

# Building Interoperability for European Civil Proceedings Online

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**EUROPEAN PAYMENT ORDER and EUROPEAN SMALL CLAIM  
ONLINE SIMULATION UK - ITALY  
Regulations (EC) No. 1896/20061 and 861/20072**

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# **EPO and ESCP simulation UK- Italy claim Regulations (EC) No. 1896/2006<sup>1</sup> and 861/2007<sup>2</sup>**

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<sup>1</sup> [https://e-justice.europa.eu/content\\_european\\_payment\\_order-41-eu-en.do](https://e-justice.europa.eu/content_european_payment_order-41-eu-en.do) Last accessed 04.16.2012. The simulation (in both parts) was conducted on 7-9 February 2012. Since then, the e-justice portal has changed.

<sup>2</sup> [https://e-justice.europa.eu/content\\_small\\_claims-42-en.do](https://e-justice.europa.eu/content_small_claims-42-en.do) Last accessed 04/17/2012.

<sup>3</sup> This essay is based on 2 earlier reports produced by Gar Yein Ng and Marco Mellone. With thanks to Marco Mellone and Francesco Contini for comments.

## **Introduction:**

The purpose of conducting these simulations was to gain some initial insights into how well trans-border civil claims at the EU level operate. The first simulation was for the European Small Claims Online Procedure (ESCP)<sup>4</sup> and the second was for the European Payment Order (EPO)<sup>5</sup> (both of these have been described in some detail elsewhere in this project/book). This essay focuses on one actor in particular for both simulations: that of the claimant in relation to both of the proceedings, in terms of specific problems encountered in completing the forms, and what to expect from the final outcome itself.

## **Methodology:**

The simulations followed flow charts that were designed to lay out the steps provided for by the two regulations. This was done by going through each step described by the e-justice website for the EPO and ESCP proceedings. The flow charts provide a picture of how the steps should work, and the simulation describes how it works. There were two parts to both simulations. One person follows the procedures as if making a claim under EPO and ESCP. This required the person to fill out the forms online, following the instructions on the one hand, and describing the process based on the flow chart on the other, at the same time as describing any obstacles or difficulties (or not) to filling out the forms. The other person followed the procedure once the claims arrive at the relevant court (in this case, the Justice of the Peace in Bologna). In a similar way, this person had to follow the procedure in court. This required an in person presence at the Justice of the Peace in Bologna, to interview and ask how this procedure was dealt with, also in light of the steps laid out in the flow chart, according to the Regulations. This procedure was further described in the reports.

A final section of the reports, “problems” highlights the main obstacles to following the steps of the procedures by both parties. These are not grouped or clustered in any particular way, but are there only to stimulate a discussion on the interoperability problems from the users points of view. The ones for EPO are a starting point for further discussion in light of the broader project. However, they do form the basis for this essay, as they highlight the main difficulties for the claimant in this process. The reason for this focus is that these procedures are essentially there to serve claimants, rather than courts. In order to better advise the further technical development of the ESCP and EPO, it is best that they develop it around consumer needs.

The essay will look first at the problems for claimants with filling out the forms for both procedures, as the problems are common to both, and then with the problems after the claims are filed at court. This essay will not go in depth into either process, as they are described in the larger reports. Where the simulation showed similar problems for the same areas, they have been written about in one section; where the simulation showed different problems for same areas, I have given separate headings for the two different procedures.

## **Claimants under EPO and ESCP: main problems**

### **Introduction:**

Firstly, there is a problem of expectations generated by this procedure. It is somewhat unclear from the e-justice portal what EPO consists of: whether it is only a summary proceeding to confirm a claim, or if it

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<sup>4</sup> This was conducted October 2011

<sup>5</sup> This was conducted February 2012. Since both simulations, the websites have had some slight alterations, but do not actually affect the insights in this essay.

includes enforcement. This actually is not a problem for the small claims procedure. It is clear that you have a claim for a certain amount that falls within the ESCP. What may not be altogether clear is the difference between the two and how a claimant should choose the appropriate procedure, especially if the amount claimed falls under the ESCP, but would be faster under a summary proceeding such as EPO. Secondly, there is an issue of how easy it is to fill out the form itself. EPO is a friendlier site to fill than that of ESCP based on the experience of the simulation. However, issues such as deciding jurisdiction if you are not a lawyer, identifying attackable assets, calculating interest (if you are not a banker), describing documents that you have in support of your claim, and any additional information in Italian are stumbling blocks to doing this without legal representation. The problem is at which point do you give up and at what point is it worthwhile pursuing this. It is easy to forget whilst filling this form in English that at some point you need to be writing in Italian. Thirdly, whilst not a large problem by itself, there is a technical difficulty with the website- more so with the ESCP than EPO, but with EPO there were other problems.

