

Themis 2021

Semi-Final
EU and European Civil Procedure

EUROPEAN SMALL CLAIMS PROCEDURE

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1. INTRODUCTION

Since its construction, the European Union has implemented multiple initiatives aimed at achieving one of its ultimate goals: the European single market, a territory without any internal borders or other regulatory obstacles to the free movement of goods and services, which has fueled the economic growth and made everyday life of European businesses and consumers easier. Due to the European single market, the number of cross-border consumer transactions in the EU is growing at a rapid pace¹. Unfortunately, cross-border transactions do not always have the outcome desired by both parties and the consumer faces the alternatives to pursue the case in court, or to give up the claim. Most EU Member States have introduced some form of simplified and cheaper civil procedure designed for the pursuit of small claims, but those procedures were not well adapted for cross-border disputes and that has brought consumers engaging in cross-border transactions without an adequate procedural remedy to the EU.²

1.2. AIM AND PURPOSE OF EUROPEAN SMALL CLAIMS PROCEDURE

The substantial differences amongst the national small claims procedures cause a distortion in competition within the internal market. The main purpose of the European Small Claims Procedure (further in the text: “ESCP”) is to help to eliminate the obstacles to free movement of goods, persons, services and capital. The objective of the ESCP – to simplify and speed up litigation in small claims procedures – cannot be sufficiently accomplished by the individual Member States, since they cannot guarantee the equivalence of the rules. There is no level playing field if some operators have access to efficient and effective procedures while others do not.³

The ESCP according to the Article 1 of the Regulation No. 681/2007 of the European Parliament and of the Council (further in the text: “Regulation” or “Regulation 861/2007”) intends to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs. Therefore, according to the Preamble of the Regulation, the objective of such a procedure should

¹ Hazenberg P., Dicembre F., Cattaruzza J., 2018, Eu cross-border payments-an evolving concept, Inside magazine Issue 18

² Mańko R., 2014, Legal analysis of the Commission's proposal to remedy weaknesses in the current system

³ Kramer X.E., A Major Step in the Harmonization of Procedural Law in Europe: The European Small Claims Procedure Accomplishments, New Features and Some Fundamental Questions of European Harmonization, 2007

be to facilitate access to justice, to simplify and speed up litigation concerning small claims in cross-border cases, whilst reducing costs, by offering an optional tool in addition to the possibilities existing under the laws of the Member States, which will remain unaffected. This Regulation should also make it simpler to obtain the recognition and enforcement of a judgment given in the ESCP in another Member State.

The harmonization of European civil procedure was started by the famous Conclusion of the European Council Tampere in October of 1999. The conclusion affirmed the need to improve access to justice, the mutual recognition of judicial decisions and greater convergence in civil law, amongst others, to establish common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims.

At the end of 2002, the Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation in which different approaches for solving existing problems were presented: firstly, to abolish the exequatur for uncontested claims in the European Union; secondly, the creation of a specific harmonized payment procedure; and thirdly, adopting measures to simplify and speed up small claims litigation.⁴

The Regulation No. 805/2004 created a European Enforcement Order for uncontested claims, which was the first stage of the abolition of exequatur for uncontested claims. The Regulation No. 1896/2006, adopted on 12 December 2006 created a European Order for Payment Procedure (EOP) and Regulation 861/2007 established a European Small Claims Procedure adopted on 11 July 2007. The following Regulations are the first to introduce autonomous European procedures, which is a major step in the harmonization of the procedural law in Europe.

The ESCP became applicable on 1 January 2009 in all Member States except in Denmark. It is an alternative procedure which does not replace national civil procedure, but coexists with it in parallel. It was evaluated in 2013 and in the same year the European Commission published a

⁴ Twigg-Flesner C., “Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?”-A way forward for EU Consumer Contract Law, 2011, *European Review of Contract Law*, Vol. 7, No. 2, 2011

report and adopted a proposal amending the Regulation. The ESCP was amended by adopting the Regulation No. 2015/2421, which became effective on 14 July 2017.

