

THE SMALL CLAIMS ANALYSIS NET PROJECT

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Abstract: *The European Small Claims Procedure is one of the most important tools provided by European Union, in order to decrease judicial litigation and make the judicial systems of Member States more efficient. Although, the European Union really believes this procedure to be fundamental, the ESCP is very little used. Therefore an effort is needed in order to disseminate the functioning of these procedures, but also to understand why consumers don't use it and how the European Small Claims Procedure can be improved, raising citizens' awareness about it. SCAN project aims at disseminate the knowledge of ESCP, that is not even know in the courts, among the stakeholders, which are lawyers, judges, consumers and EU citizens. The project serves the stakeholders, so that lawyers can guarantee an efficient legal assistance, judges can implement this procedure and consumers association can disseminate the knowledge of ESCP among their members and among all EU citizens.*

1. State of the art of the Small Claims Procedure within the European Union

The problem of Small Claims within the European Union was deeply analyzed by the European Commission, since these kinds of lawsuits flooded the national courts. For instance, it is essential underline how, in 1997, there were three million small claims in the Italian courts¹. That's why, since the Eighties, the European Commission decided to start many pilot projects in Member States, in order to guarantee small claims to be judged in a faster and more efficient procedure. In Belgium, from 1984 to 1986, the Commission financed two parallel pilot projects (in Marchienneau-Pont and Deinze), based around the figure of the «delegated lawyer» (*stafmedewerker*) appointed to the conciliatory judge². In France, the Commission decided to fund in 1988 a pilot project in Dijon and Le Creusot to facilitate the application of the new legislation adopted on simplified

¹ R. DANOVÌ, «Le ADR (Alternative Dispute Resolutions) e le iniziative dell'Unione europea», Giur. It., 1997, 11.

² EUROPEAN COMMISSION, «Additional Commission communication on consumer legal protection», Green Book, 23, 1986.

procedures before the *Tribunal d'instance*. A consumer office was set up in the two cities to provide information and a typical form has been drawn up. Special conciliation hearings have been set up to deal with the cases in question. Furthermore, a *Comité de Pilotage* was established³. In Germany, a first pilot project for consumer credit counseling was funded by European Commission and carried out in Hamburg; then a second project started in 1990-1991 for the development of a technical and legal advisory system on credit matters. The consultancy was on three levels: computerized assistance services in the field of credit (consultancy in the matter of credit agreements); computerized debts advice (advice in favor of households in situations of over-indebtedness) and information system on financial services (a database containing the most important legislative provisions, as well as individual cases of species). Since 1992, efforts have been made to adapt the system to the situation in other Member States and to connect it to parallel systems established there. The system was used by all regional consumer protection organizations («*Verbraucherzentralen der Länder*»). A third pilot project, located in Halle, began in 1993 with the aim of improving advice to consumers with excessive debt exposure⁴. In May 1992, the Commission decided to fund a pilot project in Greece, whose objective was to provide legal assistance to consumers. In the implementation of the project, which was headed by a consumer organization, four legal advisory offices have been opened to the public in as many cities in Greece (Athens, Kavala, Drama and Iraklion), with the task of assisting the consumer in the protection of its rights in concrete cases (information, mediation, conciliation and prosecution)⁵. In Ireland, a pilot project called Consumer personal service (CPS) was launched in June 1990 by the Irish consumer association, with the financial support of the European Commission. With regard to Italy, a project called «Consumer Access to Justice» was launched on an experimental basis in January 1991. The service informed the consumer on the laws in force and on the possible solutions to the proposed complaints, assisting the consumer who wished to appeal to the *justice of peace*⁶, using the conciliation procedure provided for by art. 322 of Italian Civil Procedural Code. Apart from some out-of-court initiatives to improve public services, implemented with the establishment of «mediators», pilot projects have had particular resonance in Portugal. In particular, a first project in Lisbon was made possible in 1988 thanks to the close collaboration between various promoters (the government, the municipality, the association of traders, the consumer association and the European Commission), and led to the establishment of an Arbitration center with its own headquarters, and the elaboration of a procedure aimed at facilitating the reconciliation of lawsuits. On 15 March 1991 a new agreement was signed by which the Arbitration Center was formally recognized as a permanent⁷.