Lastly, communication with the court appears to be a problem, in terms of connectivity, and what to do after the ESCP application has been received or EPO has been issued. There appears to be no institutional support, although EPO does not claim that you do not need a lawyer in the same way that ESCP claims, technically both websites could advise you to find a lawyer, and maybe give a list of lawyers able and willing to give a service on this procedure.

## 1. Expectations

This appears to be an EPO problem only. The opening page starts with an introduction to EPO, and outlines generally how the procedure works. What is interesting is that enforcement appears to be a separate procedure:

“A copy of the European Payment Order, and if necessary a translation, must be sent to the enforcement authorities of the Member State where it needs to be enforced. Enforcement takes place in accordance with the national rules and procedures of the Member State where the European Payment Order is being enforced. For details on the enforcement, please consult the [relevant section](#)”<sup>6</sup> This is interesting because the “intelligent reader” (not necessarily a lawyer) could expect this to be a “one stop shop” given its name “European Payment Order”, and its nature as a “summary proceeding” could lead one to believe that enforcement could be done at the same time. It is not assumed that you will need a separate proceeding, as according to the “relevant section” link above. You only need this if judgment has not been complied with:

“If a court has decided that someone must pay you an amount of money or undertake a particular action (judgment) and this has not happened or you have not received the money, you may want to ask the court to enforce the decision.”<sup>7</sup>

This may serve as a warning to the user that EPO may not be enough to claim your rights, and that it could go further. However, at another part of the ejustice portal<sup>8</sup> it is stated that:

“The judicial decision obtained as a result of this procedure will circulate freely in the other Member States; the creditor will not have to undertake intermediate steps to enforce the decision abroad.”

<sup>6</sup> [https://e-justice.europa.eu/content\\_european\\_payment\\_order-41-en.do](https://e-justice.europa.eu/content_european_payment_order-41-en.do) last accessed 4/16/2012

<sup>7</sup> [https://e-justice.europa.eu/content\\_enforcement\\_of\\_judgments-51-en.do](https://e-justice.europa.eu/content_enforcement_of_judgments-51-en.do) last accessed 4/16/2012

<sup>8</sup> [http://ec.europa.eu/civiljustice/simplif\\_accelerat\\_procedures/simplif\\_accelerat\\_procedures\\_ec\\_en.htm](http://ec.europa.eu/civiljustice/simplif_accelerat_procedures/simplif_accelerat_procedures_ec_en.htm) last accessed 4/16/2012

With several clicks of the mouse, you may find conflicting information already as to what to expect from this procedure (i.e. whether you will be paid the amount under the judgment with or without enforcement, if you win the claim).<sup>9</sup>

## 2. Ease of form filling

The first form that must be filled is Form A to make the claim for both EPO and ESCP. When you click on this, it leads to a map, and you click on the country you wish to file the claim in.

### a. Initial steps:

The information given on both sites when you click Italy tells you how to communicate with the court (paper format-post), the language you need to do it in (Italian), and how long it will take (in this case, no more than 30 minutes). It also helpfully tells you that data will be saved in case of inactivity for more than 30 minutes (which is actually not always true). From here, there is already a problem of language. If you do not read or write in Italian you may get into trouble with filing the claim. If the information required in this form is very basic, one may be able to use internet translation tools to make the claim; if more information is required in clear legal language, this maybe more problematic. This goes to who this procedure is really aimed at. If it is aimed at repeat players with a constant practice of cross-border transactions, it is possible that their knowledge of local language would be sufficient to fill out the form. If however it is a one shotter, someone who rarely conducts cross border transactions, it may be more difficult.

### b. Scope and Jurisdiction:

Here there are two issues: what type of claims you can make (scope), and to which courts (jurisdiction). On the types of claim you can make:

#### **Scope EPO/ ESCP:**

There is actually no monetary cap or limit on the amount possible to be claimed for EPO (unlike with the ESCP- 2000 euro). The only reference to monetary limitation is which court you choose to apply for the EPO; less than 5000 euro you must go to the Justice of the Peace, above that you must go to the ordinary tribunal. There is nothing here about rejecting complex or variety of cases, and therefore probably no limitation on the types of evidence you may submit. However, this is an area which will require further research.

In terms of types of claim:

“If the application concerns a claim against a consumer relating to a consumer contract, it must be lodged with the competent court of the Member State in which the consumer is domiciled. In other cases, the application must be lodged with the court having jurisdiction in accordance with the rules of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Information on the rules of jurisdiction can be found on the European Judicial Atlas”

Furthermore<sup>10</sup> :

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<sup>9</sup> During simulation, this was indeed problematic for the claimant. However, as it is not within scope of this essay to discuss enforcement proceedings outside the EPO proceeding, you are directed to read the report for more details on this issue.

