

**Topic:** European Small Claims Procedure as a response to the needs of the creative class.

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„This time, perhaps for the first time in human history, economic logic is on our side. Prosperity in the Creative Age turns on human potential. It can only be fully realized when each and every worker is recognized and empowered as a source of creativity – when their talents are nurtured, their passions harnessed, and they are appropriately rewarded for their contributions.”<sup>1</sup>

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<sup>1</sup> Richard Florida published in 2012 by Basics Books , The rise of the creative class, p. XIV

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## **Introduction**

The purpose of research in the field of law is either to summarize certain existing enacted laws or to pose questions and make plans for the future. In our work we would like to first and foremost focus on a practical aspect of regulations and base it on an interdisciplinary character from the fields of law and sociology. We formulate a hypothesis that a significant part of our society is in need of our action – legal attention. We try to present a certain, in our opinion existing, problem, to identify presently applied solutions and to offer one for the future.

In this effort we wish to focus not only on the law, but on the people as well. We believe that the regulations described always have a derivative character and a human should always be put first.

The law should always follow human needs. Where societies are formed, it always leads to the creation of a system protecting the values which said society deems important. In our case, i.e. in the case of societies developing over the years, for the previous law to adhere to new demands it either has to be the subject of certain interpretation, or be changed.

We believe that we are witnessing historic changes. We find it necessary to speak up and try to address existing social problems. We see an additional value in this work in that it indicates a hidden potential for European small claims procedure.

We kindly invite you to read the paper.

### **What is the creative class, where it comes from**

To be able to define the notion of creative class, we first need to define both creativity and class separately.

#### Definition of class

So – what is a class? It is a system of ordering society, where people are divided into sets, most often based on perceived social or economic status.

## Definition of creativity

The Oxford English Dictionary defines creativity simply as “the facility of being creative; ability or power to create.” For us that definition does not explain an important role of creativity. And here is what Michael Grybko, a neuroscience research scientist and engineer from the Department of Psychology at the University of Washington<sup>2</sup> has to offer: “In science, we define ‘creativity’ as an idea that is novel, good, and useful. Furthermore, Dean Keith Simonton<sup>3</sup>, a Distinguished Professor of Psychology at UC-Davis, describes creativity as the act of bringing something useful, that works, and is non obvious into the world, or as he succinctly puts it, that is the “conjunction of novelty, utility and surprise.”

For us the most accurate definition of creativity, according to Mr Grybko’s research<sup>4</sup>, is “seeing the intersection of seemingly unrelated topics and combining them into something new” together with “interpreting something you saw or experienced and processing it so it comes out different than how it went in”. The key to understanding creativity is understanding how our brain works. We think creativity is the ability to let brain connect previously gathered experience and to create new, original ideas.

## Definition of the creative class

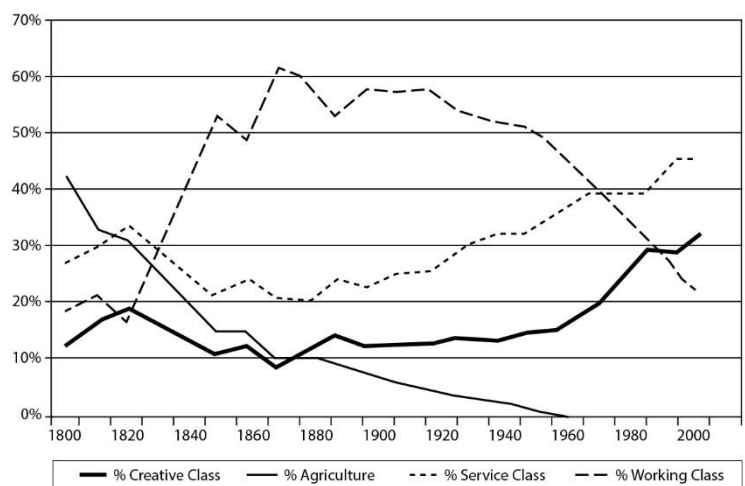
According to R. Florida the creative class includes people whose economic function is to create new ideas, new technology and new creative content. He distinguishes the creative class from agriculture, service class and working class on the basis that all other classes receive salary for doing their work according to a pre-established plan.

### **Rise of the creative class**

The rise of the creative class is a consequence of final form of the Industrial Revolution. As the Industrial Revolution began many years ago and is still happening, it had great impact on the evolution of the creative class.

As can be seen from the graph<sup>5</sup>, in 1800 the creative class formed barely 12% of the total

The Class Structure, 1800–2000 (Percent of Workforce)



<sup>2</sup> <https://rainmaker.fm/audio/writer/neuroscientist-michael-grybko/> 29 April 2018

<sup>3</sup> Richard Florida 2012 by Basics Books , The rise of the creative class, p. 6

<sup>4</sup> <https://rainmaker.fm/audio/writer/neuroscientist-michael-grybko/> 29 April 2018

<sup>5</sup> Richard Florida 2012 by Basics Books , The rise of the creative class, p 46

workforce and it has increased gradually after the world war II, from 16 % in 1960, 19% in 1970, 24% in 1980, having reached 32,6% by 2010.

### Characterization of the creative class

Previously the creative class was bound by big industries, such as music publishing companies or high-volume publishers. Nowadays, thanks to new technologies which give people new opportunities, the creative people are not dependent on big industries, as R. Florida wrote<sup>6</sup> “our economy is moving from an older corporate – centered system defined by large companies to a more people-driven one. This view should not be confused with the unfounded and silly notion that big companies are dying off. Nor do I buy into the fantasy that our economy is being reorganized around small enterprises and independent free agents. Companies, including very big ones, obviously still exist, are still influential, and almost certainly always will be. We simply mean to stress that as the fundamental source of creativity, people are a critical resource of the new age. This has far-reaching effects – for instance, on our economic and social geography and the nature of our communities”. It is worth noting that new possibilities lead to new risks. People who were previously under protection of big companies today have to face many threats.

