EUROPEAN SMALL CLAIMS PROCEDURE

Guidelines for an effective response to the call for Justice

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EUROPEAN SMALL CLAIMS PROCEDURE GUIDELINES FOR AN EFFECTIVE RESPONSE TO THE CALL FOR JUSTICE

IRENE ABIGNENTE, RITA TUCCILLO*

ABSTRACT. The authors examine the most relevant regulatory and enforcement issues of the European Small Claims Procedure and present the harmonized guidelines developed by the SCAN Consortium in order to ensure greater dissemination and application of the European procedure. The guidelines for policymakers contain proposals to the European Commission to amend Regulation 861/2007. The guidelines for users and judicial authorities are suggestions for a smoother and more uniform application of the ESCP. The authors believe that the procedure, with appropriate modifications, can become a useful tool for the protection of consumers and entrepreneurs for the resolution of small claims.

Keywords: *ESCP, Small Claims, Access to justice, Guidelines, Policymakers, Judicial authorities.*

1. Introduction

The social and healthcare context experienced nowadays because of the current pandemics has showed how the use of electronic media is the most suitable and effective to manage a litigation. In order to cope with the spread of the new Coronavirus (SARS-CoV-2) and the related disease (Covid-19), a reorganization of the judicial system had to be rethought and new measures be taken. The usual overcrowding of tribunals in Italy, far away from being compatible with the need for

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social distancing and the mitigation of contagion, had to be prevented by introducing new alternative ways to discuss hearings and fulfil all obligations. These ways feature a widespread and preferred use of online and electronic media (face-to-face hearings were replaced by remote hearings by means of videoconferences or notes lodged for hearings to be discussed in writing; electronic notifications; electronic requests and communications to and from the Tribunals)[1].

Given the contingency, the Italian legislator deemed a recourse to electronic justice as the most performing solution for current circumstances, thus outlining a procedure that ensures a continuity with those used for the cross-border dispute settlement, as introduced by the more forward-looking European legislator already more than a decade ago[2].

On the pattern laid down by the new ways for litigation management - not only at regulatory level but also in terms of awareness and attitude of legal practitioners towards the use of information systems and the new modes of litigation management – there are strong hopes that the European Small Claims Procedure (ESCP) established by Regulation (EC) n. 861/2007, as successively amended by Regulation (EU) 2015/2421[3], may find a new momentum.

[1] Cf. Legislative decree 18/2020, as successively modified by conversion law n. 27/2020 and legislative decree 28/2020, as successively modified by conversion law n. 70/2020.

[2] Along with the ESCP, this article deals with, see also the European order for payment procedure as introduced by EC Regulation n. 1896/2006.

[3] See in Italian literature on ESCP: among the latest papers, Ruggieri, P. C. 2020. La European Small Claims Procedure (Reg. CE 861/2007) in Italia: un (rimediabile?) insuccesso. *Federalismi.it* (21). Among the less recent, though relevant papers, D'Alessandro, E. 2008. *Il procedimento uniforme per le controversie di modesta entità*. Torino: Giappichelli Press; Bina M. 2008. Il procedimento europeo per le controversie di modesta entità (Reg. CE n. 861/2007). *Rivista di diritto processuale*(6): 1630. See in foreign literature, among the numerous articles on the matter, Cortés P. 2007. Does the Proposed European Procedure Enhance the Resolution of Small Claims? *SSRN Electronic Journal* (7); Cortés P. 2015. The European Small Claims Procedure and the Commission proposal of 19 November 2013; Harasic Z. and M. Kersic. The European and Croatia Small Claims Procedure and Appertaining Legal Principles, 22 *Economic and Social Development, International Scientific Conference on Economic and Social Development: The Legal Challenges of Modern World* (Zeljko Radic, et al., eds.) 118 (2016-2018); Kramer, X. E. 2008. The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation. *Zeitschrift für europäisches*

The procedure for cross-border small claims settlement, existing in the European legal system since 2007, has unfortunately till now not brought up the expected results, being it only little known and used, not only by European citizens but also by the same legal practitioners[4].

The European Commission, with a view to disseminating the knowledge about ESCP on European territory and to investigating the reasons for its scarce employ and to proposing solutions, decided to co-fund the project Small Claims Analysis Net (SCAN)[5], gathering five Member States (France, Belgium, Italy, Slovenia and Lithuania) in a Consortium. The SCAN Consortium envisages – by partnering with universities, research centres, consumers' associations, council of the bar associations – to build a bridge between Commission and EU citizens and more specifically with the potentially most interested users in the procedure: consumers, small-medium entrepreneurs and legal practitioners.

In the initial stages of the SCAN Project the partners of the Consortium prepared some questionnaires and interviews in order to investigate the degree of knowledge about ESCP among potential users and the reasons for its scarce employ. These were successively submitted to the various categories of stakeholders: judges, lawyers, academics and expert legal advisors; EU citizens/consumers/entrepreneurs; representatives of consumers'

Privatrecht (2): 355-373; Kramer, X. E. 2011. Small claim, simple recovery? The European small claims procedure and its implementation in the member states. *ERA Forum* (12): 119–133; May, J. and M. Malczyk. 2019. European Small Claims Procedure and Its Place in the System of Polish Separate Proceedings. *Access to Just. E. EUR.* (36); Ontanu, E. A. and E. Pannebakker. 2012. Tackling language obstacles in cross-border litigation: the European Order for Payment and the European Small Claims Procedure approach. *Erasmus Law Review* (5)(3).