On 15 March 2004, the European Commission proposed⁸ to create the European Small Claims Procedure, in order to eliminate the intermediate measures needed to enable recognition and enforcement, in other Member States, of judgments, but only in 2007 the Regulation EU 2007/861 was finally approved, creating the European Small Claims Procedure. In addition and support to the Regulation EU 2007/861, Directive 2013/11/EU about the Alternative Dispute Resolutions was approved. The ADR Directive was required, according to European Commission, in order to facilitate out-of-court resolution of lawsuits between consumers and traders by guaranteeing a «*low-cost, simple and fast*»⁹ procedure. The aim of the European Commission was, therefore, the creation of an additional way for consumers to gain justice, encouraging them to invoke their rights through

³ S. n. 1, page 1.

⁴ EUROPEAN COMMISSION, Green Book, 29, 1993.

⁵ EUROPEAN COMMISSION, Green Book, 30, 1993.

⁶ In Italian legal system, justices of peace are a special kind of first degree judge, which can solve only specific matters of small claims.

⁷ EUROPEAN COMMISSION, Green Book, 56, 1994.

⁸ http://europa.eu.int/comm/justice_home/doc_centre/civil/doc/com_2005_087_en.pdf. Annex:

http://europa.eu.int/comm/justice_home/doc_centre/civil/doc/com_2005_087_annex_en.pdf.

⁹ EUROPEAN COMMISSION, «A Step Forward for EU Consumers: Questions & Answers on Alternative Dispute Resolution and Online Dispute Resolution», 12 March 2013, available at europa.eu/rapid/press-release_MEMO-13-193_en.htm.

this simplified procedure, preventing them to go before national courts. Anyway, ADR Directive would have strengthened consumer law enforcement¹⁰, since it was a shorter and less costly procedure, which may sound appealing to consumers. Although some Member States established effective ADR procedures, their use was sporadic¹¹. Furthermore, the application of ESCP in many Member States was based on court-systems and therefore they are unattractive to consumers, as they are too complex, user-unfriendly and really expensive¹². Researchers anyway noticed just how the majority of most consumer claims involve very small amounts of money¹³. Therefore, most consumers avoid any kind of civil procedure systems, since it is more expensive than the claim itself. Then, the consumers do not use procedures, which are not highly user-friendly. At the end of the day, many consumers disputes are «*below the radar*»¹⁴ of any kind of dispute resolution system and therefore they are unresolved and consumers are increasingly disgruntled and unsatisfied, since they perceive European market as unfair. This situation causes a consumer detriment across the EU¹⁵, estimated at 0.4% of Europe's gross domestic product. The detriment in cross-border shopping is estimated in 1 billion euros¹⁶.

2. The Regulation 2007/861

The SCAN project was created to ensure the effective implementation of the European Regulation 2007/861, as amended by Regulation 2015/2421, which introduced the European Small Claims Procedure. It must be considered that, pursuant to Articles 2 and 3 of Regulation 2007/861, this procedure applies only to cross-border disputes. Article 3 establishes that a dispute is defined as cross-border, when at least one of the parties is domiciled or habitually resident. The 2007/861 Regulation applies in civil and commercial cross-border disputes, regardless of the court, which have a value of €5000. This limit has been raised by Regulation 2015/2421 and there will be discussion in the next five years regarding the maximum limit of the value of Small Claims. Article 2 nevertheless identifies areas of strict competence of the Member States, such as tax, customs and administrative matters, the responsibility of the State for acts or omissions in the exercise of official authority (*acta iure imperii*). Likewise, disputes concerning rights that connote unavailable rights are excluded from the procedure. The procedure is introduced by presenting the application form to the competent court, which informs the plaintiff about the procedure. The procedure is written, the hearing is held only if deemed necessary for the purpose of issuing the verdict. The defendant shall reply within thirty days of notification of the application. Within fourteen days of receipt of the respondent's reply, the court or tribunal

¹⁰ F. WEBER, «Is ADR the Superior Mechanism for Consumer Contractual Disputes? –An Assessment of the Incentivizing Effects of the ADR Directive», 38. *JCP (Journal of Consumer Policy)* 2015, p 266.

¹¹ Council of Europe, «Report on «European Judicial Systems – Edition 2014 (2012 Data): Efficiency and Quality of Justice» (Strasbourg: 2014).

