

ARTICOLE

**THE ORDER FOR PAYMENT PROCEDURE IN ROMANIAN AND HUNGARIAN LAW
OF CIVIL PROCEDURE**

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Abstract: *In our study we examine and compare the historical roots, subsequent development and currently applicable law of domestic order for payment procedures provided for in the Romanian and Hungarian legal systems. We establish, that in the jurisdictions under scrutiny the developmental features of this procedure differ significantly. While in Hungary it has evolved primarily as a default judgement to be rendered when the defendant fails to lodge an opposition to the claim in a set amount of time, which does not require the examination of the case on its merits and is currently a procedure administered by notaries public, in Romania the court must as a rule proceed to examining the merits of the case, albeit based only on the written instruments administered, even if the defendant lodges no well founded defence. From this basic difference flow deep consequences in the field of automating the order for payment procedure: while in Hungary it is already a mostly automated, electronic procedure, based on forms submitted into an integrated case management system, in Romania the prospects of such automation are limited by two aspects: lack of standardized forms to be used during the procedure and the requirement for the court to examine the merits of the case. However, the standardization implemented for the newly regulated procedure for small claims under the New Code of Civil Procedure, shows that the prospects for a future automated order for payment procedure have improved.*

Keywords: *default judgement, payment injunction Romania, payment order Romania, order for payment Hungary, electronic civil procedure, Hungarian Chamber of Civil Law Notaries*

I. Introductory thoughts

Domestic order for payment procedures (we are not referring here to their European counterpart) are a well-known, and widely applied legal institution in several member states of the European Union.¹ As far as the role of this procedure is concerned, within the scope of the particular civil procedure laws of the member states, a common starting point for their analysis can be identified in the fact, that in numerous court proceedings in member states, the parties go to court not in order to reveal or clarify the merits of the case in dispute, but only so that the claimant may obtain a decision required for enforcing an otherwise undisputed claim.

The purpose is therefore to establish and apply a more efficient and more rapid procedure that exempts the courts from conducting a regular civil law procedure in cases without any dispute on their merits.² The significance of the payment order procedures in member states is that they can offer a quicker, simpler and less expensive tool for settling cases submitted to the court.³ However, the specific details of the regulations applicable in each member state can display significant differences or inconsistencies upon comparison.⁴

In this study, the authors wish to report about the way in which the Romanian and Hungarian payment order procedures are regulated in 2016. During our examination, we focus on two fields: 1° the historical roots these procedures have and how these have determined their current structure; 2° the extent to which conventional procedural elements and modern technological developments are present in the said procedures. Based on the results of the examination conducted on these two issues, the similarities and differences of the ways of regulation of the Romanian and Hungarian procedure can also be elicited.

II. The payment order procedure in Romania

1. Regulation of the procedure in the Romanian law of civil procedure

1.1. Evolution of the institution of decision by default in Romanian civil procedure

As opposed to the Hungarian law of civil procedure (see below), no longstanding tradition can be identified for payment orders under Romanian law. The first Romanian Code of Civil Procedure, which entered into force in 1865,⁵ did provide for decisions by default (articles 148–158) in cases, when a legally summoned party failed to appear in court, or to submit a written statement of defence, when required to do so during procedures without an oral hearing. In such cases, if the defendant was found to be in default, and the claims of the claimant *appeared* to be well founded on their merits, the claimant would be awarded the claim.⁶ The defaulting party could submit an *opposition* against the decision rendered, and could also appeal the decision, if this remedy was provided for by law. In all cases the merits of the opposition were assessed by the court which could either admit or reject it.⁷ This procedure was later amended by the civil procedure reform of 1900.⁸ The new regulations no longer referred to the “apparently” justified nature of the claim, which implied that the court had to verify its justification, not only *prima facie*, but also by analysing the merits of the case.

The next wave of procedural reform did away with the institution of decisions by default altogether.⁹ Amendments to the Code of Civil Procedure enacted in 1948 bound the court to resolve the dispute of the parties, even if the parties themselves showed no interest towards the case. The court could suspend the proceedings, if neither party showed up at a hearing, but only if neither requested that the trial take place in its absence. The default of either party had no procedural significance. In case of unjustified refusal to submit to questioning, or to answer questions, during the administration of evidence by means of judicial interrogation, the party found to be in contempt could be considered as having defaulted, and

therefore having tacitly acknowledged the claim. This sanction was however only rarely applied, as the legal doctrine of the time, based on guidance issued by the former Supreme Tribunal, advised it should be used only judiciously and only after sufficient evidence has been administered to justify such a decision.¹⁰

1.2. The payment injunction

The first procedure resembling the currently applicable payment order was not enacted in Romanian legislation up until the year 2001. Government Ordinance number 5/2001 instituted what was called a *payment injunction (somație de plată)*.¹¹ Regulated outside the scope of civil procedure,¹² this procedure was generally considered to be *non-contentious*¹³ in Romanian legal literature. One early analysis¹⁴ however, still deemed it had a fully contentious character, a position also adopted by the Constitutional Court in one of its early decisions.¹⁵ We are of the opinion, that due to the source of inspiration for this procedure, it is a non-contentious one, even though, debate lingered over whether this is truly the case.¹⁶

The injunction could only be issued in order to render enforceable a *pecuniary claim, in an amount which was already determined, and which was overdue for payment*. The claim had to be *based on a written contract, bylaw, or other written instrument, approved by the signature of the parties*. These written instruments *had to refer to the rendering of services, works, or any other benefit*.¹⁷ Also, the initial form of Government Ordinance 5/2001 provided, that the claims had to be of *a civil or commercial nature*, a restriction later lifted by Act 295/2002.¹⁸ The injunction could be issued by the court which would have had jurisdiction to try the case, in the first instance, if a trial under regular civil procedure would have taken place.

Any documents supporting the claim had to be appended to the application, which was then forwarded in copy, during service of process, to the defendant. The defendant, could (but was not required to) submit a written statement of defence, as well as any written instruments invoked as part of the defence.¹⁹ No sanctions were provided for, in case of refusal or omission to submit such a statement.