<sup>10</sup> [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l16023\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16023_en.htm) last accessed 4/16/2012

“The European order for payment procedure applies to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal. A "cross-border case" is one in which at least one of the parties is domiciled or habitually resident in an EU country other than the country of the court hearing the action. The regulation applies to all EU countries except Denmark.

The procedure does not extend to revenue, customs or administrative matters or the liability of a state for acts and omissions in the exercise of state authority ("*acta iure imperii*").

The following are also excluded:

matrimonial property regimes;

bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

social security;

claims arising from non-contractual obligations, unless they have been the subject of an agreement between the parties or there has been an admission of debt or they relate to liquidated debts arising from joint ownership of property.”

It is possible to follow these rules quite easily. If your claim fits within one of these excluded areas, then you are excluded from the scope of EPO procedure. Further rules of scope are found in the form itself in section 4 of EPO form:

“4. Cross-border nature of the case

For you to be allowed to use this European order for payment procedure, at least two of the boxes in this field must refer to different States.”

This is easy, and somewhat different from ESCP, where they give you a box and you fill in the story of the relationship and the nature of the dispute, and therefore how it is a cross border case as well as a legitimate “dispute” for the purposes of the ESCP. EPO gives you a choice of countries from the EU, so you choose where you are domiciled and where the defendant is domiciled and the jurisdiction chosen.”

If you can choose neither, then you are once again excluded from scope of the EPO.

For **the ESCP**, the same regulation for scope applies as for EPO. However, the form offers only one choice for scope, and does not exclude any matters in the same way as EPO does. In describing the cross border nature of the case, the claimant needs to show the cross border nature of transaction that took place, i.e. she/he ordered goods and/or services from Italy.

The scope of this is however not clear. What if he was (living) in Italy when he ordered the goods/services, and discovered a breach of contract/tort only after he/she had left Italy etc. This is an added complexity and it is unclear what solutions they have to offer to the European trader.

**Rules of jurisdiction EPO:**

“The basic principle is that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of his/her nationality. Domicile is determined in accordance with the domestic law of the EU country where the matter is brought before a court. If a party is not domiciled in the EU country of the court considering the matter, the court is to apply the law of another EU country to determine whether the party is domiciled in said state. In the case of legal persons or firms, domicile is determined by the country where they have their statutory seat, central administration or principal place of business. In the case of trusts, domicile is defined by the court that is considering the case by

applying its own rules of private international law <sup>11</sup>.<sup>11</sup>This leaves this claimant to assume that the court seized is that of the defendant.

For the specific claim made in Italy during the simulation, a link exists to Italy's rules of jurisdiction, making a difference between "magistrates court" and ordinary tribunals (for the non-lawyer, it will not be clear that Giudice di Pace is the same as magistrates court). This has changed since the simulation took place in February 2012, and it is now called "Justice of the Peace" instead of Giudice de Pace (although it still may not be clear that this is the same as a magistrates court however).

It was assumed that because the claim was 1000 euro only and it is for moveable property (i.e. money), and it does not fall under "claims relating to companies, banks and securities firms and loans for public works within the meaning of Section 1 of Legislative Order No 5 of 17 January 2003", that the claim should go with the "magistrates court".

Whilst this is dealt with in preliminary activities of the flow chart, Section 3 of the form also asks for grounds for jurisdiction and gives a list of possible reasons for jurisdictions. This is a bit odd given the information given earlier about using the defendants domicile as the basis for jurisdiction (and indeed it is the first one on this list). However, if one is uncertain, one may choose 5 out of up to 14 possibilities for grounds of jurisdiction, the last one being "other":

["01 Domicile of the defendant or co-defendant](#)

[02 Place of performance of the obligation in question](#)

[03 Place of the harmful event](#)

[04 Where a dispute arises out of the operations of a branch, agency or other establishment, the place in which the branch, agency or other establishment is situated](#)

[05 Domicile of the trust](#)

[06 Where a dispute arises concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, the place of the court under the authority of which the cargo or freight is or could have been arrested](#)

[07 Domicile of the policyholder, the insured or the beneficiary in insurance matters](#)

[08 Domicile of the consumer](#)

[09 Place where the employee carries out his work](#)

[10 Place where the business which engaged the employee is situated](#)

[11 Place where the immovable property is situated](#)

[12 Choice of court agreed by the parties](#)

[13 Domicile of the maintenance creditor](#)

[14 Other \(please specify\)"](#)

Having identified the correct country, and the correct type of court, one must then find the address of the court to which one must send one's form. One problem identified during the filling out of the ESCP form (that was not encountered in EPO) was the address given of the court with jurisdiction over the simulated case, was wrong. Without correct addresses, there is no point in going further with the claim, let alone the project in general.