1.3. CRITERIA OF APPLICABILITY

Pursuant to Article 2, in cross-border cases the Regulation shall apply to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 5,000. The cross-border character of the claim means that the ESCP can only be opted in a cross-border case and is not applicable in national cases and according to Article 3: “*A cross border case is one 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.*”

The subject matter of the claim is defined by using one positive criterium, it must fall within the scope of civil or commercial proceedings, and a series of negative criteria. Although the Regulation does not state this explicitly, it has been argued that the notion of a civil or commercial matter must be understood in the light of other EU instruments including Brussels I⁵ and EOP Regulation⁶.

As for the negative criteria, public law claims, those relating to revenue, customs, administrative matters and state liability for the exercise of its authority, are excluded, as for being *acta iure imperii*. Secondly, in the Article 2 (point a-j) the Regulation specifies that it does not apply to certain other specific matters which would fall within the notion of civil and commercial matters.

1.4. COMMENCEMENT OF THE PROCEDURE

A Claim under the ESCP is commenced by filing the standard Claim Form A at the competent court, pursuant to Article 4. The claim can be sent by post and by other means of communication such as fax or email acceptable to the Member State. The claim form should be accompanied, where appropriate, by any relevant supporting documents which may be used as evidence and it

⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

⁶ Regulation (EC) No. 1896/2006 of 12 December 2006 creating a European order for payment procedure

must be submitted in a language of the court or tribunal, which also applies to the supporting documents. Not all courts will accept copies or scanned documents and therefore even if a court would accept the Claim in electronic form, it may not be possible to send the documents electronically, so it would make sense to send the Claim Form by some other means acceptable to the court. The claim may be faulty, and the Regulation distinguishes three situations:

- a) where a claim is outside the scope of the Regulation, the court shall inform the claimant, and proceed in accordance with national law, unless the claimant withdraws the claim;
- b) where the court considers the information provided inadequate or insufficiently clear, or the form is not filled in properly, the opportunity to complete or rectify the form (using standard form B of Annex II) will be given;
- c) where the claim appears to be clearly unfounded, or the application inadmissible, or where the claimant fails to complete or rectify the claim form within the time specified, the application shall be dismissed.

Once the court has decided that the claim can proceed as ESCP, within 14 days of having received the proper claim form properly completed, the defendant receives a copy of the claim form and supporting documents along with the Answer Form C, a special form which can be used for the defendant to reply to the claim. Upon receipt of the claim form, the defendant may respond within 30 days by completing the Answer Form 3 or without using the answer form, in any other appropriate way. If the defendant does not respond, the court will give judgment on the claim after 30 days. The defendant can also raise a counterclaim in which case he is not required to send any documents to the claimant. The documents are sent by the court within 14 days of the receipt and the claimant must respond within 30 days.

1.5. CONDUCT AND CONCLUSION OF THE PROCEDURE

Within 30 days of receiving the last document from the parties, the court needs to decide whether the case is ready for decision, or whether additional evidence is necessary (Article 7 of the Regulation). In the former case, the court should go directly to the decision of the merits, whereas in the latter case, it may either demand more information from the parties, setting them an appropriate deadline of no more than 30 days, or take other evidence (Article 9 of the Regulation),

or arrange a hearing which must be held within 30 days of the summons. According to the Article 5 of the Regulation, the court shall only hold an oral hearing (using the appropriate means of communication, such as video conference or teleconference, unless the use of such technology is not appropriate to the fair conduct of the procedure) as an exception, when it is not possible to give the decision on the basis of the written materials, or if a party requests so and the court agrees, in line with the principle that the ESCP is a written procedure which provides fast and low-cost procedure. The court may refuse the request if it considers that, having regarded the circumstances of the case, an oral hearing is not necessary for the fair conduct of the proceeding. The reasons for refusal shall be given in writing and that decision cannot be the subject of a separate appeal or review.

According to the Article 9 of the Regulation, the court shall determine the means of taking evidence and the extent of the evidence necessary for its judgment. It may admit taking of evidence through written statements of witnesses, experts or parties or taking of evidence through video conference or other available technical means, but only if it is necessary for giving the judgment.