The initial form of the ordinance provided as a rule [at article 4 paragraph (1)], that the payment injunction would be issued by the court, after examining the application and the written evidence, but *without summoning the parties*. Process would only be served, according to article 4 paragraph (2) of the ordinance, if the court deemed the presence of the parties to be necessary. The legal text which permitted the court, to decide the case without service of process, was repealed by Government Emergency Ordinance no. 142/2002.²⁰ A later amendment, requiring a summons during the procedure in all cases, was included in Act no. 295/2002. The inconsistency apparent from the inversed timing of the two regulations is the result of an error in the legislative technique²¹ of the Romanian legislator.

If the court deemed the claims to be justified, after examining the application on its merits, based on the written evidence which was administered, and the statements of the parties, it would then issue a payment injunction, which stated the amount to be payed and the date the payment became due.²² However, if the court considered the claim to be partially or entirely unjustified, it would reject the application, either in part or completely.

In this latter case, the claimant had no remedy at its disposal, but only the possibility to seize the court with a new application, this time to be tried based on the rules of regular contentious civil procedure.²³ The defendant, against whom the claim was upheld, could submit a *motion for annulment* of the injunction. This motion, the sole remedy available for the defendant during this procedure, was resolved by a different judge, but one appointed to the same court. The decision handed down with regard to this motion was final. The former defendant, transformed into a debtor by the issuance of the injunction could also challenge the merits of the injunction by submitting a separate motion during the enforcement²⁴ procedure, if no motion of annulment was previously submitted.²⁵

It is very important to note, that a *payment injunction issued by the court, under the above procedure provided no res iudicata effects whatsoever in favour of the claimant.*²⁶

1.3. The payment order

As consequence of Romania's accession to the European Union, the payment injunction was joined, in parallel, by a very similar, new institution. Government Emergency Ordinance no. 119/2007 "regarding measures for combatting the late performance of payment obligations resulting from contracts concluded between professionals"²⁷ was adopted in order to implement the provisions of Directive 2000/35/EC of the European Parliament and of the Council, of 29 June 2000 on combating late payment in commercial transactions.²⁸ This emergency ordinance introduced the so-called *payment order (ordonanță de plată)* into the Romanian legal system.

The scope of the payment order procedure was much narrower than that of the one regulating the payment injunction. It was limited to *pecuniary claims of a commercial nature, when the defendant was not subject to insolvency procedures, and where the extent of the claims was already certain, and which were overdue for payment, but only if they were owed based on contracts concluded between professionals, or a professional and a contracting authority.* The notion of "professional" was not defined by the emergency ordinance, and its definition in Romanian law changed over time.²⁹ However, it should be understood in the meaning attributed to "undertaking" by article 2 list entry no. 1 of Directive 2000/35/EC. The "contracting authority" should be understood in a meaning similar to that attributed at the same article and list entry, to "public authority".

The procedure provided for the issuing of a payment order was, apart from its narrower scope, almost identical, to that established for the payment injunction, with the following major *differences*:

1. The procedure was generally regarded as *contentious*, because its rules made no reference to the provisions of non-contentious civil procedure.³⁰

2. During the payment order procedure, *the submission of a written statement of defence was compulsory.*³¹ Failure to do so would result in barring the defendant from invoking evidence in its favour, and from raising certain types of objections (those only pertaining to the private interest of the party). As a first in post-1948 Romanian civil procedure, failure to submit a written statement could also be considered to be a full recognition of the claims, as uncontested, thereby permitting the court to pass down a decision by default.

3. The *types of evidence admissible* in the payment order procedure were not limited to written instruments, but the maximum duration of the procedure, set at 90 days, could preclude admissibility of certain types of evidence.³²

4. Any opposition lodged by the defendant, by means of a written statement, *would not automatically result in the rejection of the claimant's application*. The court would analyse the defendant's statements on their merits, based only on the evidence administered in the case, and would only reject the application if the defence was considered well founded.³³

5. If the application was at least partially admitted, and a payment ordinance issued, it produced *res iudicata* effects, but only to the extent to which it was admitted, as Government Emergency Ordinance no. 119/2007 contained no exemptions similar to those set forth for payment injunctions, yet stipulated that to the extent to which the application was rejected, the claimant could seize the courts with an application based on the common civil procedure.³⁴

1.4. The payment order in the New Code of Civil Procedure

The Romanian legislator, in 2010 enacted the New Code of Civil Procedure,³⁵ and concomitantly with its entry into force³⁶ repealed both the payment injunction and former payment order procedures, replacing them with a new payment order procedure, organized according to the provisions of articles 1014–1025 of the New Code of Civil Procedure. These provisions constitute an amalgamation of both previous legislative solutions, without almost any completely novel elements when compared to these. The procedure currently in force is a *contentious* one, even though due to the silence of the legislator on this aspect, the old debates have resurfaced.³⁷ Apart from the differences mentioned below the new and previous payment order procedures are quasi-identical.

The scope of the new payment order now includes *all pecuniary claims in a known amount, against defendants not subject to insolvency procedures, and which are due for payment, resulting from any civil contract, including but not limited to, those between professionals, or a professional and a contracting authority, if the claim is ascertained by a written instrument acknowledged by the parties through their signature or other means permitted by law*.

One difference between the new and previous payment order procedure is that the new procedure now requires that the creditor (future claimant) must serve a written notice on the debtor (future defendant) by which the former asks the latter to pay the amount due. The creditor may not apply for a payment order, unless this notice has been previously served.³⁸ Another difference is, that only written evidence is now admissible, apart from the statements of the parties, made during the procedure. Finally, under the current procedure, the court may uphold the claim against the defendant, in case of failure to lodge a written statement of defence, based on “all circumstances of the case”, which means that besides the merits, the court may also take into account any other circumstances,³⁹ including the behaviour of the defendant. This possibility can be interpreted as an encouragement to consider such a failure as a tacit recognition of the claim by the court.⁴⁰

The court must still examine the application on its merits, but only based on the written instruments provided by the claimant (and if a written defence was lodged, by the defendant) and based on the statements of the parties. If the court finds the opposition of the defendant to be well founded, or the claim unfounded even in lack of any opposition, it will reject the application (even if in the latter case, this possibility is not explicitly provided for by the legal text).⁴¹

The court must also reject the application if, in order to examine the merits of the defendant's opposition, the administration of evidence, other than written instruments, is deemed necessary, and the evidence would also be considered admissible according to regular civil procedure.⁴² In case the application is partially or entirely rejected, the claimant may opt to enforce the claim by means provided by civil procedure, as the payment order produces the effects of *res iudicata* only to the extent to which it is admitted.⁴³

The motion for annulment, the sole remedy available to the defendant, as opposed to the original procedure for the issuing of a payment order, can now only be exercised, if the requirements which are necessary for the emission of the payment order are not met,⁴⁴ or if payment has been made subsequent to the issuing of the payment order. As opposed to both the previous payment order procedure, and that provided for the payment injunction, the claimant may also submit a motion for annulment, if the application was completely rejected, or admitted only partially.

