

Research Article

EUROPEAN SMALL CLAIMS PROCEDURE: AN EFFECTIVE PROCESS? A PROPOSAL FOR AN ONLINE PLATFORM

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ABSTRACT

Background: Statistics concerning the use of the European Small Claims Procedure implemented by Regulation 861/2007 (as amended by Regulation 2015/2421) show that this mechanism has not been as successful as expected. When choosing between a domestic and a European instrument, the creditor most often opts for the domestic procedure. They avoid an instrument that is less well known, that they do not fully manage, and that has limited integration in domestic law.

Methods: This article starts with the legislative analysis of the European Regulation 861/2007, using analytical and hermeneutic approaches. Empirical methodologies will also be applied since the practical application of the rules established by the European Regulation will be analysed in order to build the proposal of an online platform for the small claims procedure.

Results and Conclusions: Bearing in mind the weaknesses of the European Small Claims Procedure, we conclude that an online platform incorporating alternative dispute resolution mechanisms is the best option to promote access to justice. A list of arbitrators or judges designated by each member state to decide the cases submitted on the platform could be a solution to overcome lengthy court processes. The decision shall be standardised for all proceedings according to a model incorporated into the platform. Thus, the enforceability will be facilitated, and the process will be more accessible to the parties, ensuring the right of access to justice in this context.

Keywords: small claims procedure, effectiveness, obstacles, online platform, civil procedure

1 INTRODUCTION

Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007,³ as amended by Reg. 2015/2421 (hereinafter Regulation 861/2007), established a European Small Claims Procedure in cross-border litigation, aiming to create a fast and inexpensive process to obtain judgments in specific cross-border cases and, consequently, to facilitate access to justice. As expressly declared in this Regulation:

the distortion of competition within the internal market due to imbalances with regard to the functioning of the procedural means afforded to creditors in different Member States entails the need for Community legislation that guarantees a level playing-field for creditors and debtors throughout the European Union.

Bearing in mind this goal, the recognition and enforcement of a judgment within the European Small Claims Procedure in any member state was also established. Despite the European nature of this procedure, each member state should incorporate the processual formalities internally for obtaining the final judgment, and some issues still require internal legislation to be applied.

The EU has tried to create a European procedure, but it still has a very national implementation, and there are obstacles to the effective participation of European citizens. It is still difficult to use a procedure that may take place in a court other than that of one's home state. In fact, the European Commission study done in 2017 on this and other means concluded that 'in a number of Member States these instruments are

³ OJ L 199, 31 July 2007, 1-22.

not well-implemented into national legislation, creating uncertainties in legal practice'.⁴ So, the intended goals have been partially defeated. Therefore, considering these results and given the globalisation of the economy and the current context of crisis in the post-pandemic scenario, it is necessary to make this mechanism more effective.

In this paper, we intend to analyse the possible implementation of an online platform that incorporates at a European level the European Small Claims Procedure as a solution to the current problems faced by this instrument. Thus, we propose that the procedure that is carried out so far in the national courts of member states should be entirely integrated into this online platform. The platform implementation will be developed in this article as a proposal to promote the use of the European Small Claims Procedure and to improve access to justice in the EU, incorporating the technologies that already exist, for instance, the European ODR Platform for consumers complaints.⁵ This solution could also overcome the imbalance that exists in member states regarding electronic processes since ICT has different levels of maturity in the European space. Before that, we will analyse the main obstacles that the European Small Claims Procedure established by Regulation 861/2007 faces in practice to understand what the features and possibilities of the proposed online platform should be.

2 EUROPEAN SMALL CLAIMS PROCEDURE

2.1 Civil court proceedings and small claims in the Portuguese environment

The usefulness and necessity of effective procedure in civil matters are undeniable. In Portugal, for example, civil justice accounts for 66% of cases initiated in judicial courts.⁶

The Portuguese statistics on justice⁷ show that in 2019,⁸ there were 53,208 claims in civil matters before the courts of first instance, of which 27,989 were proceedings for the performance of contracts and other obligations. In 2018 and 2017, the ratios were 25,221 out of 51,006 and 24,842 out of 52,507, respectively. In other words, proceedings to comply with contracts and other obligations accounted for around 50% (47% in 2017, 44% in 2018, and 52% in 2019) of the declaratory actions. On the other hand, actions of lower monetary value remain common in terms of percentage of GDP (Gross Domestic Product), as they represent 76.5%.⁹

Regarding European recovery procedures, in Portugal, the number of cases is still low but has grown. Statistics from 2011 to 2019 show that there were 220 small claims judged,

4 European Commission, 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law' (2017) <<https://op.europa.eu/pt/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en>> accessed 7 January 2022.