¹² European Small Claims Procedure Report (ECC-Net, September 2012); Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee of November, the 19th of 2013 on the Application of Regulation (EC) No. 861/2007 of the European Parliament and of the Council Establishing a European Small Claims Procedure. This publication is available on the official website of European Commission: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0795:FIN:EN:PDF>.

¹³ C. HODGES, «Consumer Redress: Ideology and Empiricism», in *Varieties of European Economic Law and Regulation. Festschrift for Hans Micklitz*, eds K. Purnhagen & P. Rott (Springer 2014); *Consumer Detriment. Assessing the Frequency and Impact of Consumer Problems with Goods and Services* (Office of Fair Trading 2008), OFT992; *Special Eurobarometer 342. Consumer Empowerment* (European Commission 2011); *Consumer Detriment 2012, Prepared for Consumer Focus by TNS BMRB April 2012* (Consumer Focus 2012).

¹⁴ C. HODGES, «Mass Collective Redress: Consumer ADR and Regulatory Techniques», *European Review of Private Law* 5-2015 [829–874]. © Kluwer Law International.

¹⁵ «The Consumer Conditions Scoreboard 2013», available at http://ec.europa.eu/consumers/underline/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf; quoting source as ECC Network.

¹⁶ Commission Staff Working Paper. «Impact Assessment: Accompanying the Document: Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes (Directive on Consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes» (Regulation on Consumer ODR), SEC(2011) 1408, 29 Nov. 2011 («CDR Impact Assessments»).

shall send a copy to the plaintiff, together with any relevant supporting documents. Any counterclaims must be submitted using the standard form A and all the related supporting documents. Then it shall be notified to the plaintiff according to the procedures referred to in Article 13. These documents shall be sent within fourteen days of receipt. The claimant has thirty days from the date of notification to respond to any counterclaim.

This procedure is actually often not used, due to a whole lack of knowledge about it. As reported by the European Consumer Centres Network in September 2012¹⁷, the main obstacle to the proper use and knowledge of the ESCP are just represented by the lack of awareness among the judges and lack of information and assistance for consumers. Perhaps, in some Member States, courts too don't know the Regulation 2007/861, which disciplines the European Small Claims Procedure.

The main problem seems to be an overall lack of awareness among judges and consumers, since many courts in some Member States have never even heard about the ESCP. As a consequence, consumers are rarely able to obtain accurate information on the Procedure and to get practical assistance in initiating it.¹⁸ Therefore, since many of the courts don't even know about the ESCP, they still do not provide consumers with specific forms, neither on their premises, nor on their websites, as they should, according to the Article 4 § 5 of Regulation 2007/861. Furthermore, language issues increase the costs of the procedure¹⁹, since, although the ESCP is meant to be a quite inexpensive way, it often may not be so, because of translation costs. According to civil proceeding legislation in force in some Member States, all the documents supporting the claim must be officially translated, but it doesn't often happen. In many cases, the consumer most probably has to bear the translation costs. The procedure for the service of judgments is unclear: indeed, problems have been identified as regards the service of judgments. The verdict is required to be notified to the counterpart, but consumers have no information on how to carry out this operation and it happens that the defendant cannot understand it and the judgment is not properly considered. Even if the consumers have achieved a positive outcome, it does not always mean that the decision has really been enforced. Sometimes the losing party uses a conscious strategy by protracting the fulfillment of the obligations related to the judgment or in using some other means to avoid the fulfillment. As the enforcement proceedings are very different from one Member State to another, it is hard to get advice on who to turn to and what it may cost.

In comparison to the current situation, the realization of our project would be able to really bring the added value required by the adoption of legislation, and that the lack of take-up has hindered, as highlighted by the Commission report. As also noted by the EU Parliament, in its resolution of 25 October 2011, legal certainty remains unstable when the usage of small claims tribunals in some Member States remains significantly low, as happened in the past years²⁰. Thus, a side effect will be an increase in legal certainty.

3. Aims and results of Small Claims Analysis Net Project

Because of these very important issues, one of SCAN project's aims is the dissemination of the European Small Claims Procedure. That's why SCAN website²¹ and Twitter²² and LinkedIn²³ accounts²⁴ have been created. SCAN website has been realized in a very direct cognitive way, in order to let everyone understand

¹⁷ M. GIACALONE, «La facilitazione della circolazione delle sentenze nell'Unione europea», Studies and Documents of International and European Law.