[4] See also Abignente, I. 2019. Prospettive e criticità del ricorso alla modulistica standardizzata nell'European Small Claims Procedure. *i-lex. Scienze Giuridiche, Scienze Cognitive e Intelligenza Artificiale Online four-monthly magazine: www.i-lex.it* (12); and Ruggieri, P.C. 2019. European Small Claims Procedure – Aspetti applicativi rilevanti. i-*lex. Scienze Giuridiche, Scienze Cognitive e Intelligenza Artificiale, Online four-monthly magazine: www.i-lex.it* (12). For a review of the criticalities concerning the ESCP.

[5] The SCAN project (Small Claims Analysis Net 2018-2020) is co-funded by the European Union's Justice Programme [2014-2020] of the Call (JUST-AG-2017/JUST-JCOO-AG-2017) under Grant Agreement No. 800830. Additional information at: http://www.scanproject.eu

associations. The collected interviews were analysed with a view to identifying gaps, impediments and difficulties concerning the procedure and to developing guidelines, initially at national level, then in a single harmonized version currently undergoing the Commission scrutiny.

The research and analysis effort made by the SCAN Consortium has highlighted the need for action towards a double direction. On one side, some shortcomings and inconsistencies in the discipline produced by Regulation (EC) n. 861/2007, as successively amended by Regulation (EU) 2015/2421 were recorded and especially in those arrangements conferred by the European legislator on the national legislators (more specifically with regard to the pieces of information the States are required to produce as under art. 25 of Regulation n. 861/2007). On the other, the need emerged of helping the users to make use of the procedure and of the European e-justice portal (https://beta.e-justice.europa.eu).

In line with the work and the objectives it pursues, there is a need for a more extensive dissemination of the pathways followed and the results achieved, as tentative they might be, in the hope of a broader discussion among stakeholders and experts.

The aim of this paper is to critically review the two categories of harmonized guidelines developed by the SCAN consortium: the *guidelines for policymakers*, consisting in indications to the Commission whose goal is to suggest modifications or integrations to the discipline produced by Regulation n. 861/2007, as successively amended by Regulation 2015/2421, and make ESCP more effective and attractive for its potential users; *the guidelines for Judicial authorities and users* drafted with the goal of explaining the ESCP to judicial authorities and users and make the procedure friendlier.

2. Guidelines for Policymakers

Art. 28 of Regulation (EC) 861/2007, as modified by Regulation (EU) 2015/2421[6], sets forth the possibility to review ESCP within 15

[6] «Art. 28: Review 1.By 15 July 2022, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the operation of this Regulation, including an evaluation as to whether:

July 2022. By drafting the guidelines for policymakers, the SCAN consortium envisaged to provide the Commission a way to determine the modifications or integrations to be made to the current regulatory framework, with a view to enhancing and streamlining the use of ESCP by consumers and EU citizens. These guidelines can be broken down into two subgroups: a first group collecting the proposals of modifications that would be desirably made to the Regulation; a second group consists of suggestions to make the e-Justice portal more user-friendly.

The analysis of the questionnaires and the interviews submitted to the stakeholders within SCAN Project, as previously mentioned, has revealed the need to intervene on the existing discipline to make ESCP more accessible and uniform in Europe. Within the study it emerged that the discipline produced by Regulation n. 861/2007, as successively amended in 2015, features several possible options for interventions. There are gaps to be filled, inconsistencies to be resolved but also limitations that can be considered for reduction or removal. Firstly, with regard to the discretionary nature of the procedure, as under art. 1, and to the object of the claim to be settled via ESCP, as defined under art.2.

It might prove useful and appropriate, with a view to encouraging the recourse to ESCP, to make it mandatory for the settlement of cross-border small claims, whereas now it is only suggested as an alternative option to the proceedings provided by national systems. The data obtained within the analysis shall be here highlighted. The experience of some U.S. states and EU Member states (such as Lithuania), as regards the introduction of the online dispute resolution (ODR) within their judicial system, show that the mandatory nature of a new

(a) a further increase of the limit referred to in Art. 2(1) is appropriate in order to attain the objective of this Regulation of facilitating access to justice for citizens and small and medium-sized enterprises in cross-border cases; and (b) an extension of the scope of the European Small Claims Procedure, in particular to claims for remuneration, is appropriate to facilitate access to justice for employees in cross-border employment disputes with their employer, after considering the full impact of such an extension. That report shall be accompanied, if appropriate, by legislative proposals. To that end and by 15 July 2021, Member States shall provide the Commission with information relating to the number of applications under the European Small Claims Procedure as well as the number of requests for enforcement of judgments given in the European Small Claims Procedure»

procedure would make it easier and faster for the users to get accustomed to the innovation itself.

All the while, a greater implementation of the procedure could also result from the enlargement of its scope of application. Art. 2 of the Regulation restricts the practicability of this procedure only to cross-border small claims, up to a maximum amount of 5.000 euros and not pertaining matters related to rights for which a compulsory greater judicial protection is needed. The first possible modifications identified to be suggested for the promotion of a greater recourse to the procedure concern its scope of application. On one side, the SCAN Consortium considered an increase of the amount limit of 5.000 euros[7] provided by art. 2 par. 1 to 10.000 euros. Although the results collected during the course of the Project show that the poor recourse to ESCP cannot be ascribed to the amount limit currently fixed but to the limited knowledge about it, an increase to the 10.000 euros threshold is deemed likely to favour and facilitate the use of ESCP, particularly by small and medium-sized companies and it is considered a value threshold currently appropriate on the basis of a growing confidence of consumers in the single market which leads them more and more to make even high amount purchases in other Member States.