### **The internet – new possibilities**

The internet leads to the disappearance of borders. That concept is not a new idea. It happened before with the invention of both telegraph and railway and later with the telephone and passenger planes. It was just the beginning. The real invention was the wireless revolution of the internet which allows people to communicate easily all around the globe. In this way people from the creative class can share their work in order to make or maintain contact with their consumers.

### Why the creative class needs legal help

While the internet gives new possibilities it is also a source of a great threat. Many independent artists are an easy target for infringers. A great example of how wide the problem is, is the [www.youthoughtwewouldntnotice.com](http://www.youthoughtwewouldntnotice.com) website, which presents, among others, the case of Rockie Nolan<sup>7</sup>, a nineteen year old photographer who uploaded her works (photos) on deviantART. One of her photographs was used, without her consent or even knowledge, as a print on a commercially available t-shirt.



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<sup>6</sup> Ibidem

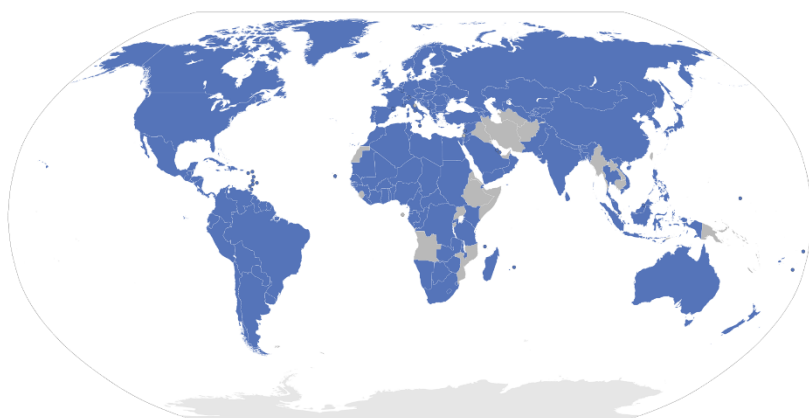
<sup>7</sup> <http://www.youthoughtwewouldntnotice.com/2010/06/09/reserved-rips-off-rockie-nolan/> 2 May 2018

Even drawing from personal experience, two of our friends working in the field of arts chose not to assert their rights because they were too scared and overwhelmed with the cross-border civil procedure.

### How we can help

First of all, it is worth mentioning that the definition of a subject of creation is the same as the definition of work (“that which is produced by mental labor”) in Polish Copyright and Related Rights Law. The work is described therein, in article 1.1 as “any manifestation of creative activity of an individual nature, established in any form, regardless of its value, purpose and form of expression (work)”.

Secondly, due to the Berne Convention<sup>8</sup>, the copyright law is very similar in 175 countries around the globe. Everywhere, an author of work whose rights have been infringed may seek justice.



from [https://en.wikipedia.org/wiki/Berne\\_Convention](https://en.wikipedia.org/wiki/Berne_Convention) subpage.

In the case of worldwide material copyright law which protects creative class works, it is crucial to find effective and cheap procedures to apply it. We formulate a hypothesis that a Small Claims Procedure can be a solution for these needs.

### **What is the European Small Claims Procedure**

The European Small Claims Procedure was established by the Regulation No (EC) 861/2007 (**further referred to as ESCP**) and has been applied since 1 January 2009 in all Member States - except Denmark. The main purpose of it is to ensure access to justice in cross-border civil and commercial matters through a faster and low - cost judicial procedure. It is used for the recovery of claims where the value does not exceed an established threshold<sup>9</sup>. It provides mutual recognition of judgments issued by courts in Member States of the European Union by eliminating the intermediate proceedings necessary for their recognition and enforcement (exequatur). The Regulation supports proper functioning of the internal market by increasing legal certainty and confidence in investments of cross-border trade<sup>10</sup>. This procedure does not replace national civil procedures. It simply coexists with them as an option and provides a claimant with an alternative method

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<sup>8</sup> The Berne Convention for the Protection of Literary and Artistic Works, widely known as the Berne Convention, is an international agreement governing copyright, it was first accepted in Berne, Switzerland, in 1886

<sup>9</sup> Initially a threshold of 2000 € but from 14 July 2017 it is 5.000 € - article 1 of Regulation (EU) No 2015/2421 amending Regulation (EC) No 861/2007 and Regulation (EC) No 1896/2006

<sup>10</sup> DG JUST – Impact Assessment on the revision of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (draft version of 21 June 2013), D (2013), page 1.

of seeking redress. ESCP marked the beginning of a new era for cooperation between Member States in the field of civil procedure<sup>11</sup>.

### Characteristics of the Regulation No (EC) 861/2007

The procedure created by the Regulation has a few key characteristics, in particular – the usage of standard and simplified forms by parties and the court, deadlines imposed upon the court and parties, mandating the written form of proceedings with the usage of electronic means of communication, and standards for review of the judgment. Representation by a lawyer is not obligatory (however often they are involved). The unsuccessful party bears costs of the proceedings of the successful party to the extent to which the costs are proportionate to the claim. The definition of a number of essential elements within the procedure still happens on a national level. These elements include: the competence and organisation of courts, the possibility of, and detailed rules on appeal, detailed rules on service of documents and taking of evidence, court fees and details of the enforcement procedure).

### **To whom the regulation is addressed**

From the start European legislators designed the ESCP procedure for use by both consumers and businesses doing cross-border transactions in the EU in order to ensure enforcement of their rights. An increase in cross-border trade in the EU in the recent years and the further growth expected to come forced the provision of efficient forms of judicial cooperation in civil matters. The decision makers focused mostly on cross-border consumer transactions which have grown in recent years due to the development of Internet access<sup>12</sup>.

