Simplification of Debt Collection in the EU

(European Order for Payment Procedure and European Small Claims Procedure)

Italian Report

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SUMMARY: After a cursory glance at the Italian procedures for the recovery of money claims, domestic and cross-border, this essay expands on a few aspects of the implementation of Regulation (CE) No. 1896/2006 and on the failed implementation of Regulation (CE) No. 861/2007.

1. Introduction

Although the availability of legal mechanisms for the efficient resolution of cross-border cases is universally considered of paramount importance for the smooth functioning of the European single market, from an Italian perspective the proper implementation of the European regulations whose purpose is precisely to simplify the procedures available to creditors for the recovery of cross-borders debts does not seem to be a real priority. The state of Italian civil and commercial justice has deteriorated greatly, and to keep track of European legislation affecting civil procedure is a small and mundane issue in an ocean of very serious problems in need of being addressed: the unbearable length of proceedings, the unmanageable caseload burdening the courts and the constant lack of resources. The number of cases concerning outstanding cross-border debts is negligible if compared to the number of disputes related to outstanding debts arising out of strictly domestic transactions, and that may explain (at least, partially) the reasons why the impact of the European instruments devised for a better enforcement of money judgments within the Union on the daily activity of Italian courts has been minimal.

Since this report will concentrate on the implementation of both the European Order for Payment Procedure (hereinafter, EOPP) and the European Small Claims Procedure (hereinafter, ESCP), it must be emphasised from the very beginning that in Italy the regulations establishing the two procedures have given rise to broad academic interest, but the judgments issued by the courts dealing with the EOPP (in general, when a statement of opposition is lodged by the debtor, according to articles 16 and 17 of the regulation) only come down to a handful, while no decisions related to the application of the ESCP have been reported yet. The chasm between theory and practice is quite common in Italy: it concerns not only European legislative instruments, but also domestic statutes, and it shows a lack of communication between academia and the circles of those who are involved in the practical operation of the law in force (most of all, lawyers and judges). But as far as EU law is concerned there is an 'aggravating circumstance', that is, the lack of awareness

among legal professionals of the procedures (such as the EOPP and the ESCP) that are available as alternatives to the domestic ones.[1] Consumers, too, are rarely aware of the opportunities offered by European regulations, and often consumer associations seem more interested in fighting each other in order to gain the attention of the media than involved in disseminating useful information on efficient ways to enforce consumers' rights. All that may justify the fact that in this report readers will be able to find only a limited number of empirical data and no statistical data at all. If it is true that, in order to test how well the EOPP and the ESCP have been implemented and how useful this implementation has been for individuals, the old-fashion rule according to which 'the proof of the pudding is in the eating' must be applied,[2] then one can say that Italians are still waiting for the pudding to be served.

2. Obtaining a title of execution in Italy[3]

2.1. Ordinary proceedings and summary proceedings

Italian law provides for a variety of procedural tools for the enforcement of money claims, whether domestic or cross-border. This paragraph will sketch the main avenues creditors can choose according to domestic law, dispensing with details outside the scope of this report.

a) The creditor can institute an ordinary proceeding,[4] praying for a judgment that orders the debtor to pay the sum of money due (*sentenza di condanna*). According to the amount in controversy,[5] courts of first instance having jurisdiction are either the justices of the peace (*giudici di pace*) or the *Tribunali*; justices of the peace are lay judges, while the *Tribunali* are stuffed with professional judges. Justices of the peace have jurisdiction in cases whose value is up to five thousand euros, but their jurisdiction increases to twenty thousand euros if the dispute concerns claims for damages caused by the circulation of vehicles or boats; above these thresholds jurisdiction pertains to the *Tribunali*.

The judgment issued by the court of first instance at the end of an ordinary proceeding is one of the legal instruments (certainly, the most traditional one) entitling the creditor to begin an

[1] See the findings of the survey conducted by the ECC-Net on the implementation of the ESCP Regulation: 'EEC-Net European Small Claims Procedure Report, September 2012', < http://ec.europa.eu/consumers/ecc/docs/ small_claims _210992012_en.pdf >, visited 13 November 2012. The findings would be the same, at least with reference to Italy, should a similar survey be carried out on the implementation of the EOPP Regulation.

[2] This suggestion comes from X. E. Kramer, 'Enhancing Enforcement in the European Union. The European Order for Payment Procedure and Its Implementation in the Member States, Particularly in Germany, The Netherlands, and England', in C. H. van Rhee and A. Uzelac (eds.), *Enforcement and Enforceability. Tradition and Reform*, Antwerp – Portland, OG: Intersentia, 2010, 36.

