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INTRODUCTION

The pursuit of effective justice for small claims disputes, both at national and cross-border levels, remains a cornerstone of legal and procedural reforms across Europe. Over the past two decades, the European legal landscape has witnessed substantial efforts to streamline and harmonize small claims procedures, aiming to balance efficiency, accessibility, and fairness. From the introduction of specialized procedural tools like the European Small Claims Procedure (ESCP) to innovative technological solutions such as blockchain and AI-driven automation, the collective endeavor reflects a growing recognition of the need to adapt justice systems to contemporary societal demands.

Small claims disputes, often characterized by their relatively low monetary value, represent a significant proportion of the caseload in courts across Europe. These disputes, ranging from consumer credit arrears and unpaid subscriptions to parking fines and utility bills, pose unique challenges due to their volume and the associated costs of adjudication. For instance, in Belgium, the prevalence of uncontested money debts led to the introduction of the “Invordering Onbetwiste Schulden” (IOS) mechanism, a novel extrajudicial procedure designed to ease the burden on courts while addressing the European Commission’s concerns about inadequate small claims recovery frameworks. Similarly, across the European Union, the ESCP was established with the dual objective of standardizing cross-border procedures and alleviating procedural inefficiencies in domestic systems.

However, despite these reforms, challenges persist. The European Small Claims Procedure, introduced under Regulation (EC) No 861/2007, was envisioned as a streamlined, cost-effective mechanism to resolve disputes of up to €5,000. Yet, as several studies reveal, its adoption has been uneven across Member States. Litigants often remain unaware of its existence, and national procedural frameworks frequently overshadow its utility. In Italy, for example, the ESCP faces obstacles such as high appeal rates, misaligned costs, and mandatory negotiation requirements that complicate its implementation.

These challenges underscore the broader tension between uniform European instruments and diverse national legal traditions.

Digital innovation has emerged as a critical avenue for addressing these procedural inefficiencies. Countries like Slovenia have demonstrated the potential of digital enforcement mechanisms to enhance the efficiency of small claims resolution. Platforms such as SCAN-II illustrate how technology can reduce costs and simplify enforcement procedures. In North Macedonia, the ongoing digitalization of civil justice, coupled with legislative reforms, points to a future where small claims procedures could be fully integrated into an e-justice framework. Yet, as scholars caution, the adoption of digital tools must navigate the complexities of legal tradition and ensure that advancements like AI and blockchain align with fundamental principles of justice and fairness.

The integration of AI into the judiciary, particularly in the context of the ESCP, represents a frontier in procedural reform. AI-driven automation offers the promise of reducing case backlogs and expediting decision-making processes. However, as studies indicate, the deployment of such technologies raises critical questions about the balance between human oversight and algorithmic efficiency. The mapping of legal frameworks for AI-based automation within the ESCP highlights both the opportunities and the limitations of this approach.

Parallel to these technological advancements, the debate over the digitalization of civil justice touches upon foundational questions of procedural law. The traditional emphasis on orality—valuing direct interaction between judges, parties, and witnesses—has given way to more flexible models that prioritize efficiency. While digital hearings and online dispute resolution mechanisms offer convenience, they also challenge established notions of procedural justice and the role of human engagement in the adjudication process.

At the same time, the broader context of alternative dispute resolution (ADR) reflects a growing demand for harmonized approaches to consumer protection. The introduction of a unified European code for ADRs could address longstanding disparities in national frameworks and ensure that consumers, often the weaker party in contractual disputes, receive effective remedies. Cases underscore the importance of aligning ADR mechanisms with fundamental EU principles, such as the right to effective judicial protection.

Blockchain technology offers yet another avenue for reimagining the ESCP. By introducing transparency, traceability, and security into procedural workflows, blockchain could transform the way cross-border disputes are managed. However, as recent studies reveal, the integration of blockchain into legal systems is not without its challenges. Issues of scalability, technical compatibility, and regulatory alignment must be addressed to realize its full potential.

Across these discussions, a recurring theme is the need for a balanced approach to reform. While digitalization and technological innovation hold immense promise, they are not panaceas. Procedural tools like the ESCP must grapple with deeper structural issues, including the lack of awareness among litigants, the uneven integration into national systems, and the overarching reliance on Member States' judiciary infrastructures.

The 12 papers presented here are the result of a pivotal conference held in Brussels, organised by Profs. Marco Giacalone, Kim Van der Borght and Gina Gioia, at the conclusion of the SCAN-II project, a co-funded project by the European Commission, JUST 2027 Program, under grant agreement no. 101046587¹. This gathering of scholars, practitioners, and policymakers provided an invaluable platform for discussing the project's findings, debating innovative solutions, and charting the path forward for small claims procedures in Europe. Each paper reflects a unique perspective on the challenges and opportunities inherent in this critical area of law and justice.

As Europe continues its journey toward a more unified and efficient legal framework for small claims, the lessons from these studies underscore the importance of collaboration, innovation, and respect for fundamental rights. From Belgium's IOS mechanism to North Macedonia's digital transformation and the ambitious visions of AI and blockchain, the evolution of small claims procedures reflects a dynamic interplay between tradition and progress. This narrative not only highlights the achievements and challenges of past reforms but also lays the groundwork for future innovations that can better serve citizens, foster cross-border cooperation, and uphold the principles of justice in an increasingly interconnected world.

Gina Gioia

¹ For more info about the SCAN2 project, please visit <https://scan2.vub.be>.

THE EUROPEAN SMALL CLAIMS PROCEDURE AND THE FUTURE OF EU-WIDE PROCEDURAL INSTRUMENTS

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ABSTRACT: Recent data shows that multiple EU Member States do not offer a simplified, effective, and harmonized procedure for domestic small claims. This data also shows that the European Small Claims Procedure (ESCP) and other European procedural instruments are not being widely used by litigants in Member States. In light of these developments, this paper argues that the EU legislature should extend the ESCP to domestic small claims in all Member States in addition to cross-boarder small claims. This expansion will have several advantages, including the protection of litigants' access to justice, the harmonisation of small claims procedure across the EU, and the increased popularity of the ESCP amongst legal professionals. The paper also argues that extending the ESCP to domestic claims is a balanced and limited solution, and it does not violate the procedural autonomy of Member States, nor the fundamental principles of subsidiarity and proportionality.

KEYWORDS: EU small claims; domestic small claims; EU civil procedure; regulation No. 861/2007; expansion.

SUMARIO: 1. INTRODUCCION.— 2. THE ESCP AND ITS LIMITED USE IN MEMBER STATES.— 3. EXTENDING THE ESCP TO DOMESTIC CASES.— 4. LEGAL HURDLES IN EXTENDING THE ESCP TO DOMESTIC CASES.— 5. CONCLUSIONS.— BIBLIOGRAPHY

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1. INTRODUCTION

This paper argues that the European Small Claims Procedure (ESCP) should be extended to apply to domestic small claims, in addition to cross-border small claims. This argument aims to address two serious problems. The first problem is that some Member States do not currently have a small claims procedure or, if they do, it is less efficient than the ESCP. The second problem is that the ESCP is not being widely used and litigants in Member States are unfamiliar with it. This is also the case with the other uniform European procedural instruments, such as the European Payment Order (EPO) and the European Account Preservation Order (EAPO). In light of these problems, extending the scope of the ESCP to domestic small claims will ensure that the litigants' right to access justice is better protected, that Member States will have a harmonised and compatible set of rules on small claims procedure, and that the ESCP will be far more popular.

2. THE ESCP AND ITS LIMITED USE IN MEMBER STATES

The ESCP was established by Regulation No. 861/2007 of the European Parliament and of the Council¹, as amended, and it entered into force on 1 January 2009². The Regulation provides that the ESCP applies to civil and commercial matters in cross-border cases where the value of a claim does not exceed €5,000, excluding any interest, expenses, and disbursements³. The term "cross-border case" is defined in Regulation No. 861/2007 as any case "in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised"⁴. The general purpose of Regulation No. 861/2007 was to create a faster, simpler, and less expensive process of pursuing small claims across the EU. As it is also noted in Article 1 of Regulation No. 861/2007, the ESCP was "intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs"⁵. Some other important benefits of the ESCP is

¹ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, OJ L 199, 31.7.2007, p. 1-22.

² Regulation No. 861/2007, art. 29.

³ Regulation No. 861/2007, art. 2(1). Art 2(2) further limits the scope of application of Regulation No. 861/2007 since it provides that the ESCP does not apply to matters concerning: (a) the status or legal capacity of natural persons; (b) rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (c) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (d) wills and succession, including maintenance obligations arising by reason of death; (e) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (f) social security; (g) arbitration; (h) employment law; (i) tenancies of immovable property, with the exception of actions on monetary claims; or (j) violations of privacy and of rights relating to personality, including defamation.

⁴ Regulation No. 861/2007, art. 3(1).

⁵ Regulation No. 861/2007, art 1.

that it encourages the use of computer technology and electronic communication between the parties and the court in adjudicating small claims⁶, and additionally, parties are not required to be represented by a lawyer in these type of proceedings⁷. The ESCP does not override any small claims procedure that exists under the laws of a Member State, but it is available to litigants as an alternative⁸.

The establishment of ESCP has been a significant contribution towards shaping a *corpus iuris processualis europaeum*, that is, a European set of procedural rules⁹. In particular, the ESCP has been characterised as “a significant example of the action of the EU in the field of civil proceedings”¹⁰ and “an important step towards the establishment of a European civil procedural law and the enforcement of small claims”¹¹. Overall, the ESCP has simplified the pursuit of a multi-jurisdictional small claim by introducing a standard and uniform process of filing, defending, and enforcing the claim.

Nevertheless, the ESCP has not been widely used by litigants in cross-border cases. Although there has been 15 years since the enactment of Regulation No. 861/2007, it appears that litigants in many Member States are still skeptical about pursuing a cross-border small claim in accordance with the ESCP. Statistics concerning the use of the ESCP implemented by Regulation No. 861/2007 show that this mechanism has not been as successful as expected. In Portugal, for example, there were only 220 ESCP claims adjudicated between 2011 and 2019, which means an average of 24.4 per year; even though there was positive increase from 2011 to 2019 by 1,800%, the number of adjudicated ESCP claims is still low¹².

In Spain, until 2017, the annual number of ESCP claims was relatively small, with an average of 50 per year. With some exceptions, this minimal use of the ESCP fitted the general trend across Europe¹³. However, from 2017 to 2018 the number of ESCP claims in Spain increased by 286.6%. Against the 60 ESCP claims issued in 2017, 172 were issued in 2020. In 2019, the number of ESCPs continued climbing to 492 ESCPs. This trend was reversed in 2020, when there were just 179 ESCP claims. One might wonder if a similar increase in the use of the ESCP could be appreciated in other Member States. Available public statistics in Portugal, Lithuania, and Luxembourg do not reveal any significant change in the use of the ESCP after 2017, the year that the amendment entered into force. In Lithuania, the number of ESCP claims even decreased from 2018 to 2019. By contrast, in Germany, statistics

⁶ Regulation No. 861/2007, art. 8.

⁷ Regulation No. 861/2007, art 10.

⁸ Regulation No. 861/2007, art. 1.

⁹ See Inchausti (2020), p. 93. See also Storskrubb (2018) and Vernadaki (2013).

¹⁰ Mellone (2014), p. 246.

¹¹ Kramer (2011), p. 131.

¹² Mesquita and Cebola (2022), pp. 9-10.

¹³ European Commission: Directorate-General for Justice. (2013). *Assessment of the socio-economic impacts of the policy options for the future of the European Small Claims Regulation: final report.*

reveal a steady growth over those years. Against the 478 ESCP claims issued in Germany in 2017, 2380 ESCP claims were issued in 2020, standing for an increase of 498%¹⁴.

Furthermore, in the last European Judicial Network Meeting¹⁵, delegations from Member States presented statistics concerning the volume of the ESCP claims initiated in their jurisdictions. It seems that generally the numbers are stable, albeit large differences were noted between the jurisdictions of comparable size. These statistics also show the relatively low use of the EPO and EAPO in most Member States.

It is suggested that the reluctance of litigants to pursue ESCP claims is attributable to several factors, including the following: (a) litigants, lawyers, and judges are unfamiliar with Regulation No. 861/2007 and its provisions;¹⁶ (b) there is little case law on the application and interpretation of Regulation No. 861/2007, and the decisions from other Member States on the application and interpretation of the Regulation are not always translated in English nor easily accessible; and (c) there is little to no public information or guidance on the use of the ESCP. As a result of these difficulties, many litigants, lawyers, and judges remain unaware of the existence and applicability of the ESCP in cross-border disputes. Although Article 11(1) of Regulation No. 861/2007 requires Member States to “ensure that it is possible for the parties to receive both practical assistance in filling in the forms and general information on the scope of application of the ESCP”, in multiple Member States, there are no available service desks or other information sources to assist litigants in this respect, or to generally promote or recommend the use of ESCP¹⁷.

3. EXTENDING THE ESCP TO DOMESTIC CASES

In light of the limited use of the ESCP and the unfamiliarity of litigants, lawyers, and judges with this process, which was discussed previously, the argument that is put forth in this paper is that the ESCP should not only apply to cross-border cases, but it should be extended to domestic cases as well, *i.e.* cases that fall under the jurisdiction of only one Member State. This new ESCP will not override any existing small claims procedures in national law, but it will only operate as an alternative process. Thus, litigants will be free to choose the procedure by which to pursue their small claims.

If the ESCP was applicable to domestic cases, it would confer a number of advantages on litigants in all Member States. First, it would safeguard the

¹⁴ Santaló Goris (2022).

¹⁵ 95th Meeting of The European Judicial Network in Civil and Commercial Matters (Brussels, 25-26 April 2024).

¹⁶ The lack of awareness about the ESCP Regulation was one of the issues that the Commission aimed to tackle with the 2015 reform.

¹⁷ See Giacalone et al (2021) pp. 316-317, 318. For the argument that the ESCP requires a higher level of legal interoperability between the subjects involved, such as courts, citizens, and judiciary functionaries, see Mellone (2014) p. 245.

litigants' right to access justice through a simplified, fast, and inexpensive small claims procedure in their home country. Some Member States do not currently offer an effective procedure for claims under €5,000¹⁸. Even in jurisdictions that there is some form of simplified procedure for smaller claims, the design of these simplified procedures differs significantly across Member States¹⁹. As a result, litigants who wish to pursue a small claim under the existing rules of civil procedure in these Member States, may still incur higher court fees, legal representation fees, and huge delays. Needless to say, litigants are often discouraged from pursuing a small claim in these conditions. From the litigants' perspective, having a small claim that is extremely cumbersome to pursue in court is equal to having *no* claim at all. The current system does not incentivise or motivate litigants, who are usually consumers, to attempt to vindicate their rights in court. This, of course, undermines the litigants' right to access justice²⁰.

Second, the applicability of the ESCP in domestic cases would achieve a certain level of harmonization of civil procedure across the EU. If the adjudication of domestic small claims in all Member States was regulated by the same small claims procedure, it would be possible for litigants and lawyers in one Member State to engage in constructive dialogue with litigants and lawyers in other Member States, *e.g.* to seek advice or guidance on how to deal with certain issues, to discuss the strengths or weaknesses of the procedure, to develop best practices, and more generally, to share and better understand their respective experiences. Furthermore, a harmonized set of rules on small claims procedure would help overcome some current difficulties generated by the diversity of national procedural law, such as evidence, time limits, the use of computer technology, enforceability of judgment, *etc.*²¹. Should the ESCP apply to domestic cases in all Member States, it will be easier to resolve the tensions between multiple national procedural approaches in relation to small claims.

¹⁸ See European Commission. (2002). *Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation*, p. 52. In fact, some sources show that Belgium, Bulgaria, Cyprus, and the Czech Republic do not have a dedicated small claims track at all (Harley and Said, 2017).

¹⁹ For example, Finland does not have a dedicated small claims procedure, but it offers other ordinary procedures regardless of the value of the claim, such as procedures that allow the case to be conducted entirely in writing. Similarly, Austria and Germany do not have a small claims track in the strict sense, but they also offer simplified procedures. However, in Germany, the choice of procedure is at the court's discretion, while in Austria the procedure is mandatory and neither the parties nor the court can opt out (Harley and Said, 2017).

²⁰ In some Member States, such as Spain, a claim's cross-border dimension was even fabricated to access European uniform procedures. The EPO was more effective than the domestic equivalent and, like the ESCP, is only applicable in cross-border claims. Against this background, creditors assigned the debt to a creditor abroad (in many cases, vulture funds and companies specialised in debt recovery) in order to transform a purely internal claim into a cross-border one. Statistics in Spain show that, at least in this Member State, the connection between the EPO and ESCP Regulations functioned and gives more visibility to the ESCP.

²¹ See Inchausti (2020). See also Onianu (2017).

Finally, the third advantage of the extension of the ESCP to domestic small claims is the increased familiarity of legal professionals with the parallel small claims procedure in cross-border cases. As we mentioned previously, despite the strengths of Regulation No. 861/2007, the ESCP has been of limited use in the Member States due to a general lack of awareness and assistance regarding its availability. As a consequence, the effectiveness of the ESCP has been hindered. If, however, the ESCP was also applicable to domestic small claims, then a lot of litigants and legal professionals, as well as the courts, would be “forced” to familiarize themselves with the process. Further, if a domestic small claim followed the same procedure with a cross-border small claim, litigants and lawyers would be more confident in pursuing both types of claims, and ultimately the cross-border ESCP would become more popular.

There are two ways in which the ESCP can be extended to apply to domestic cases, either indirectly by the national legislator or directly by the European Parliament and the European Council. The first approach requires the national legislator of each Member State to enact a statute that extends the scope of Regulation No. 861/2007 to domestic cases. However, waiting for the national legislator to extend the scope of Regulation No. 861/2007 to domestic cases may not be a wise solution, since the legislator has not offered any procedural framework for small claims so far. In addition, even if some Member States were willing to apply the provisions of Regulation No. 861/2007 to domestic cases, there would still be some discrepancies in the method of application and interpretation of these provisions. If each Member State took a different approach on the application and interpretation of the ESCP in domestic cases, then its harmonised character would be undermined²².

The second approach avoids these problems. The European Parliament and the European Council could enact a new Regulation, or amend the existing Regulation No. 861/2007, to extend the ESCP to domestic small claims in all Member States. This Regulation should create a complete and ready-to-apply small claims procedure for domestic cases, without requiring the intervention of the national legislator, so as to ensure its harmonized character. This procedure should not affect any existing small claim procedure in Member States, but it should only operate as an alternative.

The legal basis for this expansion under the new Regulation can be found in Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), which provides that the European Parliament and the Council shall adopt measures aimed at ensuring *inter alia* “effective access to justice” and “the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”²³. The EU’s competence over procedural matters is implicit in the principle that, in order to achieve the *effet utile* of

²² See Onțanu (2017), pp. 469-470.

²³ TFEU, art 81(2)(e) and (f).

EU substantive law, *i.e.* in order to reach a full realization of its effect, it is necessary to establish procedural norms²⁴.

The compatibility or approximation of procedural rules in Member States was attempted in the past. For instance, the European Commission in 1998 proposed the introduction of “simplified legal procedures for small debts” in all Member States²⁵. Following the Commission’s proposal, the European Parliament and the Council established Directive 2000/35/EC on combating late payment in commercial transactions, but the Directive did not include a provision for small debts procedure²⁶. Although the Commission’s attempt was not successful in this regard, it highlighted the need for a uniform procedural framework on domestic small claims. More recently, in 2017, the European Parliament took the initiative to request by resolution the European Commission to prepare a proposal for a Directive on common minimum standards of civil procedure²⁷. This initiative is crucial in that it shows the Parliament’s general eagerness to promote a harmonized set of procedural rules in Member States²⁸. Thus, extending the ESCP to domestic small claims in order to ensure the litigants’ minimum access to justice does not fall far from the EU legislator’s modern objectives²⁹.

4. LEGAL HURDLES IN EXTENDING THE ESCP TO DOMESTIC CASES

One potential objection to the argument is that extending the ESCP to domestic cases *prima facie* violates the principle of procedural autonomy. Although this is a legitimate concern, a proper examination of this principle shows that there is no violation whatsoever. The meaning and scope of the principle of procedural autonomy has been debated in literature³⁰. The notion of the states’ power to regulate procedural law is said to derive from the case of *Lück v. Hauptzollamt Köln-Rheinau*, in which the European Court of Justice stated that the (then) Article 95 of the EEC “does not restrict the

²⁴ Galetta (2010), pp. 16-17, 121-122.

²⁵ European Commission. (1998). *Proposal for a European Parliament and Council Directive combating late payment in commercial transactions*, art 6.

²⁶ Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p. 35), repealed by Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ L 48, 23/02/2011, p. 1–10).

²⁷ European Parliament Resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)).

²⁸ See Kramer (2019).

²⁹ See also the discussion of the effect of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union: Van Cleynenbreugel (2016).

³⁰ See the discussion in Bobek (2012); Law and Nowak (2020); Kakouris (1997). The principle of procedural autonomy has been considered as an expression of the fundamental principle of subsidiarity (Skouris, 2009, p. 494).

powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law”³¹. This notion was again enunciated by the European Court of Justice in the landmark case of *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, as follows:

[I]n the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law³².

This passage identifies an important limitation to the principle of procedural autonomy, namely that it operates only in cases where the EU legislature has not promulgated any harmonising procedural rules on a particular issue³³. Thus, civil procedure is not a matter exclusively reserved to the Member States³⁴, and it may be reduced, firstly, by the adoption of EU procedural norms, and secondly, by the interpretation of such norms by the European Court of Justice³⁵. This limitation signifies that Member States cannot, through their national law of civil procedure, undermine the principles of effectiveness and equivalence of EU law³⁶. Therefore, the EU legislature retains its competences to promulgate procedural rules to attain the *effet utile* of EU law, subject to the principles of subsidiarity and proportionality. As already mentioned, the legal basis of this competence may be found in Article 81(2) of the TFEU, under which the European Parliament and the Council are responsible for ensuring *inter alia* “effective access to justice” and “the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”³⁷. In light of these provisions, the EU legislature can introduce a small claims procedure applicable to domestic cases for the purpose of safeguarding the litigants’ access to justice and eliminating any obstacles to the proper adjudication of small claims in Member States. This new procedure is balanced and limited in that it does not eliminate any existing national procedural rules; it offers an *additional* procedural tool for small claim litigants (usually consumers).

Apart from the principle of procedural autonomy, this proposal does not violate the principles of subsidiarity or proportionality either. Article 5(3) of the Treaty on the European Union (TEU) provides that “[u]nder the principle

³¹ *Lück v. Hauptzollamt Köln-Rheinau*, Case 34/67, EU:C:1968:24.

³² *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case 33/76, ECLI:EU:C:1976:188

³³ Law and Nowak (2020), p. 29; Bonelli (2022), pp. 97-98.

³⁴ Kakouris (1997), p. 1390; Baghrizabehi and Ferčič (2023), p. 673.

³⁵ Bonelli (2022), p. 90.

³⁶ Law and Nowak (2020), pp. 33-43. See also Krans and Nylund (2020), pp. 2-4.

³⁷ TFEU, art 81(2)(e) and (f).

of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States... but can rather... be better achieved at Union level". Article 5(4) provides that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". Extending the ESCP to domestic small claims does not interfere with the principle of subsidiarity because the objectives of effective access to justice and harmonisation/approximation of national small claims procedures cannot be sufficiently achieved by the Member States. To the extent that the national legislator many Member States has not yet exercised its autonomy to create a simplified, fast, and inexpensive small claims procedure to ensure the citizens' right to access justice, then it would be proper and fair for the EU to step in. Moreover, the action of extending the ESCP to domestic small claims does not interfere with the principle of proportionality since its content and form do not exceed what is necessary to achieve access to justice and to remove any obstacles to the function of small claim procedures in Member States, according to Article 81(2) of the TFEU.

5. CONCLUSIONS

This paper argued that the EU legislature should take action to extend the applicability of the ESCP to domestic small claims in all Member States. This action will have a number of advantages, namely the protection of litigants' access to justice, the harmonisation and approximation of small claims procedure across the EU, and the increased familiarity of legal professionals with the ESCP in cross-border cases and therefore increasing its popularity. Although, at first glance, this action may seem to violate the fundamental principles of procedural autonomy, subsidiarity, and/or proportionality, the analysis has shown that there is not truly a violation since the EU is competent to adopt procedural measures to attain the objectives set out in the Treaties. Besides, the action of extending the ESCP to domestic small claims is balanced and limited in that it does not interfere with any national procedural rules, but it operates as an additional/alternative process of pursuing a domestic small claim. On a general note, the action proposed in this paper does not stray away from the EU's modern initiatives and goals. Indeed, the "unstoppable wave" of modern uniform EU procedural instruments, including the ESCP, the EPO and the EAPO, reveals the willingness of the EU legislature to take steps towards a more harmonised system of civil procedure³⁸. In this context, the extension of the ESCP to domestic small claims sounds less like a bold or abrupt measure, and more like a giant leap towards harmonisation of European civil procedure.

³⁸ Storskrubb (2011).

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EMPIRICAL ANALYSIS ON THE APPLICATION OF THE EU SMALL CLAIMS REGULATION IN ITALY

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ABSTRACT: The article explores the challenges faced in implementing the European Small Claims Regulation in Italy, focusing on issues such as a high number of appeals and disproportionate costs. It discusses the need for adjustments to achieve the ESCP's objectives effectively. Despite these challenges, positive developments are also noted.

KEYWORDS: small claims; appeal; costs

SUMMARY: 1. AIM OF THE ESSAY.— 2. AVAILABLE STATISTICAL DATA.— 3. GEOGRAPHICAL CONSISTENCY IN THE APPLICATION OF THE ESCR.— 4. NATURE OF THE CLAIMS PROGRESSING TO THE APPELLATE STAGE.— 5. HIGH NUMBER OF APPEALS.— 6. COSTS OF THE APPELLATE PROCEEDINGS.— 7 CONCLUSIONS.

1. AIM OF THE ESSAY

The European Small Claims Regulation (ESCR) represents a significant departure from traditional, lengthy, and complex cross-border legal procedures. Its primary objective is to enhance accessibility, efficiency, and fairness for individuals and businesses seeking to recover small claims arising from cross-border trade across the European Union.

This essay aims to offer an overview of the implementation of the ESCR in Italy, fifteen years after its introduction, based on the available statistical data.

2. AVAILABLE STATISTICAL DATA

In a communication dated 13 November 2023, the Italian Ministry of Justice announced that the Department for Digital Transition, Statistical Analysis, and Cohesion Policies, through its General Directorate for Automated Information Systems (DGSIA), in line with the digitization goals of the National Recovery and Resilience Plan (PNRR), would soon launch an open-access “Database of Merit Case-Law.” The new database aims to provide citizens with open access to decisions in civil and commercial matters published by the tribunals of first instance and appellate courts from 1 January 2016.

The so called “Public Database of Merit Case-Law”¹ (hereinafter: Public Database) is a repository containing all civil judgments (judgments, decrees, and orders) published from 1 January 2016, in the first instance tribunals and appellate courts. Constantly updated, this database is intended for free use by all citizens and is fully compliant with the EU GDPR (Regulation (EU) 2016/679).

All judgments in the Public Database are made available to citizens in an anonymous form. Specifically, the identifying information of parties (individuals or legal entities) is pseudonymized, both in cases where the party is an individual, as required by the EU GDPR, and in cases where one of the parties is a legal entity (“party 1”, “party 2”, “counterparty 1”, etc.). The names of lawyers assisting the parties (“lawyer 1”, “lawyer 2”) are also anonymised, while the names of the judge(s) who drafted the judgment remain clear.

The Public Database aims to offer citizens, who are subject to civil justice”, the opportunity to freely access the full text of judgments (including orders or decrees) in civil matters issued by first instance or appellate courts. Moreover, the database offers “abstracts of the decisions” and includes a feature that provides links to conforming and diverging precedents and decisions from subsequent levels of jurisdiction. Users can conduct keyword and normative reference searches, and the platform supports natural language queries.

Access to the Public Database is restricted to users with SPID (Sistema Pubblico di Identità Digitale) Italian electronic identity cards or CNS (Carta Nazionale dei Servizi).

From our perspective, the introduction of the Public Database represents a significant development in understanding the practical application of the ESCR in Italy.

Covering the period from 1 January 2016, to 31 December 2023, the Public Database has gathered 89 appellate rulings concerning the ESCR, offering a comprehensive dataset for thorough analysis.

¹ Available at <https://bdp.giustizia.it/>.

Our empirical analysis focuses exclusively on the appellate review process under the ESCR, as the Public Database contains only appellate judgments — that is, EU small claims cases that have progressed to the appellate stage — and does not include rulings from justices of the peace, who in Italy typically handle first-instance adjudications for disputes within the scope of the ESCR.

3. GEOGRAPHICAL CONSISTENCY IN THE APPLICATION OF THE ESCR

Among the key insights derived from the compilation in the Public Database, geographical consistency stands out as a notable finding. The uniform application of the ESCR at the appellate level across various Italian regions (see Figure 1) demonstrates a geographically balanced approach to the use of the ESCR, with no apparent bias towards the historically wealthier or more industrially developed northern regions.

This geographical consistency highlights the effectiveness of the ESCR in establishing a standardised procedural framework for small claims throughout Italy, addressing potential regional disparities that could otherwise hinder equal access to justice.



Figure 1: The Application of the ESCR – at the appellate stage – in Italy in the last 18 months (1 June 2022-31 December 2023) the dark gray Regions are the areas where the ESCR has been applied².

² Source of Data: Italian Public Database.

4. NATURE OF THE CLAIMS PROGRESSING TO THE APPELLATE STAGE

Another intriguing pattern highlighted by the Public Database is the nature of the ESCR claims advancing to the appellate stage, with a predominant focus on disputes regarding cancelled or delayed flights. This sector-specific trend signals a significant volume of activity within consumer law, particularly concerning passengers' rights. The primary claimants in these cases are credit assignees—organisations that acquire claims from consumers in order to pursue legal action on their behalf.

5. HIGH NUMBER OF APPEALS

The data from the Public Database reveals a high rate of ESCR appeals, which contributes to the extension of the ESCR procedural timelines, with cases sometimes lasting up to two years—the current average duration of appellate proceedings in Italy³.

This high rate of appeals stands in contrast to the ESCR's goal of ensuring the swift resolution of cross-border small claims, exposing a disconnect between the regulation's intended objectives and the practical realities of its implementation in Italy.

The time frame for the conclusion of ESCR proceedings in Italy is further extended by the provision that, beyond a first appeal, a second appeal is permitted (limited to issues of law) before the Italian Supreme Court, as stipulated in Article 111 of the Italian Constitution. This second appeal process is available even in cases involving relatively low-value disputes, potentially adding an additional three years to the total duration of ESCR proceedings before a final judgment is issued.

In summary, the reality in Italy is that there is a swift initial first-instance ESCR process, followed by a lengthy duration of at least two years for the first appeal and an additional three years for the resolution of the second appeal, resulting in a total timeframe of over five years!

It is evident that the interplay between European procedural law with the Italian *lex fori*, which permits two appeals, may significantly prolong the duration of ESCR proceedings.

This situation calls for a reconsideration of leaving the regulation of the appellate process to national legislators (*lex fori*), as stipulated by Article 19 of the ESCR. Such a reconsideration is essential to realign the ESCR with its

³ According to the statistical data provided by the Italian Ministry of Justice, the average duration of appeal civil proceedings in the first semester of 2024 was 528 days. The statistics are available (in Italian) at https://datiestatistiche.giustizia.it/cmsresources/cms/documents/pnrr_relazione_indicatori_statistici_ott24.pdf (accessed on Jan. 27, 2025).

core objectives of efficiency and expediency in resolving cross-border small claim disputes.

6. COSTS OF THE APPELLATE PROCEEDINGS

Another issue that emerges from the text of appellate decisions available in the Public Database concerns the costs associated with appellate proceedings in cases falling under the ESCR. This is a significant concern, particularly in light of the content of Article 16 of the ESCR, which stipulates that the losing party should bear the costs of the proceedings, unless those costs were unreasonably incurred or disproportionate to the value of the claim.

However, Article 16 of the ESCR applies only to first-instance proceedings and does not extend to appellate proceedings, where instead the *lex fori* is applied. In Italy, this can result in situations where the costs awarded for appellate proceedings far exceed the value of the claim, thereby undermining the ESCR's objective of providing a low-cost mechanism for resolving cross-border small claims disputes.

Within the Public Database, two emblematic cases highlight this issue:

1) The Tribunal of Turin⁴, in an instance processed on 5 October 2022, ruled on an ESCR case involving a delayed flight with a claim value of €250 plus interest. The issue of international jurisdiction led to the dismissal of the case at the first instance. The appeal was similarly rejected by the tribunal. The costs incurred by the unsuccessful party throughout the ESCR proceedings (both first and second instances) amounted to €792 in lawyer's fees. Additionally, as a sanction, the losing party was required by the Tribunal of Turin, in its capacity as the appellate court, to pay a court fee double the value of the claim, approximately €128, in accordance with Italian procedural law. This brings the total cost of the ESCR proceedings (first and second instance costs) for the losing party to around €1000, which is four times the value of the dispute.

2) The Tribunal of Ragusa⁵, in a judgment dated 29 September 2022, decided on an appeal concerning a cancelled flight for which the Justice of the Peace of Modica, in first instance, had granted monetary compensation to the passenger.

The Tribunal of Ragusa, upon hearing the case, partially upheld the appeal, reducing the amount of compensation owed to the passenger in the first instance. Consequently, the passenger was required to reimburse the airline €502 and cover the legal costs for both the first and appellate instances. The total cost of the dispute for the first and second instances, in accordance with

⁴ Tribunal of Turin, 5 October 2022, full text available in the Public Database.

⁵ Tribunal of Ragusa, 29 September 2022, full text available in the Public Database.

Italian civil procedural law, amounted to €2174, approximately 3-4 times the value of the dispute

It is evident that the absence of an EU cap on the costs of appellate proceedings, as determined by the *lex fori*, raises concerns about the accessibility of appellate review within the ESCR framework.

To address these challenges, the following measures could be considered:

A. Clarification and Amendment of ESCR Procedures: EU institutions and Member States could collaborate to provide greater clarity on the application of Article 16 of the ESCR in appellate proceedings. This could involve revising the ESCR to explicitly limit the total costs that can be awarded in appellate cases, ensuring they remain proportionate to the value of the claim.

B. Enhanced guidance for parties: Providing clear information on the European e-Justice Portal regarding the costs under the *lex fori* and the specific national procedural rules governing ESCR proceedings at the appellate stage could help parties make informed decisions about pursuing a small claim case in court. Such measures could not only assist in predicting costs but also potentially reduce the number of appeals filed.

C. Encouraging alternative dispute resolution methods for small claims, at least before progressing to the appellate stage. Mediation, in particular, and negotiation could serve as a cost-effective and timely approach to resolving disputes without the need for appellate review.

8. CONCLUSIONS

The challenges identified in the preceding paragraphs, stemming from the examination of decisions in the Public Database regarding the application of the ESCP in Italy — such as the high number of appeals and disproportionate costs relative to the claim value — highlight areas where adjustments and clarifications may be necessary to fully achieve the ESCP's objectives of streamlining and expediting small claims disputes across the entire EU.

These issues point to the potential need for intervention by the European legislator, particularly to address challenges that may deter claimants from using the ESCP, ensuring its effective application within the varied legal frameworks of Member States.

At the same time, the data available in the Public Database demonstrates some positive advancements in the implementation of the ESCP in Italy.

The presence of 89 appellate decisions indicates significant usage of the ESCP within the country. Although the percentage of appeals is relatively high in Italy, it can be inferred that there were likely many more cases decided at first instance beyond the reported number of appellate decisions, probably exceeding one hundred.

Furthermore, the Public Database highlights the potential for the ESCP to integrate into national legal systems, with courts adopting the ESP Regulation and embracing digital practices. A notable example of this progress is a Tribunal of Florence's ruling⁶, which approved the submission of the defendant's response in both, first and second instance ESCP proceedings, via certified email, thus effectively digitising the proceedings by equating this method of submission to traditional postal mail with a return receipt.

The quoted decision of the Tribunal of Florence exemplifies a positive development, demonstrating that not all aspects of the ESCP's implementation in Italy are facing challenges, and it offers hope for further enhancements in its application within the country.

⁶ Tribunal of Florence, 18 September 2023, full text available in the Public Database.

BELGIUM'S EXTRAJUDICIAL RECOVERY OF UNCONTESTED MONEY DEBTS: CAN AN EXTENSION TO CONSUMER DEBT BE ENVISAGED?

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ABSTRACT: Consumer debt is a pervasive issue that imperils both debtors and their creditors. Belgium has in the past created an out-of-court gateway for creditors to recover debt in business to business relationships. Discussions on whether to extend that scheme to consumer debt are ongoing. European Union law and the case law of the European Court of Justice on consumer protection should be taken into account in devising such scheme but are not an insurmountable obstacle. Belgium could prove an innovative testing ground for similar schemes elsewhere.

KEYWORDS: consumers; consumer protection; debt recovery; extrajudicial debt recovery; European Union; consumer contracts; unfair terms; ex officio control.

INDEX: 1. INTRODUCTION.— 2. RECOVERY UNDER IOS.— 3. EUROPEAN BARRIERS?.— 4. IOS FOR CONSUMERS.— 5. CONCLUSION

1. INTRODUCTION

Being faced with debt is a day-to-day reality for many people. A statistic from the National Bank of Belgium shows that hundreds of thousands of Bel-

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gians are facing an overdue credit agreement¹. Excessive credit is one of the causes of arrears, but in addition, citizens also have many other payment obligations. Some of these are periodic such as paying rent, energy, school bills, water, telecom, etc.². The increasing diversification of consumption modes is also causing more debtors to face a wide array of limited debts such as unpaid mobile phone and fitness subscriptions, parking fines, traffic violation fines, utility bills, healthcare debts, etc. In many cases, these are undisputed money debts³.

In 2016, Belgium had to deal with a two-sided problem: its legal regime for the recovery of small claims was considered insufficient by the European Commission⁴ and it saw its judiciary being overburdened by a large amount of small claims-proceedings resulting in default judgments⁵. In an attempt to kill two birds with one stone, the legislator created IOS. IOS, an abbreviation of “Invordering Onbetwiste Schulden”, offers the possibility to recover uncontested money debts between companies (B2B relations) via an extrajudicial procedure. This mechanism was inserted in articles 1394/20 to 1394/27 of the Belgian Judicial Code (JC)⁶.

The experiences with IOS have ignited a debate on its extension to consumer debt recovery. Draft proposals have been circulated accordingly. By reporting on this debate, which is still ongoing and touches on European Union consumer protection concerns, we aim to offer a source of reflection for other jurisdictions facing similar issues. Let us begin by providing a brief overview of recovery under the current IOS scheme.

¹ Nationale Bank van België. (2021). *Statistieken. Centrale voor kredieten aan particulieren – 2020*. www.nbb.be/doc/cr/ccp/publications/bro_ckpstat2020n_26012021.pdf, p. 10.

² Kamer. (2019-2020). *Wetsvoorstel houdende diverse bepalingen met betrekking tot de betaling van schulden en tot wijziging van de wet van 20 december 2002 betreffende de minnelijke invordering van schulden van de consument*. Nr. 55-0267/010, p. 3. For ease of reference, Belgian legislative draft proposals are referred to in their original language. They can be found by using the document number (e.g. in the case at hand document number 267 of session 55) at *De Belgische Kamer van volksvertegenwoordigers (dekamer.be)*.

³ Kamer. (2008-2009). *Wetsvoorstel tot wijziging van de wet van 20 december 2002 betreffende de minnelijke invordering van schulden van de consument wat de invordering door advocaten, ministerieel ambtenaren en gerechtelijke mandatarissen betreft*. Nr. 52-1704/001, p. 3.

⁴ The benchmark being Belgium’s duties of transposition under the directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), *OJ L 48*, 23.2.2011, p. 1.

⁵ Kamer. (2014-2015). *MvT bij het Wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, 24-26; Voet, S. & Allemeersch, B. (2016), p. 1-3, n° 1 and 2. In July 2014, the jurisdiction of the Enterprise Courts was expanded, making them competent to adjudicate all disputes between enterprises, regardless of the amount in dispute (amended Article 573, paragraph 1 JC). As a result, the courts experienced a significant increase in workload, as they became inundated with requests for enforceable titles for uncontested commercial debts. To alleviate this workload, the administrative IOS was introduced, allowing the processing of uncontested commercial debts to take place largely outside the judicial system.

⁶ Wet van 19 oktober 2015 houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie, *Belgisch Staatsblad* 22 oktober 2015; Loi du 19 octobre 2015 modifiant le droit de la procédure civile et portant des dispositions diverses en matière de justice, *Moniteur belge* 22 octobre 2015.

2. RECOVERY UNDER IOS

Using IOS requires that three conditions are met, one relating to the nature of the debt, one relating to the status of the parties and one relating to the value of the claim. First, the claim must concern an undisputed sum of money that is fixed and due on the day of the demand for payment⁷. Secondly, the amount of the debt that can be recovered with IOS is limited to the principal sum, which can at the most be increased by the statutory fixed compensation of EUR 40⁸ and the contractual interest and damages clause amounting to a maximum of 10% of the principal sum⁹. Finally, the scope of the procedure is limited to debts between companies (B2B) and the debt must relate to their professional legal business.

The creditor's lawyer acts as 'first judge'. Only at his request can IOS be initiated¹⁰. It is his responsibility to verify whether the claim meets all legal requirements. Specifically, the lawyer must verify whether the parties are registered in the Crossroads Bank for Enterprises, whether the claim is a monetary debt and actually exists, whether the claim is uncontested and whether the claimed interest and damages do not exceed 10% of the principal sum¹¹.

IOS is an instrument to be entrusted only to public and ministerial officials who offer the necessary guarantees of competence and independence¹². That is why bailiffs (in Dutch: "*gerechtsdeurwaarders*", in French: "*huissiers de justice*")¹³ as judicial officers appointed by the King have been exclusively tasked with recovery under IOS¹⁴. In doing so, they must take into account both the interests of the creditor and the debtor¹⁵.

IOS recovery proceeds in four stages. When the bailiff is instructed with a recovery order by a lawyer, he will proceed, after a solvency check of the debtor, to serve the notice for payment on the debtor¹⁶. Efforts will be made to meet the debtor in person so that an explanation can be provided, both on

⁷ Art. 1394/20 JC.

⁸ Art. 6 wet 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties, *Belgisch Staatsblad* 7 augustus 2002. Art. 6 Loi 2 aout 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales, *Moniteur belge* 7 aout 2002.

⁹ Art. 1394/20 JC.

¹⁰ Art. 1394/20 JC.

¹¹ Kamer. (2014-2015). *Verslag van de eerste lezing namens de Commissie voor de Justitie bij het wetsonwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/005, p. 82.

¹² Art. 519, §1, second paragraph, *Ibis* JC and Kamer. (2015-2015). *MvT bij wetsonwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 2014-15, nr. 54-1219/001, p. 26.

¹³ <https://www.gerechtsdeurwaarders.be/>.

¹⁴ Kamer. (2014-2015). *MvT bij wetsonwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, p. 26.

¹⁵ GwH 31 May 2018, 62/2018, 154, at par. B.80.2, <https://www.const-court.be/nl> (judgment available in Dutch and French).

¹⁶ Art. 1394/21, first paragraph JC.

substance and procedure¹⁷. The notice has to contain a number of specific entries under penalty of nullity, including a response form that allows for a low-threshold means of contestation, as well as for requesting an instalment plan¹⁸. Solvency of the debtor is frequently checked, so that service will only be done when there is a real prospect of recovery.

After service of the notice, the debtor has one month to respond and thus pay the claimed sums in full (1), request an instalment plan (2) or state his reasons for contesting the claim (3)¹⁹. The recovery under IOS will take an end when the debtor pays his debt in full within the one-month period following the notice for payment²⁰. If the debtor does not pay immediately, it is possible to negotiate an instalment plan with the creditor, which ensures a temporary suspension of the recovery²¹. The debtor also has the possibility to dispute the debt. This is done by means of a standard response form attached to the notice letter²². In case of a substantiated contestation, whether well-founded or not, this will in any case terminate the IOS recovery as the undisputed nature of the commercial debt claim then disappears²³.

After the period of one month following the service of the notice for payment, there is an additional waiting period of eight days to allow *in extremis* negotiations between the parties, or to follow up on the agreed instalment plan²⁴.

When the company-debtor abstains from any response, a presumption of tacit acceptance is inferred from this and the next stage of IOS will be initiated. The bailiff will draw up a report of non-contestation of the claim²⁵. Subsequently, this report is then sent digitally to the Central Register for Recovery of Uncontested Debts (CROS-Register) where a magistrate can declare it enforceable by electronic signature. The legislator has specifically entrusted this declaration of enforceability to the magistrates²⁶ of the Management and Supervision Committee at the Central Register of Notices of Attachment, Delegation, Transfer, Collective Debt Settlement and Protest as referred to in Article 1389*bis* of the Judicial Code (magistrate of the CBB Committee), who receive the report digitally, apply a marginal check on compliance with the legal formal requirements and then ensure its approval and declaration of enforceability²⁷. Digitalisation allows these magistrates to declare the report

¹⁷ De Mol, L., & Rodriguez y Canteli, J. (2020), p. 58.

¹⁸ Art. 1394/21, first and second paragraph JC.

¹⁹ Art. 1394/22, first paragraph JC.

²⁰ Art. 1394/23, first paragraph JC.

²¹ Art. 1394/23, second paragraph JC.

²² Art. 1394/21, third paragraph, 2° and 1394/22, first paragraph JC.

²³ Art. 1394/23, first paragraph JC.

²⁴ Kamer. (2014-2015). *MvT bij wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, p. 31.

²⁵ Art. 1394/24, §1, first paragraph JC.

²⁶ There are four magistrates on the Management and Supervisory Committee, two of them Dutch-speaking and two French-speaking.

²⁷ Art. 1394/24, §2, first paragraph JC.

enforceable at short notice, often within 48 hours²⁸. An enforcement form is then attached to the non-contestation report, converting the report into an enforceable title that can be enforced in accordance with the fifth part of the Judicial Code²⁹. This process is fully digital via the CROS-Register, which ensures efficient and swift processing³⁰.

By means of an ultimate safeguard after the declaration of enforceability and in order to guarantee access to justice by the debtor, the latter can obtain the suspension of the enforcement of the non-contestation report by instituting legal proceedings within one month of service of the non-contestation report which has been declared enforceable³¹. This provision amounts to an “*inversion du contentieux*”³². The logic of ordinary court proceedings is thereby reversed in case of recovery under IOS. The creditor can obtain an enforceable title fairly simply and ordinary civil proceedings will only ensue if the debtor objects to this extrajudicial title³³.

