

Simplifying access to justice in cross-border litigation, the national practices and the limits of the EU procedures. The example of the service of documents in the order for payment claims

Paper presented at 2015 EGPA Annual Conference, PSG XVIII: Justice and Court Administration (24 -29 August 2015, Toulouse, France)

Marco Velicogna

Researcher, Research Institute on Judicial systems, National Research Council of Italy (IRSIG-CNR); Corresponding author, e-mail: marco.velicogna@irsig.cnr.it

Marco Velicogna is a researcher at the Research Institute on Judicial Systems of the National Research Council of Italy. His main research interests are judicial administration, comparative judicial systems, court technology, information infrastructures, evaluation, organizational change and the management of innovation. He participated in a number of national and international research projects, and played a key role in the e-CODEX EU Large Scale Pilot project. He is currently the principal investigator of the Pro-CODEX project. He served as a consultant and collaborated with the Italian Ministry of Justice and several international institutions (including the CoE, OSCE, UN and Worldbank) and worked as an advisor in judicial reform initiatives in several countries.

Giampiero Lupo

Researcher, Research Institute on Judicial systems, National Research Council of Italy (IRSIG-CNR); e-mail: giampiero.lupo@irsig.cnr.it

Giampiero Lupo received his PhD in Political Science-Comparative and European Politics in 2010 at the University of Siena. He worked as a researcher at the University of Bologna working on deliberative democracy, quality of democracy, justice systems, and e-justice. He is currently a researcher at the IRSIG-CNR (Research Institute on Judicial Systems - National Research Council of Italy) taking part in a set of international projects as 'Building Interoperability for European Civil Proceedings Online,' e-CODEX, Towards Cyberjustice, API for Justice and publishing in peer-reviewed books and articles the results of his research. His main scientific interests are e-justice, quality of democracy, quality of justice systems, access to justice, deliberative democracy.

Elena Alina Ontanu

PhD Candidate, Department of Private International Law and Comparative Law, Erasmus School of Law, Erasmus University Rotterdam; email: ontanu@law.eur.nl

Elena Alina Ontanu is a PhD Candidate at the Department of Private International and Comparative Law at the Erasmus University Rotterdam in the Netherlands. Her research interests focus on the functioning of European uniform procedures across EU jurisdictions, national special procedures for recovery of monetary claims, access to justice, protection of parties' procedural rights and cross-border enforcement. She obtained her Masters from the University of Toulouse 1, Social Sciences and Paris I Panthéon Sorbonne University (French-

Romanian Law College of European Studies), and she holds a double diploma in law from Paris I Panthéon Sorbonne University and University of Bucharest Law School. She is a lawyer with the Bucharest Bar in Romania since 2008.

Abstract

Over the years, a number of regulations were adopted at EU level in an attempt to facilitate and simplify access to justice in cross-border litigation. Despite the various actions undertaken by the European legislator to establish a uniform procedural framework with regard to certain types of cross-border claims, numerous differences continue to exist. The recent efforts to digitalize cross-border procedures through the e-Codex project in order to allow an electronic filing of European uniform procedures claims between Member States have raised awareness as to the complexity and the impact of national procedural rules on the application of the European uniform procedures. Empirical data on the service of documents rules applicable in the European Order for Payments claims as well as domestic procedures used for equivalent purposes was collected in 16 EU jurisdictions. This paper investigates the way the implementation and coordination between the national service of documents rules and the service standards set by the Regulation impact on the application of the European Order for Payment and, subsequently, on the parties' access to justice. To conclude, the paper focuses on the possible solutions and actions that could mitigate the difficulties encountered in the present legal framework.

Keywords: access to justice, e-Codex, European Order for Payment, national order for payment procedures, procedural standards, service of documents

Table of contents

1. INTRODUCTION	4
2. METHODOLOGY	7
3. SERVICE OF DOCUMENTS AS THE BASIS FOR GUARANTEEING THE PARTIES' RIGHT OF ACCESS TO JUSTICE	9
4. SERVICE OF DOCUMENTS IN PRACTICE	12
4.1. SERVICE PRACTICES IN THE NATIONAL ORDER FOR PAYMENT PROCEDURES	12
4.1.1. <i>Responsibility for the service of documents</i>	13
4.1.2. <i>Methods of service</i>	15
4.1.3. <i>Time limits and deadlines</i>	18
4.2. SERVICE OF DOCUMENT IN THE EOP PROCEDURE	19
4.2.1. <i>EOP coordination with national rules</i>	21
4.2.2. <i>Language requirements</i>	23
4.2.3. <i>Compliance with minimum standards</i>	24
4.2.4. <i>Responsibility for the service of the EOP</i>	26
4.2.5. <i>Methods of service</i>	27
4.2.6. <i>Time limits and deadlines</i>	28
5. PROSPECTIVE FOR THE FUTURE – CONCLUDING REMARKS	29