Although the Regulation does not specify the form or content of the judgment, and it does not prescribe any standard form to be followed by the court, leaving the matter entirely to national law, it is implicit from the fact that the judgment in an ESCP has to be served to the parties that should be in written form. The judgment, which can find the claim well founded or reject it as unfounded, as said before, must be pronounced within 30 days either of the day when the court received the submission from the parties, or, if requested, additional submissions from the parties, or, if held, of the day of the hearing, or, if ordered, of the day of taking evidence outside the hearing (the limit of 30 days can only be extended in exceptional circumstances according to the Article 14 of the Regulation).

1.6. CONTROL OF THE DECISION

The judgments issued in the ESCP may be challenged by means of appeal or review. The appeal is not codified in the Regulation and is up to the Member States to decide whether judgments given in the ESCP may be subject to an appeal (the Article 17 of the Regulation). The Regulation

prescribes a minimum review procedure, which must be allowed in any Member State, even in those which do not allow ordinary appellate proceedings.

Pursuant to the Article 18: „*A defendant who did not enter an appearance shall be entitled to apply for a review of the judgment given in the ESCP before the competent court or tribunal of the Member State in which the judgment was given where a) the defendant was not served with the claim form, or, in the event of an oral hearing, was not summoned to that hearing, in sufficient time and in such a way as to enable him to arrange for his defence, or b) the defendant was prevented from contesting the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part*”. If the court agrees with the defendant’s petition for review, it sets aside the judgments, making it null and void; otherwise, the judgments remain in force.

1.7. RECOGNITION AND ENFORCEMENT

The judgment pronounced in the claim or counterclaim under the ESCP in a Member State is recognized and enforced directly, regardless of any appeal, in another Member State without the need for a declaration of enforceability or the possibility of opposing its recognition. At the request of one of the parties the court or tribunal will issue a judgment certificate, using standard form D (Article 20). The procedure of enforcement is governed by the law of the Member State of enforcement, subject to the provision of the Regulation on enforcement which contains a set of rules regarding the documents the party seeking enforcement must precede, and if necessary, its translations, and the judgment given under the ESCP is to be enforced under the same conditions as a judgment issued in the Member State.

Enforcement can only be refused, upon application of the person against whom recognition is sought, if the judgment in the ESCP is irreconcilable with an earlier judgment of an EU Member State, or of a third country, provided that it involves the same cause of action and that it was between the same parties, and that it is given by the Member State of enforcement, provided that the irreconcilability could not have been raised as an objection in the Member State where the judgment in the ESCP was given (Article 22 of the Regulation). According to the Article 23 of the Regulation, the unsuccessful party has the possibility of requesting the court competent for

enforcement to limit the enforcement to protective measures only, or to make enforcement conditional on provision of security by the successful party, or, in exceptional situations, to demand that the enforcement be suspended until the appeal is decided.

2. RESULTS OF CONDUCTED SURVEY IN THE REPUBLIC OF CROATIA AND LACK OF AWARENESS

In order to get a more accurate picture in terms of the actual use of the ESCP and related experiences in the Republic of Croatia, we decided to conduct a survey with the support of the Croatian Bar Association. Our analysis was exclusively focused on the knowledge and experience in using the ESCP of the persons that are directly involved in the proceedings and have adequate knowledge about the theme, lawyers. In total, 60 lawyers were interviewed, and they were asked to answer the questions with the following answers: yes, no or didn't apply the ESCP. In the first part of the survey we wanted to gain information about the knowledge of the lawyers for the ESCP and the concrete use of it.

The first question was *“Are you familiar with the Regulation No. 861/2007?”* 60% of the interviewed lawyers are familiar with the following Regulation, while 40% aren't. Since one of the aims of our survey was also to gain information about the actual use of the Regulation, our second question was *“Have you ever applied the Regulation No. 861/2007?”*. 85% of the interviewed lawyers have never applied the Regulation in their praxis. In the second part of the survey we wanted to know how the lawyers evaluate the experience of applying the Regulation and according to the results 13,3% of interviewed have a positive experience, while 1,6% have a negative experience (85% have never applied the Regulation). Regarding the efficiency of the procedure introduced by the Regulation, 6,6% of the interviewed claim that the procedure introduced by the Regulation is efficient, while 8,3% claim that the procedure is not efficient (85% have never applied the Regulation). Our last question: *“Do you think that the procedure introduced by the Regulation No. 861/2007 is more cost-effective for the parties in terms of costs of proceedings (payment of court fees, translation of documents, etc.) compared to the ordinary proceedings under the national law?”* was directed at finding out what do the interviewed think of the Regulation in terms of dispute cost. According to the results of the survey, 10% of the