5 Available at <<https://ec.europa.eu/consumers/odr/main/?event=main.trader.register>> accessed 7 January 2022. To analyse this Platform, consult Fernando Esteban de La Rosa, Cátia Marques Cebola, 'The Spanish and Portuguese Systems: two examples calling for a further reform. Uncovering the architecture underlying the new consumer ADR/ODR European framework' (2019) 27(6) *European Review of Private Law* 1251–1278.

6 Statistics of Justice of the Portuguese Ministry of Justice are available at the following website <<https://estatisticas.justica.gov.pt/sites/siej/pt-pt>> accessed 7 January 2022.

7 Statistics of Justice of the Portuguese Ministry of Justice, *ibidem*.

8 We excluded 2020 and 2021 because these periods were atypical.

9 Note from the Portuguese government to the report of the European Commission for the Efficiency of Justice (CEPEJ) <<https://www.portugal.gov.pt/pt/gc22/comunicacao/noticia?i=portugal-entre-os-paises-com-mais-eficiencia-da-justica>> accessed 7 January 2022.

which means an average of 24.4 per year, which is a small number. However, growth has been positive since, from 2011 to 2019, it increased from 4 to 71, corresponding to an increase of 1,800%.¹⁰

For all these reasons, it is very important for states to try to establish effective procedures.

2.2 Some unresolved procedural issues in small claims – the role of internal systems and their different solutions

2.2.1 The general terms and conditions of the proceeding

The importance of Regulation 861/2007 is undoubted. It is an advantage to have a procedure with a uniform central structure, accessible to citizens, in which the decision is enforceable in the European area.

This procedure is characterised by being simple, written, supported by standard forms, and based on judicial cooperation with the parties and an active stance of the court. It is used as an alternative to domestic proceedings by the creditor of a civil or commercial obligation (pecuniary or non-pecuniary) up to EUR 5,000 (excluding interest, costs, and other expenses), provided that it is a cross-border case. 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 seized, on the date on which the claim form is received by the court or tribunal with the jurisdiction (Art. 3).

The procedure has these stages,¹¹ as provided for in Arts. 4 to 9: i) the creditor submits the case using Form A; ii) the court has an initial intervention (preliminary injunction) to assess the correct applicability of this procedure to the application, the correct filling in of the form, and the regularity of the proceedings; iii) after this intervention, the court may: a) decide that the procedure is not applicable, applying the consequence provided for in the internal procedural rules for such failure; b) request corrections to form A (using form B) if the information provided by the claimant is inadequate or insufficiently clear or if the claim form is not filled in properly; c) reject (reject out of hand) in case the claim appears to be clearly unfounded or the application inadmissible; d) order the continuation. Then, if the proceedings continue: iv) the defendant is 'summoned to answer' and given a copy of Form A (application), the documents, and Form B with Part I (details of the court and of the proceedings) completed by the court.

The defendant has 30 days to respond, so he or she should submit a defence and make a claim against the applicant (counterclaim) using Form A. If there is a counterclaim, the claimant has 30 days to answer.

At the end of the pleadings, if the judge has sufficient information, he or she shall give a decision. If the judge is unable to give a judgment, he or she may: i) request further clarification; ii) order the production of undocumented evidence; iii) arrange a final hearing, which is exceptional.

When an oral hearing is considered necessary in accordance with Art. 5(1a), it shall be held by making use of any appropriate distance communication technology, such as

¹⁰ See the Statistics of Justice of the Portuguese Ministry of Justice as well.

¹¹ On the characteristics, structure, and procedures of small claims, see Xandra Kramer, 'Small claim, simple recovery? The European Small Claims Procedure and Its Implementation in the Member States' (2011) 12 ERA Forum - Journal of European Law 119-133.

videoconference or teleconference, available to the court or tribunal, unless the use of such technology, on account of the circumstances of the case, is not appropriate for the fair conduct of the proceedings. Nevertheless, the Regulation does not mention in what language the oral hearing should be made. The Council Recommendations on cross-border videoconferencing of 15 and 16 June 2015, as well as the work carried out in the framework of the European e-Justice Strategy and Action Plan adopted for the 2019-2023 period,¹² warn that videoconferencing services should be available in all languages of the member states, but their implementation is still difficult.

