electronic legal communication, the online-application for an order for payment was introduced.[28] This free on-line application allows the claimant to compose their claim, print it out, and file it to the competent court via the

22 Act on the reform of civil procedure of 2002, Österreichisches Bundesgesetzblatt (Austrian Federal Law Gazette) öBGBl. I nr. 76/2002; Andreas Frauenberger, Die ZVN 2002 – Neuerungen im Zivilprozessrecht, Österreichische Juristenzeitung 2002, p 873.
23 Bartosz Sujecki, Das Online-Mahnverfahren in Deutschland, MultiMedia und Recht 2006, p 371.
24 Vgl. Rolf Keller, Die Automation des Mahnverfahrens, Neue Juristische Wochenschrift

1981, p 1186.
25 See for a list of the courts participating in the ProfiMahn-procedure: Bremen Online Service (BOS), FAQs zu Profimahn, Version 1.0, April 2005, p. 5; on the web to be found at http://www.profimahn.de/profimahn/download/files/FAQs_ProfiMahn.pdf.
26 The participation in the ProfiMahn-procedure requires a special set of software that can be used for composing applications to issue an order for

payment. A list of such software can be found at http://www.mahnverfahren-aktuell.de. The additionally required software programmes JAVA Web Start and the ProfiMahn-Modul can be downloaded from http://www.profimahn.de.
27 Bartosz Sujecki, Mahnverfahren, 2007, p 91.
28 To be found on-line at http:www.online-mahnantrag.de; see also http://www.optimahnoffice.de.

conventional way. The applicant can also file the application electronically via the internet. The characteristic of the on-line-application is that all important steps are explained to the applicant while completing the claim. Additionally, every submission is examined on its plausibility directly on the internet web page. This allows applicants without specific legal knowledge to file for an order for payment without referring to a legal practitioner. This keeps the cost of the procedure low. Another effect of the on-line examination of the application, is that the court receives applications without any mistakes. This reduces the time it takes to deal with the application.

In order to use the on-line-application, whether in its conventional or electronic form, a personal computer is required. If the applicant wants to use the printing function of the on-line-application they only need the official form *Antrag auf Erlass eines Mahnbescheids* as well as the latest version of Acrobat Reader in order to file the application via the *Online-Mahnantrag* web site. For the extended version of the on-line-application, additional software programmes (java web start and OptiMahnSign) as well as a signature card with a qualified electronic signature and a card reader are necessary. However, if the applicant wants to use the print service of the company *OptimahnOffice*,[29] they just need a normal personal computer with internet access. The additional software is then not required.

The applicant has to fill out his application on the web site. Afterwards, the applicant can, in case of a conventional submission of the application, print out the application and submit it to the competent court. Where the applicant uses the print service of the company *OptimahnOffice*, the application to issue an order for payment will be printed by this company and then sent back to the applicant. The applicant must sign the application and submit it to the competent court. If the applicant wants to transmit the application electronically, they must fill out the web based form on their personal computer. Then the form must be signed with a qualified electronic signature before being transferred to the competent court. The receipt of the application will then be confirmed by the computer system of the court. The application data is, in this instance, directly inserted into the court computer

system where it is further processed. In case of a conventional submission of the application, the official forms need to be scanned in order to be further processed by the court.

Conclusion

In spite of the necessary adjustments of the legal basis of the German order for payment procedure, the court procedure can be seen in general as a success story of the German judiciary.[30] The system works well to reduce costs and provide for the fairness of the process in the interests of the parties. This can be said where the applicants have a high number of applications as well as for single users. Arguably, the German order for payment procedure is a very good example for the European law maker in attempting to introduce a European order for payment procedure. [31]

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[29] *This service costs 6.50 per document.*
[30] *Besides the German Mahnverfahren only the Austrian order for payment procedure can be seen as similarly successful.*
[31] *See further on the European order for payment procedure European Commission, Amended proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure, COM (2006) 57 final; Council of the European Union, Council Common Position by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council creating a European order.*