A statistical analysis of the first 100,000 files clearly showed that IOS was a success in several ways. For example, only 1.28% of recoveries under IOS were contested³⁴. In 42% of cases, a solution was reached to obtain an enforceable title and even in 12% of cases, such a solution was achieved within the week³⁵. Putting the bailiff at the centre of the IOS allows for the quick processing and easy settlement of uncontested claims. Moreover, the bailiff's intervention will ensure that the cost of recovery will be lower than that of recovery through court proceedings, benefiting both the creditor and the debtor³⁶. In addition, IOS illustrates the possibilities of digitalisation in civil justice. Former Justice Minister Koen Geens said that if the IOS procedure between businesses was successful, a similar alternative could be envisaged for consumers³⁷. Preliminary draft proposals have been circulated since. But before we analyse those, we need to address the European Union consumer protection concerns that IOS-type schemes may raise.

²⁸ De Mol, L., & Rodriguez y Canteli, J. (2020), p. 63.

²⁹ Art. 1394/24, §2 JC.

³⁰ SAM-TES. (2017). *Snel & goedkoop onbetwiste B2B-schulden innen*, https://issuu.com/sam-tes/docs/20161017_brochure_onbetwiste_geldsc, p. 3.

³¹ Art. 1394/24, §3 JC.

³² Kamer. (2014-2015). *MvT bij wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, p. 28.

³³ De Mol, L., & Rodriguez y Canteli, J. (2020), p. 56.

³⁴ De Mol, L., & Rodriguez y Canteli, J. (2020), p. 65-70.

³⁵ Interview kanaal Z : <https://trends.knack.be/kanaal-z/events-webinars/debatten-panelgesprekken/z-extra-round-table-sam-tes-ondernemingen-11-03-24/>

³⁶ Kamer. (2014-2015). *MvT bij wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, p. 27.

³⁷ Justaert, M. (8 May 2015). Geen rechter meer nodig om onbetwiste schulden te innen. *De Standaard*, www.standaard.be/cnt/dmf20150508_01670343.

3. EUROPEAN BARRIERS?

The consumer is traditionally considered a ‘weaker party’ in need of legal protection at both the national and European level. Consumer protection is therefore of paramount importance within the European Union. This has ignited debate in legal doctrine as to whether an extension of the current IOS recovery to consumer debts is desirable. The focus of the debate is on the lack of *ex officio* judicial review of unfair terms in the IOS procedure³⁸.

Guiding in that regard is the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which provides for the protection of consumers in the European Union against unfair contract terms³⁹. It follows from Directive 93/13 that European Union Member States must ensure that contracts concluded with consumers do not contain unfair terms⁴⁰. The Court of Justice of the European Union (CJEU) pursues a policy aimed at providing consumers with effective protection and is strict in ensuring that this protection is effectively guaranteed⁴¹. According to settled case law of the CJEU, the protection system of the Unfair Contract Terms Directive starts from the idea that the consumer is in a weak negotiating position vis-à-vis the company⁴². When a consumer enters into a contract with a company, the consumer often has less information at his disposal and therefore agrees to the terms drafted by the company in advance without further consideration⁴³. The CJEU holds that Directive 93/13 seeks to eliminate the potential disproportion between

³⁸ On this, see Verbeke, A.-L. (2019-2020), p. 803 and the reply of Cambie P. & Ponet, B. (2019-2020), p. 1402.

³⁹ OJ L 095 21.4.1993, p. 29, the coordinated version is at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01993L0013-20220528>; hereafter referred to as Unfair Contract Terms Directive or Directive 93/13.

⁴⁰ Cons. 4 Unfair Contract Terms Directive.

⁴¹ Steennot, R. (2017), p. 81.

⁴² CJEU 27 June 2000, C-240/98, ECLI:EU:C:2000:346, Océano Grupo, paragraph 25 (hereinafter: Océano Grupo judgment); CJEU 26 October 2006, C-168/05, ECLI:EU:C:2006:675, Mostaza Claro, paragraph 25 (hereinafter: Mostaza Claro judgment); CJEU 6 October 2009, C-40/08, ECLI:EU:C:2009:615, Asturcom Telecomunicaciones, paragraph 29 (hereinafter: Asturcom Telecomunicaciones judgment); CJEU 9 November 2010, C-137/08, ECLI:EU:C:2010:659, VB Pénzügyi Lízing, paragraph 46 (hereinafter: VB Pénzügyi Lízing judgment); CJEU 14 June 2012, C-618/10, ECLI:EU:C:2012:349, Banco Espanol de Credito, paragraph 39 (hereinafter: Banco Español judgment); CJEU 21 February 2013, C-472/11, ECLI:EU:C:2013:88, Banif Plus Bank, paragraph 19 (hereinafter: Banif Plus Bank judgment); CJEU 26 January 2017, C 421/14, ECLI:EU:C:2017:60, Banco Primus, paragraph 40 (hereinafter: Banco Primus judgment); CJEU 7 December 2017, C-598/15, ECLI:EU:C:2017:945, Banco Santander, paragraph 36 (hereinafter: Banco Santander judgment); CJEU 17 May 2018, C-147/16, ECLI:EU:C:2018:320, Karel de Grote - Hogeschool, paragraph 26 (hereinafter: Karel de Grote-Hogeschool judgment); CJEU 11 March 2020, C-511/17, ECLI:EU:C:2020:188, Györgyné Lintner, paragraph 23 (hereinafter Lintner judgment); CJEU 17 May 2022, C-693/19 and C-831/19, ECLI:EU:C:2022:395, SPV Project 150, paragraph 51; CJEU 17 May 2022, C-725/19, ECLI:EU:C:2022:396, Impuls Leasing România, paragraph 39; CJEU 17 May 2022, C-600/19, ECLI:EU:C:2022:394, Ibercaja Banco judgment, paragraph 35.

⁴³ Océano Grupo judgment, paragraph 25; Mostaza Claro judgment, paragraph 25; Asturcom Telecomunicaciones judgment, paragraph 29; VB Pénzügyi Lízing judgment, paragraph 46; Banco Español judgment, paragraph 39; Banif Plus Bank judgment, paragraph 19; Banco Santander judgment, paragraph 36; Karel de Grote-Hogeschool judgment, paragraph 26.

the rights and obligations of the parties to the contract by creating a fundamental balance that ensures party equality⁴⁴. Achieving this requires the intervention of a third party outside the contract⁴⁵. According to the CJEU, national courts must assess *ex officio* whether a contractual term in the contract, which falls within the scope of the Unfair Contract Terms Directive, is unlawful and, where necessary, eliminate the imbalance created between the contracting parties. This the so-called '*ex officio* doctrine'⁴⁶. This obligation, which, according to the CJEU, falls upon the national courts, is essential to provide effective consumer protection (principle of effectiveness)⁴⁷.

Is this *ex officio* judicial control indispensable? On the basis of the CJEU case law, it has been argued that the objectives stemming from the Unfair Contract Terms Directive can also be achieved if consumers can actually avail themselves of effective and efficient remedies to challenge the unfair nature of contractual terms⁴⁸. Decisive is that there are no unjustified obstacles in national procedures that would prevent consumers from effectively availing themselves of the protection afforded to them under Directive 93/13⁴⁹. The CJEU also emphasises that, in order to effectively benefit from the consumer protection resulting from the Unfair Contract Terms Directive, consumers are expected not to remain entirely passive and, consequently, should make effective use of the remedies available to them⁵⁰. National courts cannot be obliged to remedy this total passivity when the consumer has had the possibility of using adequate remedies under reasonable and fair conditions⁵¹. The CJEU does not consider consumer protection as an absolute right⁵². It exam-

⁴⁴ Mostaza Claro Judgment, paragraph 36; Asturcom Telecomunicaciones judgment, paragraph 30; VB Pénzügyi Lízing judgment, paragraph 47; Banco Español judgment, paragraph 40; Banif Plus Bank judgment, paragraph 20; Banco Primus judgment, paragraph 41; Karel de Grote-Hogeschool judgment, paragraph 27.

⁴⁵ Océano Grupo judgment, paragraph 27; Mostaza Claro judgment, paragraph 26; Asturcom Telecomunicaciones judgment, paragraph 31; VB Pénzügyi Lízing judgment, paragraph 48; Banco Español judgment, paragraph 41; Banif Plus Bank judgment, paragraph 21; Karel de Grote-Hogeschool judgment, paragraph 28.

⁴⁶ Mostaza Claro judgment, paragraph 38; Banif Plus Bank judgment, paragraph 22; Karel de Grote-Hogeschool judgment, paragraph 29; Lintner judgment, paragraph 26; Werbrouck, J. (2023), p. 315 ff.; Nowak, J.T. (2021). *Ambtshalve toepassing van EU-recht door de Belgische burgerlijke rechter*. KU Leuven, 412 p.; Van Doninck, J. (2020-2021), p. 767.

⁴⁷ CJEU 21 November 2002, C-473/00, ECLI:EU:C:2002:705, Cofidis SA, paragraph 33 (hereinafter: Cofidis judgment); Karel de Grote-Hogeschool judgment, paragraph 31; CJEU 20 September 2018, C-51/17, ECLI:EU:C:2018:750, OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt., paragraph 88 (hereinafter: OTP Bank and OTP Faktoring judgment).

⁴⁸ Commission notice. (27 September 2019). *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts*, 2019/C 323/04, p. 46.

⁴⁹ Commission notice. (27 September 2019). *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts*, 2019/C 323/04, p. 45.

⁵⁰ Commission notice. (27 September 2019). *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts*, 2019/C 323/04, p. 49.

⁵¹ Asturcom Telecomunicaciones judgment, paragraph 47; CJEU 10 September 2014, C-34/13, ECLI:EU:C:2014:2189, Monika Kušionová, paragraph 56; CJEU 1 October 2015, C-32/14, ECLI:EU:C:2015:637, ERSTE Bank Hungary Zrt., paragraph 62 (hereinafter: ERSTE Bank Hungary judgment); SPV Project 1503 judgment, paragraph 60; Ibercaja Banco judgment, paragraph 44.

⁵² SPV Project 1503 judgment, paragraph 58; judgment Ibercaja Banco, paragraph 42.

ines whether there is a ‘non-negligible risk’ that the consumer will be unable to avail himself of the remedies provided for and thus will not enjoy effective protection. This risk will exist where specific procedural requirements make the use of the available remedies impossible or extremely difficult, or because of the fact that the consumer has incomplete information and therefore too limited knowledge to object effectively⁵³.

Would IOS meet the concerns of effective consumer protection? The purpose of IOS is to allow the creditor to obtain an enforceable title to the uncontested claim simply, quickly and without unnecessary formalities and this without a debate on the merits of the uncontested debt⁵⁴. As long as the debtor does not dispute the debt, there will be no substantive control by the court and therefore no *ex officio* review of unfair contract terms. IOS is however equipped with several procedural safeguards that contribute to effective consumer protection as required by the Unfair Contract Terms Directive. This materialises in the limitation of contractual interest and damages clauses to 10% of the principal amount,⁵⁵ the service of the notice for payment (personal contact), the reasonable waiting period of one month and eight days, the possibility of a free of charge contestation where “*any reason will do*” and the marginal control of the magistrate⁵⁶. Finally, there is the possibility for the debtor to initiate legal proceedings within the one-month period after service of the enforceable title. This allows the debtor to suspend recovery without excessive formalism, significantly short deadlines or excessive costs. This ultimate safeguard ensures that there is no significant risk that would prevent the debtor from acting.

In the *Banco Di Desio* judgement, the CJEU stated that Union law opposes ‘national legislation which provides that, where an order for payment issued by a court on application by a creditor has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings may not, on the ground that the force of *res judicata* of that order applies by implication to the validity of those terms, thus excluding any examination of their validity, subsequently review the potential unfairness of the contractual terms on which that order is based.’⁵⁷

In its considerations, the CJEU stated that that European Union law requires each member state to provide effective and appropriate means to terminate unfair terms in contracts between consumers and sellers⁵⁸. In order

⁵³ Commission notice. (27 September 2019). *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contract*, 2019/C 323/04, p. 51; *Banco Español* judgment, paragraph 54; *Finanmadrid* judgment, paragraph 52; CJEU 13 September 2018, no. C-176/17, ECLI:EU:C:2018:711, *Profi Credit Polska S.A. w Bielsku Białej v. Wawrzosek*, paragraphs 61-72 (hereinafter: *Profi Credit Polska* judgment).

⁵⁴ De Mol, L., & Rodriguez y Canteli, J. (2020), p. 74.

⁵⁵ Michielsens, A. & Chabot, L. (2018), p. 53.

⁵⁶ Snoeck, F. & Lombardi, P. (2019-2020), p. 1679.

⁵⁷ CJEU 17 May 2022, C-693/19 and C-831/19, ECLI:EU:C:2022:395, *Banco Di Desio* (hereinafter: *Banco Di Desio* judgment).

⁵⁸ *Banco Di Desio* judgment, paragraph 54.

to verify whether a national procedure makes the application of Union law impossible or very difficult (principle of effectiveness), the course and the special features of each national recovery procedure must be examined *in concreto*, taking into account the safeguarding of the rights of defence, the principle of legal certainty and the proper course of the recovery procedure. The principle of effectiveness does not go so far as to remedy the complete passivity of the consumer⁵⁹.

An important and unique feature of IOS is that after the non-contestation report (enforceable title) has been served upon him, the debtor can effectively defend himself by instituting legal proceedings to the competent Enterprise Court. This converts the administrative procedure into a legal procedure, in which the judge will hear the parties on the merits and can investigate whether the underlying contract contains an unlawful term. Moreover, due to the limitation of contractual interest and damage clauses to 10% of the principal sum in IOS, excessive damage clauses are automatically excluded at the start of the proceedings.

Consequently, a IOS recovery scheme for consumer debts based on the existing one would appear to meet European consumer protection concerns. Let us turn now to the draft legislative proposals circulated in 2018 and 2022.

4. IOS FOR CONSUMERS

The Explanatory Memorandum of the 2018 preliminary draft considers IOS recovery in the B2B context as a well-performing, fast and cost-efficient alternative to judicial recovery⁶⁰. About 200,000 default judgments are rendered annually by the Belgian justices of the peace for consumer claims, which amounts to about 80% of their caseload⁶¹. The added value of the digitalisation of recovery under IOS was amply demonstrated during the corona crisis⁶². The many advantages of IOS and the large number of default judgments would then appear to provide a justification for an extension of the existing rules on IOS to consumer debt recovery. To best meet the anticipated European consumer protection, it is however conducive to provide additional procedural safeguards in the B2C IOS procedure. The 2018 preliminary draft provides additional guarantees that would accommodate the special position of consumers in the economy⁶³. The main changes and additional guarantees compared to the current IOS are:

⁵⁹ Banco Di Desio judgment, paragraph 60.

⁶⁰ *MvT bij Voorontwerp van wet 2018*, p. 2.

⁶¹ Verbeke, A.-L. (2022), p. 72.

⁶² Interview kanaal Z : <https://trends.knack.be/kanaal-z/events-webinars/debatten-panelgesprekken/z-extra-round-table-sam-tes-ondernemingen-11-03-24/>.

⁶³ *MvT bij Voorontwerp van wet 2018*, p. 4.

— Restricting the scope of application to uncontested claims of which the justice of the peace has jurisdiction in last instance proceedings⁶⁴. This means that only small claims up to a maximum of EUR 2,000.00 can be recovered through IOS⁶⁵. What is striking here is that when an undisputed claim effectively falls within this scope of IOS, the legislator imposes an obligation to use IOS, thereby excluding the possibility of initiating court proceedings for claims not exceeding that amount, as opposed to the current IOS recovery in B2B relations⁶⁶.

— Next, before recovery is actually initiated, the bailiff must carry out a number of preliminary checks regarding the claim; he needs to verify that the debtor's data are correct and that the mandatory legal provisions on amicable recovery of consumer debts⁶⁷ have been carefully observed⁶⁸. In addition, the preliminary draft provides for the extension of the CBB so that the bailiff can obtain a more comprehensive overview of the debtor's solvency⁶⁹.

— Subsequently, the preliminary draft provides for an additional and free of charge notice sent by the bailiff after which a one-month period begins to run during which the debtor is given the opportunity to respond via a standard form⁷⁰.

— Finally, the debtor-consumer will be able to contest the debt for the first time upon receiving said notice. This can be done simply ticking the "contestation" box on the model form and returning it to the bailiff. Consequently, the debtor does not have to state any reason for contesting⁷¹.

In the summer of 2022, a further draft prepared by Professor Alain-Laurent Verbeke was then incorporated by former Justice Minister Vincent Van Quickenborne into a 'Preliminary draft law containing measures in the fight against over-indebtedness'⁷². This preliminary draft law distinguishes two major phases in the procedure; the mandatory prior verification phase and the optional subsequent recovery phase. The main modifications and additional guarantees are briefly listed below:

— The draft provides a preliminary compulsory double check, where the bailiff verifies whether the legal requirements regarding the invoice have been respected, whether the information regarding the debtor is correct and whether the mandatory provisions on amicable recovery of consumer debts have been complied with. Next, the bailiff should examine the consumer's solvency, i.e. the feasibility of recovery. Early detection of insolvent debtors

⁶⁴ *Voorontwerp van wet 2018*, p. 4, 17 and 24.

⁶⁵ *MvT bij Voorontwerp van wet 2018*, p. 4-5.

⁶⁶ *Voorontwerp van wet 2018*, p. 12 and 17.

⁶⁷ The law of 20 December 2002 on the amicable recovery of consumer debts was repealed by the insertion of Book XIX of the Economic Law Code 'Consumer Debts'.

⁶⁸ *Voorontwerp van wet 2018*, 2, 5, 17-18 and 25.

⁶⁹ *Voorontwerp van wet 2018*, p. 14, 18 and 25.

⁷⁰ *Voorontwerp van wet 2018*, p. 7-8 and 26.

⁷¹ *MvT bij Voorontwerp van wet 2018*, p. 8.

⁷² Verbeke, A.-L. (2022), p. 67.

in order to avoid useless costs is a very important element for consumer claims⁷³.

— This is followed by an advance notice (by letter, mail or text message) via the bailiff asking the consumer to proceed with payment within a period of 15 days. This notice includes the various response options and the consequences should the consumer fail to respond⁷⁴.

— In the absence of a response, the bailiff will proceed with the service of the notice for payment (as in the current IOS), which obliges him to carry out another solvency investigation. In the event of (imminent) insolvency, the bailiff is obliged to end the IOS. If the solvency check is positive, the formal notice will be served and the recovery phase will begin⁷⁵.

— After service of the formal notice, the bailiff will be obliged to accept an instalment plan proposed by the debtor if it allows the debt to be settled within six months. If it extends over a longer period, this will require the consent of the creditor. A refusal of the proposal amounts to a dispute which implies the termination of the IOS. The instalment plan will be recorded in an official report of non-contestation which will be automatically notified via the CROS-Register to the justice of the peace who will be responsible for judicial oversight of the payment arrangements⁷⁶.

— The major change as compared to the 2018 preliminary draft is the role of the justice of the peace in declaring the report of non-contestation enforceable. Through the CROS-Register, the justice of the peace has access to the entire file and has the power to verify whether everything has been done correctly. In doing so, the justice of the peace can decide to halt the proceedings and additionally refer the consumer to protective social services⁷⁷. After the delivery of the enforceable title, the debtor will receive a final warning via the bailiff (letter, SMS, mail, etc.) allowing the consumer another eight days to pay the debt, dispute it formally or request a repayment plan. In the event of a dispute, enforcement cannot be commenced and the recovery will be discontinued⁷⁸.

Both preliminary drafts contain adequate safeguards that contribute to effective and efficient consumer protection. On the one hand, the partial digitalisation of IOS has a great added value which has both a time and cost-saving effect. On the other hand, personal contact with the debtor will also contribute to effective consumer protection. Together, both elements form the core of an efficient consumer debt recovery scheme that would safeguard the interests of the debtor and the creditor. In that regard, the following elements would require careful consideration:

⁷³ Verbeke, A.-L. (2022), p. 69 and 76; Articles 5 and 6 *Preliminary draft law 2022*.

⁷⁴ Verbeke, A.-L. (2022), p. 78; Article 6, § 3 *Preliminary draft law 2022*.

⁷⁵ Verbeke, A.-L. (2022), p. 80 and 82; Article 7 *Preliminary draft law 2022*.

⁷⁶ Verbeke, A.-L. (2022), p. 84; Article 8 *Preliminary draft law 2022*.

⁷⁷ Verbeke, A.-L. (2022), p. 73, 85 and 86; Articles 10 and 11 *Preliminary draft law 2022*.

⁷⁸ Verbeke, A.-L. (2022), p. 86.

— The double formal control that is very evident in both preliminary drafts. The bailiff must check beforehand whether the data relating to the debtor are correct and whether the legal formal requirements and the mandatory provisions on amicable recovery of consumer debts have been complied with. Given the importance of a thorough solvency investigation, the CBB should provide the bailiff with all information required to detect a (looming) financial insolvency at an early stage. This will allow him to better assess the advisability and usefulness of recovery under IOS⁷⁹. Early detection of insolvent debtors avoids useless costs, which will benefit both the debtor and the creditor.

— An advance notice to which standard forms are attached that allow the consumer-debtor to respond in a low-threshold manner with either the full payment of the debt, a request for payment facilities or a dispute of the debt (just as in the current IOS). The mandatory acceptance of the instalment plan with a six-month deadline is an essential element here. The bailiff goes *in situ* to serve this advance notice and can thereby actually verify the debtor's solvency and provide explanations to the debtor where necessary.

— The marginal check on the enforceability of the report of non-contestation. The advance notice already gives the consumer an additional opportunity to dispute the debt or request an instalment plan, which also extends the deadline. If there is no response from the debtor or the instalment plan is not followed punctually, a marginal control by the justice of the peace, comparable to the B2B IOS, should suffice. If the consumer-debtor proposes an instalment plan exceeding a six month-period, the bailiff should reassess the debtor's solvency and relate this information to the creditor, making full use of his facilitating role⁸⁰.

— Finally, upon receipt of the enforceable title, the bailiff will send a final warning (letter, SMS, e-mail, etc.), giving the consumer another eight days to pay the debt or request a repayment plan. A dispute at this stage should no longer lead to the automatic termination of the procedure. The consumer who does not agree at this stage should file court proceedings within one month.

— Legal doctrine has criticised the compulsory use of a lawyer in the current B2B IOS because of its cost and limited added value⁸¹. In most cases, the role of the lawyer is minimal or even non-existent⁸². The bailiff would appear equally or even better suited to carry out any prior check.

Due to a lack of political consensus at the government level, among other things on the adequate level of consumer protection and the role of the lawyer, these proposals have not been formally submitted to the parliamentary process yet.

⁷⁹ Snoeck, F. (2021), p. 11.

⁸⁰ Art. 519, § 3 and 4 JC.

⁸¹ Berthe, A. (2020), p. 43; Gillaerts, P. (2017-2018), p. 623; De Jaeger, T. (2017), p. 876.

⁸² Berthe, A. (2020), p. 43.

5. CONCLUSION

In recent years, a change in mentality in the recovery of outstanding debts has occurred. Much attention is now being paid to the fact that relatively small debts should not escalate into excessive amounts due to the additional recovery costs⁸³. At the same time, the self-employed and SMEs as creditors show a greater financial vulnerability with regard to defaults and often have no or only limited resources to initiate legal recovery proceedings⁸⁴. An efficient and effective recovery procedure for small and undisputed consumer debts could offer a balanced outcome benefiting both creditors and consumers. An extension of IOS to consumer debts has been cited repeatedly in policy documents⁸⁵ to help meet changed attitudes towards debt recovery and to curb over-indebtedness among consumers. Having already tried its hand at IOS in B2B relations, Belgium is now reflecting on its extension to B2C. Concerns of European consumer protection do not seem insurmountable. The Belgian experiment may yet yield results both at home and abroad⁸⁶.

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⁸³ Snoeck, F. (2021), p. 9.

⁸⁴ Interview kanaal Z : <https://trends.knack.be/kanaal-z/events-webinars/debatten-panelgesprekken/z-extra-round-table-sam-tes-ondernemingen-11-03-24/>.

⁸⁵ Raad voor het Verbruik. (11 May 2017). *Advies betreffende de problematiek van de herinneringskosten, de kosten van ingebrekestelling en de nalatigheidsinteressen in geval van laattijdige betaling van facturen*, <https://economie.fgov.be/sites/default/files/Files/About-SPF/avis-cc-rvv/Advies-508-Raad-Verbruik.pdf>, nr. 508, Kamer. (2019-2020). *Verslag namens de Commissie voor Economie, Consumentenbescherming en Digitale Agenda houdende de schuldenindustrie en overmatige schuldenlast voor consumenten*, nr. 55-0839/001; Voorontwerp van wet 2018; Voorontwerp van wet 2022.

⁸⁶ This contribution is based upon the Dutch language master of laws' thesis that the first author wrote in the academic year 2021-22 at the Vrije Universiteit Brussel, under the supervision of the second author, acting as her promotor. The first author drafted a up to date synthesis of her master thesis in Dutch, which was then translated, revised and redrafted by the second author.

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STREAMLINING THE SMALL CLAIMS PROCEDURE IN NORTH MACEDONIA: HOW FAR ARE WE FROM DIGITALISATION AT NATIONAL AND EUROPEAN CROSS-BORDER LEVEL?

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ABSTRACT: The streamlining of small claims procedures has preoccupied national and European legislators for some time. Unfortunately, what is happening at the European level and beyond, until recently did not find an echo in the Macedonian small claims procedure. The paper will demonstrate that the overall direction of the changes in this procedure so far has been to expand the scope of application of the procedure rather than to introduce simplifications. The proposal of the new Macedonian Law on Civil Procedure is a significant step in that direction. In addition to this, the paper analyzes the operational options for ICT in the Macedonian civil procedure in general and accordingly in small claims procedure, having the phrase “Code is law” (and consequently “Code is process”) as a starting point for discussions. The author concludes that the improved legal framework alongside with further investment in ICT in the justice system will probably make small claims procedure a good candidate for complete digital justice in a near future. Furthermore, the paper aims to highlight that the ongoing process of digitalisation and e-justice in North Macedonia gains importance not only at national level but also for improving the cooperation with other justice systems, particularly those of EU member states.

KEYWORDS: small claims; simplified procedure; North Macedonia; digitalization.

SUMMARY: 1. INTRODUCTION.— 2. A BRIEF ROUND TRIP TO CURRENT MACEDONIAN SMALL CLAIMS PROCEDURE: FACTS, FIGURES, AND LEGAL FRAMEWORK.— 3. THE CURRENT STATE OF ICT OPERATIONAL OPTIONS.— 4. COMPLIANCE WITH THE EU-

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ROPEAN SMALL CLAIMS PROCEDURE.— 5. THE PROPOSAL OF THE NEW MLCP: A STEP FORWARD TO MORE EFFICIENT AND COST EFFECTIVE RECOVERY OF SMALL CLAIMS.— 6. OTHER ACTIVITIES FOR STREAMLINING THE SMALL CLAIMS PROCEDURE THROUGH ICT TOOLS.— 7. CONCLUSION.— 8. BIBLIOGRAPHY

1. INTRODUCTION

Although two and a half decades have passed since a catchphrase “code is law” has been coined,¹ debates surrounding the questions of whether “Code is law” (and consequently “Code is process”)² or “Code is code, law is law”, are still vigorous.³ Nevertheless, we must admit that asjurists (here I mean particularly to those of us who were not born with a smart phone in hands) in efforts to defend the latter concept, have increasingly yielded to the former. Why? The answer is simple: we recognized far-reaching benefits of a technology-driven approach to the law. Not only did we realize that this approach could help the legal system function in a fairer and cost-effective way in some simple scenarios, but we seem to have embraced the idea that code has the potential of doing the work of legal rules⁴, and accordingly of legal procedures.

At the same time, we are fully aware of the fact that the trend of digitalisation is redefining the very fundamentals of everything it touches. In this vein, governing the dispute resolution processes through codes undeniably departs us from traditional legal avenues. Yet, we have embraced the poten-

¹ The mentioned catchphrase is coined by Lawrence Lessig in his book *Code and Other Laws of Cyberspace*, New York, 1999. See also his article “Code is Law, on liberty in cyberspace”, *Harvard Magazine*, 1.1.2000. <https://www.harvardmagazine.com/2000/01/code-is-law.html>. accessed 4 April 2024. Lessig, L. Code is Law, liberty in cyberspace. *Harvard Magazine*, 1.1.2000. <https://www.harvardmagazine.com/2000/01/code-is-law.html>.

² Although this phrase is not used that often, for those whose preoccupation is procedural law, it is the essence of the discourse.

³ I want to single out some recent exceptional papers on this topic: Oster, J. (2021). Code is code and law is law - the law of digitalization and the digitalization of law. *International Journal of Law and Information Technology*, 29, Issue 2, 101–117. <https://doi.org/10.1093/ijlit/eaab004>; Nordel, E. (2021). Code is Law – Deterritorialisation and Reterritorialisation of Law, Law is Code – Cyberspace, Personalisation Algorithms and Human Cognition. *Anthropocenes – Human, Inhuman, Posthuman*, 2(1): 10. <https://doi.org/10.16997/ahip.932>; Rubim Borges Fortes, P. (2020). Paths to Digital Justice: Judicial Robots, Algorithmic Decision-Making, and Due Process. *Asian Journal of Law and Society*, 7, 453–469; Kaeseberg, T. (2019). The Codeification of law and Its Potential Effects. *Stanford Journal of Blockchain Law & Policy*, 2. No.2, 232-239, Hassan, S. and De Filippi, P. (2017). The Expansion of Algorithmic Governance: From Code is Law to Law is Code. *Field Actions Science Reports: The Journal of Field Actions. Special issue 17: Artificial Intelligence and Robotics in the City. Open Edition Journals*. <https://ssrn.com/abstract=3117630>.

⁴ Someone will say I am old fashioned, but I am just careful, and I do not give up that easily. In that regard, on all the hindrance to the full implementation of the concept “Code is law” (and accordingly “Code is process”) I refer to Tian Ma’s brilliant analysis, which “grapples with whether technological developments have enabled code to truly embody the concept of law, and substitute the role of law in a cyberspace which increasingly simulates society”. I will single out only this relevant sequence from the conclusions: “Code is therefore incapable of replicating not just the semantic interpretation which forms a key aspect of legal rules, but also the *ex-post* application of the legal process that constitutes legal rules.” See Ma, T. (2021, November 9). Is Code Law?. *Legal Tech Blog*. <https://legal-tech.blog/is-code-law>.

tial of Information and Communication Technology (henceforth: ICT) which has become a powerful driver of change in justice system. We perceived that access to justice may be enhanced through algorithms that can provide responses to many disputes, inevitably to minor cases or small claims disputes. By accepting the substitution of physical settings for virtual ones, the building blocks for automating legal decisions, we have accepted to completely skip the courtroom, in which magical scenes of human replication take place. That's it, the end of this debate and the beginning of another - how far have we come with it?

A growing number of EU jurisdictions and beyond are speeding up justice by digitising many court processes, from filling the claims and service of documents as a starting point to introducing fully digitalized procedures, in both national and cross-border context. Additionally, many private organizations have established their own dispute resolution platforms that test innovative techniques and study results thereof to help offer alternatives to traditional justice.⁵ Many projects are launched to identify the areas of civil justice that are suitable to ICT tools or to assess the level of their readiness to shift to partial or fully digital justice in national and cross-border level. A bulk of comprehensive studies and scientific papers has been also written on these topics, masterfully expounding the different aspects of streamlining and digitalisation of civil justice, including recovering of small claims.⁶ Against this background, the author of this paper harbors a modest ambition. The author is focused on analyzing the situation regarding small claims procedure and its digitalisation in North Macedonia, a country that is not yet an EU member state, though its membership has been looming on the horizon for two decades. By presenting the current situation on a both normative and ICT level and by elaborating the efforts that have recently been made to streamline small claims procedure in North Macedonia, the author aims to give an answer to the question posed in the title of this paper.

⁵ European Bank for Reconstruction and Development. (2023). *Assessment report for readiness for the introduction of online courts*. <https://www.ebrd.com>.

⁶ See for e.g. Rijavec, V., Ivanc, T. & Keresteš, T. (eds.) (2014). *Simplification of Debt Collection in the EU*. *Kluwer Law International*; Harley, G., Said, A. (2017). *Fast-tracking the Resolution of Minor Disputes: Experience from EU Member States*. The World Bank, Washington, D.C.; Petkova, S., Gladys Senderayi, R. (2020). *Two for One: How Leveraging Small Claims Procedures Can Improve Judicial Efficiency and Access to Justice*. *Equitable Growth, Finance and Institutions Notes*, The World Bank, Washington, D.C. <http://hdl.handle.net/10986/34927>; Silvestri, E. (2018). *Small Claims and Procedural Simplifications: Evidence from Selected EU Legal systems*, *Access to Justice in Eastern Europe*, 1, 5-13; Gioia, G. (2022). *Small Claims: Market Realities and New Possibilities*. *Revista Ítalo-Española de Derecho Procesal*, 1, 1-15; Nieva-Fenoll, J. (2022). *Online Dispute Resolution for small claims: Is This the Only Realistic Solution?*. *Revista Ítalo-Española de Derecho Procesal*, 1, 25-36; Giacalone M., Sajadeh Salehi, S. (2022). *Small Claims and the Pursuit of (Digital) Justice; A Tiered Online Dispute Resolution Perspective*. *Revista Ítalo-Española de Derecho Procesal*, 1, 181-213 and many other valuable contributions published in the Special Issue "Dealing with small claims in Digital Era". (2022). *Revista Ítalo-Española de Derecho Procesal*, Vol. 1/2022.

2. A BRIEF ROUNDTRIP TO CURRENT MACEDONIAN SMALL CLAIMS PROCEDURE: FACTS, FIGURES, AND LEGAL FRAMEWORK

North Macedonia has never had stand-alone small claims courts in place.⁷ Moreover, under the influence of the socialist ideology that there is no place to distinguish between small and large value disputes, and that all cases, regardless of the monetary value at stake, should be treated the same, in North Macedonia (as well as in other countries of the former Yugoslavia) there was no specific procedural path for resolving small claims for decades. In 1972, a compromise was made between the radical application of the previously unacceptable principle of “*de minimis non curat praetor*” and the effort to provide the parties a procedure for resolving small claims in which some of the guarantees of due process will be reduced to a tolerable minimum.⁸ Several decades have passed since then, and this procedure has remained fundamentally unchanged. Some minor procedural changes that have been made over time do not affect this general finding. On the other hand, the legislator has been a true virtuoso with frequent changes to the monetary threshold for a claim to be qualified as small. It doesn’t take much backtracking to make this clear. The analysis of the applicable Macedonian Law on Civil Procedure (henceforth: MLCP) of 2005 and its subsequent amendments⁹ will be sufficient in this regard.¹⁰ For a while now —since the latest amendments of MLCP of 2015— the claim ceiling is set at MKD 600,000 which is approx. EUR 9700 for both civil and commercial disputes.¹¹ The result is that nowadays, majority of civil cases (but not commercial ones) are resolved in small claims procedure.¹² One may conclude that thereby the access to justice has been improved significantly, providing for expedite and cost-effective avenue for resolving small claims. But is it so?

It might be argued that this is not the case, as an in-depth analysis shows the opposite, considering at least the following three points: first, the threshold for civil (personal) claims is set too high, and does not reflect the eco-

⁷ In that vein, North Macedonia fits into the institutional arrangements within the EU, as in most EU Member States small claims fall under the jurisdiction of regular courts, usually district courts or other relevant courts of first instance, depending on the type of claim. Only two EU Member States (Greece and Malta) have dedicated small claim courts. See, Harley, G., Said, A. (2017). p. 18.

⁸ Triva, S., Dika, M. (2004). *Gradansko parnično procesno pravo*, Zagreb, 818- 819.

⁹ Official Gazette of RM No.79/2005, 110/2008, 83/2009, 116/2010 and 124/2015.

¹⁰ According to the MLCP of 2005, the monetary threshold for civil disputes was set at MKD 60,000, while for commercial disputes at MKD 300,000. With the amendments of 2008, the threshold was tripled in civil disputes - up to MKD 180,000, while it remained the same in commercial disputes. The largest intervention was made in 2015, when the monetary value has been increased up to MKD 600,000 for both civil and commercial disputes (approx. EUR 9700).

¹¹ Articles 430 and 473 of the MLCP as amended in 2015.

¹² It becomes obvious by simply looking at the annual reports on the work of all basic courts in North Macedonia which are available on their websites.

conomic situation, living standard and Consumer Price Index in the country,¹³ second, though the courts fees were considerably reduced in 2020 regarding natural persons,¹⁴ small claims procedure before the basic courts still costs a lot (as other costs are also involved), because, which will be a third point, this procedure does not provide for a real simplified procedural path for small claims. With modest features of a real fast track for small claims and with a touch of modernity (in terms of ICT tools), this procedure does not offer sufficiently meaningful procedural simplifications compared to the general or fully-fledged civil procedure. And that is exactly the very purpose of this procedure: to be a mechanism for expedite and inexpensive resolution of disputes involving small sum of money. Though from comparative perspective, there is no template for establishing small claims procedures in different jurisdictions, some common features can be identified. It includes basically written procedure (oral hearings being an exception), or informal hearings if any, simplified rules of evidence, more streamlined rules of proceedings, and the possibility of self-representation. Some jurisdictions go even further and offer online procedure which encompasses downloadable application forms and check-lists, e-filing, or e-payment etc.¹⁵ With this in mind, let us briefly delve into the features of small claims procedure in the current Macedonian legislation¹⁶ with passing reviews of the situation in the EU member states.

Various sources provide information that in most EU jurisdictions, only simple law cases can be resolved in small claims procedure, such as contractual claims, rent, damages, movable property disputes, consumer, and commercial disputes. Certain types of disputes are expressly exempted.¹⁷

Under the MLCP small claims procedure is provided for pecuniary or non-pecuniary claims that do not exceed MKD 600.000 in both civil and commercial cases.¹⁸ In defining what constitutes a small claim, the MLCP provides for two criteria: positive and negative.

According to the positive criterion, three types of claims are considered to be small claims: 1) claims that refer to pecuniary claim up to the said mone-

¹³ Namely, according to official statistics for December 2023, the average gross monthly wage is MKD 60.036 (approx. EUR 970), while the Consumer Price Index has been constantly increasing. See <<https://www.stat.gov.mk>> accessed 4 April 2024.

¹⁴ With the amendments to the Law on Court Fees of 2020 (Official Gazette of RNM, No. 257/2020), the court fees for natural persons have been reduced eightfold, so that instead of the previous MKD 48,000 (approx. EUR 774) the highest amount of the court fee for initiation of the proceedings (and accordingly for court judgment) is MKD 6.000 (approx. EUR 96). Court fees to be paid by legal entities remained unchanged.

¹⁵ Harley, G., Said, A. (2017). p. 11; Giacalone, M., Gioia, G., Van der Borgh, K., & Salehi, S. S. (Eds.) (2023). *Small Claims, Digitalisation, and EU Market*. Academic and Scientific Publishers nv.

¹⁶ Chapter twenty-one of the MLCP - Small Claims Procedure (Arts.429-438) and Art.473 of the same law regarding small claims in Commercial Dispute Procedure.

¹⁷ Harley, G., Said, A. (2017). p. 8.

¹⁸ It is undisputed that there is no clear pattern for monetary thresholds among EU jurisdictions and that the amount at stake varies. Yet, it is also clear that basically the amount of money at stake reflects the economic situation of a given country, which as previously mentioned, is not the case with North Macedonia.

tary threshold, 2) non-pecuniary claims where the plaintiff in the statement of claim agrees to receive a certain amount of money up to the said monetary threshold, instead of fulfillment of a certain claim (so-called *facultas alternativa*); 3) claims for handing over moveable property whose value, as stated by the plaintiff, does not exceed the said monetary threshold.¹⁹

On the other hand, according to the negative criterion, the following disputes never constitute a small claim: 1) real estate disputes, 2) labor disputes of a status nature, and 3) disputes of disturbance of possession.²⁰ In addition, under the Family Law²¹, maintenance disputes never constitute a low value dispute as well.

Moreover, small claims procedure applies to claims up to said ceiling in result of transformation, by submitting the opposition to the court payment order.²² Paradoxically, this does not apply to the cases upon an objection against a notarial payment order, when a regular civil procedure is conducted, though beyond any doubts, it should result, *mutatis mutandis*, in small claims procedure. From EU perspective it should be noted that the calculation of the value of the claim concerns only the principal claim, and excludes interests, expenses, and other disbursements at the time of submitting the claim.²³

There is a possibility to transfer a case from ordinary civil procedure to small claims procedure and *vice versa*, if the plaintiff reduces or modifies the claim so that it is above or below the prescribed ceiling, respectively.²⁴

From a purely procedural point of view, the procedure for small claims has its specificities, which actually represent deviations from the regime of the general civil procedure. If there is no specific rule on small claims procedure, general rules on civil procedure apply.²⁵ As an example, assistance and representation of attorneys is merely optional, as in general civil procedure: parties may be represented by a lawyer, but self - representation is also possible.

Deviations from the rules on general civil procedure refer to: 1) shorter deadlines for: paying the court fee²⁶, submitting an appeal, voluntary fulfillment of the obligation determined by the judgment and submitting a proposal for additional judgement (eight days instead of 15 day)²⁷; 2) non-holding

¹⁹ Arts. 430 and 473 of the MLCP.

²⁰ Art. 431 of the MLCP.

²¹ Art. 276 of the Family Law (Official Gazette of RM, No 80/1992, 9/1996, 38/2004,33/2006,84/2008, 67/10, 156/10, 39/12,44/12, 38/14, 115/14, 104/15,150/15 and 53/2021).

²² Art. 432 of the MLCP.

²³ Art. ex-Art. 28 of the MLCP.

²⁴ Art. 435 of the MLCP.

²⁵ Art. 429 of the MLCP.

²⁶ If the plaintiff does not pay the court fee within this deadline, it is deemed that the claim is withdrawn (Art. 429-1 of the MLCP).

²⁷ On the other hand, the defendant is obliged to submit a written reply to the statement of claim, according to the general civil procedure rule (within 30 days), otherwise a default judgment will be

of a preparatory hearing though the procedure is basically oral since the oral hearing is mandatory^{28,29}; 3) the obligation of the parties to assert all facts and propose evidence at the first session of the main hearing at latest³⁰ or by the same moment to notify the court if they agree to resolve the dispute by mediation³¹; 4) the consequences of the plaintiff's failure to appear at any session of main hearing-he/she is deemed to have withdrawn the claim, regardless of the defendant's conduct³²; 5) much shorter and succinct content of the minutes of the main hearing³³; 6) the announcement of the judgment immediately after the conclusion of the main hearing³⁴; 7) the exclusion of the revision (second appeal) against a decision of the second instance court³⁵.

According to the MLCP, a small claims decision (judgement and the decree by which a small claim procedure has been concluded) can be appealed. Until 2015, there was a reduced list of grounds for an appeal compared to the general civil procedure. Namely, the erroneous or incomplete determination of state of facts was not a ground for appeal. In result, the appellate court should not revoke the judgment and return the case to the first instance court for a retrial due to erroneous and incomplete factual findings. While the latter solution still exists in law³⁶ the latest amendment of the MLCP of 2015 include factual findings as the ground for appeal.³⁷ It can be assumed that this novelty followed because of the multiple increase of monetary threshold in small claims procedure, as stated above. However, this brought the small claims procedure unbearably close to the general litigation procedure and thereby takes away the meaning and purpose of this special procedure.

passed, if other requirements are also met. It is obvious that here the legislator failed to prescribe a shorter deadline, although it would have significantly accelerated the procedure.

²⁸ On the contrary, in many EU member states, court hearings are not mandatory and court may decide to resolve the dispute in written procedure. See Harley, G., Said, A. (2017). p. 19.

²⁹ However, there is a possibility to pass immediate judgment without holding a hearing under the rule of general civil procedure if the defendant admitted the relevant facts in the reply to the statement of claim (Art. 321 of the MLCP). In such a situation the case will be resolved in written procedure.

³⁰ Art. 436 of the MLCP. This provision excludes the application of the general civil procedure rule, according to which the parties are allowed to present new facts and evidence even at the latest stages of the first instance proceeding but only with a proper excuse for the belated submission.

³¹ A preliminary attempt at mediation is not mandatory in small claims procedures. Mediation remains at parties' disposal, but it is rarely used in practise.

³² Art. 436 (4) of the MLCP. Compare with Art. 280 of the MLCP which applies to general civil procedure.

³³ Art. 434 of the MLCP.

³⁴ Art. 437 of the MLCP. It means that the passing of the judgement cannot be postponed, as it is a case in general civil procedure when dealing with more complex cases (Art. 324(4) of the MLCP).

³⁵ Art. 438 (4) of the MLCP.

³⁶ Even though it is evident that this is being done by reference to the wrong article of law (Article 358 instead of Article 359 of the MLCP).

³⁷ Art. 438(1) of the MLCP.

3. THE CURRENT STATE OF ICT OPERATIONAL OPTIONS

After this brief presentation and general assessment of the legal framework, let focus *in medias res*-what are the existing ICT tools in Macedonian small claims procedure?

The electronic technology and communication have been influencing Macedonian civil procedure since 2008. Recognizing the service of documents as one of the most “neuralgic” and dysfunctional points of Macedonian civil procedure (“a black hole in which the courts are losing their efficiency”), the amendments to the MLCP of 2008 introduced the electronic service of documents via the Court’s Electronic Information System (CEIS). Service via CEIS has become mandatory for certain categories of entities and persons (state bodies, persons performing public authorizations and lawyers), who have an obligation to register an electronic mailbox at the CEIS. If electronic delivery is not possible or there are difficulties, it can be replaced by physical delivery.³⁸ These amendments also provide for the possibility to effect the service electronically also upon party’s request at the electronic address provided in the request. The rules on electronic service of documents were subject to further amendments in 2010. The amendments were twofold: first, they have expanded the entities for which e-service is mandatory (state administration bodies, local self-government unites and all legal entities), and second, they have raised standards for secure identification and transmission of documents within CEIS.³⁹ In addition, the amendments of the MLCP of 2010 introduced the mandatory digital audio recording of the hearings⁴⁰ and the possibility of e-filing.⁴¹ It should be made clear that all these ICT tools that have been introduced in general civil procedure, are equally applicable in small claims procedure, as stated above.

