

THE EU ACTION IN THE FIELD OF SMALL CLAIMS PROCEDURES AND THE LIMITS RESULTING FROM ITS IMPLEMENTATION IN THE NATIONAL LEGAL SYSTEMS¹

Adriano MAFFEO²

Flavia ROLANDO³

University of Naples “Federico II”

ABSTRACT: This article aims to illustrate, in the first part, the reasons that led the Union to adopt a regulation on small claims, focusing on the objectives set by the EU legislator in 2007 and 2015, through the amending regulation.

In the second part, the effects that such an instrument is intended to have on internal legal systems will be examined, highlighting in a critical light the limits that derive from the need to integrate the EU mechanism with national procedural rules.

KEYWORDS: European Small Claims Procedure; Cross-border cases; SCAN Project; Procedural autonomy; National procedural rules

SUMMARY: 1. INTRODUCTION.— 2. THE PURPOSE OF ESCP REGULATION AND ITS LIMITATIONS.— 3. THE PRINCIPLE OF NATIONAL PROCEDURAL AUTONOMY AS A LIMIT TO THE IMPLEMENTATION OF THE ESCP.— 4. CONCLUSIONS

¹ Paragraphs 2 and 4.1 were edited by Dr. Rolando, paragraphs 3 and 4.2 by Dr. Maffeo while the premise was edited jointly by the Authors.

² Assistant Professor in EU Law and Lecturer of EU Procedural Law at the University of Naples “Federico II”.

³ Post-Doc in EU Law at the University of Naples “Federico II”.

1. INTRODUCTION

The European Small Claims Procedure (hereinafter: ESCP) was introduced to provide EU citizens as well as Small and Medium Enterprises (hereinafter SME) with an agile tool to recover their cross-border claims efficiently and at an acceptable cost. However, this tool has not been used as much as expected and has remained rather unknown in practice. In this paper, we intend to analyse the changes that have taken place over time to improve this tool and we will try to assess whether the substantial lack of use of the ESCP is due to particular practical or procedural issues or whether it is merely a knowledge deficit (Para. 2).

Moreover, although the ESCP Regulation has introduced a uniform judicial remedy as an alternative to those that may already exist in the legal systems of the different Member States, its implementation cannot completely avoid the recourse to the rules of national procedural law.

Therefore, in this contribution it will be attempted to highlight how the national procedural law may affect the application of the small claims procedure (Para 3) and how the implementation of this instrument could, conversely, play an action of indirect harmonization of some national procedural rules (Para 4).

2. THE PURPOSE OF ESCP REGULATION AND ITS LIMITATIONS

In its proposal adopted in 2005 aiming at introducing the ESCP regulation⁴, the European Commission has underlined the need for simplified and accelerated small claims litigation. This need was first expressed by the European Council in Tampere 1999 and then endorsed by the European Parliament and by the Council. In this connection, in 2002 the European Commission started a wide-ranging consultation of both Member States and all the interested parties of civil society through the adoption of the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation⁵. The European Commission's approach, also shared with a meeting of experts of the Member States and generally

⁴ Proposal for a Regulation of the European parliament and of the Council establishing a European Small Claims Procedure presented by the European Commission, COM(2005) 87 final, legislative procedure 2005/0020 (COD). About this proposal see G. HAIBACH, "The Commissions proposal for a regulation establishing a European small claims procedure: an analysis", in *European review of private law*, 2005, 4, p. 593-601; X. E. KRAMER, "Harmonisation of Procedures in Europe: the proposal for a European Small Claims Procedure", in *Int'l Lis*, 2006, no 3-4, p. 109-115.

⁵ Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, COM (2002) 746 final. Through this Green paper, the European Commission gave an overview of the currently existing Small Claims procedures in the Member States and, considering the comparative study of how Member States deal with the relevant procedural issues, it formulated a number of questions concerning the desirable scope and features of a European instrument.

appreciated by them, was focused on adopting a regulation establishing a European Small Claims Procedure available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected. Moreover, this instrument was supposed to abolish the intermediate measures to enable the recognition and enforcement of a judgment given in another Member State.