Once the procedure has been decided, the applicant may request a certificate (Form D) which would serve as an enforcement order. This enforcement order may provide an enforceable application in any member state (Art. 20).

2.2.2 Some other aspects of the proceeding

We will now consider some situations that may cause difficulty in a uniform approach, bearing in mind that domestic legal systems are called upon to respond.

The Regulation provides that the applicant's claim may be a monetary obligation or a nonmonetary obligation (Art. 2.1). For a non-monetary obligation (e.g., to deliver something), the applicant assigns the case value taking into account the value of the thing. However, if that value is discussed by the defendant, who argues that it is higher than the value allowed for this proceeding (EUR 5,000), the Regulation is not exhaustive in the solution. Art. 5(5) states that:

if, in his response, the defendant claims that the value of a nonmonetary claim exceeds the limit set out in Article 2(1), the court or tribunal shall decide within 30 days of dispatching the response to the claimant, whether the claim is within the scope of this Regulation. Such decision may not be contested separately.

This is a preliminary issue to be resolved, which is left to the judge to decide with the help of the internal rules adapted to the purpose and ratio of this proceeding. So, the judge's intervention will always depend on the procedural paradigm adopted in the respective legal system and will lead to inequalities in the solution applied in different member states.

Another aspect that may have an impact on the proceedings is the existence of a counterclaim. Although the Regulation allows counterclaims, which is an advantage for the efficiency of the procedure, there will certainly be differences in each member state regarding admissibility and procedural rules. So, this will create unequal treatment, at least between national and cross-border disputes.

It is acceptable that the Regulation does not deal exhaustively with the whole procedure, but this brings some disadvantages, especially if member states do not create specific legislation for adaptation. In the absence of such legislation, as in Portugal,¹³ the solution will be found by the judge, in accordance with his or her powers, and that will bring uncertainty. In fact, this is often insufficient and has weakened the harmonisation of procedures.

As the study carried out by Elena Otanu concluded:

¹² OJ C 96/9, 13 March 2019.

¹³ In a different way, Spain, for example, approved the Law 4/2011 of 24 March, amending Law 1/2000 of 7 January, on Civil Procedure, to facilitate the application in Spain of European order for payment and small claims procedures (BOE – Spanish Official Bulletin – No 72 of 25 March 2011 31831-31838).

The empirical research carried out with practitioners did not seek to examine the link between the handling practices and legislative actions undertaken by the national legislator to implement the EOP and the ESCP within the national system. However, there seems to be some connection with regard to the extent of the phenomenon. In the jurisdictions where the national legislator did not adopt any legislative action and/or specific guidelines for the implementation and application of the EOP and ESCP, courts and practitioners are more inclined to submit the European procedures to requests and handling that is similar, if not identical, to national procedures having a similar purpose. This is the case in Italy and Romania.¹⁴

2.2.3 Some issues reserved for internal systems and divergent solutions

The Regulation provides for a procedure that is directly applicable in the internal legal systems and has indirectly influenced the internal legal systems as well as encouraged a movement towards harmonisation of civil procedure.¹⁵ Nevertheless, member states were required to communicate certain elements necessary for the operation and implementation of the procedure in the internal legal system (Art. 25),¹⁶ namely: i) the means of communication accepted for the purposes of the European Small Claims Procedure and available to the courts or tribunals in accordance with Art. 4(1); ii) the court fees of the European Small Claims Procedure or how they are calculated, as well as the methods of payment accepted for the payment of court fees in accordance with Art. 15a; iii) any appeal available under their procedural law in accordance with Art. 17, the time period within which such an appeal is to be lodged, and the court or tribunal with which such an appeal may be lodged; iv) the procedures for applying for a review as provided for in Art. 18 and the competent courts or tribunals for such a review; v) the languages they accept pursuant to Art. 21a(1).

The decision to apply domestic law in certain matters is well justified. On the one hand, these are issues where the EU must respect the principle of subsidiarity. On the other hand, some of these issues depend on resources and the ability to make the instruments of justice operational. However, the implementation of individual member state solutions creates asymmetries that should not exist. We found different solutions for the same situation, placing European citizens on an unequal footing despite using the same procedure. For example:

- Some countries accept more flexible languages, while others only accept their own national or official minority language. In France, the languages accepted pursuant to Art. 21a(1) are: French, English, German, Italian, and Spanish; in Spain, English and Spanish; in Portugal, English, French, and Spanish. But Germany, Italy, and Poland, for example, only accept their own languages.