### ESCP only for customers and businesses, in particular small and medium-sized enterprises?

In our opinion focusing exclusively on consumers and businesses might give an incomplete perspective as nowadays consumers<sup>13</sup> are well protected by procedural regulations in Member States<sup>14</sup> and by European instruments<sup>15</sup>. Consumers have a choice and they may bring proceedings against the other party to the competent court of their habitual residence and proceedings against consumers may be brought only to such

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<sup>11</sup> Xandra E. Kramer, A Major Step in the Harmonization of Procedural Law in Europe: the European Small Claims Procedure Accomplishments, New Features and Some Fundamental Questions of European Harmonization, page 2-3

<sup>12</sup> Special Eurobarometer 395 (2013), page 10, 20, Flash Eurobarometer 186 (2006), page 11.

<sup>13</sup> natural persons who concluded a contract outside of their trade or profession

<sup>14</sup> e.g. in Poland art. 34 of the code of civil procedure *Actions for executing a contract, determining its contents, for amending a contract, as well as for determining the existence of a contract, or the performance, termination or invalidation thereof, as well as for damages for default of contract may be brought before the court in place of the performance of the contract. In case of doubt, the place of performance of the contract shall be confirmed by a document.*

<sup>15</sup> e.g. Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR); Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91; Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

a court<sup>16</sup>. Therefore in the majority of cases consumers sue other parties in their own jurisdiction. In this way at the stage of court proceedings they do not face the challenge of having to use a foreign language. Whereas businesses, even small, usually use the help of lawyers, as often they are required to sue in the defendant's forum<sup>17</sup>.

### Creative class and ESCP

In our opinion, legal analysis and research tend to forget that for the purpose of ESCP, a simple division into consumers and businesses is insufficient. The creative class is a large group of natural persons who usually do not run businesses, nor are they consumers, and who might still seek redress in cross-border disputes arising from an infringement of their author's rights. The scope of copyright is very wide, making it easier for the authors to utilise the results of their creative work as fully as possible. At the same time, the implementation of these guarantees without a solid basis for enforcing these rights in courts would not only affect the copyright system, but would also constitute a serious obstacle to the establishment and functioning of the European Union's internal market<sup>18</sup>. Such claims are the subject of proceedings in the Member State where a harmful event occurred or may occur – mostly defendant's jurisdiction<sup>19</sup>. Having in mind that artists mostly do not run very prosperous businesses and usually cannot afford to pay for legal support it is important to guarantee this group an adequate path to seek judicial redress.

ESCP is a chance for the creative class, ensuring that the cost and complexity of a lawsuit will not deter them from pursuing their claim, making their rights functional in practice.

### **Current state of affairs. Diagnosis and treatment**

During the first five years of existence of ESCP it has been rarely used. The average number of claims filled yearly per Member State was only around 120. In many countries that number has even been below 10 per year.<sup>20</sup> The number of applications varied greatly, ranging from just 3 applications in Bulgaria to 1047 applications in Spain in 2012<sup>21</sup>.

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<sup>16</sup> Article 18 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

<sup>17</sup> Special Eurobarometer 395 (2013) page 8, Dr Pablo Cortés, opinion for JURI Committee, The European Small Claims Procedure and The Commission Proposal of 19 November 2013, page 10

<sup>18</sup> Ewa Laskowska-Litak, *Jurysdykcja, naruszenie praw autorskich a Internet - wprowadzenie i wyrok TS z 3.10.2013 r., C-170/12, Peter Pinckney przeciwko KDG Mediatech AG oraz wyrok TS z 22.01.2015 r., C-441/13, Pez Hejduk przeciwko EnergieAgentur.NRW GmbH*, page 1

<sup>19</sup> Article 7(2) Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

<sup>20</sup> Rafał Mańko, *Briefing EU Legislation in Progress Reform of the European Small Claims Procedure by European Parliamentary Research Service*, page 2

<sup>21</sup> Rafał Mańko, *European Small Claims Procedure: Legal analysis of the Commission's proposal to remedy weaknesses in the current system by European Parliamentary Research Service*, page 18

## Report from The Commission

The European Commission was, by article 28 of the Regulation 861/2007, obliged to present by the 1 January 2014 a report reviewing the operation of ESCP. The final report was submitted on 19 November 2013. It was based on an external study, an online public consultation, replies to a questionnaire addressed to Member States, discussions in the European Judicial Network in Civil and Commercial Matters ("EJN") in 2011 and 2013, and input from consumers and the general public<sup>22</sup>. The report noted that the procedure reduced the cost of litigation in cross-border claims by up to 40%, reduced the duration of litigation from as high as 2 years and 5 months to an average of 5 months and introduced a procedure which is cheaper and simpler than national procedures. Commission pointed out the limited use of the regulation despite a huge number of potential cases. The Commission diagnosed the reasons for this problem and pointed out following regulation drawbacks:

1. **limited scope of the regulation** (2.000€ threshold is too low; definition of “cross-border is too narrow)
2. **high costs and length of the current procedure in cross-border cases below 2.000 €** (priority given to postal service over electronic service; reluctant use of distance means of communication for hearings and taking of evidence; disproportionate court fees to the value of the claims; practical obstacles to the payment of court fees like demanding physical payment at the court premises; unnecessary translation costs; lack of transparency of information concerning costs of litigation and methods of payment of court fees in ESCP cases;
3. **limited awareness of the existence and operation of the procedure of relevant actors:** the citizens, the courts and other organisations providing support and advice.<sup>23</sup>

## **Low popularity of ESCP**

The main issue seems to be an overall lack of awareness, not only of the details and principles of ESCP but also of the procedure itself. The EU citizens do not know about the possibilities which ESCP gives. There is little or no knowledge that such procedure exists and that it is a simple tool of getting the judgement in cross-border cases.