First of all, it is interesting to remark that this European procedure has been adopted by way of regulation and not of a directive. In its proposal, the European Commission affirmed that the choice of that legal instrument was made considering that this type of legal act leaves the right of the Member States unaffected to continue the application of their domestic rules alongside the European Small Claims Procedure⁶; thus, a regulation encroaches much less on the national procedural systems than a Directive that would require an adaptation of national legislation to the standards set in that instrument. Furthermore, the European Commission highlighted that a regulation would ensure the uniformity and direct applicability of the procedure. Through this legislative instrument, in fact, a common minimum level in the efficiency of the recovery of small claims is ensured in all Member States, notably in those Member States where no simplified procedures were in place, at the same time it permits to Member States that have developed an even better-functioning domestic system to retain it. As we know, this proposal resulted in the adoption of the regulation 861/2007⁷.

If we look at the practice, we see that the expectations expressed by the Commission and by other European institutions have not been met: the European Small claims Procedure has not become an alternative tool but has remained in the background.

In 2011, the European Parliament called on the Commission to take steps to ensure that consumers and businesses are made more aware and make use of existing legislative instruments, such as the ESCP⁸. In the same year, a EP

⁶ See Para 2.2.2 of the Proposal for a Regulation of the European parliament and of the Council establishing a European Small Claims Procedure presented by the European Commission, cit.

⁷ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, GU L 199 del 31.7.2007, p. 1-22. For a comment on the Regulation establishing the ESCP see, between the others, P. CORTÉS, "The need for synergies in judicial cooperation and dispute resolution : changes in the European small claims procedure", in H. BURKHARD, X. E KRAMER (eds.), *From common rules to best practices in European civil procedure*, Hart Publishing, Oxford, 2017, p. 3791401; A. FIORINI, "Facilitating Cross-Border Debt Recovery: The European Payment Order and Small Claims Regulations", in *The International and Comparative Law Quarterly*, 2008, 2, p. 449-465; X. A. KRAMER, "The European Small Claims Procedure: Striking the Balance Between Simplicity and Fairness in European Litigation", in: *Zeitschrift für europäisches Privatrecht*, 2008, pp. 355-373; C. O. MARTINEZ, "The Small Claims Regulation: On the Way to an Improved European Procedure?", in H. BURKHARD, M. BERGSTRÖM and E. STORSKRUBB (eds.), *EU Civil Justice: Current Issues and Future Outlook*, Hart Publishing, Oxford, 2015, p. 123-140.

⁸ European Parliament resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters, (2011/2117(INI)), point 40.

Policy Department Study⁹ suggested that consumers wishing to bring a small claim may face several practical problems and highlighted some shortcomings of the ESCP Regulation, such as the threshold of 2,000 Euro, considered to be too low; the Claim form too complex and potentially to be completed in another language, i.e. that of the counterpart; the consumer's difficulty in fully understand the procedure in the Member State concerned, e.g. as to the costs involved and the length of the procedure¹⁰.

In the practice, according to a Eurobarometer Survey conducted in 2012 and published in 2013¹¹, only 12% of the respondents were aware of the existence of the ESCP, and an even smaller proportion of Europeans have used it: only 1%! But we can also point out that 69% of those who already used the ESCP were satisfied and 97% of all respondents who took businesses to court and won within the last 2 years (both domestically and cross-border) had their judgements enforced successfully¹².

Following the calls for action by the Parliament and considering the findings of the survey, the Commission announced its intention to issue a proposal to amend Regulation 861/2007¹³, especially taking into account that respondents said that they would be most encouraged to go to court in their country by the following factors: being able to conduct proceedings only in writing without physically going to court (37%), being able to conduct proceedings without having to hire a lawyer (31%), and being able to conduct proceedings online (20%)¹⁴.

In its proposal for amendments of the ESCP Regulation¹⁵, the European Commission affirmed that the problems were arising mainly from the deficiencies in the established rules, such as the limited scope of application in terms of low threshold as well as cross-border coverage. Moreover, the procedure was too cumbersome, costly and lengthy and does not reflect the technological progress achieved in the Member States' justice systems since the adoption of the Regulation¹⁶. Consequently, the European Commis-

⁹ F. ALLEWELDT, (ed.), *Cross-Border Alternative Dispute Resolution in the European Union*, Policy Department A Study, 2011.

¹⁰ See F. ALLEWELDT, cit., p. 81.

¹¹ Special Eurobarometer survey no. 395, <https://europa.eu/eurobarometer/surveys/detail/1045>.

¹² See the Summary of the Special Eurobarometer survey no. 395, p. 23 ff.

