

# TRAIN TO ENFORCE

Tjaša Ivanc, Vesna Rijavec, Kristjan Zahrastnik  
EDITORS

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Casebook on European Order  
for Payment Procedure and  
European Small Claims Procedure

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Faculty of Law

# **Casebook on European Order for Payment Procedure and European Small Claims Procedure**

Editors

**Tjaša Ivanc**

**Vesna Rijavec**

**Kristjan Zahrastnik**

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## Case Study 32

# Articles 10-19 (ESCP)

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**Facts:** Bea, a German national, books for her and her family, composed of seven people, a flight with Alitalia from Frankfurt to Rome Fiumicino. The flight lands three hours and eleven minutes later than the expected landing time. As a consequence, Bea, on her behalf and on behalf of her relatives, files a claim by using Form A of Regulation No 861/2007 (hereinafter ESCP Regulation) with the Justice of the Peace of Rome, where Alitalia has its seat, for compensation in accordance with Regulation 261/2004<sup>29</sup> for an amount of € 250 each, for a total of € 1.750, plus interests, court fees and other disbursements.

**Scenario I:** Suppose Bea stands trial personally.

**Question 1:** Should the Justice of the Peace of Rome reject the request because under Italian law Bea should be represented by a lawyer?

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<sup>29</sup> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 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 (Text with EEA relevance) - Commission Statement (OJ L 46, 17.2.2004, p. 1).

**Answer:** Under the ESCP Regulation, the representation of a lawyer is not necessary.

#### Article 10 of the ESCP Regulation

Representation by a lawyer or another legal professional shall not be mandatory.

The above rule however does not correspond to principles of Italian civil procedure. Under Article 82 of the Italian Code of Civil Procedure (CCP), enacted in 1940, representation by a lawyer is always mandatory before Italian courts, except in cases brought before the Justice of the Peace.<sup>30</sup> Before the Justice of the Peace, a party can always stand trial personally in disputes whose economic value does not exceed 1.100 euro. In disputes of higher economic value, a person can stand trial personally only if authorized by the Justice of the Peace.

#### Article 82 of the Italian CCP

1. Before the Justice of the Peace litigants can stand trial personally if the economic value of the dispute does not exceed 1.100 euro.
2. In all other cases, parties cannot stand trial without the representation or assistance of a lawyer. However, taking into consideration the nature and value of the dispute, the Justice of the Peace, upon request, might authorize a party to stand trial personally.
3. Except in cases provided by law, before the Tribunal and the Court of Appeal parties can stand trial only if represented by a lawyer; before the Court of Cassation, parties can stand trial only if represented by a lawyer admitted before the Court.

Article 82 of the Italian CCP is therefore partially conflicting with Article 10 of the ESCP Regulation. The issue of the relationship between the ESCP Regulation and national civil procedure rules is partially dealt with in Article 19 of the ESCP Regulation.

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<sup>30</sup> A further exception is provided by Article 86 of the Italian CCP, according to which a party who is qualified as a lawyer can stand trial personally.

## Article 19 of the ESCP Regulation

Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted.

Article 19 of the ESCP Regulation makes it clear that national procedural law applies to all the matters not covered by the Regulation. By contrast, in matters covered by the ESCP, the Regulation prevails. Therefore, Bea can stand trial personally, no matter what the Italian CCP provides.<sup>31</sup>

It should be further noted that, under Article 113(2) of the Italian CCP, Justices of the Peace are obliged to decide cases according to equity (rather than legal norms) in disputes whose economic value does not exceed € 1.100, unless the dispute concerns contractual relationships based on standard form contracts.<sup>32</sup>

## Article 113 of the Italian CCP

1. In deciding a case, the court must follow the rules of law, except when the law grants her the power to decide in accordance with equity.
2. The Justice of the Peace decides on an equitable basis claims not exceeding € 1.100, provided that they do not relate to contracts governed by uniform standard terms and conditions.

Even if Article 113 CCP does not apply to the scenario outlined above, it is worth noting that, according to Italian commentators, Article 113 CCP remains applicable in the context of the ESCP Regulation, insofar as the latter does not regulate the issue of the applicable law.<sup>33</sup> This means that, in Italy, claims brought under the

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<sup>31</sup> It should be noted that, if the standard form contracts signed by Bea forbid the assignment of claims to a third party, Bea cannot assign her claim to a third party, the clause not being unfair according to Directive 93/13/EEC: see District Court of Eastern Brabant, 28 June 2018, ECLI:NL:RBOBR:2018:3169, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBOBR:2018:3169>.

<sup>32</sup> The Legislative Decree 13 July 2017, no 116 modified the threshold of € 1.100 mentioned by Article 113(2); from October 31, 2025 the threshold will be raised to € 2.500.