[3] The literature on the subjects addressed in this paragraph and in the following ones is mainly in Italian. This author has chosen to devote the footnotes to the relevant articles of the Code of Civil Procedure and other statutes applicable to the matters dealt with in the text, as well as to some occasional essays touching upon the same matters and written in English. An extensive collection of the many academic writings that are relevant for the topic of enforcement of money claims, both domestic and cross-border, can be found in a separate bibliography, placed at the end of this essay.

[4] Ordinary proceedings are governed by articles 163 – 281 *novies* of the Code of Civil Procedure.

[5] The amount in controversy is one of the two criteria according to which the Code of Civil Procedure identifies the court having jurisdiction over a given case. The other criterion is subject matter, and it prevails over the former. Venue, called in Italy 'territorial competence' (*competenza territoriale*) is governed by specific rules that are exceptions to the general principle stating that the proper forum for a lawsuit is the place in which the defendant has his residence or domicile (or, if the defendant is a legal entity, its seat). See articles 7 – 30 *bis* of the Code of Civil Procedure.

enforcement proceeding.[6] For the satisfaction of a judgment ordering the payment of a sum of money, the enforcement proceeding is the forced liquidation of the assets belonging to the debtor: in simplified terms, the steps along which the procedure develops are the attachment of property, the liquidation of the assets that are sold at public auctions (or, alternatively, the assignment of the attached property to the creditor in satisfaction of his claim) and the distribution of the proceeds.[7]

According to article 282 of the Code of Civil Procedure, judgments issued by courts of first instance are provisionally enforceable. The enforceability or the enforcement of the judgment (if enforcement has already begun) can be stayed upon motion made by the debtor and lodged together with an appeal against the judgment. The court of appeal may grant the motion when it finds that a stay of execution is justified by 'serious and well-grounded reasons' (article 283 of the Code), including the risk that enforcement may force the debtor into a state of insolvency, bringing about bankruptcy. If the motion made for having the enforcement stayed is denied and the debtor's request is found inadmissible or clearly devoid of merit, the court of appeal can sanction the debtor with a fine ranging from €250 to €10,000.[8]

b) A money claim can also be enforced by relying on the judgment issued against the debtor at the end of a summary proceeding (*procedimento sommario di cognizione*).[9] The summary proceeding is one of the newest additions to the Code, and it is devised as an alternative to the ordinary procedure: if it is chosen by the claimant, the defendant – at least in principle – has no means to oppose this choice, since only the court can decide that the case is not suitable for summary disposition. The English translation of the Italian expression '*procedimento sommario di cognizione*' into 'summary proceeding' is fairly accurate from a linguistic point of view, but quite misleading, since the adjective 'summary' does not mean that the proceeding lacks an exhaustive and complete investigation as to the facts in dispute: in fact, judgments issued at the end of summary proceedings can be appealed against before the court of appeal and, once the appeal is time-barred, they become *res judicata* between the parties, exactly like judgments closing ordinary proceedings, once all avenues of appeal have been exhausted. The summary proceeding is a simplified procedural scheme, suitable for cases that are not complex, because 'the facts are not contested or may be easily ascertained'.[10]

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[6] Titles of executions are listed by article 474 of the Code of Civil Procedure: besides judgments, they include settlements, negotiable instruments such as bills of exchange, promissory notes, different types of checks, and public deeds.

[7] For an overview of Italian enforcement procedures, see E. Silvestri, 'The Devil Is in the Details: Remarks on Italian Enforcement Procedures', in C. H. VAN RHEE AND A. UZELAC (eds.), *Enforcement and Enforceability – Tradition and Reform*, above n. 2, 207.

[8] For an extensive collection of the case law on the circumstances that have been taken into accounts by courts of appeal as valid reasons to justify a stay of execution, see M. G. Canella, 'Commento agli articoli 282 – 286', in F. Carpi – M. Taruffo (a cura di), *Commentario breve al Codice di procedura civile* (7th edn.), Padova: Cedam, 2012, 1056–72, at 1061.

[9] See articles 702 *bis* – 702 *quater* of the Code of Civil Procedure: this new set of rules was added to the Code as part of an extensive procedural reform adopted on June 2009.

[10] See M. A. Lupoi, 'Recent Developments in Italian Civil Procedural Law', *Civil Procedure Review*, 2012, 37, <www.civilprocedurereview.com>, visited 17 November 2012.