¹³ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, *Citizenship Report 2013 EU citizens: your rights, your future*, COM(2013) 269 final.

¹⁴ See p. 16 of the Citizenship Report 2013 EU citizens: your rights, your future, cit., where the Commission also envisaged the revision of the existing rules raising the threshold to EUR 25000.

¹⁵ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, COM/2013/0794 final, legislative procedure 2013/0403 (COD). About this proposal see J. P. CORTÉS, "Does the proposed European procedure enhance the resolution of small claims?", in *Civil justice quarterly*, 2008, 1, p. 83-97.

¹⁶ See p. 3 of the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007, cit., where the European Commission also pointed out that "Even

sion proposed as major changes: the extension of the scope of the Regulation to cross-border claims from 2,000 € to 10,000 €¹⁷; the extension of the definition of cross-border cases; the enhancement of the use of electronic communication, including for the service of certain acts; the obligation for courts to use videoconferencing, and other distance means of communication to conduct hearings and take evidence; providing a maximum cap on court fees at 10% of the value of the claim, excluding all interest, expenses and disbursements. At the same time, the European Commission highlighted its efforts in support of the dissemination on this European procedure¹⁸.

We know that some of these proposals were not approved by the European Parliament and by the Council during the legislative procedure. It is quite interesting to observe that, after an initial debate in the Council, the Parliamentary Commission decided to open interinstitutional negotiations. Then, the modified text has been adopted in first reading by the two institutions¹⁹.

About the monetary limit of the procedure, an early working document of the European Parliament made a distinction between ESCP against legal persons, available for claims up to 10000 €, and individuals, available for claims of less than 5000 €²⁰. In the final text approved by the European institutions²¹ the limit is 5000 € for claims against legal and natural persons.

where problems are related to the poor implementation of the current rules—as is the case to a certain extent with the problem of the lack of transparency—it must be acknowledged that the rules of the Regulation are not always clear. In order to address the problem of lack of awareness, the European Commission launched already several actions, for example a series of thematic seminars in the Member States to inform SMEs about this procedure, the publication of a practice guide and the distribution of teaching modules to train European entrepreneurs on this subject”.

¹⁷ In the Commission Staff Working Document - Executive Summary of the Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, SWD/2013/0460 final, the European Commission affirmed that “The threshold of €2,000 severely limits the availability of the procedure for SMEs, whose cross-border disputes with another business amount on average to €39,700. About 30 % of the claims of businesses have a value between €2,001 and €10,000. These businesses have to revert to national small claims procedures or—where there is no such national procedure in place for cross-border cases—to ordinary civil proceedings. Particularly in Member States which do not provide for procedural simplifications in small claims disputes, this leads to disproportionate litigation costs and lengthy proceedings, which in turn deter claimants from pursuing their claims.”

¹⁸ See p3 of the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007, cit.

¹⁹ The development of the legislative procedure related to the adoption of the Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation, (EC) No 1896/2006 can be observed in <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52013PC0794&qid=1623692786511>.

²⁰ See the Report on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for Payment procedure, A8-0140/2015, PE539.630v02-00, p. 9, Amendment 7.

²¹ 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 Regula-

Moreover, the proposed modification of the extension of the cross-border cases covered by the scope of the ESCP Regulation was not adopted. Also Art. 3, para. 1, has remained unchanged: “For the purposes of this Regulation, 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”²². The European Commission tried to include in the scope of the regulation also the case where the claimant and the defendant are both domiciled in the same Member State but they can choose the jurisdiction of a third Member State under the provision of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²³.

Also the cap on the fees has not been introduced as drafted by the European Commission. However, a principle in this regard has nevertheless been included in the Regulation: according to Art. 15a the court fees shall not be disproportionate and shall not be higher than the court fees charged for the correspondent national simplified court procedures.

The modifications relating to electronic communications, applied for the hearing and for the service, have substantially been adopted as well²⁴.

Any change has been introduced with regard to the language of certain part of the application form: in the ESCP application form the reasons for the claim, for instance, have still to be expressed in the language or one of the languages of the competent court or tribunal. In this regard, this is not a problem for most consumers, since under Regulation No 1215/2012 they can choose the court of their domicile as the competent court, and thus write in their own language or at least in the language of the country where they live. However, this may continue to be a problem for Small and Medium Enterprises (Hereinafter SMEs), which are instead bound to refer to the jurisdiction of the consumer or of the counterparty.