interviewed claim that the procedure introduced by the Regulation is more cost-effective compared to the ordinary proceedings, while 5% of the interviewed claim that it is not.

3. PROBLEMS AND SOLUTIONS REGARDING REGULATION 861/2007 AND ESCP

Taking into account the conducted survey about the overall knowledge of the existence of the ESCP established with the Regulation, a lack of knowledge is imposed as a primary problem of the application of the same Regulation. Namely, according to the survey, it can be concluded that the citizens of the Republic of Croatia have no or very limited knowledge of its existence, so they do not use the opportunities provided by the regulation in question.

Although the official EU website (e-justice.europa.eu) provides information on the ESCP, as well as standard forms of the Regulation, it is important to emphasize that the websites of the national courts of the Republic of Croatia do not provide sufficient information about the Regulation. In the Republic of Croatia, 30 municipal courts and 9 commercial courts have jurisdiction over small claims, and although all courts contain a link to the official EU website, it is questionable whether this can be considered adequate information for citizens about the ESCP. For example, in a case where the party is not aware of the existence of this Regulation, it is difficult to believe that they will search every link on the websites of the national courts, and it should be noted that by opening this link on the official EU website, citizens enter the homepage of the official EU website. Therefore, a citizen of the Republic of Croatia should know in advance which procedure is in question in order to be able to seek relevant information.

It is important to emphasize the above because according to the Regulation, Member States are obliged to provide general information on the scope of the European Small Claims Procedure and on the courts that have jurisdiction over that procedure.⁷ Member States should be free to decide on the most appropriate means of providing such practical assistance and general information, and it should be left to the Member States to decide which authorities should be assigned these obligations.⁸ Furthermore, the Regulation provides that Member States shall ensure that the standard claim form A is available in all courts before which a small value proceeding may be

⁷Regulation (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 Regulation (EC) No 1896/2006 creating a European order for payment procedure, Preamble 20

⁸Ibidem.

instituted and that it can be accessed through the relevant national websites.⁹ Even if we assume that the Republic of Croatia has fulfilled its obligation by placing a link of the official EU websites on the websites of the competent national courts, it should be emphasized that a more adequate way to inform citizens would be to find all necessary information and forms on the pages of national courts and other Member States.

Not only do we consider it necessary for the national courts of the Member States to provide general information on the Regulation and the ESCP, but there is also some guidance on who to turn to for help in initiating proceedings, which will be discussed further.

3.1. PRACTICAL ASSISTANCE IN FILLING OUT STANDARD FORMS

The Regulation obliges Member States to ensure the possibility of practical assistance for the parties in completing the standard forms provided in the ESCP.¹⁰ Given that, as already mentioned, the national courts of the Member States in the Republic of Croatia do not provide general information and the ESCP on their websites, so there is also no information on practical assistance. In addition, under the Regulation, Member States shall ensure that information on the authorities or organizations responsible for providing assistance is available in all courts before which the ESCP may be initiated and can be accessed through the relevant national websites.¹¹

Namely, in the Republic of Croatia, practical legal assistance in compiling submissions, i.e. in the specific case of standard forms, is provided by state administration offices in counties and the competent administrative body of the City of Zagreb, authorized associations and legal clinics. Given that, in case the claimant has knowledge of the ESCP and wants to initiate it and has problems in filling out the standard forms, the claimant has no knowledge of whom to turn to for practical assistance. We emphasize again that the official website of the EU contains the above information, but it is a page maintained by the European Commission, while on the website of the competent national courts there is only a link to this page (as explained in the previous chapter). We do not consider this to be adequate information for citizens, as evidenced by the weak

⁹Ibid., Preamble 23

¹⁰Ibid., Art.11

¹¹Ibid., Art 11 (2)

application of the ESCP in the Republic of Croatia. In this case a party may be considered compelled to engage a lawyer (which undoubtedly increases his expenses. It is clear that the lack of information on the provision of practical assistance by national courts also negatively affects the prevalence of the Regulation.