The summary proceeding went into effect in the second half of 2009. Lawmakers had great expectations for the summary proceeding, which was presented as the key to a true Copernican revolution in Italian civil justice, based – for the first time in the history of Italian civil procedure – on the principle of proportionality, with a view to establishing a flexible and deformalised procedure for 'simple' cases, such as those that can be decided on documentary evidence alone. Needless to say, the hope was to speed up the disposition of cases. After approximately three years of operation, the results are not promising. According to the only available findings, a very small percentage (i.e. 1.29 per cent) of civil and commercial cases commenced in the relevant timeframe (summer 2009 – spring 2011) has been brought to court choosing the summary proceeding instead of the ordinary one.[11] In any event, and without expanding on the reasons for the only modest success enjoyed so far by the summary proceeding, it is worth mentioning that for creditors interested in speeding up the recovery of money claims it nevertheless represents a viable alternative to the ordinary proceeding.

The judgment issued for the creditor through either an ordinary proceeding or a summary proceeding can work as a title of execution for both domestic and cross-border money claims. For the latter claims, the judgment will be recognised and enforced automatically in the Member State of enforcement provided that the judgment itself meets the requirements according to which it can be certified as a European enforcement order pursuant to Regulation (CE) No. 805/2004 on uncontested claims. In any other cases, recognition and enforcement of the judgment will take place in application of the rules laid down by Regulation 44/2001: that means the creditor will have to obtain a declaration of enforceability issued by the appropriate court or authority of the Member State of enforcement, according to article 38 and following of the said Regulation.

2.2. Summary procedures: in particular, the order for payment

Within ordinary proceedings, the creditor is allowed to apply for various kinds of 'anticipatory (or provisional) rulings'[12] for the recovery of money claims or for the delivery of specific goods if certain requirements are met, for instance if the amount of money owed by the defendant to the plaintiff is undisputed or if the court is satisfied that the claim is well grounded, based upon the evidence offered by the creditor. Strictly speaking, these 'anticipatory rulings' cannot be qualified as summary procedures even though they serve the same purpose, that is, the swift satisfaction of creditors. To summarise the rules governing these judgments appears to be a 'mission impossible', most of all due to the difficulty of explaining in English the subtleties of Italian procedural law:

[11] See M. Gerardo & A. Mutarelli, 'Procedimento sommario di cognizione *ex* art. 702 bis c.p.c.: primo bilancio operativo', <www.judicium.it/admin/saggi/201/Gerardo-Mutarelli.pdf>, visited 17 November 2012.

[12] See articles 186 *bis* (*Ordinanza per il pagamento di somme non contestate*), 186 *ter* (*Istanza di ingiunzione*), 186 *quater* (*Ordinanza successiva alla chiusura dell'istruzione*) of the Code of Civil Procedure.

suffice it to say that sometimes the 'anticipatory rulings' can be modified or revoked by the court, other times they are incorporated into the judgment issued at the end of the proceeding, yet other times they can be used immediately as titles of execution.

More important than the 'anticipatory rulings' is the special summary *ex parte* proceeding (*procedimento di ingiunzione*) resorting to which an order for payment (called *decreto ingiuntivo*) can be obtained by the creditor.[13] The rationale supporting the order for payment procedure is to allow the creditor to obtain a judgment in his favour without summoning the debtor before the beginning of the proceeding. In fact, the debtor is alerted only after the judgment has been issued: if he fails to move so as to have the judgment set aside, the judgment becomes final and fully enforceable.

The order of payment procedure is available – as an alternative to the ordinary proceeding – only for the recovery of money claims or for the delivery of either a specific quantity of fungible goods or for a given chattel. As far as money claims are concerned, no upper limit is laid down by the Code of Civil Procedure: in other words, the value of the claim is irrelevant for the availability of the procedure. Among the requirements to be met for properly commencing the procedure, the most important ones concern the evidence the creditor is supposed to rely upon: as a matter of fact, the claim must be supported either by documentary evidence or at least by certain documents that could not be admissible as written evidence in ordinary proceedings, but that are granted the status of documentary evidence by the Code of Civil Procedure for the sole purpose of supporting applications for orders for payment. These latter documents are writings by third persons, insurance policies, commercial invoices, as well as telegrams and bookkeeping entries complying with certain terms and conditions.

If the claim to be recovered either relates to the payment of fees and expenses incurred by lawyers, court clerks, bailiffs or any other professionals who have rendered their services in connection with legal proceedings, or if the claim has to do with the payment of the fees due to notaries or any other professionals whose services are remunerated according to legally approved and binding tables of charges , the application lodged by the creditor must be accompanied by a detailed list of all the services rendered and the expenses sustained by the creditor himself. The creditor is also supposed to sign the list and produce an official opinion issued by the professional association to which he belongs as to the value of the services he claims to have rendered to the debtor.