1. INTRODUCTION

¹Access to justice and effective enforcement mechanisms are of key importance for protecting citizens' rights and for securing the economic activities undertaken at national as well as at European level on the basis of the four fundamental freedoms. Civil procedure rules 'are the expression of fundamental rights' as recognised by national constitutions, the EU Charter of Fundamental Rights and international treaties.² The European Union has adopted a number of regulations in the area of civil justice in an attempt to simplify cross-border litigation, reduce its costs, and support the citizens and businesses in obtaining speedier judgments and enforcement for their claims, facilitating thus their access to justice. These instruments range from regulations facilitating the coordination between national rules (e.g. in the area of international jurisdiction, recognition and enforcement,^{3,4} cross-border service of documents,⁵ and the taking of evidence),⁶ to harmonised procedures that provide an automatic recognition and enforcement of the judgment issued for certain types of civil and commercial matters (e.g. the European Order for Payment (EOP),⁷ the European Small Claims Procedure (ESCP)⁸ and the European Account Preservation Order (EAPO).⁹

Despite the intention of the European legislator to provide uniform procedural frameworks for specific cross-border procedures, harmonizing and simplifying the different norms and practices disciplining cross-border claims in Europe, numerous differences continue to exist. A number of studies carried out in this area have already identified a number of sources of complexity that the interested parties need to overcome in order to successfully employ the

A previous version of the paper was presented at the EGPA Annual Conference 2015.

¹ The authors are in debt to many academic colleagues, practitioners and institutions that supported the collection and analysis of the information used in the drafting of this article. We wish, in particular, to express our gratitude to Prof. Xandra Kramer for the precious suggestions and comments on earlier drafts of this paper. We also wish to thank all the e-CODEX team for the work carried out in the study of the service of documents in the EU Member States and, in particular, Marco Mellone and Christine Lewis. The contribution of Marco Velicogna and Giampiero Lupo has been made with financial support of the ICT-PSP programme of the European Commission and of the e-CODEX 2.0 research project funded by IRSIG-CNR, while Elena Alina Ontanu contribution has been made possible with the support of the Netherlands Organisation for Scientific Research (NWO) within its Innovational Research Incentives Scheme (VIDI). The opinions expressed in this article are those of the authors and do not necessarily reflect the positions of the aforementioned persons and institutions.

² M. Tulibacka, *Europeanization of Civil Procedures: in Search of a Coherent Approach*, Vol. 46 N. 5, Common Market Law Review, 15-38, (2009).

³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1–32.

⁴ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, in OJ L 143, 30.04.2004, p. 15-39.

⁵ Council regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, in OJ L 324, 0.12.2007, p. 79–120.

⁶ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, in OJ L 174, 27.6.2001, p. 1–24.

⁷ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p. 1-32.

⁸ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in OJ L 199, 31.7.2007, p. 1-22.

⁹ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, in OJ L 189, 27.6.2014, p. 59–92.

EOP and the ESCP in order to recover their claims.¹⁰ A relevant example of such complexity is the service methods available within the EOP procedure. According to the regulation, the EOP has to be served on the defendant in accordance with the provisions of the national law of the competent court. Such a method has to meet a set of minimum procedural standards as provided for in the Regulation (Art.13-15). At the same time, different methods are used within the various Member States. This may clearly pose a difficulty for the users, especially when they are required to play an active role in the service procedure. The impact of these differences is particularly strong on the non-repetitive players who want to make use of the harmonized procedures. For these parties, proceedings may translate into time-consuming and costly actions that often become evident only after the cross-border claim was filed and the party has already invested time, effort and resources in initiating the proceeding.¹¹ While some guidance is provided in the guidelines published by the European Commission,¹² it is still difficult to

¹⁰ M. Mellone, *Legal Interoperability: The Case of European Payment Order and of European Small Claims Procedure*, in F. Contini and G. F. Lanzara (eds.), *Building Interoperability for European Civil Proceedings Online*, 57-84, (Bologna: Cooperativa Libreria Universitaria Editrice Bologna, 2013).

M. Mellone, *Legal Interoperability in Europe: The Cases of the European Payment Order and the European Small Claims Procedure*, in F. Contini and G. F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, 245-264, (Dordrecht: Springer, 2014).

G.Y. Ng, *Experimenting with European Payment Order and of European Small Claims Procedure*, in F. Contini and G. F. Lanzara (eds.), *Building Interoperability for European Civil Proceedings Online*, 317-334, (Bologna: Cooperativa Libreria Universitaria Editrice Bologna, 2013).

G.Y. Ng, *European Payment Order and European Small Claims Procedure in Practice: Findings from a Simulation Experiment*, in F. Contini and G. F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, 245-264, (Dordrecht: Springer, 2014).

X.E. Kramer, *A European Perspective on E-Justice and New Procedural Models: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU*, Available at SSRN 2696978, (2015).

X.E. Kramer and E.A. Ontanu, *The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections*, Vol. 3, *Nederlands Internationaal Privaatrecht (NIPR)*, 319-328, (2013).

F. Contini and G.F. Lanzara, (eds.) *Building interoperability for European civil proceedings online*, (Bologna, CLUEB, 2013).

E.A. Ontanu, *Uniform European Procedures, a Way to Efficient Cross-Border Litigation and Enforcement? A Comparative and Empirical Research*, (forthcoming publication, 2016).

¹¹ These concern aspects such as the scarce and often too generic information regarding: the courts having jurisdiction; the amount of court fees and costs of proceedings and the specific means of payment that must be used for this purpose; the possible need for the claimant to be actively involved in the service of documents on the defendant and the valid methods of service.

See G.Y. Ng and M. Mellone, *The legal interoperability and the European Small Claims Procedure*, Report presented at the meeting of the research project 'building interoperability for European civil proceedings online', 1-2 Dec 2011, Bologna.