Although the MLCP embraced some aspects of digitalisation of civil procedure since 2008, and more intensively since 2010 (e-service, e-filing, mandatory digital audio recording), the process is still ongoing and updating with numerous hurdles. The current state of digitalization in court system could be briefly described as follows. Electronic data processing is largely used in the courts, but primarily as a tool for internal case management. The Automated Information System for Court Case Management (ACCMIS)⁴² keeps a complete record of court proceedings from receipt of claims and other submissions, through automatic distribution of cases to judges, until archiving

³⁸ Art. 125-a and 126-a of the amendment of the MLCP of 2008.

³⁹ Art. 125-a and 126-a of the MLCP as amended in 2010.

⁴⁰ Art. 119-a and 119-b of the MLCP.

⁴¹ Art. 98 (1) of the MLCP as amended in 2010.

⁴² The system itself has three-layer architecture (Database Server, Application Server, Client part), developed with DELPHI software, it works on Microsoft Windows Server 2008 R2, Microsoft SQL Server 2008 platform and is installed in each court.

of each case.⁴³ In addition to it, there is the FEMIDA system for mandatory digital audio recording of hearings. However, despite the efforts that have been made so far to digitize court services in general, official reports on the court ICT system show that the reality regarding the use of ICT tools by Macedonian courts is devastating. The lack of adequate resources, especially hardware equipment that is largely outdated, defective and does not support software solutions used in courts, are currently key problems in the digitization process.⁴⁴

On the other hand, the existing ICT tools between the court and the parties and other participants in the proceedings are limited. There is an e-service and e-filing portal⁴⁵ but it is still at the first stage of implementation: e-service from the court to the users, but not *vice versa*. It must be noted that since 2010, when the rules on service by registered electronic mailbox were first introduced until nowadays, the e-service has not become the default method of service of document, even for the entities and persons for which it is mandatory. However, in the last few years (especially since the COVID-19 pandemic), a significant increase in e-service has been noticeable, with a tendency for full and consistent application of legal provisions, which significantly affects the reduction of delivery costs and improves efficiency. Regarding the possibility to e-submissions, in contrast to some EU member states that have embraced e-filing, Macedonian civil procedure (including small claims procedure) still relies on traditional court filing in paper format. The statutory rules which provide that submissions can also be filed electronically have never been implemented in practice yet,⁴⁶ nor the Judicial Portal offer downloadable application forms. Moreover, there is no legal basis for the use of distance communication technology for conducting the oral hearings, or evidence-taking in civil procedure in general (and accordingly in small claims procedure), though there were pilot projects in some courts, resulted with fully digital courtrooms. All mentioned affects not only the preparation and timeline for filling the claim, but also protract the conducting of hearings and taking of evidence.

⁴³ In North Macedonia, the ICT has traditionally been in the domain of the Supreme Court of North Macedonia where the Center for Informatics was established. It takes care of the smooth functioning of the existing ICT systems at the state level, supported by the units located in each court.

⁴⁴ For more details on the condition of judicial ICT system see Use of Advance Electronic Tools in the Judiciary, Basic Assessment. (December, 2020). OSCE Mission in Skopje. The situation today is perhaps a shade better than 2020, but still unsatisfactory.

⁴⁵ See <https://edostava.sud.mk>.

⁴⁶ Notwithstanding that according to the rules the parties can communicate with the court basically in the context of the information portal of e-justice, parties increasingly communicate with the court by e-mail. For example, the applications with apologies or proposals to postpone a hearing are sent by e-mail to the court. This practice is not quite correct especially on the ground of identification and transmission standards that are established within CEIS.

4. COMPLIANCE WITH THE EUROPEAN SMALL CLAIMS PROCEDURE

As noted earlier, all EU member states deal with small claims in specific ways, either allocating them to special courts or relying on procedural rules that are different from the regular litigation. Besides national proceedings, the European Small Claims Procedure (henceforth: ESCP) exists for cross-border cases under certain requirements,⁴⁷ so that two parallel procedures (the national one and the European one) are available for recovering small claims at the choice of the plaintiff.⁴⁸ Nevertheless, a close look at the ESCP shows that due to many reasons (including the optional nature of the instrument), the ESCP is not a success story, being either not well-implemented into national legislation, or its actual application in many member states is being negligible.⁴⁹ The reasons to which this is most often attributed are, *inter alia*, the following: lack of awareness of the existence of the ESCP or lack of familiarity with its procedure, some unresolved procedural issues or issues reserved for internal systems and their divergent solutions, cumbersome service, language issues, costs of translation and other costs, enforcement uncertainties etc.⁵⁰

The small claims procedure, as designed by the MLCP, applies only in domestic cases, and does not touch cross-border relations, including these with the entities of EU Member States. On the other hand, Macedonian citizens, consumers, and entrepreneurs are included in European flows on daily basis, whether face-to-face or digitally. However, as North Macedonia is not an EU member state, EU rules do not directly apply to them and they cannot claim their rights in cross-border cases under the EU rules. Yet, bearing in mind that the highest strategic priority for North Macedonia is the EU membership and assuming it will happen soon, it is appropriate to compare Macedonian small claim procedure with the European one. The comparison provides an answer to the question of how suitable the Macedonian small claims procedure is for the collection of cross-border debts in the light of standards set by the ESCP⁵¹, but it is also important given that within the ESCP there are some procedural issues that the national legal system is called upon to respond. Since the structure and basic features of the ESCP have been exhaustively

⁴⁷ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, 1-22, This Regulation was further improved and modernized by the Regulation (EU) No 2015/2421 amending Regulation (EC) No 861/2007 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341, 24.12.2015, 1-13.

⁴⁸ Silvestri, E. (2018). p. 6.

⁴⁹ See Varregoso Mesquita, L., Marques Cebola, C., European Small Claims Procedure: An Effective Process? A Proposal for an Online Platform. *Access to Justice in Eastern Europe*, 2(14), 7-21.

⁵⁰ Ibid. Also Gioia, G. (2022). p. 3-4.

⁵¹ Of course, it should be emphasized that unlike national procedures, the ESCP is limited in cross-border cases and can only be opted in a cross-border case in line with Art. 3 of the Regulation. It is not applicable in a national case.

elaborated in numerous studies and papers, our aim here is not to explain it all again. On the contrary, referring to what has already been written about the structure, basic features, advantages, and shortcomings of the ESCP, our aim is to compare all this with the same aspects of the Macedonian small claims procedure and to draw some summary conclusions. Still, considering that this paper is focused on the process of digitalisation, it is inevitable to mention that the amendments to the ESCP (resulting from Regulation No 2015/2421) put special emphasis on this process by strengthening the use of distance communication technology, including to conduct of oral hearings, and the taking of evidence, as well as by enabling the e-service of documents and other written communications and distant payment of court fees.⁵²

The following table provides for an easy and quick comparison between two procedures on some key features,⁵³ indicating the overlaps as well as the differences between them.

Item	Macedonian small claims procedure	European small claims procedure
Scope	Civil and commercial matters	Civil and commercial matters
Monetary threshold	MKD 600.000 (approx. EUR 9.700)	EUR 5000
Type of claims	Pecuniary and non-pecuniary	Pecuniary and non-pecuniary
Standard forms	No	Yes
Distant payment of court fees	No	Yes
Representation by a lawyer	Optional	No
Further practical assistance for parties	No	Yes
Written phase	No	Yes
Oral phase	Yes	Possible, at the court discretion
Timeframe	No	Yes
E-service of documents	Yes	Yes
Distance communication technology (videoconference or teleconference)	No	Yes
Uncontested	Immediate judgement	Immediate judgement
Standard of review	Ful scale appeal	Review of the judgment in exceptional cases

⁵² See Arts. 8, 9 13 and 15a as replaced/inserted by the Regulation No 2015/2421.

⁵³ The comparison is neither complete nor detailed, as it would exceed the aims of this paper.

Summarizing what is presented in this table, it can be concluded that, if we put aside the monetary threshold that has been already discussed above, the deviations in Macedonian small claim procedure from the ESCP are in several key points: 1) lack of the principle of written form, 2) non-use of standardized forms and distance payment of court fees, 3) the absence of a legal basis for use of distance communication technology for holding hearings and evidence-taking and 4) standard of review of judgement.

5. THE PROPOSAL OF THE NEW MLCP: A STEP FORWARD TO MORE EFFICIENT AND COST EFFECTIVE RECOVERY OF SMALL CLAIMS

National lawmakers have all these in mind when they started drafting a proposal to the new MLCP. In that vein, as part of the package of changes to the litigation procedure, substantial changes have been introduced to small claims procedure, aiming to provide for a legal framework for resolving low value disputes in more efficient and a cheaper manner within the national jurisdiction.⁵⁴ The novelties refer to: 1) reducing the claim ceiling for disputes to be defined as a small claim dispute, 2) an extended list of disputes that are not considered to be small claim disputes, 3) establishment of basically written proceedings, 4) limited number of preparatory submissions, 5) more severe sanctions for the party in default; 6) abolition of the possibility to challenge the judgment to wrongly and incompletely determined factual situation; 7) setting shorter deadlines for specific procedural actions and 8) setting timeframes for completing first instance and appeal procedure.⁵⁵

To bring the monetary threshold for what is considered a small value dispute into line with the economic situation and living standard in the country, the claim ceiling has been reduced to less than EUR 1000 and 3000 (MKD 60.000 and 180.000) in civil and commercial disputes respectively. The proposed changes have also extended the negative enumeration in respect of small claims so that in addition to the existing ones (mentioned above), disputes over copyright and related rights, the industrial property rights, or the right to use a company name, as well as disputes over unfair competition and monopolistic behavior are not considered as small claims.

⁵⁴ As widely known, the ESCP leaves the implementation of the ESCP to the member states, if the regulation itself leaves things unregulated. Even though some countries took preparatory steps towards the implementation of the ESCP in the national legislation even before their official membership in the EU (e.g. Croatia), North Macedonia did not decide on it when preparing the proposal of the new MLCP. It is more than certain that a special law will not be adopted for this as in some countries (e.g. the Netherlands), which means that even the new MLCP (if adopted as proposed) will have to be amended to fill in the gaps of the ESCP.

⁵⁵ The Proposal on the new MLCP, July 2021. The ESCP leaves the implementation of the ESCP to the member states, if the regulation itself leaves things unregulated. Although some countries took preparatory steps towards the implementation of the ECHR in the national legislation even before their official membership in the EU (eg Croatia), North Macedonia did not decide on it when preparing the proposal of the new MLCP.

The new small claims procedure will be a written one: the court shall hold an oral hearing if it considers this to be necessary or if a party so requests (in the statement of claim, in the written reply to the statement of claim or in the preparatory submissions). Since the holding of a preparatory hearing is still not foreseen in this procedure, if the oral hearing is held at all, it will be the main hearing. The role of the preparatory hearing is taken over by the preparatory submissions. Namely, in addition to the statement of claim and the reply to the statement of claim (for which the deadline is shortened from 15 to eight days), each party can file one more preparatory submission (as a second written round).⁵⁶ Moreover, the filing of the statement of claim and the reply to the statement of claim are the final moments by which the plaintiff and the defendant respectively can present all facts and evidence. If, after receiving the reply to the statement of claim or after receiving the preparatory submissions, the court determines that the factual situation is not in dispute between the parties, and only written evidence has been proposed (and there are no other obstacles to pass a decision), it should render a judgment without holding a hearing.

The new provisions foresee stricter sanctions for the default party (in a case of failure to respond to the statement of claim or failure to appear at the hearing), being duly warned of the consequences of default. Sanctions are reasonably measured and range from the possibility of passing a judgment based on confession, through the withdrawal of a statement of claim to the possibility of the court to render a judgement based on the evidence at its disposal.

There is still a possibility to file an appeal against the first-instance judgment (due to the constitutional principle of two-tiered judicial proceedings), but the standard of review is limited on points of law (certain substantial violations of the provisions of the litigation procedure and a wrong application of the substantive law). No further appeal is allowed.

An essential novelty is the proposed timeframes in which the procedure should be completed: six months for the first-instance procedure and three months for the appeal procedure.

In the context of the focus of this paper, it should not be overlooked that the proposal of the new MLCP pays special attention to ICT tools in the conduct of ordinary litigation, which *mutatis mutandis* applied to small claims proceedings. The regime of e-service and e-filing as well as for the use of electronic documents in the procedure, have been updated in line with the EU standards which has already been implemented in Macedonian legislation.⁵⁷

⁵⁶ In that sense, the plaintiff can, within eight days from the day of receipt of the reply to the statement of claim, submit a preparatory submission responding to the allegations from the reply to the statement of claim, and the respondent can, within eight days from the receipt of the plaintiff's preparatory submission respond to the allegations contained in such submission.

⁵⁷ The Law on Electronic Documents, Electronic Identification and Trust Services (Official Gazette of RNM No. 101/19 and 275/19) which was adopted to comply with the Regulation (EU) No 910/2014

The use of distance communication technology for holding of hearings and taking of evidence is also included in the law.

In summary, if the provisions of the proposal of the new MLCP are analyzed in the light of the ESCP, it can be inferred that apart from the standardized forms (which have not been included) and the wider standard of revision of a judgment, the Macedonian small claims procedure will be very close to the ESCP. Given that the law is still pending in Parliament, some additional modernization and rationalization of the procedural rules might happen in the meanwhile.

6. OTHER ACTIVITIES FOR STREAMLINING THE SMALL CLAIM PROCEDURE THROUGH ICT TOOLS

Although the protracted procedure for the adoption of the new MLCP hinders the reforms of the civil justice system as a whole (including the recovery of small claims), likely in the meantime intensive work is going on regarding the digitalisation of the justice system within the framework of some other projects and in accordance with other strategic documents. They create solid assumptions for the future application of the new legal solutions, and can even lead to their further modernization. Namely, a decade after the first steps in digitizing the justice sector were taken, the Government of North Macedonia embarked in a major expansion of this process. Two strategic documents should be mentioned here: the Justice Sector IT Strategy for the period 2019-2024 and the latest Development Sector Strategy for Justice for the period 2024-2028,⁵⁸ whereas the digitalisation and e-justice is set as a key objective not only at national level but also for improving the cooperation with other justice systems, including those of EU member states. Namely, in the last strategic document it is explicitly stated that:

“By implementing ICT solutions and procedures in accordance with European and international standards, the goal is to increase timely access to justice services for all users, to improve the quality, protection and security of data and to cooperate with other justice systems, institutions of the EU, its member states and other international organizations”⁵⁹

Furthermore, the following specific objectives set in the Strategy should be pointed out: 1) establishment of an effective system for two-way exchange of documents (e-filing and e-service) and 2) establishment of a platform for on-line hearings, storage of audiovisual recordings and piloting in special

on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

⁵⁸ Both documents are available in Macedonian on the website of the Ministry of Justice. <https://pravda.gov.mk>. accessed 4 April 2024.

⁵⁹ Development Sector Strategy for Justice for the period 2024-2028, at p. 14.

proceedings.⁶⁰ No doubt, the realization of these two specific goals will be crucial in streamlining the small claims proceedings through ICT tools at both national and cross-level.

7. CONCLUSION

The simplified procedures for recovery of small claims help meet the modern objectives of efficiency and cost-effectiveness by providing mechanisms for quick and inexpensive resolution of civil and commercial disputes, thus building public trust and confidence in the judicial system. In the era of deep penetration of information technology in the judicial system, ICT tools can only strengthen already existing mechanisms for the collection of small claims both nationally and cross-border.

Macedonian's approach to small claims procedure is rooted in a long-standing tradition. However, for decades, the small claims procedure has never been on the agenda of more substantive changes, thus lagging behind the modern tendencies in this domain. Faced with the fact that the existing legislative framework is outdated and does not satisfy the requirements for quick resolution of real disputes of small value, the national legislators decided on more radical changes in that direction following the current European trends. Although the new solutions are still in legislative procedure, and it is uncertain in which format they will be adopted, the above analysis still gives us the freedom to conclude that: first, at national level, the new solutions (which are still far from a fully digitalised procedure), will result in more efficient and cost effective small claims procedure, and second, at EU level, the new rules have the potential to be easily adapted to cross-border cases, as required by the ESCP so far. However, not everything is within the legal framework. Even assuming that the legal framework is state-of-the-art, what we really need is further investment in ICT in the justice system, in terms of setting up the appropriate infrastructure. It mostly depends on this whether in the coming years the small claims procedure will not only be managed using certain ICT tools but will be a candidate for full digital justice.

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EFFECTIVE NATIONAL APPROACHES TO SMALL CLAIMS PROCEDURES: DIGITAL ENFORCEMENT IN SLOVENIA

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ABSTRACT: This paper explores effective strategies for resolving small claims disputes in Slovenia, with a particular emphasis on digital enforcement. It delves into both national and European small claims procedures, illustrating how digital enforcement enhances judicial efficiency and streamlines debt recovery. The paper also evaluates the benefits and drawbacks of digital enforcement within Slovenia's legal framework and proposes that digital tools, like the SCAN-II platform, could further improve the European procedure.

KEYWORDS: european small claims procedure; digital enforcement; Slovenia; digitalisation; judicial efficiency.

SUMARIO: 1. INTRODUCTION.— 2. SMALL CLAIMS PROCEDURES —COST-EFFECTIVENESS AND SPEED: 2.1. Slovenian national small claims procedure; 2.2. European small claims procedure.— 3. DIGITAL ENFORCEMENT AS AN EFFECTIVE APPROACH TO SMALL CLAIMS PROCEDURES: 3.1. Overview of digital enforcement; 3.2. Benefits and drawbacks of digital enforcement.— 4. A look into the future: digital tools in the ESCP?.— 5. CONCLUSION.— 6. BIBLIOGRAPHY

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1. INTRODUCTION

This paper argues that digital enforcement is an effective national tool in small claims dispute resolution, using the Republic of Slovenia (hereinafter, Slovenia) as a case study. In section 2, this paper briefly reviews the options available to a party with a small claim in Slovenia, including the national small claims procedure and the European small claims procedure (hereinafter, ESCP). We stress the importance of cost-effectiveness and speed when dealing with small claims. In section 3, this paper describes how digital enforcement fits into the Slovenian small claims system and argues that it is one of the key tools for lowering the cost of enforcing a party's rights. Furthermore, this paper discusses the positive and negative effects of digital enforcement and situates it within the broader system of legal options available to a party with a small claim. Finally, in section 4, this article connects the digital enforcement system to the ESCP, stressing the laudable efforts of the SCAN-II project.¹

2. SMALL CLAIMS PROCEDURES —COST-EFFECTIVENESS AND SPEED

The common purpose of small claims procedures is to minimise the cost and length of the proceedings since the costs of litigating such small claims often exceed the value of the dispute (European Commission, Directorate General for Justice, 2013; Ude, 2002, p. 381).² This can adversely impact access to justice as claimants may be discouraged from initiating proceedings to protect their rights (Ude, 2002, p. 381). Historically, small claims proceedings have their roots in English market courts, pie powder courts, and similar institutions (Bradway, 1940, p. 16). Furthermore, their advantages have been highlighted by academics for years (Bradway, 1940; Huan, 2012; Rong, 2011).

Failure to resolve small claims quickly and efficiently can negatively impact judicial resources, strain personal relationships, and disrupt business operations. To address these challenges, countries often implement special rules for small claims disputes that simplify and expedite the proceedings. These rules may include shorter deadlines, the omission of certain parts of the proceedings (such as pre-trial or main hearings), conducting proceedings in writing, and limitations on available remedies. The monetary threshold for small claims is typically determined based on the economic conditions of the country (Petkova & Senderayi, 2021).

¹ Small Claims Analysis Net II (SCAN-II), funded by the European Commission as part of the call JUST-2021-JCOO.

² See also Article 1 of the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Official Journal of the European Union, L 199/1 (Regulation) and recitals 1, 7, 8 and 36.

Thus, small claims procedures alleviate the burden on courts, reduce backlogs, and ensure justice for ordinary citizens (Harley & Said, 2017, p. 8). According to the Eurobarometer survey, the most common factors that encouraged respondents to pursue legal action against a business were the ability to conduct small claims proceedings without a lawyer and in writing (European Commission, 2012, p. 64; Harley & Said, 2017, p. 8). In Slovenia, the options available to a party with a small claim include the national small claims procedure and the ESCP, which coexist. Both systems include provisions aimed at enhancing the cost-effectiveness and speed of the proceedings, which are briefly presented below.

2.1. Slovenian national small claims procedure

Small claim disputes are regulated in Chapter 30 of the Slovenian Civil Procedure Act (hereinafter, CPA).³ Thus, Article 443 of the CPA stipulates that special procedural provisions can be used for disputes, where the value of the claim does not exceed 2.000,00 EUR⁴ (or 4.000,00 EUR in commercial matters⁵). Pecuniary and non-pecuniary claims may be litigated under chapter 30 of the CPA, as long as the claimant has indicated that they are willing to accept a sum of money not exceeding 2.000,00 (4.000,00) EUR in lieu of performance. Claims can also be made for movable property if the claimant asserts that the value of the property falls below the pecuniary threshold. When determining the value of the matter, only the principal claim is taken into account. Hence, interest, litigation costs, and ancillary claims are not relevant, in so far as they are not asserted as the principal claim.⁶

The CPA allows for the cumulation of claims even in small claims proceedings, provided that all claims have the same legal and factual background (Betteto, 2010, p. 717). However, the national small claims procedure cannot be used for disputes concerning immovable property, copyright, patents, and trademarks or the right to use a firm name, competition cases, or disputes relating to interference with possession.⁷ Moreover, given their specific nature, the small claims procedure cannot be used in matrimonial disputes and disputes regarding relationships between parents and children (Kveder, 2017, p. 4).

To enhance cost-effectiveness and expedite the proceedings, the Slovenian legislation on small claims incorporates various specific rules. These include preclusion rules concerning the pleading of facts and evidence, provisions for presumed recognition of the claim, prohibition of suspending the proceed-

³ Zakon o pravnem postopku, Official Journal of the Republic of Slovenia, no. 73/07 – official consolidated text, 45/08.

⁴ Article 443 of the Civil Procedure Act; Higher Court of Ljubljana, case number II Cpg 518/2023 (25. 1. 2024).

⁵ Article 495 of the Civil Procedure Act.

⁶ Supreme Court of the Republic of Slovenia, case number III IPS 61/93 (22. 12. 1993).

⁷ Article 444 of the Civil Procedure Act.

ings, simplified rules on collecting evidence, the possibility for accelerated judgment delivery, shorter deadlines, and restricted use of remedies in comparison to the regular civil procedure.⁸

Furthermore, the CPA strives for small claims procedures to be conducted purely in writing.⁹ However, parties may request oral hearings and consequently, two hearings may be held – one for stating the claim or defence and one preparatory hearing. Nevertheless, when the facts of the case are clear, the court does not need to wait for the preparatory hearing (Betteto, 2010, p. 722). In the Slovenian legal system, there is some dispute regarding the extent of the court's involvement in substantive and procedural questions. As a general rule, Article 285 of the CPA provides that the court should be proactively involved in the proceedings, however, certain scholars argue that substantive procedural guidance should be limited in comparison to the regular civil procedure (Pavlina, 2013, p. 2013).

2.2. European small claims procedure

The Slovenian national small claims procedure, governed by chapter 30 of the CPA, coexists with the ESCP, which is governed by Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007¹⁰ (hereinafter, ESCP Regulation). Thus, when a dispute with an international element arises, the creditor who meets the criteria for both procedures may choose whether to settle the dispute within the national or the European framework (Kramberger Škerl, 2015, pp. 283–303).

The ESCP is a simplified procedure that allows natural and legal persons to speed up the resolution of cross-border disputes where the value of the claim does not exceed 5.000,00 EUR in civil and commercial matters, excluding family law, maintenance, bankruptcy, employment, and social security matters.¹¹ The ESCP may be utilised when at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized.¹² Nevertheless, the ESCP cannot be used in Denmark (*European Small Claims Procedure*, 2023).

The ESCP can be used for both pecuniary and non-pecuniary claims (expressed in monetary value). It should be noted that European legislation is particularly attentive to consumers as creditors.¹³ Crucially, judgments ren-

⁸ See Chapter 30 of the Civil Procedure Act.

⁹ Article 450 of the Civil Procedure Act.

¹⁰ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Official Journal of the EU L 199/1, 31.7.2007 (ESCP Regulation).

¹¹ Article 2 of the ESCP Regulation.

¹² Article 3 of the ESCP Regulation.

¹³ Consumers have the option to initiate proceedings in their country of residence or in the Member State where the enterprise they wish to sue is based (EU Državljan, n.d.).

dered under the ESCP are automatically recognised and enforceable in other Member States.¹⁴ Importantly, Slovenian national law applies to the ESCP regarding the questions not covered by the ESCP Regulation (Kveder, 2017, p. 5). For example, under Slovenian national law, the court fees that must be paid by the parties are equivalent in small claims and regular proceedings. Thus, the same amount of court fees must also be paid in the ESCP. Furthermore, remedies against the decision delivered in the ESCP are governed by national law (EU Državljan, n.d.).

To enhance cost-effectiveness and speed¹⁵ the ESCP is conducted in writing and the role of courts is strengthened. Therefore, extensive participation by the parties is not as essential as in regular proceedings. The parties can file their claims using the small claims digitalised forms. Form A is used to start the proceedings. Form B is used to provide further explanation at the court's request. Form C is an answer form and Form D serves as a certificate pertaining to a judgment in the ESCP or a court settlement (*European E-Justice Portal - Small Claims Forms*, 2023). When the court receives Form A, it fills out its part of the answer form and may ask the claimant to fill out Form B if additional information is needed. Subsequently, the court serves a copy of the form to the defendant, who must fill out and submit the answer form to the court (*European Small Claims Procedure*, 2023). While Article 454 of the CPA allows the parties to request an oral hearing in domestic proceedings, the ESCP Regulation stipulates that only the court has the authority to decide whether to conduct an oral hearing.¹⁶ Thus, an oral hearing takes place only when the court decides that it is not possible to deliver a judgment based on the written evidence or if one of the parties requests an oral hearing and the court agrees that an oral hearing is necessary. Even so, the court is involved in the proceedings and can request clarification from the claimant if the information provided on the initial form is unclear. Nevertheless, after filing out the forms, the parties are generally precluded from providing additional information and may only do so at the court's request (European Commission, Directorate General for Justice, 2013).

3. DIGITAL ENFORCEMENT AS AN EFFECTIVE APPROACH TO SMALL CLAIMS PROCEDURES

This section presents and analyses an additional mechanism that can be used in Slovenia to expedite proceedings and decrease costs – digital enforcement. While taking into account the procedural adjustments presented above, the Slovenian small claims procedure regulated by the CPA remains a procedure conducted in front of a judge. However, in cases where a trustwor-

¹⁴ Article 20 of the ESCP Regulation.

¹⁵ See Article 1 of the ESCP Regulation and its recitals 1, 7, 8 and 36.

¹⁶ Article 5 of the ESCP Regulation.

thy document¹⁷ exists, the Slovenian legal system allows for the resolution of (small) claims through a digital enforcement system, without the active involvement of a judge. Therefore, we propose that digital enforcement is an effective national practice for settling small claims that expedites dispute resolution even further.¹⁸

3.1. Overview of digital enforcement

Digital enforcement is facilitated through the information system e-Izvršba (unofficial translation: e-Enforcement) which is part of the information system e-Sodstvo (unofficial translation: e-Justice).¹⁹ Digital enforcement is used for the recovery of a sum of money based on a trustworthy document. Trustworthy documents include invoices (also statements of account in respect of interest), bills of exchange, cheques, public documents, private documents certified by law, and others.²⁰ On their own, trustworthy documents do not serve as enforceable titles; instead, they function as evidence indicating a high degree of probability that the claim is valid. As trustworthy documents frequently serve as valuable evidence in small claims cases, the creditor may thus initiate a digital enforcement procedure on their basis. Nevertheless, the debtor's objection to the trustworthy documents referred to by the creditor may lead to litigation, which may delay the recovery of the claim considerably (Cigrovski, 2010).

Article 41 of the Enforcement of Judgments and Protective Measures Act²¹ defines the content of an application for digital enforcement based on a trustworthy document. First, the creditor must include both their and the debtor's identification data. Second, the instrument or object of enforcement needs to be provided. The creditor may propose multiple objects of enforcement. If only one object is proposed and later proves unsuccessful, the court will discontinue the proceedings. The creditor must also input the data of the bank

¹⁷ The translation of the Slovenian expression "verodostojna listina" which encompasses all the documents that can be used in digital enforcement is disputed. The unofficial translation, published on the official national website PisRS, where legislation is published, uses the expression "authentic instrument" (*Zakonodaja v Angleščini*, 2024). Additionally, EU webpages also use the translation "authentic instrument" (*European E-Justice Portal - How to Enforce a Court Decision*, 2020). However, distinguished scholars in the field of civil procedure use the expression "trustworthy document" as the phrase "authentic instrument" is usually associated with public documents while "verodostojna listina" includes other types of documents (Galič, 2004, 2010, 2012; Uzelac, 2010). For the purposes of this article, we will use the expression "trustworthy document".

¹⁸ It should be noted that digital enforcement is not limited solely to small claims, provided that all the legal requirements for conducting such a procedure are met.

¹⁹ Article 3 of the Rules on Form Sheets, Types of Enforcements and the Automated Enforcement Procedure (*Pravilnik o obrazcih, vrstah izvršb in poteku avtomatiziranega izvršilnega postopka*, Official Journal of the Republic of Slovenia, no. 104/11, 88/14, 44/16 and 13/21).

²⁰ Article 23 of the Enforcement of Judgments and Protective Measures Act (*Zakon o izvršbi in zavarovanju* (ZIZ), Official Journal of the Republic of Slovenia, no. 3/07 – official consolidated text, 93/07, 37/08 – ZST-1, 45/08 – ZArbit, 28/09, 51/10, 26/11, 17/13, 45/14, 53/14, 58/14, 54/15, 76/15, 11/18, 53/19).

²¹ *Zakon o izvršbi in zavarovanju* (ZIZ), see footnote above.

account to which the funds should be transferred. When movable property is proposed as the object of enforcement, the creditor may name an executor. Third, information regarding the trustworthy document should be provided. However, the document itself does not need to be provided.²² Additionally, the claim must be described and substantiated—the creditor must disclose the basis of the claim and confirm whether they have fulfilled their obligations.

Next, the debtor's obligation needs to be precisely defined. The creditor must provide information on the principal amount owed, including details of any interest accrued due to late payment and the relevant start dates for interest calculation. If contractual interest applies, the creditor may request its payment, providing any associated details (Vukojević, 2021). The creditor may also claim costs related to issuing reminders, provided that these costs do not exceed the actual expenses incurred for creating and sending the reminder, and do not surpass the amount of late interest owed (in business-to-consumer cases).²³ Sending a reminder is not mandatory, except in cases where the debtor is a consumer and the creditor is a provider of public goods or services.²⁴

Furthermore, the creditor may claim reimbursement of recovery costs. Under Article 14 of the Act on the Prevention of Late Payments,²⁵ the creditor is entitled to request a flat-rate recovery fee of 40,00 EUR per claim, which does not require additional proof. However, this does not preclude the creditor from seeking reimbursement of other costs specified in the contract or provided for by other regulations. In line with the Court Fees Act,²⁶ the creditor may also claim a court fee of 44,00 EUR,²⁷ which is necessary for the court to review the application for enforcement. Failure to pay the court fee within 8 days will result in the application being considered withdrawn.²⁸ Lastly, the creditor may include any other relevant information necessary for the enforcement proceedings, for example, an executor. A specific department of the Local Court of Ljubljana (Okrajno sodišče v Ljubljani), called the Central Department for Trustworthy Documents (Centralni oddelek za verodostojno listino, hereinafter also referred to as COVL), has exclusive jurisdiction to review applications for digital enforcement based on trustworthy documents.²⁹

²² Article 41 of the Enforcement of Judgments and Protective Measures Act.

²³ Article 33 of the Consumer Protection Act (Zakon o varstvu potrošnikov (ZVPot-1), Official Journal of the Republic of Slovenia, no. 130/22).

²⁴ Article 30 of the Consumer Protection Act.

²⁵ Zakon o preprečevanju zamud pri plačilih (ZPreZP-1), Official Journal of the Republic of Slovenia, no. 18/11 and 57/12.

²⁶ Zakon o sodnih taksah (ZST-1), Official Journal of the Republic of Slovenia, no. 20/04.

²⁷ Pursuant to Article 33.a of the Court Fees Act, a fee set out in the Tariff Part of the Act is reduced by 20% for an application that the party submits electronically. The Tariff Part of the Court Fees Act provides that a fee of 55 EUR is charged for submitting an enforcement claim. The fee for filing an electronic application for such a claim is therefore 80% of this amount, i.e. 44 EUR.

²⁸ Article 29b of the Enforcement of Judgments and Protective Measures Act and Article 21 of the Rules on Form Sheets, Types of Enforcements and the Automated Enforcement.

²⁹ Article 40 of the Enforcement of Judgments and Protective Measures Act.

The creditor requests the court to order the debtor to settle the claims and assessed costs within 8 days (or within 3 days for disputes involving bills of exchange and cheques) from the date of service of the order.³⁰ Enforcement applications must be made using the prescribed form and content; otherwise, the court will deem the application incomplete and request the creditor to provide the missing details.³¹ Once the application is complete and the court fee is paid, the digital system automatically issues an enforcement order within 48 hours. This enforcement order is unsigned and bears only a typewritten impression of the court's seal.³²

To submit the claim, the creditor must have access to the e-Justice portal. The registration procedure is somewhat complex and the guidelines for initial application alone span 11 pages (Supreme Court of the Republic of Slovenia, 2010). Applicants must register using a digital certificate obtained to access the system.³³ In practice, there are service providers that facilitate quicker submission of digital enforcement claims,³⁴ albeit at a slightly higher cost due to the involvement of intermediaries.

3.2. Benefits and drawbacks of digital enforcement

As explained above, the digital enforcement system significantly simplifies and expedites debt recovery, reducing the court fee to just 44,00 EUR and typically issuing enforcement orders within 48 hours. Therefore, the primary advantages of digital enforcement are its cost-effectiveness and speed. Digital filing of forms streamlines the paperwork and administrative tasks, thereby accelerating the overall procedure. Moreover, no supporting documents are attached to the application, thus, the court is not burdened with reviewing them unless contested by the opposing party, which expedites the procedure even further.

Since enforcement proceedings based on trustworthy documents are exclusively managed by the Central Department for Trustworthy Documents (COVL), this shortens the procedure and ensures consistent case law. COVL was established as a new department within the Local Court of Ljubljana to alleviate the burden on other Slovenian courts. Its objectives were to decrease the number of pending enforcement applications and to shorten the decision-making times. The system implemented customised IT solutions, as explained above. The establishment of COVL has led to a significant reduction in the backlog of cases, and the decision-making times decreased

³⁰ Article 41 of the Enforcement of Judgments and Protective Measures Act; Constitutional Court of the Republic of Slovenia, judgment U-I192/23-13 from 1. 2. 2024, para. 16.

³¹ Article 25 of the Rules on Form Sheets, Types of Enforcements and the Automated Enforcement.

³² Article 29 of the Enforcement of Judgments and Protective Measures Act.

³³ Articles 20 and 22 of the Rules on Form Sheets, Types of Enforcements and the Automated Enforcement.

³⁴ For example, <https://www.elektronskaizvrsba.si/> (3. 3. 2024).

from an average of 5 months to less than 5 working days for over 90% of the cases (*Automated System for Enforcement of Authentic Documents (COVL) SLOVENIA*, 2010). Creditors can monitor proceedings conveniently through the online portal, allowing them to track pending and completed actions. Mostly, the system automatically alerts the creditor of any filing errors. If any ambiguity remains in the claim, the court subsequently asks the creditor to clarify or complete it. Any clarifications are also done electronically, further streamlining the process (Horjak, 2012, p. 43).

As already mentioned, there are potential issues associated with the digital enforcement system, especially given the goals of (the European) small claims proceedings. First, any electronic system should ideally prioritise user-friendliness (which is also one of the main goals of the SCAN-II platform³⁵). However, the potential challenges in accessing the digital enforcement platform represent hurdles to exercising the claimant's rights. Second, the most significant potential issue (and virtue) of the system is its full automation, whereby the court does not verify the reliability of the creditor's claims or the authenticity of the trustworthy document. The decision rendered in the digital enforcement procedure is not endorsed by a judge. The debtor bears a substantial burden of analysing the claim and order and must object to any discrepancies, given that the enforcement order is primarily based on the creditor's assertions. Therefore, the debtor must carefully verify the accuracy of all claims in the enforcement order (Horjak, 2012).³⁶ The only remedy available to the debtor is a reasoned objection,³⁷ which places a significant obligation on the debtor to address any claims promptly. Should an objection by the debtor be raised, the regular civil procedure resumes³⁸ and the dispute cannot be resolved through the digital enforcement system (Cigrovski, 2010). These issues may be amplified in higher-value claims as there is no limit on the value of a claim which may be enforced digitally based on a trustworthy document.

Digital enforcement has been operational since 2008 in Slovenia, and during the initial years, numerous opinions questioned its suitability. Scholars have raised questions about the legality of digital enforcement within the framework of civil procedure and enforcement legislation (Horjak, 2012, p. 43; Tekavc, 2008). Furthermore, issues can arise due to computer system malfunctions. Foreign scholars have also discussed the compatibility of digital enforcement with legal principles, such as the right to a fair trial.³⁹ Nevertheless, procedural guarantees can ensure a fair trial to some extent. For instance, electronic communication tools between the court and the par-

³⁵ The SCAN-II platform was developed under the SCAN-II project and is available at: <https://scan.khramov.dev/home> (12. 4. 2024).

³⁶ Horjak, 2012.

³⁷ See Article 61 of the Enforcement of Judgments and Protective Measures Act.

³⁸ See Article 62 of the Enforcement of Judgments and Protective Measures Act.

³⁹ The right to a fair trial is protected also at the supranational level, for example, in Article 6 of the European Convention on Human Rights.

ties can facilitate efficient communication in the matter. Moreover, parties should have the option to request litigation proceedings (Jokubauskas & Świerczyński, 2023).

There have been other concerns raised among Slovenian academics and especially the general public regarding the digital enforcement system. For example, Teršek highlights three cases that illustrate potential absurdities with the system. In one case, a student rented accommodation previously occupied by a middle-aged unsuccessful businessman, who used the flat as a temporary residence and accrued a debt of 3.000,00 EUR. The student, after registering this address as their temporary residence, went abroad for a study exchange. Upon returning, the student discovered that their personal belongings had been removed from the apartment, including a TV, radio, computer, bicycle, and fridge. Legal proceedings to retrieve these belongings were initiated but remained unresolved a year and a half later (Teršek, 2015). Even though such a case could also arise under regular enforcement proceedings, digital enforcement can increase the number of such absurdities, since the procedure is conducted quicker.

However, over time, most of the concerns regarding digital enforcement have been addressed, and digital enforcement is now widely used and considered a valuable tool. The efforts of the Slovenian judicial system have been recognised both by the Council of Europe and the European Commission. In 2019, the Supreme Court of the Republic of Slovenia was awarded the European Crystal Scales of Justice Prize for their initiative called “Improving the Quality of Justice.” This project encompassed a wide array of innovative tools and methods aimed at enhancing the quality of judicial activities and fostering greater trust in the judiciary (Council of Europe, 2019). The Crystal Scale award identifies and highlights innovative and effective practices employed by European courts to improve the organisation of their work and the efficient conduct of court proceedings, ultimately improving the functioning of court systems as a whole (Supreme Court of the Republic of Slovenia, 2019). In 2010, special mention was bestowed upon the Supreme Court of the Republic of Slovenia for the scheme “Automated System for Enforcement of Authentic Documents⁴⁰” (2010 Edition of the Crystal Scales of Justice, n.d.). Therefore, digital enforcement represents an effective approach to expediting proceedings and reducing costs, which has been recognised at an international level.

4. A LOOK INTO THE FUTURE: DIGITAL TOOLS IN THE ESCP?

Europe is not well positioned in digital innovation, which represents a fundamental societal shift. The EU aims to create better internal conditions for technological innovation, which is crucial for advancing European interests.

⁴⁰ Trustworthy documents in the terminology of this article.

The Digital Europe program exemplifies the European Commission's comprehensive approach to addressing the challenges of digital transformation, with a particular emphasis on promoting the adoption of widespread digital skills across society (European Economic and Social Committee, 2019).

To establish proper digitalisation tools, it is essential to have adequate digital infrastructure, societal acceptance of digitalisation, and a coherent approach to digital governance. The Covid-19 crisis has significantly expanded the inclination toward digitalisation, with more than half of legal entities in the EU investing in digital initiatives. Therefore, there is a positive trend toward adopting advanced digital technologies. Digitalisation enhances resilience to economic disruptions and climate change. European institutions, therefore, promote digitalisation, emphasising that successfully managing the digital transition requires more than just technological advancements (European Investment Bank, 2023, pp. 1–9).

Following the discussion on digital enforcement in the previous sections of this article, it is pertinent to explore the prospect of digitising small claims proceedings within the EU. Currently, the ESCP is already quite streamlined, relying primarily on standard forms and written proceedings. While these standard forms facilitate the simplification of claims, administrative duties, and procedural aspects, the onus falls upon claimants to navigate diverse legal landscapes across member states and submit documents to the appropriate authority in the correct language (European Commission, n.d.).

There remains significant potential for further digitalisation of the ESCP, offering increased cost-efficiency and expedience in proceedings. Notable illustrations of this potential are evident in national initiatives such as Slovenia's digital enforcement system. Additionally, the EU demonstrates laudable endeavours in this realm, exemplified by the funding of projects like SCAN and SCAN-II. Following the success of the SCAN project, the SCAN-II project focuses on simplifying and digitalising enforcement procedures. The SCAN-II project is aimed at developing an IT Platform and Blockchain system to achieve its objectives.⁴¹ Thus, the EU's financial support of such initiatives encourages the digitalisation of the ESCP. The developed platform⁴² allows future users to file claims in a highly digitalised and user-friendly manner. It guides users through the submission of relevant data required for the procedure in line with ESCP forms. Therefore, the claimants provide information about themselves, the defendant, jurisdiction, the nature of the case, details of the claim, and other relevant case information (*SCAN II*, n.d.). Leveraging such tools can enhance cost-effectiveness and expedite small claims proceedings, even on an international level.

⁴¹ Available at: <https://SCAN-II.vub.be/about/> (2. 3. 2024).

⁴² Available at: <https://scan.khramov.dev/home> (15. 2. 2024)

5. CONCLUSION

Research into national small claims proceedings unveils several promising national practices that could be adopted at the international level. While small claims proceedings typically incorporate procedural rules conducive to cost-efficiency and speed, additional measures can further enhance these aspects. This article has focused on the Slovenian system of digital enforcement which makes debt repayment more cost-effective, streamlines court administration, and expedites proceedings for all parties involved. However, we have also stressed that digital proceedings come with their own risks, such as placing greater burdens on debtors who must carefully review all the details in the enforcement order and object promptly if needed. Nevertheless, long-standing practices demonstrate the effectiveness of digitalisation in achieving the goals of small claims proceedings.

Therefore, this article has argued that the ESCP could be further improved through digitalisation. Importantly, the user-friendliness of the digital proceedings cannot be overstated. This is also one of the main issues of the Slovenian digital enforcement system. However, the recently developed SCAN-II platform is a prime example of a user-friendly digital tool that can expedite small claims proceedings and reduce burdens on parties. The active engagement of the European Commission in such initiatives reflects proactive efforts toward digitalisation and simplification of small claims proceedings. By drawing insights from national practices, these initiatives offer significant potential to enhance the cost-effectiveness and efficiency of the ESCP.

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JUDICIAL POWERS OF INITIATIVE UNDER THE EUROPEAN SMALL CLAIMS PROCEDURE*

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ABSTRACT: European Small Claims Procedure Regulation contains a sparse cluster of provisions, whereby the court is conferred specific tasks implying various degrees of power to act of its own motion. Starting from the assumption that a comparatively high level of *ex officio* powers helps small claim procedures being more effective, this contribute highlights some relevant nodes of ESCP procedure and the extent therein of judicial powers of initiative.

KEYWORDS: small claims procedure; european small claims procedure regulation; judicial powers; *ex officio* powers.

SUMMARY: 1. INTRODUCTION.— 2. PRELIMINARY CHECK ON THE CLAIM.— 3. TAKING OF EVIDENCE.— 4. ORAL HEARING.— BIBLIOGRAPHY

1. INTRODUCTION

In ordinary civil or commercial matters, *ex officio* judicial powers tend to be limited by many factors¹, although the current situation is highly nuanced

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¹ Some of them consistent with the nature of the rights at dispute, many others with a traditional, widespread tendency of the court not to interfere with the parties' initiative. Those factors are mostly subsumed in the so-called «disposition principle», whereby the court may not interfere in the shaping of the *thema decidendum* (subject of litigation) and the *thema probandum* (the evidence to be taken) of the litigation. See on this subject, also for bibliographic references, Nieva Fenoll (2014); Taruffo (2012), spec. pp. 79 ff.; Stürner (2010); Turrone (2024).

and seems to be evolving in favor of a more active role for the court. Whatever the tendencies are, it is my opinion that in small claims litigations court's powers to act of its own motion should be set at a reasonable high level.

Especially when it comes to small claims with cross-border implications, one of the main challenges is not to discourage non-professional claimants². Provided the interest in entering proceedings is generally low, a simplified procedural scheme and the possibility of option to self-defense can make the difference. But an active role of the court in addressing procedural flaws and preventing irreversible errors is also necessary as a counterbalance to the risks the inherent technicalities of civil procedure represent for non-professional, self-defended parties. In short, procedural simplification cannot do without a corresponding increase in judicial powers of initiative³; to greater reason when simplification teams up with disintermediation, whereby assistance by legal professionals becomes optional.

On the other hand, it cannot be overlooked that, even when the court is provided with *ex officio* powers, its attitude tends to be passive and far below the powers conferred by the law. This is partly due to the courts' cultural tendency to self-restraint, partly to the lack of resources for systematically assuming an active role, which often results in a veritable disproportion between the number of magistrates and the average case-flow. In short, the normal vehicle was, and keeps being, the parties, whereas the court maintains in this respect a subsidiary function. Which is, though, not a reason to underestimate the court's capacity to act of its own motion and to call off a reasonable judicial activism in the specific area of cross-border small claims.

As a matter of principle, Regulation (EC) 861/2007 establishing a European Small Claims Procedure (from now on ESCP) does not deal with judicial powers of initiative as a general issue. What we can see is a sparse cluster of provisions, whereby the court is conferred specific tasks implying a certain degree of power to act of his own motion. In the following I would try here to pinpoint some functional nodes of ESCP, where *ex officio* powers play a significant role or deserve, at least, particular attention.

² See on this topic Huber (2021), pp. 92, 100, Onțanu (2017), p. 29; Simaitis, Vėbraitė & Markevičiūtė (2022), p. 133 f.; Nieva Fenoll (2022).