Similarly, when analysing the matters for which the possibility to make recourse to ESCP is ruled out, it emerged that the extension of the scope of application to some of these matters wouldn't mean a risk for an inadequate judicial protection and that, thus, they could be fruitfully be treated with the ESCP. More specifically, the ownership rights and the maintenance obligations resulting from family, parental, marriage relations or by relations whose effects are similar to those of marriage, wills and successions and administrative appropriations. More complex is the discussion concerning wage claims resulting from cross-border work relations; matter to which a special attention is reserved under art. 28 of the Regulation when reviewing the discipline. The growing mobility of European citizens within the EU single market, would induce to think that an extension of the scope of application of ESCP to wage claims could be desirable. At the same time, however, it shall not be neglected that the special nature of the

[7] Limit already increased from 2.000 to 5.000 with the Regulation (EU) 2015/2421.

disputes on matters of labour law would require judges to establish the facts of the case in detail and not briefly and to carefully examine the evidence. A hypothesis would thus to consider the practicability of ESCP for claims concerning labour credits, while introducing for greater protection a mandatory taking of evidence and hearing to be held via video or teleconferencing.

Given the transnational nature of the dispute, a redefinition could be taken into consideration that extends the use of ESCP to national claims. Encouraging the spread and the recourse to ESCP also for national claims would lead citizens and judges to familiarize more with this procedure, which would in turn promote a greater use of it also at transnational level.

The extension of the scope of application of the procedure, though, would hardly make up by itself for the deficiencies of the existing discipline, given the multiple weaknesses and inconsistencies of the system outlined by Regulation n. 861/2007, also from a strictly procedural point of view. First of all, let us consider the conduct of hearings: he discretion to take part to hearings via videoconferencing or teleconferencing should be replaced by an obligation to hold the hearings in these modalities. Otherwise, there is a real risk of negating the advantages of the ESCP, which is designed to be a procedure to be carried out remotely, quickly and at low cost. Such a modification would necessarily and obviously go hand in hand with a need of Member States to supply the required tools for teleconferencing and videoconferencing to the national tribunals in order to hold these hearings from remote. It was, in fact, observed that the Offices today in charge of being aware of ESCP, in most of the cases have no information nor electronic devices available to correctly carry out the procedure.

This serious gap results in other aspects of the shortcomings reported in the current judicial system to manage a litigation with ESCP, particularly in terms communication and transmission means of the documents accepted by the Member States. The reports issued by the Member States under art. 25 of the Regulation show that too many of them are not yet equipped for the digital submission of forms and documents, thus requiring the parties to make use of the mail service and/or hand delivery. The above is quite discouraging for the use of ESCP and is totally against the same objectives of the procedure, along

with increasing costs and time required. The SCAN consortium has consequently suggested a modification of the procedure requiring the judicial authorities in all Member States to accept forms and documents digitally and to promote a digital handling of the procedure.

A further obstacle to the spread of ESCP procedure is the complex nature of the forms attached to the Regulation (A, B, C and D) that the parties and the judge need to use within the procedure, along with the need to have the most relevant variable sections of the forms and of the documentary evidence translated. The SCAN consortium partners observed and reported unanimously that the forms currently used for ESCP do not allow the European citizens to make use of the procedure without having to refer to a lawyer: the vocabulary used in the forms is highly technical and not easily understandable to citizens who have no legal expertise, including the possibility to easily identify the plaintiff and the defendant. Some knowledge of legal provisions is given for granted – ordinary citizens are not usually familiar with it unless they have a legal background – such as criteria to identify the court having jurisdiction; and the forms do not contain clear information which is relevant for the submission of the application, like the costs of proceedings. If the goal of the standard forms attached to the Regulation should be that of enabling the citizens to access ESCP without consulting a lawyer, then, they need to be rephrased so as to become accessible to the highest number of possible users without legal background. At the same time, it appears necessary to amend the Regulation as for the translation of forms and documents. The SCAN consortium suggested three different options with regard to this: supply and set a software for machine translation available on the e-Justice portal; organize an help desk for translations at EU level supplied by the European Commission, or request the Member States to make one available; request the Member States to include English and French among the accepted languages and include the option of submitting forms and documents in these two languages, in addition to the language of the national judge seised: these are all necessary and inalienable measures to ensure a correct approach to the procedure and make it user-friendly.

A research carried out within the SCAN project has showed in fact that one of the main reasons for the limited recourse to ESCP is due to the difficulties that citizens face in having the related forms and

documents translated into the official language of the national court seised and to understand a final decision of the court in a language other than their mother tongue. After completing the forms, the guided procedure on the e-Justice portal supplies a machine translation of the "fixed" sections of the form into all the EU languages, but it leaves out the "variable" ones. The problem does actually not arise with the section containing pieces of information or personal identification data concerning the submitted claim. It arises instead with the description of the "dispute details" (cf. point 8 of form A) and the attached documents, which need to be translated pursuant to art. 6 of the Regulation.

In accordance with the above, it seems appropriate to suggest to the Commission to urge the Member States to review and reformulate the declarations made under Art. 25. To this end, it seems appropriate to require, firstly, that States provide a clearer indication of the competent national courts and the authorities and organisations in charge of providing practical assistance under Art. 11. Secondly, it should be required that States accept remote electronic means of communication for the transmission of documents and communications to and from the courts and more languages in which documents may be received, including English and French. Thirdly, it could be required that court fees be set at a fixed amount or at a reference range indicated in the Regulation.