2. Conventional and modern elements – results and possibilities

As is evident from the description of the Romanian payment order procedure, this special means of judicial dispute resolution, similarly to regular civil procedure, requires that the merits of the claim be considered every time, before a decision is handed down, unless the defendant fails to submit a written statement of defence. Even if the defendant fails to contest the claim in such a way, a decision by default is by no means assured.⁴⁵ Since in the majority of cases, the court issuing the payment order must analyse the merits of the case in a contentious procedure, if only based on written instruments and the statements of the parties, and such analysis must be preceded by service of process, granting the possibility for verbal as well as written statements, such a procedure does not easily lend itself to automation.

In spite of an increase in the use of information technology tools during the course of the civil procedure in Romania, this use is still limited exclusively to case-flow management.⁴⁶ Since the application, and the written statements of defence used for requesting a payment order, and contesting the request, are not standardised forms (although the former⁴⁷ must contain some compulsory information), and because such standardization constitutes a prerequisite⁴⁸ to the creation of an electronic procedure, Romania is still a long way away from an electronically issued payment order.

Prospects for progress, are, however not as bleak as they would at first seem: another procedure, introduced by the New Code of Civil Procedure might herald some change. The Romanian legislator created an optional domestic small claims procedure, based on the

template established by Regulation (EC) no. 861/2007⁴⁹ of the European Parliament and of the Council of 11 July 2007. This procedure, established by articles 1026–1033 of the New Code of Civil Procedure, provides for a simplified civil trial in cases where the pecuniary value of the object in dispute does not exceed 10.000 lei (equivalent to approximately 2500 Euros). This simplified procedure calls for the use of forms (article 1029), by both the claimant and the defendant, to outline their claims and statements of defence, as well as by the court. The trial is held *in camera*, with service of process optional, and takes place only if the court deems the presence of the parties necessary. Even though this procedure too calls for the analysis of the claim on its merits, it might more easily lend itself to automation, and provide the basis for an electronic payment order procedure in the future.

III. The payment order procedure in Hungary

1. Regulation of the procedure in the Hungarian civil procedure

The payment order procedure was introduced into the Hungarian civil procedure by Act XIX. of 1893.⁵⁰ The basic elements of the regulation including the setting aside of the usual formalities of court proceedings, the simplification of the procedure and, the all-encompassing tendency for a quick and inexpensive path to justice, without endangering material truth, can be considered unchanged since this procedure was introduced.⁵¹

The procedure can be circumscribed through the following elements: *upon the one-sided application of the claimant, the competent authority calls on the defendant to meet the claim included in the application or lodge an opposition to it, without the assessment of evidence. Failing this, the order for payment becomes final and enforceable, whereas in case of opposition the payment order procedure is transferred to a civil law procedure at court.*⁵²

Regarding its procedural nature, the payment order procedure is a *non-contentious* civil law procedure in Hungary. Its non-contentious nature is demonstrated by the lack of certain guaranteeing principles applicable to the regular civil procedure. Thus, the principles of oral proceedings, direct assessment of evidence, publicity as well as the principle of a contradictory hearing involving both parties are not applied, and no assessment of evidence is conducted during the procedure.⁵³ The defendant has the opportunity of giving a statement only after the payment order has been issued and consequently, the principle of adversarial proceedings is not applied.

In his book published in 1910, Károly TÓTH included the payment order procedure into „cases not being part of a court proceeding” next to “certain cases of default”. The author states that in such cases, there is a court proceeding to be conducted where the defendant fails to appear in court on the first day set forth for the hearing, so the proceeding is concluded with a so-called judgment by default.⁵⁴ Károly TÓTH believed the payment order procedures and the signs of default are similar phenomena. Their common feature is that the debtor/defendant

has a right to lodge an opposition. Consequently, the actual court proceedings begin. Another common feature is that the judge makes a decision without hearing the debtor previously in terms of subjective private rights.⁵⁵

Marcell KOVÁCS believed that the payment order is an anticipated default judgment. Compared to the judgment made during a court proceeding, the only difference is that the default as a base of the judgment is stated by the judge at the hearing before the judgment is passed (the defendant fails to appear at the first hearing). In the payment order procedure, the default depends on facts emerging after the judgment that are beyond the scope of the court's role during the legal proceedings (failing to lodge an opposition). Even so, they can be used for considering the defendant's passive behaviour as an implied waiver of the right to defence.⁵⁶

The rules of procedure were included in the laws of civil procedure among others due to the close connection with the decisions based on default until June 2010.⁵⁷ From June the 1st 2010, the rules of the payment order procedure were included in a separate act.⁵⁸ This fact is closely linked to the rules on jurisdiction to be applied in the procedure. The procedure formerly fell within the jurisdiction of the court between 1893 and May the 31st 2010, whereas from June the 1st 2010 civil law notaries have jurisdiction to resolve such matters.⁵⁹

In the procedure, a payable claim, for paying a sum of money can be enforced. The payable pecuniary claims not exceeding HUF 1,000,000 can be enforced by a payment order or within the scope of other procedures specified by the law, provided that the defendant has a known domicile or place of residence, or a registered office, or other similar place of representation. If the pecuniary claim arises between employer and employee, this threshold does not constitute the only precondition of using such a procedure, as no payment order can be issued if the claim results from the creation, modification or cessation of the title of employment, the breach of such title, or from disciplinary proceedings conducted against the employee.⁶⁰

In most cases, the course of the procedure can be described with the determination used as a definition above: *Upon the unilateral request from the claimant, the civil law notary (notary public), without assessing any evidence, calls the defendant to meet the claim (payment order) included in the application or lodge an opposition. In case of an opposition, the payment order procedure is transferred to an ordinary civil law procedure, in other words an opposition has the effect of automatically transferring the proceedings to a court procedure.* In case of failure to lodge an opposition, the payment order becomes final by the effect of the law, and shall have the same effect as a final court judgment.⁶¹ Having a final payment order, the claimant can then initiate its enforcement and the claim contained in the payment order is considered to have the effects of *res judicata*.⁶² The payment order, issued by a civil law notary, states merely the legal force and confirms the order as a written recognition of the statement in force.⁶³

The question arises whether the Hungarian payment order procedure is effectively capable of, and adequate for settling pecuniary claims on the basis of legality?