We can therefore see some improvements, although not all of those suggested by the Commission, but the modifications in the ESCP Regulation did not really increase the use of the ESCP. Five years later we are faced with a similar situation. Therefore, the question is whether the substantial lack in using the ESCP still lies in particular practical or procedural issues, which

tion (EC) No 1896/2006 creating a European order for payment procedure, GU L 341 del 24.12.2015, p. 1–13

²² About this point, see also p. 2 of Commission Staff Working Document - Executive Summary of the Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007, cit.

²³ 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, OJ L 351, 20.12.2012, p. 1–32. As an example of this circumstance, consider the case of two parties to a contract who are domiciled in the same Member State but the place of performance was established in another Member State: in such a case art. 7 of Regulation 1215/2012 may apply.

²⁴ See art. 8, 9 and 13 of ESCP Regulation as adopted in 2007 and as modified by Regulation No 2015/2421, cit.

are still present, or whether the limitation is merely a knowledge deficit. Perhaps these two explanations are both valid and the latter is in part dependent on the former.

With regard to practical or procedural issues²⁵, we can refer to the guidelines expressed by the SCAN Project²⁶ and endorse in particular some of them. Since claimants may have a problem filling in some parts of the application form in the language of the competent court, it may be appropriate to intervene on this point. Among the various possibilities that might overcome this difficulty, we believe that a mandatory requirement to accept a second language between the most common EU languages (e.g. English or French) could be introduced.

This choice could lead to difficulties in the management of the procedure by national courts. However, this problem, as well as, more generally, the inefficiency in the procedure's management determined by the fact that it is a rarely used procedure and, therefore, not well known even by judges, could be resolved by reserving the competence of ESCP to functionally-specialised sections of domestic courts. It will be also envisageable a modification of the text of the Regulations aiming at obliging courts to accept forms and documents by electronic means and to promote the digitalization of the procedure.

With regard to the knowledge deficit, we can only commend the Commission's continuing efforts to support projects that seek to raise awareness of this instrument²⁷. Indeed, dissemination initiatives remain the main tool to bring the ESCP to the attention of consumers and ESCPs. While it is true that the e-justice portal provides all the main information related to this instrument, it is also true that usually if a consumer searches on the web using simple combined keywords (e.g. damages, litigation, EU) there is no direct link to the pages related to this instrument. Maybe, if Member States were to introduce an analogous procedure for domestic disputes, the stakeholders would be more likely to use it. However, we have to remind that the EU cannot require Member States to do so, considering the limitation established by

²⁵ See, between the others, G. Y. NG, "Testing transborder civil procedures in practice: findings from simulation experiments with the European payment order and the European small claims procedure", in F. CONTINI, G.F. LANZARA, (eds.) *The circulation of agency in e-justice*, Springer, 2014, pp. 265-286 and for a focus on the Italian legal system see P. C. RUGGIERI, *La European Small Claims Procedure in Italia in Federalismi*. cit.

²⁶ See I. ABIGNENTE, R. TUCCILLO, "European Small Claims procedure. Guidelines for an effective response to the call for justice", in *i-Lex*, 2020, 1 and I. ABIGNENTE, F. G. SACCO, R. TUCCILLO, "Il Progetto SCAN", in F. ROMEO, F. GIUSEPPE SACCO (eds.), *Il procedimento europeo per le controversie di modesta entità. L'esperienza del progetto SCAN*, Naples, 2021.

²⁷ Also the SCAN Project contributed in the dissemination of the ESCP, specially with the creation of the ESCPlatform in <https://www.scanproject.eu/small-claims-platform-euscplatform/>. About the Platform see C. D'ONOFRIO, F. ROLANDO, "La piattaforma EUSCP: un nuovo strumento per migliorare l'accessibilità alla European Small Claims Procedure", in F. ROMEO F. G. SACCO (eds.), *Il procedimento europeo per le controversie di modesta entità. L'esperienza del progetto SCAN*, cit.

Article 81 TFEU²⁸ and especially that, as mentioned above, this instrument was adopted in this form in order not to affect national procedural autonomy.