An application for an order for payment must be lodged with the court that would have jurisdiction over the case if the creditor had chosen the path of an ordinary proceeding to assert his

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[13] The order for payment procedure is governed by articles 633 – 656 of the Code of Civil Procedure.

claim; in other words, the proper court is determined according to the amount in controversy, and therefore it is either the justice of the peace or the *Tribunale*, keeping in mind that before the *Tribunali* order for payment procedures are heard by a single judge (that is, a judge sitting alone) and not by the traditional panel of three judges. General rules governing venue in ordinary proceedings apply, but special rules provide for alternative fora in particular cases. For claims concerning the payment of fees and expenses incurred by lawyers, court clerks, bailiffs or any other professionals who have rendered their services in connection with legal proceedings, the procedure may be commenced before the court in charge of the legal proceeding that gave rise to the debt to be satisfied. In addition, lawyers and notaries may petition the court sitting in the place in which their professional organisations have their seats.

While no standardised forms are available, applications for order for payment can be filed electronically. E-Justice is not well developed in Italy yet, in spite of the efforts made by the Government to advance the cause of a project known as PCT (*Processo Civile Telematico*: Electronic Civil Justice). The only 'shining star' in a process of computerisation that is far from being completed is the order for payment: the application can be filed electronically in forty-nine courts and it is estimated that 60 per cent of the applications for orders for payment nationwide are filed online. At the *Tribunale* sitting in Milan, the use of the electronic procedure (that became available in 2006) has brought about a significant decrease in the length of proceedings: now an order for payment can be obtained in 6 days, while before 2006 the average waiting time was 45 days, which is a remarkable result for a legal system that, as a whole, seems unable to grant its citizens reasonably swift judicial protection.[14]

As far as court fees are concerned, they depend on the monetary value of the claim. Here is a table of the court fees arranged according to the value of the claim:

Value of the Claim	Court Fees
Up to € 1,100	€ 18.50
From € 1,100 to € 5,200	€ 42.50
From € 5,200 to € 26,000	€ 103.00
From € 26,000 to € 52,000	€ 225.00
From € 52,000 to € 260,000	€ 330.00
From € 260,000 to € 520,000	€ 528.00
Above € 520,000	€ 733.00

Table 1.

In order to determine the total cost of the procedure, attorney fees must be taken into account, too. Legal representation is mandatory. Both parties (that is, the creditor and the debtor, insofar as he decides to move so as to have the order for payment set aside) must be represented by their

[14] For this and other data, see 'Diffusione del processo civile telematico. Stato dell'arte. Dati a tutto aprile 2012', <www.processotelematico.giustizia.it/pdapublic/resources/Diffusione_PCT_aprile_2012.pdf>, visited 20 November 2012.

attorneys, unless the case falls within the jurisdiction of the justice of the peace and the value of the claim is lower than €1,100. As of now, due to a true ‘revolution’ in the legal rules governing attorney fees with the view to increasing competition among lawyers and other professionals, it is not possible to make a reliable estimate of how much lawyers are supposed to charge for representing clients willing to apply for an order for payment.

The application is lodged with the court and – as mentioned above – is not served on the debtor: it will be later on, together with the order for payment, if it is granted. As far as the content of the application is concerned, no special requirements are provided for other than the usual ones, that is, the elements necessary to identify the court, the parties, the cause of action, the relief sought and, most of all, the required documentary evidence. If the application is denied, the claimant is still entitled to either bring a new *ex parte* application or commence an ordinary proceeding: no appeals can be brought against the denial of the application.

If the application is granted, the judgment (in Italian, *decreto ingiuntivo*) shall order the debtor to pay the amount of money due (or to deliver the goods or the chattel in dispute) within forty days. The order for payment shall also include an express warning to the debtor: if he fails either to comply with the order within the assigned time or to move so as to have the judgment set aside (which is done by lodging a statement of opposition), the order for payment shall become final and the creditor shall be entitled to levy execution against the debtor. If the debtor resides in another Member State, the time assigned for making the payment (or the delivery) or for lodging a statement of opposition is fifty days. In any event, the court may shorten the time or even make it longer, if it appears that ‘good reasons’ justify a reduction or an extension of the time assigned to the debtor.

The order for payment (and the application upon which it was granted) must be served on the debtor within sixty days (if service takes place in Italy) or ninety days (if service takes place abroad), otherwise it becomes void. In this case, though, a new application for on order for payment concerning the same money claim is not barred, nor is the creditor prevented from instituting an ordinary proceeding for its recovery.

The order for payment is not immediately enforceable, even though under specific circumstances the court may or even must make the order provisionally enforceable. The court may make the order provisionally enforceable (sometimes, conditional upon the posting of a bond) when it is satisfied that if enforcement were delayed, the creditor’s rights could suffer serious negative consequences, as well as when the creditor can prove his right by producing a document signed by the debtor. The court must make the order provisionally enforceable when the claim was based on

promissory notes, bills of exchange, checks, stock exchange certificates of liquidation, and notarial deeds.