The problem might be that obtaining even basic information about ESCP is complicated. It seems difficult to get practical assistance in initiating the procedure. One of the problems noticed in Poland is that the majority

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<sup>22</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, 19.11.2013, COM(2013) 795 final page. 2 with materials mentioned there

<sup>23</sup> Commission Staff Working Document Executive Summary Of The Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 and Regulation (EC) No 1896/2006, SWD(2013) 460 final, page 2-3; please see also Alexia Maniaki-Griva, Briefing Initial Appraisal of a European Commission Impact Assessment by Ex-Ante Impact Assessment Unit, PE 514.109, page 1-3



of courts still do not provide citizens with forms, neither on their premises, nor on their websites, even though they should, in accordance with the Article 4.5 of the Regulation on ESCP. On the other hand the European e-Justice portal - European Judicial Atlas in Civil Matters – offers help in this area providing information and forms. However, if such assistance was provided on a national level it would be far more effective. Moreover, the Regulation imposes an obligation on Member States to ensure practical free of charge assistance in filling the forms and general information on the scope of application of ESCP. This assistance should be available at all courts and tribunals before which ESCP can be commenced, and it should be accessible through relevant national websites<sup>24</sup>. This obligation is formulated in a general manner, leaving the Member States the possibility of adopting solutions most suitable for their legal systems. However, it does not ensure that citizens are clear about whom they should address for assistance and in practice the Regulation does not oblige Member States to notify of the methods of provision of assistance to applicants.

### Polish example

Regrettably, Poland, being the example here, has not fulfilled this obligation. On the court websites there is no information about ESCP, no instruction how to proceed. As the forms are regarded, website of the Regional Court of Warsaw – which is the biggest Regional Court in Poland - links to the website of the Ministry of Justice, where forms concerning the European Order for Payment procedure and legal aid application in another Member State of the European Union are available. Unfortunately there is no information or indication on ESCP. As a consequence, Polish citizens are rarely able to obtain necessary and accurate information on ESCP. This may be one of the reasons for such a small number of claims commenced under ESCP.

### **The consequences of lack of awareness for the proceeding**

The direct result of the lack of ESCP cases in the courts are irregularities in their recognition by the courts. For instance ESCP cases are so rare in Poland that when they appear in courts, judges are confused about the proper course of action and usually prolong making decisions concerning the proceeding. We were able to analyse 3 cases with an ESCP claim.

### Short case analysis

**Case I** was commenced in October 2015 and the judgement was delivered in October 2017. It took 2 years, while the Regulation imposes a 30 day time limit<sup>25</sup>. So what happened? During the proceeding – on 10 December 2015 - the court called the claimant to rectify his claim by completing the Form A in the court

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<sup>24</sup> Article 11 of Regulation No 861/2007 of the European Parliament and of the Council

<sup>25</sup> Ibidem – Article 7

language (Polish) and paying the court fee<sup>26</sup>. A year after that – on 9 December 2016 - the court served the copy of the claim with the Form C to the defendant, for him to submit his response. The defendant submitted the response within the deadline (13 February 2017). The interesting part was he did not contest the claim, in the sense that he indicated that he had paid the demanded amount (250 €). The court then decided to serve the response to the claimant – on 26 April 2017. The judgement was issued half a year later. In our view this proceeding could and should be completed much earlier. The idea of ESCP is to simplify and accelerate civil procedure. The Regulation covers several aspects of the procedure, giving the tools for accelerating the procedure - in particular by using standard forms and imposing deadlines upon the court and parties. In the analysed case there were no objective circumstances which would justify prolonging of making the decision.

In **Case II** the proceeding was terminated by dismissal based on a failure to rectify the claim. However, the court failed to notice that it did not have the jurisdiction.

**Case III** is still pending. It was commenced in 2015. The copy of the claim and Form C were served on the defendant who responded via e-mail, not using the standard form. He admitted the claim and indicated that he had paid the demanded amount, submitting the copy of proof of payment. The court then decided to hold an oral hearing, even though there was no indication that the hearing is necessary for giving the judgement. It must be said that ESCP is a written procedure and the court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgement on the basis of the written evidence or if a party so requests. And even if the party requests the oral hearing, the court may refuse it, if it considers that, with regard to the circumstances of the case, an oral hearing is not necessary for the fair conduct of the proceedings<sup>27</sup>. In this case the circumstances were unambiguous and did not require a hearing. Despite that, the court appointed a hearing during which the judge noticed that the subpoena was not served on the defendant, because he had moved out from the address indicated in the claim. Because of that the court adjourned the hearing and called the claimant to indicate the defendant's current address. The court did not notice that the defendant, in his e-mail, indicated his address, which was different from the address put in the claim. It must be said that the defendant can respond not only by using Form C but also in any other appropriate way, not using the answer form<sup>28</sup>. Therefore the e-mail sent by the defendant in these case should be treated like a regular response with all the consequences.

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<sup>26</sup> Ibidem - Article 4.4.

<sup>27</sup> Ibidem - Article 5. 1 and 1a

<sup>28</sup> Ibidem - Article 5.3.

## Case analysis - conclusions and solution

The common conclusion is that usually the length of the proceedings is unreasonable. We believe that lack of experience with ESCP cases is leading to such irregularities and unjustified prolonging of the proceeding. If the courts had to deal with these claims more regularly, the proceedings would go smoothly as the judges would have more experience with such cases. The solution to change that is to increase the awareness among citizens and lawyers about the existence of this procedure and its advantages in cross-border litigation.

### **New start - The European Commission proposal**

To address the identified problems the Commission considered 4 policy options. On the basis of the assessment, it finally decided to recommend the increase of threshold to 10,000 €; broadening the definition of cross-border cases; improving the use of electronic communication, including for service of documents; an obligation to use videoconference for hearings and evidence taking; providing a maximum limit on court fees charged for the procedure; an obligation to provide remote means of payment of court fees; limiting the requirement to translate Form D, just to the substance of the judgment; imposing an obligation for Member States to provide the Commission with information regarding: litigation costs and methods of payment of court fees; where the parties can obtain practical assistance in filling in the forms<sup>29</sup>.