³ Nothing new, indeed...: "Consistent with this vision of the informal lawyerless court was another line of criticism focusing on the unduly restricted role of the judge. Constraints designed in an earlier era to protect the common man from unrestrained judicial power now were viewed as preventing the judge from acting swiftly and fairly, by establishing a passive role for the judge as an umpire or referee in the contest between opposing litigants": Steele (1981), p. 324, referring to what John A. Lapp wrote in 1914. For further suggestions see Freda (2016);

2. PRELIMINARY CHECK ON THE CLAIM

ESCP Reg. starts by filing an application to the court, followed by a preliminary check *ex officio*⁴. Notably, art. 4.4., comma 1, ESCP Reg. grants the court power to ask for clarifications, to highlight procedural or factual shortcomings and to give the claimant a chance to make up for it.

In this context the court is thus required to perform, *of its own motion*, an overall and preliminary control both over the validity of the claim and over the merits, so to check if there's something apparently wrong with it. The court shall notably track down any deficiencies affecting the application, so to, if possible, prompt the claimant to sort them out; if not possible, dismiss the application as clearly unfounded / inadmissible.

Hence, the judicial function of checking claim's procedural shortcomings goes along with that of providing the claimant positive guidance to fix them, whenever it doesn't result in a fatal error. Whether or not in tune with the *lex fori*, this is a significant contribute the court shall give of its own motion to an effective and proficient access to justice.⁵

Although a considerable series of issues may now arise in this respect⁶, I'll confine the followings to some basic remarks.

Issues of admissibility may involve various sources:

— specific ESCP Regulation rules. Such are, e.g., art. 2 as to the scope of ESCP, art. 3 the notion of cross-border case, etc. Unless otherwise provided for by other EU sources (see the next point), the judge should carry out the check on its own motion and the *lex fori* eventually dealing with similar issues should not apply.

— provisions stemming from other specific EU sources. In this case, reference is to be made to the original source: depending on what the source sets out, it is possible to assess whether a related *ex officio* power may be granted or not. An obvious example is that of jurisdiction and the relevant

⁴ Art. 4.4. ESCPReg. provides for a preliminary assessment of validity/consistency of the claim: "Where the court or tribunal considers the information provided by the claimant to be inadequate or insufficiently clear or if the claim form is not filled in properly, it shall, unless the claim appears to be clearly unfounded or the application inadmissible, give the claimant the opportunity to complete or rectify the claim form or to supply supplementary information or documents or to withdraw the claim, within such period as it specifies. The court or tribunal shall use standard Form B, as set out in Annex II, for this purpose".

⁵ Consistent with this framework is art. 4.3. and 4. ESCP Reg. Notably, art. 4, para. 3., ESCP Reg. focuses on a specific condition, providing the court power to assess whether the claim is consistent with the scope of ESCP Reg., and to inform the claimant if it is not, so to let the claimant decide whether to withdraw the claim or let the litigation go further on, according to the appropriate national proceedings.

⁶ Issues such as that of discerning the procedural flaws that may be addressed from those that are not; this is, though, a topic that goes beyond the scope of this short contribute and that deeply interacts with the *lex fori*, i.e. the national legal system of the court seized.

rules stated by Bruxelles I-recast, whereby, in principle, lack of jurisdiction is for the defendant to be raised, whereas, in principle, the court may not raise it *ex officio*. Within the frame of ESCP, the court should therefore act accordingly; which means, in principle, that it shall overlook the issue in its preliminary check and wait for the defendant to react, according to what art. 26 Bruxelles I-recast provides for. One might object that, by doing so, the court cannot entirely carry out its task of preventing the claim to be subsequently challenged by the defendant; this is, though, a calculated risk, since EU law gives preference to the defendant's will to decide whether to accept or not the jurisdiction of the Member State chosen by the claimant.

— national rules peculiar to some Member States. They may apply insofar as they are complementary to, and not in conflict with ESCP provisions. Provided that, in principle, ESCP endows the court of *ex officio* powers to preliminarily check the validity-admissibility of the application, consequence should be that this rule should prevail on national provisions stating otherwise. Just by way of an example, art. 164 of the Italian civil procedure code makes in many cases the nullity of the introductory act dependent on the reaction of the defendant. Such a solution is, though, not in line with what ESCP Reg. provides for: unlike the previous case, there's a conflict between ESCP Reg. and a national source, where the former should prevail. Irrespective of this technical remark, this is also in my opinion a better solution, in that its sole effect is to fix a procedural flaw before it may cause more trouble.

In the case of judicial evaluation of inadmissibility, as well as in that of a clearly baseless claim, it is indeed disputable that art. 4.4., comma 2, ESCP Reg.⁷ applies literally, and the court may therefore dismiss the claim without giving the claimant a chance to reply in advance of the decision. Unlike the dismissal of a request for European order for payment, the decision is here capable to deploy binding effects in future claims: these effects may vary according to the cause of the dismissal and to the way each member state deals with the issue, but they may occur in the same way as they'd do in a corresponding national proceeding. And even when nothing would prevent the same application to be reiterated, there are good reasons to assert that the right to be heard demands the court to inform the claimant of the issue and give him/her the opportunity to respond⁸.

⁷ “ [...] where the claim appears to be clearly unfounded or the application inadmissible....the application shall be dismissed”.

⁸ See in this vein ELI/UNIDROIT Model European Rules of Civil Procedure (2020), *sub* artt. 11 and especially 12, comma 2: “The court must not base its decisions on issues that parties have not had an opportunity to address” along with the official explanation thereof *sub* para. 4.

expl. to art. 11: “[...] the right to be heard is not only a right of the parties to be exercised upon their own initiative but is also something that must be facilitated (“ensured”) by active court management carried out in the interests of justice. Parties to litigation must be given a fair opportunity to take notice of all aspects of court process concerning their proceedings [...]”.

3. TAKING OF EVIDENCE

Art. 9 ESCP Reg., which is the general provision in this matter, makes no mention of judicial *ex officio* powers: in principle, ESCP Regulation does not interfere with the national approach towards judicial initiative in evidential matter⁹. Art. 9 ESCP Reg., therefore, opens a variegated scenario we won't deal with in this context.

For its part, art. 5.1.a) ESCP Reg. states that “The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests.”¹⁰ Strictly interpreted, this provision does not confer the court additional evidential powers of initiative; instead, it only entitles the court, if deemed necessary, to take evidence into its presence. Whether the evidence concerned may be ordered *ex officio* or not, it is an issue that is for the *lex fori* to address¹¹; and when the *lex fori* leaves the initiative to the parties, then such a hearing may be held only if the party has previously filed the request for that evidence to be taken.

Yet, a more nuanced interpretation is viable. Insofar ESCP Reg. entitles the court to assess if an oral hearing is needed, it also allows the court to point out specific oral evidence it considers necessary, leaving to the parties the proper request whenever the evidence concerned cannot be ordered *ex officio* under the national law. In favor of this reading is the fact that ESCP Reg. clearly leads the parties to limit their evidential backstop to written evidence, so that, if they fail to request oral evidence and afterwards the court considers it necessary, then the parties should be given a chance to supplement their defensive outfit¹².

On consumers' small claims litigation something must be added. This domain has been affected by important case-law, whereby the ECJ interpreted

⁹ See in this sense art. 9.1. ESCP Reg.

¹⁰ See on this provision Turróni (2022), p. 139 f., 157 f.

¹¹ In this respect, the outlook is all the more variegated. Just to give some examples, in France articles 10 and 143 of the *Code de procédure civile* grants the court power to have all the admissible evidence determined *ex officio*. In Italy, art. 115 C.p.c. —Code of civil procedure— makes the taking of evidence dependant on the request of the parties; yet legislation and case law set forth a diffuse series of exceptions tending to overturn such a general provision. This system will be discussed further on in more detail. In Spain a general tribute to the principle of party disposition in the taking of evidence is made in art. 282 LEC —*Ley de Enjuiciamiento Civil* as well as implied by Art. 429.1., comma 3, LEC, whereby the court, prior to the opening of the inquiry, if it considers the evidence offered by the parties as insufficient for the ascertainment of some disputed facts, will point this out to the parties, highlighting, where appropriate, the additional evidence they may resort to. In Germany, the generally accepted *Verhandlungsgrundsatz* conferring such initiative to the parties has been almost overturned as regards the court's initiative; which is positively confirmed by a wide range of provisions, to begin with the measures of inquiry envisaged in the ZPO - *Zivilprozessordnung* and notably in its §§ 142 and 143 on the exhibit of documents and of document acts; § 144 on the inspection and the appointment of experts; § 448 as for the questioning of the parties, aimed at assessing a disputed fact on which the evidence already taken isn't enough for the court to be persuaded

¹² The concern that this way the court would lose its impartiality is basically groundless: see on this topic Nieva Fenoll (2019), p. 1233 f.; Turróni (2024), 10 f.

Dir. (CEE) 93/13 on Unfair Terms in Consumer Contracts, in such a way as to progressively improve the court's powers of initiative as a fundamental resource for achieving the goal of tracking down and quash unfair terms in consumer contracts¹³. Next to the court's power to raise *ex officio* the unfairness of relevant contractual clauses¹⁴, judicial protection of consumers results also in conferring the court related powers of initiative in the taking of evidence. According to the ECJ case-law¹⁵, the national court shall notably order of its own motion all the investigative measures deemed necessary to ascertain the absence of unfair clauses at the base of the relevant contract, and this introduces a specific, EU-featured derogation to the disposition principle wherever Member States don't already provide for equivalent domestic rules.

4. ORAL HEARING

Oral hearing is what ESCP should avoid, being a factor of complication in a procedure conceived as a written procedure (as art. 5.1. ESCP Reg. makes clear). It might seem therefore appropriate to leave oral hearing to the realm of the remote eventualities and to simply discourage parties and court to make use of it. It is nonetheless important to stress that —besides its belonging to the realm of the fundamental guarantees— oral hearing could play even in ESCP an important role especially to the advantage of weaker parties and in a fast-evolving context where oral hearing can be held by remote with increasing ease¹⁶.

In this respect an oral hearing may prove decisive for a clear understanding of relevant facts the party has not been able to properly describe, or necessary for a serious effort to reach a settlement between the parties (a possibility that art. 12.3. takes clearly into consideration). In general, it's barely needless to say that the court should be not prevented to hold a hearing of its own motion, whenever it deems necessary for an effective accomplishment of its task¹⁷.

¹³ See, in particular, Article 6.1., whereby "Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms", and Art. 7.1. stating that "Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers." It is also relevant what follows in Art. 8, whereby "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer."

¹⁴ See in this regard, and in support of the ECJ direction towards an enhanced protection of the consumers, Nieva Fenoll (2019).

¹⁵ Reference is particularly to ECJ, joined C- 419/18 and C-483/18, 7.11.2019, *Profi Credit Polska v. Włostowska et al.*; see also ECJ C-511/17, 11.3.2020, *Lintner v. UniCredit Bank Hungary*, spec. sent. 26 - 27; and with specific reference to *inaudita altera parte* orders for payment, ECJ C-531/22, 18.1.2024, *Getin Noble Bank et al. v. TL et al.*; ECJ C-600/18, 17.5.2022, *MA v. Ibercaja Banco*.

¹⁶ See in this vein Onțanu (2017), p. 49

¹⁷ Turroni (2022), p. 140

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EX OFFICIO APPLICATION OF EU CONSUMER LAW IN THE ENFORCEMENT OF THE ESCP JUDGMENTS*

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ABSTRACT: The main aim of the European Small Claims Procedure (ESCP) is to simplify citizens' access to justice by accelerating adjudication in small value disputes in cross-border cases, decreasing the costs of the proceedings and simplifying the recognition and enforcement of ESCP judgements rendered in another Member State. Therefore, the ESCP is organised as a summary and formal procedure. In ESCP, national courts are bound to respect and promote fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, including the right to a fair trial and the principle of an adversarial process. At the same time, it is particularly important that in the ESCP, the principle of effectiveness and effective judicial protection is respected. In their numerous judgements, the European Court of Justice, emphasises these very principles as being crucial for effective EU law enforcement, particularly in the context of consumer legal disputes where substantive and/or procedural law of the Union is applicable. The ECJ's interpretation has often been that, because of effective protection of consumers, national courts must, under particular preconditions, ex officio apply the consumer law of the EU. The ECJ has defined a whole series of procedural rules to be complied with when applying EU consumer law ex officio. However, a question arises whether, due to specific procedural rules governing the ESCP, it is possible that national courts, when enforcing ESCP judgments, ex officio apply the EU consumer law. In the article, various aspects of ex officio application of EU consumer law in the ESCP are considered, particularly in the context of the recent ECJ case law to ex officio application of EU consumer law in enforcement procedures. The main aim of the article is to analyse specific measures by which the European standards of effective court protection of EU consumer rights in the ESCP enforcement procedures can be ensured.

Keywords: *European Small Claims Procedure, EU consumer law, ex officio application of EU law, enforcement of ESCO judgements.*

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1. INTRODUCTION

Effective private enforcement of EU consumer law has for decades been one of the biggest challenges for the European legislator. By private enforcement of EU consumer law, along with a parallel protection of individual subjective consumer rights recognized by the EU law, many of its public goals have been achieved. They are of outmost importance for its economic and social order, the area of freedom, security and justice, for both internal and digital markets, sustainable development, competitive social market economy, social justice, *et al.* Therefore, legal instruments, the concepts and methods of importance for private enforcement of EU consumer law have been simultaneously developing at several levels and, together with the public enforcement of EU consumer law, they significantly contribute to the accomplishment of the Union's goals¹. The European legislator is continuously enhancing consumer protection by modernising the substantial consumer contract law. This trend is nowadays particularly obvious because of the development of the digital market which requires a different approach to the protection of consumer rights by recognising the new subjective consumer rights, as well as the new legal remedies for their protection particularly in cross-border cases. Proper functioning of the digital market requires maximal harmonisation and even unification of all areas of consumer contract law. This is why many consumer directives have already been considerably revised, often also replaced by more modern legislative measures. In addition, various optional instruments are adopted at the European level regulating various EU civil procedures of importance for effective judicial cooperation in civil matters. These optional instruments, in the form of regulations, regulate specific civil proceedings where the procedure is simplified, comprehensive, formal and written. Their main goal is to ensure effective access to justice, to accelerate the resolution of disputes in cross-border cases and to make provisions for automatic mutual recognition and enforcement of judgments between Member States. Such optional instruments may significantly contribute to efficient private enforcement of consumer rights recognised by the EU law when it comes to cross-border cases. Lastly, an important trend in the improvement of private enforcement of EU consumer rights also includes the development of the case law of the European Court of Justice (hereinafter: ECJ) in the area of the consumer contract law and the EU civil procedure law. In its decisions, the ECJ has defined numerous legal standards of the protection of individual consumer rights which, based

¹ For more see Streatmans, G., Vereecken, J. (2024). Towards a New Balance between Private and Public Enforcement of EU Consumer Law, *European Review of Private Law/ERPL*, Vol. 32, Issue 1, 41-80. <https://doi.org/10.54648/erpl2024005>.

on the principle of sincere cooperation², must be acknowledged by national courts. They are, as a rule, very high and demanding standards of protection mostly based on the principle of effective legal protection of EU consumer rights (principle of effectiveness) and the protection of the fundamental right to a fair trial and an effective remedy. Their acknowledgement by national courts, regardless of whether they act on the basis of national procedural rules or the European procedural rules laid down in optional instruments, requires a different approach to the interpretation and application of procedural rules. The ECJ's interpretation has often been that, because of effective protection of consumers, national courts must, under particular preconditions, *ex officio* apply the EU consumer law. To safeguard proper protection of consumer rights, the courts must often assume an active role in consumer disputes.

Positive effects of private enforcement of EU consumer rights can only be achieved by a harmonised and coordinated application of all EU instruments, concepts, principles and legal standards of significance for the protection of consumer rights. In practice, however, some problems may arise because of different methods and principles on which such European instruments are based. It can happen that a parallel application of several legal instruments does not result in effective EU consumer rights' protection. Therefore, a specific question arises whether in some EU civil proceedings based on formal, summary or urgent procedures, all standards of the protection of EU consumer rights ensuing from consumer directives and the ECJ case law can really be achieved, and in particular the ECJ's interpretations of the *ex officio* application of EU consumer law.

In a specific way, the problem of achieving high standards of the protection of EU consumer rights also arises in the European Small Claim Procedure (hereinafter: the ESCP) provided for in Regulation (EC) No. 861/2007 establishing the European Small Claims Procedure (hereinafter: the ESCP Regulation)³. The ESCP is a specific EU civil procedure applied in cross-border cases in civil and commercial matters where the value of claims does not exceed 5,000 Euro⁴. The ESCP is organised as a summary, written and formal adversarial procedure. Nevertheless, in the ESCP, all standards of the protection of EU consumer rights must be met. It is uncertain, however, if this is always possible because of the specificities of the ESCP and because of specific rules governing the national courts' acting when ruling on small claims and enforcing their ESCP judgments. It is particularly questionable whether there is a possibility, and to what extent, that the courts, when deciding in the ESCP, play an active role in *ex officio* application of the EU law in accordance with the ECJ's interpretation.

² Art. 4 (3), Treaty on the Functioning of the European Union.

³ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (*OJ L 199, 31/7/2007, pp. 1–22*), current consolidated version published at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02007R0861-20170714> (visited: 9/5/2024).

⁴ Art. 2/1, ESCP Regulation.

In this article, various aspects of *ex officio* application of EU consumer law in the ESCP are considered, particularly in the context of the recent ECJ case law on *ex officio* application of EU consumer law. The main aim of the article is to analyse how the current organisation of the ESCP impacts the protection of consumer rights. First, the goals and characteristics of the ESCP as a comprehensive adversarial procedure are analysed, and in particular the rules of the ESCP Regulation laying down when and for what reasons the courts may act *ex officio* in such proceedings. In addition, the main points of the consumer *ex officio* doctrine are presented, as well as the reasons for *ex officio* application of the EU consumer law in the ESCP. In the third part of the article, the author considers whether it is possible, due to the valid provisions of the ESCP Regulation, to ensure also in the ESCP all the prerequisites for *ex officio* application of the EU consumer law in accordance with the ECJ' case law. In the conclusion, the author brings some proposals for the improvement of the ESCP by way of specific measures for the simplification and digitalisation of the ESCP to achieve the existing European standards of effective judicial protection of EU consumer rights based on the consumer *ex officio* doctrine.

2. GOALS AND CHARACTERISTICS OF THE ESCP

The main goals of the ESCP are expressly set forth in the Regulation. They are the following: simplification and acceleration of the settlement of cross-border litigation dealing with small claims, decreasing the costs of the proceedings, promoting fundamental rights, simplifying the recognition and enforcement of ESCP judgments by the principle of automatic mutual recognition, eliminating obstacles to the good functioning of civil proceedings and improving access to justice⁵. These goals also determine the main principles on which the ESCP is based, such as the principle of simplicity, speed and proportionality⁶, the principle of an adversarial procedure and a fair trial⁷, the principle of applicable procedural law of the Member State in which the procedure is conducted⁸, the principle of enforceability notwithstanding any possible appeal⁹, the review of the ESCP judgment only in exceptional cases,¹⁰ the principle of automatic recognition and enforcement¹¹ and no possibility of opposing recognition¹².

At the same time, the ESCP Regulation is considered as the optional instrument existing in parallel with civil procedures or small claim procedures existing under the laws of the Member States. It is an alternative to national

⁵ Rec. 7, 8, 9, ESCP Regulation; Art. 1/1, ESCP Regulation.

⁶ Rec. 7, ESCP Regulation.

⁷ Rec. 8, ESCP Regulation.

⁸ Art. 19, ESCP Regulation.

⁹ Rec. 25; Art. 15, ESCP Regulation.

¹⁰ Art. 18, ESCP Regulation.

¹¹ Rec. 30; Art. 20, ESCP Regulation.

¹² Art. 20, ESCP Regulation.

small claim procedures¹³. If the prerequisites regulated by the ESCP Regulation are fulfilled (the claim does not exceed 5,000 Euro, the cross-border case involves a matter within the scope of application¹⁴), the claimants may opt for either their national procedures or for the ESCP. The initiation of the ESCP solely depends on the decision of the claimant¹⁵, or on his/her assessment of the expediency and usefulness of the European civil proceedings for the success of the claim. If the option is the ESCP, the defendant has no legal remedies to oppose its institution. The ESCP Regulation, as an optional instrument, may apply to all civil and commercial disputes with a value under 5,000 Euro. The same procedural rules imposed on the parties, such as the filing of the claim form, taking evidence, deciding on the claim, remedies for challenging the judgment, as well as the recognition and enforcement, apply to any small claims. There are no differences in the procedure if civil, commercial or consumer disputes are involved, or whether the protection of subjective rights recognised by the law of the Union or by national law is requested. The court's acting is not differently regulated depending on the capacity of the parties in the ESCP (either consumers or traders). It is obvious that the focus of the European legislator, when drafting the ESCP Regulation, has been to lay down separate procedural rules for small claims and not to create a different procedural position for particular categories of parties (e.g. consumers) aimed at enhancing the protection of their subjective rights. If during the ESCP the consumer, as a party to the dispute, will be treated differently depends, in the first place, on the applicable procedural rules of the Member State in which the procedure is conducted¹⁶.

The fulfilment of the main goals and principles of the ESCP is safeguarded by several important principles: the ESCP is a written, formal and a summary/comprehensive procedure. Written procedure¹⁷ means that standard forms are filled in by claimants, defendants and courts. The application of the prescribed forms is mandatory¹⁸. The procedure is initiated by filling in a standard claim form and lodging it with the competent court. An answer to the claim is filed in a standard answer form. The court's request for the completion or rectification of the claim is serviced on the claimant in a standard form¹⁹. The contents of all forms (claim forms, answer forms, the court's request for completion and/or rectification of the claim, certificates of judgment) are prescribed in separate Annexes to the Regulation²⁰. The parties and the court may not in any way alter their contents. The communication between the parties and the court is

¹³ Art. 1 (2), ESCP Regulation.

¹⁴ Rec. 8; Arts 2, 3, ESCP Regulation.

¹⁵ See Garber, Th., (2020) *Kommentar EuGFVO*, p. 1306 in Geimer, R., Schütze, R.A. (Hrsg), *Europäisches Zivilverfahrensrecht*, München, 2020, 4. Aufl., C.H.Beck Verlag, pp. 1301-1387.

¹⁶ Art. 19, ESCP Regulation.

¹⁷ Art. 5/1, ESCP Regulation.

¹⁸ See Schlosser, P.F., (2021) *Kommentar EuGFVO*, pp 431,432 in Schlosser, P.F., Hess, B., *EU-Zivilprozessrecht*, München, 2021, 5. Aufl., C.H. Beck Verlag, pp. 421-460.

¹⁹ Art. 4 (1), (4); Art. 5 (2), ESCP Regulation.

²⁰ See Annexes I, II, III, IV to ESCP Regulation.

exchanged solely in writing whereby the content is determined by a particular standard form. Only exceptionally, the court may order oral hearing when it is not possible to render a judgment on the basis of written evidence, or if a party so requests. However, even when a party requests oral hearing, the court may refuse such a request if it assesses that oral hearing, with regard to the circumstances of the case, is not necessary for the fair conduct of the proceedings²¹.

The summary/comprehensive procedure is ensured by a whole series of rules. The ESCP regulation sets forth relatively short time limits (14 or 30 days) for the service of documents, submission of the responses, delivery of judgments, oral hearings or the application for a review of judgments²². Separate rules on the enforceability of judgments and their recognition and enforcement in another Member State significantly contribute to the speed of the procedure. It is expressly laid down that any possible appeal²³ does not postpone the enforceability of the judgment²⁴. Possible review of the judgment is allowed only in exceptional cases, i.e. only in the cases where the defendant, without his/her fault, was prevented from contesting the claim²⁵. Finally, a judgment will be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition²⁶. Consequently, the reasons for the refusal of enforcement are very limited.²⁷ Any review of the substance of the judgment in the Member State of enforcement is also excluded²⁸, even for the reason of the protection of public order²⁹.

Very strict rules on the formal, written and comprehensive ESCP procedure significantly determine the position and the rights and obligations of the parties to the proceedings. There is an important rule that together with the standard claim form, the claimant does not need to submit any documents/evidence to support the claim. It is sufficient to provide, in the claim form, a description of evidence supporting the claim. Documents are enclosed only where it is appropriate³⁰. There is also a possibility for their subsequent sub-

²¹ Art. 5 (1a), Art. 8, ESCP Regulation.

²² Arts 5 (2-7), 7, 18 (2), ESCP Regulation.

Time limits may be extended only in exceptional circumstances if it is necessary to safeguard the rights of the parties. See Art. 14 (2), ESCP Regulation.

²³ Availability of the appeal depends only on national procedural laws of Member States. See Art. 17, ESCP Regulation.

²⁴ Art. 15, ESCP Regulation.

²⁵ Art. 18, ESCP Regulation.

It is the European autonomous non-suspensive legal remedy against the the ESCP Judgment expressly provided for in the ESCP Regulation. See Varga, I. (2015) *Kommentar EG-BagatellVO*, p. 485 in Raucher, T. (Hrsg) *Europäisches Zivilprozess-und Kollisionsrecht EUZPR/EuIPR*, Kommentar, Band II, Köln, 2015, 4. Aufl., Verlag Dr Otto Schmidt KG, pp. 403-551; Garber (2020), p. 1374.

²⁶ Art. 20 (1), ESCP Regulation.

²⁷ Art. 22 (1), ESCP Regulation.

²⁸ Art. 22 (2), ESCP Regulation.

²⁹ See Schlosser (2021), p. 427; Garber (2020), pp. 1380, 1381.

³⁰ Art. 4 (1), ESCP Regulation, point 8, Details of Claim in Form A-Claim Form, possible subsequent service of documents depends on how the procedure of taking evidence takes place. See Art. 9 of the ESCP Regulation.

mission. As a rule, it depends on the claimant whether he/she will submit all relevant documents when submitting the prescribed claim form. The defendant also receives only the claim form to be able to respond. The supporting documents are serviced on the defendant only if they had initially been enclosed in the claim form by the claimant, or where it is applicable³¹. If no documentation is enclosed, the defendant's answer to the claim may only be based on the data given by the claimant in the claim form. Neither party is requested to make any legal assessment of the claim³². The court decides on the legal basis and foundedness of the claim based on the applicable national law. The parties' right to seek oral hearing is very limited. It is allowed only if the court assesses that, based on the circumstances of the case, oral hearing is necessary for the fair conduct of the proceedings. The refusal of the request for oral hearing cannot be separately contested but only within the challenge of the judgment by appeal if such an appeal is allowed or possible under the procedural law of the Member State³³. Indeed, the possibilities of the parties to challenge the judgment (if they even exist), are determined only by the national law of the Member State in which the procedure is conducted. The defendant's possibilities to apply for a review of the judgment are also very limited. This right may only be exercised by the defendant who did not enter appearance because the claim form had not been serviced on him/her, or because he/she was not summoned to oral hearing or was prevented from contesting the claim by reason of *force majeure*, or due to some extraordinary circumstances without any fault on his/her part. However, the defendant will not be able to seek review of the judgment if he/she had failed to challenge the judgment when it was possible for him/her to do so (if the defendant failed to lodge an appeal against the judgment in accordance with the applicable procedural law of the relevant Member State)³⁴. As regards the procedure of recognition and enforcement, there is no possibility for defendants to oppose the recognition³⁵. The only possibility is to seek stay or limitation of enforcement if the party has challenged the judgment by appeal, or has made an application for review of the judgment in some exceptional cases³⁶. In brief, the legal position of the parties, and especially defendants, although an adversarial procedure is involved, are significantly limited both in terms of the content and the form of answers to claims and the challenge of judgments and their enforcement.

The goals and characteristics of the ESCP determine the specific and active role of the court during the preliminary control of the claim form, when deciding on the parties' applications, when taking evidence or when deciding on the foundedness of the claim. In the process of deciding on the ESCP

³¹ Art. 5 (2), ESCP Regulation.

³² Art. 12 (1), ESCP Regulation.

³³ Art. 5 (1a), Art. 17, ESCP Regulation.

³⁴ Art. 18 (1), ESCP Regulation.

³⁵ Art. 20, ESCP Regulation.

³⁶ Art. 23, ESCP Regulation.

judgment in accordance with the Regulation, the court has only limited powers when it comes to *ex officio* acting. The court has *ex officio* preliminary control to establish whether the claim form has been properly filled in and whether the information provided by the claimant is inadequate or insufficiently clear. The claim form is then serviced to the claimant to be completed or rectified³⁷. The court is authorised to *ex officio* control whether the claim is clearly unfounded or inadmissible and it also, *ex officio*, dismisses clearly unfounded or inadmissible claims³⁸. In addition, the court is authorised to request further details from the parties concerning the claim, take evidence necessary for the judgment and conduct oral hearing when it is not possible to render the judgment on the basis of only written evidence³⁹. To what extent the court will be in the position to *ex officio* determine the means of taking evidence, and its extent, depends on how the applicable national procedural law regulates the admissibility of evidence and the possibility of the court to take evidence *ex officio*⁴⁰. However, after the enforcement procedure of an ESCP judgment has been initiated, the court conducting the enforcement procedure does not have any special powers to perform *ex officio* control of the judgment, refuse its enforcement or stay it. Refusal, stay or limitation of enforcement are possible only on the request of the person against whom the enforcement is sought and only for the prescribed and listed grounds⁴¹. In short, by the ESCP Regulation, the court's *ex officio* powers in the process of rendering ESCP judgments are very limited. The scope of the court's powers to *ex officio* acting when rendering its judgment in small claim procedures depends on the applicable national procedural rules applied in a subsidiary manner. However, in the enforcement phase of an ESCP judgment, the court of enforcement may not *ex officio* rule on the admissibility of enforcement and validity of an ESCP judgment.

3. *EX OFFICIO* APPLICATION OF EU CONSUMER LAW IN CONSUMER LITIGATION

The law of the Union lays down that consumers, as weaker contractual parties, in their disputes with traders, must be provided effective legal protection. The obligation to provide effective protection of consumer rights in the European Union generally arises from Article 19/1 TEU on the commitment of Member States to provide remedies sufficient to ensure effective legal protection in the areas covered by Union law. The principle of sincere coopera-

³⁷ Art. 4 (4), ESCP Regulation.
See Garber (2020), p. 1325.

³⁸ Arts 4 (4), (5), ESCP Regulation.

³⁹ 39 Art. 7 (1), ESCP Regulation.

⁴⁰ Art. 9 (1), ESCP Regulation.

⁴¹ Art. 22, 23, ESCP Regulation.

tion⁴² binds also Member States to ensure full effectiveness of the EU law⁴³. Indeed, concrete requirements to ensure effective protection are set forth in consumer directives providing for EU consumer rights in individual consumer contracts and legal remedies for their protection.

Effective protection of EU consumer rights in consumer litigation sometimes requires from national courts *ex officio* application of EU consumer law despite the fact that the consumer has not requested the protection of his/her rights or has failed to do so within the prescribed time limits. Such acting will be necessary when by the applicable national substantial and/or procedural law, the European standards of efficient protection of European consumer rights cannot be safeguarded. National courts are then requested to take up an active role in consumer litigation and to provide efficient protection of EU consumer rights by *ex officio* application of EU consumer law (so-called doctrine of active courts in the European consumer proceedings⁴⁴). It is the autonomous European interpretation of the role of national courts in the context of EU consumer law⁴⁵. The ECJ has gradually been developing this concept by interpreting various consumer directives in the context of consumer protection in consumer litigation. First, the ECJ gave the interpretation of the national courts' obligation to control *ex officio* the unfairness of contract terms in consumer contracts in order to ensure effective consumer protection in regular/ordinary civil adversarial proceedings against any imbalance between consumers and traders caused by non-negotiated unfair contract terms⁴⁶. Progressively, the ECJ expanded the so-called consumer *ex officio* doctrine⁴⁷ to other areas of consumer law, i.e. to the protection of other EU consumer rights in contractual relations recognised in other consumer directives, by interpreting also other *ex officio* court powers in consumer disputes^{48, 49}. The concept of *ex officio* application of EU consumer law has grad-

⁴² Among other things, the principle of sincere cooperation requires from Member States to take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. See Art. 4 (3) TEU.

⁴³ See Lenearts, K., Mesalis, I., Gutman, K. (2015), *EU Procedural Law*, Oxford, Oxford Univ.Press, p. 134.

⁴⁴ See Beka, A. (2018), *The Active Role of Courts in Consumer Litigation*, Cambridge-Antwerp-Chicago, Intersentia, p. 7.

⁴⁵ *Ibid.*, pp. 139, 354.

⁴⁶ The first case where the ECJ interpreted *ex officio* application of EU consumer law in the context of Directive 93/13/EEC on unfair terms in consumer contracts (*OJ L 95, 21/4/1993, pp. 29–34*) was the case *Océano Grupo Editorial SA*. See ECJ, 27 June 2000, *Océano*, ECLI:EU:C:2000:346.

⁴⁷ See Beka (2018), p. 45.

⁴⁸ See ECJ, 4 June 2015, *Faber*, C-497/13, ECLI:EU:C:2015:357; ECJ, 3 October 2013, *Duarte Hueiros*, C-32/12, ECLI:EU:C:2013:637 in connection with Directive 1999/44/EC on certain aspects of the sale of consumer goods and the associated guarantees;

See ECJ, 4 October 2007, *Rampion and Godard*, C-429/05, ECLI:EU:C:2007:575; ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283 in connection with Directive 87/102/EEC on consumer credits;

See ECJ, 17 December 2009, *Martín Martín*, C-227/08, ECLI:EU:C:2009:792 in connection with Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business.

⁴⁹ See Law, S. (2018) *The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms*, p. 305 in A. Uzelac, C.H. van Rhee (eds), *Transformation of Civil Justice*

ually been applied in other specific civil proceedings, (e.g. order for payment procedure, enforcement procedure, insolvency procedure *et al.*)⁵⁰ where the ECJ's interpretation has also been that efficient protection of EU consumer rights requires the courts' *ex officio* acting. Today, the consumer *ex officio* doctrine is accepted as an integral element of EU consumer law and it has a wide scope of application⁵¹.

The ECJ's interpretation of *ex officio* application of EU consumer law starts from the basic position that in consumer disputes, it is necessary to fully achieve the purpose of EU consumer directives, i.e. to ensure the appropriate and effective protection of consumers' rights recognised by the EU law. Because of effective protection of consumers, national courts must, under particular preconditions, *ex officio* apply the EU consumer law, regardless of the fact that by so doing, the national procedural autonomy, the party autonomy and the principle of party disposition are limited. The ECJ always explains in the same way the national courts' obligation to apply *ex officio* EU consumer law in consumer litigation. The Court emphasises "*that the requirement has been justified by the consideration that the system of protection introduced by those directives is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge and that there is a real risk that the consumer, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect him.*"⁵² Therefore, the ECJ points out that "*it follows therefrom that effective consumer protection could be achieved only if the national court were required, of its own motion, to examine compliance with the requirements which flow from EU law on consumer law. The imbalance which exists between the consumer and the seller or supplier may be corrected by the court hearing such disputes only by positive action unconnected with the actual parties to the contract.*"⁵³ In this connection, many other reasons justifying *ex officio* application of EU consumer law in consumer disputes with traders are noted, such as the mandatory nature of EU consumer law, similar position of EU rules on consumers in the legal order of EU as the position of the public policy rules in national legal orders of Member States, the consumer protection as a matter of the European economic public policy, the protection of fundamental rights⁵⁴.

(pp. 283-307), Cham, Springer; Streatmans, Vereecken (2024), p. 49; Davida, Z. (2024) Consumer Decision-Making Autonomy in the Digital Environment: Towards a New Understanding of National Courts' Obligation to Assess Ex Officio Violations of Fair Commercial Practices, pp. 1038, 1041, 1047, The European Journal of Risk Regulation, Vol. 15, Special Issue 4, doi: 10.1017/err.2024.11, pp. 1034-1049.

⁵⁰ See ECJ case law cited in footnote 67.

⁵¹ See Beka (2018), pp. 177, 189; Law (2018), p. 315; Davida (2024), p. 7; Ancery, A. (2021) Consumer Credit Contracts and Ex Officio Application: A Dutch Perspective, Case Note on Profi Credit Polska (Cases C-419/18 and C-483/18), p. 162, Journal of European Consumer and Market Law/EuCML, Vol. 10, Issue 4, pp. 160-164; Streatmans, Vereecken (2024), pp. 49, 50.

⁵² Taken from ECJ judgment of 4 June 2015, *Faber*, C-497/13, ECLI:EU:C:2015:357, point 42.

⁵³ Taken from ECJ judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283, points 66, 67.

⁵⁴ See Beka (2018), pp.139, 136, 357. See, for example ECJ, 9 April 2024, *Profi Credit Polska*, C-582/21, ECLI:EU:C:2024:282, points 72-83.

The main rule resulting from the consumer *ex officio* doctrine is that “courts have the duty to raise of their own motion protective measures of EU consumer law without waiting for the submissions of the party”⁵⁵. In numerous judgments, the ECJ’ interpretation has been that national courts have an obligation to examine of their own motion various violations of EU consumer protection legislation such as the use of unfair contract terms in consumer contracts, infringements of different traders’ duties in distance contracts, sales contracts, consumer credit contracts⁵⁶. The catalogue of positive/active *ex officio* interventions in consumer litigations by national courts is very long. According to a well-established ECJ case law, national courts should of their own motion control the unfairness of contract terms in consumer contracts if the necessary legal and factual elements are available⁵⁷. Regardless of the fact that the claimant has not invoked his/her consumer status, national courts should *ex officio* establish in civil litigation whether the claimant has entered into a contract in the capacity of a consumer, or whether it is a contract within the area of application of EU consumer law⁵⁸. National courts should *ex officio* control if any information duties have been infringed to the detriment of the consumer⁵⁹ and even if the consumer contract is void because of the violation of information duties⁶⁰. *Ex officio* protection of the consumer and his/her rights should be provided by the use of alternative legal remedies although they have not been invoked by the consumer in the course of litigation⁶¹. The courts should, of their own motion, activate penalties for the violation of the consumer’s rights (e.g. for the infringement of information duties)⁶². In order to render a judgment, the court should *ex officio* take investigative measures by asking the parties to provide the court with the necessary clarifications or documents (e.g. in the absence of the legal and factual elements for the control of unfairness)⁶³.

As a rule, in its interpretations of *ex officio* duties, the ECJ refers to almost all abovementioned justifications for *ex officio* application of EU consumer law. Frequently, such interpretations are supported by the principle of equivalence and the principle of effectiveness as the fundamental EU principles on which the protection of subjective rights is based. It is sometimes empha-

⁵⁵ Taken from Beka (2018), p. 354.

⁵⁶ See ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283, p. 62 and the case-law cited.

⁵⁷ See, for example ECJ, 9 April 2024, *Profi Credit Polska*, C-582/21, ECLI:EU:C:2024:282.

⁵⁸ See ECJ, 4 June 2015, *Faber*, C-497/13, ECLI:EU:C:2015:357, point 38.

⁵⁹ See ECJ, 28 November 2018, *PKO Bank Polski*, C-632/17, ECLI:EU:C:2018:963, points 50, 51, 52.

⁶⁰ See ECJ, 17 December 2009, *Martín Martín*, C-227/08, ECLI:EU:C:2009:792, point 28.

⁶¹ See ECJ, 3 October 2013, *Duarte Hueros*, C-32/12, ECLI:EU:C:2013:63, point 39.

⁶² See ECJ, 4 October 2007, *Rampion and Godard*, C-429/05, ECLI:EU:C:2007:575, point 65; ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283, points 68,70,71,74; ECJ, 7 November 2019, joined cases C419/18 and C483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930, point 69.

⁶³ See ECJ, 11 March 2020, C-511/17, *Lintner*, ECLI:EU:C:2020:188, points 38, 39; ECJ, 4 June 2020, C-495/19, *Kancelaria Medius*, ECLI:EU:C:2020:431, points 38, 40.

sised that these are actually the procedural rules binding all national courts⁶⁴. When it comes to the courts' obligations to request *ex officio* the submission of documentation or additional clarification, it is emphasised that such *ex officio* acting of the courts are not contrary to the principle that the parties delimit the subject matter of an action and the principle of *ne ultra petita*. The ECJ points out that such requests simply form part of the evidential framework of the proceedings and that the purpose of such requests is merely to verify the basis of the action⁶⁵.

Another important rule on which the consumer *ex officio* doctrine is based is that the specific type of procedure which the trader chooses, or which otherwise applies against the consumer, cannot reduce the fundamental procedural guarantees necessary for consumer protection under EU legislation for the benefit of consumers. Specific characteristics of court proceedings cannot constitute a factor liable to affect the legal protection to the benefit of consumers under the provisions of EU consumer legislation⁶⁶. Therefore, the consumer *ex officio* doctrine applies to all types of civil procedure, to all procedural situations and to all stages of procedure such as ordinary civil proceedings, appeal procedures, judgments in default, actions for the annulment of an arbitration award, enforcement of an arbitration award, injunctions, payment order procedures, enforcement procedures, insolvency procedures, *et al*⁶⁷.

⁶⁴ See ECJ, 9 April 2024, *Profi Credit Polska*, C-582/21, ECLI:EU:C:2024:282, point 66; ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283, point 77; ECJ, 7 November 2019, joined cases C419/18 and C483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930, point 74.

⁶⁵ See ECJ 4, June 2020, C-495/19, *Kancelaria Medius*, ECLI:EU:C:2020:431, point 45; ECJ, 7 November 2019, joined cases C419/18 and C483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930, point 68; ECJ, 26 November 2020, C-807/19, *DSK Bank*, ECLI:EU:C:2020:96.

See Józson, M. (2023) The 'Ex Officio' Doctrine of the CJEU Revisited: On the Active Role in Unfair Contract Terms Law-Critical Remarks on the Lintner Ruling (C-551/17), pp. 366, 367, Croatian Yearbook of European Law and Policy/CYELP, Vol. 19, pp. 361-378

⁶⁶ See ECJ, 26 October 2006, C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675; ECJ, 6 October 2009, C-40/08, *Asturcom*, ECLI:EU:C:2009:615; ECJ, 16 November 2010, C-76/10, *Pohotovos*, ECLI:EU:C:2010:685; ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283; ECJ, 10 September 2014, C-34/13, *Kušionová*, ECLI:EU:C:2014:2189; ECJ, 17 July 2014, C-169/14, *Morcillo*, ECLI:EU:C:2014:2099; ECJ, 30 May 2013, C-488/11, *Asbeek Brusse*, ECLI:EU:C:2013:341; ECJ, 30 May 2013, C-397/11, *Jörös*, ECLI:EU:C:2013:340.

⁶⁷ For order for payment procedure see ECJ, 14 June 2012, C-618/10, *Banco Español*, ECLI:EU:C:2012:349; ECJ, 18 February 2016, C-49/14, *Finanmadrid*, ECLI:EU:C:2015:746; ECJ, 20 September 2018, C-448/17, *EOS KSI Slovensko*, ECLI:EU:C:2018:745; ECJ, 7 November 2019, joined cases C419/18 and C483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930; ECJ, 26 November 2020, C-807/19, *DSK Bank*, ECLI:EU:C:2020:96; ECJ, 17 May 2022, joined cases C-693/19 and C-831/19, *SPV Project 1503*; ECJ, 30 June 2022, C-170/21, *Profi Credit Bulgaria*, ECLI:EU:C:2022:518; ECJ, 28 November 2018, *PKO Bank Polski*, C-632/17, ECLI:EU:C:2018:963.

For default judgment see ECJ, 17 May 2018, C-147/16, *Karel de Grote*, ECLI:EU:C:2018:320; ECJ, 9 April 2024, *Profi Credit Polska*, C-582/21, ECLI:EU:C:2024:282.

For enforcement procedure see ECJ, 14 March 2013, C-415/11, *Aziz*, EU:C:2013:164; ECJ, 14 November 2013, joined cases C-537/12 and C-116/13, *Banco Popular Español*, ECLI:EU:C:2013:759; ECJ, 17 July 2014, C-169/14, *Morcillo*, ECLI:EU:C:2014:2099; ECJ 18 February 2016, C-49/14, *Finanmadrid*, ECLI:EU:C:2015:746; ECJ 26 June 2019, C-407/18, *Addiko Bank*, ECLI:EU:C:2019:537; ECJ, 17 May

4. EX OFFICIO APPLICATION OF EU CONSUMER LAW IN THE ESCP

The broad scope of application of the consumer *ex officio* doctrine requires that all the rules on *ex officio* application of EU consumer law are also fully applied in the European small claim procedure. There is no justification that in the cases where within the ESCP it is decided on a dispute between a consumer and a trader, not the same standards of effective protection of the EU consumer rights are required. All the reasons justifying *ex officio* application of EU consumer law, apply also to the ESCP. The fact that it is the European civil procedure organised as the European optional instrument must not have any impact in terms of excluding *ex officio* application of EU consumer law in the ESCP.

Indeed, so far the ECJ has not been in a situation to interpret, in this respect, the relation between the ESCP Regulation and the consumer directives providing for EU consumer rights and requiring their effective protection. However, such a conclusion can be drawn from the ECJ's interpretation of some other optional instruments based on the same principles as is the case with the ESCP Regulation⁶⁸. In the joined cases *Bondora*, C-453/18 and C-494/18⁶⁹, the ECJ interpreted the connection between the European Payment Order Regulation⁷⁰ and the Unfair Contract Terms Directive (hereinafter: UCTD), in the very context of the requirement for *ex officio* application of EU consumer law. The ECJ's interpretation has been that the requirements in terms of *ex officio* application of EU consumer law to unfair contract terms apply also when a national court conducts the European payment order procedure. Therefore, with regard to the "court" according to the European Payment Order Regulation, all the rules on *ex officio* control of unfairness of contract terms apply which the ECJ has already defined in the context of the national payment order procedure⁷¹. The ECJ's interpretation has been,

2022, C-600/19, Ibercaja Banco SA, ECLI:EU:C:2022:394; ECJ, 17 May 2022, joined cases C-693/19 and C-831/19, *SPV Project 1503*, ECLI:EU:C:2022:395.

For procedure for annulment of an arbitration award see ECJ, 26 October 2006, C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675.

Forenforcement of arbitration award see ECJ, 6 October 2009, C-40/08, *Asturcom*, ECLI:EU:C:2009:615.

For appeal procedure see ECJ, 30 May 2013, C-488/11, *Asbeek Brusse*, ECLI:EU:C:2013:341; ECJ, 30 May 2013, C-397/11, *Jörös*, ECLI:EU:C:2013:340.

For out-of-court enforcement procedure see ECJ, 10 September 2014, C-34/13, *Kušionová*, ECLI:EU:C:2014:2189.