Within the time assigned according to the Code of Civil Procedure, the debtor can move to have the order for payment set aside by lodging a statement of opposition with the court that issued the order. If a statement of opposition is lodged, the subsequent procedure develops according to the rules governing ordinary proceedings: the roles are reversed, though, with the debtor being the plaintiff and the creditor the defendant, which has some bearing on the allocation of the burden of proof and related issues. A statement of opposition can be lodged even after the expiration of the time assigned to the debtor, provided that he is able to demonstrate that timely notice was prevented either by irregular service of the order or by *force majeure*. At the end of the proceeding, the court issues a judgment that is like any other judgment issued by a court of first instance, and is subject to all the appeals available under Italian law.

If the motion is rejected, the order for payment becomes final and fully enforceable. As mentioned above, the same happens if the debtor fails to lodge a statement of opposition (or fails to make an appearance in the proceeding commenced by the statement of opposition): in this case, the creditor, after the expiration of the time assigned to the debtor, shall petition the court to have the order for payment declared enforceable. An order for payment that became final due to the fact that the debtor never moved to have it set aside falls within the scope of article 3.1 (b) of Regulation (CE) No. 805/2004, since the claim advanced by the creditor was clearly 'uncontested' in the meaning upheld by the Regulation: therefore, the order for payment can be certified as a European enforcement order.

2.2.1. Italian order for payment and cross-border claims: a summary

After having described the rules governing Italian orders for payment, it seems useful to emphasise some issues having a specific bearing on the possible use of a domestic order for payment with the view to recovering outstanding cross-border debts.

i. According to the original text of article 633, sec. 3 of the Code of Civil Procedure, the order for payment procedure could not be resorted to if the debtor was a resident of a foreign state. This rule was repealed by statutory instrument no. 231 of 2002, by which Italy implemented Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions. At present, therefore, Italian creditors can apply for orders for payment against debtors residing in any other Member State. The order for payment will be served on the debtor according to the rules of Council Regulation (EC) No. 1348/2000.

ii. According to article 641, sec. 2, the term assigned to the debtor residing in another Member State is fifty days; it can be reduced to twenty days for 'good reasons'.

iii. If the debtor lodges a statement of opposition, the court, upon motion of the creditor, can make the order partially enforceable, that is, enforceable within the limits of the part of the claim that is not in dispute, provided that the statement of opposition is not grounded on procedural errors (article 648, sec. 1 of the Code of Civil Procedure, as modified by statutory instrument no. 231 of 2002, mentioned above). Therefore, the domestic order for payment can be certified as a European enforcement order as far as the 'uncontested claim' is concerned, allowing the creditor to recover immediately at least part of the outstanding debt.

iv. Domestic orders for payment that became final due to the fact that the debtor never lodged a statement of opposition can be certified as European enforcement orders. If the debtor moves to have the order set aside and his motion is rejected, the order for payment becomes final and enforceable, but the creditor willing to enforce it in another Member State shall have to rely on the rules governing recognition and enforcement under Regulation No. 44/2001.

3. Italian implementation of the European order for payment procedure

Differently from other Member States, such as France or Germany, the Italian legislators did not adopt any special rules with the view to coordinating domestic legislation with Regulation (EC) No. 1896/2006: that is unfortunate, since the reference made by article 26 to 'national procedural law' as the law governing issues not specifically addressed by the Regulation can bring about some practical problems that are likely to undermine the appeal of the EOPP as a simplified 'tool' for the recovery of cross-border claims.

As mentioned earlier, Italian academic literature on the EOPP is extensive and has explored the Regulation in all its details. From the standpoint of a non-Italian reader, though, only a small amount of this information may be interesting or useful. In particular, it seems worth emphasising what makes the European order for payment different from the domestic one. First of all, while the Italian order for payment can be granted only insofar as the creditor can rely on documentary evidence, the application for a European order for payment requires something less, that is, a mere description of the evidence supporting the claim (article 7.2 (e)). Within the scope of the Italian order for payment fall not only money claims, but also claims concerning the delivery of either a specific quantity of fungible goods or a given chattel; in addition, the nature of the obligation (contractual or non-contractual) has no bearing on the availability of the domestic order for

payment, while in principle the EOPP cannot be resorted to for the recovery of 'claims arising from non-contractual obligation' (article 2.2 (d)). The creditor applying for a domestic order for payment must be represented by an attorney and so must the debtor, when he files a statement of opposition. Differently, the European Regulation does not foresee legal representation as mandatory, even though when a statement of opposition has been lodged and the procedural law of the Member State of origin becomes applicable, the parties to the subsequent proceeding will have to be represented by their attorneys. Finally, the statement of opposition to a European order for payment lodged by the debtor, who is not even required 'to specify the reasons for this' (article 16.3), has very little in common with the statement of opposition to a domestic order for payment, even though the former introduces a proceeding 'in accordance with the rules of ordinary civil procedure' of the Member State of origin, that is, the rules laid down by the Code of Civil Procedure.