- Regarding the means of communication, Portugal accepts the use of registered post, fax, and electronic data transmission; Poland only accepts written pleadings in paper form. In Italy, post and online submissions are accepted only for proceedings before the ordinary courts but must be done by a defence lawyer; Germany accepts post including private courier, fax, delivery by hand, or lodging the claim at the court's claims filing office

14 Elena Alina Ontanu, 'Incorporating European Uniform Procedures into National Procedural Systems and Practice: Best Practices a Solution for Harmonious Application' in Burkhard Hess, Xandra E Kramer (eds), *From common rules to best practices in European Civil Procedure* (Auflage 2017) 459-480.

15 On this topic, see Gascón Inchausti, 'Have the EU Regulations on Judicial Cooperation Fostered Harmonisation of National Procedures?' in Fernando Gascón Inchausti (ed), *The Future of the European Law of Civil Procedure* (Burkhard Hess Intersentia 2020) 91-110.

16 This information is available on the European e-Justice Portal.

(Rechtsantragstelle); in France, legal proceedings can be submitted to the court by post; in Spain, in addition to submissions in person before the competent court and submissions by post, Spanish courts also permit the submission of claims via the Electronic Courthouses (sedes judiciales electrónicas) of the authorities responsible for the administration of justice.

2.3 The weak points of small claims

In 2017, there were two studies published relating to consumer affairs and consumer protection to make proposals for measures to improve the European legal framework in this area and the effectiveness of procedures. These are:

- i. An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law: Strand 1 – Mutual Trust and Free Circulation of Judgments;
- ii. Strand 2 – Procedural Protection of Consumers.¹⁷

The first report examined how national legislation and procedural practices have contributed to the free movement and recognition of decisions, as well as to the effectiveness of consumer protection, including access to justice, under EU consumer law, and in particular, the impact of the European Enforcement Order and the European Small Claims Procedure. Some of the points made are positive, but there are some aspects to be improved that cannot be controlled by the states because they depend on the behaviour and will of those who use them (be they citizens or legal practitioners). This means that potential users of this procedure should be motivated to use it. Therefore, the necessary steps to make this procedure more attractive should be taken.

These were some of the conclusions: i) it is true that European procedures usually work well within national legal systems, despite the differences in their implementation. However, the practice is that not all instruments are used, and the practitioners are not particularly familiar with the instruments, in particular, in the case of the European Order for Payment and Small Claims; ii) in several member states, the instruments have not been adapted to national legislation, for example in the Civil Procedure Code or in separate legal acts, leaving uncertainties in legal practice; iii) the revision procedure, as it exists under the instruments, should be aligned, and possibly reconsidered; iv) a well-functioning and efficient cross-border document system is needed to implement the instruments; v) the biggest obstacle to the use of these procedures is the lack of mastery and knowledge of them compared to internal instruments, and also the language and technical specificities of legal terminology in the various languages.¹⁸

The following has already been concluded:

According to the ECC-NL, the most common difficulties that consumers experience in using the ESCP are related to (1) the need for translation, which often results in an increase in costs;⁴³ (2) the means of determining the interest rate for the amount for

17 Report prepared by a Consortium of European Universities (Hess, Requejo Isidro, Gascón Inchausti, Oberhammer, Storskrubb, Cuniberti, Kern, Weitz, Kramer) led by the Max Planck Institute Luxembourg for Procedural Law as commissioned by the European Commission [JUST/2014/RCON/PR/CIVI/0082] (Publications Office of the European Union 2017).

18 On the obstacles to the implementation of the Regulation, see Elena Alina Ontanu, Ekaterina Pannebakker, 'Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach' (2012) 5(3) *Erasmus Law Review* 169-186.

which they claim reimbursement and/or payment; (3) the competent court according to the Brussels I Regulation (Regulation (EC) No. 44/2001) [currently Regulation 1215/2012]; and (4) enforcement problems. In the event that the losing party refuses to comply with the court decision, enforcement needs to be carried out by an enforcement officer or bailiff. This adds to the costs incurred for obtaining judgment and may even exceed the amount awarded. The status of enforcement costs and their recovery is not clear within the ESCP Regulation, and questions arise as to how to have these reimbursed.¹⁹

Moreover, as exequatur was abolished by the Brussels I Regulation (recast),²⁰ this reduced the interest in small claims, especially if the reason for using this procedure was to obtain a certified judgment enforceable throughout the European area.