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[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33054\\_en.htm#KeyTerms](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm#KeyTerms) last accessed 4/16/2012

It is suggested that more guidance to select the appropriate jurisdiction maybe helpful to the lay claimant. This could be in the form of FAQ section instead of more detailed regulations and links, which may open up the user to more confusion.

**Rules of Jurisdiction ESCP:**

The Court of the domicile of the defender is the main criteria of jurisdiction but in some cases it could be incorrect. This happens for instance when the Court of the where immovable property must be seized is situated or the Court chosen by the parties in the agreement.

Moreover, the criteria of jurisdiction's function of the ESCP form is to determine if an Italian Court is competent rather than a French Court, but in order to determine if the Italian Court of Bologna or Modena is competent other internal rules shall apply. Whilst this is for the High Council to decide, and internal rules on territorial competence contain other criteria of connection which are still interpreted not in the European way and that can cause complexity, there is actually explanation of which court to direct your application to within the form itself.

Furthermore, deciding jurisdiction is a bit trickier under ESCP. Here the claimant needs to explain why the forum he has chosen should capture jurisdiction. To a lawyer, these terms and criteria are quite clear. However, if you click on the links within the form to see the glossary for some of the legal terms employed, you will see that none of the terms within from s. 4.1 to s. 4.7 have been explained and the other website on rules of jurisdiction for other types of cases is also not helpful here. It takes you back to an index of proceedings for different types of claims and jurisdictions. This is not easy for a lay person to do. Again, everything depends on target audience and who would want this service and their experience and connections.

**c. *Identifying attackable assets and representatives:***

**Assets:**

The first divergence from the guidelines of EPO and ESCP from the flow chart is on the preliminary activities of the debtor/claimant, in the "basic investigation on the debtor and the identification of attackable assets". It is a bit unclear what this means beyond identifying who is the debtor. However, identification of attackable assets is not easy if you are foreign, and do not know how to investigate this. You would probably require a lawyer or court order to investigate private details of any possible assets. There are also issues of privacy involved, in terms of how far an individual citizen may investigate the assets of another citizen, especially of another country.

This step is logical from a procedural perspective so that the claimant is not wasting time suing someone or an entity that is bankrupt or has no valuable assets to cover the claim should the claimant win. However, as logical as this is, whether or not a defendant has attackable assets, should not detract from the fact that a claimant may have rights against him/her, and may indeed be able to enforce their claims in part, and/or over time. Another problematic item within both flow charts is "notice of warning". This does not appear in any of the guidelines or the forms. This is apparently a basic courtesy to the alleged debtor that if he/she does not pay the debt owed within a certain amount of time, then the ESCP or EPO will be filed against him/her.

**Persons:**

Section 2 of the EPO and sections 2-3 of ESCP forms require identification of actors in the proceeding, including claimant, defendant and representatives. Identifying claimant and defendant are not difficult. However, identifying representatives in the EPO form appears to be somewhat complicated. The ESCP

form does not require this information in any special format, only a name and any other contact details if known (possibly because ESCP claims that one does not need representation for this proceeding). Section 2 of EPO states that:

“The box [Identification code] should refer, where applicable, to the special number which solicitors have in certain Member States for the purposes of electronic communication with the court (see Art. 7(6), second subparagraph, of Regulation (EC) No 1896/2006), to the registration number for companies or organisations or to any applicable identification number for natural persons. The box [Other details] may contain any other information that helps to identify the person (e.g. date of birth, position of the named person in the company or organisation concerned). If there are more than four parties and/or representatives, please use field [11].”

If you only fill the parts for claimant and defendant, it is quite easy. Otherwise you need to ask your representative as well as that of the defendant for the details requested about them in this field. It refers to identification codes, but gives no link as to where you may find such codes. This can be difficult, and it is unclear how important this information is until the court responds to the form.

#### *d. Court fees*

“... you may inform the court by what means you intend to pay the court fees. Please note that not all methods of payment in this field are necessarily available at the court to which you are making this application. You should verify which method of payment will be accepted by the court. You can do this by contacting the court concerned or by consulting the website of the European Judicial Network in civil and commercial matters ([http://ec.europa.eu/civiljustice/homepage/homepage\\_ita\\_en.htm](http://ec.europa.eu/civiljustice/homepage/homepage_ita_en.htm)). If you choose to pay by credit card or to allow the court to collect the fees from your bank account, you should give the necessary credit card/bank account details in Appendix 1 to this form...”

This is the first major obstacle for both procedures: How to pay. As with the ESCP simulation, the information on how to pay is in Italian (In recent changes to the EPO site, there is a section in English now as well, but it is not very useful). This is a problem of access to information in relevant language as well as important information for the case to be processed. In the simulation bank transfer was chosen, though we know this to be impossible.