For this problem, it would certainly be necessary to have all the necessary information on the websites of national courts together with other information already mentioned on the ESCP, the initiation of proceedings, the competent courts, etc.

3.2. STANDARD FORMS AND E-FORMS

Given that the procedure is initiated by a standard form¹², they certainly play a key role in the application of the Regulation. The purpose of the standard forms in the ESCP is certainly to facilitate the procedure itself and to reduce the language barriers.¹³

Standard forms are available online on the EU's official website in the languages of all EU Member States.¹⁴ It should be emphasized that although the existence of the e-form greatly facilitates the ESCP, it needs significant changes in order to further facilitate and increase its application. E-forms provide the possibility of online filling in all mandatory fields required for proceedings and the possibility of finding a competent court, which greatly helps the parties, i.e. the plaintiff to initiate proceedings before the competent court. The official EU website provides parties with the possibility to fill in e-forms in their own language and then create a PDF form in the language of any Member State. However, this only applies to the translation of the generated answers, which are answered by ticking the boxes, and not the answers to open-ended questions. Therefore, a person who would fill in the form this way, without knowing the language of the court, would not be able to submit it to the court without an adequate translation.

Changes that we consider important to introduce into e-forms can be divided into several groups:

a. The need to open the possibility of translating open answers

¹²Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Art.4

¹³Ibid., Preamble 11

¹⁴https://e-justice.europa.eu/content_small_claims_forms-177-en.do

The claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language or one of the languages of the court or tribunal.¹⁵ If the e-forms in question were to translate open-ended responses, it would be much easier for the parties to start ESCP, and the need for translation would be almost eliminated, which will be discussed in more detail.

b. Introducing the possibility of submitting forms via the same website where e-forms are filled out

Under the Regulation, the claimant initiates the ESCP by completing standard form A of the claim by filing directly with the competent court, by post or other means of communication such as fax or e-mail, which are acceptable to the Member State in which the proceedings are instituted. Thus, for example, in the Republic of Croatia, a request to initiate an ESCP is submitted in the form of submissions, by fax or electronically, in France by post and in Italy by post or e-mail, but only in proceedings before regular courts and exclusively through lawyers. The available means of communication in each Member State are listed on the official EU website. In favor of facilitating and speeding up the process, and consequently greater application of the ESCP, we consider it possible to enable the delivery of standard e-forms electronically via the same pages that allow the translation of e-forms. In any case, it would certainly be necessary for the competent courts of the Member States to have electronic communication in place. Although such a digitization of the process would be a significant undertaking, both at Member State and EU level, we believe it would make a significant contribution to the ESCP in the long run. Not only would the procedure be accelerated, but the need to hire lawyers would be significantly reduced, and the procedure would undoubtedly be easier for the parties and for the courts.

c. The possibility of uploading written evidence in order to expedite the proceedings

Should the already mentioned electronic delivery by the parties themselves be possible, it would be necessary to enable the possibility of uploading written evidence in such e-forms. Delivery of

¹⁵Regulation (EC) No 861/2007, op. cit., Art. 6

e-forms, i.e. requests to initiate proceedings electronically would not make sense if written evidence had to be submitted by post, fax, etc. However, before the existence of such digitization of the ESCP further clarification in this matter is not needed.

3.3. TRANSLATION IN ESCP

According to the Regulation the claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language or one of the languages of the court or tribunal.¹⁶ Also, if any other document received by the court or tribunal is not in the language in which the proceedings are conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for giving the judgment.¹⁷ The above provisions of the Regulation impose an obligation on the parties to translate documents into the language of the proceedings. When commencing ESCP that obligation is imposed on the claimant. Overall the obligation of filling in standard forms in foreign languages discourages potential claimants from using ESCP, but keeping in mind what we already emphasized the possibility of online translation of e-forms on the official EU websites, we will not repeat ourselves.