¹⁸ R. SIMAITIS, «Litigation Expenses in Civil Proceedings», Scientific Monograph, Vilnius: Justitia, 2007.

¹⁹ A. MAFFEO, «La tutela delle parti deboli nelle controversie transfrontaliere» (The protection of weaker parties in cross-border disputes), PhD Thesis, discussed in February 2012.

²⁰ K. ZAJC/V. DIMITROVA-GRAJZL/P.GRAJZL/J. SUSTERIC, «Court output, judicial staffing, and the demand for court services: evidence from Slovenian courts of first instance.» International Review of Law and Economics, 2012, 32:1, 19-29.

²¹ SCAN website: <http://scan.unina.it>.

²² SCAN Twitter account: <https://twitter.com/scaneuproject>.

²³ SCAN LinkedIn page account: <https://www.linkedin.com/company/project-scan-eu/>.

²⁴ SCAN LinkedIn profile account: <https://www.linkedin.com/in/scan-project-a44031174/>.

about the benefits of the procedures. SCAN Twitter and LinkedIn account have been targeted, in order to reach legal practitioners, consumers association, European citizens interested in the theme of Small Claims, IT Law, E-Justice, Civil Law and related arguments. Many improvements may be proposed to modify the 2007/861 Regulation, in order to make it more close to citizens' needs, such as to extend this procedure to national small claims lawsuits too.

During SCAN kick-off meeting, partners reflected on the most appropriate way to make the ESCP understandable to European citizens and consumers and they decided for the use of pictograms. Indeed, introducing the pictographic way can make ESCP very simple and popular for stakeholders. This proposal is based on the studies and researches about the *structural legal visualization (SLV)*²⁵. Structural legal visualization was born with the works of Friedrich Lachmayer²⁶. SLV highlights the difficulties in interpreting legal texts, the interpretation of law is difficult even for legal practitioners, since legal systems are very complex. Even using legal databases, laws are contained in several documents, so that the legal practitioners consider difficult to consult all of them at the same time. Thanks to the SLV, the understanding of regulatory concepts can be made clearer. For instance, the article of Čyras, Lachmayer and Lapin shows how the Kelsenian²⁷ concepts of *Ought* and *Is* may be depicted as «*metaphorical stages*»²⁸. SLV may be dynamic or static, depending on whether it is more useful to display text and images in a static or dynamic way. In static SLV, every image is highlighted, in order to focus on it and then concentrating on the other images. Dynamic SLV is useful for identifying the correlations among the legal concepts. It is the case of a person, which is investigated and subjected to a criminal trial. Through the images, it is possible to better understand the different stages of criminal proceedings, in which the suspect is first questioned by the police, then he has to face the trial and in the end he is sentenced to conviction. According to Klaus Röhl and Stefan Ulbrich²⁹, it is required to include pictures in law teachings, in order to avoid learning obstacles. Indeed, law is represented in a textual way, since pictures may be not fit to represent the abstraction, which is needed for law, but anyway pictures may have benefits in the explanation of concepts. It is the case of representation of *tertium comparationis*, as provided by Arthur Kaufmann³⁰, in order to explain the relationship between two norms for their compliance with constitutional provisions. In a recent work Erich Schweighofer³¹ lists eight different representation levels, which are: text corpus, logical representation, ontological representation, visualization, argumentation view, annotation view, citation network view, and user view. Moreover, there are four methods to represent and analyze a legal domain, which are: documentation, interpretation, structural analysis, and visualization. In the SCAN project we intend to introduce a «point and click» procedure based on pictograms and icons supported by pictographic explanations of the legal contents of the different stages of the procedure. The use of pictograms can represent a turning point in the perception of the usefulness and therefore in the diffusion of the ESCP.

²⁵ V. ČYRAS/F. LACHMAYER/K. LAPIN, «Structural legal visualization», *INFORMATICA*, 2015, Vol. 26, No. 2, 199–219, 2015 Vilnius University.

²⁶ F. LACHMAYER, «Graphical presentation for teaching law (Graphische Darstellung im Rechtsunterricht)». *Zeitschrift für Verkehrsrecht (ZVR)*, 8, 230–234, 1976.