In addition to the above, the obstacles are even greater when the citizen wishes to use this procedure. For one thing, consulting and using the European electronic portal or the websites of the national institutions is not easy or intuitive. They have too much information and are not always well organised. Thus, one might reasonably conclude that the ordinary citizen would quickly give up on this type of procedure; the professional, on the other hand, would prefer to use a national procedure that is simpler and can be technically mastered.

3 AN ONLINE PLATFORM FOR SMALL CLAIMS PROCEDURE – A PROPOSAL

Bearing in mind the reasons why the European Small Claims Procedure has less use than expected, we intend to present our proposal for implementing an electronic platform for small claims in the European space. Currently, the existing system allows the filling in of the forms inherent to the claim and the defendant's answer to be done electronically by the available means, which each member state accepts and has communicated to the Commission.²¹ Besides, the procedure takes place before the member State court with jurisdiction for the case in accordance with the applicable national rules, which may cause constraints on parties who are unfamiliar with the internal procedural system or who may be territorially distant.

This type of thinking in the justice system needs to change. Concerns in the justice sector should move from promoting access to justice to delivering justice.²² In fact, there is no point in implementing procedures that are not used or that are considered inaccessible or difficult to use. Today, the focus in justice reforms is on valuing the participation of citizens and on choosing conciliatory means for parties to avoid future conflicts on the same issue. This is why, in global terms, there is a growing commitment to mechanisms such as mediation and ombudsman schemes.

On the other hand, technology is increasingly present in the justice sector. National systems make an effort to modernise the existing procedures. In European terms, there is a growing trend to put technology at the service of justice. That is why we are proposing here to integrate trends regarding the modernisation of justice in technological and conceptual terms, advocating the creation of an online platform for small claims that bases its procedure on alternative mechanisms such as mediation and arbitration.

19 Xandra Kramer, Elena Alina Ontanu, 'The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections' (2013) 3 *Nederlands Internationaal Privaatrecht* 323.

20 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 (recast) [O] L 351, 20 December 2012, 1-32].

21 See <https://e-justice.europa.eu/content_small_claims_forms-177-en.do> accessed 7 January 2022.

22 In this regard, see Christopher Hodges, *Delivering Dispute Resolution. A Holistic Review of Models in England and Wales* (Beck/Hart Publishing 2019).

The use of technology in the justice sector could have additional advantages if the technological resources are well enhanced. The implementation of an online platform for all member states concerning small claims would allow us to collect information about the cases and produce automatic statistics. In this way, the system could aggregate data on the type of problems submitted by parties or on who the parties are, and this information could be used in the future to promote legislative changes that prevent and reduce conflict or change cultural behaviour.²³

Justice should thus incorporate a holistic analysis of the legal system in structural and practical-procedural terms, based on three essential pillars: i) information should be provided to citizens regarding their rights in order to prevent disputes; ii) if a conflict emerges, consensual mechanisms for dispute resolution should be accessible to promote settled outcomes; iii) and if an agreement is not reached, procedural systems should be simple, without forgetting procedural guarantees, accessible to all and incorporating technological tools that would allow the aggregation of data necessary to justify legislative changes and avoid future lawsuits. In this way, the system would allow for its continuous and circular legal perfection.

3.1 Management and administration of the European Online Platform for Small Claims and national entities

The first question to be determined is the body responsible for managing the platform and where it would be allocated. As is already the case with the ODR Platform for consumer conflicts,²⁴ we propose that the European Commission should be responsible for administering and making the small claims platform available through the Europe Portal.

This platform should be a single point for parties and national dispute resolution entities to conduct the small claims procedure. Each member state must choose or create a national service that would be responsible for managing the small claims procedure internally through the online platform.

Each national authority must incorporate three essential services:

- 1) Information service and procedural management
- 2) Mediation
- 3) Arbitration/ Small Claims Court

Internally, each member state may assign these functions to entities that already exist and would become part of the online platform for small claims. In Portugal, for example, peace courts could manage the small claims cases placed on the future European platform proposed here, since they already include a service for attending, mediating, and judging small claims (even if this solution requires some legislative changes in terms of the territorial competence of these bodies).²⁵

23 On advocating this role to technology in justice sector, see Hodges (n 23).

24 See Art. 5(2) of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (hereinafter referred to as Regulation ODR).

25 In fact, there are no peace courts in the entire national territory, and each peace court has its territorial competence limited to a certain area of jurisdiction (Art. 4 of Law 78/2001 of 13 July). So, the Portuguese State would have to decide whether only two main peace courts – Lisbon and Oporto – would have competence within the future online platform or whether all peace courts would judge this type of process randomly.