The application for a European order for payment is made using Form A filled out only on paper and in Italian. The court having jurisdiction is determined based upon the value of the claim: accordingly, the application will be filed with the justice of the peace or the *Tribunale*. Court fees are the same as the ones mentioned with reference to the domestic order for payment; legal aid is available, at least in theory.

As far as the content of the application is concerned, the implementation in Italy of the EOPP does not seem to raise any issues of interest, which is to be expected, keeping in mind that the goal pursued by the required use of standardised forms is to simplify the procedural steps to be taken. It may be emphasised, though, that the use of standardised forms makes sense within a system that is well equipped for automatic data processing, but does not appear to bring about any clear improvements if – as in Italy – the procedure turns out to be just another 'paper trail', due to the fact that the form cannot be submitted electronically.

The application is examined by the court: according to the most accredited opinion, such examination will not touch upon the merits of the claim, even though the wording of both recital 16 (the court should examine '*prima facie* the merits of the claim and *inter alia* ... exclude clearly unfounded claims or inadmissible application') and article 8 of the Regulation ('the court ... shall examine ... whether the claim appears to be founded') could justify a different interpretation. The court shall evaluate only whether the application meets the formal requirements laid down by the Regulation, that is, the requirements concerning the scope of the EOPP, the jurisdiction and the information reported on the claim form as regards the cause of action and the description of the evidence supporting the claim. A variety of elements supports this interpretation: first of all, the 'automated procedure' that, according to article 8, could conduct the examination might be devised for checking formal requirements, but certainly could never test the merits of the claim. Secondly,

article 12.4 (a) makes it clear, for the benefit of the debtor, that the order is issued ‘solely on the basis of the information which was provided by the claimant and was not verified by the court’. Finally, it must be kept in mind that the examination of the application is not necessarily carried out by a judge, since Member States – based upon article 5.3 – can entrust other authorities with the task of issuing European orders for payment, while a judge should always be the final arbiter of the merits of the claim.

As far as the rejection of the application is concerned, no specific problems can be signalled in the Italian practice. If the application is granted, the order for payment (issued on Form E) and the original application (Form A) must be served on the defendant. According to Italian law, the creditor/claimant is responsible for the service: since as a rule the defendant is resident in another Member State, Regulation No. 1393/2007 shall apply.

3.1. Opposition to the European order for payment: some practical problems.

The only case law produced by Italian courts on the EOPP deals with the statement of opposition lodged by the debtor and with the interpretation of article 17, providing that the proceeding will continue according to the domestic procedural law of the Member State of origin, applicable to the transfer of the proceeding itself, too. The problem at the core of the issue dealt with by Italian courts has to do with the fact that the statement of opposition against a European order for payment lodged with a standardised form, in which the debtor is not even required to specify the reasons for his opposition, is difficult to match with the applicable rule, that is, article 654 of the Code of Civil Procedure, governing the opposition to a domestic order for payment. In this regard, the lack of specific rules enacted with the view to bridging the gap between the European Regulation and the national procedural law is likely to bring about practical difficulties that undermine the usefulness of the EOPP, which is already competing with national procedures serving the same purpose: these latter procedures are not necessarily better or more efficient, but at least they are more familiar to the creditor and do not expose him to the procedural ‘surprises’ he is faced with when courts must engage in a creative effort to make European rules workable in the domestic arena.

Out of the various solutions advanced by different courts (and by legal scholars, too), the prevailing one seems to be the following: once the claimant/creditor has been informed that the defendant/debtor has in a timely manner lodged a statement of opposition, the parties (represented by their attorneys) will be assigned by the court different times to lodge the pleadings required for the commencement of an ordinary proceeding aimed at producing a complete and exhaustive

adjudication on the merits of the claim.[15] This solution seems consistent with the fact that, differently from the opposition to a domestic order for payment, the opposition contemplated by the EOPP has the sole purpose of preventing the order from becoming enforceable, leaving the issue whether the claim is well founded or not still open.