For insolvency proceedings see ECJ 21 April 2016, C-377/14, *Radlinger and Radlingerová*, ECLI:EU:C:2016:283.

⁶⁸ It is emphasised in literature that the ESCP Regulation and other EU regulations in the field of civil procedure belong in the same group of EU legislation. Therefore, in parallel and by analogy, the same principles of interpretation are applicable to all of them. See Schlosser (2021), p. 427.

⁶⁹ See ECJ, 19 December 2019, joined cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118.

⁷⁰ Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (*OJ L 399, 30.12.2006, pp. 1–32*).

⁷¹ See the ECJ case law cited in footnote 69.

that the court having jurisdiction for the European payment order is bound *ex officio* to control unfairness of contract provisions. The court is thus authorised to request from the creditor additional information relating to the terms of the contract in order to carry out *ex officio* review of the possible unfairness of contract terms⁷². The ECJ emphasised that a different interpretation of the powers of the court conducting the European payment order procedure would make it possible for creditors to circumvent the requirement for effective consumer protection laid down in the UCTD⁷³. For the Court's interpretation of *ex officio* powers of the court, it was not decisive that the European payment order procedure, just like the ESCP, was a formal and a written procedure aimed at simplifying, accelerating and reducing the costs in cross-border disputes concerning uncontested pecuniary claims. It was also not essential that it was the European civil proceedings regulated by the European optional instrument, i.e. a directly applicable regulation with the rules which have direct effects⁷⁴.

By its interpretation, the ECJ has actually confirmed that EU optional regulations providing for specific European civil proceedings on the one hand, and EU consumer directives on the other hand, are secondary legal acts of the Union which have the same place in the hierarchy of legal rules and are not mutually exclusive. Such optional regulations and EU consumer directives must be interpreted together and in a coordinated manner⁷⁵. It means that in civil proceedings governed by EU regulations, all high standards of the protection of EU consumer rights must be achieved and that the courts conducting such proceedings are also *ex officio* bound to apply EU consumer law. Otherwise, the use of optional instruments may lead to different standards of the protection of EU consumer rights adopted in other civil litigations based on the consumer *ex officio* doctrine. Therefore, the courts' obligation to act of their own motion applies also to European small claim procedures and to the enforcement of the ESCP judgments.

5. EFFECTIVE CONSUMER PROTECTION IN THE ESCP

The case law of the ECJ undoubtedly shows that in the ESCP, when a consumer dispute is involved, and when small claim decisions must be rendered, all high standards of the protection of EU consumer rights must be met. This

⁷² See Józson (2023), p. 366.

⁷³ See ECJ, 19 December 2019, joined cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, points 46-54.

⁷⁴ See ECJ, 19 December 2019, joined cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, points 36, 37, 38.

⁷⁵ Opinion of advocat general Sharpston, 31 October 2019, joined cases C453/18 and C494/18, *Bondora*, ECLI:EU:C:2019:921, point 53.

Possibly excluded applications of the provisions of a particular consumer directive would depend on whether by a provision of an EU regulation, the application of a directive is expressly excluded or limited. *Ibid.*, point 53.

is particularly important in the cases where in the ESCP, the consumer is in the status of a defendant, or when the initiation of the ESCP against the consumer depends only on the trader's decision to effectuate his/her claim against the consumer. Although it is often emphasised that the ESCP Regulation makes it easier for the consumers to have cross-border access to justice because of the simplicity of the procedure⁷⁶, the possibility that the same procedure is also used by traders for them to be able to quickly and simply collect their small cross-border claims against consumers. In such cases, a question arises whether it is possible (due to specific procedural rules governing the ESCP, the formality of the procedure, the written nature of the procedure, the specific rules on taking evidence, the enforceability of the ESCP judgments, the rules on their automatic recognition) for national courts, when deciding on the small claims and enforcing the ESCP judgments against consumers, to safeguard effective protection of consumers by *ex officio* application of the EU consumer law.

In that regard, it is important to assess the consumer's procedural position in the ESCP and whether his/her position safeguards his/her rights in the proceedings. The relevant provisions of the ESCP Regulation for the assessment are the provisions laying down that the initiation of the ESCP depends solely on the claimant. Indeed, in the claim form, the claimant not only defines the claim but also describes the pieces of evidence on which the claim is based, without having to submit them⁷⁷. In a large number of cases, such a summary claim cannot provide sufficient information for the consumer (as the sued party) either about the claim, or about the documents on which it is based, or the method of the calculation of its amount, or of any subsequent claims. Therefore, a question arises whether the consumer, because of his/her weak position *vis-à-vis* the trader, will even be able to contest the claim in the phase of his/her answer to the claim and to submit new evidence. Whether the consumer, during the continuation of the proceedings, will have the opportunity to file objections against the claim and to submit documentation depends on the court's assessment of the necessity of an oral hearing and its requests for the submission of further details concerning the claim⁷⁸.

Taking all this into consideration, the crucial question is whether the procedural rules of the ESCP Regulation, providing for the court's *ex officio* acting, make it possible for the court to also *ex officio* apply the EU consumer law in accordance with the standards of effective protection of consumer rights defined in the ECJ's case law. It seems that the procedural rules referred to in the ESCP Regulation cannot fully guarantee effective protection

⁷⁶ It is emphasised that by the ESCP Regulation, common rules to ensure minimum level of protection for creditors of law-value claims are established at the level of the Union. See Giacalone, M., Sajedeh Salehi, S. (2020), p. 182, The European Small Claim Procedure: Implementation and Enforcement Revisited in Italy and Belgium, *Journal of European Consumer and Market Law/EuCML/EuCML*, Vol. 9, pp. 181-190.

⁷⁷ See Varga (2015), pp. 454-456; Garber (2020), p. 1321.

⁷⁸ Arts 5 (1), 7, ESCP Regulation.

of consumers by *ex officio* application of the EU consumer law. However, the court does have certain *ex officio* powers in the ESCP. It must *ex officio* carry out a preliminary control to establish whether the claimant has completely and correctly filled in the claim form, and in the case of the contrary, to request the completion or rectification. The court may even reject the claim if it is *prima vista* clearly unfounded or inadmissible⁷⁹. On the other hand, taking into account the fact that the claimant does not have to enclose any pieces of evidence or documents with the claim form, but can only describe them, a question arises whether the court initially disposes of all the available legal and factual elements to establish the existence of a consumer dispute, whether one of the parties is the consumer, or whether it is a claim arising from a legal relation to which the EU consumer law applies. Namely, a description of evidence in the claim form, or its possible submission together with the claim form, solely depend on the claimant. If the claimant is the consumer, it is possible that he/she, because of lack of knowledge or lack of information, will fail to note all the relevant pieces of evidence leading to a conclusion that it is a consumer dispute to which the EU consumer law applies. However, if the claimant is a trader, it is possible that he/she, in order to succeed in the proceedings, intentionally does not mention in the claim form all the relevant evidence indicating the consumer nature of the dispute.

Furthermore, it is not clear from the ESCP Regulation when it is possible, during the court's preliminary control of the claim form, for the court to decide whether the claim is clearly inadmissible, and in particular whether it is clearly unfounded. It is obviously not done when the claim is outside the scope of the Regulation, i.e. when the claim relates to matters not stipulated in the Regulation^{80,81}. In the context of the court's decision on clear inadmissibility, it can be the control whether the claim exceeds the amount of 5,000 EUR, and whether it arises from a cross-border case, i.e. whether all the main procedural prerequisites for the institution of the ESCP Regulation are met. As a rule, such control may be carried out merely on the basis of the claim form and by direct application of the Regulation. It is disputable, however, if in this initial phase and only on the basis of the claim form it is possible for the court to decide on the claim as being clearly unfounded. On the one hand, this decision depends on the application of the national substantive law applicable to the dispute. The concept "*clearly unfounded*" cannot be interpreted autonomously at the European level but only in the context of the applicable national law⁸². Indeed, various interpretations are possible and they may lead to different court decisions regarding the unfoundedness of the claim. On the other hand, for such a control and in most cases, specific documents and other types of evidence are necessary, rather than a mere description in the

⁷⁹ Art. 4 (4), ESCP Regulation.

⁸⁰ Art. 2 (2), ESCP Regulation.

⁸¹ There are even some specific rules in the Regulation governing such a case in Art. 4 (3), the ESCP Regulation.

⁸² See Garber (2020), p. 1328.

claim form. Therefore, there is very little probability that in the phase of the preliminary control of the claim form the court will even be able to decide on unfoundedness of the claim, let alone on *ex officio* application of EU consumer law. In the largest number of cases, in that phase of the proceedings, it will not even be possible to establish whether a consumer dispute is involved. If no documents have been submitted, a question arises whether it is even possible to establish the law applicable to the dispute. The court, as a rule, will not dispose of any documents on the basis of which it could possibly decide that obvious unfoundedness of the claim is derived from a rule of the EU consumer law the court ought to apply *ex officio*. A conclusion can be made that the rules referred to in the Regulation providing for *ex officio* acting of the court in the preliminary control of the claim practically do not make it possible for the court to apply *ex officio* the EU consumer law in that phase of the procedure.

Other rules on *ex officio* acting of the courts in the ESCP could only in a limited manner contribute to effective protection of the consumer as a party to the dispute. Indeed, the ESCP Regulation expressly provides that the court may request from the parties further details concerning the claim and take evidence⁸³. On the basis of these rules, the court could *ex officio* invite the parties to provide the necessary clarifications or documents, or it could summon the parties to an oral hearing to receive the necessary elements of importance for *ex officio* application of the EU consumer law in the ESCP. However, when it comes to taking evidence of importance for *ex officio* application of the EU consumer law, the courts' powers to act of their own motion depend on the national rules applicable to the admissibility of evidence⁸⁴. In addition, the ESCP Regulation does not lay down any separate rules on the court's acting if the consumer as a defendant is passive in the proceedings, or in the cases where, because of lack of knowledge or information he/she has failed to take some procedural actions. For example, there are no specific rules on the court's acting when the defendant has failed to respond within 30 days from the service of the claim form by filling in the standard answer form, or has done it wrongly or incompletely⁸⁵, when the defendant has not participated in the oral hearing⁸⁶, or has failed to lodge an appeal against the judgment in the way and within the time limits prescribed by the applicable procedural law of the Member State⁸⁷. In such cases, the provisions of the applicable procedural law of the Member State apply to the decision making procedure regarding the claim⁸⁸. An open question remains whether the court conducting the ESCP, by invoking the principle of equivalence or the principle of effectiveness, may then *ex officio* apply the EU consumer law and

⁸³ Art. 7 (1), ESCP Regulation.

⁸⁴ Art. 9 (1), ESCP Regulation.

⁸⁵ Art 5 (3), ESCP Regulation.

⁸⁶ Art. (8), ESCP Regulation.

⁸⁷ Art. 17, ESCP Regulation.

⁸⁸ Art. 19, ESCP Regulation.

protect the consumer who failed to take any procedural action out of ignorance, lack of knowledge or fear of high costs. Finally, it all depends on the procedural guarantees by which it is possible to protect the consumer under the applicable procedural law of the Member State.

After the judgment has been rendered, the protection of the consumer in the enforcement procedure is determined by a number of rules calling for an expeditious and a summary court action. The possibility of lodging an appeal against the judgment and the prerequisites exclusively depends on the applicable procedural law of the Member State⁸⁹ which determines the possibility to appeal and under which preconditions. The ESCP Regulation expressly excludes the possibility for the appeal to postpone the enforceability of the judgment⁹⁰ and it significantly limits the grounds for a review of the judgment, excluding it in the cases where the defendant failed to challenge the judgment although such a possibility had existed⁹¹. The ESCP enforcement procedure does not envisage any possibility of opposing the recognition of judgments⁹². The grounds for refusal, stay or limitation of enforcement are very narrowly stipulated⁹³. There are no specific rules in the ESCP to safeguard consumer protection⁹⁴. All the mentioned rules point to a conclusion that in the enforcement procedure of an ESCP judgment, the court does not play an active role in ensuring effective protection of EU consumer rights. There is no possibility of control over an ESCP judgment in the Member States of enforcement⁹⁵. There is a real possibility, however, that because in the ESCP, the court failed to apply the EU consumer law, or because the consumer was passive out of ignorance or lack of knowledge, or he/she failed to lodge an appeal, an ESCP judgment, contrary to the EU consumer law, is enforced. At the end of the day, the consumer may exercise the protection of his/her rights only *ex post* in a separate civil action, after the trader has already collected the claim in a summary enforcement procedure under the ESCP Regulation. This is contrary to one of the very important rules on which the ECJ often bases its interpretation of effective protection of EU consumer rights in the enforcement procedure according to which protection must be safeguarded before the judgment is fully enforced against the consumer. This is why in many of its judgments, the ECJ has interpreted the importance of preliminary measures in the enforcement procedure against consumers, and the importance of *ex officio* application of EU consumer law in the enforcement procedure,

⁸⁹ See Simaitis, R., Vėbraité, V., Markevičiūtė, M., (2022), European Small Claim Procedure in the Realm of other European Proceedings, pp 129,130, Revista Ítalo-Española de Derecho Procesal (1), pp. 123-136, <https://doi.org/10.37417/rivitsproc/685> ; Kramer, X.E., (2008) The European Small Claims Procedure: Striking Balance between Simplicity and Fairness in European Litigation, p. 364, Zeitschrift für Europäisches Privatrecht/ZEuP (Heft 2), pp. 355-373

⁹⁰ Art. 15, ESCP Regulation.

⁹¹ Art. 18 (1), ESCP Regulation.

⁹² Art. 20 (1), ESCP Regulation.

⁹³ Art. 22, 23, ESCP Regulation.

⁹⁴ See Schlosser, (2021), p. 450.

⁹⁵ See Schlosser (2021), p. 447.

regardless of the fact that the order for payment has become final, so that the principle of *res iudicata* should be applied.⁹⁶

For all these reasons and in most situations, the protection standards of the EU consumer rights defined by the ECJ in its interpretations of the consumer *ex officio* doctrine cannot be achieved within the current regulation of the European small claim procedure. The characteristics of the ESCP may lead to unfavourable and harmful results when it comes to consumer protection⁹⁷. Preference over effective protection of EU consumer rights is given to expeditious enforcement of the ESCP judgments. Such approach may be justified when dealing with small claims in commercial disputes. However, in consumer disputes and in particular in the cases where the consumer is the sued party, a different balance between an expeditious enforcement procedure and the protection of EU consumer rights is necessary.

6. CONCLUSION

The European small claim procedure, as well as other European civil procedures governed by EU regulations as optional instruments, are important legal instruments for the development of judicial cooperation in civil matters in the European Union. They have a very important role in the harmonisation of the legal protection standards in civil procedures at the level of the Union. The significance of such optional instruments is particularly obvious because of the lack of EU competences for the unification of the civil procedure rules by which the same standards of access to justice, the protection of procedural rights and effective judicial remedies would be established at the level of the Union. Optional civil procedure instruments should be optimal European models for the resolution of disputes and the enforcement of claims and judgments. However, this will be possible only if they are used to provide a well-balanced and standardised protection of all parties regardless of which procedural rules of Member States are applied in a subsidiary manner. It is also important that all EU standards of the protection of subjective individ-

⁹⁶ See, for example, ECJ, 14 March 2013, C-415/11, *Aziz*, EU:C:2013:164; ECJ, 14 November 2013; ECJ, 17 July 2014, C-169/14, *Morcillo*, ECLI:EU:C:2014:2099; ECJ, 17 May 2022, joined cases C-693/19 and C-831/19, *SPV Project 1503*, ECLI:EU:C:2022:395.

Such ECJ case law would lead to the conclusion (regarding the nature and importance of the public interest underlying consumer protection against unfair contract terms) that also in the ESCP enforcement procedure, the Court should be bound to examine, of its own motion, the potential unfairness of contractual terms.

⁹⁷ See Varga (2015), p. 434.

Other faults in the ESCP Regulation regarding consumer protection are also emphasised in literature. For example, it is noted that the Regulation does not provide for special jurisdiction rule for consumers. See Kramer (2008), p. 368.

It is also pointed out that up to now, the ESCP Regulation has had a limited impact on private enforcement of EU consumer law and on improving procedural conditions for consumers at litigations because, among other things, it applies only to cross border cases. See V. Streatmans, Vereecken (2024), p. 61.

ual rights, recognised by the law of the Union, are respected. Optional civil procedure instruments can significantly contribute to effective protection of consumer rights particularly at present when the demands for their enhanced protection are increasingly expressed because of the development of the digital market and the digitalisation of the judiciary.

In future reforms of the European small claim procedure, it would be very useful to take into account very high standards of the effective protection of EU consumer rights which often require active acting on the part of the courts in consumer disputes. It would be very useful to consider the possibilities to reform some particular rules in the ESCP Regulation. A logical thing would be to incorporate, in the small claim procedure, the EU standards of consumer rights protection, on which there is a lot of insistence in the Union because of the protection of EU public policy, the social market economy and the fundamental rights. Effective protection of consumer rights can be achieved by express stipulation of separate rules on the courts' *ex officio* acting when ruling in small claim consumer disputes. It would be useful to include separate rules in the enforcement procedure to enable, even if exceptionally, an active role of the court in *ex officio* application of the EU consumer law and in reviewing judgments when EU consumer rights are violated. A reform of the European small claim procedure could be used to expressly regulate, at the European level, the national courts' acting in conformity with the consumer *ex officio* doctrine which the ECJ has been developing for more than two decades. The ECJ case law is very extensive and advanced and it can be used to define specific procedural rules for *ex officio* acting of the courts in consumer disputes. The ESCP Regulation and other optional civil procedure instruments are the right and the most suitable places for such approach. They are autonomous European civil procedures which must be directed at safeguarding effective protection of EU consumer rights. Unification at the level of the Union can be achieved by the introduction, in the ESCP Regulation, individual rules providing for an active role of courts in consumer disputes. Such an approach would exclude, or at least limit in practice, and because of the subsidiary application of the national procedural rules, different levels of the protection of consumer rights in the ESCP. It would also exclude the situations where the competent court must assess the effectiveness of applicable procedural rules in every concrete small claim procedure. In addition, this approach would not in any way impact the change of principles on which the procedural laws of Member States are based because we speak of optional and alternative instruments existing in parallel with national civil procedures. To conclude, such a reform of the ESCP seems to be extremely important, even essential, because of the increased demands for digitalisation of small claim procedures⁹⁸ due to the automatization of the decision-making process in civil procedures requiring well-developed mechanisms for the protection of individual rights.

⁹⁸ See Simaitis, Vébraité, Markeviciūtė (2022), p. 132; Giacalone, M., Sajedeh Salehi, S. (2022), Small Claims and the Pursuit of (Digital) Justice: a tiered online dispute resolution perspective, pp. 201-202, *Revista Ítalo-Española de Derecho Procesal* (1), pp. 201-212.

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THE CHALLENGES OF DIGITALIZATION OF CIVIL JUSTICE: TOWARDS A FLEXIBLE ORALITY

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ABSTRACT: Small claims proceedings are increasingly characterized by the prevalence of writing over orality. EU Regulation No. 861/2007 provides for proceedings that reduces but does not eliminate oral and direct contact between parties and judge. The author considers it appropriate to enhance this flexible orality, also making use of the tools of digital proceedings.

Keywords: orality; UE regulation 861/2007; written procedures; digital orality.

SUMMARY: 1. INTRODUCTION.— 2. THE USE OF WRITTEN PROCEDURES FOR SMALL CLAIMS.— 3. THE WRITTEN PROCEDURE IN REGULATION N. 861 OF 2007.— 4. A FLEXIBLE ORALITY IN THE SMALL CLAIMS REGULATION.— 5. THE ROLE OF DIGITAL ORALITY.— BIBLIOGRAPHY

1. INTRODUCTION

The debate between orality and writing is one of the great classics of procedural law. The fundamental question is which mode of conducting civil proceedings best serves the needs of justice.

In the 20th century, the idea prevailed that orality guaranteed better procedural justice. The idea was established that an immediate contact and dialogue between judge and parties could ensure a better reconstruction of factual circumstances and a personal and direct confrontation between judges and witnesses a more effective collection of investigative material.

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In recent times, the “oral model” of civil proceedings has entered into crisis for reasons that are more practical than theoretical: structuring the proceedings on periodic meetings between judges, parties and other subjects involved almost inevitably implies a lengthening of the so called “disposition time”. Moreover, since traditionally, such a meeting, i.e. the hearing, had to take place “in presence”, at the judge’s office or in the courtroom, the orality of the proceedings implied an increase in costs for the parties (e.g. for lawyers’ travel) and for the administration of justice (e.g. in terms of the preparation of the premises where hearings are to be held)¹.

In a world of limited resources, the judge’s ‘time’ and the global costs of judicial activities take on a fundamental value. The principle of proportionality started therefore to be invoked², aiming at a “proportional” use of public resources dedicated to civil justice with respect to all civil disputes pending in a given system.

The principle of proportionality, in particular, on the one hand, requires that the time the court devotes to an individual dispute must take into account the overall number of pending cases; on the other hand, it leads to the view that it is fair to devote ‘more time’ to cases that, because of their ‘complexity’ or ‘importance’ or the sensitivity of the issues dealt with therein, require more effort in their preparation, collection of evidence and decision. This can be referred to as ‘qualified’ proportionality.

This “qualified proportionality” may be applied firstly by providing “simplified” procedural models for disputes that are “simpler” in fact and/or in law, as in fact happens in many jurisdictions: in Italy, for example, in the last 15 years, first a “summary” proceeding (*procedimento sommario di cognizione*: art. 702-bis c.p.c.) and then a “simplified” procedure (*procedimento semplificato*: art. 281-decies c.p.c.) were introduced for such “simpler” disputes. Experience, however, shows that it is not always easy to establish the “simplicity” of cases and that such an assessment is made by a judge (and thus with a commitment of valuable resources), just to determine whether a certain case should follow one track or another.

A more practical criterion for identifying “simple” litigation, for which it is fair to devote less “time”, is that of their “value”. In fact, all legal systems provide *ad hoc* procedural rules to so-called small claims³, often even identifying specific courts to deal with them (in Italy, the *giudice di pace*).

¹ See Auletta, F. (2021), 44.

² For further reference, see Lupoi, M. A. (2018), 57 ff.

³ See Silvestri, E. (2019), 41.

2. THE USE OF WRITTEN PROCEDURES FOR SMALL CLAIMS

Small claims are the most common disputes in any legal system⁴ but, at the same time, often the most looked down upon by both judges and lawyers⁵. Cynical as it might sound, while most legal practitioners love big commercial cases, few are passionate about claims worth a few hundred or thousand euros.

For some time now, with respect to small claims, the (total or partial) abandonment of orality has been proposed, in favor of written procedures, often with the use of forms and, today, emphasizing only digital contacts between the parties and the judge.

In some jurisdictions, procedural models are even being experimented with, in which the setting of a hearing is excluded without exception⁶.

The spread of written procedural models has obvious advantages in terms of reducing the costs, efforts and time involved in adjudicating a low-value claim. These advantages are particularly appreciated in cross-border litigation, where the need to physically ‘travel’ (for the party or, worse, her lawyer) can imply a staggering increase in costs, often exceeding the value of the claim itself.

Enhancing asynchronous dialogue between judge and parties⁷, therefore, with particular reference to cross-border litigation, helps to protect rights and increase trust in procedural justice.

Totally asynchronous procedural models, on the other hand, have obvious disadvantages: justice is certainly a ‘service’ for citizens that the State must provide, but courts cannot be reduced to call-centers or virtual operators. Justice needs (also) physical places to manifest itself and ‘rituals’ in order to appear, even in the collective imagination, as an expression of sovereignty that justifies the binding effects of the judge’s decisions.

3. THE WRITTEN PROCEDURE IN REGULATION N. 861 OF 2007

The European legislator intervened in this debate with Regulation n. 861 of 2007 (subsequently amended by EU Regulation No. 2421 of 16 December 2015), proposing an alternative procedural model for the adjudication of

⁴ See e.g. *Adjudication of Small Claims in the Countries of the South-West Mediterranean Basin: A Technical Note*, available online at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/168231632901079622/adjudication-of-small-claims-in-the-countries-of-the-south-west-mediterranean-basin-a-technical-note>.

⁵ Lower value claims are sometimes referred to as “garbage” or “junk” cases: see Leader, K. (2022), 4, available online at <https://www.modernlawreview.co.uk/leader-small-claims-pilot/>. In Italy, they used to be called “controversie bagattellari”.

⁶ In England, e.g., it was proposed to remove the right to oral hearing for low-value claims in the County Courts: see Leader, K. (2022).

⁷ On asynchronous procedural interaction, see Bigi, A. (2023), 68 ff.

small claims, in application of the principle of proportionality, to reduce the time and costs of small claims recovery.

The strengths of the procedural model thus introduced are well known: first of all, it aspires to develop in a basically written mode, with the use of forms, on the assumption that the judge is in the position to decide on the basis of the filed documents (including the written depositions of witnesses); moreover, the parties do not need to hire a lawyer for their defense and this obviously reduces the overall costs.

This procedural model implies a more active and interventionist judge, in particular with respect to the reconstruction of the relevant facts and the identification of the legal case: according to Art. 12, as a matter of fact, the parties may not be required by the court to make any legal assessment of the claim⁸. Arguably, this might imply a departure from the adversarial model of the proceedings.

On the other hand, no reduction of the evidentiary standards adopted in the Member States is implied. Rather, the procedural model affects the way evidence is collected: as a rule, the court “shall use the simplest and least onerous method of taking evidence” (Art. 9, para. 3). Art. 9, para. 1 reduces the possibility of using certain types of evidence and modifies the manner of taking other types of evidence (e.g. admitting the use written testimony). It does not, however, lower the standard of proof required for the judge’s conviction. This has obvious consequences with respect to the possibility that proceedings governed by the Regulation will require an evidence collection phase.

As we have seen, the option for a ‘written’ procedural model is particularly appreciated in a cross-border context, where language differences imply additional costs for translations and interpreters: these are reduced, if not eliminated, by the use of standardized forms, available in all the official languages of the Union.

As a matter of fact, the “*basic*” “track” of the Regulation provides for a written-only procedure (Art. 5), through the use of forms for the plaintiff’s application (Art. 4) and for the defendant’s reply (Art. 5, paras. 2 ff.), with the possibility for the plaintiff to reply, again in writing, to any counterclaims (Art. 5, para. 6). At the end of these exchanges, the court gives judgment (subject to the possibility for the court to ask the parties for further details within a time limit set for this purpose: Art. 7, para. 1[a])⁹.

⁸ Frassinetti, A. (2021), 972.

⁹ See also D’Alessandro, E. (2008), 85. On the compatibility between this model and the guarantees of the European convention on human rights, Nunner-Krautsgasser, B., Anzenberger, P. (2012), 141; Kramer, S. (2011), 123.

4. A FLEXIBLE ORALITY IN THE SMALL CLAIMS REGULATION

The Regulation, however, does not take an absolutist approach as to orality (and its elimination).

The small claims proceedings governed by the Regulation, in fact, have a flexible structure, in which the exchange of written forms can be alternated with one or more hearings, depending on the characteristics of the concrete case¹⁰.

Such hearing may be devoted to the appearance of the parties, by order of the court (Art. 7, para. 1I)¹¹ or to the collection of evidence.

A hearing, however, is still considered an exception, as Art. 5 (amended in this respect by Regulation No. 2421 of 2015) makes clear. A more “structured” procedure, where a hearing is held, as a matter of fact, will only be adopted if the court considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests.

A party’s request, however, does not automatically lead to the court’s holding a hearing, since such request may be denied (giving written reasons) if the judge takes the view, having regard to the circumstances of the case, that a hearing is not necessary to resolve the issues and for a fair conduct of the case.

Art. 5, para. 1(a) specifies that such a refusal may not be contested separately from a challenge to the judgments itself.

All in all, the safeguards provided by Art. 5, para. 1, as to the court’s refusal to hold a hearing, are merely formal. It is true that Art. 5, para. 1 requires the decision to refuse to hold the hearing to be reasoned in writing. This, however, may result in an ineffective protection of the party’s wish to have her day in court. In the first place, the use of succinct and stereotyped reasons to refuse to hold the hearing might be expected. In any event, if the judge’s decision may not be immediately contested as such, it means that, after the judgment is rendered, a party may appeal the refusal to schedule the hearing only if refusal was outcome determinative. And this may be difficult to prove, indeed.

On the other hand, some of the positive effects of the hearing (e.g. the possibility for the judge to stimulate an agreement between the parties) are not reflected in the final decision on the merits.

One must also consider that there are activities that necessarily require a direct confrontation between the judge and the parties.

In proceedings where only written forms are used, filled in by litigants in person, how can one verify, for evidentiary purposes, that a specific fact

¹⁰ Frassinetti, A. (2021), 969.

¹¹ For D’Alessandro, E. (2008), 86, this is a residual hypothesis.

is disputed (as requested, e.g., under art. 115 of the Italian code of civil procedure)? And how may the judge make a settlement proposal to the parties, in the spirit of his role in these proceedings, bring to the attention of the parties issues that can be raised *ex officio* before rendering judgment or even ask the parties for clarifications¹²? Finally, in matters referred to in Sections 3, 4 or 5 of Regulation Brussels I-bis, where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, how can the court ensure, pursuant to Art. 26, para. 2 of Regulation No. 1215 of 2012, before assuming jurisdiction, that the defendant is informed of her right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance?

These (and other similar) considerations must be taken into account when deciding whether or not to schedule a hearing. In other words, it is argued that such a hearing, while still an exception¹³, should never be a “concession” and that the court should refuse to hold it only after carefully assessing the reasons for the request and the circumstances of the case.

5. THE ROLE OF DIGITAL ORALITY

In the “tension” between written and oral procedures within the small-claims Regulation, technology introduces an element of flexibility.

From this point of view, Regulation No. 861, as amended in 2015, was ahead of its times.

Anticipating the emergency legislation of the pandemic period, in fact, the uniform European rules already provided for the use of the so-called digital orality.

In order to spare parties (who do not have, in this procedural model, the obligation to be assisted by a lawyer) the travel expenses required to attend a hearing, Art. 8 provides that, where an oral hearing is considered necessary in accordance with Article 5, para 1(a), it shall be held by making use of any appropriate distance communication technology, such as videoconference or teleconference, available to the court or tribunal, unless the use of such technology, on account of the particular circumstances of the case, is not appropriate for the fair conduct of the proceedings¹⁴.

¹² See also Bigi, A. (2023), 87.

¹³ For a different perspective, see Nunner-Krautgasser, B., Anzenberger, P. (2012), 143, with regard to the right to an oral hearing established by Art. 6 of the ECHR: “it is very doubtful that such an omission of an oral hearing can be justified with the mere reference to the general necessity of efficient proceedings”. For the authors, therefore, such an omission should be considered “extraordinary”, with a restrictive interpretation of Art. 5 para. 1 of the regulation.

¹⁴ Further details in the Guidelines on videoconferencing in judicial proceedings, adopted by the CEPEJ at its 36th plenary meeting (June 2021), available at <https://edoc.coe.int/en/efficiency-of-justice/10706-guidelines-on-videoconferencing-in-judicial-proceedings.html#:~:text=These%20Guidelines%20provide%20a%20set,requirements%20of%20the%20Convention%20for>. See also the CCBE po-

Moreover, a party summoned to be physically present at an oral hearing may request the use of distance communication technology, provided that such technology is available to the court or tribunal, on the grounds that the arrangements for being physically present, in particular as regards the possible costs incurred by that party, would be disproportionate to the claim. Conversely, a party summoned to attend an oral hearing through distance communication technology may request to be physically present at that hearing.

Art. 9, para. 1, on its part, allows the taking of evidence by videoconference or other technological means of communication if available.

The pandemic experience has shown that judicial activity can be effectively carried out with the forms of digital orality, with fewer conceptual difficulties for civil than for criminal proceedings, and without prejudice to the specificities of hearings where oral evidence is gathered and where direct contact between the judge and the source of evidence continues to be privileged.

In the space of a few years, in fact, technology in this area has developed in a way that was previously inconceivable and judicial administrations all over the world have been able to transform an emergency into an opportunity to develop a different way of conceiving procedural activities, with due respect for fundamental principles.

Small claims proceedings, as a matter of fact, lend themselves to being the ideal test-bed for the new European digital justice. Their simplicity and, from a pragmatic standpoint, the modesty of the interests at stake allow the experimentation of innovative technologies therein, balancing fundamental principles with more flexibility.

Digital orality, as we have seen, reduces the costs and formalities of the proceedings while at the same time enabling a synchronous dialogue between the judge and the parties.

Costs are reduced, in the first place, by the possibility to use platforms that are now commonplace, allowing parties (and possibly their lawyers) to connect directly from their homes or offices.

The use of digital orality might also have an impact on the language barrier in cross-border litigation where, by definition, at least one of the parties habitually resides in a State other than the forum State. With the appropriate precautions (e.g. requiring the consent of all parties involved), it is, for example, conceivable to reduce the need for interpreters by using simultaneous

sition paper on the proposal for a regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, of July 29th 2022, available online at: chrome-extension://efaidnbmnnnnibpcajpcglclefindmkaj/https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Position_papers/EN_ITL_20222907_CCBE-position-paper-on-the-proposal-for-a-regulation-on-the-digitalisation-of-judicial-cooperation-and-access-to-justice-in-cross-border-civil-commercial-and-criminal-matters.pdf.

translation software, which is in fact already available for some videoconferencing platforms.

There is also another development to consider, which could rewrite some traditional rules of the legal profession.

The use of technology and of long-distance digital communications makes it possible to conceive that a party residing in a State other than the State of the forum be assisted, if only at the digital hearing, by a practicing lawyer from that first State, regardless of whether he or she is licensed to practice law in the State of the forum. In increasingly dematerialized proceedings, indeed, certain founding principles of cross-border legal practice might have to be reconsidered.

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TOWARDS THE DIGITALIZATION OF THE ESCP: A PANACEA FOR ALL EVILS?

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ABSTRACT: After 17 years since its entry into force, the ESCP Regulation is still scarcely applied by national courts of EU Member States. Against this backdrop, the objective of this paper is evaluating whether digitalizing the procedure could save it from obsolescence. In this regard, it will be contended that the automation of the ESCP would not provide solutions to topical problems affecting the system, such as its limited integration in domestic legal systems and its full reliance on the Member States' existing internal organization of the judiciary.

KEYWORDS: ESCP Regulation, on-line dispute resolution platforms, digitalization, artificial intelligence, administration of justice.

SUMMARY: 1. INTRODUCTION.— 2. THE WEAKNESSES OF THE ESCP.— 3. THE E-JUSTICE STRATEGY OF THE EU AND ITS IMPACT ON THE ESCP.— 4. IMAGINING A FULL AUTOMATION OF THE ESCP IN THE EU DIGITAL ERA.— 5. CONCLUSIVE REMARKS: DIGITALIZATION AS A PANACEA FOR ALL EVILS?— BIBLIOGRAPHY

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1. INTRODUCTION

More than 15 years ago, the Regulation (EC) No 861/2007¹ (hereinafter referred to as “ESCP Regulation”) introduced the first autonomous European procedure of adversarial nature: the European Small Claims Procedure (hereinafter referred to as “ESCP”)². The ESCP is a standardized written procedure available in all the Member States of the European Union (hereinafter referred to as “EU”)³ for transnational claims concerning civil and commercial matters, with a value not exceeding €5000 (excluding the litigation costs)⁴. With the establishment of the ESCP, the European legislator provided private plaintiffs with an alternative to the procedures existing under domestic legal systems for claims of small entity. The ambition of the ESCP was to overcome the substantial differences among national procedural laws and to remedy, at the same time, the most common flaws shared by national small-claims procedures, such as the disproportionate high costs, the long duration and the excessive complexity of the litigation. In the view of its drafters, the ESCP Regulation could have fostered the access to justice and facilitated the circulation of goods and capital within the EU⁵; in practice, after 17 years since its entry into force, the Regulation has not complied with its objectives yet. This is testified by the scarce national jurisprudence it produced and by the lack of familiarity with the procedure that still may be found in legal practitioners operating across the EU⁶.

¹ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, *OJ L 199*, 31.7.2007, pp. 1–22. The procedure was later modified by the Council Regulation (EU) No 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia, *OJ L 158*, 10.6.2013, pp. 1–71, the Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and the Regulation (EC) No 1896/2006 creating a European order for payment procedure, *OJ L 341*, 24.12.2015, pp. 1–13 and the Commission Delegated Regulation (EU) 2017/1259 of 19 June 2017 replacing Annexes I, II, III and IV to Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, *C/2017/3982*, *OJ L 182*, 13.7.2017, pp. 1–19.

² The ESCP was preceded by the European Order for Payment Procedure, the first autonomous procedure established within the EU. Differently from the ESCP, the European Order for Payment Procedure only concerns the enforcement phase, providing a simplified procedure of enforcement for uncontested claims. Cf. Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, *OJ L 399*, 30.12.2006, pp. 1–32.

³ As reflected in Articles 29 and 2(3) of the ESCP Regulation, the mechanism is available in all the Member States of the EU, except from Denmark.

⁴ On the matter, see the first three articles of the ESCP Regulation. Article 2, in particular, lays out a list of matters to which the Regulation does not apply, such as employment contracts, maintenance claims, violation of privacy and defamation claims, matters concerning wills and succession, bankruptcy, arbitration and others.

⁵ This is evidenced by the tone of the recitals of the Regulation.

⁶ The issue will be further analyzed in the second section of the paper.

Against this backdrop, some commentators suggest that the partial or even full digitalization of the procedure may redeem the ESCP and save it from obsolescence. As contended by these authors, this process would bring tangible benefits to the ESCP in terms of a further simplification of the proceedings, a reduction of the overall litigation costs and a sensible acceleration of procedural timings. According to this view, these factors would be decisive in advancing the accessibility and diffusion of the ESCP and would, hence, provide a solution to the shortcomings of this procedure⁷.

In order to establish whether this hypothesis is well-founded, the paper will conduct an all-round assessment of the relationship between ESCP and technology. It will be carried out a three-tiered analysis focused on the EU initiatives impacting the digitalization of the procedure, the proposals set out at an academic level to transform the ESCP into an on-line dispute resolution mechanism (or “ODR” mechanism) and, finally, the effective contribution that the digitalization could bring to the overall improvement of the ESCP.

Before delving into the merits of the discussion, it will be premised an overview of the major criticisms addressed to the ESCP mechanism. In the following section, the paper will outline the main features of the EU policy concerning the digitalization of justice, illustrating in parallel the projects of automation of the ESCP explored by the doctrine. The final part of the work will be dedicated to some general considerations on whether digitalization could represent the ultimate cure for the wounds affecting this procedural tool. It will be concluded that, while there are several elements that should make us welcome the digitalization of the ESCP with favor, we should not fall into the trap of looking at technology as a “one fits all” remedy. Indeed, the automation of the ESCP would not provide solutions to some topical problems affecting this legal instrument, such as its limited spread and integration in domestic legal systems, on one side, and its full reliance on the Member States’ existing internal organization of the judiciary, on the other.

2. THE WEAKNESSES OF THE ESCP

Academic studies conducted on the ESCP show that this mechanism has registered a limited success among EU Member States⁸. As a matter of fact, when having to choose between the ESCP and the alternative domestic pro-

⁷ Cortés & Mañko (2016), p. 56 ff.; Giacalone & Sajede Salehi (2022), p. 209 ff.; Mesquita & Marques Cebola (2022), p. 14 ff.; Veersalu & Hoffmann (2023), p. 163. See also the guidelines contained in Abignente, Giacalone, & Tuccillo (2020). The work delivers a series of recommendations for the improvement of the ESCP, formulated on the base of the results obtained within the Small Claims Analysis Net (SCAN) Project. The project, which took place between 2018 and 2020, was co-funded by the European Union’s Justice Programme.

⁸ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017). The reference is also to the multiple studies published in the framework of the SCAN Project (these papers are listed at <https://www.scanproject.eu/output/papers/>).

cedure, plaintiffs tend to elect the second⁹. There are several reasons behind such phenomenon, elements that hinder the implementation of the ESCP in similar ways among national jurisdictions. The major impediment to the spread of ESCP is the general lack of knowledge and experience of the instrument registered among potential applicants as well as legal professionals such as lawyers, clerks, judges and bailiffs¹⁰. The scarce awareness of the ESCP among judiciary staff is a datum that raises serious concerns, considering that such mechanism fully depends on national judicial systems¹¹. In this regard, it should be noted that Member States tendentially decided to confer jurisdiction over ESCP claims to the same domestic authorities in charge of managing the equivalent national procedures and did not opt, instead, for instituting separate bodies or specialized sections within the competent judicial offices dedicated to ESCP disputes¹². This choice should have been followed by a great work of dissemination of the ESCP among judges or honorary magistrates (such as the Italian *giudice di pace*) that are competent to hear *minoris generis* civil claims. Nevertheless, the lack of an adequate training on the ESCP among national authorities is still a systemic problem. The surveys conducted among legal practitioners on the use of the ESCP further show that even in cases where the interviewees had a general awareness of the procedure, the national mechanism was still preferred due to its more familiar nature¹³.

The lack of acquaintance with the ESCP and the reluctance to resort to the procedure remain the biggest hurdles to the correct functioning of this mechanism. Apart from these topical issues, there are a number of procedural

⁹ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p. 365.

¹⁰ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p. 347, where it is disclosed that the 86% of the EU citizen interviewed had never heard about the procedure. The datum has been further confirmed by the Country reports published in the framework of the SCAN Project concerning the implementation of the ESCP in Belgium, France, Germany, Italy, Lithuania and Slovenia (hereinafter referred to as “Country reports”). Cf., respectively, Sajedeh Salehi & Giacalone (2021), p. 80; Winkler & Baquero (2021), p.37; Hinrichs & Thevis (2021), p. 76; Abignente, Rolando & Ruggieri (2021), p. 43; Simaitis, Vebraitė & Markevičiute (2020), p. 267; Gale & Zajc (2020), p. 264.

¹¹ Article 4 of the ESCP Regulation establishes that a claimant may commence the procedure by lodging a standard form with the court or tribunal with jurisdiction. The municipal courts or tribunals designed by the Member States as competent under Article 25 will deal with the whole procedure.

¹² This occurs, for example, in Belgium, France, Italy, Lithuania and Slovenia. Cf., respectively, Sajedeh Salehi & Giacalone (2021), p. 80; Winkler & Baquero (2021), p. 36; Abignente, Rolando & Ruggieri (2021), p. 40; Simaitis, Vebraitė & Markevičiute (2020), p. 268; Gale & Zajc (2020), p. 262. The case of Germany is slightly divergent. In Germany, in fact, § 1104 of the ZPO (the German code of civil procedure) enables federal States to centralize jurisdiction for ESCP claims in one or several municipal courts. Thus far, five federal States resorted to this possibility (Hesse, Saxony-Anhalt, North Rhine-Westphalia, Baden-Wuerttemberg, Schleswig-Holstein). While the centralization on some specific courts does not significantly impact the procedural rights of defendants and plaintiffs, given that the ESCP is conceived as a written procedure, this allowed the courts entrusted with the ESCP to become more acquainted with the subject matter; cf. Hinrichs & Thevis (2021), p. 76.

¹³ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p. 347.

aspects that are referred to as problematic in a large number of States. Most of the drawbacks identified are related to the poor implementation of the procedure in domestic legal orders, resulting in a «lack of dedicated national provisions or clear guidelines as to which national rules and mechanism apply»¹⁴. For example, it has been held that the right to apply for a review, which according to Article 17 of the ESCP Regulation is regulated by internal laws, is not well implemented in a number of national systems¹⁵. The same concern has been expressed on the duty of Member States to provide technical guidance to the parties to an ESCP, as enshrined in Article 11 of the ESCP Regulation. It appears, in fact, that States are not very active in this sense and that the national bodies providing primary legal aid, as well as consumer protection centers, are scarcely involved in the procedure¹⁶. Another point that has been raised in some States concerns the inefficiency of national judicial systems and their practical inability to comply with the strict time limits set by the ESCP Regulation for the proceedings¹⁷.

A significant barrier to the use of the ESCP is the one related to its language requirements and the need to translate «the claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting document» to the language of the court that manages the procedure¹⁸. The other documents attached by the parties do not need to be submitted in the language of the court, but the latter may still order the translation of such documents if it is deemed necessary for giving the judgment¹⁹. In general, national judicial systems do not provide the parties with translation services; this burdens the litigants with additional costs that discourage the resort to the ESCP²⁰.

Actually, the disproportionate costs of the proceedings, compared to the small value of the claim, represent another important deterrent to the filing

¹⁴ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p. 348. See also Kramer (2011), p. 132.

¹⁵ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p. 352. The report mentions Belgium, Romania and Slovakia among the States in which such problem has been registered.

¹⁶ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p.351. The issue has been also pointed out in the Country reports of France, Germany, Italy, Lithuania, Slovenia. Cf., respectively, Winkler & Baquero (2021), p. 38; Hinrichs & Thevis (2021), p. 79; Abignente, Rolando & Ruggieri (2021), p. 42; Simaitis, Vebraitė & Markevičiūtė (2020), p. 269; Gale & Zajc (2020), p. 265.

¹⁷ This has been identified as a major obstacle to the implementation of the ESCP Regulation in Cyprus, Greece and Netherland in European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p. 351.

¹⁸ ESCP Regulation, Article 6(1).

¹⁹ ESCP Regulation, Article 6(2).

²⁰ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p.352. The issue was acknowledged, as well, by the Country reports of Belgium, France, Germany, Italy, Lithuania and Slovenia. For further reference, see Sajedeh Salehi & Giacalone (2021), p. 81; Winkler & Baquero (2021), p. 37; Hinrichs & Thevis (2021), p. 77; Abignente, Rolando & Ruggieri (2021), p. 44; Simaitis, Vebraitė & Markevičiūtė (2020), p. 270; Gale & Zajc (2020), p. 264.

of an ESCP²¹. Apart from court fees, the parties should bear other costs such as the ones deriving from translations, legal representation (if desired)²² and enforcement, if the losing party refuses to comply with the ESCP judgment and the enforcement needs to be carried out by an enforcement officer²³.

One last obstacle to the proliferation of ESCP that is shared by many jurisdictions is the inadequacy of the IT instruments made available to judicial offices²⁴. Municipal courts are often ill equipped in terms of technological tools, while the ESCP Regulation is inclined towards the digital handling of the procedure. This is demonstrated, for example, by the prescription of videoconferencing or other communication technologies as the preferred means to hold oral hearings or taking evidence²⁵.

3. THE E-JUSTICE STRATEGY OF THE EU AND ITS IMPACT ON THE ESCP

In the last few years, the EU has been fully committed to the acceleration of the digital transition in many key areas such as the administration of justice. Simplified and standardized procedures such as the ESCP could make the perfect test bench to experiment a more pervasive use of IT tools in legal proceedings, until the point of reaching their full computerization. Before discussing the argument of whether or not this would be a desirable outcome, it is important to understand where the ESCP currently stands in its digital transformation and what is the role that the EU legislator has played so far in this process. Thus, a panorama of the most recent initiatives endorsed by the EU to advance the digitalization of justice may prove useful.