<sup>33</sup> See P. Chiara Ruggieri, *La European Small Claims Procedure (Reg. CE 861/2007) in Italia: un (rimediabile?) insuccesso*, in *Federalismi.it*, 8 luglio 2020, no. 21, 270-289, pp. 283, available at: <https://www.sipotra.it/wp-content/uploads/2020/07/La-European-Small-Claims-Procedure-Reg.-CE-8612007-in-Italia-un-rimediabile-insuccesso.pdf>; A. Leandro, *Il procedimento europeo per le controversie di modesta entità*, in *Rivista di diritto*

ESCP Regulation will be decided by Justices of the Peace on an equitable basis, provided that the claim has an economic value not exceeding € 1.100 and does not stem from relationships based on standard form contracts.

**Scenario II:** Suppose that Bea does not ask for an oral hearing and Alitalia does not submit its response. The Justice of the Peace delivers a judgment based on the statement of the claim and on the documents attached to the claim. Alitalia then lodges an appeal against the decision, claiming that the Justice of the Peace failed to determine the circumstances relevant to the claim and to correctly evaluate evidence.

**Question 2:** Is the appeal well-founded, as to both the procedure and the merit?

**Answer:** The ESCP Regulation does not determine whether a decision adopted under the ESCP Regulation should be open to appeal, leaving the issue to the determination of Member States. In this regard, Article 25 of the ESCP Regulation obliges the Member States to inform the European Commission about the solution applicable in their legal system.

#### Article 17 of the ESCP Regulation

1. Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the European Small Claims Procedure and within what time limit such appeal shall be lodged. The Commission shall make that information publicly available.

#### Article 25 of the ESCP Regulation

1. By 13 January 2017, the Member States shall communicate to the Commission:  
[...]

(g) any appeal available under their procedural law in accordance with Article 17, the time period within which such an appeal is to be lodged, and the court or tribunal with which such an appeal may be lodged [...].

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internazionale, 2009, 65-85, p. 79; Cristina Asprella, Il “procedimento europeo per le controversie di modesta entità”, in *Giurisprudenza di merito*, 2008, 29-42, p. 40.

In its communication concerning Article 25(1), letter (g), Italy stated that “[t]he decisions of the justices of the peace can be challenged before the ordinary courts [...] The time-limit for lodging a challenge is 30 days from notification of the judgment (Article 325 of Italy CCP) or six months from its publication in the event of the judgment not being notified (Article 327 CCP)”.<sup>34</sup>

The communication makes it clear that parties under Italian law can lodge an appeal against a decision issued under the ESCP Regulation.

This means that Alitalia’s appeal if lodged within the prescribed time limit, is admissible.<sup>35</sup>

As to the merit of the appeal, one should consider that, under Articles 5 and 9 of the ESCP Regulation, the decision as to whether an oral hearing should be held (in the absence of parties’ requests) and as to how evidence should be evaluated is left to the determination of the judge.

#### Article 5 of the ESCP Regulation

1. The European Small Claims Procedure shall be a written procedure.

1a. The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests. [...]

#### Article 9 of the ESCP Regulation

1. The court or tribunal shall determine the means of taking evidence, and the extent of the evidence necessary for its judgment, under the rules applicable to the admissibility of evidence. It shall use the simplest and least burdensome method of taking evidence. [...]

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<sup>34</sup> European e-Justice Portal, Small claims, Italy, available at: [https://e-justice.europa.eu/content\\_small\\_claims-354-it-en.do?init=true&member=1](https://e-justice.europa.eu/content_small_claims-354-it-en.do?init=true&member=1).

<sup>35</sup> See also Tribunal of Rome, 18 November 2013, no. 23097, available at: <https://ic2be.uantwerpen.be> (judging on an appeal from a Justice of the Peace’s decision on ESCP Regulation).

The fact that the judge issued its decision without holding an oral hearing and only on the basis of the documents presented by the claimant is not, in itself, a ground for appealing the decision under Article 17 of the ESCP Regulation. Alitalia's appeal is therefore unfounded in the merit.<sup>36</sup>

It should be noted that Alitalia is also precluded from applying for the review of the decision by the Justice of the Peace since Article 18 of the ESCP Regulation entitles a defendant who did not submit a response to apply for review only if the defendant can prove that she was not served with the claim or was prevented from contesting the claim by reasons of force majeure not attributable to her.

**Scenario III:** Suppose that Bea is represented by a lawyer and that her claim is upheld by the Justice of the Peace. In its decision, the Justice of the Peace awards € 75 to the lawyer for her service, notwithstanding the request to award € 500 for the lawyer's service. Bea challenges the decision by lodging an appeal before the Tribunal of Rome.

**Question 3:** Is the appeal well-founded?

**Answer:** From a procedural point of view, as said above under question no 2, under Italian law Bea can appeal the decision before the Tribunal of Rome.

As to the merit of the claim, the only relevant provision in the ESCP Regulation concerning legal fees is Article 16, which prohibits awarding fees that are unnecessary and disproportionate.

#### Article 16 of the ESCP Regulation

The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.