G.Y. Ng, *EPO and ESCP simulation UK—Italy claim: Regulations (EC) No. 1896/2006 and 861/2007*, Paper presented for the 'building interoperability for European civil proceedings' online conference, 14 June 2012, Bologna.

M. Mellone, *Legal Interoperability in Europe: An Assessment of the European Payment Order and the European Small Claims Procedure*, in F. Contini and G. F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, 245-264, (Dordrecht: Springer, 2014).

M. Velicogna and G. Lupo, *Developing e-Justice technology for use: the e-CODEX experience*, presented at the EGPA conference, 2015.

¹² See for example the EU Commission 'Practice Guide for the application of the Regulation on the European Order for Payment', available at <https://e-justice.europa.eu/fileDownload.do?id=79895a32-067e-4a6e-b7fc-c117d59bf87f> (last visited 14 June 2016) or the EU Commission 'A citizens' guide to cross-border civil litigation in the European Union', available at

find and correctly interpret all the information needed prior to the filing of the claim. Access justice barriers deriving from the different national rules that must be followed in order to carry out many of the specific tasks of the ‘same’ EU procedure clearly hinder the use and diffusion of such procedures.¹³ Delays (often of several years) in providing and updating the information on national procedural specificities on the e-Justice Portal¹⁴ or the European Judicial Network in Civil and Commercial Matters, and the extensive time needed to make amended data available in the main, if not all the EU official languages does not help to improve the situation.

The recent efforts of the European Union to digitalize cross-border procedures through the e-CODEX project¹⁵ has raised the awareness on this source of complexity and on the impact of these national differences on the uptake of the EU harmonized procedures. While the digital interoperability for cross-border cases has been reached between e-CODEX piloting countries, the persistence of procedural barriers are clearly hampering the smooth flow of legal agency,¹⁶ contributing to the low use of the system.¹⁷ This increased awareness has resulted in several actions, both to support the provision of updated information by the e-Justice Portal, and to investigate some of the most common issues, such as calculation of court fees, payment methods, and service of documents.¹⁸

This paper investigates the impact of the application of the national service of document provisions on the EOP procedure and on the claimant’s access to justice through this harmonized procedure in 16 EU justice systems. In doing so, two key questions will seek to be answered:

http://ec.europa.eu/civiljustice/publications/docs/guide_litiges_civils_transfrontaliers_en.pdf (last visited 14 June 2016)

¹³ F. Contini and G.F. Lanzara, (eds.), *The Circulation of Agency in e-Justice: Interoperability and infrastructures for Europe trans-border judicial proceedings*, (Springer: Dordrecht, 2014).

M. Velicogna, and G. Lupo, 2015, *supra* note 11.

¹⁴ G.Y. Ng and M. Mellone, (2011) *supra* note 11.

G.Y. Ng, (2012) *supra* note 11.

¹⁵ The e-Justice Communication via Online Data Exchange (e-CODEX) is a Large Scale Pilot project co-funded by the EU Commission and coordinated by the Ministry of Justice of the German Land Nordrhein-Westfalen (Jm Nrw). The project foresees the implementation of an infrastructure composed of several ‘building blocks’ (in the e-Codex terminology) that supports the exchange of judicial data and documents between European Union Member States. The e-Codex infrastructure has been shaped in order to allow the exchange of data in different domains. These are denominated ‘use cases’, and they are the trans-border legal procedures on which the e-CODEX infrastructure is applied and tested. One of the e-Codex ‘use cases’ is the EOP procedure. For more details on e-CODEX see: M. Velicogna, *Coming to Terms with Complexity Overload in Transborder e-Justice: The e-CODEX Platform*, F. Contini and G. F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, 309-330, (Dordrecht: Springer, 2014).

M. Velicogna, e-CODEX and the Italian Piloting Experience, V. 1.0, IRSIG-CNR Working Paper (2015).

M. Velicogna, et al., *D7.4 Architectural Hands on Material*, e-CODEX Deliverable (2014).

G. Pangalos, I. Salmatzidis and I. Pagkalos, *Using IT to Provide Easier Access to Cross-Border Legal Procedures for Citizens and Legal Professionals-Implementation of a European Payment Order e-CODEX pilot*, Vol. 6(2), *International Journal for Court Administration*, 43-52, (2016).

G. Lupo and J. Bailey, *Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples*, Vol. 3(2), *Laws, Technology, Social Media and Law, Special Issue*, 353-387, (2014).

¹⁶ G.F. Lanzara, *The Circulation of Agency in Judicial Proceedings: Designing for Interoperability and Complexity*, in F. Contini and G. F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, 245-264, (Dordrecht: Springer, 2014).

¹⁷ On the actual use of the e-CODEX infrastructure, see e-CODEX WP3 *Piloting and testing* presentation, e-Justice Communication via Online Data Exchange MB Meeting, Brussels, 2 March 2016; M. Velicogna, (2015) *supra* note 17.

¹⁸ G.Y. Ng, (2013) *supra* note 10. G.Y. Ng, (2014) *supra* note 10. M. Mellone, (2013) and M. Mellone, (2014) *supra* note 10.

- How does the application of the national service of documents rules impact on the application of the EOP and subsequently on the parties' access to justice?

- What are the possible solutions and points to be addressed in mitigating the encountered difficulties considering the present legislative framework?