Moreover, the weakness of the existing regulatory framework is highly influenced by the lack of homogeneity in the application of the procedures within the different Member States. The non-standardization caused by the multiple references to national legislations contained in the Regulation ends up conflicting with the intention of the European legislator of creating a single procedure applicable within the EU. Introducing amendments to the discipline that allow for a greater standardization and uniformity in the application of ESCP on the entire EU territory could be a spur to use the procedure.

The nature of this article requires us to briefly introduce the above mentioned amendments to be proposed to the Commission, offering them as simple food for thought, being aware that each of them could be the subject of a separate analysis by the doctrine.

The non-uniformity of national procedures is evident under many

aspects. The first involves the lack of uniformity among the legal systems of the Member States as for the possibility of credit splitting into diverse and multiple legal actions on credit rights originating from a single working relation or based on the same triggering event. Credit splitting is only allowed in some European systems, whereas it is banned in others. This creates a confusion on the use of ESCP: shall the amount limit as under art. 2, para. 1 of Regulation n. 861/2007 be considered as a whole with reference to the credit originating from the same working relation and the same triggering event, or shall it be referred to as a single legal action? In other words, is credit splitting allowed or not? A clarification of this point by the European legislator would be highly needed.

The second aspect concerns the rules for executing and challenging the judgment issued as completion of ESCP. Given the differences in the rules and procedures on matters of execution among the Member States' different legal systems, the introduction of a single execution procedure would be desirable. Also leaving to Member States the discretion about the possibility to challenge or not the judgment leads to an uneven treatment and protection, visibly conflicting with the same purpose of ESCP and discouraging its use.

In the road towards a greater uniformity and standardization in the application of the procedure within EU, it would be desirable for the legislator to also provide a standard procedure as to how to collect evidence admissible in accordance with ESCP. Art. 9 of Regulation n. 861/2007, as successively amended in 2015, requires national judges to decide on the admissibility of the modes to collect evidence and the extent of necessary evidence needed under the national law on admissibility of evidence. The lack of uniformity among Member States' legal systems regarding the admissibility and evidence assessment creates confusion and discourages the use of ESCP. A standardization of this aspect would certainly ensure a greater transparency and predictability of the outcome of the procedure and thus would encourage the citizens to make recourse to it.

Similarly, costs and court fees should be calculated by providing fixed fees for courts, equal in all Member States or by fixing a recommended range everybody should refer to. The diversity of the legal systems in Member States regarding court fees creates confusion and lack of confidence among citizens when using ESCP. A

standardization of art. 15 bis, introduced by Regulation 2015/2421, which at the moment leaves to national courts the discretion to set the court fees in compliance with national legislation, would be thus desirable.

The study of the procedure and the results of the interviews submitted to stakeholders, pushed SCAN consortium to propose to the policymakers also possible innovations to be introduced into ESCP discipline, again with a view to promoting its implementation and correct use. With regard to this, it has been suggested that it could be useful to put ESCP in charge of specific specialized sections of national tribunals, which could collaborate among each other. The entrustment of ESCP to functionally specialized sections of national tribunals would improve the training of the judges assigned to these sections in an easier and more effective way (the training in ESPC in all European Member States analysed in the SCAN Project appeared to be very lacking) and would enable a coordination among interested judges at European level, thus leading to a more even application of ESCP within EU. By the way, reducing the number of Judicial Offices involved in the procedure would definitely make it easier for the States to supply the information systems required for a correct use of ESCP. In order to promote a coordination among judicial authorities in charge of knowing ESCP, a central online platform should be developed enabling the judges of different Member States to share information on ESCP, along with files in cases and judgments. It would be likewise useful to collect and regularly supply transparent data and accurate statistics on the use of ESCP in national tribunals. Data collection and statistics on the use of the procedure would, in fact, allow the Commission to monitor the application of the procedure, thus obtaining a direct knowledge of issues encountered and so intervening promptly to solve them. Data and statistics could be collected in annual reports to be published on the e-Justice portal, so as to make them accessible to everyone.

Lastly, an interesting suggestion offered here as food for thought relates to the possibility to strengthen the link between ESCP and alternative or online dispute resolutions mechanisms (ADR, ORD), by deciding that ESCP should be preceded by an attempt to settle the dispute via ADR/ODR or that this shall be proposed to the tribunal during the proceeding.

As already described in the beginning of the paragraph, room for improvement appears to be quite wide also with regard to the e-Justice portal. The research conducted within SCAN Project has, in fact, showed that European citizens are not familiar with the portal and the services it delivers. Multiple suggestions and ideas emerged during the research. Creating and disseminating targeted advertising within EU via a broader range of media, such as web sites, social networks and TV channels, could prove useful in promoting awareness of the Portal. Different types of modifications should be made to allow the users to access a guided procedure available on the e-Justice Portal without the need to consult a lawyer: sentences and questions should be rephrased using a non-technical and common-use vocabulary; a multiple choice of pre-set answers should be offered to answer the questions; a mechanism to automatically identify the competent court for the user claim based on the data (entered by the user), the place of residence or domicile of the parties, the type of claim and other relevant information should be created; a system of machine translation also of the "variable" sections of forms and documents attached should be available; the possibility to give support to the users from remote in filling in the forms, on the phone or a chat box or both, could be considered.

The guidelines for Policymakers described here were developed with the aim of providing the Commission with a point of departure for the discussion on the possible modifications to be made to ESCP, in order to make the procedure leaner and more functional and to facilitate the access to justice for consumers and small and medium-size entrepreneurs. The adoption of measures encouraging the use of ESCP is deemed here appropriate and urgent also in the hope that national legislators may in turn consider introducing reforms of national systems for small claims in line with the European system.