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<sup>36</sup> See Lodz Regional Court, XIII Ga 728/13, of 5 June 2014, available at: <https://ic2be.uantwerpen.be/> (on appeal from a first instance decision); Court of Appeal of Barcelona, SAP B 15507/2012, of 26 September 2012, ECLI:ES:APB:2012:15507, available at: <https://ic2be.uantwerpen.be/> (on appeal from a first instance decision).



The ESCP Regulation leaves any other issue concerning the award of the costs of the proceedings to national law.

In Italy, lawyers' fees are determined by the Decree of the Ministry of Justice of 10 March 2014, no 55, according to which remuneration for lawyers' services should be proportionated to the value of the dispute and the amount of work performed. Under the Decree, no 55/2014, the average remuneration for representation in a proceeding before the Justice of the Peace whose economic value is € 1.750 should be comprised between € 600 and € 2.200.

Bea's claim is therefore well-founded because the award by the Justice of the Peace as to the fees of Bea's lawyer is consistently lower than the average value of such fees. In a similar case, the Tribunal of Rome – on appeal from a decision by a Justice of the Peace awarding to a lawyer € 75 as remuneration – held that the sum awarded to the lawyer was trifling and offensive to the professional dignity of the lawyer, and quashed the decision<sup>37</sup>.

**Scenario IV:** Suppose that Bea is represented by a lawyer and that her claim is upheld by the Justice of the Peace. The Justice of the Peace however decides that each party has to bear their own court fees. Bea challenges the decision by lodging an appeal before the Tribunal of Rome.

**Question 4:** Is the appeal well-founded?

**Answer:** From a procedural point of view, as said above under question no 2, under Italian law Bea can appeal the decision before the Tribunal of Rome.

As to the merit of the claim, the relevant provision in the ESCP Regulation concerning costs is Article 16, under which “the unsuccessful party shall bear the costs of the proceedings”. The Article should be read in light of the interpretive guidelines provided by the Court of Justice of the European Union (CJEU) in the *Rebecka Jonsson* case.<sup>38</sup>

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<sup>37</sup> See also Tribunal of Rome, 18 November 2013, no. 23097, available at <https://ic2be.uantwerpen.be/> (judging on an appeal from a Justice of the Peace's decision about legal fees).

<sup>38</sup> Court of Justice of the European Union, 14 February 2019, C 554/17 *Rebecka Jonsson*.

In the *Rebecka Jonsson* case, Ms Jonsson, domiciled in Sweden, brought a proceeding against a French-incorporated company for copyright infringement before the Tribunal of First Instance of Attunda in Sweden. This Tribunal made a partial award in favour of Ms Jonsson and determined that each party had to pay their own court fees. Upon Ms Jonsson's appeal of the decision before the Court of Appeals of Stockholm, the Court made a preliminary reference to the Court of Justice of the European Union (CJEU), requesting the CJEU to determine whether Article 16 of the ESCP Regulation allows for national provisions under which the costs of proceedings may be set off or adjusted depending on whether the parties were in part successful and in part unsuccessful. The CJEU answered the question in the affirmative.

Court of Justice of the European Union, 14 February 2019, C 554/17 *Rebecka Jonsson*, point 30

“Article 16 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure must be interpreted as not precluding national legislation under which, where a party succeeds only in part, the national court may order each of the parties to the proceedings to bear its own procedural costs or may apportion those costs between those parties. In such a situation, the national court remains, theoretically, free to apportion the amount of those costs, provided that the national procedural rules on the apportionment of procedural costs in small cross-border claims are not less favourable than the procedural rules governing similar situations subject to domestic law and that the procedural requirements relating to the apportionment of those procedural costs do not result in the persons concerned foregoing the use of that European small claims procedure by requiring an applicant, when he has been largely successful, nonetheless to bear his own procedural costs or a substantial portion of those costs.”

According to the CJEU, Article 16 of the ESCP Regulation should be read as allowing courts to apportion costs between the parties in case of the partial success of the claim if national rules so provide. By contrast, Article 16 cannot be read as allowing the apportionment of legal costs when the claim is fully upheld.

Going back to the scenario outlined above, the Justice of the Peace upheld Bea's claim in its entirety and yet ordered to set off parties' legal costs. The decision, therefore, does not conform to the CJEU's interpretation. Bea's claim is well-founded.



# CASEBOOK ON EUROPEAN ORDER FOR PAYMENT PROCEDURE AND EUROPEAN SMALL CLAIMS PROCEDURE

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**Abstract** Publication Case studies on European order for payment procedure and European small claims procedure was created as part of the Train to Enforce project and is the result of the collaboration of eight faculties of law across Europe. The publication contains numerous case studies focusing on European order for payment procedure (Regulation No. 1896/2006) and European small claims procedure (Regulation No. 861/2007). Case studies focus on both the practical and theoretical aspects of the European order for payment procedure and European small claims procedure. They will promote self-learning on cross-border debt collection in the EU.

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