3. THE PRINCIPLE OF PROCEDURAL AUTONOMY OF MEMBER STATES AS A LIMIT TO THE IMPLEMENTATION OF THE ESCP

The provision, pleonastically²⁹ set out in Article 4(1) TEU, that any competence not conferred on the Union remains, in principle, a competence of the Member States makes it possible to assert that the Union's competence is an exception to the national competences which constitute the norm and that its powers are derivative since they are based on the transfer of sovereignty voluntarily made by the Member States.

In the context of procedural law, however, identifying a clear dividing line between State and Union competences and placing the competence in one of the categories resulting from the framework of the Treaties is not an easy task.

This is because, although the adoption of the measures provided for by the Treaty on judicial cooperation certainly falls within the category of shared competences, there is a whole series of further activities which, even if not falling within those attributed to the EU and, therefore, apparently placed within the dimension of State competences, are nevertheless strongly influenced and conditioned by EU law. However, in principle, in the absence of a specific conferral of competence on the Union to adopt uniform procedural rules and in the absence of codification of those provisions in the body of the Treaties, the Member States retain a high degree of autonomy in organising their internal procedural systems³⁰.

Therefore, it is possible to agree with the assumption that the exercise of the Union's competences is based on the fundamental contradiction that, on the one hand, the nature itself of the EU order imposes the requirement of an intrinsic primacy, but, on the other hand, the implementation of this requirement presupposes the concurrence and the use of the instruments of national law³¹. In fact, since the Union does not have direct and autonomous executive power within the Member States, the application of EU law is in any case largely left to the national authorities, which will have to resolve,

²⁸ According to Art. 81 TFEU, The Union shall develop judicial cooperation in civil matters having cross-border implications.

²⁹ G. STROZZI, R. MASTROIANNI, *Diritto dell'Unione europea. Parte istituzionale*, Torino, 2013, p. 68.

³⁰ G. GRECO, "A proposito dell'autonomia procedurale degli Stati membri", *Riv. ital. dir. pubbl. comunitario*, 2014, p. 1 ss.

³¹ In this sense, see D. SIMON, *Les exigences de la primauté du droit communautaire: continuité ou métamorphoses*, *Mélanges Boulouis*, Paris, 1991, p. 481; and P. GIRERD, « Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres », *Rev. trim. droit. eur.*

according to the rules in force in their own legal system, the complex issues of jurisdiction, the legitimacy of the parties to bring and resist legal proceedings, the assessment of limitation and prescription periods, all aspects—to name but a few—connected to procedural autonomy.

A corollary of this is that, as stated by the Court of Justice in the *Rewe* judgment, in the absence of harmonised rules, «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 law»³². This means that «the rights conferred by Community law must be exercised before the national courts in accordance with the rules of procedure laid down by national law»³³.

This implies a manifest decentralization of the application of EU law, which is therefore entrusted to the national courts in the absence of harmonization of procedural rules and remedies available in the event of infringement of rights³⁴. However, the principle of procedural autonomy of the Member States, like other fundamental principles and rights deriving from EU law, cannot be considered absolute and is therefore also subject to a necessary balancing exercise³⁵.

This balancing operation is in practice carried out through the application of some fundamental principles such as that of equivalence between judicial remedies aimed at protecting legal positions deriving from national law and legal positions of European derivation, as well as that of effectiveness of the instruments available in the domestic system.

Although these principles can sometimes serve as an instrument of indirect harmonization³⁶ of national procedural rules, the limitation imposed by the procedural autonomy of the member States may, nevertheless, also constitute a limitation on the application of those regulatory instruments developed at the European level for the purpose of standardizing and simplifying certain national procedures.

In this perspective, the case of the ESCP is emblematic.

³² ECJ, 13 December 1976, *Rewe*, EU:C:1976:188, pt. 5.

³³ ECJ, 13 December 1976, *Comet*, EU:C:1976:191, pt. 15.

³⁴ Of decentralized application also speaks K. LENAERTS, “The Decentralised Enforcement of EU Law: The Principles of Equivalence and Effectiveness”, U. LEANZA, A. TIZZANO, T. VASSALLI DI DACHENHAUSEN, R. MASTROIANNI, P. DE PASQUALE, R. CICCONE (eds.), *Scritti in onore di Giuseppe Tesauero*, Naples, 2014, p. 1057.