However, we have to address the problem with translation of evidence. First of all, we have to take into consideration that the claimant commences ESCP by filling in standard claim Form A which includes a description of evidence supporting the claim. If in the future e-forms translated open questions online, that would simplify the ESCP, but the problem of translation of the evidence (documents, written statements of witnesses, experts or parties) itself would remain unresolved.¹⁸ The ESCP is essentially a written procedure¹⁹ and oral hearing is held only if considered necessary²⁰, so the translation of the evidence is crucial. Bearing in mind that this is a European procedure, we consider the introduction of an official language of ESCP to be almost impossible.

¹⁶Regulation (EC) No 861/2007, op.cit., Art. 6

¹⁷Ibid., Art. 6(2)

¹⁸Regulation (EC) No 861/2007, op.cit.,Art. 6 (2) with Art. 9

¹⁹Regulation (EU) 2015/2421, op. cit., Preamble11

²⁰Ibid., Art. 8

In our opinion, the best solution would be to translate the evidence through an expert ordered by the court. Although the court would bear the costs of translating the evidence, it would be borne by the unsuccessful party at the end of the ESCP, which we consider to be fair. That would also eliminate the possible withdrawals of potential claimants from commencing ESCP because of the fear of high translation costs.

On the other hand, according to the Regulation, a party may refuse to accept a document because it is not in either the official language of the Member State addressed nor in a language which the addressee understands the court or tribunal shall so inform the other party with a view to that party providing a translation of the document.²¹ In order to simplify the procedure, we believe that it would be the most appropriate for the parties to submit the documents in the official language of the Member State of the court and in the language of the addressee. This would be done by the parties using the already explained and improved e-form that allows the translation of open-ended questions.

3.4. COSTS AND EXPENSES IN ESCP

*The European Small Claims Procedure provides an inexpensive and easy way for someone to pursue a cross-border claim without the need to employ a solicitor. The claim cannot exceed €5,000.*²²

In the Preamble of Regulation (recital 29) there is a general provision, regarding costs in European small claims procedures and it states: *The unsuccessful party should bear the costs of the proceedings. The costs of the proceedings should be determined in accordance with the national law. Having regard to the objectives of simplicity and cost-effectiveness, the court or tribunal should order that an unsuccessful party be obliged to pay only the costs of the proceedings, including, for example, any costs resulting from the fact that the other party was represented by a*

²¹Regulation (EC) No 861/2007, op. cit.,Art. 6 (3)

²² https://www.citizensinformation.ie/en/justice/courts_system/european_small_claims_procedure.html

*lawyer or another legal professional, or any costs arising from the service or translation of documents, which are proportionate to the value of the claim or which were necessarily incurred.*²³

In this general provision, it is visible that the Regulation has adopted the so-called the “*loser pays principle*” or the “*cost shifting rule*”. However, that rule is limited with the provision that the party cannot be awarded if the costs are unjustified or disproportionate with the claim.

3.4.1. COST OF THE PROCEDURE WHEN THERE IS NO HEARING AND USE OF THE FORMS

When conducting the ESCP in most EU Member States, it is necessary to pay court fees for lodging the application commencing the procedure. Since ESCP is mostly written procedure in which Forms that are components of the Regulation have the main role, arrangements for payment of the court fee the parties can find in the Form A in the box number 6 of the claim Form. That box is not obligatory to fulfill but it is planned for the plaintiff to inform the court on the way he will pay the court fee. In section from 6.1. to 6.1.4. of the Form A, the plaintiff needs to state the information about the Bank, then the information if he is paying with a credit card or is allowing the court to charge the amount of the fee to his bank account. In the 6.2. section of the Form A, the plaintiff can state the way he wants to receive payments from the defendant.²⁴

The amount of fees varies depending on the EU Member State and its national law, which is already stated in point 29 of the Preamble of the Regulation. Information about the amount of the fees and the ways to pay them can be found on the European e-justice Portal. Of course, the court fee will be reimbursed if your case is successful.