As a result of the data presented and of the analysis carried out to address such questions, the paper draws some preliminary conclusions on the service of documents in the European Union and its importance in facilitating or hampering access to justice for the parties litigating cross-border. Further, it draws attention to a few specific points that need to be addressed in future discussions between scholars, practitioners and legislators.

- First, there is an important differentiation in terms of procedures for service of documents in civil litigations within the EU.

- Second, the national procedures and practices applicable for the service of documents in most cases apply to the EOP Regulation.

- Third, this results not only in very different proceedings that have to be followed by the user of the same harmonized EU procedure, but also in a very different degree of complexity affecting the users depending on the justice system of the competent court.

Such points need to be addressed both at EU and national level. At EU level, when amending the texts of existing regulations or adopting new procedures, or when designing e-Justice systems such as e-CODEX; at national level, to coordinate national practices when implementing EU procedures and to provide relevant and detailed data to keep the e-Justice portal updated.

The paper is structured in several parts addressing aspects related to the service of documents. The methodology section introduces the means and methods that were used for the exploration of the topic and the data collection. Further, a general overview on the topic of service of documents is carried out in order to clarify its role and function within the judicial proceedings. This is followed by a section investigating the service of documents in national and EU cross-border procedures. The EOP is confronted here with the national payment order procedures, looking at the legal discussion and the practice outcome, as well as at the data from the 16 analysed judicial systems. Afterwards, the authors make a reflection on the present and potential role of information technology in supporting the service of documents in cross-border disputes. The concluding section seeks to sum up the results of the research, reflecting on possible solutions that may simplify the life of professionals and non-professionals dealing with EU cross-border procedures, building on the EOP experience.

2. METHODOLOGY

This paper analyses the service of documents from a theoretical and practice standpoint, considering both the national and the EU cross-border perspective. The data was gathered from several sources following a multidisciplinary approach that combines social science and legal research. A literature research was carried out to explore the argument of the service of document in the context of the right to fair trial, the protection of the parties' right to defence and in relation to the European regulations. This sought to identify the critical aspects legal scholars distinguish within various national systems, the particularities of the national practices, as well as the aspects that continue to be ruled by the internal procedural rules, though some special rules were enacted at EU level. Particular attention is given to the EOP provisions regarding service of documents and their interpretation in legal literature. The national as well as the EU context was considered. The research investigates the phenomenon from a legal and

law in action perspective.¹⁹ Furthermore, the analysis considers relevant published national and EU case law regarding the service of the EOP on the defendant.

With regard to the national case studies, the main data source is a questionnaire circulated between e-CODEX project partners (the replies cover 14 justice systems) and the e-CODEX study on service of documents (e-CODEX study),²⁰ which was drafted on the basis of this data.²¹ Two of the three authors of this paper were involved in the data collection and drafting of the report.

The exercise was carried out as a result of an emerging information need in the implementation of the e-CODEX project. The development of an e-service supporting the EOP procedure brought to the attention of the project partners the significant divergences existing between the national civil procedures and practices for the service of documents. As e-CODEX partners soon realized, gaining a better understanding of the national and cross-border service of documents procedures was relevant for the successful implementation of the EOP e-service. A limited number of partners first tested the questionnaire between December 2013 and February 2014. Based on their provided inputs, the document was improved, and then circulated to all partners, resulting in a total of 14 replies providing information on 14 different EU justice systems (**Austria, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Malta, Poland, Portugal, Scotland, Spain, England and Wales**) between March and May 2014. It should be noted that at the time the questionnaires were filled in, the e-CODEX partners were or represented 20 European Ministries of Justice.

The questionnaire contains 9 open questions on the application of national and European civil procedure with a particular focus on who takes care of the service of documents, and on how these functions are exerted. The questionnaire begins with a question regarding the service of documents (who and how) in national generic civil procedures. This is followed by a set of questions focusing on the service of documents in the national order for payment procedure, including who takes care of it, how documents are served, what is the deadline for the service of the document and how the declaration of enforceability is issued. Finally, a set of questions investigate the EOP, seeking to find out who is responsible for the service of documents in this case, how are the orders served, whether a specific deadline applies, and what procedure is followed for enforcement purposes.

On the basis of the official replies, a study was drafted. In September 2014, the e-CODEX study on service of documents followed a review process that included a first cycle where the respondents had the possibility to comment on the text, on the interpretation of the answers, and provide additional information. After being revised, the study was then circulated to the all e-CODEX partners for additional comments. A consolidated version was drafted by the end of October 2014. Further minor amendments were made until December 2015 when the document was finalized. This process allowed a strong validation of both the data and the analysis by the official representatives of the Ministries of Justice involved.

As some key cases were still missing, additional data from 2 more justice systems (**the Netherlands and Romania**) were collected specifically for this paper on the basis of the e-

¹⁹ See M. Velicogna, G. Lupo and M. Mellone, *Notification and Service of Documents in National and European Civil Procedures*, v1.0, e-Justice Communication via Online Data Exchange, e-CODEX WP7 Report, (December 2015).

²⁰ M. Velicogna, G. Lupo and M. Mellone (2015) *supra* note 19.

²¹ *Supra* note 17.