Further research has revealed that there is actually the possibility to pay court fees, by paying on a post account **owned by the Tesoreria Provinciale di Viterbo**.<sup>12</sup>

The court fee can be paid online through [www.poste.it](http://www.poste.it), but the website requires a registration and it is available just in Italian. The registration procedure is not so simple, and a mobile phone is required to get a SMS with activation code.

More late research has revealed that the payment can be also carried out by international bank transfer, under specific invitation by the seized Court<sup>13</sup>.

Unfortunately, the Italian State did not transmit this kind of information to the Commission and, therefore, no information on this issue appears on the ATLAS web site. Therefore, that is quite problematic if you are claiming from abroad and you don't know how to pay the Court's fees.

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<sup>12</sup> See also <http://www.contribuounificato.it/esenzioni.html> last accessed 4/16/2012

<sup>13</sup> See the Communication of the Italian Ministry of the Justice [http://www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.wp?previousPage=mg\\_16\\_1&contentId=SDC391384](http://www.giustizia.it/giustizia/it/mg_1_8_1.wp?previousPage=mg_16_1&contentId=SDC391384).

It is also possible that the court will send more information on court fees in its further communication with the claimant if it identifies this as a problem with the form itself.<sup>14</sup>

One other common difficulty for both of these procedures is the guarantee of privacy of bank details once a claimant has submitted them. This is an interesting legal issue, but easy to solve with a classical statement, such as the data provided with this form will be used exclusively for the procedure. But they have to do it and they haven't since it has been running. Privacy on bank data details is actually a problem. According to the European legal framework, each Court should expressly state the treatment applied to these data. The issue is then, why they haven't.

*e. Calculating interest*

Section 7 of the EPO and ESCP forms deal with interest rates; during the simulation, random numbers were entered in order to move forward with filling out the form.

Again this is an impossible task for anyone not versed in calculating interest (i.e. lawyer/accountant/banker). Two options were randomly chosen. However, reading this means, even though it is written in English, appears to be somewhat unintelligible to the average user. The guidelines really are not helpful in this respect. This is another area in which more information or offer of guidance could be given by the website itself.<sup>15</sup>

The calculation of interest is a real problem outside of these complicated instructions. First of all, there is a problem of applicable law: the citizen should assess which is the applicable law to the relationship, since the calculation of the interests is a problem of "substantial law" and not of "procedural law". Of course, the assessment of the applicable law is a difficult operation which is based on a specific EU regulation and on specific juridical criteria. Secondly, the material calculation can be difficult. Normally, an Italian lawyer calculates interest on the basis of specific software which is also available on internet. I

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<sup>14</sup> During simulation other problems with charging court fees were identified in terms of how to receive them without creating the danger of inappropriate behavior, such as corruption or bribery. Please see report for more details, as this is also not a problem for the claimant per se.

<sup>15</sup> "If interest is demanded, this should be specified for each claim as identified in field [6] in accordance with the codes indicated on the form. The code must contain both the relevant number (first row of the codes) and the letter (second row of the codes). For instance, if the interest rate has been agreed by contract and covers annual periods, the code is 02A. If interest is demanded up to the decision by the court, the last box [to] should be left blank. Code 01 refers to an interest rate laid down by statute. Code 02 refers to an interest rate agreed by the parties. If you use Code 03 (capitalisation of interest), the amount indicated should be the basis for the remainder of the term to be covered. Capitalisation of interest refers to the situation where the accrued interest is added to the principal and is taken into account for purposes of calculating further interest. Please note that in commercial transactions as referred to in Directive 2000/35/EC of 29 June 2000 on combating late payments, the statutory interest rate is the sum of the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ('the reference rate'), plus at least seven percentage points. For a Member State which is not participating in the third stage of economic and monetary union, the reference rate referred to above is the equivalent rate set at national level (e.g. by the national central bank). In both cases the reference rate in force on the first calendar day of the half-year in question will apply for the following six months (see Art. 3(1)(d) of Directive 2000/35/EC). The "base rate (ECB)" refers to the interest rate applied by the European Central Bank to its main refinancing operations."

frankly doubt that the existence of this software is known by all citizens and above all by a foreign citizen.

The European Union should facilitate the calculation of interests by providing common software which contains all the data of the interest rates of each EU country. This should be something they can do on their e-justice website.

**f. *Calculating Costs (if applicable) (EPO only)***

If reimbursement of costs is demanded, these must be described using the codes indicated on the form. The box [specification] must be used only for code 02, i.e. when reimbursement of costs other than court fees is demanded. These other costs could include, for instance, fees of a claimant's representative or pre-litigation costs. If you request reimbursement of the court fees but you do not know the exact amount, you must fill in the box [Code] (01) but you may leave the box [Amount] blank and it will be filled in by the court.