²⁷ H. KELSEN, «Pure Theory of Law», 2nd ed., Max Knight (transl.) (Reine Rechtslehre, 2. Auflage. Deuticke, Wien, 1960). University of California Press, Berkeley.

²⁸ V. ČYRAS/F. LACHMAYER/K. LAPIN, «Structural legal visualization», *INFORMATICA*, 2015, Vol. 26, No. 2, 199–219, 2015 Vilnius University, page 3, figure 1.

²⁹ K. ROHL/S. ULBRICH, «Law Graphically. Visualization in the Education of Jurists (Recht anschaulich. Visualisierung in der Juristenausbildung)», 2007.

³⁰ F. LACHMAYER, «Tertium comparationis in law. Variations on a theme of Arthur Kaufmann». In: Neumann, U., Hassemer, W., Schroth, U. (Eds.), *Responsible Law – the Philosophy of Law of Arthur Kaufmann (Verantwortetes Recht – die Rechtsphilosophie Arthur Kaufmanns)*, *Archiv für Rechts- und Sozialphilosophie, ARSP*, vol. 100, pp. 67–77.

³¹ E. SCHWEIGHOFER, *Legal datalystics – outline of a theory of legal informatics (Rechtsdatalogik – Versuch einer Teiltheorie der Rechtsinformatik)*. In: Schweighofer, E., Kummer, F., Hötendorfer, W. (Eds.), *Cooperation. Proceedings of the 18th International Legal informatics Symposium IRIS 2015*. OCG, Vienna, 61–72 and Jusletter IT, February 2015, <http://jusletter-it.weblaw.ch/issues/2015/IRIS.html>.

Furthermore, legal assistance in the ESCP is allowed, but not mandatory. In our project, lawyers should explain this mechanism to the disputants and their main role will be to guide them into the procedure, that's why it may be proposed to make legal assistance mandatory. In this working phase of the project, partners are collecting rules of ESCP and national case law practices on small claims proceedings. The collection is done through organizing questionnaires among the stakeholders and through interviews of professionals in the field, in order to identify areas of Small Claims where best practices could enhance the possibility to increase protection of cross border creditors and consumers and also the problematic issues that hinder or deter the access to the ESCP. Collecting relevant national best practices is needed, so that European best practises will be identified and disseminated among the stakeholders of small claims procedures all over the European Union. Through interviews, stakeholders are allowed to express freely their concerns and problems, so that SCAN partners can analyse them. Additionally, interviews and questionnaires are useful to further strengthen the trust between stakeholders and the SCAN consortium. A database of best practises will be created in which a predefined format will be used for implementation of the data. In this way, the comparison and exchange of best practices will be objective and effective.

An online platform will be also created, where, through the participation of stakeholders, such as judges, lawyers, consumers and EU citizens, the current status about Small Claims will be identified, in order to understand the problems of implementation of ESCP in first instance courts. Furthermore, the weaknesses and deficiencies of Regulation 2007/861 will be underlined, in order to pinpoint solutions to these issues. The platform will also contain the European the best practices. Furthermore, the SCAN project can improve the development of the Internal Market Information. The Internal Market Information System (IMI) was established with the EU Regulation 2012/1024, recently amended by EU Regulation 2018/1724. The Internal Market Information System recognizes the role of the Internet and IT in transforming the way in which citizens access information, acquire knowledge in buying goods, services and participating in the Internal Market, in order to create opportunities for innovation, growth and jobs. This is why it aims to exploit the full potential of the Internal Market, making it easier for citizens to expand their cross-border economic activities. Article 2 of EU Regulation 2018/1724 establishes a digital helpdesk managed by the European Commission, which provides access to relevant Union and national websites. This helpdesk gives access to information concerning the rights, obligations and rules of Union and national law which apply to users who exercise or intend to exercise their rights under European Union law in the Internal Market. That's why SCAN can be really useful for the European Commission in informing and educating citizens about their rights, within the internal market. The certainty and the guarantee of rights will help citizens to expand cross-borders activities, since there will be no more problems related to the resolution of lawsuits. The SCAN project will really succeed in creating a common European economic area.

Finally this project aims to increase the efficiency and the speed up of the ESCP procedure in all national systems, in order to get continuous improvement by suggesting future amendments and through EU-wide dissemination and communication activities.

4. Disclaimer



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