### Path to Regulation (EU) 2015/2421

The Commission proposal was referred to the Parliament and the Council. It was subjected to debates which greatly changed the initial proposition. An agreement between the Parliament and the Council was reached on 23 June 2015<sup>30</sup>. The regulation was adopted on 16 December 2015<sup>31</sup>. Amendments entered into force on 13 January 2016 but apply from 14 July 2017, with the exception of article 25 applying from 14 January 2017. This article imposed on Member States an obligation to provide the Commission, until 13 January 2017, with information regarding *inter alia* methods of payment of court fees, languages used in enforcement proceedings, court fees, the availability of appeal, where to receive practical assistance in filling the forms. The Commission had to make this information publicly available by appropriate means, including e-Justice Portal<sup>32</sup>.

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<sup>29</sup> Commission Staff Working Document Executive Summary Of The Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 and Regulation (EC) No 1896/2006, SWD(2013) 460 final, page 6-7

<sup>30</sup> Small claims procedure: MEPs strike a deal with Council, Press Releases; 23-06-2015 - 16:05; Key events of legislative process: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0403\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0403(COD)) /6 May 2018

<sup>31</sup> Regulation (EU) 2015/2421 amending Regulation (EC) No 861/2007 and Regulation (EC) No 1896/2006 creating a European order for payment procedure, Official Journal of the EU L 341/1, 24.12.2015, p. 1–13

<sup>32</sup> amended art. 25 Regulation No 861/2007

## Key amendments of Regulation (EC) 861/2007

European co-legislators finally decided that: the value of a claim shall not exceed 5.000 € for all claimants alike (art. 1); the procedure shall be available only in genuinely cross-border cases (art. 1 in connection with art. 3); the use of electronic communication shall be widely accepted (including for the service of documents), the courts shall be obliged to use videoconferencing for hearings and evidence taking, court fees shall not be disproportionate and shall not be higher than the court fees charged for national simplified court procedures in that Member State<sup>33</sup>, at least one possibility of remote payment shall be guaranteed, translation of form D shall be limited to the substance of judgement.

It is worth mentioning that the amendments opened doors for court settlements which now should be recognised and enforced under the same conditions as a judgment given in a ESCP<sup>34</sup>. Beyond doubt a factor which will expedite a lawsuit is emphasizing the need for the courts to use appropriate remote communication technology, such as videoconferences or teleconferences. What might also contribute to this end is a wider use of electronic service of documents. New regulation includes measures providing practical assistance to claimants - in filling in the forms and providing general information about the procedure and court jurisdiction. Information on the authorities or organisations competent to give assistance to parties must be available, as we have already mentioned, at all courts before which the ESCP can be commenced, and displayed on relevant national websites<sup>35</sup>.

## New opening for the creative class

This new opening is very promising. Steps towards simplifying the procedure, making it more “user friendly”, with low cost and easy accessible are praiseworthy. But still there are steps to take to make it work better, especially for the creative class.

## **What can be done currently**

### To ensure the efficiency of the proceedings

Before widely promoting the European Small Claims Procedure among the creative class, Member States should ensure that informational obligations are fulfilled. Promotional activities cannot bring expected results when there is a lack of human resources with sufficient awareness of the matter, who could adequately advise and help consumers with respect to the procedure. It should be also ensured that the procedure works smoothly. To that end it would be useful to organise trainings for judges and court officers on ESCP. Other

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<sup>33</sup> Poland does not fulfil this obligation. court fee for ESCP is fixed for 100 PLN but the basic court fee is just 30 PLN

<sup>34</sup> added art. 23a Regulation No 861/2007 of the European Parliament and of the Council

<sup>35</sup> amended art. 11 Regulation No 861/2007 of the European Parliament and of the Council

possible option to implement ESCP more effectively would be establishing one or several court authorities in each Member State which would be responsible only for ESCP. This would be a way to assign dealing with ESCP to a smaller group of competent entities, who would be completely familiar with the procedure itself as well as the details of enforcement of the judgements.

#### To provide adequate training for lawyers

The next step would be to raise awareness among legal professionals. There should be seminars during training courses for attorneys-to-be. Also, the bar associations could organise trainings about ESCP and its scope of application. Therefore, the professional lawyers could give better and more informative advice on suitable tools and procedures in cross-border cases, especially those concerning copyright issues.

#### To promote ESCP throughout the EU

Finally, the ideal solution would be to introduce European campaign promoting ESCP and to present it as a guarantee of the right of access to court and a distinctive element of the European area of freedom, security and justice. Such campaign should not only be aimed at consumers, but also at entrepreneurs engaged in activities related to creative work. It has to be emphasized that the ESCP procedure is suitable not only for consumers, but that it can also be applied in business relations and disputes based on copyrights claims. The application of ESCP should be a part of youth programs such as international exchanges and training, so that the awareness among younger generation is raised. We recommend to introduce seminars about ESCP and its applications in art schools and universities, so that the creative class would be aware of the options for enforcement of their rights.

### **Proposals for improvement and further modifications of ESCP**

The first thing that comes to mind as a possible reason for low popularity of ESCP – except the lack of knowledge about its existence – is language barrier. The empirical research by the European Consumer Centres Network (EEC-Net) on the ESCP application revealed that language requirements and translation are among the most commonly identified difficulties for this instrument<sup>36</sup>.

#### ESCP language provisions

ESCP Regulation, in Article 6, contains specific provisions on language of procedure and language of documents to be served or dispatched to the other party. According to article 6.1, the claim form, the response, as well as any counterclaim and any response to a counterclaim and any description of relevant supporting

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<sup>36</sup> Elena Alina Ontanu and Ekaterina Pannebakker "Tackling language obstacles in cross-border litigation: the European Order for Payment and the European Small Claims Procedure approach", Erasmus Law Review, Volume 5, Issue 3 (2012)

documents shall be submitted in the language or one of the languages of the court or tribunal. The obligation for translation is imposed on the claimant<sup>37</sup>. The obligation of filling in form with a foreign language discourages from using the small claims procedure. It requires an extra workload from the party as he or she has to translate his or hers claim and evidence. In the event where the interested party does not understand the language of procedure, this party is left in a situation where he or she either requires legal assistance and translation or drops the procedure.