3. Guidelines for users and national judicial authorities

The study promoted within SCAN Project and the analysis of documents, questionnaires and interviews collected, allowed to identify the major criticalities of ESCP, consisting in a lack of knowledge about the procedure by the users and stakeholders and the uneven application of the procedure in the EU Member States. For this

reason, it was decided not only to develop guidelines to be proposed to the European Commission to have it consider amending Regulation n. 861/2007 (refer to § 2), but also to draft guidelines addressed to local judicial authorities and users.

The guidelines have three main goals: promoting the recourse to ESCP; making the procedure more accessible to users and consumers; ensuring a uniform application of provisions contained in Regulation n. 861/2007.

The results of the analysis and studies conducted by the members of SCAN Consortium have showed that the first goal can be pursued by organizing events, training courses and dissemination workshops targeted not only at users and consumers but also at lawyers and judges. In order for these training courses to be effective, they should deal with ESCP, the use of electronic instruments and the translation into different foreign languages. The analysis conducted clearly reported a limited knowledge of the procedure among the citizens who could and should make recourse to it and among the legal professionals who could advice and guide the consumers towards this fast and cheap procedure. In addition to this, there is a scarce digitization of public offices and court having jurisdiction to apply ESCP – which in Italy are the *giudice di pace*, justice of the peace - which makes the access and the conduct of the procedure more complicated. Given the above, refresher courses for judges on ESCP should be organized within mandatory education curricula.

Dissemination workshops, seminars and events, anyway, wouldn't be sufficient by themselves to make up for the shortcomings of European States on ESCP. For this reason a useful tool appeared to be the introduction of the study of ESCP in bachelor programs of law but also economics and political sciences: this alternative procedure to the ordinary one to settle cross-border disputes should be the subject of a specific study program in the curriculum of procedural civil law, consumers' right or private law. The recourse to ESCP could be broader if users may be informed from university about the existence of a fast, quick, cheap procedure to settle disputes. A procedure which, moreover, can also be started and defined from remote.

The possibility of conducting this procedure from remote is both a strength of ESCP and also a weakness. According to the wording of the Regulation n. 861/2007 the user, by filling in the *FORM A*,

downloadable from the site https://e-justice.europa.eu, might submit to the competent judicial authority a request for justice; the defendant, similarly, by filling in *FORM C*, might enter an appearance before the court; hearings should be held from remote via videoconferencing, likewise the taking of evidence. Such articulated procedure can ensure full accessibility and a meaningful saving of costs for justice, both for the users and the administering State, in accordance with the principle set forth under art. 81 of the Constitution[8], demanding the Italian State to balance revenues and expenditures in its budget.

Based on the analysis conducted, unfortunately, in the majority of Member States of SCAN Consortium, judicial authorities have no electronic tools available to be able to receive writs of summons digitally to successively hold hearings from remote or take the evidence. The public health emergency we are experiencing has also confirmed the importance of the digitization of justice: the employ of digital tools would reduce costs and time of the proceeding by actively contributing to a deflation of justice burden upon the courts. In line with this, an effort to promote the use of digital systems and the employ of economic resources to equip the offices of the justices of peace with the tools required to conduct judicial proceedings from remote, would be extremely required. Similarly, the competent authorities for the application of ESCP should be able to receive the evidence digitally, whereas to date only few Countries have the necessary instruments to take the evidence via videoconferencing or receive the documents digitally. It is enough to consider that the offices of the justices of peace in Italy are not even included in the On-line Civil Trial (*Processo Civile Telematico*), since they were not involved in the process of digitization of Italian civil justice.

Such a scarcity of resources ends up clearly degenerating a procedure like ESCP whose fundamental features are the speed, reduction of costs and time and the proceedings held from remote. The Italian system for instance would only enable to fill in *FORM A* online, but would immediately after require a paper copy to be shipped to the office of the Italian justice of the peace via certified mail. It is, thus,

[8] On the interpretation of art. 81 of Italian Constitution refer to Carlassare, L. 2015. Diritti di prestazione e vincoli di bilancio. *Costituzionalismo.it* (3):136 -138 and 146, where the Author quotes Rodotà, S. 2013. The right to have rights in Europe, Seminario della Foundation for European Progressive Studies.

evident that without a targeted action for the digitization of offices, the ESCP in Italy couldn't find the widespread application it deserves.

A second perspective for a reform urged by the guidelines considers the promotion of a greater and easier accessibility to ESCP users. With a view to this, the e-Justice Portal was developed, which includes a specific section on ESCP and the main information concerning the purpose and functioning of the procedure: therein one can find indispensable information to access the procedure. The site, however, is incomplete, since some necessary pieces of information like the identification of the competent judicial authority to decide upon the claim are still missing. Moreover, the information is not easy to read and understand. In fact, while it may certainly represent a useful starting tool for the legal practitioners, the users would hardly find their way around in that big set of rules without the help of a lawyer. This is the reason why the SCAN Project has, among its objectives, the development of an online platform designed to bridge the gaps of the e-Justice Portal and to make the process to initiate ESCP easier for the users.