Another option would be to assign the procedural management functions to a department of the Ministry of Justice and to create a list of mediators and arbitrators for the resolution of small claims through mediation and arbitration, respectively. Consequently, the responsible Ministry of Justice department would receive the claim and analyse its feasibility, quoting the defendant to reply. After this phase, the platform would be asked to appoint a mediator/ombudsman from a previously organised list to try to reach a negotiated solution. If this attempt to reach an agreement is frustrated, the process would be assigned to one of the arbitrators for a final decision.

Regardless of the institutional solution chosen in each member state, it will be essential for the national body to have an information service on the procedure so that any citizen can clarify his or her doubts.

All stages of the process would be managed through the European Online Platform for Small Claims. The national service or the entity designated by each member state would be integrated into the platform so that the management of the whole process would be carried out electronically, and the parties could follow the process by the minute.

The platform would also have the translation functions of all documents and forms entered electronically to make the information accessible to all parties. The translation functions of the platform would have to be extended to the mediation phase to allow negotiation between the parties when they are nationals from different member states.

The proposed model is similar to the ODR Platform for consumer disputes. However, this small claims platform would incorporate domestic dispute resolution mechanisms in each state, either extrajudicial (such as mediation or arbitration) or judicial (with member states being able to choose the competent court for these disputes and incorporate it into the Platform to manage the process).²⁶

In this way, the parties would not have to choose which entity is competent since it would be the platform that would refer the case to the entity that each member state designated. In the eyes of the user/party, the whole process would take place through the platform, which would be the point of contact and connection between parties and competent entities.

3.2 Procedure: Stages and Platform Functions

So far, the claimant in a European Small Claims Procedure must complete the online form available on the European Commission's portal and submit it to the competent court of the member state determined according to the rules laid down in the Brussels I Regulation (recast).

With the implementation of a European Online Platform for Small Claims, the forms would become available electronically on the website and be sent directly by the platform's software to the competent national authority.

The claim form would have the necessary fields for determining which member state is competent to examine the case, and the rules of competence of each state are electronically incorporated so that this determination would be automatic. In this way, the fundamental

26 Pointing out as a disadvantage of the ODR Platform for consumer disputes the lack of its own dispute resolution mechanisms, see Fernando Esteban de La Rosa, Cátia Marques Cebola, 'The Spanish and Portuguese Systems: two examples calling for a further reform. Uncovering the architecture underlying the new consumer ADR/ODR European framework' (2019) 27(6) *European Review of Private Law* 1251-1278.

right of access to justice would be promoted because under Regulation 861/2007, 'the parties should not be obliged to be represented by a lawyer or other legal professional' (Whereas 15 and Art. 10).

In terms of the value of the case, this should be maintained by the rules already laid down by Regulation 861/2007, according to which 'all interest, expenses and disbursements should be disregarded. This should affect neither the power of the court or tribunal to award these in its judgment nor the national rules on the calculation of interest' (Whereas 10). In this context, the platform could incorporate an interest calculator in accordance with the rules in force in each member state.

Regulation 861/2007 considers that 'the court or tribunal must include a person qualified to serve as a judge in accordance with national law' (Whereas 27). It therefore removes the possibility for member states to confer jurisdiction on extrajudicial bodies such as arbitrators or mediators. However, given the type of disputes covered by Regulation 861/2007 (of low value and low complexity) and the new concept of delivery justice referred to above, extrajudicial means should be part of the small claims procedure on the future European Online Platform.

We will now analyse the stages of the procedure to be developed in this platform, proposing, as said above, that the process to be adopted should include three essential phases:

- Information and management of the procedure (complaint and response);
- Mediation;
- Arbitration or specialised judicial courts.²⁷

3.2.1 Information and Procedure Management

The first stage would be assigned to the service/entity designated by each member state, whose task would be to provide all the information requested by parties or by any European citizen with regard to the small claims procedure.²⁸ However, this service would manage the process. It would receive the claim through the platform, analyse its feasibility, and open the corresponding process in the platform. It would then send the claim form through the platform to the defendant, giving this party the opportunity to reply and, after receiving the response, the process would proceed to the mediation stage.