During simulation, only "court fees" were claimed and left the rest blank. As with the ESCP, we assumed in this simulation that a lawyer was not needed. It says at the beginning that once you submit the form, the procedure leads its own life, and the claimant is not required in court. But unlike ESCP, EPO does not tell you that you do not need a lawyer, and you can have more than one. If it costs a fee to identify attackable assets at the beginning of this form (in which case it would have taken longer than 30 minutes to gather this type of information for filling in the form), you may well be able to claim this as a prelitigation cost. The claimant probably will not know court fees, as information on how to pay it, let alone how much it costs, is not available directly through the e-justice portal.

It has been asked whether from a functional simplification perspective I wonder if all these details are needed and if the judge can be in condition to accept all the requests as declared by the plaintiff. One may assume that the court will require evidence of receipts and bills in relation to the EPO proceeding, but further research needs to be done on this issue.

**g. *Providing Evidence available in support of the claim***

This must specify the evidence available in support of each claim for both proceedings using the codes indicated on the form. The box [Description of evidence] will contain, for instance, the title, name, date, and/or reference number of the document concerned, the amount mentioned on the document concerned, and/or the name of the witness or expert.

One can assume contract in this simulation. One should not forget to fill in this form in ITALIAN. This is the only part in both forms (along with additional statements) that appears to require foreign language knowledge. This is a barrier to those who do not write Italian and have not hired an Italian lawyer to do this work. It maybe that 1000 euro is not enough incentive to pay a lawyer to fill this in for you.

If the claimant can keep it simple, i.e. "I ordered goods in Italy to the sum 1800 euro and they were all faulty on arrival in England" [see experimental claim pack form A], this may be easily translatable within google translate® or babel fish®. However, if the courts in Italy require more complex explanation, i.e. "The defendant is in breach of contract, s. XYZ, clause ABC, in which he agreed etc etc" with a whole page of legal explanation, then an Italian lawyer may be needed. It does say that "If space is insufficient, you can add additional sheets". It requires details of the claim in terms of facts of what happened. Again, if this can be kept simple, then may be google translate® or babel fish® would again be sufficient. Evidence is simple enough, if you have a contract or a receipt or witnesses.

It can be added at this point that Italian Justice of Peace applies the principle “dame mihi factum tibi dabo ius” (You give me the facts, then I will give you the law): therefore, before the Italian Justice of Peace normally a description of the facts is enough. However, the court may return the claim with form B (for both procedures) for incompleteness, requiring either more details or more legibility.

This is a semantic problem, which may be solved if it is possible to identify ex ante a certain number of options to choose from, given that the complexity and variety of these claims are quite limited. If we have a pre-established list of options, plus an “open” class (to be filled in by the plaintiff) we solve the main semantic problem.

### 3. Technical problems

Given that it would be very difficult for any “intelligent” person to fill in this form in one sitting without all available information, it should be possible to save this form. The website for both forms remembers the answers in the fields if you use the same computer to fill out the form the second time around.

During simulation, saving the ESCP appeared to be possible, but when attempted, it failed. For the EPO for it was also tried, and it saved it xml document, and when an attempt was made to open it, it came out in code and many colours. We have no idea what went wrong. There is a feedback part of the website that you can complain to about any problems with the site.

One detail that did surprise the researchers was that of signature. At some point in the guidelines to the form A one is reminded to **date and sign** the last page. This means that identification is provided by personal data entered in the form and by signature: Copy of ID documents are not required. This is interesting within the broader project of interoperability, as there are problems in other similar cross border projects with accepting electronic identification.

### 4. Communication with the court and responsibility for procedural steps.

#### EPO:

Based on the rules of EPO, once the form has been filled out and sent according to the rules of procedure, the whole thing should take on a life of its own without further interference from the claimant (unless the court requires more information). However, various problems with this were encountered in the second phase of the simulation, whereby a trip to the Justice of the Peace court of Bologna was made to verify what steps were taken with regards to an EPO application.

Based on the observations from that part of research, there are mainly problems of communication between the court and the claimant, which would not be a problem if the claimant did not have to take further steps (but in fact, under internal rules of the court, does have to take many further steps).