The accessibility of users to the procedure also demands a creation of a support system, along with a full transparency of the procedure. Art. 10 of Regulation n. 861/2007 sets forth that: "being represented by a lawyer or a different practitioner of the legal sector is not mandatory" within the procedure. The rule granting a reply to the request for justice of all citizens, irrespectively of their economic conditions, requires the existence of a functioning help desk for citizens. Considering this need the Regulation n. 861/2007, under art. 11 requested the Member Stated to make sure that "the parties may have a practical support in the compilation of forms". Certain States have actually set up an information desk assisting the users; in other States this support is provided by the consumers' associations[9]. Based

[9] Based on the research conducted by VUB Vrije Universiteit Brussel it emerges that the support within ESCP provided to the Belgian users is ensured by consumer protection centres such as the ECC-Net Belgium. The main form of support provided to citizens in France and Lithuania, based on the researches conducted by the universities HEC Hautes Etudes Commerciales de Paris and VILNIUS VilniausUniversitetas, is via websites, that is respectively via a web page of the French Government and the French Justice and the E-Service Portal of Lithuanian Courts.

on an analysis conducted, though, it emerged that art. 11, with few exceptions, is not fully effective.

Two alternative options, not incompatible with each other, were proposed in order to ensure the full effectiveness of the said provision.

First of all, the function of assistance in the application of the ESCP could be performed by notaries who, in the legal systems where this professional role is present, are very widely distributed throughout the territory. A relation between the notaries and the civil justice is not new to the Italian system and the class of notaries is already collaborating to improve the efficiency of the civil proceedings. From its origins the function of the notary has been to ensure the certainty of legal relations; a function which represents per se a kind of containment of the risks of conflict arising. Hence, the activity of notaries is featured by impartiality, like the one of judges, and can be easily targeted to prevent the recourse to civil justice or to relief the burden of certain judicial activities by means of a proxy[10]. In line with this, the notaries could be brought to inform citizens about ESCP and assist them in promoting the initiation of a proceedings.

Secondly, the support to users could be provided via an online multilingual platform developed to guide them step by step and to make sure to give an answer to some of the users' questions, or also via the existing European e-Justice Portal, improved and integrated. Moreover, in order to facilitate the competent authorities in the implementation of ESCP, a section of the portal could be dedicated to upload and comment the judgments issued at the end of the procedure. This data base could result in a very useful tool for lawyers, scholars and the judges themselves.

In addition, a greater transparency to the procedure shall be conveyed, particularly with regard to its costs. The fees needed to access ESCP along with the litigation costs are still variable and depending on the internal rules of the State having jurisdiction. Consequently, each user, once identified the Member State and the competent authority, is responsible to discover the cost of the procedure. This ambiguity could easily be solved by adding on the

[10] Let's consider the proxy of sales operations in a case of forced expropriation or the role of notaries in the insolvency procedures and in the phase of liquidation of the assets.

European e-Justice Portal a summary table with the justice fees required for ESCP in each Member State and a web calculator of the fees to start up a proceeding and those required for litigation. This would be a way to ensure the user full transparency and predictability of the costs required to seek justice: the user would be able, before initiating the procedure, to estimate the overall costs to access the justice.

Another relevant aspect to encourage the recourse to ESCP is to ensure its harmonized application in all Member States. By comparing and studying the ESCP discipline and the domestic standard code of procedure some discrepancies emerged that could impact the correct use of the procedure. Art. 2 of Regulation n. 861/2007, as amended with reg. n. 2421/2015, sets forth that an assessment of the claim amount shall be made by referring to the moment when the court having jurisdiction receives the request for justice and that the calculation of the amount of the procedure shall not include interests, rights and expenditures. This estimate is in contrast with the choice made by the Italian legislator, for instance, who under art. 10 of the civil procedure code[11] sets forth that in order to calculate the value of the claim, the amount shall be summed up to the interests due at the moment of submission of the request, the expenditures and the prior damages caused. This difference could cause troubles in the application, also as for the identification of the competent authority having jurisdiction of the small claims procedure, considering that the claims whose amount doesn't exceed the 5.000,00 euros – calculated only on capital account – could fall outside the value jurisdiction of the Italian justice of the peace, pursuant to the calculation criteria under art. 10 of the civil procedure code. It shall be here clarified that in order to apply ESCP, the criteria for the calculation of the request value are those set forth under art. 2, even though they conflict with those fixed under art. 10 of the civil procedure code. It could be, thus, stated that the subject-matter jurisdiction of the justice of the peace, within ESCP, falls outside the set amount limit of 5.000,00 Euros, without considering the European criteria set forth under art. 2 of the interests, expenditures and damages.

[11] Croci. C. 1998. Sulla regola «la competenza si determina dalla domanda», *Giurisprudenza italiana* 1 (I): 1923.

Another meaningful aspect to ensure a harmonized application of the procedure is the definition of a common discipline for the appeal against judgments issued according to ESCP: the lack of this discipline leads to the formulation of different rules of appeal in each Member State and thus a clear lack of homogeneity in the procedure.

Two aspects would, in the end, require a coordination, both at legislative level and at the level of users: the introduction of a link between ESCP and ADR - Alternative Dispute Resolution or ODR - Online Dispute Resolution; and between ESCP and the class actions in favour of consumers.

The SCAN Consortium Partners all confirmed that currently there is no link between ESCP and the ADR or ODR systems. And yet, the possibility of a simplified, fast and easily accessible procedure for citizens with a view to reducing the litigation and giving concrete and effective implementation to the principle of fair civil trial has acquired a judicial and social relevance, also considering the lack of public resources and the persistent crisis of civil justice. This goal was pursued, both at national and European level, by introducing alternative dispute settlement techniques or those complementary to ordinary justice. These techniques became commonly used in diverse domains, both as mandatory procedures or as voluntary ones. This also led to the establishment of ad hoc settlement and mediation bodies[12] and also the establishment of entities specific to certain domains, like the relations concerning energy, communications, banking and financial agreements[13] European regulations and Directives deal with this matter, mainly focusing the attention and the discipline on the dispute settlement among consumers and businesses, the small claims and the procedures of litigation settlement by means of the internet network - ODR Online Dispute Resolution[14]-. The deflationary intent is pursued by the Community not only by promoting alternative dispute settlement instruments, but also by proposing full merits judicial proceedings to ordinary justice, featuring simplicity and speed.