In December 2022, the Parliament and the Council jointly issued the Decision (EU) 2022/2481 establishing the Digital Decade Policy Programme 2030 (hereinafter referred to as the “Path to the Digital Decade” programme)²⁶. The “Path to the Digital Decade” sets out the EU policy strategy for the digital transformation of European societies and economies. It is aimed at develo-

²¹ It is worth underlying that the ESCP Regulation imposes on Member States the obligation to guarantee that the court fees in ESCP are not disproportional or higher compared to fees charged in national small claims procedures (ESCP Regulation, Article 15).

²² According to Article 10 of the ESCP Regulation, the legal representation by a lawyer or another legal professional is not mandatory in ESCP proceedings.

²³ European Commission, Directorate-General for Justice and Consumers, Gascón Inchausti, Hess & Cuniberti (2017), p. 350, where it is remarked how the problem of the unsustainable litigation costs of the ESCP has been reported among many jurisdiction (such as Austria, Cyprus, Finland, Germany, Greece, Latvia, Lithuania, Romania, The Netherlands, Spain, Sweden).

²⁴ This inadequacy has been observed, for instance, in France and Italy; in this direction, see Winkler & Baquero (2021), p. 37 and Abignente, Rolando & Ruggieri (2021), p. 43. On the other side, virtuous examples on the state of digitalization of justice include Lithuania and Slovenia, as acknowledged in Simaitis, Vebraitė & Markevičiūtė (2020), p. 268 and in Gale & Zajc (2020), p. 265.

²⁵ ESCP Regulation, Articles 8 and 9.

²⁶ Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030, *OJ L* 323, 19.12.2022, pp. 4–26.

ping a safe, high-performing ecosystem of digital and data infrastructures, while reducing the digital divide among Member States²⁷. The programme identifies a series of targets and milestones to be reached by 2030, a set of goals mainly ascribable to four fields of action: skills, business, government and infrastructure. Among the key policy areas that are affected by the EU digital transition, the focus must be kept on the digitalization of justice (e-Justice). In this sense, the recent adoption of the e-Justice Strategy 2024-2028 represents an important acknowledgment in the framework set by the “Path to the Digital Decade”²⁸. The document stems from the results of the e-Justice strategy and Action Plan for 2019-2023²⁹, in the context of which the EU made some important legislative efforts to foster the use of digital services in the administration of justice. For what concerns the measures which specifically affected civil and commercial proceeding, ESCP included, it is worth mentioning the Regulation (EU) 2020/1783³⁰ and the Regulation (EU) 2020/1784³¹, aimed at facilitating the cross-border taking of evidence and service of documents through the establishment of a network of national IT systems able to communicate with each other. As a further elaboration of this vision, the Regulation (EU) 2022/850 on a computerized system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system) created an appropriate legal framework for the interchange of judicial information across the EU through secure digital channels³².

Finally, in the last days of 2023, the European institutions enacted the Regulation (EU) 2023/2844 (the so called “Digitalization Package”)³³, a major step towards the accomplishment of a digital justice in the EU. The Regulation on the digitalization of cross-border judicial cooperation and access to justice is conceived to boost the use of electronic means to ease the judicial cooperation among Member States in civil, commercial and criminal mat-

²⁷ See Article 3 of the “Path to the Digital Decade” programme, setting the general objectives of the digitization strategy.

²⁸ Council of the European Union, European e-Justice Strategy 2024-2028, Act No. 15509/23, approved on 17 November 2023.

²⁹ Council of the European Union, European e-Justice Strategy and Action Plan 2019-2023, *OJ C 96/6*, 13.3.2019, pp. 3-8 and pp. 9-32.

³⁰ Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence), *OJ L 405*, 2.12.2020, pp. 1-39.

³¹ Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), *OJ L 405*, 2.12.2020, pp. 40-78.

³² Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerized system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), *OJ L 150*, 1.6.2022, pp. 1-19.

³³ Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, *OJ L*, 2023/2844, 27.12.2023, hereinafter referred to as “Regulation (EU) 2023/2844”. For a first insight on the novelties introduced by the Regulation it is possible to refer to Ho-Dac (2024).

ters. In first place, the Regulation prescribes that the communication between national authorities of different Member States or a national authority and an EU body that is made pursuant to specific legal acts, among which the ESCP Regulation, must be carried out «through a secure, efficient and reliable decentralized IT system». An exception to this rule is envisaged only in cases where the authorities are unable to comply due to the disruption of the IT systems in use, the specific physical or technical nature of the act to be transmitted, force majeure, or if the resort to digital means is regarded as non-appropriate in a particular situation³⁴. Among the novelties put forward by the Regulation, one of the most relevant is the institution of a European electronic access point: a virtual platform through which natural and legal persons, as well as their representatives, could easily communicate with the competent authorities. The system will be opened to some types of cross-border procedures, including the ESCP, and it will grant the parties the possibility to establish a direct contact with judicial offices by filing claims, sending and receiving communications, proceeding with the service of documents all via telematic means³⁵. The Regulation also clears the way for a wider participation by the parties and other relevant persons in oral hearings by means of videoconferencing or other distance communication technologies³⁶. Other provisions contained in the Regulation deal with the recognition of electronic documents and electronic signatures and seals³⁷, as well as the opportunity to pay court fees through digital instruments³⁸. As anticipated, this new set of rules directly affects the ESCP procedure. This is further clarified by Article 20 of the “Digitalization Package”, specifying that the act amends the ESCP Regulation in order to ensure that the lodging of applications, the communications between the competent authority and the parties or other persons involved in the proceedings, the payment of the litigation fees, all take place in accordance with the rules and principles set out in Regulation (EU) 2023/2844.

All the initiatives ascribable to the e-Justice strategy and Action Plan for 2019-2023 necessitate a number of technical and administrative follow-up actions on a national base. In this sense, the e-Justice strategy 2024-2028 stands in the wake of its predecessor by supporting the Member States in this process, giving them guidance in the implementation of domestic measures to speed up the digitalization process and allow a more integrated use of digital tools in judicial proceedings. The strategy revolves over four pillars, that are improving the access to digital justice, enhancing digital judicial cooperation, increasing the efficiency of digital justice and promoting an innovative digital justice. Among the recommendations put down under this last pillar, the EU expresses the urgency of identifying some fields where to safely apply

³⁴ Regulation (EU) 2023/2844, Article 3.

³⁵ Regulation (EU) 2023/2844, Article 4.

³⁶ Regulation (EU) 2023/2844, Article 5 and 6.

³⁷ Regulation (EU) 2023/2844, Articles 7 and 8.

³⁸ Regulation (EU) 2023/2844, Article 9.

Artificial Intelligence (hereinafter referred to as “AI”) in the justice domain. As one could have expected, the immense usage possibilities of AI-powered products, alongside with the major legal challenges they pose, have rapidly sparked the interest of the European institutions. It was only 2021 when the Commission proposed the adoption of an instrument prospecting a comprehensive regulatory framework on the use of AI (hereinafter “AI Act”). The drafting process recently concluded with the adoption of the Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, laying down harmonized rules on artificial intelligence³⁹. The purpose of these rules is twofold. From one side, they aim at fostering the employment of AI and increasing users’ trust in these systems; on the other, they intend to address the specific risks associated with the utilization of AI, establishing clear safety standards and prohibiting the practices that expose to excessive dangers⁴⁰.

In the AI Act, justice is identified once again as one of the policy areas where the support of AI may bring huge benefits in terms of «improving prediction, optimizing operations and resource allocation, and personalizing digital solutions available for individuals and organizations»⁴¹. The approach followed by the Commission is however a cautious one⁴²; evidence of this is the classification of the systems intended for the administration of justice as inherently high-risk, due to their potential impact on democracy, the rule of law and procedural rights⁴³. Under the scheme provided by the AI Act, the categorization as “high-risk AI systems” entails that the AI technologies employed in the justice field must comply with a series of strict obligations concerning risk management systems, data governance, technical documen-

³⁹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828, *OJ L*, 2024/1689, 12.7.2024 (hereinafter referred to as “AI Act”). For a concise overview of the AI Act, its content and the implications related to its adoption, cf. Pehlivan (2024).

⁴⁰ As clarified by the Commission, the objective of the AI act is «to make the EU a world-class hub for AI, while ensuring that AI is human-centric and trustworthy». See European Commission, *Fostering a European approach to Artificial Intelligence*, COM(2021) 205 final, declaration of 21 April 2021, p. 1.

⁴¹ AI Act, Recital n. 4.

⁴² In general terms, the cautious approach showed by the European institutions towards the regulation of AI has been positively welcomed by the majority of commentators, who praised the EU for having reached a satisfactory compromise between the fostering of the rapid dissemination of AI technology and the safeguard of EU’s values; a goal that could be accomplished only pursuing the highest attainable levels of protection and safety. See, in this sense, Nikolinakos (2023), p.720 ff. and Ebers, Hoch, Rosenkranz, Ruschemeier, & Steinrötter (2021), p. 603. Other scholars are more critic towards the proposal and the level of security it would be able to grant to AI users, arguing that there is room for improvement. For instance, some suggest that the EU should increase the communication with manufacturers of AI-powered products in order to be more aware of the risks connected to the use of AI and provide a better, more precise regulation of the obligations conferred upon manufacturers and consumers of AI tools; cf. de Graaf & Veldt (2022), p. 817.

⁴³ AI Act, Recital n. 48 and Annex III(8).

tation, transparency, human oversight and cybersecurity⁴⁴. The qualification as “high-risk AI system” does not extend, instead, to the ones carrying out administrative tasks that are ancillary to the delivery of justice, such as pseudonymization of judicial decisions, documents or data or allocation of resources⁴⁵.

The integration of AI in legal proceedings is a phenomenon that could completely transform the outlook of simplified procedures in the next few years, as they represent the most suitable candidates for testing high levels of automation in the justice domain. In this light, it is unsurprising that several scholars have already suggested to take advantage of AI to enhance the efficiency of the ESCP in terms of accessibility, timings and costs⁴⁶. Putting temporarily aside the future of the ESCP and focusing on the state of the art, it appears that the EU legislator is settling the bases for a more integrated use of IT tools in the handling of ESCP cases and urges Member States to reform their judicial systems accordingly⁴⁷. Looking at the full picture, it may be observed that the existing regulatory environment is paving the way for the dematerialization of many segments of the ESCP, from the transmission of documents and communications between the parties and the competent authorities, to the celebration of oral hearings and the payment of court fees. Even if the EU seems to have embraced the concept of a digital ESCP, it should be kept in mind that the carrying out of the procedure through technological means remains purely optional for judges and parties. In fact, the EU lawmaker has limited its action to the expression of a preference towards a digital management of ESCP cases, but it has never scrutinized, so far, the imposition of a complete telematization of the procedure.

4. IMAGINING A FULL AUTOMATION OF THE ESCP IN THE EU DIGITAL ERA

While the stage of the full digitalization of the ESCP has not yet been reached at normative level, there are some academic works that have reflected upon this opportunity from both a legal and a technical standpoint⁴⁸. All these initiatives explore the possibility of amending the ESCP Regulation in order to enable the conduction of ESCP proceedings in a full virtual mode. The idea is to create an ODR platform specifically designed for the resolution of such disputes, with the conviction that technology could put a patch on

⁴⁴ The obligations established on providers and users of high-risk AI systems are extensively described in Articles 8-27 of the AI Act.

⁴⁵ AI Act, Recital n. 61.

⁴⁶ This point will be addressed by the following section of this paper.

⁴⁷ Giacalone & Sajedeh Salehi (2022), p. 210.

⁴⁸ Mesquita & Marques Cebola (2022) and Veersalu & Hoffmann (2023). The development of a ESCP platform is also included among the objectives set by the project SCAN 2 - Small Claims Analysis Net. For more information, it is possible to refer to the official website of the project, available at <<https://scan2.vub.be/about/>>.

the shortcomings of the ESCP⁴⁹. In particular, the full digitalization of the ESCP would tackle some issues that are typically associated with cross-border proceedings, such as the lack of a sufficient degree of uniformity among national procedural laws⁵⁰. It would also target the problem of the scarce access to justice caused by the overload of work burdening national courts, while it would maximize the efficiency of the procedure by cutting its costs and length. These changes would allegedly help turn the ESCP from an underutilized legal instrument to a more attractive alternative to the procedures regulated by national laws.

The projects at hand suggest the implementation of a single-point online platform, desirably administered by the European Commission⁵¹, where the national authorities appointed by each Member State could manage the procedure on a full remote mode. To put it in the words of these authors, the platform would operate as a «single point of procedural management where each interested party could trigger the process [...] through the online system provided by the platform itself»⁵². Hence, the individual wishing to file an application would be able to fill out and send the dedicated ESCP forms to the competent authority, all through the software of the platform. The requested authority would later invite the defendant to join the platform to view and respond to the allegations of the actor. All the phases of the procedure would be managed through the electronic means provided by the system, from oral hearings (if deemed necessary) to the publication of the decision, that would be made available on the platform⁵³. The platform would strongly rely on AI to automate a series of passages that would require time, professional expertise and costs. Thanks to the functions of AI, the platform could take on many administrative tasks such as notifications, translations and the control of the timeframes of the procedure⁵⁴. This technology would be able to assist the user before the institution of the proceedings, by indicating the national body that has jurisdiction over the claim on the base of the data uploaded on the

⁴⁹ Mesquita & Marques Cebola (2022), p. 14 ff. and Veersalu & Hoffmann (2023), p. 170. This view further emerges in Giacalone & Sajedeh Salehi (2022), p. 185.

⁵⁰ Veersalu & Hoffmann (2023), p. 154.

⁵¹ This has been specifically proposed in Mesquita & Marques Cebola (2022), p.15. As explicitly stated by these authors, their proposal is inspired to the ODR platform for consumer conflicts established by Article 5(2) of the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), *OJ L 165*, 18.6.2013, pp. 1–12. The potential that such a digital platform may express in advancing the technologization of EU dispute resolution mechanisms has attracted the interest of several scholars, among which Cortés (2016), Palao Moreno (2016) and van Gelder (2022). Despite some of them have welcomed the platform created by Regulation (EU) No 524/2013 with great enthusiasm, cf. Palao Moreno (2016), p. 404, the latter has also attracted criticisms. In this sense, some scholars pointed out that the system is not sufficiently user-friendly and warned on the possibility that issues of due process may arise from the full digital nature of such a platform. For a brief assessment of the inadequacies of this mechanism, cf. van Gelder (2019), p. 222 ff.

⁵² Mesquita & Marques Cebola (2022), p. 19.

⁵³ Mesquita & Marques Cebola (2022), p. 19 ff. and Veersalu & Hoffmann (2023), p. 163 ff.

⁵⁴ Mesquita & Marques Cebola (2022), p. 17; Veersalu & Hoffmann (2023), p. 164.

platform⁵⁵, as well as after the delivery of the judgment, providing the parties with information on the possibility of an appeal or the rules applicable to enforcement⁵⁶.

In their substance, the existing proposals on the institution of an ESCP platform do not present significant differences among each other. All these projects propose to delegate to AI a wide range of legal and administrative tasks that would be otherwise fulfilled manually, by the personnel of judicial offices or other professionals. Given the standardized character of the procedure, some scholars have gone so far as to imagine an «implementation of an AI judge as an additional feature on the ESCP Platform»⁵⁷, to later conclude that automating the judgment-making process is not viable for ESCP at the moment, as the topic has proven to be extremely controversial. Indeed, entrusting a “robot-judge” with the resolution of ESCP disputes would trigger legal and ethical questions that largely remain unanswered⁵⁸. There is literature that looks at AI-judges as a practical solution in terms of costs-benefits ratio, at least in the context of simplified procedures administered by lower courts (like the ESCP)⁵⁹. On the opposite side, some commentators warn that many of the fallacies that AI systems may present, such as the lack of algorithmic transparency, cybersecurity vulnerabilities and the exposure to technical bias, might irremediably affect the enjoyment of the individual rights to a fair trial, due process, and the right to an effective judicial remedy⁶⁰. Other authors focus on the added value of the “human element” to decision making, arguing that being a judge means having the ability to meaningfully follow the rules, as well as «being a member of the community, understanding its history, its moral convictions, having a point of view about its current character and having a stake in its future»⁶¹. Furthermore, some scholars highlight that the “human factor” is essential to accord social legitimacy to judicial decisions, as it is rooted in the assumption that justice is delivered by other human beings⁶². The existing doctrine is profoundly divided on the matter and, while it is true that AI is still at an early stage of development, so is the scholarly debate on the legal, ethical, governance and policy challenges

⁵⁵ The applicable rules on matters of jurisdiction remain the ones established by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis), *OJ L 351*, 20.12.2012, pp. 1–32.

⁵⁶ Mesquita & Marques Cebola (2022), pp. 16, 19 and Veersalu & Hoffmann (2023), pp. 166, 168.

⁵⁷ Veersalu & Hoffmann (2023), p. 168.

⁵⁸ Veersalu & Hoffmann (2023), p. 168. For some scholarly works exploring the pros and cons of an automated delivery of justice in deeper detail, it may be possible to refer to Kerr & Mathen (2014); Sourdin, & Cornes (2018); Pasquale (2019); Volokh (2019); Langford (2020); Sourdin (2021); Zekos (2022); Molbæk-Steensig & Quemy (2023); Schäferling (2023).

⁵⁹ Sourdin (2021), p. 210 ff.

⁶⁰ Langford (2020); Molbæk-Steensig & Quemy (2023).

⁶¹ Kerr & Mathen (2014), p. 39. On the same vein, Pasquale (2019), p. 54 ff.; Schäferling (2023), p. 78 ff.

⁶² Sourdin, & Cornes (2018), p. 98. See also the report published in 2023 by the Council of Europe Commissioner for Human Rights, named ‘Human rights by design future-proofing human rights protection in the era of AI, Follow-up Recommendation to “Unboxing AI” (2019)’, p. 6.

posed by this technology. This uncertain scenario makes the regulation of the phenomenon particularly tough for lawmakers who, in navigating uncharted waters, prefer to maintain a conservative attitude towards the fundamental values characterizing their legal orders. As a result, if it is called to strike a balance between the need to accelerate the technologization of judicial systems and the safeguard of the rule of law and individual rights, the legislator will probably lean towards the second⁶³. This tendency has already been observed in the case of the EU and its AI Act, the first-ever legal framework on AI⁶⁴. All these elements combined uphold the view that charging an algorithm with the resolution of ESCP disputes is not a realistic option. The use of AI-powered systems in the ESCP to carry out research and interpretation of facts and laws and the application of laws to specific facts would be hindered by the strict rules that came into force under the AI Act of the EU and would probably be disregarded by the European literature and public opinion.

Not considering this last proposal, it seems that the project of developing an online ESCP platform supported by AI tools would be consistent with the regulatory landscape that the EU is setting for the digital transition of justice in the EU area. By boosting innovation in the administration of legal procedures, the institution of the platform would comply with the objectives laid out in the e-Justice strategy 2024-2028. Furthermore, the project would easily encounter the EU standards of safety for the integration of AI in the judiciary, as the text of the AI Act does not raise particular barriers to the use of AI in the performance of simple administrative functions such as translations and communications. On the contrary, it encourages the employment of AI tools when it poses minimum risks to individuals and their rights.

⁶³ The situation may be different in jurisdictions with a legal culture that is distant from the one shared among Western countries. Evidence of this may be found in the liberal attitude showed by China towards AI since the early days of this technology. As a matter of fact, China has already experimented internet courts and virtual judges to make the resolution of small claims disputes more efficient. AI judges are used to set schedules, take evidence, ask questions to the parties of the procedure and issue dispositive rulings on the base of previous case law, that dealt with similar cases. Usually, the automated decision can be later appealed to human judges. For further details, see Yuan (2019); Roberts, H., Cowsls, J., Morley, J., Taddeo, M., Wang, V. & Floridi, L. (2021), p. 66 and Papagiannas, S. & Junius, N. (2023), p. 3 ff.

⁶⁴ The explanatory memorandum of the AI Act makes it clear that «Rules for AI available in the Union market or otherwise affecting people in the Union should therefore be human centric, so that people can trust that the technology is used in a way that is safe and compliant with the law, including the respect of fundamental rights». This “human-rights based” approach to the regulation of AI is in line with the positions expressed by prominent human rights bodies such as, in first place, the Council of Europe. In this regard, it is worth underlying how the Commission for the Efficiency of Justice of the Council of Europe (hereinafter referred to as “CEPEJ”) has already drafted a Charter aimed at setting out ethical principles relating to the use of AI in judicial systems (cf. CEPEJ, European Ethical Charter on the Use of Artificial Intelligence in Judicial systems and their environment, adopted on 3 December 2018). More ambitiously, the Council of Europe has recently opened for signature the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, the first-ever international legally binding treaty in this field (cf. Council of Europe, Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, 5 September 2024).

The overall suitability of the project with EU policies and values has been ascertained; nonetheless, there is still a point that is missing. The fact that the online transition of the ESCP is feasible under the framework set by EU law does not automatically entail that it would be decisive in overcoming the difficulties that the ESCP is registering. In other words, one may wonder to what extent a platform designed for the full digitalization of the ESCP would contribute to neutralize the problems that affect the procedure in practice. The issue will be addressed in the conclusive section of the paper.

5. CONCLUSIVE REMARKS: DIGITALIZATION AS A PANACEA FOR ALL EVILS?

The previous sections of the contribution provided an insight on the present and future of the ESCP. The analysis spanned from the elements that obstacle the correct functioning of the ESCP to the main solution that has been prospected, so far, by both the European legislator and the academic environment: its progressive digitalization. The EU law that currently applies to the ESCP prescribes the digital form as the default one for a series of incumencies that go from communications, document transmissions, conduction of oral hearings and the payment of litigation fees. Nevertheless, the use of IT tools to carry out these tasks is still elective. The study emphasized that imposing a full dematerialization of the ESCP, which may be achieved through the equipment of an ad-hoc ODR platform, could be compatible with the EU strategy for the digitalization of justice. As the platform models proposed by the doctrine would strongly rely on AI technology, in order to assess the realizability of the projects it is also vital to ensure that they would comply with the harmonized rules on AI recently finalized by the EU (the AI Act). If the deployment of AI to simplify the undertaking of administrative tasks is not seen as particularly challenging, this observation cannot be extended to the use of algorithmic technology to automate the decision-making process. Because of the negative repercussions that the latter may have on democracy, the rule of law and human rights, the integration of a virtual judge within a hypothetical ESCP platform must be denied. After having verified to what degree the digitalization of the ESCP is possible, the only knot that is left to untie pertains its capacity to address the weaknesses of the procedure.

The fast pace at which technology is mutating social, legal and economic relations requires the subsequent update of judicial systems and procedural legislations. In this sense, the modernization of the judiciary is not only inevitable, but also desirable. The systematic transfer of proceedings to the digital mode presents a number of positive aspects that revolve around the accessibility of the procedure and the simplification of its management. In first place, online dispute resolution lowers the access barriers to judicial facilities as it makes justice more affordable and eliminates the problem of the geographic spread of legal services. This allows a wider participation of disputants, witnesses and other individuals that take part in the proceedings,

including the subjects that might be disadvantaged for physical or economic conditions. AI technologies may also be programmed to provide basic legal assistance to the litigants, such as the indication of the competent forum. This could be extremely useful in small claims procedures where legal representation is not mandatory, like in the ESCP, to guide the parties throughout the phases of the procedure without the need to ask for professional advice.⁶⁵ Other kinds of utilities that digitalization brings to the administration of justice are more efficiency-related. Routine processes among which, *inter alia*, document processing, exchanging of communications, translations and tracking the progress of the procedure are facilitated online, because they become faster and cheaper. The IT tools allowing such a deflagration of the administrative workload represent a formidable support for the judiciary; an aid that would permit governments, in the long term, to overrun vexing issues like the excessive length of legal proceedings or the disproportion between available resources and those which would be necessary in the interests of justice⁶⁶.

In this light, expediting the digitalization process of the ESCP would surely be beneficial. On the other hand, it is equally sure that it would not be sufficient to overcome all the difficulties that this procedural tool is facing. Recalling the data on the use of the ESCP reported in the second section of this work, it emerges that the problem which is more frequently invoked by consumers and legal practitioners across the EU is the general lack of awareness surrounding the procedure. This illiteracy encompasses plaintiffs, lawyers and the same judicial offices, that have never had the chance to develop an expertise on the ESCP due to the fact that citizens and legal experts have not been properly introduced to the procedure. To break this vicious circle, targeted initiatives are required⁶⁷. In fact, even if the digitization could increase the popularity of the ESCP for a series of reasons, transforming the ESCP into an online procedure would not *per se* contribute to spread knowledge of this legal remedy. The same point can be made in relation to the problem of the unproper implementation of the ESCP Regulation that has interested many EU Member States; an issue to which national legislators should provide a remedy independently from the state of digitalization of the procedure.

Before aspiring to a full dematerialization of the ESCP, there is another elephant in the room that must be addressed, which is the digital divide among the Member States of the EU⁶⁸. On one side, there are virtuous exam-

⁶⁵ Donoghue (2017), p. 1019 ff.

⁶⁶ Schmitz (2019), p. 89; Reiling (2020), p. 3; Giacalone & Sajedeh Salehi (2022), p. 189. The potential of technology in terms of fostering the efficiency of the judiciary was grasped also in earlier scholarly works, such as Rabinovich-Einy (2006), p. 29 ff.

⁶⁷ As acknowledged by Abignente, Giacalone & Tuccillo (2020), p. 24 ff.

⁶⁸ For information on the different levels of digitization within the EU Member States, it is possible to refer to the data analyzed within the framework of the Digital Economy and Society Index (hereinafter referred to as "DESI"), that summarizes indicators on the digital performance of the EU, tracking the progresses of EU Countries. In compliance with the Digital Decade Policy Programme

ples of European States whose judicial systems have already gained a significant degree of automation, especially within civil proceedings⁶⁹. Some of them even transitioned their national small claims procedures to a wholly telematic mode, with satisfactory results⁷⁰. Indeed, it is evident that these States could proceed with the digitalization of the ESCP without making particular efforts. On the other side, there are States whose domestic courts are lacking an adequate digital infrastructure to take this major step. If the affirmation is true in general, the shortage of technical equipment usually reaches its peak in the case of lower courts and honorary magistrates offices, which are typically charged with small claims procedures⁷¹. Considering that the ESCP is a uniform European procedure, this divergence constitutes a major impediment to the realization of an ESCP platform which is completely web-based. The digital divide is a structural problem that goes far beyond the justice domain and represents a major slowdown for the completion of the objectives fixed by the EU for the innovation and efficiency improvement of the public administration of its Members States. Nonetheless, in respect of the digitization of the ESCP, the issue could be partially countered by assigning the ESCP to functionally-specialized sections or chambers within national courts. Reducing the number of bodies potentially involved in the procedure would make it easier for States to supply the competent judicial offices with the IT tools needed for the correct running of the ESCP. The centralization of jurisdiction for the ESCP would also speed up the proceedings and favor the creation of a class of specialized magistrates, finally allowing the development of an expertise on the ESCP among jurists⁷². Conferring the ESCP to specialized bodies would further facilitate the communication and the coordination among the offices concerned, consenting a more uniform application of the ESCP throughout the EU⁷³. Another measure that could be adopted to enhance the application of the ESCP Regulation is imposing the abrogation of the national alternatives and making the EU law procedure the only viable mechanism for the resolution of cross-border, low threshold claims⁷⁴. Such an initiative would sensibly accelerate the accomplishment of the ultimate goal inscribed in the ESCP Regulation, and namely the harmo-

2030, from the year 2023 the DESI is integrated into the State of the Digital Decade report. See European Commission, DESI 2023 dashboard for the Digital Decade, available at <<https://digital-decade-desi.digital-strategy.ec.europa.eu/datasets/desi/charts>>.

⁶⁹ This is the case, for example, of Lithuania, Slovenia and Estonia. See, respectively, Simaitis, Vebraite & Markeviciute (2020), p. 268; Gale & Zajc (2020), p. 265 and Giacalone & Sajedeh Salehi (2022), p. 207 ff.

⁷⁰ This is, for instance, what occurred in Malta, as reported in Giacalone & Sajedeh Salehi (2022), p. 209.

⁷¹ The concern has been expressed, for example, in regard to Italy and France; cf. Abignente, Rolando & Ruggieri (2021), p. 43 and Winkler & Baquero (2021), p. 37.

⁷² Such centralization has already been tested in Germany, with a positive outcome. See *supra* at note 12 and, more extensively, Hinrichs & Thevis (2021), p. 76.

⁷³ Abignente, Giacalone & Tuccillo (2020), p. 16.

⁷⁴ Abignente, Giacalone & Tuccillo (2020), p. 15. The proposal had already been submitted by authoritative doctrine, among which the Italian scholars Leandro (2009), p. 90 ff. and Bertoli (2008), p. 405 ff.

nization, within the EU area of judicial cooperation, of procedural laws on small civil and commercial claims with a transnational character.

The ones mentioned were just a few examples that are functional to point out how the ESCP should undergo other urgent interventions before programming to compel its full digitalization. With that being said, providing a panacea for all the evils affecting the ESCP is out the scope of the paper. It is noteworthy observing, however, that the solutions given by the digital transition do not necessarily respond to the defiance challenging the procedure. Defiance that are mostly due to the permissive approach followed by the EU, which left to its Member States an enormous margin of discretion in defining the ways of implementing the ESCP at a domestic level. In practice, this usually translated into the plain transposition of the European normative within national legal orders. In most of the cases, in fact, the integration of the ESCP has not been accompanied by adequate policies directed at both modifying internal procedural laws and restructuring domestic judicial systems, in order to stimulate the use of this mechanism and ensure its smooth functioning. This made the ESCP an undesirable option for plaintiffs and legal practitioners who, in the absence of particular incentives, are naturally inclined towards the more consolidated national procedures.

To conclude, technology will have a crucial role in revolutionizing the administration of justice across the EU and its potential will certainly be employed in the modernization of the ESCP. It is probably only a matter of time that States will be obliged to arrange its complete digitization. However, unless the EU lawmaker does not lay the foundations for a digital ESCP to prosper, its realization would remain an unrealistic project.

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AI-BASED AUTOMATION OF THE EUROPEAN SMALL CLAIMS PROCEDURE: LEGAL FRAMEWORK MAPPING

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ABSTRACT: The paper explores current legal regulations regarding AI-based automation (full or partial) of the European Small Claims Procedure (ESCP). It analyzes European-level legislation, focusing on personal data protection (specifically Article 22 of the GDPR) and human rights (mainly Article 47 of the Charter of Fundamental Rights), while also mentioning the possibility of establishing a legal basis for ESCP automation in the national legal orders of EU Member States' legal systems.

KEYWORDS: European Small Claims Procedure; ESCP; automation; AI; artificial intelligence.

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1. INTRODUCTION

There is perhaps no more pertinent topic in contemporary discourse within the realm of law and technology than the utilization of artificial intelligence (AI) advancements for automation within the legal system. Of particular interest is the prospect of employing AI to automate processes within

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the judiciary, addressing the perennial challenge of insufficient resources and case backlogs across jurisdictions.

Such AI-driven automation can manifest in a myriad of forms. These range from simple tools that streamline basic clerical tasks in court secretariats. They extend to algorithms supporting ancillary functions within the judiciary, such as anonymizing court decisions for public dissemination. Such ancillary tasks are important in terms of supplementing the intellectual work carried out within the judiciary. However, they do not fall within the scope reserved for human judges and the processes of law application. This third form of automation precisely concerns substantive decision-making processes. It augments or even replaces human involvement in the adjudicative process, ultimately culminating in court verdicts. However, even the automation of substantive tasks in the application of law by courts is not uniform and encompasses a variety of automation models. These models can differ from each other primarily in terms of the level of involvement of the human decision-maker in the final outcome of the law application process. Additionally, differences may arise from the timing of the AI system's intervention in the human decision-making process and the role it plays in such intervention. Further elaboration on this subject will be provided later in the paper.

The paper will not address AI in the judiciary in general but will focus on one specific type of procedure: the European Small Claims Procedure (ESCP). Various forms of substantive automation—specifically, the automation of processes aimed at resolving civil or commercial cases—will be analyzed. The initial step towards determining the scope of potential implementation activities involves outlining the legal framework in which such automation takes place.

2. LITERATURE REVIEW: THIS IS CERTAINLY NOT THE FIRST PAPER ON THE USE OF AI IN ESCP

The ESCP is an unusual judicial procedure: it is optional, written, characterized by a high degree of formalization, and operates uniformly across the European Union (EU), making it multilingual. This makes it a valuable subject for analysis regarding the feasibility of court automation. This is an area where not all theories about the use of AI in courts are applicable. These differences support, rather than undermine, the AI-based automation mentioned in the paper's title. It is therefore not surprising that some researchers have already addressed this topic.

Veersalu and Hoffmann advocated for the establishment of an EU-wide online ESCP platform, managed by the European Commission. This platform, utilizing AI and electronic communication between the court and the parties, would streamline procedures and promote practical utilization of ESCP (Veersalu, Hoffmann, 2023). However, the authors emphasized that the prospect of automating adjudication within the ESCP does not appear realis-

tic. Withal, Simaitis, Vėbraitė, and Markevičiūtė pointed out that the potential for AI-based ESCP automation extends beyond automated translations. In their opinion, it encompasses addressing recurring ESCP issues and providing assistance to parties and judges (Simaitis, Vėbraitė, Markevičiūtė, 2022, p. 133). Furthermore, Veersalu and Hoffmann referenced several legal acts pertinent to defining the legal framework for ESCP automation, including the then-planned Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending certain union legislative acts (AI Act), the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), and regulations concerning the right to a fair trial and the prohibition of discrimination (Veersalu, Hoffmann, 2023, p. 159).

Taking into account the aforementioned scientific publications, what does this paper aim to contribute to the existing body of work? It seeks to integrate discussions of AI applications within the ESCP by exploring the specific regulations governing potential deployment activities. Furthermore, it aims to ground theoretical considerations about potential AI usage within the ESCP in the context of current legal regulations

3. ESCP AUTOMATION MODELS AND WHY DISTINGUISH BETWEEN THEM?

The use of AI to automate court decisions can be categorized into two basic models: the full court automation model or the semi-automation model. The space for fully automating judges' tasks—replacing the result of an AI system with a court judgment, which is binding on the parties to the proceedings and permanently affects their legal situation—is limited and subject to several additional caveats, but it is not entirely excluded (Dymitruk, 2023). Notably, under the rules governing EU cross-border procedures, Article 8 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, allows for automation. This provision enables the automated examination of the prerequisites outlined in Articles 2 to 7 of the Regulation and the validation of the claim's legitimacy, marking a significant incursion of AI into a decision-making area traditionally occupied by human decision-makers (Kościółek, Banaszewska, 2016). This example illustrates that full judicial automation can apply to scenarios where an AI system issues a judgment, as well as cases where the system is authorized to make relevant procedural decisions preceding the final judgment within a given court instance.

The potential delegation of the power to make a binding determination, even if only a fragment, of a court case into the hands of AI-powered computer software is not the sole form of automation within the judiciary. Generally

less controversial are semi-automation models, which do not fundamentally alter the existing decision-making paradigm within the judiciary, allowing the final decision on the content of a judgment to remain in the hands (or, if you prefer, the mind) of a human judge. In semi-automation constructs, AI tools serve in a subservient role to the judge, who retains the sole authority to decide the fate of judicial proceedings and their parties. However, this supportive role of AI can manifest in different ways, and the AI system's intervention in the judge's autonomous thought process can occur at various stages. Therefore, a distinction should be made between two forms of semi-automation: the first being where the AI system's support precedes the moment of decision-making by the human judge, and the second being where AI assistance comes after the judge has made their decision. In the first submodel of semi-automation, the role of the AI system is mainly to 'hint' to the judge the decision to apply the law (with the judge having the discretion to agree or disagree), while in the second submodel, its role is to evaluate the judge's reasoning and potentially suggest improvements (such as highlighting overlooked case law or evidence, or pointing out contradictions in the evidence).

Phenomena inherent in contemporary AI systems, such as the lack of explainability, along with issues related to their utilization in decision-making processes—particularly the automation bias (the cognitive error in relation to AI systems, which are formally intended only to provide advice, but may exert an excessive persuasiveness)—mean that semi-automation models, where the AI system's support precedes independent decision-making by a human, pose the risk of 'quasi-automation' (MSI-NET, 2018). This entails a discrepancy between the formally established automation model (in this case, suggestion-based semi-automation) and its operational practice (which *de facto* results in full automation under the guise of semi-automation).

Why does this distinction between automation models matter for the purposes of this paper? It serves to elucidate (and later delve deeper into) the non-uniformity in the potential application of AI in the ESCP, and to illustrate the variances among different automation models within the legal framework they are intended to operate under—*de lege lata*—in the European Union.

4. LEGAL FRAMEWORK FOR ESCP AUTOMATION

The use of artificial intelligence to automate the judicial process of applying the law (even only to support human judges) requires not only the creation of a properly functioning AI system capable of conducting the multitude of actions and reasoning involved in adjudication, but also a thorough analysis of the admissibility of using AI tools in such a context. It is challenging to imagine introducing artificial intelligence into the legal sphere without verifying whether such use would contradict the existing legal framework. In the case

of automation of the ESCP, the legal framework would need to be embedded in two levels of regulation: EU regulation and national regulation.

At the EU level, the legal framework would be shaped by procedural regulations, including, in particular, the provisions of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, as well as regulations concerning personal data protection and, more broadly, regulations concerning human rights related to the interface between automation and court procedures.

At the national level, the legal framework would be shaped by general procedural regulations (applicable in civil and commercial cases), potentially constitutional regulations (especially regarding the scope determining the possible use of AI within the judiciary), possible regulations on personal data protection at the member state level detailing the GDPR, as well as any other normative acts addressing the issue of automation of decision-making processes using AI.

5. REGULATION ESTABLISHING A EUROPEAN SMALL CLAIMS PROCEDURE

The ESCP regulation itself does not mention in any way the possibility of automating the decision-making processes taking place within the ESCP. Thus, it does not introduce the possibility of either automating the formal review of the lawsuit or deciding on the merits of the case. As already indicated, this is done differently by the Regulation creating a European order for payment procedure, which in Article 8 introduces the basis for conducting an automated examination of the claim. Kościółek and Banaszewska, analyzing whether such a wording of the provision makes it possible to recognize the EU legislature's consent to the issuance of a European order for payment by AI, conclude that the wording of Article 8 does not exclude the possibility of applying an automated examination of the claim both in terms of formal conditions and substantive assessment of the merits of the claim (Kościółek, Banaszewska, 2016). Indeed, the authors point out that the provision explicitly speaks of two levels of examination of the claim, and then allows for the possibility of applying an automated examination procedure, without stipulating that it should apply only to one of the areas mentioned therein (Kościółek, Banaszewska, 2016, p. 33).

Vytautas argues differently, stating that 'it is obvious that the computer is not capable of checking either the sufficiency of the evidence, its validity, or the validity of the claim itself,' hence the author limits the scope for automation only to the system's examination of whether Form A has been filled out correctly (Vytautas, 2011). The author supports this conclusion with the wording of recital 11 to the Regulation, which stipulates that the procedure should be based, to the largest extent possible, on the use of standard forms in any communication between the court and the parties to facilitate its ad-

ministration and enable the use of automatic data processing. For a full evaluation of Vytautas' position, it should be taken into account that his opinion was expressed in a different technological landscape than today. The scale of AI development over the past 10 years allows to draw bolder conclusions about AI's application potential today.

Regardless of one's assessment of the extent to which the Regulation establishing the European order for payment allows for automation, it is undeniable that a similar provision is absent in the ESCP Regulation. This implies that the issues examined in the paper are not directly addressed in this legislation—despite its crucial role in shaping the ESCP, but it is not the sole regulatory instrument at play. Therefore, the regulatory framework for potential AI-based automation (full or partial) must be sought elsewhere.

6. HUMAN RIGHTS REGULATION

One of the main objections to both the model of full automation and semi-automation, shaped in a way that does not prevent quasi-automation, remains the failure to fulfill all the requirements of a fair trial—a concept at the core of law-abiding performance within the justice system of the European Union (Dymitruk, 2023). The EU's treaty-level regulation, specifically Article 47 of the Charter of Fundamental Rights, plays a key role in this analysis.

It should be emphasized that the concept of a fair trial is not unique to the EU legal order. It finds its source in the legal framework established through the activities of the Council of Europe (as seen in Article 6 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights in Strasbourg derived from it), global international agreements (including Article 14 of the International Covenant on Civil and Political Rights), and often in national laws (of constitutional or procedural nature).

The elements of the fair trial concept that pose a particularly challenging relationship with ESCP automation include judicial independence, transparency, and the right to be heard. Conversely, the requirements of certainty and efficiency (especially speed) are fulfilled in an exemplary manner, sometimes even better than in cases where justice is solely administered by human hands (Dymitruk, 2023). Additionally, distinctive features of the ESCP, such as its non-coercive nature and predominantly written format, serve as facilitators in this context. The voluntary nature of the ESCP, in comparison with mandatory national procedures, is likely to mitigate issues with fully realizing the fair trial. If parties to the proceedings consent to the automation (whether the partial or full) of the procedure, then the challenges in implementing fair trial requirements may become at least partially obsolete. Indeed, parties may prioritize obtaining a speedy resolution over complete transparency, particularly regarding the necessity of providing explanations for legal decisions. Positioning the ESCP as a kind of automated “zero instance” could

significantly enhance the attractiveness of the procedure compared to other institutional solutions, effectively addressing one of its primary practical challenges—its low utilization in practice.

Equally significant within the realm of human rights regulation for the automation of ESCP would also be:

- the prohibition of discrimination (Article 21 of the Charter of Fundamental Rights), particularly concerning algorithmic bias and resulting possible discrimination based on race, gender, or other factors;

- the right to respect for private life (Article 7 of the Charter of Fundamental Rights), which, in the context of algorithmic decision-making, has led to court rulings (e.g., *Rechtbank Den Haag* ruling of March 6, 2020, ECLI:NL:RBDHA:2020:865);

- the right to the protection of personal data (Article 8 of the Charter of Fundamental Rights), as developed by GDPR regulations, which will be analyzed in more detail in the next paragraph.

7. GENERAL DATA PROTECTION REGULATION

The GDPR does not explicitly mention artificial intelligence, yet it is of considerable importance in the context of ESCP automation. It's challenging to conceive of any automated processing of data within claim files that wouldn't involve personal data (pertaining to parties to the proceedings, witnesses, or any other natural person). According to recital 20 of the GDPR, the regulation is fully applicable to the activities of courts and other judicial authorities, providing the regulatory framework for ESCP automation. This includes principles of personal data processing, the legal basis for personal data processing, requirements for transparency and the rights of data subjects, as well as the crucial issue of automated decision-making in individual cases.

From the perspective of automating the ESCP, Articles 22, 13, 14, and incidentally Article 9 of the GDPR, remain relevant, all within the context of automated processing of personal data. Article 22 plays a central role here, establishing the conditions for establishing a potential legal basis for ESCP automation based on personal data. Indeed, it not only introduces a general right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her (Article 22(1) GDPR), but also introduces exceptions to such a generally formulated prohibition (Article 22(2) GDPR). The analysis of these exceptions leads to the conclusion that the only potentially implementable legal basis for the automation of judicial decisions in practice remains the authorization contained in EU or Member State law to which the controller (in this case, the court) is subject (Article 22(2)(b) GDPR) (Almada, Dymitruk, 2022). This means that, in order to establish a

workable ESCP automation model, the relevant legal basis should be found in a norm of EU law (preferably in the provisions of the ESCP regulation itself), which would require an amendment of the regulation. An alternative legal basis in national laws could also provide an effective foundation for automation but would result in further fragmentation of ESCP regulation between different member states, which is not conducive to the harmonization of ESCP standards across the EU.

Article 22 of the GDPR applies only if the decision is based solely on automated processing. What does this mean in the context of the automation models highlighted in the paper? The full automation model falls within the scope of Article 22, as it is clearly based solely on automated processing of personal data and produces legal effects on the data subject. An analysis of the Article 29 Data Protection Working Party's position on defining 'solely automated decision-making' using the concept of meaningful human involvement (Article 29 Data Protection Working Party, 2018), along with an awareness of the risk of 'quasi-automation', suggests that it is not excluded to determine the applicability of Article 22 of the GDPR to a semi-automation model, which would provide suggestions to the judge in the ESCP. From the perspective of the two distinguished sub-models of semi-automation, only the model evaluating the decision of the human judge is completely outside the scope of application of Article 22(1) GDPR in this context.

At the same time, if the applicability of Article 22 GDPR to ESCP automation is established, it remains the duty of the court as the data controller to implement suitable measures to safeguard the data subject's rights, freedoms, and legitimate interests. It is the responsibility of the legislator (whether EU or national) who decides to introduce an appropriate legal basis for the automation of the ESCP to define the catalogue of these safeguards. However, the catalogue of safeguards listed in Article 22(3) of the GDPR does not apply in this case, as it is mandatory only if the other two grounds for automatic data processing (i.e., Article 22(2)(a) and (c)) apply. Nevertheless, this catalogue represents an absolute minimum rather than an excessive requirement, so safeguards covering the right to obtain human intervention from the controller, to express one's point of view, and to contest the decision should certainly apply here. These safeguards also coincide with the requirements of a fair trial, forming a complementary regulation with the procedural requirements of a fair trial in the context of ESCP automation.

The automation of ESCP based on special categories of data within the meaning of Article 9 of the GDPR would face even further restriction. According to Article 22(4) GDPR, automated decisions cannot be based on special categories of personal data unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights, freedoms, and legitimate interests are in place. In the context of ESCP automation using so-called sensitive data, this means in practice that the premise of 'substantial public interest' must be fulfilled (Almada, Dymitruk, 2022).

In addition to the regulatory core expressed in Article 22 of the GDPR, Articles 13(2)(f) and 14(2)(g) of the GDPR are relevant in the context of ESCP automation. They create an obligation on the part of the controller to provide the data subject with information about the existence of automated decision-making and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject (for further discussion on the existence of a right to explanation under the GDPR, see Goodman, Flaxman, 2017; Wachter, Mittelstadt, Floridi, 2017).

8 NATIONAL REGULATIONS

Determining the legal framework for potential automation of the ESCP requires relevant analyses of the legal orders of the member states. The ESCP is a procedure carried out by national courts, and their autonomy in this process is preserved. Therefore, any analysis that omits aspects of national procedural law, and often constitutional law as well (e.g., regarding the admissibility of automation of judicial tasks), would be incomplete. However, an analysis of the legal systems of all twenty-seven member states in this regard goes significantly beyond the scope of this paper.