- a. EPO is a default judgment against a defendant unless the defendant challenges the claim. Once EPO has been issued, and once the foreign creditor acknowledges that a European order for payment has been issued, he/she has to serve it upon the debtor within 30 days after notice. This requires the claimant to know when the EPO has been issued and therefore for the claimant to contact the court by phone or letter (in Italian) as the court in Bologna will not inform a claimant of this.
- b. Furthermore, in order to serve the EPO upon the debtor, creditor must obtain an original copy of the EPO and to file the request for its service with the Italian judiciary service Authority (“ufficiale

giudiziario”): these activities normally entail the physical presence of the creditor or of a person acting on his/her behalf. This requires further payment of court fees<sup>16</sup>

- c. Moreover, the request for the original copy as well as the actual service of said EPO upon the debtor should be carried out in Italian language, being the seized Court normally competent to deal with requests in Italian language along with court fees.<sup>17</sup>
- d. Challenged EPO: If the debtor has challenged the EPO within the 30 days from receipt of notice, then the creditor should be informed about this circumstance: indeed, if the creditor did not choose to stop the proceedings in case of opposition by the debtor (within appendix 2 of EPO forms), then a civil ordinary proceeding shall start before the Court seized. Further information is unavailable about further proceedings at this stage.

For this purpose, it seems that the court in Bologna does inform the creditor about the opposition by registered letter: moreover, the Court on its own motion fixes a hearing for the commencement of the ordinary proceedings: of course, the date of the hearing is communicated also to the debtor.

The communication is in Italian language and this is not helpful for the (foreign) creditor who will may not able to understand the content of the communication: moreover, it seems that the communication only informs the creditor about the date of the hearing not informing him about the basic procedural information about the Italian civil proceedings (i.e. his/her defensive rights; the faculty/need to appoint a lawyer etc.).

- e. Non-challenge- If the EPO is not challenged within 30 days, then the claimant may start enforcement proceedings. As it is not within the scope of this essay to discuss the problems inherent with enforcement (as it is separate from EPO proceedings, please refer directly to the report on the issue)

**ESCP:**

- a. Once received the court should process the ESCP petition. Council Regulation 861/2007 of 11 July 2007 establishes time limits for the parties and for the court in order to speed up litigation. There is a summary here of time limits, but as with all things European that affect court procedures it is left up to the courts as to how to do this.<sup>18</sup>
- b. As concerns the “timing” of the procedure, it must be remembered that time limits are compulsory for the parties, but not for the Courts. Therefore, time limits for the Courts are just an “indication”, a suggestion for best practices, but no effects are provided in case of non-fulfilment of the rules. This raises a question of breach of article 6 rights, as well as the practicality of following a court case from abroad and the facilities for that.
- c. Where the court has received a small claim, but is incomplete because it’s in the wrong language or documents are missing etc, they will send the form back to be properly filled. The only thing that isn’t here is the timeline in which that should take place. (There is no timeline for this aspect of the courts work described in the summary of the regulations)

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<sup>16</sup> If you have somehow made it to this point, then it may mean that you have already successfully paid court fees once, and may know how to do it again at these various stages of the courts proceeding- if they inform you that further fees are required.

<sup>17</sup> If you have again made it to this point by filling out the original form in Italian, it may well be possible to apply for this in Italian again- if you are informed of the need to do so.

<sup>18</sup> [http://europa.eu/legislation\\_summaries/consumers/protection\\_of\\_consumers/116028\\_en.htm](http://europa.eu/legislation_summaries/consumers/protection_of_consumers/116028_en.htm) last accessed 04/17/2012

- d. Communication with the Justice of the Peace in Bologna is in Italian. They do not appear to be aware of the translation of the form software on the e-justice portal, or if aware, do not seem willing to use it.
- e. If the court does return form B for incompleteness, Form A can either be rectified or withdrawn. If rectified and accepted by the court, notice will be given to the defendant. The key aspect at this time of the procedure is that it is always on the claimant whether domestic or cross border. It is for him/her to start the claim and therefore go to the trouble of doing the work and communicating with the court. However, there is one possible complexity, if the defendant is not actually Italian, but only resides in Italy, this maybe something worth considering as another complexity later on as Italians are not the only residents in Italy.
- f. In terms of actual proceedings, the ESCP should be conducted with written procedures (these are not in breach of article 6 fair trial rights). If an oral hearing is demanded, then both parties must be available to attend.<sup>19</sup>
- g. After final judgment is given, if the claimant wins, normally, only a copy of the ESC judgment will be enough in order to start the execution in Italy (that is to say to proceed with the preliminary seizure of the defender's assets). In practice, no bailiffs start the execution procedure if the local Court does not declare the ESC judgment internally enforceable (there is a formula put on the ESC judgment called "formula esecutiva"). This is a further step which implies basically the participation of a lawyer, since a normal citizen – and about all a foreign citizen - cannot be aware of a so technical step.

## Conclusions

The complexity of this procedure varies depending on who is using it. In principle, this is an access to justice issue in order to support and develop the free market within the EU, so technically EVERYONE should be able to use it. However, not EVERYONE "lives" in the EU. People live in member states and rarely have cross border experiences with business or administration. Majority of people will buy locally. Only businesses and people with specific interests in buying goods/services (or travelling across borders) will have reason to sue. Also consider that if you are a business or a repeat player in the market, you are likely to know the supplier you are suing, and therefore also probably have knowledge of the language of the country you are dealing with or know someone who has knowledge.