ESCP is part of this context, since it namely aims at introducing a standard, fast and expedited procedure for small claim proceedings.

[12] Refer to law n. 28/2010.

[13] Institutions such as ABF – Arbitro Bancario Finanziario or ACF – Arbitro per le controversie finanziarie.

[14] European regulation on *Online Dispute Resolution* - ODR n. 524/2013.

Now, although the same Regulation n. 861/2007 encourages "when applicable, the court or tribunal" to "reach a settlement between the parties"[15], an express link between ESCP and ADR is missing; whereas by alternative dispute resolution, in this case, is intended any instrument or mechanism able to assist the parties in settling disputes, or in reaching an amicable agreement. Missing, thus, a specific obligation upon the parties or the competent authorities to make a "conciliatiory" attempt, *latu sensu*, a crucial role is played by the judges to push the parties to resort to the ADR or ODR mechanisms. From this point of view, the judicial authorities should encourage or anyway inform the parties about the possibility to resort to other instruments for dispute settlement. It would also be desirable that the European legislator may introduce in the ESCP discipline a system of punishment, similar to the one provided under art. 91 of Italian civil procedure code[16] and Rule 44.3. (4) of the British Civil Procedure Rules, whereby when the judge decides in favour of a reconciliation attempt advanced by one of the parties to the other, the party rejecting this proposal shall be sentenced to the payment of the litigation costs.

In conclusion, also a link between the consumerist discipline on matters of class action and ESCP would be appropriate. In some States of the SCAN consortium, indeed, the class action is an effective tool of consumers' protection that can be resorted to also within ESCP[17]. Differently, in other States, like Italy, no link allows for a combined

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15 As expressly provided under art. 12 (3) of Regulation n. 861/2007.

16 SCARSELLI, G. 1998. *Le spese giudiziali civili*, Milano: Giuffrè Press; RICCI, G.F. 2009. *La riforma del processo civile*, Torino: Giappichelli Press.

17 According to Univerza V Ljubljani, the Slovenian legislation does not contain any limitation regarding the number of claimants and so it is possible to lodge the class action also in the ESCP. Moreover, according to the University VUB Vrije Universiteit Brussel: the Belgian legislator has introduced the specific law on class actions called '*actions en réparation collective'* that is in force since September 2014. In the context of the ESCP implementation in Belgium, there is no direct link or indication to the use of class action for the ESCP claims. However, one of the main objectives of the national legislator in permitting the class action in relation to the consumer law is to provide more protection for them, considering the majority of the consumer claims to fall under the small individual damages. Given that, the class action can be used as an efficient legislative tool to improve access to justice for consumers in cross-border small claims (such as the eligible cases under the ESCP) also to ensure the convenient implementation of the judicial proceedings for consumers.

use of the two instruments.

Given the expedite and simple nature and the reduced initiation costs, the small claims procedure appears to be suitable for the actions to protect the receivables of weak contractors and more specifically the consumers. Hence, in a *de iure condendo* perspective, the possibility to exercise the class action, as regulated in the Italian legislative system under art. 140 bis Consumers code and arts. 840 bis – 840 *sexiesdecies*, should be provided also within ESCP.

4. Conclusions

The analysis concerning the *small claims procedure* – as provided for in the mentioned regulation n. 861/2007, amended by reg. n. 2421/2015 – conducted within the SCAN project led us observe that the procedure is featured by the following relevant strengths: speed; simplicity; possibility to resort to modern technologies to bridge the geographic distance between the parties; enforceability of judgment; costs reduction[18].

The procedure represents an alternative to the civil proceedings which can be resorted to in each Member State, based on the respective codes of procedure or as an effective option for the citizens to settle cross-border disputes in short time and with reduced costs.

First, the procedure is defined based on speed criteria. It's enough to mention that art. 7 of the Regulation provides that the court or tribunal have to issue a judgment within thirty days from the receipt of the statement of defence, unless the nature of claim requires the collection of further information or evidence.

The simplification of the procedure is granted by its prevailingly written form, where the hearing is only a possible and exceptional phase of the proceedings (limited to the case where the court seised is not able to issue a judgment based on written evidence produced by the parties or upon request of one of the two parties, subject to the decision of the judicial body whether or not to reject the request if a hearing is unnecessary for the purposes of a fair discussion of trial). The procedure initiation requires to fill in some *online standard* forms in

[18] Refer to D'Alessandro, E. 2008. *Il procedimento uniforme per le controversie di modesta entità*, Torino: Giappichelli Press.

the language of the judge before whom the claim was brought.

The procedure also ensures the recourse to new technologies in the justice sector, which allows for a simplification of the participation of the parties (by definition having domicile or registered address in one of the Member States bound by the Regulation other than the State where the seised court is located), to bridge the geographic distance and above all reduce costs and justice time.

Indeed, apparently the *small claims procedure* might also result in a reduction of the costs incurred by the parties to settle the dispute, considering that the presence of a lawyer is not mandatory and that it is expressly provided that the "loser pays principle" shall not result in a recognition to the winner party of "*superfluous or disproportionate expenses compared to the amount of the claim*" (art. 16).

Along with these clear strengths, the *small claims procedure* also features some criticalities which limit its broader diffusion and which the guidelines herein described aim at clarifying.