In order to answer the question, as a first possible scenario we have to consider the procedure that is transferred to a civil law court as an effect of an opposition, when the legal dispute must be settled on the basis of its merits (its legality), in accordance with the rules of regular civil procedure.

However, in the cases when the payment order issued becomes final as resulting from the failure of the defendant to lodge an opposition, hence it becomes enforceable as a decision with an effect of a judgment after the expiry of the due date for performing the claim, we cannot answer the question affirmatively, concerning legality, as we can assume the defendant's failure to lodge an opposition means that he recognizes the existence of the claim. In most cases, this statement can be justified and the legality of the claim is not rendered therefore dubious. However, in certain cases there are well founded reasons for the failure to lodge an opposition, and a decision failing to meet the requirement of legality may in such cases become final. In Hungarian legislation, remedies are provided for just such cases, even if the decision became final, by which the defendant can still challenge the legality of the payment order and eventually have it overturned (the procedure for justification of tardive lodging of an opposition, revision of the case).⁶⁴

As far as the assessment of the above issue is concerned, we have to emphasize the basic idea which states the purpose of the payment order procedure as being to settle undisputed pecuniary claims through a simplified procedure, out of court.⁶⁵ According to János NÉMETH, in view of considerations concerning expediency and procedural efficiency it is justified to keep this institution even if the features of its default system harbour certain dangers.⁶⁶

According to Tamás TÓVÁRI, the payment order procedure has to find balance between rapidity and simplicity on the one hand and the requirement of enforcing material justice on the other hand by providing that it still remains an attractive alternative in addition to the usual civil law procedure, while reducing the risk to a minimum concerning the fact that unfounded claims become final due to a certain automatism of the said procedure.⁶⁷

2. Conventional and modern elements

2.1. The appearance of electronic elements in the regulation of the Hungarian procedure – historical background

As early as 1975, János NÉMETH proposed the application of IT developments launched in the German Federal Republic to the Hungarian procedure. The fact that the Hungarian procedure also used forms, which constitute one of the cornerstones of electronic data processing, had a crucial role in this regard.⁶⁸

Still, one had to wait for a long time to see this solution implemented, as the basics for the launch of the electronic payment order procedure were established only by Act XXX. of 2008. To ensure that the essence of the payment order procedure does not change during the electronic procedure,⁶⁹ three cardinal rules were included in Chapter XIX. of the Civil Procedure Code⁷⁰ that state as follows:

- The possibility of an electronic application and electronic administration is ensured in the payment order procedure: the application for issuing a payment order can be submitted electronically on the form specified by decree of the Minister of Justice, and in such a case, the court acts by use of an IT tool based on computerised data processing.⁷¹

- During an electronic procedure, payment orders shall be issued within three days⁷²;
- The courts act nationwide by use of a unified computer system.⁷³

In April 2009 another amendment proposal was made to the payment order procedure,⁷⁴ on the basis of which the Parliament adopted Act L. of 2009 on the payment order procedure (hereinafter: "Fmhtv." according to the Hungarian abbreviation) that includes the rules of the currently active electronic procedure.

2.2. Technical background of the electronic payment order procedure: the system of the Hungarian National Chamber of Civil Law Notaries

IT applications play a significant part during electronic procedures. The name of the Hungarian system is: „*The MOKK System*” that can be defined as follows: “It is the national uniform IT system of the Hungarian National Chamber of Civil Law Notaries for the technical support of payment order procedures regulated by the Fmhtv. available via the Internet to civil law notaries, the parties and other persons involved in the procedure, and other users”.⁷⁵

The MOKK System is a network which functions on a permanent basis, that provides a unified solution compared to the rules for communicating and conferring with the parties established for the courts and other authorities. This system is available on (and via) the Internet from anywhere, and it works without any limitation to workdays, or to business hours within any given day. Claimants can access it at any time, even at night. It is a solution which provides for 24 hour service.⁷⁶

2.3. Procedural law basics for the functioning of the electronic payment order procedure

As stated above, the essential elements of the payment order procedure are not altered in the electronic procedure. Such an electronic solution, however, required procedural law amendments especially under two aspects.

One of these concerned the notaries’ room for manoeuvre during the examination of the applications. Based on the respective German laws, the examination of the applications in terms of merits and justification was excluded, thus removing the main obstacle to the implementation of the electronic procedure, which used to be the possibility of assessment (and modification) of the claim by the authority empowered with issuing an order for payment. In the Hungarian electronic procedure, the order cannot be issued with any content, other than the one requested in the application.⁷⁷

The second aspect appears at the output side of the procedure. Part of the MOKK System is a central printing office where the issued orders are printed, put into envelopes and mailed.⁷⁸ Based on the practice in Austria, in Hungary a single central printing office is used⁷⁹ and the issued order appears thus physically far away from the notary with jurisdiction to issue the order for payment. To preserve the nature of a public document, some allowance had to be made: the orders are considered to be authentic public documents without the notary’s signature.⁸⁰

2.4. The course of the procedure – conventional elements and "e-points"

2.4.1. Applications

During the payment order procedure, there are oral and written (paper based and electronic) means for submitting applications available.⁸¹

A claimant has direct access to the computerised system only when he or she submits his or her application electronically.

A party represented by an attorney or which is a legal entity, a branch of a foreign company, or a one-person company (a self-employed entrepreneur) can submit its application only electronically.⁸² For other persons electronic submission of an application is also a possibility, but is not compulsory.