3.2. Further remarks on the Italian implementation of the EOPP

As mentioned earlier, the only case law of Italian courts concerning the EEOP deals with the opposition to the order: other issues have been addressed by legal scholars, but – to the best of this author's knowledge – have not yet arisen in practice, keeping in mind that for many lawyers (and judges, too) the European order for payment is still a 'mysterious object', whose features and alleged virtues have yet to be discovered.

As far as the enforceability of the European order is concerned, two issues are worth mentioning. The first one has to do with the interpretation of article 18.1 and its reference to 'an appropriate period of time' the court is supposed to take into account before it declares the order enforceable for lack of opposition, since a statement of opposition could have been sent by mail and the time of its arrival at the destination can rarely be predicted. The second issue revolves around the question whether the court may declare the order enforceable *ex officio* or upon motion from the claimant. Different solutions have been advanced, but none have been supported yet by any authorities.

4. The European Small Claims Procedure in Italy: 'missing in action'

Not much can be said about the Italian implementation of the ESCP. The procedure parallels the domestic one before the justices of the peace, whose jurisdiction extends to cross-border 'small claims' under Regulation No. 861/2007. Unfortunately, no information is available on the reception in Italy of the ESCP, to the point of making one wonder whether anybody (except legal scholars, of course) is at least aware that such a procedure exists.

As in the case of the EOPP, the strategy of Italian legislators has been to refrain from passing new rules aimed at coordinating the European procedure with the domestic one. With a good measure of malice, one might think that this omission is intentional, at least to a certain extent, since the official acknowledgment of a simplified and efficient procedure such as the ESCP for cross-border claims would have made it clear that the domestic procedure devised for small claims is anything but simple and efficient. Whether or not this theory deserves any credit, the fact is that in

[15] Trib. Verona, judgment of 26 May 2012, <www.ilcaso.it> visited 26 November 2012; Trib. Milano, judgment of 18 July 2011, *Il Foro italiano*, 2012, I, 1, 275; Trib. Varese, judgment of 12 December 2010, *Rivista di diritto internazionale privato e processuale*, 2011, 3, 761; Trib. Varese, judgment of 12 November 2010, *Rivista di diritto internazionale privato e processuale*, 2011, 2, 466; Trib. Milano, judgment of 28 October 2010, Il Foro italiano, 2011, 1, 1572.

more than three years since the entering into force of Regulation No. 861/2007 nothing has been done to disseminate information about the ESCP so as to encourage its use.

5. Conclusions

The modest success gained in Italy by the EOPP and the failed implementation of the ESCP have several reasons that are not possible to explore here. Suffice it to say that, as mentioned at the beginning of this essay, while cross-border commerce is an obvious concern for the European institutions, for some Member States, and certainly for Italy in the first place, the problems related to the effective recovery of cross-border claims (whether small claims or not) seem negligible when compared with the magnitude of the problems affecting the administration of civil and commercial justice at large.

It has been said that 'the bringing about of European procedures, and in particular the ESCP, is an accomplishment, especially in view of the scepticism that surrounded the harmonisation of civil procedure until only recently':[16] although this statement is worth subscribing to from a general point of view, a disenchanted bystander could not refrain from noticing that although harmonisation, if limited to cross-border cases, can set a good example, it does not necessarily bring about any improvements in the treatment of domestic cases, which are by far the ones affecting the everyday lives of European citizens.

[16] X. 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 (September 2007)', <http://ssrn.com/abstract=1120742>, visited 20 November 2012.

Bibliography

S. Bastianon, 'Prime osservazioni sul regolamento (CE) n. 1896/2006 che istitutisce un procedimento europeo di ingiunzione di pagamento', *Giurisprudenza di merito*, 2008, 2871.

P. Bertoli, 'Verso un diritto processuale civile comunitario uniforme: l'ingiunzione europea di pagamento e le controversie di modesta entità', *Rivista di diritto internazionale privato e processuale*, 2008, 395.

P. Biavati, 'Il regolamento (CE) n. 1896/2006 del Parlamento europeo e del Consiglio, del 12 dicembre 2006, che istitutisce un procedimento europeo d'ingiunzione di pagamento', in M. Taruffo – V. Varano (a cura di), *Manuale di diritto processuale civile europeo*, Torino: Giappichelli Editore, 2012, 311.

P. Biavati (a cura di), 'Reg. CE n. 1896/2006 del Parlamento europeo e del Consiglio che istituisce un procedimento europeo d'ingiunzione di pagamento', *Nuove leggi civili commentate*, 2010, 387.

P. Biavati – M.A. Lupoi (a cura di), *Regole europee e giustizia civile*, Bologna: Bononia University Press, 2008.

M. Bina, 'Il procedimento europeo per le controversie di modesta entità (regolamento (CE) n. 861/2007)', *Rivista di diritto processuale*, 2008, 1629.