Language obstacles are to certain extent eliminated by the use of standard forms which are available online on the European e-Justice Portal in all 24 EU's official languages<sup>38</sup>. These forms are based on tick boxes, short closed questions and fields requiring certain information from parties (like names and contact details). The claimant can choose a Member State to which he would like to send a form after completion. The form presented for completion is in the language of the competent court – language of procedure. The claimant still has to translate for his use all of the questions and information included. Of course the parties can download versions in their language and the language of the court, and then compare them while filling them in. It is also possible to fill the form electronically by using dynamic forms provided online on e-Justice Portal. The party fills the form by using his language and then the form is automatically translated in the requested language of procedure. This solution does not cause any costs to the parties. However, it does not translate the open questions sections, like section 8 “Details of claim” in which the claimant has to give reasons for his or her claim by describing what happened. If the claimant fills this section in his own language – not the court's language - the court will ask him (by using Form B) to complete or to rectify the data submitted, which prolongs the procedure and may cause the claimant to drop the procedure, regarding it as too problematic and causing additional costs for translation.

#### Language of procedure vs language of service

We also must have in mind that in ESCP there are separate provisions about language of procedure and language of service and dispatching of documents. According to Article 6.3 of ESCP Regulation, in the situation where a party refuses to accept a document coming from court because it is not in either of the official language of the Member State addressed or one of the official languages of the place where service is to be effected or to where the document is to be dispatched, or in a language which the addressee understands, the court informs the other party about it so that the other party provides a translation of the document<sup>39</sup>. So even if a party submits the documents in court's language it may still be obliged to provide

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<sup>37</sup> Article 6(1) of Regulation No 861/2007 of the European Parliament and of the Council

<sup>38</sup> [https://e-justice.europa.eu/content\\_small\\_claims\\_forms-177-en.do?clang=en](https://e-justice.europa.eu/content_small_claims_forms-177-en.do?clang=en) /6 May 2018

<sup>39</sup> Article 6(3) of Regulation No 861/2007 of the European Parliament and of the Council

additional translation in a completely different language, which leads to additional costs and prolonging the procedure. Once more the burden of translations is imposed on the party.

#### Using one language to proceed small claims

The first of the solutions proposed by us to reduce the language barrier and to reduce the need for translations is choosing one common language in which small claims can be pursued in all Member States. The idea of Europeans using a single common language is coherent with the concept of European integration and unification. The suggested language would be English as it is the world's most spoken language and it is considered to be the language of international relations in various aspects. English is used increasingly in international trade and is often chosen for practical reasons as a language for communication when the assistance of a foreign lawyer is needed<sup>40</sup>. What is more, English dominates among the three working languages of the EU (French and German). Of course there is an issue of UK leaving the European Union which may jeopardize the idea of choosing English as a language of ESCP. English is one of 24 official languages of the European Union<sup>41</sup>. Each member state identifies one official language and the UK is currently the only country to nominate English as such. However, Ireland and Malta both use English as their official language as well. Changes to the EU's language regime would come with huge added costs, given that translation accounts for 1% of the annual budget<sup>42</sup>. Having that in mind we are convinced that English will remain one of the EU's official languages and that it is the most sensible choice as it comes to language for ESCP.

#### Benefits and requirements of having English as language of procedure

Choosing one language in which the courts of all Member States would proceed small claims cases and in which service on documents would be made, would lead to releasing the party from the obligation of providing documents often in two different languages. However, introducing English as one common language as the language of ESCP in all Member States requires providing certain safeguards for the right to a fair trial and access to justice. The responsibility of the court would be to assess the quality of English used by parties to avoid ambiguities or mistakes in understanding<sup>43</sup>. Moreover, the judge's level of English should not be neglected. It must be ensured that judges assigned to ESCP cases have a proper proficiency in English. The good idea would be to create a special department in each court, designated for cross-border litigation

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<sup>40</sup> Elena Alina Ontanu and Ekaterina Pannebakker "Tackling language obstacles in cross-border litigation: the European Order for Payment and the European Small Claims Procedure approach", Erasmus Law Review, Volume 5, Issue 3 (2012)

<sup>41</sup> Regulation No 1 determining the languages to be used by the European Economic Community together with Article 55(1) of Treaty on European Union

<sup>42</sup> <https://www.euractiv.com/section/languages-culture/news/english-will-remain-an-official-language-of-the-eu/> /6 May 2018

<sup>43</sup> Elena Alina Ontanu and Ekaterina Pannebakker "Tackling language obstacles in cross-border litigation: the European Order for Payment and the European Small Claims Procedure approach", Erasmus Law Review, Volume 5, Issue 3 (2012)

cases and provide judges assigned to such sections with suitable language and procedural seminars. Nowadays, given the wide choice of international seminars organized e.g. by EJTN - including a new program focused solely on language skills (Summer School) – the idea of creating specialized sections in Member States courts, dedicated to proceeding European procedures with ESCP among them, does not seem unrealistic. The Netherlands is setting an example here. They are launching a specialised court designed to adjudicate cases of civil or commercial matters with an international aspect. Based in Amsterdam, the Netherlands Commercial Court (NCC) will operate under Dutch procedural law, while the working language will be English. The establishment of the NCC is still under way and it is expected to launch mid 2018<sup>44</sup>.

#### Submission of documents in two languages

The other option is establishing a rule obliging the parties to file documents in two languages at once - the language of the court and the language that both of the parties use. The same form should be established in two languages simultaneously: the language of procedure - to communicate with the court - and the language of the parties - in order to be served to the other party. This happens both when the claimant fills in Forms A and B and when the defendant fills in Form C. Filing forms simultaneously in two languages would definitely shorten the proceeding by eliminating the need for calling the party to provide translation of the documents for the purpose of service or dispatching.