In accordance with the original idea of the legislative, and MOKK, and on the basis of the provisions of Act L. of 2009 which entered into force on the 1st of June 2010, natural persons would have also had the possibility of submitting their application via the so-called electronic portal.⁸³ The respective rules of the payment order procedure were however amended by Act LIX. of 2010 in this respect, and the possibility of submitting an application via the electronic portal was repealed as of the 29th of June 2010.⁸⁴

As a general rule, natural persons have the possibility of submitting a paper based (written) application or they may apply to the notary with jurisdiction by requesting initiation of the procedure orally. In addition, the possibility of submitting an application electronically is also valid with the above mentioned terms and conditions for the above mentioned persons as follows: an application shall be submitted on a form bearing an electronic signature and qualified time-stamp.⁸⁵ The claimant submitting such an application receives a confirmation automatically and electronically through the MOKK System.

As a consequence of this electronic element the application is to be submitted in one copy only, and with very few exceptions, appendices cannot be attached to it.⁸⁶

2.4.2. The "path" of applications to the competent notary

A new element was included in Fmhtv. which exceptionally, for the case of payment orders, separates territorial jurisdiction from that of the notaries' registered office, and extends it to the whole territory of Hungary.⁸⁷ The explanation for this regulation is that the purpose of the national legislature and the Chamber of Civil Law Notaries was to provide a more equitable distribution of caseloads among notaries.

The applications for payment orders submitted electronically are directly received in the MOKK System where cases are distributed to notaries by an automated process without any human intervention. The cases received are allocated one by one on the basis of the sequence number of the notaries' registered offices. To this automated system, exemption is the only exception.⁸⁸ Notaries receive the applications according to the number sequence of their registered office codes. The applications are allocated a few minutes after they are received.

In the case of the paper based and oral applications, the notary, to whom the application was submitted or presented, acts. As a general rule, the electronic allocation of cases is not to be applied to these situations. It is important, however, that no notary be subjected to any pressure due to a disproportionate caseload, and for this reason notaries are obliged to constantly track the number of paper based and oral applications. If a notary receives more than 20 applications sent in a conventional way within one week, such a notary can notify the chairman (deputy chairman) of the MOKK of this situation.⁸⁹ The notary in question may then apply to the MOKK for help, for reducing this caseload. The “surplus applications” in such situations are forwarded into the electronic case distribution system and they are allocated to another notary with jurisdiction, after which the administration time starts to flow.

2.4.3. Procedure before the notary

It is obvious how important a part the electronic system is in this procedure as it is the claimant who uploads his/her application into the system and thus, the application is not made in any other form. As far as paper based and oral applications are concerned, an intermediate activity is needed for using the electronic system: the content of the paper based and oral applications is entered by the notary into the electronic system.

The entirely electronic procedural element of the Hungarian payment order procedure is the notary’s action based on an application as this is registered in the electronic system of MOKK irrespectively of the way the application was submitted. The notary makes his decisions and produces his other documents through the MOKK System.

As a general rule, the decisions – among others, the payment order itself – issued by the notary do not appear in a paper form in the office of the competent notary as they are printed via a computer command in the computer centre of MOKK. Also, they are prepared for mailing (put into envelopes) then they are mailed from there.⁹⁰

2.4.4. Delivery

Currently, electronic delivery is only available to the claimant who submitted his/her application electronically during the payment order procedure.⁹¹ The recipient can access the documents via the user interface relating to the case and at the same time, a notification is also sent by the MOKK System to the electronic mailing address indicated by the recipient. The recipient can receive the documents by a receipt bearing a qualified digital signature and time stamp. The documents are considered to be delivered at the date indicated in the receipt. Even for the claimants involved in the electronic communication, the above mentioned way of communication is not an exclusive one. If the recipient fails to receive the documents within fifteen calendar days after they have been made accessible, these shall be delivered to the recipient as a paper based “hard copy”.⁹²

On the other hand, the payment order issued as a paper based document shall be delivered to defendants by mail (or by an executor, upon a special request).⁹³

2.4.5. Opposition

An opposition can be lodged by the defendant to any notary. In the Hungarian payment order procedure, there are different rules in force concerning the form of opposition for cases with or without the participation of an attorney.

A defendant with an attorney or a legal entity as well as an enterprise can lodge an opposition only electronically, and for this a standard form is made available.⁹⁴ From the 15th of March 2012, the sanction for submitting an opposition in any other way in such cases is provided: the notary rejects the opposition not lodged electronically by a defendant with an attorney or an enterprise or any legal entity.⁹⁵

As far as defendants without an attorney are concerned, there is no restriction or any formalities in this regard, as an opposition can be lodged orally or as a paper based document, or even electronically, if technical conditions are met.

2.4.6. Ordering execution on the basis of a payment order in force

If a defendant fails to lodge an opposition, the payment order in question becomes valid by the effect of law. The notary adds a clause of confirmation to the payment order and then he arranges for the delivery to the claimant.⁹⁶

The application for enforcement as well as the application for a request of security shall be submitted on a form intended for this purpose as a paper based document or electronically to the competent notary.⁹⁷ As a formal requirement, any oral application is excluded. In addition, such an application shall be submitted in accordance with the compulsory rules of electronic application to be applied to a party represented by an attorney, or to a legal entity.

The sheet of enforcement (the enforcement codicil) is issued by the competent notary through the MOKK System as an electronic public document and it is forwarded to a judicial officer in one copy electronically through the electronic system of MOKK and to the Hungarian Chamber of Judicial Officers (bailiffs). Based on the electronic public document, the judicial officer makes a paper based authentic document copy.⁹⁸

2.4.7. First contact between the competent notary and the competent court in case of a legal proceeding

If a defendant lodged an opposition to the payment order within the set time limit, the procedure is transferred to a civil law procedure on the basis of the opposition.⁹⁹

The notary with jurisdiction notifies the claimant about the opposition and the transfer to an ordinary civil law procedure informing him or her that he or she has an obligation of preparing a civil law procedure (payment of court fees, presentation of facts and evidence at court). If a claimant applied by electronic communication for the payment order procedure, he or she must also use an electronic way of communication towards the competent civil law court within the scope of preparing the civil law procedure. If a claimant does not submit an application electronically, it is considered as the claimant's default with the legal consequence of cancelling the civil law procedure.¹⁰⁰

The competent notary is also obliged to notify the court which is competent to conduct the civil law procedure and has jurisdiction after the receipt of the opposition. In such a case, he or she forwards to the court a printed copy of the documents issued in the payment order procedure and entered into the system of MOKK (printed “hard” copy) for registration.