CODEX questionnaire. The answers to the e-CODEX questionnaire on service of documents in National and EU procedures provided by X. E. Kramer²² and E.A. Ontanu.²³

The data collected was then analysed in the light of the theoretical framework provided by the literature and legal research, looking for relevant patterns and insight that could help achieving a better understanding of the existing relation between national rules and the EOP service of document practices. This explorative stance has also been directed to bring out critical elements of the present legislative framework that need to be tackled in order to make this potentially very useful instrument more effective.

3. SERVICE OF DOCUMENTS AS THE BASIS FOR GUARANTEEING THE PARTIES' RIGHT OF ACCESS TO JUSTICE

Service of documents is a key element in any court proceeding.²⁴ The Regulation (EC) No. 1393/2007 ('Service Regulation') establishes the main rules regarding cross-border service of documents in civil and commercial matters at a European level.²⁵ Besides the provisions laid down by this regulation, several other European regulations contain specific rules regarding the communication of judicial documents during litigation proceedings, as well as of judicial decisions (e.g. the Brussels *Ibis* Regulation, EEO Regulation, the EOP Regulation, the ESCP Regulation, the EAPO Regulation). For example, in the Brussels *Ibis* the European legislator provides that the court 'shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting proceedings or equivalent within sufficient time to enable him to arrange for his defence or that all necessary steps have been taken' in this regard.²⁶ However, the text refers to the rules of the Service Regulation for matters of cross-border service when the defendant did not enter into appearance and the provisions according to which the communication of judicial documents has to be carried out.²⁷ Furthermore, service of the judgment on the person against whom the execution is to be carried out is essential in

²² Professor, Erasmus University Rotterdam, Department of Private International Law and Comparative Law.

²³ PhD Researcher, Erasmus University Rotterdam, Department of Private International Law and Comparative Law.

²⁴ Traditionally, at international level, besides using diplomatic channels, countries used to conclude bilateral conventions with regard to cross-border service of documents. See D. McClean, *International Co-operation in Civil and Criminal Matters*, 18-23, (Oxford University Press, 2002). E. Storskrubb, *Due notice of proceedings: present and future*, Vol. 19, *Uniform Law Review*, p. 353, (2014). Regional convention on the service of documents were adopted between American Countries (i.e. the 1975 Inter-American Convention on Rogatory Letters and the 1979 Inter-American Protocol), and between the Asia and African Counties (i.e. the Asian-African Model Arrangements). See D. McClean, *International Co-operation in Civil and Criminal Matters*, 18-60-72, (Oxford University Press, 2002). Today, the 1965 Hague Service Convention is the international instrument that has the broader geographical application with regard to the cross-border service of documents. Convention of 15 November 1965 on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 658 UNTS 163. At present, there are 71 contracting states to the Hague Service Convention (available at http://www.hcch.net/index_en.php?act=conventions.status&cid=17#nonmem). See further, W.A. Kennett, *Enforcement of Judgments in Europe*, 193-200, (Oxford University Press, 2000).

²⁵ Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, O.J. L 324, 10.12.2007, p. 79-120.

²⁶ Article 28(2) Brussels *Ibis*.

²⁷ Article 28(3) Brussels *Ibis* in conjunction with Article 19 Service Regulation. When the Service Regulation does not apply the provisions of Article 15 of the Hague Service Convention apply (Article 28(4) Brussels *Ibis*).

the enforcement of a decision under the Brussels *Ibis*.²⁸ Differently to the Brussels *Ibis*, the EOP and the ESCP Regulations establish a number of methods that should be employed in serving the documents of the proceedings on the defendant.²⁹ In providing a specific list of service methods for the European uniform procedures, the European legislator established a minimum standard for the actual service on the defendant, relying on specific mechanisms offering a high degree of certainty or of likelihood that the documents reached the defendant. The purpose of these means is to enable the defendant to set up a defence or execute the decision issued by the court.³⁰ In a broader perspective, such provisions aim to secure an effective judicial protection for the parties and their rights to access to justice and fair trial, as framed within the provisions of Articles 6 and 13 of the European Convention of Human Rights and Fundamental Freedoms ('ECHR') and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').³¹

Fair judicial proceedings, as required by Article 6(1) ECHR, cover a wide range of issues.³² Effective access to justice is not limited to the existence of a competent court and a formal entitlement to institute proceedings.³³ A proper service of judicial proceedings will not only secure that the defendant is aware that judicial proceedings were initiated against him, but will also allow the parties to prepare their defence on the basis of the arguments and legal reasoning put forward by the counter-party and effectively present their case.³⁴ The simplification of court proceedings in cross-border litigation by using uniform European procedures, such as the EOP, should not result in the breach of procedural guarantees that have been recognised by the ECHR and by the Charter. A service of documents carried out in compliance with the applicable procedural rules remains of 'utmost importance' for the defendant's right to be heard guaranteed under Article 6(1) ECHR and Article 41 (2) of the Charter.³⁵ The communication of judicial documents before and during the proceedings, as well as their provision in a language the recipient can understand is of key importance for securing the party's right to a fair trial, access to justice and the equality of arms. Thought not an absolute right, access to a court is 'inherent to a right to fair trial'.³⁶ In its interpretation of

²⁸ Article 43 Brussels *Ibis*.