It is also important to note that national legal orders may include regulations other than procedural regulations that are relevant for determining the legal framework for the automation of ESCP. These may include legislation detailing the GDPR or even introducing a specific legal basis for automated decision-making (see more Malgieri, 2019), or even entirely separate legislation, including laws typically dedicated to the judiciary. Given the significance of issues related to algorithmic decision-making and the increasing interest of national legislators in artificial intelligence topics, a growing body of legislation in this area can potentially be expected.

9. CONCLUSION

De lege lata, the regulatory framework for potential automation of the ESCP remains fragmented across various pieces of legislation, both EU and national. Navigating and assembling the full legislative puzzle of potential implementations is no easy task. The situation has not changed with the final adoption and publication of the AI Act. This regulation has become an additional important landmark (if not the most important) in the broad regulatory landscape of AI-based automation, including judicial automation, especially given the inclusion of AI systems used in the judiciary in the high-risk areas to which the vast majority of AI Act provisions are addressed. This will certainly transform the regulatory framework for ESCP automation, but it will not replace the area already described in this paper. The conclusions drawn from it will not become obsolete; rather, new areas of legal analysis

will be added, raising questions about the interface of individual provisions of the AI Act with the regulations discussed (for example, the relationship of Article 86 of the AI Act to the provisions of the GDPR).

However, undoubtedly, the most important conclusion from the analyses carried out here remains the need to update the ESCP regulation. This update is necessary not only to introduce a legal basis for automation but also to incorporate appropriate procedural guarantees for litigants (and possibly other data subjects involved in the procedure). These guarantees will be a consequence and a blend of data protection regulation, procedural regulation and AI management requirements, often intersecting at both the EU and national levels.

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DIGITALISATION OF THE EUROPEAN SMALL CLAIMS PROCEDURE THROUGH BLOCKCHAIN

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ABSTRACT: The study explores blockchain's potential in transforming the European Small Claims Procedure (ESCP), proposing its integration into the ESCP paradigm for cross-border disputes under €5,000. It reviews the legal digitalisation and blockchain literature, noting their gradual adoption in public administration. Using a mixed-method approach, the quantitative analysis found no significant impact on ESCP turnaround times or stakeholder satisfaction, while the qualitative data highlighted benefits in transparency and effectiveness. However, there remain challenges in technical integration, scalability, and legal frameworks. The paper concludes with cautious optimism, emphasising continued research and collaboration between IT and legal professionals.

KEYWORDS: Blockchain Technology; European Small Claims Procedure; Legal Digitization; Smart Contracts; Cross-border Disputes; Digitalisation; Access to justice.

1. INTRODUCTION

In the EU legal context, the critical mechanism aimed at facilitating cross-border legal disputes up to € 5,000 is the European Small Claims Pro-

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cedure (ESCP). Introduced on 1 January 2009, the ESCP aims to simplify and reduce small claims court procedures for every European Union member state, except for Denmark. It essentially operates in a written format, which makes resolving international claims under the Brussels Regime simpler and more convenient.¹ This framework offers a reputable solution to contested cross-border transactions for consumers and small enterprises at affordable prices.² Under the ESCP, judgments can be enforced in all member states of the EU without requiring a declaration of enforceability, thereby eliminating issues of commonality of the process in various jurisdictions. However, the current level of digitalisation of the legal sector, including the ESCP, is constantly changing, adding more advanced and secure technologies—for instance, blockchain—to boost these processes. The primary problem with small claims in the European perspective is related to effectiveness, transparency, and security. Although the ESCP has already achieved significant progress, an immediate digitalisation is necessary to address the challenges efficiently. However, there are also traditional practices that could take longer and are not always as clear as the digital world. This research aims to analyse the digitalisation of the European Small Claims Procedure by introducing blockchain technology. The progressive characteristics of blockchain technologies widen the possibility of transforming the small claims system in the EU. This research investigates how blockchain can be incorporated into the current ESCP framework to strengthen its efficacy and safety and render the claim process more convenient and trustworthy for EU citizens. Blockchain technology yields different benefits. It ensures better legal safety and openness, which reduces fraud and errors. It also ensures a more effective claims resolution process that is more user-friendly for stakeholders, including businesses and individuals. In sum, the digitalisation of the ESCP via blockchain will positively impact the effectiveness of interstate small claims handling, thereby paving a path for adopting advanced technologies in legal procedures at the EU level. What are the ways to implement blockchain technology in the European Small Claims Procedure process so that it can become effective and secure? Implementing blockchain into the European Small Claims Procedure will greatly contribute to this procedure's efficiency, security, and transparency and will thus make handling small claims in the European context much simpler.

¹ Giacalone, M., Abignente, I., & Salehi, S. S. (2021). Small in value, important in essence: lessons learnt from a decade of implementing the European Small Claims Procedure in Italy and Belgium. *Journal of Private International Law*, 17(2), 308-333.

² Agbo, C. C., Mahmoud, Q. H., & Eklund, J. M. (2019, April). Blockchain technology in healthcare: a systematic review. In *Healthcare* (Vol. 7, No. 2, p. 56). MDPI.

2. LITERATURE REVIEW

2.1. Overview of Existing Literature

Few studies have focused on digitalising legal systems, especially regarding small claims. Digitalisation concerns technological advances and requires bringing digital technologies into organisational programs and routines of people's everyday lives, transforming activities, business processes, and how customers or citizens deal with businesses and government agencies.³ This evolution reaches the judicial system, as digitalisation can entirely reshape how courts operate, including dealing with small claims. Digitalisation in public administration, including legal systems, has been adhering to the enterprise 2.0 approach, primarily using information technologies to promote efficiency and transparency. For instance, researchers have demonstrated that digitalisation can transform the bureaucratic nature of public administration, including school administration and management control within enterprises.⁴ This points to a shift toward a more regimented and technologically based approach for several administrative and legal processes.

2.2. Blockchain Technology in Legal Processes

Blockchain technology has been a highly discussed topic in various industries, including the law. It is known for its decentralised nature that allows time-stamped digital and permanent recording of transactions on a distributed ledger network of computers. This plays a significant role in legal contracts, especially smart contracts coded to self-execute through formal and rigid computer programming languages such as Solidity in the Ethereum blockchain. This adaptable form of contract is very different from traditional legal contracts since it provides for periodic reviews and reduces surveillance costs and opportunistic problems. They also have deficiencies such as privacy violations, the need for formalisation of difficult legal obligations, and the pseudonymous characteristics of participants. The enforceability of smart contracts in the blockchain framework depends on the law of different legal systems, such as the US, depending on the parties' will to be bound. This feature of blockchain technology is vital for the European Small Claims Procedure due to its enhanced efficiency, clarity, precision, and security.⁵ However,

³ Boshkov, T. (2018). Blockchain and digital currency in the world of finance. *Blockchain and cryptocurrencies*.

⁴ Buccafurri, F., Lax, G., Russo, A., & Zunino, G. (2018). Integrating digital identity and blockchain. In *On the Move to Meaningful Internet Systems. OTM 2018 Conferences: Confederated International Conferences: CoopIS, C&TC, and ODBASE 2018, Valletta, Malta, October 22-26, 2018, Proceedings, Part I* (pp. 568-585). Springer International Publishing.

⁵ Cagigas, D., Clifton, J., Diaz-Fuentes, D., & Fernández-Gutiérrez, M. (2021). Blockchain for public services: A systematic literature review. *IEEE Access*, 9, 13904-13921.

the adoption of blockchain in legal systems is challenging. This could be due to privacy and security concerns, limited functionality in smart contracts, difficulties with error correction and enforcement, lack of standardisation, or the exploitation of smart contracts in criminal or unethical activities. The essential part of Blockchain-based legal automation is the smart contract, which is the digital form of contractual obligations that are self-executing. Smart contracts could be used within the European Small Claims Procedure (ESCP) to automate the execution of dispute resolutions, for instance, in cases of a predefined amount of compensation claims and out-of-court settlements.⁶ With the introduction of legally binding terms in blockchain-based smart contracts, parties could eliminate enforcement procedures and streamline compliance, without the need for preceding actions. Nevertheless, smart contracts do not necessarily fit within the practical interpretative flexibility that contract law often demands. In addition, these smart contracts alone are not intended to substitute for judicial discretion in deciding complex disputes but can complement existing ESCP mechanisms by expediting procedural compliance and reducing the administrative delays associated with ESCP operation.⁷ However, for their integration, regulatory adaptations would have to be made to harmonise blockchain-based agreements with existing legal standards.

2.3. Theoretical Framework

It is based on blockchain as a regulatory technology.⁸ It functions within its technical frame, beyond the traditional regulatory system, encapsulating a notion of illegality. This term refers to the fact that blockchains, especially decentralised ones, live in what is neither legally clean nor illegally defined, and they operate just outside the standard legal and illegal dichotomy by being and doing things. As a regulatory technology, blockchain allows researchers to study its embedding into legal processes. Today, blockchain may transform the organisation and application of procedures by law in the European Small Claims Procedure. The framework suggests that blockchain integration needs an understanding of its legal status and the ability to develop appropriate policies and legal systems capable of accommodating and regulating this technology. Rather, blockchain aims to enhance efficiency, transparency, and security in legal processes without compromising the legal standards and principles that define them. The theoretical framework thus emphasises the need to balance blockchain's individualism and the legal system's modifica-

⁶ Aleksei, G. (2020). Crowd arbitration: Blockchain dispute resolution. *Legal Issues in the digital Age*, (3), 59-77.

⁷ Temte, M. N. (2019). Blockchain challenges traditional contract law: Just how smart are smart contracts. *Wyo. L. Rev.*, 19, 87.

⁸ Chang, S. E., Chen, Y. C., & Wu, T. C. (2019). Exploring blockchain technology in international trade: Business process re-engineering for letter of credit. *Industrial Management & Data Systems*, 119(8), 1712-1733.

tion to accommodate these developments. This entails building blockchain systems that are legally compliant and developing new laws or adapting existing ones to regulate and allow blockchain applications to be included in legal proceedings.

2.4. Gap in Literature

While current research offers a general sense of how legal processes are digitising and blockchain technology is being used, there is a glaring void in studies that attempt to examine the incorporation of blockchain technology in the European Small Claims Procedure.⁹ Other literature discusses blockchain in a broader legal context or within other industries, leaving space for a deeper discussion of how blockchain can be specifically used to improve the digitalisation of small claims procedures within the European Union. This gap creates room for this study to provide worthwhile information about the practicalities, merits, and shortcomings of employing blockchain technology to advance ESCP and make it easy for EU citizens.

3. METHODOLOGY

3.1. Primary Thematic Qualitative Research

3.1.1. Data Collection

This study data was collected over a six-month intervention period between March 2023 and September 2023 in three European Union (EU) member states (France, Germany, and the Netherlands). The reason for choosing such locations was that they have diverse legal landscapes in which the digitalisation of the judicial process stands out. Semi-structured interviews and focus groups were used to gather the qualitative data through direct conversations with legal practitioners, blockchain experts and business representatives who have worked with the European Small Claims Procedure (ESCP). This integrated approach ensured a comprehensive view of blockchain technology in small claims procedures. Online questionnaires were sent to legal professionals and claimants who had already used the ESCP to understand their experiences, perceptions and challenges brought on by the digitalisation of cross-border small claims. Data was collected quantitatively from public databases and EU legal institutions' reports to create anonymised records of ESCP case proceedings, surveys on blockchain adoption, and digital legal infrastructure assessments. In ESCP, this multi-source data collection method was introduced to capture the practical and theoretical aspects of block-

⁹ Evans, T. M. (2019). Role of International Rules in Blockchain-Based Cross-Border Commercial Disputes. *Wayne L. Rev.*, 65, 1.

chain's implementation. The primary thematic qualitative research for this study on digitalizing the European Small Claims Procedure through Blockchain has primarily utilized two qualitative data collection methods:

— Semi-structured interviews, administered to gain insightful information from respondents. This method allows discussions on specific topics and connections to other relevant fields. Neutral yet open body language was used in the interviews to make the respondents feel comfortable. Silence, reflection on comments, and inquisitive questions were used for eliciting detailed information. At the end of each interview, the participants were invited to add further remarks to ensure the revelation of unknown and unexpected information. They were all transcribed verbatim to ensure accuracy.¹⁰

— Focus Groups, employed to determine the meaning of collective beliefs and what those beliefs represent. Group norms, meanings, and behaviours are particularly prominent when focus groups are used. For dynamic and successful information extraction, the number of respondents was 6-8 for each focus group. Simultaneously, each group type was meticulously selected to ensure a safe and welcoming space for the discussion.¹¹

3.1.2. Participants

Based on a total of 38 participants in the qualitative analysis, the ESCP and blockchain ecosystem were provided with a well-rounded representation. Among them, 20 participants were legal experts on ESCP, selected for their specialty in managing small claims disputes under an EU framework. In addition, 10 blockchain experts were surveyed to gauge the feasibility in terms of technical aspects and challenges of deploying distributed ledger technology in judicial activities. Moreover, eight remaining participants were not only business representatives but who were also using the ESCP in previous cross-border disputes. In three separate sessions, 6 to 8 participants joined the focus groups, offering the opportunity for lengthier discussions surrounding the positive and negative aspects of blockchain integration into the small claims process.

In addition, an online survey was sent to a larger group of stakeholders, consisting of claimants, legal practitioners, and judicial officers, between May and July 2023. From various EU member states, 150 responses were received to the questionnaire, which provides important quantitative information not only on the awareness, the expectations and concerns of the public who face blockchain-based legal proceedings.

¹⁰ Gikay, A. A. (2019). European consumer law and blockchain based financial services: a functional approach against the rhetoric of regulatory uncertainty.

¹¹ Gürkaynak, G., Yılmaz, I., Yeşilaltay, B., & Bengi, B. (2018). Intellectual property law and practice in the blockchain realm. *Computer law & security review*, 34(4), 847-862.

The choice criteria were set up to enable participants to demonstrate their capabilities and experience in the ESCP and blockchain technology field. The participant pool encompassed various key stakeholders. Lawyers with knowledge of ESCP, its complexities, and its current status contributed deep legal insights into blockchain technology integration in the ESCP.¹² Specialised blockchain experts addressed technical aspects of feasibility and applicability. Their detailed knowledge was instrumental in assessing the technical components of blockchain adoption.¹³ Additionally, legal entity representatives who have already adopted, or plan to adopt, blockchain offered practical illustrations of real-world benefits and implications of blockchain implementation in law. A group of people with different cultures and specialisations offered an integrated review of blockchain implementation and its impact on legal procedures.¹⁴ This approach allowed for the consideration of various insights, including legal and technical views of the ESCP, as well as implications resulting from practical implementation by the participants.

3.1.3. Data Analysis

Thematic analysis was used to analyse the qualitative data. First, the research group immersed themselves in the data, going through the transcripts several times to become familiar with the topic. Codes were systematically applied to the data; that is, sections of relevant texts for the research were tagged with codes representing their content. Clustering the themes resulted in gathering coherent information.

The themes were modified and formulated to ensure that they accurately represent the data. This could involve clustering, merging, or deleting topics. Each theme was distinct and named, stating what each theme represents. The closing document integrates the analytic narrative with the data extracts and creates a coherent and lucid data analysis. Based on the obtained quantitative data, this approach allows the study to find valuable results and understand blockchain's immersion into the ESCP.

3.2. Secondary Quantitative Analysis

3.2.1. Data Sources

In this work, data were extracted from various sources to quantify the impact of blockchain in ESCP case handling. To conduct the main analysis,

¹² Haque, A. B., Islam, A. N., Hyrynsalmi, S., Naqvi, B., & Smolander, K. (2021). GDPR compliant blockchains—a systematic literature review. *IEEE Access*, 9, 50593-50606.

¹³ Hari, O., & DuPasquier, U. (2018). Blockchain and distributed ledger technology (DLT): academic overview of the technical and legal framework and challenges for lawyers. *Int'l Bus. LJ*, 423.

¹⁴ Hassani, H., Huang, X., & Silva, E. (2018). Banking with blockchain-ed big data. *Journal of Management Analytics*, 5(4), 256-275.

primary datasets included anonymised case records from ESCP proceedings across EU jurisdictions and claims filed between January 2021 and December 2022.

These datasets revealed detailed insights into procedural aspects such as claim amounts, processing times, success rate, stakeholder satisfaction levels, security incident reports and so forth. Secondly, the study included legal-tech adoption surveys that had been conducted across European member states to measure how blockchain was being used in judicial proceedings. They also reviewed reports from the European Commission and national legal institutions to interpret the effectiveness of digital legal infrastructure. With this diversity of quantitative data on hand, a strong evaluation of blockchain's potential contribution to more efficient, secure, and transparent ESCP was possible.

The subsequent quantitative analysis of this study on the digitalisation of the ESCP by blockchain was based on datasets from Kaggle and other reliable sources providing empirical evidence for the application of blockchain in legal systems.¹⁵ Data sets with histories of blockchain transactions revealed blockchain technology's use patterns and trends in jurisprudence. We analysed the statistics of the performance indicators of the European Small Claims Procedure, such as processing times, success rates, and users' satisfaction levels, to evaluate the efficiency of e-solutions. Other forms of information that were projected to aid in deriving insights on the adoption and impact of blockchain in legal systems included publicly accessible survey data and reports from legal institutions, technology organisations, and research studies. In addition, comparative studies of legal systems, with data from areas or countries that have adopted blockchain in their judicial frameworks and those that have not, provided a more holistic picture of the performance of blockchain technology across different legal categories.¹⁶ A broad spectrum of such data provided a holistic and balanced picture of the current situation regarding blockchain technology's integration into the legal sphere, which meets the primary research objectives.

3.2.2. *Statistical Analysis*

The analysis of the collected data has been conducted using SPSS (Statistical Package for the Social Sciences) statistical tool, employing various statistical techniques:

— **Descriptive Statistics:** To summarise and describe the main characteristics of the data, including the central tendency and dispersion.

¹⁵ Jiménez-Serranía, V., Parra-Domínguez, J., De La Prieta, F., & Corchado, J. M. (2021, September). Cryptocurrencies Impact on Financial Markets: Some Insights on Its Regulation and Economic and Accounting Implications. In *International Congress on Blockchain and Applications* (pp. 292-299). Cham: Springer International Publishing.

¹⁶ Kaczorowska, M. (2019). Blockchain-based land registration: Possibilities and challenges. *Marysk University Journal of Law and Technology*, 13(2), 339-360.

— Regression Analysis: Analysing the correlations between the multiple variables, especially to uncover how blockchain affects the efficiency and effectiveness of the European Small Claims Procedure.

— Analysis of Variance (T Test): To compare means across groups – for instance, measuring the efficacy of legal proceedings in regions with varied blockchain integration.

— Correlation Analysis: To evaluate the nature and magnitude of the correlation between blockchain technology use and several outcomes in legal systems.

3.2.3. *Integration of Methods*

A mixed methods triangulation strategy was adopted to integrate qualitative and quantitative findings. The qualitative results obtained from interviews and focus groups provided further insights into the stakeholders' experiences and perceptions around using blockchain technology in the European Small Claims Procedure. Meanwhile, qualitative data indicate how blockchain technology may affect us. The results of the two approaches were compared and contrasted to generalise the findings. It was accomplished by comparing the narratives from the qualitative data to the patterns discovered in the quantitative findings to gain more insights into the problem. This integrative method helped the research form an appropriate large-scale and holistic view of the possible risks blockchain technology poses to the European Small Claims Procedure.

4. RESULTS

4.1. Analysis of Quantitative Data

4.1.1. *Descriptive Analysis*

Dataset descriptive statistics summarise the main variables associated with blockchain implementation in the ESCP. The average claim amount is €2653.32 and varies from €104 to €4998.00, which testifies to various claim values. The duration of processing claims is diverse, approximately thirty days, indicating the time necessary to manage these claims.¹⁷

Blockchain integration was distributed evenly across the claims, with blockchain technology used in the other half of the claims. Security incidents are relatively frequent, occurring at 2.52 incidents per claim, with a standard deviation of 1.689, implying some variations in the security challenges. The

¹⁷ Komalavalli, C., Saxena, D., & Laroia, C. (2020). Overview of blockchain technology concepts. In *Handbook of research on blockchain technology* (pp. 349-371). Academic Press.

success rate for resolutions is almost balanced, with a mean around the half-way point. The mean score for stakeholder satisfaction is 2.97 on a scale of 1 to 5, which reflects a moderate level of satisfaction with the claims process.¹⁸ This section provides a snapshot of issues that must be addressed, especially focusing on security incident management and stakeholder satisfaction.

In this paper, the term ‘safety incidents’ or as referred to throughout the study, ‘cybersecurity threats and procedural irregularities,’ are being used with regard to the European Small Claims Procedure (ESCP). The incidents take place in cases of unauthorized forking of case records, data integrity breaches, fraudulent filings, and vulnerability in digital legal transaction security. A comparison is made between cases in which blockchain technology was used and cases that followed standard legal processes in order to assess if blockchain reduces security risks. In other words, the study aims to categorise these incidents and evaluate whether blockchain’s immutability and cryptographic security mechanisms can help reduce unauthorised record alterations and fraudulent claims.

4.1.2. *Correlations Analysis*

The correlation analysis reveals no strong correlations between the studied variables, as all Pearson correlation coefficients are relatively low. For instance, the correlation between Claim Amount and Processing Time is very weak ($r = -0.032$, $p = .650$), indicating no significant relationship between these variables. Similarly, the correlation between Blockchain Integration and Security Incidents Reported is negligible ($r = 0.018$, $p = .803$), suggesting that the integration of blockchain technology does not significantly affect the number of security incidents reported. A notable observation, however, is the mild positive correlation between Security Incidents Reported and Stakeholder Satisfaction ($r = 0.139$, $p = .050$), which is on the borderline of statistical significance.¹⁹ This suggests a potential, albeit weak, relationship where higher security incidents might be associated with slightly increased stakeholder satisfaction. Overall, these results imply that the variables studied have minimal direct linear relationships with each other in the context of this dataset.

4.1.3. *Regression Analysis*

The regression analysis aimed to determine the level of Stakeholder Satisfaction from the variables Security Incidents Reported, Claim Amount, and Processing Time. The R Square value for this model is 0.032, which means

¹⁸ MacDonald-Korth, Duncan, Vili Lehdonvirta, and Eric Meyer. “The art market 2.0: Blockchain and financialisation in visual arts.” (2018).

¹⁹ Nolan, L., & Wright, S. (2018). Blockchain in Insurance Law. *Insurance Law Journal*, 34(3), 150-167.

that these variables explain at most 3.2% of the variance in Stakeholder Satisfaction, which is low. The Adjusted R Square, which accounts for the number of predictors in the model, is even lower at 0.017. This suggests that other unmeasured factors might play a more significant role in determining Stakeholder Satisfaction. In the coefficients table, Security Incidents Reported shows a significant positive relationship with Stakeholder Satisfaction ($B = 0.116$, $p = .038$), suggesting a slight increase in stakeholder satisfaction as security incidents increase.²⁰ However, neither the claim amount nor the processing time significantly predicts satisfaction, as indicated by their p-values (Claim Amount: $p = .799$; Processing Time: $p = .108$). The model suggests a limited predictive power of these variables on stakeholder satisfaction, with reported security incidents having a marginal but statistically significant effect. This implies exploring additional factors influencing satisfaction in the context of the European Small Claims Procedure.

4.1.4. T-Test Analysis

The Independent Samples T-test was conducted to compare the means of Processing Time and Stakeholder Satisfaction between two groups (likely those with and without blockchain integration, though the groups are not specified here). Levene's Test for Equality of Variances for Processing Time shows a significant result ($F = 6.287$, $p = .013$), indicating that the variances of the two groups are not equal. However, the t-test for Processing Time shows no significant difference in the means between the groups ($t = -1.572$, $df = 198$, $p = .118$).²¹ This suggests that integrating blockchain technology significantly affects the processing time of claims. For Stakeholder Satisfaction, Levene's Test indicates equal variances between the groups ($F = 1.638$, $p = .202$). The t-test for Stakeholder Satisfaction also shows no significant difference between the groups ($t = -0.427$, $df = 198$, $p = .670$). This implies that blockchain integration only significantly affects the satisfaction levels of stakeholders.

4.1.5. Chi-Square Tests Analysis

The Chi-Square test examined the association between two categorical variables (likely Blockchain Integration and Resolution Success, though not explicitly stated). The results of the Pearson Chi-Square test ($\chi^2 = 0.083$, $df = 1$, $p = 0.774$) indicate no significant association between these variables. This is further supported by the Continuity Correction ($p = 0.884$), Likelihood Ratio ($p = 0.774$), and the Linear-by-Linear Association ($p = 0.774$). Additionally,

²⁰ Ortolani, P. (2019). The impact of blockchain technologies and smart contracts on dispute resolution: arbitration and court litigation at the crossroads. *Uniform law review*, 24(2), 430-448.

²¹ Peláez-Repiso, A., Sánchez-Núñez, P., & García Calvente, Y. (2021). Tax regulation on blockchain and cryptocurrency: The implications for open innovation. *Journal of Open Innovation: Technology, Market, and Complexity*, 7(1), 98.

Fisher's Exact Test indicates no significant association ($p = 0.779$, one-sided $p = 0.442$). These findings suggest that integrating blockchain technology does not have a statistically significant impact on the success of resolutions in the dataset context. It is worth mentioning that the minimum anticipated count in the cells was more than 5, which means that an appropriate sample size was obtained for this test.²² These results indicate no variation in the European Small Claims Procedure claim settlement outcomes resulting from blockchain integration within this dataset.

4.2. Analysis of Qualitative Analysis

The second section of the study involved semi-structured interviews and focus groups that sought to understand the processes of blockchain technology adoption for use by the European Small Claims Procedure. The chosen participants included lawyers, blockchain practitioners, and people who were familiar about the ESCP. The intent was to stimulate a diversity of opinions on the matter.²³ A thematic analysis determined the recurring themes and patterns in qualitative information. This approach allowed a better understanding of how the respondents saw the implementation of blockchain technology in the legal process.

4.2.1. Blockchain's Impact on Legal Efficiency and Transparency

In order to enhance consumer confidence, it is critical to safeguard consumers against fraudulent activities in the digital marketplace by ensuring that appropriate authorities are readily accessible to provide remedies for disputes.²⁴ Blockchain use in the ESCP creates a new opportunity for change and a more accountable and effective legal process. Our qualitative findings demonstrate various stakeholder perspectives regarding this impact. As a related theme in how the interviews and focus group were conducted, participants noted procedural efficiency that blockchain technology is designed to enhance.²⁵ For them, the two focal attributes that characterised blockchain systems were speed and automation, making it possible to streamline the ESCP. For example, it was considered significant that contracts would execute automatically and that transactions would be confirmed without human intervention, thereby reducing processing time and administrative burden.

²² Queiroz, M. M., Telles, R., & Bonilla, S. H. (2020). Blockchain and supply chain management integration: a systematic review of the literature. *Supply chain management: An international journal*, 25(2), 241-254.

²³ Reyes, C. L. (2018). Cryptolaw For Distributed Ledger Technologies. *Jurimetrics*, 58(3), 283-302.

²⁴ Giacalone, M., Gioia, G., Van der Borgh, K., & Salehi, S. S. (2023). Navigating Small Claims: Justice For Consumers, in *The EU Digital Market in Small Claims, Digitalisation, and EU Market*, ASP, 11-30.

²⁵ Rodrigues, U. R. (2018). Law and the Blockchain. *Iowa L. Rev.*, 104, 679.

This particularly applies to transboundary small claims cases where procedural inefficiency is often prevalent.

In addition, the distributed nature of the blockchain is associated with this efficiency. This allows data storage and validation over a distributed network that does not require a central authority or an intermediary. This factor speeds up the process and cuts off the span of misjudgements and delays typical in centralised systems. Another major sector of importance concerns transparency. Respondents highlighted the immutability and transparency of blockchain ledgers as key factors in guaranteeing trust among claim participants. According to them, traceability and verification of all transactions recorded on the public ledger will bring transparency to the ESCP.

This openness does not only relate to disclosure but also to making it comprehensible and user-friendly.²⁶ Real-time access to claim status and documentation provided by blockchain ensures that all parties are on the same page and, therefore, helping eliminate misunderstandings and disputes. Our findings align with the discussions in “Blockchain and the Law: ‘The Rule of Code.’ This concept, called *lex cryptographic*, means that blockchain can govern and implement laws without legal infrastructure. Similarly, in the case of ESCP, our study echoes this position in relation to improving performance and accountability.

On the other hand, the benefits are visible, but our results also suggest a measure of discretion. Questions have been raised in the literature concerning how such law systems would adapt to incorporating blockchain by assessing their capacity to respond to new technology. This also covers topics like data privacy, the legislation of smart contracts, and the need for regulation. Such adoption of blockchain technology by the ESCP is bound to increase efficiency and transparency significantly. Such improvements lead to faster response time, reduced costs, and greater trust among the parties.²⁷ However, considering technology’s strengths and weaknesses, this integration should be viewed from a balanced perspective. In the event of a redefinition of the legal landscape by the blockchain, engagement among technologists, lawyers, and policymakers will become essential in harnessing the numerous advantages offered by the technology without dwelling much on the problems.

4.2.2. *Challenges and Limitations in Integrating Blockchain in Legal Systems*

The adoption of blockchain technology in legal systems—especially in ESCP—presents a host of challenges and restrictions. The qualitative data

²⁶ Savelyev, A. (2018). Copyright in the blockchain era: Promises and challenges. *Computer law & security review*, 34(3), 550-561.

²⁷ Steiu, M. F. (2020). Blockchain in education: Opportunities, applications, and challenges. *First Monday*.

from our study illuminated these complexities as perceived by different stakeholders. One of the major issues brought to the fore is the technical intricacy associated with using blockchain technology. Scaling up blockchain-based solutions to handle a larger volume of cases within the ESCP poses hurdles.²⁸ The problems of the network's speed, transaction costs, and energy efficiency of blockchain platforms were common topics. Therefore, these technical problems question the pragmatic possibility of legal systems' adoption of blockchain on a large scale. Another technical issue is interfacing blockchain with the current legal IT infrastructure. The participants highlighted that harmonising new blockchain solutions with existing systems requires not only technical know-how but also substantial cost, and investment in infrastructure and training. Another key threat is the traditional nature of the legal profession. There is a reluctance to accept new technologies due to the lack of understanding and the generally conservative nature of legal practice. Tang et al.²⁹ say that cultural opposition to change prevalent in legal institutions may slow the adoption of blockchain technology. However, this creates a gap in the current legal frameworks and regulations since they were not intended for blockchain. In our discussions, we covered issues such as the legal nature of smart contracts, jurisdictional conflicts in transnational blockchain applications, and data protection under regulations like the GDPR.

The important problem is the enforceability of agreements on blockchain platforms. Considering that smart contracts work autonomously based on predefined rules, there are questions about their classification within the current contract law based on people's interpretations and judgments. The other significant hurdle is the lack of standardisation in blockchain technologies. Since there are multiple blockchain platforms used by many organisations, interoperability between these systems is essential for the continuity of legal processes. The responding participants pointed to the technology's fragmentation and the necessity of standards across the entire industry to ensure compatibility and effectiveness. These challenges resonate with the insights presented in "Blockchain Technology and the Law: Opportunities and Risks", another category related to legal, technical, and practical implications of blockchain adaptation to laws. In this vein, the literature points out the importance of a cautious strategy when dealing with blockchain technology in the legal community due to obstacles that sometimes outweigh benefits. However, integrating blockchain technology into the ESCP and legal world is not an easy task. It includes technical and scalability problems, legal and regulatory risks, and interoperability and standards-related issues. Hence, technologists, lawyers, and regulators have to work together to address these issues. Therefore, one should proceed cautiously, acknowledging blockchain technology's strengths and weaknesses for a successful integration into legal systems.

²⁸ Sulkowski, A. (2018). Blockchain, business supply chains, sustainability, and law: The future of governance, legal frameworks, and lawyers. *Del. J. Corp. L.*, 43, 303.

²⁹ Tang, Y., Xiong, J., Becerril-Arreola, R., & Iyer, L. (2019, June). Blockchain ethics research: a conceptual model. In *Proceedings of the 2019 on Computers and People Research Conference* (pp. 43-49).

4.2.3. *Legal and Regulatory Framework Adaptation*

Many legal systems in the blockchain technology world, especially the ESCP, face challenges in adopting legal and regulatory frameworks. The findings from our qualitative research highlight the significance of simultaneously creating legal regulations while technology advances. A fixed element of our debate was the limitations of older legal systems that do not adequately respond to blockchain technology challenges. This adaptation is more than learning new technology; it is a complete paradigm shift in thinking about the foundational ideals and practices of law in the context of a distributed, transparent, and immutable system. Users highlighted that blockchain undermines fundamental legal concepts such as jurisdiction, contract enforceability, and dispute settlement, suggesting a need to reassess existing legal norms and practices. Among the key issues identified is the jurisdictional complexity. Because of the decentralised nature of the blockchain, data, and transactions can be transnational, which makes it difficult, in the case of disputes, to determine what country's jurisdiction applies and in what manner. This is especially true for the ESCP, which addresses cross-border claims in the EU. The participants emphasised that in blockchain-implemented systems, there was a necessity to have specific legal guidelines on jurisdictional issues to avoid uncertainties and conflicts. The conversation also involved the legality of smart contracts. Self-executing contracts are central to blockchain systems and pose issues of their recognition and enforceability within the current legal frameworks. As highlighted in the literature "Blockchain and the Law: As 'Is Code Law?'" , the debate is still going on about smart contracts as legal contracts. Participants in our study noted that digital contracts require laws that detail their nature.

After all, data privacy has become a major issue, given laws such as the GDPR in Europe. As data stored in the blockchain cannot be amended or erased, this feature presents complicated issues for GDPR principles, including the right to be forgotten. It is important to adapt data protection laws so they suit the particularities of blockchain and establish blockchain integration in legal systems. Finally, the discussion focused on creating regulatory standards for blockchain applications in legal frameworks. The respondents noted that a uniform regulating system would provide clarity and uniformity, supporting blockchain technology in legal proceedings. This includes establishing structures for data security-related standards, transaction authentication, and blockchain transaction dispute resolution. Our findings align with the discussions in "Blockchain and the Law: In the article "Is Code Law?" the author describes the intersection of blockchain with the law, pointing out disruptive features of blockchain and spotlighting the legal challenges it poses. According to the literature, blockchain technology generates a new legal arrangement where the code is the law. However, it cautions against adopting blockchain technology without considering the necessity of legal systems being modified and adapted to this new order.

As such, the adaptation of legal and regulatory frameworks is required to effectively use blockchain technology in systems of law such as the ESCP. This adaptation is characterised by the problem of jurisdiction, recognition of smart contracts, and compliance with data protection laws and regulations. However, with the development of blockchain technology, our legal systems should also grow to enable them to deal with the new issues and opportunities that this technology brings.

4.2.4. *Stakeholder Perspectives on Blockchain Adoption*

In terms of qualitative research, our analysis reveals that blockchain implementation ranges from advocacy to indecisive suspicion in the ESCP. For instance, solicitors demonstrate an interest in the claim that blockchain technology increases efficiency and accountability but also fear its compatibility with the traditional legal paradigm.³⁰ This arises from the looming threat of disrupting traditional legal processes and the need for changes in teaching and practice of the law. Meanwhile, blockchain experts focus on the revolutionary nature of blockchain, such as immutability, transparency, and security. They assert that such qualities can improve the validity and efficiency of legal processes. However, they also confess that there are problems regarding technological complexity, scalability, and interoperability with already existing systems. Respondents from business and non-business sectors with ESCP experience demonstrate optimism and apprehension. Although they see promise in rapid and transparent resolution of disputes, they also have concerns about the feasibility of such an advanced technological system and its effect on those who are not equipped with technology. Participants also considered how blockchain may reform legal standards and procedures. It is as if blockchain might usher in a new legal arrangement described in 'Decentralized Blockchain Technology and the Rise of Lex Cryptographic,' where contracts and transactions would be governed by programmable code. The transition from inherited legal systems to a newly automated legal framework is regarded as both an opportunity and a challenge.

A major problem is the risk to legal sovereignty. However, stakeholders voiced concerns that overreliance on technology in legal processes would make us lose the essential human factor in legal ethics and practice. There is a concern that blockchain could transform sophisticated legal decisions into algorithmic outputs. Almost all stakeholders recognise the need for a balanced approach to adopting blockchain. This means ensuring that technological progress is consistent with the basic values of justice and fairness. Implementing blockchain into the legal frameworks requires regulation and ethical guidelines in tandem with retaining human supervision. Our results relate to the debates in "Decentralized Blockchain Technology and the Rise of

³⁰ Wei, P., Wang, D., Zhao, Y., Tyagi, S. K. S., & Kumar, N. (2020). Blockchain data-based cloud data integrity protection mechanism. *Future Generation Computer Systems*, 102, 902-911.

Lex Cryptographia,” referring to the emergence of a new legal paradigm due to blockchain technology. As is consistent with our results, the literature indicates that while blockchain embodies revolutionary potential, it poses fundamental dilemmas regarding the future of legal systems, the role of human judgment, and the value of regulatory safeguards in a world where everything is digital. The stakeholders’ perceptions of blockchain adoption in the ESCP setup shed light on a dynamic mix of optimism, caution, and uncertainties. It is acknowledged that the benefits may be enormous, but issues surrounding legality and ethics, technological issues, and balancing are all widely present.³¹ With technological developments in blockchain, these diverse views will become essential factors in regulating the legal systems’ position such technology will occupy.

4.3. Comparative Discussion

Our research identifies four themes related to the investigation of blockchain technology within the European Small Claims Procedure that reveal a complex picture of potentials and challenges. These themes complement but differ in certain details from the existing literature, providing new insights and highlighting several issues requiring further studies. The theme of “Blockchain’s Impact on Legal Efficiency and Transparency” aligns with the narrative in “Blockchain and the Law: As discussed in “The Rule of Code,” blockchain is a revolutionary tool for automating and simplifying the process of law. Our results, as well as the literature, clearly indicate the transformative character of blockchain, especially in terms of improving efficiency and transparency. Our work offers a more detailed view of the legal angle, pointing out the practical implications and urging prudent adoption of blockchain technology within the current legal frameworks. This brings a pragmatic perspective to the theoretical debates that are common in the current literature.

It is also a significant departure from the overly hopeful accounts dominating some scholarly literature. Our study highlights the substantial technical, legal, and cultural challenges in adopting blockchain, echoing the concerns raised in “Blockchain Technology and the Law:” However, the focus on scalability, interoperability, and legal adaptability gives a grounded view, offering a counterbalance to overly excited narratives about blockchain possibilities. “Legal and Regulatory Framework Adaptation” reflects the discussions in the literature about the necessity of adapting legal systems to technological progress.

Nevertheless, some issues related to jurisdictional ambiguities and GDPR compliance have emerged through our study that are not always fully addressed in other works. This helps develop a more specific and granular ap-

³¹ Wouda, H. P., & Opendakker, R. (2019). Blockchain technology in commercial real estate transactions. *Journal of property investment & Finance*, 37(6), 570-579.

preciation of the legal adjustments required for a link to blockchain. The subsection “Stakeholder Perspectives on Blockchain Adoption” provides new angles on the divergent reactions to blockchain in the legal sphere. While literature such as “Decentralized Blockchain Technology and the Rise of Lex Cryptographia” focuses on the paradigm shift blockchain might introduce, our study demonstrates the actual mindsets and assumptions of those potentially affected by such tech shifts. The emphasis on combining technological advancement with preserving fundamental legal principles provides a more holistic view than what is commonly found in the literature.

5. DISCUSSION

The comprehensive analysis of the ESCP in the context of blockchain technology integration,³² as explored in our study, provides a multi-dimensional perspective on this innovative approach. Spanning across descriptive statistics, correlation and regression analyses, and thematic exploration, our findings offer a rich tapestry of insights that respond to our research question: “What are the ways to implement blockchain technology in the process of European Small Claims Procedure so that it can become effective and secure?”. The quantitative data illuminates the landscape of the current ESCP, suggesting that blockchain integration still needs to show a significant impact on processing times or stakeholder satisfaction. While the absence of strong correlations might initially seem to suggest a rejection of our research question, it is essential to delve deeper into the nuances of these findings. The minimal impact on processing times could be attributed to the early stages of blockchain integration or the complexities of adapting existing systems to this new technology. In addition, moderate stakeholder satisfaction indicates the possibility of improvement in user experience and system productivity, which can be achieved by implementing blockchain. Thus, our qualitative data present a more positive outlook on blockchain’s potential to transform the field of ESCP.³³ The most relevant themes are “Legal Efficiency and Transparency” and “Challenges and Limitations in Integrating Blockchain in Legal Systems.” There are effective ways to implement the technology based on the observed improved procedural efficiency and transparency through blockchain. However, the issues raised, such as technical complexity and integration barriers, serve as a reminder of this challenging road.

The theme of legal and regulatory framework adaptation directly correlates with the security component of the research question. It is necessary to adapt legal frameworks to blockchain’s peculiarities, such as its decen-

³² Giacalone, M., Gioia, G., Van der Borght, K., & Salehi, S. S. (2023). Navigating Small Claims: Justice for consumers in the EU Digital Market in Small Claims, *Digitalisation, and EU Market*, ASP, 11-30.

³³ Wright, A. J. (2021). The rise of decentralized autonomous organizations: Opportunities and challenges.

tralised, immutable character, in order to ensure security and compliance, especially in international contexts such as ESCP. This blockchain theme confirms that significant legal and regulatory changes will ensure blockchain works adequately and credibly in the ESCP. Theme “Stakeholder Perspectives on the Blockchain Adoption” simultaneously exposes positive and negative views. The significant differences in perspectives emphasise the need to carefully consider user concerns and needs when deploying blockchain in the ESCP. Blockchain-dominated legal process autonomy and human judgment concerns imply a cautious approach that integrates awareness of the traditional paradigms but also adapts toward technology.

In conclusion, our research question is partially accepted or confirmed. Rather, the obstacle in the ESCP is achieving blockchain’s successful and safe implementation. Building a bridge between blockchain and current systems ensures that the solutions are scalable and applicable in different cases. Stronger legal frameworks addressing blockchain transactions, smart contracts, and data privacy compliance, particularly the GDPR, remain crucial. This includes guaranteeing that blockchain integration does not affect the key principles that characterise legal practice, including human decision-making and judgment. Engaging all stakeholders, including law professionals, blockchain experts, and ESCP users, is vital to resolve their requirements and concerns, offering education and training to shift to a blockchain-based system. Our research reveals that blockchain can provide significant potential to enhance efficiency, transparency, protection, and customer satisfaction in the ESCP. On the other hand, harnessing the disruptive wave calls for overcoming numerous technological, regulatory, and cultural dilemmas.³⁴ However, successful implementation will necessitate a joint and multi-disciplinary approach that reconciles technological complexity with the subtleties of legal practice and stakeholder considerations. Finally, incorporating blockchain into the ESCP is dynamic and requires continuous study, trial, and discussion among all actors.

6. CONCLUSION

6.1. Summary of Findings

The investigation into blockchain in the context of the ESCP yielded complex findings. Quantitatively, our analysis did not reveal noteworthy relationships between blockchain integration and key metrics of claim processing times and stakeholder satisfaction. This shows that the current presence of blockchain in the ESCP needs to be more widespread to reflect in these areas. However, it is important to put these results into perspective given block-

³⁴ Zhang, X., Aranguiz, M., Xu, D., Zhang, X., & Xu, X. (2018). Utilizing blockchain for better enforcement of green finance law and regulations. In *Transforming climate finance and green investment with blockchains* (pp. 289-301). Academic Press.

chain integration in the legal system, which is still in its early stages. Qualitatively, we found a more positive view of blockchain potential. Blockchain is considered to be a catalyst for improving efficiency and transparency in the processes of the ESCP. This possibility is especially striking in cross-border small claims,³⁵ where blockchain's innate features of speed, automation, and decentralised verifications can optimise the operations. However, these optimistic approaches are tempered by barriers, including technical challenges, integration issues with established legal frameworks, and the need for significant legal and regulatory adjustments to take advantage of blockchain's full benefits. Altogether, these findings present a picture of a challenging yet transformative path for blockchain within the ESCP.

The study findings suggest that Distributed Ledger Technology (DLT) could bring a positive contribution to the European Small Claims Procedure (ESCP) in terms of increasing efficiency, while reducing security and reliability risks in key procedural stages. Second, the same archived case data stored in a blockchain can serve as an automated means of verifying cross border jurisdictional criteria under Regulation 1215/2012 for determining jurisdictional competence. It would allow for the correct identification of the competent court, which would shorten the time spent in procedural delays due to jurisdictional disputes. Secondly, blockchain can automate the service of documents by providing undeniable proof of the transmission of documents and receipt acknowledgment, thereby making it impossible for litigants to argue that service was never performed. Lastly, blockchain can be considered as a secure digital repository of electronic documents, increasing their reliability for judicial consideration, as well as collection and validation of evidence. The immutability of blockchain-held evidence minimises the risks of forgery, tampering, and challenges to evidence authenticity, thereby enhancing the trustworthiness of digital evidence in ESCP hearings.

6.2 Implications for the European Small Claims Procedure

Implementing blockchain infrastructures in the ESCP has several major implications for its future structural design. Although blockchain currently shows minimal effects on processing times and stakeholder satisfaction, its potential to reshape the ESCP is considerable. Concerning efficiency, the automation and distributed nature of blockchain can hasten the processing of claims, reducing the administrative lag common in many international claims. Another important aspect is transparency, a fundamental attribute of blockchain, which ensures a higher level of trust and visibility in the process, enabling traceable and verifiable transaction records. Security strengthened by the immutability of blockchain could significantly reduce fraud and inaccuracies, resulting in a stronger judicial system. However, these benefits

³⁵ Giacalone, M., & Sajedeh Salehi, S. (2020). The European Small Claims Procedure: Implementation and Enforcement Revisited in Italy and Belgium. *J. Eur. Consumer & Mkt. L.*, 9, 181.

can be attained only through a major transformation of the existing legal and regulatory framework. The proposed adaptation involves recognising blockchain transactions under the rule of law, regulating data privacy issues, such as those stated in GDPR, and developing standards for the operability of smart contracts. Therefore, even though blockchain unlocks revolutionary opportunities for the ESCP, the process of its seamless adoption depends on transcending the intricate legal and technological landscape.

6.3 Limitations and Recommendations for Future Research

Although this study is broad, several limitations must be highlighted. To begin with, the scope, particularly in quantitative analysis, is confined to the preliminary aspects of introducing blockchain technology to the ESCP. The preliminary stage may not fully capture the long-term implications that blockchain technology could impart in this legal context. Furthermore, although the qualitative insights provide much-needed richness and depth, these perceptions and predictions may vary as blockchain further enters the legal system. It is time for longitudinal research on changes in efficiency, transparency, and stakeholder satisfaction over time with blockchain's influence on the ESCP.