This printed document includes the content of the casefile concerning the payment order procedure as well as the name, registered office and stamp of the notary. If the court provides the relevant technical conditions, the document in printed form can also be forwarded to the court electronically.¹⁰¹

Conclusions

The electronic elements in the Hungarian payment order procedure promote the efficacy and cost-efficiency of the procedure. Based on the solution adopted in Austria, the procedure is conducted by a civil law notary. The electronic background serves as a technical element promoting the notary’s work.¹⁰²

An obvious impact of cost-efficiency appears explicitly concerning electronic deliveries. A notary could namely notify the claimant electronically about the legal force of a payment order issued and mailed as a paper-based document, based on an application received electronically, which became valid due to the defendant’s failure to lodge an opposition. The procedure resulted thus in a single mailing and in the costs thereof only.

The electronic regulation of the procedure can be considered as a fixed one from the 1st of June 2010. There can be a proposal of improvement regarding the electronic applications to be submitted by natural persons only. Submission of applications should be provided for natural persons without an electronic signature card, via the electronic portal intended for this purpose in accordance with the original ideas.¹⁰³ With this opportunity, the advantages of an electronic application can be provided to all the claimants (natural persons, legal entities or claimants represented by a lawyer).

This solution however is deeply rooted in the Hungarian legal tradition of decisions by default, a tradition which endures more or less unbroken since the first modern codification of Hungarian civil procedure. Even though such an institution existed traditionally under Romanian law, due to historical reasons it had a much less continuous path to the present. Also, due to the requirement that the claim be subjected to judicial scrutiny even in event of a default by the defendant, the Romanian solution for the payment order is much less suited to transformation into an electronic procedure. A further impediment, one that can be qualified perhaps as insurmountable is the position expressed in Decision no. 895/17.12.2015.¹⁰⁴ of the Romanian Constitutional Court, which can be interpreted as barring in principle any other entity than a court from directly issuing decisions subject to enforcement with a *res iudicata* effect. Therefore, also due to the lack of both the legal and the technical infrastructure necessary, it is doubtful that the Romanian legal system could adopt the Hungarian model of electronic procedure for the issuing of a payment order wholesale.

A domestic alternative to the Hungarian model of the electronic payment order procedure is however conceivable in the Romanian legal system, stemming from the simplified procedure set forth for disputes with a pecuniary value not in excess of approximately 2.500 Euros. This procedure shows us that the first prerequisite of electronic procedures, the use of standardized forms, is already in existence, and only the technical infrastructure is necessary in order to transform it into a truly electronic procedure. There remains the problem of judicial fact-finding: the judge must still solve the dispute at hand based on the evidence administered. By disposing of this judicial requirement, in cases of default on behalf of the defendant, a simplified electronic payment order procedure could be achieved. The Romanian legislator showed a propensity towards the use of electronic means of case management, a tendency that could, with time, extend to the payment order procedure, as well as by use of the latter as an early conduit, and proof of principle (an example evident from Hungarian civil procedure) for other procedures as well.

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¹ From a total number of 28 member states, a domestic payment order procedure is in place in 24. In Denmark, the United Kingdom, Ireland, and Cyprus no such domestic procedure is provided for. See: MOLNÁR, Judit: Fizetési meghagyásos eljárások az Európai Unióban – értékhatár alkalmazás és igénybevétel szempontjából. (In course of publication, place of accepted publication, Európai Jog, 2016). RECHBERGER, Walter H. – KODEK, Georg E.: Das Mahnverfahren in den Mitgliedstaaten der EU – Generalbericht. In: RECHBERGER, Walter H. – KODEK, Georg E. (eds.): Orders for payment in the European Union. Civil Procedure in Europe 4. Kluwer Law International 2001. p. 7.

² See: RECHBERGER – KODEK (2001) pp. 9–10. A similar position is expressed by HARSÁGI, Viktória: A fizetési meghagyásos eljárások hasonlóságai és különbségei Európában. Jogtudományi Közlöny, 2012/1. p. 2.

³ A similar position is expressed by: GÁSPÁRDY, László: A fizetési meghagyásos eljárás. Polgári nemperes eljárások. Novotni Kiadó Miskolc 2001. p. 125. KENGYEL, Miklós: Magyar Polgári Eljárásjog. Osiris Kiadó Budapest 2008. p. 459.

⁴ RECHBERGER – KODEK (2001) p. 1. HARSÁGI (2012) p. 2.

⁵ Published in the official journal of Romania (Monitorul Oficial) no. 200/11.09.1865.

⁶ See: article 150 of the initial text of the Romanian Code of Civil Procedure.

⁷ See: article 157 of the initial text of the Romanian Code of Civil Procedure.

⁸ The reform took place by means of Decree no. 1228 from the 15th of May 1900, published in the official journal of Romania no. 281/15.03.1900.

⁹ The Romanian Code of Civil Procedure was republished after substantial amendments, in the official journal of Romania no. 45/24.02.1948.

¹⁰ See: STOENESCU, Ilie – ZILBERSTEIN, Savelly: Drept procesual civil. Teoria generală. Editura didactică și pedagogică București 1977. p. 394. This perspective was maintained according to later legal doctrine as well. See: DELEANU, Ion (2005a): Tratat de procedură civilă, vol. I. Editura All Beck București 2005. p. 682.

¹¹ Published in the official journal of Romania no. 422/30.07.2011.