²⁹ The ESCP Regulation gives priority to service by post with acknowledgement of receipt method. Only subsequently, when service by post is not possible, one of the means set by Regulation (EC) No. 805/2004 should be employed. For the EOP, the text provides for a specific list of possible methods that can be chosen from in accordance with national law order to inform the debtor of the order issued against him/her.

³⁰ E. Storskrubb, *Civil Procedure and EU Law. A Policy Area Uncovered*, 210-211, (Oxford University Press, 2008).

³¹ European Convention of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4 November 1950; Charter of the Fundamental Rights of the European Union, OJ C 83/389, 30.3.2010.

³² X.E. Kramer, *The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation*, Vol. 2, *Zeitschrift für europäisches Privatrecht*, p. 372, (2008).

³³ ECHR, 9 October 1979, Series A, No. 32, *Airey v. Ireland*. See also M. Cappelletti and B. Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective*. A General Report, Vol. 1, Access to Justice. A world Survey, p. 8-9, (1978).

³⁴ A. Stadler, *Practical Obstacles in Cross-Border Litigation and Communication between (EU) Courts*, Vol. 5, N. 3, *Erasmus Law Review*, p. 153, (available at www.erasmuslawreview.nl) (2009). E. Storskrubb, (2014) *supra* note 24. X.E. Kramer (2008) *supra* note 32. W. Kennett, (2000) *supra* note 32.

³⁵ A. Stadler, (2012), p. 154 *supra* note 34. For a critical review of this Article 41(2) of the Charter see I. Rabinovici, *The Right to Be Heard in the Charter of Fundamental Rights of the European Union*, Vol. 18 N. 1, *European Public Law Review*, 149-173, (2012).

³⁶ The European Court of Human Rights made clear in *Golder v. the United Kingdom* case that the right of access to court is part of the right of the right to fair trial. ECHR, 21 February 1975, Series A No. 18, *Golder v the United Kingdom*. L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*,

the Article 6(1) of the ECHR, the Strasbourg Court underlined the fact that in accordance with the principle of equality of arms ‘each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party’.³⁷ Hence, not putting the party at ‘a substantial disadvantage vis-à-vis his [/her] opponent’,³⁸ and preserving the fundamental principle of adversarial proceedings by giving him/her the opportunity to respond to the claim, if he/she wishes.³⁹ A procedure that would not provide sufficient guarantees for the parties to be informed of judicial proceedings undertaken against them and not offering them with an opportunity to submit their position would also touch upon the principle of effective judicial protection as recognised by Article 47 of the Charter. On the contrary, the service of the documents should not become too cumbersome for the claimant, making it impossible for him/her to make use of his/her procedural rights and to obtain a judicial decision on the claim submitted to the court. As mentioned by Schack, service ‘must be simple, quick, reliable and fair’ in order to fulfil its function.⁴⁰ A European procedure aiming to simplify, speed up and reduce the costs of litigation in cross-border proceedings, but which does not maintain a fair balance between the parties’ procedural rights, securing an effective access to justice and to a fair trial leaves room for abuses and will not achieve the purpose for which it was adopted. The EOP Regulation sets a duty on the court to ensure that the order was served on the defendant ‘in accordance with the national law by a method that ...meet[s] the minimum standards’, as enumerated by the Article 13 and 14,⁴¹ and a check by the same of the date of service upon delivery of the declaration of enforceability.⁴² Furthermore, the defendant is provided with the means of requesting a review of the EOP when service is carried out by one of the methods established by Article 14 EOP Regulation and this does not leave sufficient time to the defendant to enable him/her to arrange for his/her defence.⁴³ These service checks the court is set to carry out, and the review means the debtor is provided with, aim to guarantee

p. 96-98, (Asser Press Springer, 2014). On the guarantees Art. 6(1) of the ECHR prescribes; see N.H. Andrews, A Modern Procedural Synthesis. The American Law Institute and UNIDROIT’s Principles and Rules of Transnational Civil Procedure, Vol. 54, N. 17, *Tijdschrift voor Civiele Rechtspleging*, (2009). According to the author the rights that stem from this Article are the rights to 1) access to justice; 2) a fair hearing (trial), which includes (a) the right to be present at an adversarial hearing; (b) the right to equality of arms; (c) the right to a fair presentation of evidence; (d) the right to cross examine, and (e) the right to a reasoned judgment; 3) a public hearing, including the public pronouncement of judgment; 4) a hearing within a reasonable time; and 5) a hearing before an independent and impartial tribunal established by law.

³⁷ ECHR, 6 February 2001, no. 30428/96, *Beer v. Austria*, paragraph 17. ECHR, 2001-VI, no. 39594/98, *Kress v. France*, paragraph 72. ECHR, 3 June 2003, no. 37372/97, *Walston (No. 1) v. Norway*, paragraph 56. See also the European Court of Human Rights, *Guide on Article 6. Right to a fair trial* (civil limb), 2013, p. 42. D. Harris, M. O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 3rd Edition, p. 413, (Oxford University Press, 2014).

³⁸ ECHR, 6 February 2001, no. 30428/96, *Beer v. Austria*, paragraph 18. ECHR, 2001-VI, no. 39594/98, *Kress v. France*, paragraph 72. On the idea of a ‘fair balance’ between the parties, see ECHR, 27 October 1993, Series A no. 274-A, *Dombo Beheer v. Netherlands*, 18 EHRR 213, paragraph 33. D. Harris, M. O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 3rd Edition, p. 413-414, (Oxford University Press, 2014). B. Rainey, E. Wicks and C. Ovey, *The European Convention on Human Rights*, 6th Edition, p. 263, (Oxford University Press, 2014).