First of all, the European regulation provides, under art. 19, that for matters not expressly regulated, it shall refer to the procedural law of the Member State in which the proceeding is held. The lack of autonomy of the Community procedural discipline, for instance regarding the admissibility and taking of evidence or the identification of the forms of appeal available against the judgment issued as under reg. n. 861/2007, is cause for a relevant variability of the actual structure of the procedure from State to State.

The idea of achieving a standard procedure for the settlement of small claims comes up against the obstacle of the diversification of internal procedural disciplines which will necessarily have to be referred to in the event of a gap in the European Regulation.

In addition there is, on one side, the scarce knowledge of the procedure among the users as well as the same lawyers, who are thus encouraged to initiate more the domestic procedures for dispute settlement instead of ESCP. And on the other, the absence of IT resources required to carry out the procedure fully from remote.

Disseminating the knowledge about the procedure and recurring more frequently to it by the community users could be instruments to facilitate the access to justice by ensuring, at the same time, a reduction of justice costs and an increase of the same request for justice by the citizens. Following the perspectives described *de iure condendo*, the

ESCP could grant a fast and effective response to the request for justice, while reducing the costs of justice and enforcing the principle of the fair trial.

ESCP finds its objective scope of application in the small cross-border claims, often concerning disputes among consumers and practitioners and whose content is often standardized.

Now, the reduced initiation costs of the procedure, the simplicity and the speed of the same and the possibility to conduct the proceedings from remote could encourage the citizens to bring actions and hence, seek protection of their legal position even when the amount of the claim is low. Indeed, ESCP, after the amendments and adjustments reported in the guidelines, could aim to be transformed into a tool for effective protection and for the application of the principle of fair trial and the right to action as provided under art 24 of the Constitution. This procedure could effectively promote an increase of the request for justice: in a scenario of legislative politics where there is a concern for the introduction of instruments deflating the dispute settlement impacting on the offer of justice by adding new protection in favour of the citizens, this procedure could vice versa result in an increase of the request for justice for all the claims which, given the low amount of the dispute and the high initiation costs for an ordinary procedure, would lead the users to give up, waiving the possibility of seeing their rights protected.

Providing full autonomy to the cross-border *small claims* in our modern societies featured by online purchases and negotiations is an indispensable corollary of the principle of effectiveness of protection enshrined in the same Treaties. Let's consider for instance the disputes among big market players, on one side, and consumers, on the other, where there is a clear interest by the entrepreneur to file a claim or resist to it, even when the amount of the claim is laughable; while it's quite common for the consumer to refrain from bringing a legal action given the high initiation costs.

In fact, being the dispute under examination indefinitely replicable for an even high number of users, winning (or loosing) on the single case acquires a special relevance. To the point that, while the consumer is defined a *one shot dealer*, that is an individual only interested in settling a single dispute; the company is a *repeat player*, a recurrent party, or a subject who, by its same characteristics, is facing the

disputes in series in a repetitive way and hence, in order to reach a favourable judgment is willing to invest in a specific case wide resources in term of time and money. Resources that would be definitely disproportionate for a party not having the same characteristics. It is precisely this unbalance of power and interests that could be levelled by means of ESCP, perhaps also with the possibility to resort to the class action.

This goals could be deemed achieved by making an effort in two directions simultaneously: disseminating the knowledge and the recourse to ESCP by granting its harmonized application in the Member States of European Union and modifying the regulation based on the guidelines previously mentioned under § 2 and 3; assessing the compatibility between ESCP and artificial intelligence[19], identifying the small cross-border claims that could, by their same standardized content, be settled by means of neural networks applied to justice.

The compatibility between artificial intelligence and ESCP in the Italian system could be suitable at least for the claims whose amount doesn't exceed 1.100 euros, for which art. 113(2) of the civil procedure code attaches the responsibility to justice of the peace to decide by applying the principle of equity. Apparently for these cross-border disputes, even if an express provision within regulation n. 861/2007 is missing, the justice of the peace may resort to the equitative criteria and hence, no obstacle should be encountered in the Italian code of procedure against the use of the artificial intelligence or the dispute settlement by means of an algorithm offering the parties an amicable solution.

It can be thus affirmed that the Italian system seems to recognize the possibility of resorting to this criterion of judgment also in the *small claims procedure*, within the said amount limits and in the absence of an express provision in the European regulation. And yet, in a *de iure*

[19] On the topic, a reference to the project CREA carried out by the University Federico II to create a disintermediation platform to settle cross-border disputes involving transferable rights of EU citizens is here relevant. The project can be accessed at: www.crea-project.eu. It is basically an e-Justice portal set on equitative algorithms. The algorithm, in this case, is not operating as a neural network and it is not programmed on specific cases nor on the related legal regulation. It makes a query on what they deem fair and acceptable, as for the distribution of the respective interests. Based on the proposed values and interests the algorithm provides a solution taking all them into account and allowing to get to an acceptable conclusion.

condendo perspective, it would be desirable that the European legislator may think of expressly providing the equity as a criterion of judgment in the case of *small claims*, thus disclosing the way for the use of artificial intelligence also in these claims. The use of artificial intelligence in the ESCP could bring enormous benefits in terms of reducing costs and time of justice, as well as ending geographical and linguistic disparities between parties. Artificial intelligence could also be a valuable instrument, in the ESCP, to attempt to reconcile the parties by proposing an amicable solution to the dispute, without prejudice to the possibility of obtaining a court judgment. In this way, it would also be possible to implement Art. 12(3) of the Regulation which promotes the use of amicable solutions to small claims.

By doing this, the goals of a fair and fast civil proceeding, reducing the costs of dispute and the costs of civil justice could be actually deemed attained.