- ¹² The intention of the legislator, at first, was to extend the rules of civil procedure to the payment injunction (as resulting from article 11 of the initial Ordinance), granting it a contentious nature (see: note 13).
- ¹³ Different authors' positions diverge on the existence and extent of this contentious character, due to certain inconsistencies by the legislator. Act no. 295/2002 published in the official journal of Romania no. 380/05.06.2002, which approved Government Ordinance no. 5/2001, repealed the original text of article 11 of the ordinance, which initially extended the applicability of *contentious* civil procedure rules to the payment injunction procedure. In their place it introduced a new article 11¹ which extended the non-contentious procedural rules to it instead.
- ¹⁴ NICOLAE, Șerban: Procedura somației de plată, în lumina Ordonanței de Guvern nr. 5/2001 și a modificărilor aduse acesteia prin Legea nr. 295/2002. Dreptul, 2002/9. p. 10.
- ¹⁵ Decision no. 109/2003 of the Romanian Constitutional Court, published in the official journal of Romania no. 247/10.04.2003.
- ¹⁶ See: DELEANU, Ion (2005b): Tratat de procedură civilă, vol. II. Editura All Beck București 2005. p. 348, note 3.
- ¹⁷ Article 1 paragraph (1) of Government Ordinance no. 5/2001. Therefore, the payment injunction could not be used when the claim arose from contracts, which justified a payment not related to works, services, or the rendering of other benefits.
- ¹⁸ See note 13.
- ¹⁹ Article 4 paragraph (4) of Government Ordinance no. 5/2001.
- ²⁰ Published in the official journal of Romania no. 804/05.11.2002.
- ²¹ See: DELEANU (2005b) p. 348, note no. 1.
- ²² Article 6 paragraphs (1)–(2) of Government Ordinance no. 5/2001.
- ²³ Article 7 of Government Ordinance no. 5/2001.
- ²⁴ For details see: CĂLINESCU, Irina O.: Posibilitatea de a invoca apărări de fond pe calea contestației la executare exercitată împotriva unui titlu executoriu reprezentat de o somație de plată. Revista Română de Executare Silită, 2013/3. pp. 17–23.
- ²⁵ Articles 8 and 10 of Government Ordinance no. 5/2001. Therefore, if such an injunction had been issued based on e. g. a contract, the debtor could still challenge the validity of contract itself, or the amount due. If the challenge was successful, any payment made according to the injunction would be considered retroactively, as having been undue.
- ²⁶ Article 11¹ paragraph (1) of Government Ordinance no. 5/2001.
- ²⁷ Published in the official journal of Romania no. 738/31.10.2007.
- ²⁸ Published in the Official Journal no. L 200, 8.8.2000, pp. 35–38. This directive was later repealed, and replaced by Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions published in the Official Journal no. L 48, 23.2.2011. pp. 1–10.
- ²⁹ The notion of “professional” was at the time defined in Romanian law by article 2 paragraph (2) of Act no. 193/2000 regarding abusive clauses in contracts concluded between professionals and consumers as: “any natural or authorised legal person, who, on the basis of any contract to which this law is applicable, acts in the course of its commercial, industrial, production, artisanal or liberal activity, as well as any person who acts in the same capacity on its behalf”. Later the notion was redefined by article 3 paragraphs (2)–(3) of the Romanian Civil Code (Act no. 287/2009, republished in official journal of Romania no. 505/15.07.2011.) as any person who engages in “the systematic exercise (...) of an organized activity of production, management or sale of goods, or the rendering of services, regardless if it is done with or without the goal to make a profit”.

- ³⁰ TEOHARI, Delia N.: Recuperarea creanțelor prin intermediul procedurilor somației și ordonanței de plată. Analiză comparativă a regulilor procedurale. *Curierul Judiciar*, 2010/4. p. 203.
- ³¹ See article 7 paragraph (4) of Government Emergency Ordinance no. 119/2007.
- ³² TEOHARI (2010) p. 206.
- ³³ See article 9 of Government Emergency Ordinance no. 119/2007.
- ³⁴ See article 9 paragraph (3) and article 11 of Government Emergency Ordinance no. 119/2007.
- ³⁵ Act no. 134/2010, re-published in the official journal of Romania no. 247/10.04.2015.
- ³⁶ Act no. 76/2012, published in the official journal of Romania no. 365/30.05.2012.
- ³⁷ LUDUȘAN, Florin: Recuperarea creanțelor prin procedura specială a ordonanței de plată conform Noului Cod de procedură civilă. *Dreptul*, 2016/1. pp. 70–71.
- ³⁸ See articles 1015 and 1017 paragraph (2) of the Romanian (New) Code of Civil Procedure. See also: LUDUȘAN (2016) pp. 77–78.
- ³⁹ Article 22 paragraph (7) of the Romanian Code of Civil Procedure permits the court, in situations when it may consider “all circumstances of the case”, to take into consideration any circumstances it deems appropriate, including principles of law, equity, and good faith of the parties.
- ⁴⁰ LUDUȘAN (2016) p. 79.
- ⁴¹ See: BOROI, Gabriel (ed.): *Noul Cod de procedură civilă. Comentariu pe articole*, Vol. II. Editura Hamangiu București 2013. p. 617.
- ⁴² See article 1021 of the Romanian (New) Code of Civil Procedure.
- ⁴³ See: BOROI (2013) p. 618.
- ⁴⁴ See article 1024 paragraph (1) and (3) of the Romanian (New) Code of Civil Procedure.
- ⁴⁵ See: BOROI (2013) pp. 614–615.
- ⁴⁶ See: PANTILIMON, Rikárd-Árpád: Enforcement of a Claim with the Support of the New Information Technology in the European Union, Romanian Case Study. In: KENGYEL, Miklós – NEMESSÁNYI, Zoltán (eds.): *Electronic Technology and Civil Procedure. New Path to Justice from Around the World*. Springer 2012. pp. 221–230. It must be noted that, in spite of the fact that the information contained in the study is dated, reflecting the state of affairs as of 2010, no major improvements occurred in the application of information technology to Romanian civil procedure since that date.
- ⁴⁷ Article 1017 paragraph (1) of the Romanian New Code of Civil Procedure.
- ⁴⁸ See: CALMÔN, Petronio: The future of the traditional civil procedure. In: KENGYEL, Miklós – NEMESSÁNYI, Zoltán (eds.): *Electronic Technology and Civil Procedure. New Path to Justice from Around the World*. Springer 2012. p. 83.
- ⁴⁹ Published in the Official Journal L 199, 31.7.2007. p. 1–22.
- ⁵⁰ 1893. évi XIX. tc. a fizetési meghagyásokról [Act no. XIX. from the year 1893 regarding orders for payment] 1. §
- ⁵¹ KENGYEL (2008) p. 467.
- ⁵² TÓTH, Károly: *Polgári törvénykezési jog. Alapismeretek*, vol. II. “Törvénykezés államhatalommal”. Budapest Hegedűs és Sándor Könyvkiadóhivatala 1910. pp. 460–466. KENGYEL (2008) p. 467. GÁSPÁRDY, László (2001) p. 125.
- ⁵³ NÉMETH, János – KISS, Daisy (eds.): *A polgári perrendtartás magyarázata*. 2. átdolgozott kiadás. Complex Budapest 2007. p. 1848. The principles of the permission to use one’s native language, the solution of the case in a reasonable time, and that of access to legal aid are however applied.
- ⁵⁴ TÓTH (1910) p. 462.
- ⁵⁵ TÓTH (1910) p. 466.