#### Parties' right to refuse documents

In addition, in order to secure access to justice, parties should be informed that they may refuse the forms and documents served or dispatched, provided these are not in the language or accompanied by a translation in the official language of the place of service or a language they understand<sup>45</sup>. To accomplish that, a general European form of instruction should be created, notifying of the right to refuse to accept a document served or dispatched if it is not written in or accompanied by a translation into either a language which he understands or the official language or one of the official languages of the place of service. Such instruction should at the same time impose on the party the obligation to indicate the language he or she uses and wants to conduct the dispute under. It must be pointed out that the Regulation No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters provides such form in Annex III “Information to the addressee about the right to refuse to accept a document”. Provisions of this Regulation should be used in ESCP. All the forms provided by the

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<sup>44</sup> <https://www.rechtspraak.nl/English/NCC/Paginas/default.aspx> /6 May 2018

<sup>45</sup> Article 6(3) ESCP read in conjunction with Recital 19 ESCP and Article 8(1) of Regulation No 1393/2007 of the European Parliament and of the Council



Regulation mentioned on the service of documents are available online<sup>46</sup>. The subject form, informing about the right to refuse a document, includes the declaration of the addressee that he or she understands indicated languages. However, in our view it would be necessary to add a provision that in case of failure to indicate the language, it would be considered that he or she knows the language in which the served forms and documents had been filled in. That way it would be possible to accelerate the proceedings. Such modified form should be used in all of European civil proceedings.

### Shall courts make all of translations?

Another solution could be the resignation from putting the obligation of translation on the parties for the benefit of translations being made by court *ex officio*. In order to implement that, the courts should employ professional translators, qualified in legal terminology. However, it might be a very difficult and expensive idea, as there should be translators of all of the European Union's languages. So the other option would be using the service of appointed *ad hoc* experts. The court would temporarily bear the costs of translation and it would settle them in final judgement by imposing them on the unsuccessful party<sup>47</sup>. In the event of lack of payment,, the enforcement should be carried out *ex officio*. Moreover, the Regulation should establish a fairly short deadline for translations, so as not to exceed the set duration of the proceeding, which is 30 days<sup>48</sup>.

It must be borne in mind that the proposed simplifications must not sacrifice parties' right of access to justice and a fair trial.

### **Standard forms – improvements needed**

The aforementioned standard forms are essential for the functioning of ESCP. The purpose of them was not only to diminish language obstacles but also to make the final judgment easily recognisable and enforceable in all Member States. The forms are available online in all official languages of the European Union. Parties have a possibility to construct a form online in their own language and then, just by one click, to have it translated (with the exception of open questions). A more traditional approach requires the party to download and print out a form in his or her own language along with the same form in a foreign language.

When we tested the online form filling tool, we noticed a few problems that we would like to highlight.

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<sup>46</sup> [https://e-justice.europa.eu/content\\_serving\\_documents\\_forms-269-pl.do?clang=pl#action](https://e-justice.europa.eu/content_serving_documents_forms-269-pl.do?clang=pl#action) /6 May 2018

<sup>47</sup> Article 16 of Regulation No 861/2007 of the European Parliament and of the Council

<sup>48</sup> *Ibidem* Article 8(1)

## Main problems of filling in the form using an online e-tool

On the website<sup>49</sup>, upon choosing Form A, the claimant is asked to select the Member State to which the claim is going to be sent after completion. Then the information sent by this Member State to the Commission on basis of art. 25(b) of the regulation (details how submit a claim) is displayed. Unfortunately not all of the important information is displayed. In order to access all the information sent to the Commission by EU countries, one has to navigate to another subpage<sup>50</sup>. Details from Bulgaria, Latvia, Lithuania, Hungary and Slovenia in the basic version of this page (default one) are still missing (see below). But those details are available in a beta version of the page.



from [e-justice.europa.eu](https://e-justice.europa.eu) subpage. Details from red circled countries is unavailable.

After choosing a country where the claim is going to be sent, completing claimant's data (**step 1**) and defendant's data (**step 2**) the online form requires to point out grounds for court jurisdiction (**step 3**). Non-exhaustive options are given like domicile of the defendant or place of the harmful event. Competent court in line with national procedural law can be also verified by parties on another subpage<sup>51</sup>. **Step 4** aims to determine cross-border nature of the case by picking out country of domicile or habitual residence of claimant and defendant and the seat of the court. Optionally the party can choose the method of paying the court fee and account where defendant shall pay any amount claimed or awarded. We noticed that:

- a) a link to another subpage dedicated to court fees <sup>52</sup> allows to display information which is not compatible with other subpages of the website (e.g. subpage is not showing information about court fees in Portugal although this information is available, it shows that details from Latvia, Bulgaria, Lithuania, Hungary and Slovenia are available but on the default page they are not);



from [e-justice.europa.eu](https://e-justice.europa.eu) subpage. Red circled – details not available although they are.

- b) even if the member state does not except certain way of payment all options are still displayed in step 4 just with an instruction to double check this issue;

<sup>49</sup> [https://e-justice.europa.eu/content\\_small\\_claims\\_forms-177-en.do?clang=en](https://e-justice.europa.eu/content_small_claims_forms-177-en.do?clang=en) /6 May 2018

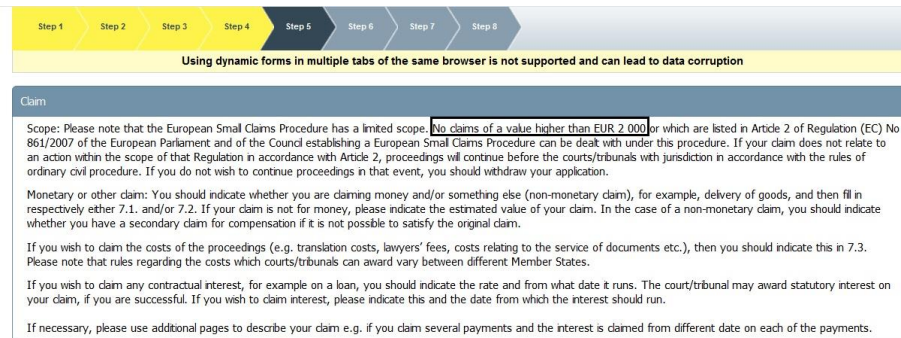
<sup>50</sup> [https://e-justice.europa.eu/content\\_small\\_claims-354-en.do](https://e-justice.europa.eu/content_small_claims-354-en.do) /6 May 2018