Many administrative tasks for managing the process would be assigned to the platform itself. Thus, the sending of the claim to the defendant and the notifications to the parties regarding different procedures would be automatic. The timeframes of the process would be controlled by the platform itself so that the processing would be as automatic as possible. The platform would therefore incorporate many of the regular tasks of a judicial court office, and all notifications would be translated into the official languages of each member state.

²⁷ This depends on the choice of each country. Portugal, for example, taking into account its internal system, may assign these functions to peace courts or create a list of arbitrators for this purpose, as noted above.

²⁸ Equivalent to the functions of ODR Platform Advisors or the contact points of the European Consumer Centres Network (ECC-Net) as established in Art. 7 of the Regulation ODR. For the ECC-net, see its website <https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net_en> accessed 7 January 2022. For how it works, see, among others, Cátia Marques Cebola, 'Mediação e Arbitragem de Conflitos de Consumo: panorama português' (2012) 6 *Revista Luso-Brasileira de Direito do Consumo* 11-46.

3.2.2. Mediation

If each national body has a list of mediators, the platform itself could randomly appoint the mediator as soon as the procedural management service has processed the process for this phase. The appointed mediator contacts the parties to schedule the pre-mediation session and, if the parties agree to proceed, the necessary mediation sessions are carried out.

The introduction of mediation and its success depends on the fulfilment of two conditions.²⁹ On the one hand, the parties accept mediation. As a non-adversarial mechanism, even if pre-mediation is mandatory (as is the case in Italy for certain matters),³⁰ the parties could never be obliged to continue mediation against their will. It is therefore essential that mediation be accepted by the parties or at least that the continuation of this process is dependent on their will.³¹

On the other hand, since the parties may belong to different member states, it is essential that the platform allows not only online sessions but also the simultaneous translation of what is said by the parties and mediator. The integration of the latter function could be considered utopian. However, current technological systems are beginning to allow the mediator to be replaced by an interface or algorithm; that is, there are already some experiments carried out by virtual mediators.³² Thus, the evolution of technology has improved electronic tools, and simultaneous translation systems have also proven to be quite efficient today.

In terms of mediation, having in mind a holistic view of the European justice system, the agreement reached by the parties would have to be enforceable in all member states. In light of Directive 2008/52/EC, the conditions for enforceability have been established in national terms by each member state. However, these conditions may differ from one state to another. The implementation of a single platform for the small claims procedure would require that the mediation agreement reached at this stage be made enforceable in all member states in the same way.³³

29 The introduction of mediation in the small claims procedure is not intended to add an additional stage and thereby delay the process, but rather to enable the resolution of the case to be achieved effectively and more quickly. Regarding the advantages of mediation, see, among others, Nadja Alexander, *Global Trends in Mediation* (Kluwer Law International 2006) or Cátia Marques Cebola, *Mediación* (Marcial Pons 2013).

30 Art. 5(1) of Legislative Decree No 28 of 4 March 2010, following the amendments introduced by Legislative Decree No 69 of 21 June 2013 and Legislative Decree No 130 of 6 August 2015. On the establishment of compulsory mediation in Italy, see, among others, Giovanni Matteucci 'Mandatory Mediation, The Italian Experience' (2015) 16 *Revista Eletrônica de Direito Processual – REDP* 189-210.

31 Debating compulsory mediation, see, among others, Cátia Marques Cebola, *Mediación* (Marcial Pons 2013) 169-178; Jennifer Winestone, *Mandatory Mediation: A Comparative Review of How Legislatures in California and Ontario are Mandating the Peacemaking Process In Their Adversarial Systems* (2015) <<https://www.mediate.com/articles/Winestone14.cfm>> accessed 7 January 2022; Lurdes Varregoso Mesquita, 'Mediação Civil e Comercial – As modalidades pré-judicial e intra-processual como elemento motivador' (2017) 1 *Maia Jurídica – Revista de Direito* 24-26.

32 See, among others, Ethan Katsh, Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2011) and Orna Rabinovich-Einy, Ethan Katsh, 'Technology and the Future of Dispute Systems Design' (2012) 17 *Harvard Negotiation Law Review* 151-199.

33 The Singapore Convention took a step forward in recognising the enforceability of mediation agreements internationally. This Convention was approved by the UN General Assembly on 20 December and opened for signature on 7 August 2019, with effect from 12 September 2020. Regarding this Convention and its effects see, among others, Nadja Alexander, Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (Wolters Kluwer 2019).

3.2.3. Arbitration or Judgement

Given the possibility that mediation may not be successful and an agreement between parties may not be reached, given the need to obtain an enforceable enforcement order in the European area of justice, a final adjudicatory phase should take place, which may involve the intervention of an arbitrator or a judge depending on the option of each member state.