Something for developers to consider is taking into account the real potential users of these proceedings, and how to give effective and efficient access to them.

### **Common problems:**

From this simulation there appear to be various problems for the claimant: the type of information required, acquiring said information in an easy and efficient manner, and communication with the courts.

The way that the forms are set out is that if the fields are incorrectly filled out or filled out with incorrect information, you may not continue with adding entries to the form or the form may not be processed and returned for corrections. Without the information that is problematic to obtain it will not be possible to complete this procedure, let alone fill out the form in 30 minutes.

Some information should be easily accessible through the e-justice portal website, such as how to pay court fees, easier ways to identify jurisdiction (both scope and territory), the type of documents one

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<sup>19</sup> The steps the court can take are more variable under ESCP than EPO

may need to support ones claims, and how to calculate interest. It should be possible for each country to provide access to information in different languages on how to identify attackable assets- e.g. through links to registries or services responsible for this (such as courts' services, or bailiffs offices, or notaries etc). It should also be possible to provide a list of lawyers from each country willing to offer cheaper services for EPO/ESCP claims.

There should be technical support from the e-justice portal itself if a claimant becomes stuck in one place or if there is a problem with the form no matter what one enters into any given field. There is a feedback link at the bottom of the page of the e-justice portal, however further research should be done to see what type of assistance may be offered in the filing of the EPO.

As for language barriers in the form, there is only one place that really requires a claimant to fill out the form in Italian and that is in the description of the claim. It has been suggested that a list be made available of the possible bases for claims, especially if ESCP or EPO is only to provide (summary) judgment in uncomplex or simple cases (failure to pay rent or breach of contract for a one time service provided etc).

From a fair trial rights perspective, the main issue that is truly problematic is that of the language of communication. In a domestic court trial (civil or criminal) the court will provide translation services to ensure that no rights of witnesses or parties are breached. If we apply this principle to the written procedure, we can state that the burden/costs of the translation should be paid by the court itself, and by court fees, eventually.

**Issues for EPO only:**

There appear to be problems in terms of fulfilling procedural steps, and what to do after you have made the application for the EPO. There appears to be no institutional support from the court, even though it is the court's responsibility to fulfil the steps of EPO after a claim has been filed. Although EPO does not claim that you do not need a lawyer in the same way that ESCP claims, it is quite clear that most people would not be able to cope with the stress of these unforeseen procedural steps and external costs. To correct this, the e-justice website could advise you to find a lawyer, and maybe give a list of lawyers able and willing to give a service on this procedure.

**Issues for ESCP only:**

Another problem (aside from language) within the fair trial rights perspective is the timeline of this proceeding. It is not clear how long it should take, and what is "reasonable time" within this procedure. It is not really possible to impose a standard on all the countries taking part. However this is mostly an administrative task for routine cases, and should not take long for any judge to recognize whether private rights have been breached or not based on the evidence and claim at hand, unless there is complexity within the case itself. If there is no oral hearing demanded, one could say that this type of case should be done in a matter of days rather than months. Having checked the regulation, judgment, having obtained the correct forms and documents should take 30 days only. There are no juridical effects in case of non-fulfilment of the said time limits for the Courts. The regulation just tries to "push" national Courts.

From an accessibility point of view, there is no actual link to this procedure within the English courts, as far as we could see at the time of the simulation, it was under maintenance at that time, and Italian procedures did not even show up in google during the simulation itself. It could indicate irrelevance for European judiciaries given its disconnected nature from national courts. This may create serious

problems of access to this service and this specific analysis should be further expanded. One can assume that if a normal citizens search for a judicial remedy he will look first at his national judiciary (to check the possibility to sue the defendant in his national court, and then at the judiciary of the defendant. The expectation that to solve a dispute or identify a judicial remedy a person should look into the website of the European Commission seems to be not realistic in general (depending again on the type of user this procedure is aimed at).

**Institutional Support:**

Given the language, semantic and technical barriers that may be experienced during these procedures, from filling out the form to filing it at court, it is suggested that some form of greater institutional support than a generic “feedback” link at the bottom of the e-justice portal be developed. This should be done not only in light of the preliminary findings of the experiences of these simulations, but one must also consider the people likeliest to use this service, and what their language skills will be. Further research is suggested to go deeper into the type of institutional support to be given, and who should be responsible for giving it, either at EU level or domestic level.

In discussing the issue of institutional support at domestic, the idea was also presented to set up a separate office within the court to deal with these cases, but apparently there are only 2-3 cases per month. In this case, maybe a clerk or paralegal can handle these cases specifically once a month (given the flexibility of timeliness standards).