³⁵ R. MASTROIANNI, “Diritti dell’uomo e libertà economiche fondamentali nell’ordinamento dell’Unione europea: nuovi equilibri?”, L.S. ROSSI (eds.), *La protezione dei diritti fondamentali. Carta dei diritti UE e standards internazionali*, Naples, 2011, p. 359. On the configurability of “absolute” rights, see A. TANCREDI, “L’emersione dei diritti fondamentali “assoluti” nella giurisprudenza comunitaria”, *Riv. dir. int.*, 2006, p. 644 ss.

³⁶ In this sense, A. MAFFEO, *Diritto dell’Unione europea e processo civile nazionale*, Naples, 2019, p. 37 ss.

Even if Regulation 861/07 is careful to regulate in detail the different steps of a uniform procedure, which is an alternative to the procedures for small claims already existing in the various national legal systems, and which is informed by extreme simplicity, being substantially written and structured to be carried out through the compilation and exchange of specific forms annexed to the regulation which introduced it, the ESCP fails to completely detach from the procedural law of the Member States.

In fact, despite the fact that it is a “complete” procedure³⁷, in order to correctly implement the provisions of the ESCP Regulation, it is sometimes necessary to refer to the procedural rules of each national legal system. This happens, for example, with regard to activities connected with the service of the forms to the counterparties³⁸, the payment of fees connected with the introduction of the dispute, the appeals³⁹, as well as the determination of legal costs.

With reference to this last aspect, it is interesting to note that the regulation merely provides that «the unsuccessful party shall bear the costs of the proceedings»⁴⁰ specifying that they «should be determined in accordance with national law» and clarifying that «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 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»⁴¹.

In this context, problems could arise in the application of the principle described above where, for example, in the event of only partial success of the claim, national law considers the parties’ loss to be reciprocal, allowing in this case for the offsetting of costs. The problem, moreover, has been addressed in the recent *Jonsson* case⁴² in which the ECJ clarified that the regulatory provision is to be understood as referring only to the hypothesis in which the party is totally successful, and therefore, as the regulation only

³⁷ This is how define it P. FRANZINA, “Regolamento (CE) n. 861/2007 del Parlamento europeo e del Consiglio, dell’11 luglio 2007, che istituisce un procedimento europeo per le controversie di modesta entità. Sub. Art. 81 TFUE”, in F. POCAR, M. C. BARUFFI (eds.), *Commentario breve ai Trattati dell’Unione europea*, Padova, 2014, p. 580.

³⁸ In the silence of the Regulation, for example, the provisions and the Italian procedural practice lead to the conclusion that the burden of the service of the form, together with the part filled in by the judge, is on the plaintiff, but it is not excluded that the procedural rules in force in another State regulate this task differently.

³⁹ Pursuant to art. 17 of the Regulation, an appeal against a judgment issued at the end of the ESCP shall be admissible if permitted by the national law of the court seised and in accordance with the formalities provided for by the national procedural law.

⁴⁰ ESCP Regulation, art. 16.

⁴¹ ESCP Regulation, recital 29.

⁴² ECJ, 14 February 2019, C-554/17, *Jonsson*, EU:C:2019:124.

operates a partial harmonization of the internal procedural rules, the judge is free to allocate costs according to the rules established by national law⁴³.

It should be added that, in some cases, application problems and doubts regarding coordination with internal procedural rules may also arise from the absence of harmonized concepts. An emblematic example of this can be found in the *ZSE Energia* case⁴⁴ in which the Court was called upon to clarify whether or not the notion of «party» mentioned in the ESCP Regulation could include the intervener who had applied to participate in the proceedings according to national procedural rules.

The question, moreover, may be particularly important when, as happened in the above-mentioned case, in which only the intervener was habitually resident in a Country other than that of the court before which the case was brought, the adherence to one solution rather than another could have the effect of making the ESCP admissible or not.

In fact, a condition for its application is that at least one of the parties must be domiciled or habitually resident in a different Country from that of the court hearing the case.

The Court's ruling resolved the interpretative doubt by excluding the applicability of the ESCP where the only person domiciled in a different State is the intervener, considering that the general structure of the Regulation, and the implied requirements of simplicity and rapidity, reveal the absence of a provision for interventions with reference to which national law is therefore irrelevant. Nevertheless, the analysis of the procedure as a whole, also in the light of what has been highlighted above, shows that domestic procedural law still plays an important role by completing and sometimes setting the conditions through which the judicial protection pursued by European provisions can be made effective.