³⁹ The essence of the right to an adversarial trial is that the parties are given the possibility or are put in a position to decide whether they wish to respond to the material put forward. ECHR, 3 June 2003, no. 37372/97, *Walston (No. 1) v. Norway*, paragraph 58. ECHR, 21 August 2015, no. 53723/13, *Zavodnik v. Slovenia*, paragraphs 70-71. D. Harris, M. O’Boyle and Warbrick, (2014), p. 416, *supra* note 37.

⁴⁰ H. Schack, *Transnational Service of Process: A Call for Uniform and Mandatory Rules*, Vol. 4, *Uniform Law Review*, p. 832, (2001).

⁴¹ Article 12(5) in conjunction with Articles 13-15 EOP Regulation.

⁴² Annex VII, Form G, Declaration of enforceability, EOP Regulation. Article 18(1) EOP Regulation.

⁴³ Article 20(1) letter a) EOP Regulation.

his/her right to be heard and an ‘effective’ access to justice as provided by Article 6(1) ECHR and Article 47 of the Charter. However, the EOP Regulation does not establish an express rule as to whom should be responsible for carrying out the service of the EOP on the debtor. This aspect is left to be determined by the national procedural rules applicable; thus, to a multiplicity of solutions that the claimant needs to be aware of and discover. No uniform information as to whom is responsible for carrying out the service on the defendant is generally available. The creditor finds himself/herself in a burdensome position, not being able to immediately assess his/her procedural duties and the costs he/she might need to incur if, according to the applicable procedural rules, he/she is responsible to serve the order on the defendant. This can potentially hinder the user, especially a non-repetitive player, rather than facilitating his/her access to justice.

4. SERVICE OF DOCUMENTS IN PRACTICE

This section investigates the service of documents in national and EU cross-border payment order procedures. The ratio of looking into both procedures is triggered by the consideration that besides the rules coordinating service of judicial and extrajudicial documents in cross-border litigation within the EU and at international level, and the specific provisions contained by the regulations establishing European uniform procedures, the service method used to serve the EOP has to be in accordance with the national rules; hence, it means that they are recognised as valid service methods by domestic law. This implies that the national practices and choices in relation to domestic similar procedures (i.e. payment order) influence the way the service of document is carried out in EU cross-border procedures such as the EOP. In order to understand the way the service of documents methods are applied in relation to the EU procedure and the implementation choices, domestic approaches to service must therefore be analysed.

4.1. SERVICE PRACTICES IN THE NATIONAL ORDER FOR PAYMENT PROCEDURES

The miscellaneous national procedural rules regard various aspects, such as the party or institution responsible for carrying out the service of documents at the beginning or during the judicial proceedings, the methods to be employed, the costs of service of documents, the conditions set for its validity, the professional bodies involved and the possible time constraints for its performance. Particular differences exist as to the way service has to be carried out within the same legal system. This may be the case between various stages of court proceedings (e.g. beginning of court proceedings when the defendant has to be informed of the claim filed against him and the communication of the judgment following its issuance by the judge) or between the ordinary national procedure and special simplified procedures, such as the order for payment procedures.⁴⁴ Following the issuance of the judicial decision, the enforcement of the award may be conditioned by prior actions that need to be undertaken by the creditor or

⁴⁴ For example, in **Hungary** the service of the documents in the national ordinary procedure is taken care by the court, while in national order for payment the service is the responsibility of the notary. See M. Velicogna, G. Lupo and M. Mellone (2015), *supra* note 19.

interested party in order to subsequently pursue the execution of the award. This may include, for example, a duty to serve a summons on the defendant to voluntarily comply with the judgment or the court order within a set period, together with an authenticated copy of the judgment.

Information regarding the national provisions on service of documents in judicial procedures should provide support for the parties in order to overcome this intricacy. However, the guidance available on the European portals is very limited and mostly not up to date. For a long period, the e-Justice Portal limited itself to make parties aware that a person involved in legal proceedings might need to serve judicial documents in a different Member State, such as summons notifying the beginning of judicial proceedings, appeals, statements of defence and injunctions. For further information, the interested parties were redirected to the web page of the European Judicial Network in Civil and Commercial Matters. The website warns the reader of the differences existing between the civil procedural rules regarding service in various Member States. It further points to the fact that in some of the Member States the service is carried out by the court, while in others the parties are called to initiate the transmission.⁴⁵ However, the difficulties a layperson will encounter do not finish, as the information on this website is not updated. The paragraph regarding service of documents refers to the 2000 Regulation, but a new Service Regulation was adopted in 2007 repealing the previous text. National information available for each Member State dates back to a period between 2004 and 2007; hence part of it is obsolete. The e-Justice Portal has only recently begun to publish updated information on the service of documents in various Member States. In June 2016 the updated versions concern 19 Member States and the information is available in the national official language alone.⁴⁶ The parties as well as practitioners that are not familiar with civil procedural systems of other Member States are facing difficulties in finding which are the rules that actually apply in their situation. Nonetheless, when verifying the existing information available, the interested party will discover that the data is not available in all the official languages of the EU, let alone not concerning all Member States.⁴⁷ The present situation hinders the party's access to justice, especially for a person that has no legal training and is not aware of the particularities of the procedural system where service needs to be carried out. Thus, in seeking to make use of the EOP procedure, the claimant might find himself with no other choice than to employ a legal representative for serving the order on the debtor in accordance with the national law.