<sup>51</sup> [https://e-justice.europa.eu/content\\_jurisdiction-85-en.do](https://e-justice.europa.eu/content_jurisdiction-85-en.do) /6 May 2018

<sup>52</sup> [https://e-justice.europa.eu/content\\_court\\_fees\\_concerning\\_small\\_claims\\_procedure-306-en.do](https://e-justice.europa.eu/content_court_fees_concerning_small_claims_procedure-306-en.do) /6 May 2018

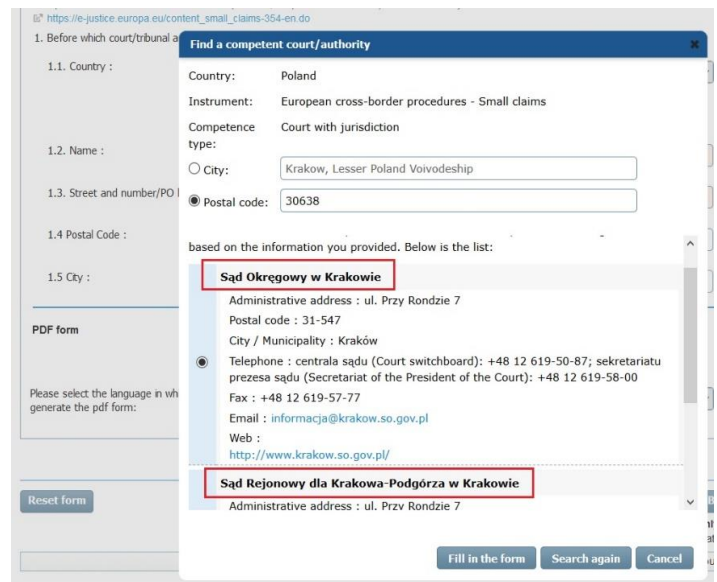
- c) beta version of the website is not compatible with the default page.
- d) online dynamic online forms do not indicate errors when contradicting information is given (e.g. the claimant lives in Croatia, the defendant in France, jurisdiction in line with the domicile of the defendant and country where that claim is going to be sent to is Poland). It is possible to check all boxes for court jurisdiction – even if they contradict.

**Step 5** is about the claim (monetary or non-monetary, cost of proceedings, interests on claim and costs).



**What is shocking is that the instruction still contains information that the procedure is available for claims not exceeding 2.000 € in value.**

Step 6 makes it possible to indicate reasons for the claim and evidence. Step 7 is dedicated to oral hearing, service of documents and communication with the court, certificate concerning the judgment and its language, date and signature. In the last step the claimant is able to find a competent court where that claim shall be sent. This might cause huge problems when more than one court is competent according to this tool<sup>53</sup>.



### How to improve e-forms. Our propositions

In order to simplify ESCP it is essential to improve the e-tool for filling in forms. Currently claimants without legal background still might find it difficult to deal with. First step is to ensure that the information given in instructions and subpages of e-justice.europa.eu website is coherent, up to date and easily accessible. Interactive forms shall conform to procedural rules of the country with court jurisdiction (way of submitting documents, court fees) and should give accurate instructions seen at the time of filling the claim.

<sup>53</sup> In Poland monetary claims are in jurisdiction of district courts (Sądy Rejonowe) when subject of the dispute is up to 75.000,00 PLN or regional courts (Sądy Okręgowe) when value of the claim exceed this amount.

## **Complete digitalization of the procedure**

The answer to the low use of ESCP might be a wider use of electronic forms of communication. The possibility to handle a cross-border case without leaving home is attractive. There exists a pilot project called e-Codex. It is a chance for modernization and popularization of ESCP. The project aims to assess the feasibility of a creation of centralised online system enabling EU citizens and companies to process civil claims online. The project already developed an e-delivery solution and cross-border recognition of e-identities and e-signatures. These components are a key requirement to speed up communication<sup>54</sup>. e-Codex interlinks national and European IT systems in the e-Justice domain without replacing the existing back-end systems<sup>55</sup>. Wide acceptance for this project and implementation of its results would contribute to the access to justice and expediting lawsuits making the procedure more convenient.

### Before the era of judiciary digitalization

Surely, the transition to a wider use of online systems in legal procedures is going to take a while. Modernization of court infrastructure, wide use of e-identities and e-signature among citizens will not happen overnight. However, this does not absolve decision makers from improving existing solutions. There is no question that current IT services demand modernization. For the time being we propose: a) rebuilding existing e-justice.europa.eu website to make all the required information on ESCP easy accessible and well organised (information sent by Member States to the Commission in accordance with art. 25, detailed information about jurisdiction, court fees); b) basic version of the page should be compatible with beta versions; c) in the e-forms, instructions should be updated (e.g. threshold is 5.000 € and not 2.000 €); d) updating information about jurisdiction (especially for cases where the e-tool suggests that two or more courts are competent); d) providing detailed information about payments of court fees (not only methods but e.g. in case of bank transfers details of bank account and SWIFT, for other services links to tools enabling to do it online).

## **Conclusion**

We believe that the solutions we offered in this work would help the creative class be more aware of its rights and compensated appropriately for its work.

Thank you for your time.

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<sup>54</sup> Marco Velicogna, From drafting common rules to implementing electronic European Civil Procedures: the rise of e- CODEX, page 10

<sup>55</sup> Fast and secure, general information on <https://www.e-codex.eu/> /6 May 2018