In view of the above, it is self-evident that in the absence of a broader and more comprehensive harmonization of national procedural rules, at least as far as cross-border litigation is concerned, the ESCP may encounter a limitation in national procedural law, which must necessarily be referred to for the concrete implementation of the ESCP instrument.

4. CONCLUSIONS

4.1. The ESCP could be an instrument that facilitates the resolution of small claims and in particular both consumers and SME could benefit from

⁴³ Nevertheless, it cannot be excluded that the concrete application of national procedural law, although permitted by the regulation, could in practice be limited by the general principles of equivalence and effectiveness if it were to have the effect of leading the interested parties to renounce the European procedure, requiring the plaintiff, where he has been largely successful, to sustain his procedural costs or a substantial part of them.

⁴⁴ ECJ, 22 November 2018, C-627/17, *ZSE Energia*, EU:C:2018:941.

it, the first ones to solve their small claims arising from the purchase of goods and services in the EU, and the second ones to supply or serve a market outside of their own country. In reality, as we have seen, this tool has not been widely used, both for practical and procedural issues and because of an awareness deficit.

Small practical issues prevent the easy use of this tool, first of all some differences in the lodging of the application form, by post or by any other means of communication, since each Member State establishes the acceptable means. Also the costs of the procedure and the competent Court are different, since they depend on the national jurisdictional system. Therefore, in the perspective of a future modification of the text of the Regulations, as suggested by the SCAN Project, it could be established that national courts are obliged to accept forms and documents by electronic means and foster the digital handling of the procedure. Furthermore, the difficulty encountered in filling in the application form also with sections directly translated into the language accepted by the competent Member State, which particularly interests SME, could be resolved by obliging Member States to accept at least one other of the most common languages, i.e. English or French.

The lack of use of the ESCP may also have another negative consequence its limited knowledge by national judges, who rarely have to apply the procedure. For this reason, reserving the competence of ESCP to functionally-specialised sections of domestic courts could also improve efficiency in the management of the procedure, especially if a second language, such as English or French, could be employed in the ESCP procedure.

Perhaps the limited use of this procedure is in part dependent on the above-mentioned issues. Then, the concrete feasibility and efficiency of this tool, together with the ongoing effort to disseminate it among stakeholders, could be the best way to facilitate its diffusion.

4.2. An implementation of the use of the ESCP instrument, despite the limitations and difficulties highlighted above, could also trigger a positive process and accelerate that process of harmonization of national procedural rules⁴⁵ which could now constitute an obstacle to the uniform application of the instrument.

The necessary complementarity between national procedural rules and the ESCP Regulation is, in fact, likely to trigger a relationship of mutual osmosis between EU law and national procedural law, as a result of which the latter can be strongly “contaminated” by principles, theories and concepts present in the European legislation but unknown to the domestic system.

⁴⁵ M. STORME, “Closing Comments: Harmonisation or Globalisation of Civil Procedure?”, X.E. KRAMER, C.H. RHEE (eds.), *Civil Litigation in a Globalising World*, L’Aja, 2012, p. 379, affirms that «the process of harmonisation and unification of procedural law on European level appears to be an irreversible trend».

Taking the Italian legal system as an example, the ESCP could, in the future, be the key to open the national legal system, at least with reference to proceedings of more modest value, to the less onerous provision on the burden of proof accepted by Regulation 861/07.

In fact, the ESCP Regulation relieves the plaintiff of the burden of providing the legal elements on which he bases his claim, requiring only a mere description of the fact in dispute. It requires that the plaintiff must provide a «description of the evidence» that he intends to offer in support of his claim, attaching, where appropriate, «any relevant supporting document»⁴⁶.

Therefore, the reference to the mere «description of the evidence», in the absence of clarifications by the European legislator or the Court of Justice, seems to mean that the plaintiff does not necessarily have to prove his or her right in documentary form, but may, as in the case of the German enforcement procedure, limit himself or herself to a mere description of the evidence in support of his or her claim.

This interpretation of the rule is, furthermore, confirmed by the provision of art. 4(4) of Regulation 861/07 according to which if «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».

In conclusion, the analysis in this paper demonstrates that the ESCP is a tool with a great potential and that, if its application is maximized by increasing information and awareness among practitioners, it could be fully exploited and it could accelerate the process of harmonization of some national procedural law rules.

⁴⁶ ESCP Regulation, art. 4.