²⁴ A Guide for Users to the European Small Claims Procedure, A short introduction to the main practical aspects of the use of the procedure based on the Regulation, European Commission, 2014., page 13.

3.4.2. OTHER EXPENSES IN THE ESCP

Other expenses which may occur in the ESCP is paying for translation of the Forms and documents if they are in a language the defendant does not understand. However, the plaintiff who wins can claim such additional costs. On the other hand, if the plaintiff loses, he may have to pay for any translation or other costs incurred by the defendant.

At the end of the case, the court will (usually) award the expenses to the successful party and that award must be proportional to the claim. It means that the costs cannot exceed the amount of the claim. On the other hand, the court should not award expenses to cover the lawyer fees (because the party does not need to have a lawyer in the ESCP, which is actually the point of the Procedure and the Regulation – to speed up the whole procedure while having minimum expenses).

In conclusion, ESCP in general should be a low-cost court procedure, but the party needs to be aware that some costs are meant to be paid even if a party does not have a lawyer (such as fees and translation of the Forms). Moreover, if the party does have a lawyer, they need to be aware of the possibility that even if the Procedure ends successfully for it, it may not be awarded the costs of legal advice for the case (if costs end up being disproportionate to the claim).

3.4.3. WHEN A HEARING IS HELD

Apart from the court fees, the party needs to be prepared for paying extra costs if the hearing is being held on the request of the party or if the court decides so. Such costs include, for example, the cost of experts, witnesses, translation of the documents, video-conferencing, oral testimony etc. In general, when there is a hearing being held the cost should be kept to a minimum and the court should use the simplest and the least burdensome method of taking evidence.²⁵

²⁵ Loc.cit.

3.5. AMOUNTS AND PROBLEMS OF COURT FEES AND EXPENSES IN ESCP

Fees that need to be paid to the courts for addressing claims etc. are calculated in different ways in each EU Member State. For example, the fees can be calculated as fixed court fees, fees based on a fixed percentage of the claim and fees that vary according to claim value.

In most EU Member States, the value of court fees for small claims procedures increases with the value of the claim, but there are exceptions and variations across the entire EU. For example, Spain has no court fees at all, the same as Luxembourg. On the other hand, France (EUR 35), Ireland (EUR 25), Malta (Form A- EUR 40, Form C- EUR 25, Form D-EUR 20) and Sweden (EUR 98) have fixed court fees, regardless of claim value.²⁶

It is obvious that EU Member States use different ways of calculating the amount of court fees and that there is no harmonization in that field. When we take all those differences and ways of calculating the amount of court fees in consideration, it turns out that a party, when lodging the application commencing the ESCP, cannot easily know which amount has to be paid and how the fees should be paid for, since the amount and the way of paying is different in every Member State and also sometimes not so low at cost.

Court fees that are relatively high may discourage the party from using ESCP. Court fees which are higher than 10 percent of the claim value are considered disproportionate and may turn away citizens from taking legal action.²⁷ In our opinion, the ESCP can still be expensive. For instance, if your claim has the value of EUR 2.000,00, in the Republic of Croatia for the court fee you will have to pay approximately EUR 66 while, for example, in Ireland, even if your claim is the maximum of EUR 5.000,00, you will still have to pay the court fee in the amount of EUR 25. When the costs of court fees add up with other expenses in the Procedure, such as expenses for translation of documents, and sometimes the costs of holding a hearing as stated above, it turns

²⁶ Fast tracking the Resolution of Minor Disputes: Experience from EU Member States Delivered by the World Bank in collaboration with the Ministry of Foreign Affairs of the Kingdom of the Netherlands

²⁷ Ibid.

out that, when comparing the amount of the claim, the ESCP can still be financially tough for the party.