M. G. Canella, 'Commento agli articoli 282 – 286', in F. Carpi – M. Taruffo (a cura di), *Commentario breve al Codice di procedura civile* (7th edn.), Padova: Cedam, 2012, 1056.

A. Carratta (a cura di), *Verso il procedimento ingiuntivo europeo*, Milano: Giuffrè Editore, 2007.

A. Carratta, 'Il procedimento ingiuntivo europeo e la «comunitarizzazione» del diritto processuale civile', *Rivista di diritto processuale*, 2007, 1519.

M. Cataldi, 'L'opposizione all'ingiunzione europea di pasgamento e la prosecuzione del procedimento: prime decisioni dimerito', *Corriere giuridico*, 2011, 1129.

E. D'Alessandro, 'Il procedimento monitorio europeo con particolare riferimento alla fase di opposizione *ex* art. 17 Reg. n. 1896/2006', *Il giusto processo civile*, 2011, 719.

E. D'Alessandro, *Il procedimento uniforme per le controversie di modesta entità*, Torino: Giappichelli Editore, 2008.

E. Garbagnati, *Il procedimento d'ingiunzione* (2ª ed. a cura di A. Romano), Milano: Giuffrè Editore, 2012.

M. Gerardo & A. Mutarelli, 'Procedimento sommario di cognizione *ex* art. 702 bis c.p.c.: primo bilancio operativo', <www.judicium.it/admin/saggi/201/Gerardo-Mutarelli.pdf>, visited 17 November 2012.

X. E. Kramer, 'Enhancing Enforcement in the European Union. The European Order for Payment Procedure and Its Implementation in the Member States, Particularly in Germany, The Netherlands, and England', in C. H. van Rhee and A. Uzelac (eds.), *Enforcement and Enforceability. Tradition and Reform*, Antwerp – Portland, OG: Intersentia, 2010, 17.

X. 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 (September 2007)', <http://ssrn.com/abstract=1120742>.

A. Leandro, 'Il procedimento europeo per le controversie di modesta entità', *Rivista di diritto internazionale*, 2009, 65.

M. A. Lupoi, 'Recent Developments in Italian Civil Procedural Law', *Civil Procedure Review*, 2012, 25, <www.civilprocedurereview.com>, visited 17 November 2012.

M. A. Lupoi (a cura di), *Tutele e procedure giudiziarie europee. Principi fondamentali e applicazioni pratiche*, Santarcangelo di Romagna: Maggioli Editore, 2011.

M. A. Lupoi, 'Dei crediti non contestati e procedimenti di ingiunzione: le ultime tappe dell'armonizzazione processuale in Europa', *Rivista trimestrale di diritto e procedura civile*, 2008, 171.

M. Marinelli, 'Note sul Regolamento CE n. 1896/2006 in tema di procedimento ingiuntivo europeo', in *Il giusto processo civile*, 2009, 63.

L. Piccininni, 'Il nuovo procedimento europeo per le controversie di modesta entità, *Nuove leggi civili commentate*, 2008, 1213.

V. Pozzi, 'Il rito bagatellare europeo', *Rivista trimestrale di diritto e procedura civile*, 2008, 611.

A. Proto Pisani, 'L'ingiunzione europea di pagamento nell'ambito della tutela sommaria in generale e dei modelli di procedimenti monitori in ispecie', *Il giusto processo civile,* 2009, 181.

A. Romano, *Il procedimento europeo di ingiunzione di pagamento*, Milano: Giuffrè Editore, 2009.

C. Silvestri, *La tutela del credito contrattuale nell'Unione Europea. Dalla domanda al riconoscimento ed esecuzione del provvedimento giudiziale*, Santarcangelo di Romagna: Maggioli Editore, 2012.

E. Silvestri, 'The Devil Is in the Details: Remarks on Italian Enforcement Procedures', in C.H. van Rhee and A. Uzelac (eds.), *Enforcement and Enforceability – Tradition and Reform*, Antwerp – Portland, OG: Intersentia, 2010, 207.

F. Rota, 'Il regolamento (CE) n. 861/2007 del Parlamento europeo e del Consiglio, dell'11 luglio 2007 che istituisce un procedimento europeo per le controversie di modesta entità', in M. Taruffo – V. Varano (a cura di), *Manuale di diritto processuale civile europeo*, Torino: Giappichelli Editore, 2012, 337.

F. Rota, ‘L’insostenibile complessità del processo: quale giustizia per gli *small claims*?’, in P.G. Monateri e A. Somma (a cura di), *Patrimonio, persona e nuove tecniche di «governo del diritto»*, Napoli: Edizioni Scientifiche Italiane, 2009, 677.