Moreover, further analysis should be performed on the legal and technical aspects of blockchain implementation in legal systems. It should also include evaluating the nuances of regulatory compliance, the adequacy of blockchain with established legal frameworks, and the details of smart contracts' use in court litigations. In turn, such targeted studies could result in a higher degree of specificity in terms of blockchain's functionality in reshaping legal processes and its ability to remain effective in the judicial arena.

Thus, the results of our study on applying blockchain technology in the ESCP reveal many opportunities and difficulties. The above research question regarding the effective and secure use of blockchain technologies in the ESCP generates multiple answers. It requires a careful balance, which marries technological innovation with the traditional framework of legal practice without compromising the cornerstones of fairness and equity. Blockchain's impacts on legal systems extend far beyond the ESCP. They point toward a novel technology-driven legal order, opening new spaces for transformation and posing new challenges. This research shows a positive outlook on the future role of blockchain in legal spheres.

APPENDIX I - TABLES**Descriptive Statistics**

	N	Minimum	Maximum	Mean	Std. Deviation
Claim Amount (€)	200	104	4998	2653.32	1380.228
Processing Time (Days)	200	1	60	30.24	17.361
Blockchain Integration	200	1	2	1.50	.501
Security Incidents Reported	200	0	5	2.52	1.689
Resolution Success	200	1	2	1.49	.501
Stakeholder Satisfaction (1-5)	200	1	5	2.97	1.333
Valid N (listwise)	200				

Correlations

		Claim Amount (€)	Processing Time (Days)	Block-chain Integration	Security Incidents Reported	Resolution Success	Stakeholder Satisfaction (1-5)
Claim Amount (€)	Pearson Correlation	1	-.032	-.113	-.029	-.043	-.018
	Sig. (2-tailed)		.650	.111	.687	.547	.795
Processing Time (Days)	Pearson Correlation	-.032	1	.111	.080	-.073	-.101
	Sig. (2-tailed)	.650		.118	.259	.307	.153
Block-chain Integration	Pearson Correlation	-.113	.111	1	.018	.020	.030
	Sig. (2-tailed)	.111	.118		.803	.775	.670
Security Incidents Reported	Pearson Correlation	-.029	.080	.018	1	-.095	.139
	Sig. (2-tailed)	.687	.259	.803		.182	.050
Resolution Success	Pearson Correlation	-.043	-.073	.020	-.095	1	-.016
	Sig. (2-tailed)	.547	.307	.775	.182		.825
Stakeholder Satisfaction (1-5)	Pearson Correlation	-.018	-.101	.030	.139	-.016	1
	Sig. (2-tailed)	.795	.153	.670	.050	.825	

Model Summary

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.180 ^a	.032	.017	1.322
a. Predictors: (Constant), Security Incidents Reported, Claim Amount (€), Processing Time (Days)				

ANOVA^a

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	11.415	3	3.805	2.178	.092b
	Residual	342.405	196	1.747		
	Total	353.820	199			

a. Dependent Variable: Stakeholder Satisfaction (1-5)

b. Predictors: (Constant), Security Incidents Reported, Claim Amount (€), Processing Time (Days)

Coefficients^a

Model	B	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		Std. Error	Beta			
1	(Constant)	2.988	.295		10.124	.000
	Claim Amount (€)	-1.729E-5	.000	-.018	-.255	.799
	Processing Time (Days)	-.009	.005	-.114	-1.614	.108
	Security Incidents Reported	.116	.056	.147	2.086	.038

a. Dependent Variable: Stakeholder Satisfaction (1-5)

Independent Samples Test

F		Levene's Test for Equality of Variances		t-test for Equality of Means						
		Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference		
								Lower	Upper	
Processing Time (Days)	Equal variances assumed	6.287	.013	-1.572	198	.118	-3.845	2.446	-8.670	.979
	Equal variances not assumed			-1.569	189.833	.118	-3.845	2.451	-8.680	.989
Stakeholder Satisfaction (1-5)	Equal variances assumed	1.638	.202	-.427	198	.670	-.081	.189	-.453	.292
	Equal variances not assumed			-.426	196.169	.670	-.081	.189	-.454	.292

Chi-Square Tests					
	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	.083 ^a	1	.774		
Continuity Correction ^b	.021	1	.884		
Likelihood Ratio	.083	1	.774		
Fisher's Exact Test				.779	.442
Linear-by-Linear Association	.082	1	.774		
N of Valid Cases	200				
a. 0 cells (0.0%) have expected count less than 5. The minimum expected count is 48.02.					
b. Computed only for a 2x2 table					

A SIGNIFICANT COMMITMENT: THE INTRODUCTION OF A UNIFIED EUROPEAN CODE ON ADRS TO REGULATE CONSUMER DISPUTES. SEVERAL CHALLENGES IN THE ENFORCEMENT AREA

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ABSTRACT: The necessity of providing alternative forms of justice alongside ordinary courts has long been recognized as a key aspect of consumer protection policies within the European context, particularly in addressing the needs of the s.c. 'weaker party' in contractual relationships. Over time, the evolution of European legislation, coupled with the proliferation of alternative dispute resolution (ADR) systems, has prompted the involvement of supranational legislative bodies to standardize and harmonize national ADR regulations.

This paper begins by analyzing the gap between the theoretical framework and its practical application, emphasizing the need for a comparative analysis of the level of protection offered by national regulations and the minimum protection standards guaranteed by other EU Member States. From this comparative analysis, a supranational code for consumer ADR may emerge.

In particular, the author tries to explore a central research question: Is there a need for a unified European code for consumer ADR? To answer this, it is essential to examine the scope and effectiveness of such tools, the procedural rules in place, and, crucially, whether the 'right to an effective remedy' under EU law has been adequately respected. To provide a comprehensive and nuanced perspective on the matter, special attention will be given to the potential creation of a European unified code, with a focus on enhancing the effectiveness of consumer protection. In this regard, the paper will also consider the Italian perspective, where the government has proposed the establishment of a unified legal framework for ADR mechanisms, known as the TUSC (Testo Unico dei Sistemi di Conciliazione). Despite being explicitly outlined in Article 1, paragraph 4, letter b, of Law Delegation No. 206/2021, this proposal has yet to be implemented.

KEYWORDS: italian justice; EU; ADR; consumer claims.

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SUMMARY: 1. THE LANDSCAPE OF ADR SYSTEMS AND THE JUDICIAL FRAGMENTATION OF JURISDICTION.— 2. THE CRISIS OF JUSTICE AND THE INFLUENCE OF THE ECONOMIC SYSTEM: THE IMPACT OF THE EUROPEAN POLICIES.— 3. THE CONSUMER ADR DIRECTIVE 2013/11/UE AND THE APPROACH OF THE ITALIAN LEGISLATOR: KEY CONSIDERATIONS.— 4. A FURTHER ACCELERATION OF THE ADR IN THE ITALIAN JUDICIAL CONTEXT: THE S. C. CARTABIA JUSTICE REFORM (LEGISLATIVE DECREE N. 149 OF 10 OCTOBER 2022).— 5. SOME BRIEF THOUGHTS.— BIBLIOGRAPHY CITED.

1. THE LANDSCAPE OF ADR SYSTEMS AND THE JUDICIAL FRAGMENTATION OF JURISDICTION

The out-of-court settlement of disputes has long held a prominent position in civil society, gradually evolving into an important alternative – often described as ‘complementary’ – to ordinary court proceedings¹. This issue is particularly significant in countries where the delays in judicial processes have reached such pathological proportions that they essentially result in a denial of justice². This phenomenon, as widely acknowledged, has become especially evident in Italy³, where recent regulatory reforms have focused primarily on addressing the crisis within the civil trial system.

The core legislative intention behind these reforms has been to create a more efficient, non-judicial system of dispute resolution, fostering the ‘fragmentation of jurisdiction’ in justice⁴. In this context, methods such as mediation, conciliation, assisted negotiation, and arbitration were introduced as essential tools aimed at reducing the overburdened judicial system. The formal complexity and rigidity of civil trials, based on established procedural rules, have further exacerbated the crisis in civil justice. With trials characterized by excessive delays and burdensome formalities, the role of the judge has gradually shifted towards a more passive, spectator-like position, thereby diminishing the authority of judicial rulings.

Faced with this *impasse* in litigation, for several decades now, the topic of alternative dispute resolution methods, or *ADR*, according to the English acronym ‘*Alternative Dispute Resolution*’, has constituted one of the great topics of international legal literature⁵. *ADR* is a broad category encompassing

¹ Danovi, F., Ferraris, F. (2018). *ADR una giustizia complementare*. Giuffrè Editore.

² Trocker, N. (2007). La conciliazione come metodo alternativo di risoluzione delle controversie nell’esperienza dell’ordinamento italiano tra obiettivi di politica legislativa e profili di compatibilità costituzionale. In Varano, V. (eds), *L'altra giustizia* (p. 319). Giuffrè Editore.

³ See above Sciacca, M. (2007) Gli strumenti di efficienza del sistema giudiziario e l’incidenza della capacità organizzativa del giudice. In *Riv. dir. proc.*, vol. 62, n. 3 (p. 644), in which the author states that «Italy is actually sadly at the bottom of the rankings that compare it not only with other countries in the European Union, but even in the world. We are faced with backlogs of millions of cases and trials that last for years».

⁴ See, in this sense, Decree-Law No. 132 of 12 September 2014 — subsequently converted into Law No. 162 of 10 November 2014 —, on «*misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell’arretrato in materia di processo civile*».

⁵ In our system, authors such as Mauro Cappelletti and Michele Taruffo have the merit of having cultivated the culture of out-of-court dispute resolution techniques. See in this regard: Cappelletti, M.,

a variety of processes designed to help the parties reach a resolution in a more informal and flexible setting than traditional litigation⁶.

ADR instruments can be divided into two main categories: autonomous and heteronomous procedures. Autonomous methods focus on achieving an agreement between the parties themselves, often referred to as 'self-settlement'. These processes do not involve a determination of legal rights and wrongs but rather aim to satisfy the interests of the parties involved, allowing them to craft their own resolution. In contrast, heteronomous procedures rely on a third-party decision-maker to impose a legally binding resolution. This includes arbitration, where the decision is imposed on the parties after hearing arguments from both sides. The distinction between these two categories is crucial, as it determines the role of the third-party in dispute resolution.

It is essential to note that when referring to ADR, we are speaking of various⁷ methods that serve as alternatives to the traditional court process. Mediation, for example, involves a neutral third-party helping parties communicate and reach an agreement, whereas arbitration involves a third-party making a binding decision after evaluating the case. While mediation and conciliation are viewed as non-adjudicative and consensual, arbitration remains an adjudicative mechanism. This variety within ADR systems reflects the flexibility and adaptability of these methods to different types of disputes and parties involved.

The origins of ADR mechanisms trace back to the United States, where they were initially developed to address the growing dissatisfaction with the formal court system⁸. The turning point in the development of ADR came during the 1976 Minneapolis⁹ conference on the 'Causes of Popular Dissatisfaction with the Administration of Justice,' where concerns were raised about the inefficiency of courts to handle the rapidly increasing number of civil disputes¹⁰. The idea was proposed to reduce the caseloads of courts by

Garth, B. (1978). Access to Justice: A World Survey. Giuffrè Editore; Taruffo, M. (7 February 1997). La composizione della lite: la conciliazione, in *Relazione al convegno organizzato dalla Camera arbitrale di Milano*.

⁶ Luiso, F. P. (2022). La risoluzione non giurisdizionale delle controversie in *Diritto processuale civile V*, (p. 3 ff.) Giuffrè Editore.

⁷ For an identification of ADR models distinguishing between self-determined and externally governed ADRs, between adjudicative and facilitative ADRs, between extrajudicial and within the proceedings ADRs, or even between compulsory and optional ADRs, see *supra* [footnote 2], Danovi, F., Ferraris, F. (2018). ADR una giustizia complementare. Ivi (p.18 ff.).

⁸ Silvestri, E. (1999). Osservazioni in tema di strumenti alternativi per la risoluzione delle controversie. In *Riv. trim. dir. proc. civ.*, vol. 1, (p. 321); see also Chase, O. G. (2007). I metodi alternativi di soluzione delle controversie e la cultura del processo: il caso degli Stati Uniti d'America. In Varano, V. (eds), *L'altra giustizia* (p. 129 ff.). Giuffrè Editore.

⁹ See in this regard Levin, L., Wheeler, R. R. (1979). *The Pound Conference: Perspectives on Justice in the Future*. St. Paul, Minnesota, West Publishing Company.

¹⁰ Cf. *supra* [footnote 9], Chase, O. G. *Alternative Methods of Dispute Resolution and the Trial Culture: The Case of the United States of America*. Cit., (p.141), the author states «that the quantity of cases is increasing is clearly demonstrable. Between 1962 and 1974, the number of civil cases com-

removing certain matters from the jurisdiction of courts, thereby delegating them to private, alternative decision-making bodies. This movement toward ‘differentiated’¹¹ protection systems was designed to provide more efficient and less formal resolutions to disputes.

Though the ADR model has been lauded for its potential, it has not been without criticism. Critics argue that a widespread reliance on ADR could lead to the erosion of certain legal guarantees, particularly with respect to due process and the impartiality of the decision-makers. Despite these concerns, ADR systems have continued to gain prominence, not only in the United States but also in Europe and other parts of the world. The development of ADR systems has become a focal point for both European¹² and domestic legislators¹³, who have recognized the need to integrate these mechanisms into national and international legal frameworks.

However, one significant issue remains: the lack of a clear, universally accepted definition of ADR. The term itself encompasses a wide array of mechanisms, and there is no singular, comprehensive definition. The 1998 Alternative Dispute Resolution Act (art. 3) defines ADR as any process in which a neutral third party facilitates dispute resolution outside of the courtroom, including methods like mediation and arbitration. Similarly, the English Civil Procedure Rules describe ADR as a collective term for dispute resolution methods that fall outside the traditional trial process¹⁴. This lack of clarity in definition poses challenges for both practitioners and parties involved, as it could impact their understanding of the available methods and influence their decision-making.

Despite these challenges, ADRs¹⁵ remain a crucial element of modern legal systems. In Italy¹⁶, for example, the introduction of mediation through Legislative Decree No. 28 of 2010 was aimed at alleviating the burden on the judicial system and shortening trial times. The Italian government sought to reduce the number of civil litigation cases by encouraging parties to resolve

menced in federal district courts each year doubled from 50,000 to over 100,000. And the ratio of cases initiated to population doubled as well, from 260 per million US citizens to about 500 per million»; even Hall, K. L. (1989). *The Magic Mirror: Law in Americana History*, (p. 223). Oxford University Press; see also Sander, F. E. A. (1979). *Varieties of Dispute Processing*, in *The Pound Conference*. In Levin, L., Wheeler, (eds) *The Pound Conference: Perspectives on Justice in the Future*, (p. 65). St. Paul, Minnesota, West Publishing Company.

¹¹ Proto Pisani A. (1979). Sulla tutela giurisdizionale differenziata. In *Riv. dir. proc.*, (p. 537).

¹² See Directive No. 52 of 21 May 2008.

¹³ Luiso, F. P. (2011). Giustizia alternativa o alternativa alla giustizia. in *Il Giusto proc. civ.*, (p. 325).

¹⁴ Benigni, F. Franzini F. (2004). *Composizione delle controversie commerciali con le procedure “ADR”*. Giuffrè Editore.

¹⁵ Cf. Silvestri, E. (2020). Risoluzione delle controversie e alternative al processo: un’introduzione teorica, in *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*, (p. 2). Giappichelli Editore.

¹⁶ Rovelli, L. (2009). La crisi della giustizia civile. Diagnosi e terapie. In *Giur. It.*, n. 2, (p. 515), in which the author reports some numerical data claiming that «civil cases pending in Italy at the end of 2006 were about five million, in Spain 5700,000, in France 1,400.00 (including commercial cases pending before the *Tribunal de Commerce*, made up of “merchants”, and labour cases entrusted to “proud’hommes”)».

disputes outside of court. Under this framework, mediation¹⁷ is defined as a process in which an impartial third party assists parties in seeking an amicable settlement of a dispute, while conciliation is seen as a final step in the dispute resolution process, where a settlement agreement is reached through mediation¹⁸. This distinction emphasizes the role of ADR in fostering amicable dispute resolution, thereby addressing the systemic issues that plague the formal court system¹⁹.

In the broader European context, ADR has been increasingly integrated into legal frameworks, particularly through EU directives and regulations designed to harmonize dispute resolution mechanisms across member states. The EU has recognized the importance of ADRs in providing consumers with accessible and efficient means of resolving disputes, particularly in cross-border situations. The ongoing development of the ADR legislation, however, has not been without its challenges. There remains a significant debate as to whether a unified European code for ADR is necessary to ensure consistent standards and protect the rights of consumers across member states.

On the whole, while ADR systems offer a promising alternative to traditional court proceedings, they are not without challenges. The lack of a universal definition, concerns over due process guarantees, and the need for further harmonization of ADR²⁰ laws are key issues that require ongoing attention. Nevertheless, the evolution of ADR reflects a growing appreciation of the need for flexible, accessible, and efficient dispute resolution mechanisms in modern legal systems. The ongoing legislative efforts at both the national and international levels, particularly in Europe, will likely continue to shape the future of ADR, offering a balanced approach to resolving disputes outside of the courtroom.

2. THE CRISIS OF JUSTICE AND THE INFLUENCE OF THE ECONOMIC SYSTEM: THE IMPACT OF THE EUROPEAN POLICIES

The evolution of European policies on alternative dispute resolution (ADR) is grounded in the acknowledgement that the judicial process alone is often insufficient to deliver timely and effective justice. There is a growing need for fast, efficient, and low-cost procedures that still ensure the protection of the parties involved, comparable to what traditional judicial methods offer. This

¹⁷ Dittrich, L. (2010). Il procedimento di mediazione nel d.lgs. n. 28 del 4 marzo 2010. In *Riv. dir. proc.*, (p. 575).

¹⁸ Ghirga, M.F. (2009). Strumenti alternativi di risoluzione della lite: fuga dal processo o dal diritto? (Riflessioni sulla mediazione in occasione della pubblicazione della Direttiva 2008/52/CE). In *Riv. dir. proc.*, vol. 2 (p. 357 ff.).

¹⁹ Cf. Cuomo Ulloa, F. (2008). La conciliazione. Modelli di composizione dei conflitti, (p. 459 ff.). Cedam Editore.

²⁰ Punzi, C. (2009). Mediazione e conciliazione?. In *Riv. dir. proc.*, vol. 4 (p. 845 ff.).

awareness has encouraged the development of ADR as a complementary tool to judicial processes, ensuring the resolution of disputes without compromising the quality of protection²¹.

Although the statutory landscape surrounding ADR within the European Union (EU) has been fragmented and incomplete, particularly in the area of consumer protection, various initiatives have laid the foundation for broader, more coherent regulatory frameworks. These initiatives include significant references to ADR in documents like the 1993 Green Paper on consumer access to justice, the 1997 Directives on cross-border credit transfers (97/5/EEC)²² and distance contracts (97/7/EEC)²³, and two important recommendations adopted by the Commission in 1998 and 2001. These early steps were instrumental in raising awareness of ADR mechanisms, but they remained isolated and insufficient in ensuring widespread adoption among businesses and consumers. As a result, the European Commission proposed a more comprehensive approach in 2011²⁴, introducing a directive on consumer ADR. This proposal was an acknowledgment that prior actions were insufficient in instilling the necessary consumer confidence in the EU's internal market.

The EU has shown consistent commitment to consumer protection by fostering sector-specific regulations that guarantee high levels of consumer security within the internal market²⁵. These efforts have often included the promotion of ADR models, emphasizing speed, simplicity, and cost-effectiveness. The EU has also focused on resolving cross-border disputes by creating mechanisms to avoid jurisdictional conflicts between Member States, facilitating cooperation among them in protecting consumer rights²⁶.

In the Italian legal system, ADR has seen steady growth, driven by the need to make legal protections more immediate and effective while addressing the excessive formality of traditional trials. The increasing importance of ADR is also motivated by the desire to move beyond national borders and incorporate extra-judicial tools that have long been present in various legal systems²⁷. Italy's introduction of a uniform mediation procedure through Legislative Decree 28/2010 marks a significant milestone in the national ADR landscape. This reform aimed to broaden the scope of ADR models, particu-

²¹ Cf. Danovi, R. (1997). Le ADR (Alternative Dispute Resolutions) e le iniziative dell'Unione europea. In *Giur. It.*, vol. 4 (p. 1032).

²² See the full text at <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX:31997L0005>

²³ Available at <https://eur-lex.europa.eu/legal-content/IT/TXT/HTML/?uri=CELEX%3A31997L0007>.

²⁴ Cf. Gioia, G. (2012). Un nuovo "pacchetto" della Commissione europea sull'ADR. In *Il Corr. Giur.*, (p. 700 ff.).

²⁵ See Silvestri, E. (2020). Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa. *Cit.*, (p. 86 ff.)

²⁶ In fact, EU law, with the aim of facilitating recourse to ADR procedures and offering support to consumers involved in a dispute - especially in cross-border disputes to which the directive intends to refer - while providing for the possibility for traders operating within a Member State to avail themselves of ADR bodies based in other Member States, also 'requires' them to strengthen the FIN-NET and ECC-NET systems.

²⁷ Danovi F. (2013). *Arbitrato online*. Rubino Sammartano, M. (eds), *Arbitrato, ADR, Conciliazione*, (p. 441). Zanichelli Editore.

larly for financial disputes involving professionals and consumers. Notably, Directive 2013/11/EU on alternative dispute resolution for consumer disputes²⁸, which Italy incorporated into national law with Legislative Decree No. 130/2015, stands as a key development in ADR practice.

The directive, in particular, represents the current state of the art in ADR²⁹. It clearly defines its objective of enhancing consumer protection while ensuring the proper functioning of the internal market. The directive seeks to make alternative dispute resolution accessible to consumers across Member States, with mechanisms that respect EU quality standards. In this context, it emphasizes voluntary, independent, and impartial ADR bodies that provide transparent, rapid, and effective procedures for resolving disputes³⁰. Importantly, the directive³¹ requires Member States to promote³² ADR mechanisms for all disputes involving consumer rights, including establishing a 'residual' ADR model to handle disputes not covered by specific forms of ADR (Article 5, para. III)³³.

An important aspect of the directive is its emphasis on online dispute resolution (ODR), which is specifically addressed in Regulation No. 525/2013. This regulation establishes an EU ODR platform³⁴ designed to facilitate the out-of-court resolution of disputes arising from e-commerce³⁵. This initiative aims to ensure uniformity across the EU in handling e-commerce-related consumer disputes, offering a seamless online experience for consumers and traders alike.

²⁸ Cf. Ferraris, F. (2018). ADR e consumatori. In *ADR una giustizia ripartiva*, cit., (p. 323).

²⁹ See Silvestri, E. (2020). Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa. Cit., (p. 87).

³⁰ The reference is to the terms used by the European legislator in Directive 2013/11/EU, Chapter I (General Provisions), Article 1 in which it is stated that: «*The objective of this Directive is to contribute, through the achievement of a high level of consumer protection, to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to bodies offering independent, impartial, transparent, effective, rapid and fair alternative dispute resolution procedures*».

³¹ See *Considerando* (5), available at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32013L0011>.

³² See *Considerando* (7) of Directive 2013/11/EU stating the following: «In order for consumers to benefit from the full potential of the internal market, ADR should be available for all types of disputes, domestic and cross-border, covered by this Directive, ADR procedures should meet the quality requirements that apply throughout the Union and consumers and traders should be aware of the existence of such procedures. In view of the increase in cross-border trade and movement of persons, it is also important that ADR schemes deal with cross-border disputes in an effective manner».

³³ See also in this respect the wording of *Considerando* (24) which states «(omissis) This Directive should not oblige Member States to create specific ADR schemes for each retail sector: Where necessary, in order to ensure full sectoral and geographical coverage and access to ADR, Member States should have the possibility to provide for the creation of a residual ADR entity to deal with disputes for the resolution of which no specific ADR entity is competent. Residual ADR entities constitute a guarantee for consumers and traders that there is no gap in access to an ADR entity».

³⁴ It is a platform accessible from <http://ec.europa.eu/consumers/odr/>, available since 15 February 2016.

³⁵ According to recital (8) of the Regulation, in fact, «ODR offers an easy, effective, quick, and low-cost out-of-court solution for disputes arising from online transactions».

The directive also highlights several essential principles that should characterize ADR procedures, focusing on access to justice, fairness, and procedural effectiveness. A key principle is that ADR procedures must be easily accessible and free of charge for consumers. Moreover, the procedures should be concluded within a reasonable timeframe, generally within 90 days, with possible extensions only in the case of complex disputes. Furthermore, the directive mandates that ADR bodies must be independent and impartial, possessing the necessary expertise in either judicial or alternative dispute resolution (Article 6). Transparency then is another critical requirement.

The directive, in fact, ensures that the procedures are clear and comprehensible for consumers, who must be provided with all necessary information about the ADR process and the entities involved (Article 7). The goal is to allow consumers to make informed decisions about which ADR mechanism to use based on factors such as the type of dispute and the expertise of the ADR body.

In the purposes of the Directive, then, equally important is the principle of fairness, which involves ensuring that the adversarial process is respected, and that both parties have an equal opportunity to present their cases. The directive ensures that consumers are not required to hire a lawyer or legal representative to participate in ADR procedures (Article 8). This provision aligns with the broader aim of making ADR accessible and user-friendly, thereby removing barriers to entry for consumers who may not have legal expertise. Furthermore, the directive ensures that consumers can withdraw from the ADR process at any point, without facing detrimental consequences. This is vital for ensuring that the process remains voluntary and that the parties involved fully understand the potential outcomes before agreeing to a resolution.

The directive also contains provisions that safeguard the legality and freedom of participants³⁶. It guarantees that consumers are free to withdraw from the ADR process at any stage, ensuring that they are not bound by resolutions that they did not fully understand or accept. These safeguards are designed to prevent any undue pressure on consumers and to maintain the integrity of the dispute resolution process. Another key aspect of the EU's ADR framework is the flexibility allowed to Member States regarding the mandatory nature of mediation. Directive 52/2008/EC and Directive 2013/11/EU both emphasize that national legislation³⁷ may mandate mediation or incentivize its use before or after judicial proceedings, provided that such requirements do not restrict access to judicial remedies. This flexibility ensures that Member States have the autonomy to tailor ADR mechanisms to their legal systems while respecting the fundamental rights of the parties involved.

³⁶ Cf. Silvestri, E. (2020). *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*. Cit., (p. 89).

³⁷ In https://conciliatorebancario.it/images/allegati/direttiva_adr.pdf. For more on consumer dispute mediation, see also the writing of Scannicchio, N. (2015). *La mediazione delle controversie di consumo nella direttiva europea 2013-11*, (p. 151 ff.). Giappichelli Editore.

In this scenario, the European Court of Justice has weighed in on the issue of mandatory mediation, particularly in the *Alassini and Others v. Telecom 38* case. The court³⁹ ruled that mandatory mediation does not violate the right to a fair trial⁴⁰, as long as it serves a legitimate public interest and does not prevent access to the courts⁴¹. This ruling underscores the EU's commitment to conciliation, recognizing its value in resolving disputes efficiently while maintaining the right to judicial recourse.

In Italy, the implementation of Directive 2013/11/EU has not been without challenges. Legislative Decree No. 130/2015, which aligns Italian law with the Directive, has revealed some complexities, particularly regarding the interaction between consumer ADR and other domestic ADR mechanisms, such as civil and commercial mediation under Legislative Decree 28/2010. The attempt to harmonize these systems has not fully achieved its intended goal of simplifying the ADR landscape. Despite efforts to streamline ADR⁴² processes for consumers, the law still features overlapping frameworks and procedural requirements, making it difficult to navigate the various ADR options available.

With this in mind, while the adoption of ADR frameworks at the EU level represents significant progress in consumer protection and dispute resolution, challenges remain in fully harmonizing these mechanisms across Member States. The ongoing evolution of ADR within the EU and Italy's legal system highlights the need for continued refinement to ensure that alternative dispute resolution is as accessible, efficient, and effective as possible for consumers. The European legislative framework offers a robust foundation, but its successful implementation relies on ongoing cooperation and adaptation to meet the needs of consumers in an increasingly complex legal and commercial landscape.

³⁸ See <https://curia.europa.eu/juris/document/document.jsf?jsessionid=0F84E52DB732C3533EB448AE0F4A40EC?text=&docid=79647&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&id=3575192>.

³⁹ See in this respect the content of paragraph 63 of the decision in which the Court specifies that: «Nevertheless, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, to that effect, Case C-28/05 *Doktor and Others* [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgment of the ECHR in *Fogarty v United Kingdom*, no. 37112/97, §33, ECHR 2001-XI (extracts)).»

⁴⁰ See Article 6(1)(I), entitled «Right to a Fair Trial», which states: «Everyone has the right to have his or her case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal constituted by law to decide upon disputes concerning his or her civil rights and obligations or the merits of any criminal charge against him or her»; also available at https://www.echr.coe.int/documents/d/echr/convention_ita.

⁴¹ See Charter of Fundamental Rights of the European Union, Title VI (Justice), Article 47 «*Right to an effective remedy and to a fair trial*», which reads as follows «Everyone whose rights and freedoms guaranteed by the law of the Union have been violated shall have an effective remedy before a court or tribunal, subject to the conditions set out in this Article».

⁴² See Silvestri, E. (2020). *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*. Ivi, (p. 92 ff.)

3. THE CONSUMER ADR DIRECTIVE 2013/11/EU AND THE APPROACH OF THE ITALIAN LEGISLATOR: KEY CONSIDERATIONS

In Italy, with Legislative Decree No. 130/2015, the domestic legislator has had the opportunity to simplify, with specific reference to consumer disputes, the limits within which consumer ADRs do not constitute an obstacle to the need for a swift settlement of disputes, expressly providing in the amended Article 141, paragraph 6, of the Consumer Code⁴³, that «the provisions providing for the compulsory nature of the out-of-court settlement of disputes shall not be affected», especially Article 5, paragraph *1-bis*, of Legislative Decree No. 28/2010 relating to civil and commercial mediation in cases where it is provided for as a condition for the admissibility of the court proceedings. However, in the relationship between Legislative Decree No. 28/2010 and Directive 2013/11/EU, the provisions of which are now contained in the Consumer Code, there remain quite a few problems.

Certainly, it can be understood how the implementation of the ADR Directive, by the domestic legislator, was welcomed, since it aimed at making available to the consumer a multiplicity of alternative dispute resolution models with respect to the trial and -above all- because it should have led to a reinterpretation of the domestic regulations on civil and commercial mediation, removing consumer disputes from the operational scope of compulsoriness. However, this did not happen: Legislative Decree No. 130/2015, in fact, opted for the coexistence of regulatory regimes in the area of consumer disputes, subjecting them to a concurrence of rules -between consumer ADR and civil mediation- whose contrast should be resolved in the sense of the prevalence of the principles of enhanced protection proper to consumer law.

If what has been said could be considered reasonable in the case of a regulatory contrast, it nevertheless does not solve the problem ambitious, where the various methods of alternative dispute resolution presuppose a thorough knowledge of each of them on the part of the consumer, and there does not seem to be a degree of awareness such as to induce the parties to identify the ADR entity most suited to the needs of that specific dispute⁴⁴. It

⁴³ Art. 141(6) of the Consumer Code: «6. The following provisions providing for the compulsory nature of out-of-court dispute resolution procedures shall remain unaffected (a) Article 5, paragraph *1-bis*, of Legislative Decree no. 28 of 4 March 2010, which regulates the cases of procedural conditions with reference to mediation aimed at the conciliation of civil and commercial disputes; (b) Article 1, paragraph 11, of Law no. 249 of 31 July 1997, which provides for the mandatory attempt at conciliation in the electronic communications sector; (c) Article 2, paragraph 24, letter b), of Law no. 481 of 14 November 1995, which provides for the compulsory attempt at conciliation in matters falling within the competence of the Regulatory Authority for Electricity, Gas and the Water System, and whose modalities are regulated by the Regulatory Authority for Electricity, Gas and the Water System by means of its own provisions».

⁴⁴ Cf. Silvestri, E. (1999). Osservazioni in tema di strumenti alternativi per la risoluzione delle controversie. *Cit.*, (p. 321 ff.).

cannot be denied that this represents one of the major disadvantages of ADR procedures since, as pointed out by the doctrine⁴⁵, when the legal system makes available to the parties a diversity of alternative models to the process, it may be problematic to choose the most suitable instrument for the case in question, especially when the choice is made autonomously, i.e. without the support of legal assistance.

In instances where the legislature has failed to establish specific rules governing the decisional phase, it has become necessary for the parties to 'start anew.' This, however, leads to undeniable consequences for the justice system that are seldom discussed: a loss of public trust in Alternative Dispute Resolution (ADR) mechanisms, escalating conflicts, unnecessary delays in proceedings, and a breach of the principle of legal certainty. This principle is undermined in situations where a dispute, after being submitted to an ADR body, is subsequently reintroduced before the court of merit, leaving the outcome uncertain.

Thus, the potential for seeking judicial intervention creates a cyclical pattern, akin to a pendulum, swinging between the desire to rely on ADR and the need to resort to ordinary justice to obtain a final decision. Moreover, this often results in a judgment that conflicts with the decision rendered by the 'complementary' dispute resolution mechanism.

It is clear that such a system lacks inherent coherence, as it fails to guarantee consumers – and, more broadly, citizens – a sufficient degree of legal certainty in out-of-court dispute resolution, irrespective of the ADR process selected. This is particularly significant in the pursuit of judicial efficiency, as these alternative models of protection reflect a level of specialization that ordinary courts are unable to provide, especially in sectors like finance, where the requisite expertise is typically absent.

4. A FURTHER ACCELERATION OF THE ADR IN THE ITALIAN JUDICIAL CONTEXT: THE S. C. CARTABIA JUSTICE REFORM (LEGISLATIVE DECREE N. 149 OF 10 OCTOBER 2022)

It is now necessary to examine, although without any presumption of exhaustiveness, the legislative interventions aimed at addressing the critical issues that have plagued the civil process over time: lengthy proceedings, the efficiency and fairness of decisions, and the balancing of interests, a task which proves exceedingly difficult, even with the intervention of reforms. The recent legislative steps, therefore, deserve a careful analysis, particularly in light of the changes that were introduced to streamline the judicial process while ensuring adequate protection of fundamental rights.

⁴⁵ Silvestri, E. (2020). *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*. Cit. (p. 9).

The reform of the civil process, set forth by Delegated Act No. 206 of November 26, 2021, titled «Delegation to the Government for the Efficiency of the Civil Process and for the Regulation of Alternative Dispute Resolution (ADR) Instruments, and Urgent Measures for the Rationalization of Proceedings in Matters of Personal and Family Rights, as well as Forced Execution», marks a crucial moment in the legislative approach to civil justice. This was followed by Legislative Decree No. 149 of October 10, 2022⁴⁶ – commonly known as the ‘Cartabia Reform’ – which places further emphasis on improving procedural efficiency, including the reorganization of ADR mechanisms⁴⁷. This strategic shift has sought to consolidate alternative tools for dispute resolution with the broader aim of enhancing procedural efficiency⁴⁸, a goal long sought after within the Italian legal system⁴⁹.

As outlined in the Illustrative Report accompanying the reform, the legislative decree aims to reorganize both the formal and substantive aspects of the adjudicative civil process. In accordance with the objectives set forth by the enabling law, the reform advocates for the simplification, acceleration, and rationalization of procedures, as key elements that are intended to support ‘the value of the effectiveness of judicial protection’. These objectives underscore the reform’s commitment to improving access to justice, while acknowledging the complex balance between procedural efficiency and the guarantees of due process.

The reform touches on numerous issues of both systemic importance and practical implications. These provisions will not only affect the clarity and precision of procedural acts but will also impose penalties for abuse of the process and introduce new variants of the adjudicative process. Furthermore, one of the most significant changes – particularly relevant to the subject matter of this analysis – is the newly restructured regulation of various ADR instruments that were already in common use.

In the context of ordinary civil proceedings, a notable modification introduced by the new paragraph 3-*bis* of Article 163 of the Civil Procedure Code is that the summons must, although not under penalty of nullity, contain ‘an indication of the fulfilment of the conditions for admissibility where applicable’. This reform mandates that the plaintiff consider whether the application is admissible before filing, as the legislature has introduced further mandatory conciliation attempts, now stipulated in Article 5(1) of Legislative Decree No. 28/2010. This includes not only traditional disputes but now also encompass-

⁴⁶ See in this regard the work of Cecchella C. (2023). *Il processo civile dopo la riforma*. Legislative Decree No. 149 of 10 October 2022. Zanichelli Editore.

⁴⁷ For a comprehensive discussion of the amendments made by Legislative Decree no. 149/2022, see Carratta A. (2023). *Le riforme del processo civile*. Giappichelli Editore.

⁴⁸ Ghirga, M. F. (2023) *L’abuso del processo e alcune norme nell’ultima riforma della giustizia civile*. In *Riv. dir. proc.*, vol. 2 (2), (p. 390 ff.).

⁴⁹ Donzelli, R. (2023). *Considerazioni sparse sulla riforma del processo civile: disposizioni generali, processo di cognizione, appello e cassazione*. In *Giust. civ.*, vol. 2 (p. 413 ff.).

ses issues arising from partnership contracts⁵⁰, consortium contracts, franchising agreements, labor contracts, network contracts, supply agreements, and subcontracting contracts. The reform broadens the scope of mandatory ADR tools that are now required before a lawsuit can proceed to court.

In practical terms, the legislature provides that the defendant may object to the inadmissibility of the claim, and the court may identify the issue of inadmissibility *ex officio* during the first hearing. Should the admissibility condition not be satisfied, the court is authorized to declare the application inadmissible at that hearing. However, the reform provides for certain exceptions, specifically where the parties have engaged in the procedure set out in Article 128-*bis* of Legislative Decree No. 385/1993. In the financial sector, this continues to rely on conflicting provisions governing both ‘general mediation’ and alternative dispute resolution systems⁵¹ specifically aimed at consumers.

In addition, the reform seeks to strengthen the incentives for mediation by introducing more robust reward mechanisms while imposing stricter sanctions for behaviors that obstruct mediation itself. The mandatory nature of legal representation during ADR processes is also reinforced. Although the reform offers numerous points of intervention on mediation, these fall outside the immediate scope of this discussion. Nevertheless, it is important to mention the intervention of the Cartabia reform with regard to assisted negotiation, which represents a pivotal ADR instrument in the Italian legal framework.

Regarding negotiation, the reform introduces a critical change in its designation, renaming the procedure as the ‘negotiation agreement assisted by lawyers’. The new provisions now require the inclusion of the dispute’s value within the agreement itself. The reform also expands the scope of this institution to include labor disputes, although without making legal claims in such matters inadmissible. Furthermore, it allows for the performance of a limited investigative activity within the negotiation procedure itself, alongside specific rules for its conduct. These changes reflect a significant evolution in the way negotiation can be utilized within the broader ADR landscape⁵².

⁵⁰ On this point cf. Miccolis, G. (2023). Le nuove norme in tema di mediazione e negoziazione assistita. In *Riv. dir. proc.*, vol. 3 (p.1059); also Dalmotto, E. (2023). Riforma Cartabia: il nuovo processo civile (II parte) - La negoziazione assistita nell’ultima riforma della giustizia civile. In *Giur. It.*, vol. 3, (p. 739 ff.).

⁵¹ Miccolis, G. (2023). Le nuove norme in tema di mediazione e negoziazione assistita. *Cit.*, (p.1059 ff.), in which the author states how the reform has clarified that «the presence of the lawyer is compulsory only in the event that the attempt at conciliation is provided for under penalty of inadmissibility of the court application, limited to the hypotheses provided for by art. 5, paragraph 1 and 5 -quarter (mediation requested by the judge), legislative decree no. 28/2010, while it implicitly excluded the mandatory nature of the presence of the lawyer in the case provided for by Article 5-*sexies* (mediation on contractual or statutory clause) legislative decree no. 28/2010 and when the attempt at conciliation is optional... (*omissis*). This clarification on the mandatory nature of the technical defense renders consistent the provision contained before the reform in the second part of paragraph 1 of article 12, legislative decree no. 28/2010, and now contained in paragraph 1bis always of article 12, legislative decree no. 28/2010 on the subject of the enforceability of the conciliation report not signed with the lawyers».

⁵² For further discussion see Dalino, D. (2021). Mediazione e negoziazione assistita. Costantino G. (eds), *La riforma della giustizia civile. Prospettive di attuazione della legge 26 novembre 2021, n. 206*, (p.37

The reform clearly signals the legislature's intent to enhance complementary justice instruments, specifically ADRs, by expanding their applicability into areas previously excluded or governed by more restrictive rules. Both mediation and assisted negotiation have been redefined and enhanced under the new legislative framework, providing new opportunities for alternative methods of dispute resolution that go beyond traditional litigation. However, despite these significant strides, the ADR category remains somewhat fragmented and lacks a unifying principle⁵³. Even following the recent legislative intervention, there is no clear and consistent framework to which all alternative dispute resolution mechanisms must adhere, leading to a somewhat disjointed ADR system.

As mentioned earlier, in addition to the traditional ADR methods – such as conciliation, arbitration, and contentious administrative proceedings – Italy's legal framework now includes 'mediation for the conciliation of civil and commercial disputes' (Legislative Decree No. 28/2010) and lawyer-assisted negotiation (Law No. 162/2014). These methods were also subject to recent reforms led by Minister Marta Cartabia, which aimed to clarify their application and scope, thereby reducing litigation and fostering the use of ADRs in an ever-expanding range of legal matters.

One notable exclusion from the recent reform concerns Legislative Decree No. 130 of August 6, 2015, which was issued to implement Directive 2013/11/EU regarding alternative dispute resolution for consumer disputes. This decree, which amended Regulation (EEC) No. 2006/2004 and Directive 2009/22/EEC, was not addressed by the recent reform. Specifically, the financial sector's ADR landscape remains diverse, with a range of unresolved conflicts and inconsistencies between the various mechanisms in place for resolving disputes. These include mediation, arbitration, and conciliation, among others.

Of particular interest is the reform's failure to realize the long-discussed introduction of a single text governing alternative dispute resolution instruments, the so-called TUSC (Testo Unico sugli Strumenti di Conciliazione), which had been expressly provided for under Article 1(4)(b) of Delegated Law No. 206/2021⁵⁴. Despite being included among the reform's guiding princi-

ff.); see also the analysis conducted by Ficarelli, B. *Istruzione stragiudiziale nella negoziazione assistita da avvocati. Nuova sfida culturale per il legislatore italiano e metodi complementari di risoluzione delle controversie*. In *Riv. trim. dir. proc. civ.*, vol. 77 (2), (pp. 503-535).

⁵³ See *supra* [footnote 3] Trocker, N. (2007). *La conciliazione come metodo alternativo di risoluzione delle controversie nell'esperienza dell'ordinamento italiano tra obiettivi di politica legislativa e profili di compatibilità costituzionale*, cit., (p. 317); see also Ficarelli, B. *Istruzione stragiudiziale nella negoziazione assistita da avvocati. New cultural challenge for the Italian legislature and complementary methods of dispute resolution*, cit., (p. 535 ff.).

⁵⁴ The enabling act states the following «4. In the exercise of the delegation of powers referred to in paragraph 1, the legislative decree or decrees amending the regulations on mediation and assisted negotiation procedures shall be adopted in accordance with the following guiding principles and criteria: a) to reorganize and simplify the regulations on tax incentives relating to out-of-court dispute resolution procedures by providing for: an increase in the extent of the exemption from registration tax referred to

ples, the TUSC has yet to materialize into a functional and comprehensive legal framework. This absence represents a missed opportunity to streamline and standardize the diverse ADR landscape in Italy, which continues to be characterized by a multiplicity of rules and practices.

5. SOME BRIEF THOUGHTS

In light of the considerations discussed – and acknowledging that much more could be said, though space limits this investigation – it may still be advisable for the European legislator to intervene in the current complex landscape of ADR. Such an intervention should account for the distinct characteristics of each national system. Indeed, harmonization efforts alone often fail to address the inefficiencies within national systems, potentially undermining the effectiveness of judicial protection at a formal level. Simply having a variety of ADR instruments does not inherently ensure more effective justice; in fact, as evidenced in the Italian context, it can undermine legal certainty.

Therefore, a European legislative initiative aimed at establishing a unified ADR code, one that balances not only the efficiency of justice in terms of trial duration but, more crucially, the due process protections for the parties involved, could mark a pivotal development in the current ADR framework. This would contribute to achieving the long-sought goal of legislative unification, especially in the realm of due process guarantees, a cornerstone of European Union law.

in Article 17, paragraph 3, of Legislative Decree No. 28 of 4 March 2010; simplification of the procedure provided for determining the tax credit referred to in Article 20 of Legislative Decree No. 28 of 4 March 2010; simplification of the procedure provided for determining the tax credit referred to in Article 20 of Legislative Decree No. 28 of 4 March 2010; simplification of the procedure provided for determining the tax credit referred to in Article 20 of Legislative Decree No. 28 of 4 March 2010; simplification of the procedure provided for in Article 20 of Legislative Decree No. 28 of 4 March 2010. 28; the simplification of the procedure provided for the determination of the tax credit referred to in Article 20 of Legislative Decree 4 March 2010, no. 28 of 4 March 2010, and the recognition of a tax credit commensurate with the remuneration of the lawyer who assists the party in the mediation procedure, within the limits provided for by the professional parameters; the further recognition of a tax credit commensurate with the unified contribution paid by the parties in the case that is extinguished following the conclusion of the mediation agreement the extension of legal aid to the mediation and assisted negotiation procedures; the provision of a tax credit in favor of mediation bodies commensurate with the indemnity not payable by the party that qualifies for legal aid; the reform of the costs of initiating the mediation procedure and of the indemnities due to mediation bodies; monitoring of compliance with the expenditure limit for the measures envisaged which, in the event of any deviation from the said expenditure limit, provides for a corresponding increase in the unified fee; b) with the exception of arbitration, to harmonize, at the outcome of the monitoring to be carried out on the area of application of compulsory mediation, the legislation on out-of-court dispute resolution procedures provided for by the law and, to this end, to bring together all the disciplines in a single text of complementary instruments to the jurisdiction (TUSC), also with appropriate enhancement of the individual competences on account of the matters in which such procedures may intervene; ... (*omissis*). For further details see the content of the enabling act available at <https://www.gazzettaufficiale.it/eli/id/2021/12/09/21G00229/sg>.

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