- ⁵⁶ KOVÁCS, Marcell: A polgári perrendtartás magyarázata, Második kiadás, nyolcadik füzet Budapest, 1929. p. 1225. TÓTH, Károly is of a similar opinion, who, in his treatise published in 1910 placed the procedure in the category of non-contentious proceedings, along with some cases of contempt of court. TÓTH (1910) p. 461.
- ⁵⁷ Act no. I. from the year 1911. regarding civil procedure, Title 8. (588–605. §). Act no. III from the year 1952. regarding civil procedure, Chapter XI. (313–323. §). See also: KENGYEL (2008) p. 467. NÉMETH – KISS (2007) p. 1847.
- ⁵⁸ Act no. L. from the year 2009. regarding the payment order procedure (hereinafter: Fmhtv.)
- ⁵⁹ Fmhtv. §1 paragraph (1).
- ⁶⁰ Fmhtv. § 3.
- ⁶¹ Fmhtv. § 36. paragraph (1); The date at which the payment order becomes final is the first day following the date at which the time-limit for submitting an opposition elapsed. SZÉCSÉNYI-NAGY, Kristóf: A fizetési meghagyásos eljárás. In: VARGA István (ed.): A polgári nemperes eljárások joga, 2. átdolgozott kiadás. ELTE Eötvös Kiadó Budapest 2013. p. 839.
- ⁶² See: SZABÓ, Imre (ed.): A polgári perrendtartásról szóló 1952. évi III. törvény magyarázata, vol. III. Magyar Hivatalos Közlönykiadó Budapest 2006. p. 1319. NÉMETH – KISS (2007) p. 207. SZÉCSÉNYI-NAGY (2013) p. 839. Reasons for the Fmhtv. § 36.
- ⁶³ SZABÓ (2006) p. 1320. Fmhtv. § 36. paragraph (2).
- ⁶⁴ NÉMETH – KISS (2007) p. 1849. NÉMETH János – KISS Daisy (eds.): A bírósági nemperes eljárások magyarázata, Vol. I. KJK-KERSZÖV Jogi és Üzleti Kiadó Kft. Budapest 2002 p. 167.
- ⁶⁵ Fmhtv. § 1. paragraph (1).
- ⁶⁶ NÉMETH – KISS (2007) p. 1849. NÉMETH – KISS (2002) p. 168.
- ⁶⁷ TÓVÁRI, Tamás: Fizetési meghagyásos eljárásunk néhány kérdése a német ZPO tükrében. Studia Collegii Bibó 2001. p. 296.
- ⁶⁸ NÉMETH, János: Fizetési meghagyásos eljárás. In: SZILBEREKY, Jenő – NÉVAI, László (eds.): A polgári perrendtartás magyarázata, Vol. II. Budapest, 1976. p. 1477.
- ⁶⁹ KENGYEL (2008) p. 527.
- ⁷⁰ Act no. XXX. of 2008. § 63. paragraph (7).
- ⁷¹ § 315. paragraph (4) of the Code of Civil Procedure in force until the 31st of May 2010.
- ⁷² § 317. paragraph (2) of the Code of Civil Procedure in force until the 31st of May 2010.
- ⁷³ § 314. paragraphs (2) and (3) of the Code of Civil Procedure in force until the 31st of May 2010.
- ⁷⁴ Legislative proposal (bill) no. T/9400. regarding the payment order procedure, Budapest, April 2009.
- ⁷⁵ Joint Ordinance no. 21/2010. (V. 6.) of the Ministry of Justice and Public Order and the Minister in Charge of the Office of the Prime Minister § 1. paragraph (1).
- ⁷⁶ MOLNÁR, Judit – NYILAS, Anna: A fizetési meghagyásos eljárásról szóló 2009. évi L. törvény kommentárja. Opten Informatikai Kft. Budapest 2015. p. 165.
- ⁷⁷ Fmhtv. § 26. paragraph (5).
- ⁷⁸ Act no. L. of 2009. reasons for § 56–58.
- ⁷⁹ See also: SZÉCSÉNYI-NAGY, Kristóf: Az automatizált fizetési meghagyásos eljárás Németországban és Ausztriában. Notarius Hungaricus, 2009/3. pp. 16–19.
- ⁸⁰ Fmhtv. § 18. paragraphs (4)–(5)
- ⁸¹ Fmhtv. § 11–14.
- ⁸² Fmhtv. § 11. paragraph (3).
- ⁸³ Fmhtv. § 11. paragraph (1) list entry b).
- ⁸⁴ Act no. LIX. of 2010. § 3. paragraph (10).
- ⁸⁵ Fmhtv. § 11. paragraph (1) list entry a).

⁸⁶ See: Fmhtv. § 10. paragraphs (3) and (4).

⁸⁷ Fmhtv. § 8.

⁸⁸ See: MOLNÁR, Judit: A magyar fizetési meghagyásos eljárás az európai megoldások tükrében. Közjegyzői Akadémia Kiadó Budapest 2014. pp. 163–166.

⁸⁹ Ordinance no. 23/2010. (V. 7.) of the Ministry of Justice and Public Order § 10.

⁹⁰ Fmhtv. § 56. paragraph (5).

⁹¹ Fmhtv. § 16. paragraph (5).

⁹² Fmhtv. § 16/A.

⁹³ Fmhtv. § 16. paragraphs (1) and (3).

⁹⁴ Fmhtv. § 11. paragraph (3).

⁹⁵ Fmhtv. § 36. paragraph (5) list entry c).

⁹⁶ Fmhtv. § 36. paragraphs (1)–(2).

⁹⁷ Fmhtv. § 52. paragraph (1).

⁹⁸ Fmhtv. § 53. paragraph (1).

⁹⁹ Fmhtv. § 37. paragraph (1).

¹⁰⁰ Fmhtv. § 37. paragraph (4a).

¹⁰¹ Fmhtv. § 38. paragraphs (1) and (4).

¹⁰² MOLNÁR (2014) pp. 223–228.

¹⁰³ See also: heading 2.4.1. above.

¹⁰⁴ Published in the official journal of Romania no. 84/04.02.2016.