It should be noted that introducing arbitration as a binding mechanism for the solution of small claims may be complex since, in this case, a situation of mandatory institutional arbitration would be created. If compulsory arbitration is allowed, as in Portugal, there will be no constitutional problems in this matter. But if the compulsory nature of this mechanism is not constitutionally permitted, as in Spain, the member states will have to opt for judicial mechanisms that may pass through specialised courts or indicate courts already competent in this matter.

Regardless of whether a judge or arbitrator was given jurisdiction, his or her appointment would occur via the online platform as soon as the mediator indicates that the agreement had not been reached.

At this adjudicatory stage, priority should be given to the written procedure. In other words, if the judge/arbitrator considers that he/she has all the necessary evidence and documentation, he/she could decide without holding a trial hearing. If he/she considered it necessary, it would be scheduled through the platform using the virtual tools integrated into it, in addition to the simultaneous translation of the trial.

The procedure would end with the publication of the judgement on the platform, which would communicate it to the parties. The judgement would be enforceable within the European area without any further procedures being required.³⁴ If the judgement were in favour of the applicant, a certificate that would serve as an enforcement order would be sent to him/her. This enforcement order would be enforceable in any member state.

Regarding the costs, a uniform scheme for all member states should exist. Thus, the claimant would have to pay a small amount (e.g., EUR 100) when submitting the claim. The idea of delivering justice should not make the process so costly that the parties do not want to use it. If the proceedings end by mediation, a sum must be collected and divided equally between the parties (e.g., EUR 50). If the case ends by judgment, the amount to be paid for the end of the case should be charged to the losing party.

At the end of the process, all statistical data regarding the nationality of parties, the matter of the case, and the final outcome should be automatically processed by the platform and made publicly available. In this way, its functioning would be continuously monitored, and member states could have permanent access to important data in the adoption of legislative changes or in the definition of justice policies.

3.2.4. Process path: overview

In conclusion, the proposed European Online Platform for Small Claims would be a single point of procedural management where each interested party could trigger the process to

³⁴ In view of the 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 December 2012 1-32).

be managed by the competent entity designated by each member state through the online system provided by the platform itself.

The process would have the following stages carried out through the platform:

- online submission of the form by the claimant;
- sending the form to the national body of the member state responsible for deciding the case determined by the platform, according to applicable rules;
- analysis of the claimant information sent by the competent national authority;
- if the case can proceed, the claimant's form is sent to the defendant for a response to be entered into the platform;
- receiving the defendant's reply, the case is sent to mediation, with the platform appointing a mediator (of a list created by member states);
- if the mediation succeeded in reaching an agreement, it would be enforceable – if an agreement was not reached, the case would proceed to trial, and the platform would appoint a judge or arbitrator for the case (according to the options of each member state);
- the judge/arbitrator in the case could dismiss the trial hearing if he/she had all the documentation and evidence necessary for the trial;
- if the judge/arbitrator considers it necessary to hold a trial hearing, it should take place using electronic means made available on the platform. The parties would be notified of the day and time of the trial hearing and should use the platform to enter the trial session. In this case, the judge/arbitrator would give the decision after the hearing and introduce it on the Platform for notification to the parties;
- once the procedure has been decided, the applicant may request a certificate that would serve as an enforcement order – this enforcement order may provide an enforceable application in any member state.

The parties and the competent national body could follow the entire case in real time, knowing at what stage it is and having access to the documentation annexed by the parties.

4 CONCLUSIONS

The proposal presented in this article aims to motivate the use of the small claims procedure in the EU and to overcome the difficulties already identified within the existing system. It also responds to the new challenges that justice systems face in the 21st century. Technological developments need to be properly incorporated into the procedures so that citizens have real access to the means of resolving their disputes.

This proposal also allows information to be collected, providing useful statistics. In this way, the system captures information on the type of problems submitted by parties feeding the aggregated data. Consequently, this information may be essential to promote legislative changes or behavioural changes in market players.

The proposed platform also promotes the parties' participation in the resolution of their conflicts since they could reach an agreement in the mediation stage. In conclusion, the right of access to justice must be fully promoted in a way that does not consist only of a mere possibility of access to a conflict resolution mechanism.

Access to justice must include an effective way of solving parties' disputes, which incorporates data produced by each process and is continuously improved, thus responding to the demands of the conflict.

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