3.6. POSSIBLE SOLUTIONS

To increase the number of ESCP in the Republic of Croatia, as well as in other EU Member States, we think that first of all, the amount of court fees, when taking legal actions regarding Regulation, should be equal in all EU Member States. For example, less than 5 percent of the claim value. Also, the cost of translation of documents in the language of the specific EU Member State should also be harmonized and equal for all parties wishing to pursue legal action. In other words, all courts of all EU Member States should have Tariffs with costs especially written for ESCP, which should be easily available and accessible to the citizens of Europe through online mobile applications. That mobile application should contain a number of accounts of all courts in the EU and other needed information about paying; it should be made by bodies of the EU and free of charge for the EU citizens. The payment of fees and other costs should be available only in money and not in revenue stamps, as we have in the Republic of Croatia. That way, wherever the party is in the EU and needs to pursue legal action using Regulation, it can easily pay the requested amount on the direct account of the court and know where, how and how much it will need to pay. We think that expenses arising when holding a hearing are inevitable (such as expenses for the witnesses), and because of that our opinion is that in ESCP there should be a very small number of hearings, as well as the mobile application for at least paying the obligatory court fees, as stated above.

3.6.1. THE POSSIBILITY OF CALCULATING COURT FEES AND PAYING THEM ONLINE

The possibility of online calculation of court fees for the competent court of a Member State according to the value of the claim would certainly strengthen the ESCP, given that the parties are, in every procedure, particularly concerned about the total cost. There is information on the official EU website on the amount of court fees in every Member States, but we must emphasize that data

for most of the Member States are missing, for example Portugal, Belgium, Germany.²⁸ On the other hand, for the Member States for which the amount of court fees is stated, e.g. Croatia, it must be emphasized that they are presented in the currency of the Republic of Croatia according to the value of the claim in the same currency. Taking in regard that value of the claim under Regulation is presented in Euros, the difference in the currencies makes it difficult for the party which commences ESCP in Croatia to know how much the court fee would be. When filling in the standard Form A on the official EU website (in section 6 bank details), the plaintiff must fill in how to pay the court fee, of which the following methods are offered: by bank transfer, credit card or direct debit of the bank account. If we were to digitize the procedure as previously mentioned, the possibility of direct calculation of court fees according to the value of the claim and their online payment when filling out e-forms would certainly play an important role. Namely, it would be possible for the parties to obtain the amount of the court fee when filling in the standard forms by entering the value of the claim, which would certainly increase the party's security in cross-border proceedings, i.e. the party would know in advance about the court fee in another Member State. Paying court fees online would certainly make the process easier. It should be emphasized that all of the above for court fees in relation to the standard form A which initiates the ESCP is analogously valid for all further standard forms in the procedure.

4. SUMMARY

The main purpose of the ESCP is to help to eliminate the obstacles to the free movement of goods, persons, services and capital in the EU by simplifying and speeding up litigation in small claims procedures when concerning cross-border cases. ESCP should be less expensive for the parties and more effective than the regular small claim procedure in any Member State and it should also make it simpler to obtain the recognition and enforcement of a judgment ruled in another Member State. Although well thought out, in reality there are a lot of problems regarding ESCP with first of them being poor usage and lack of awareness of that Procedure. As exposed in the Paper, in the Republic of Croatia only 15% of the interviewed lawyers in the survey have used ESCP in practice,

²⁸https://dg-justice-portal-demo.eurodyn.com/ejusticeportal/content_court_fees_concerning_small_claims_procedure-306-de-hr.do?member=1

while regarding case law before European Court of justice, since the existence of the ESCP, there were only two cases before the Court. In relation to that, the other problem is that there is no sufficient information available in an easy and simple way about the Regulation to the citizens of the EU. Adequate way to inform citizens would be to find all necessary information about ESCP and forms on the pages of national courts of Member States as well as practical assistance in filling those forms. Also, the possibility of translation of the e-forms automatically while submitting forms via the same website where e-forms are filled out would be of great significance. Finally, although the ESCP should be less expensive for the parties, it turns out it can still be financially tough for the parties. Expenses which can arise for the party are expenses of translation, costs of a hearing (when it is held), lawyer expenses (if party had one) and court fees. The problem about the court fees is that the way of paying them and their amounts are different in every Member States. That should be harmonized in a way that there is one Tariff, applicable in every Member State, with court fees written only for ESCP, easily available to the parties which they can pay through online mobile applications which would offer direct calculation of court fees regarding claim value, but not more than 5 percent of the value of the claim.