4.1.1. Responsibility for the service of documents

The data gathered through the e-CODEX study shows important differences in procedures and practices between the justice systems for the service of documents to a defendant in a national payment order procedure. The Justice systems analysed divide, with

⁴⁵ http://ec.europa.eu/civiljustice/serv_doc/serv_doc_gen_en.htm (website last visited on 14 June 2016).

⁴⁶ https://e-justice.europa.eu/content_service_of_documents-371-en.do (website last visited on 14 June 2016).

⁴⁷ https://e-justice.europa.eu/content_service_of_documents-371-en.do (website last visited on 14 June 2016). Previously, on the European Judicial Network in Civil and Commercial Matters the more extreme situations rested with Bulgaria, the information was available only in Bulgarian (http://ec.europa.eu/civiljustice/serv_doc/serv_doc_bul_en.htm), and Estonia provided no information (http://ec.europa.eu/civiljustice/serv_doc/serv_doc_est_en.htm) referring to a forthcoming updated version of the data to be published on the e-Justice Portal. The information regarding national rules of service for the other Member States was available in all or several official languages of the EU.

few exceptions, between those in which the court takes care of the delivery of the payment order documentation to the defendant and those countries in which the claimant is responsible for the service of documents. Before going further with the analysis of the national practices for the service of documents, it has to be mentioned that for the justice systems that do not have a specific order for payment procedure (i.e. the Netherlands and England and Wales) and money claims are handled as ordinary court proceedings or default judgements, such procedures are considered instead.

	Court	Bailiff under request of Creditor	Civil Law Notary	Sheriff Officer
Countries	AT, CZ, EE, ES, DE, MA, PL, PT, RO, UK (England and Wales)	FR, GR, IT, NL	HU	SC
Number in sample	10	4	1	1

Table 1 Who Takes Care of the Delivery in the National Order for Payment or Similar Procedures

Out of the 16 justice systems considered in the research, in 10 cases (**Austria, Czech Republic, Estonia, Germany, Malta, Poland, Portugal, Romania, Spain, England and Wales**) a service of documents by the court is foreseen (see table 1).

The means by which the court takes care of the task may vary, and in most cases several options are available. In **Portugal**, the procedure distinguishes between the cases where the parties previously agreed on the service of documents at their domicile and the cases where there is no agreement. In the former case, the documents are served in a simple letter through regular post. In the latter case, documents are served through a certified mail with an acknowledgement of receipt. In **Germany**, the service of document in a national payment order is the responsibility of the court, with an exception. In cases in which the claimant requests a party-to-party service, the order for payment is submitted by the court to the claimant for service on the defendant (Sec. 699 Para. 4, Sec. 191 Civil Procedure Code). The **Romanian** procedure foresees that the court takes care of the service of documents by two methods. Through its procedural agents (rarely used) or by postal service with declared content of the package and acknowledgement of receipt.⁴⁸ With the entrance in to force of the new Code of Civil Procedure (15 February 2013), procedural documents can be served also by fax or by email when the party provided the necessary information. In such cases, the party will receive together with the documents, an additional form that needs to be filled in and returned to the court. The form contains information regarding the date it was received, the name of the person receiving it and his/her signature. This serves as a proof that the party received the documents. Moreover, the new code allows the interested party to request that the service of documents is carried out by a bailiff or by a rapid courier service. In such cases the costs are borne by the parties. In **England and Wales**, there is no specific national payment order procedure. Money claims are submitted under the ordinary default judgment. After the filing of a money claim, documents are serviced to the defendant by the court.

In 5 countries, the service of documents is the responsibility of the claimant who has to notify the defendant by using different means and activating different types of professional actors. In 4 countries, (**France, Greece, the Netherlands and Italy**), the claimant has to serve the documents through the bailiff. In the **Italian** case, the claimant has to request an original

⁴⁸ Article 154 New Code of Civil Procedure.

copy of the payment order to the court staff and to serve it by bailiff, after paying an additional fee. The claimant has to serve the payment order before the deadline of 30 days from the issuing of the order by the judge. The law 21-01-1994 n. 156 introduced the possibility for lawyers to notify payment orders directly by post or in person to the defendant's lawyer, only when the latter is part of the same local bar association as the claimant's lawyer. Additionally, in order to directly serve the order on the defendant without activating the bailiff, the claimant's lawyer has to be authorised by its local bar association. In **France**, the procedure for service of documents is very similar to the Italian one. Article 1411 of the French Code of Civil Procedure states that 'a certified true copy of the petition and of the order has to be served, at the request of the creditor, on each of the debtors'. The documents can be served in person at the defendant's domicile or in case of a corporate entity, on its legal representative or on any other person empowered for this purpose. In **Hungary**, on the ground of the Article 26 (1) of the Act L of 2009 on the Order for Payment Procedure, the claimant has to serve the claim through the civil law notary.⁴⁹ The order can be served by a postal service provider or by the proceeding notary public personally on the party being present. Documents served by post are considered served on the day of the attempt to serve them, and if no one authorized to receive document is found at the address, the postman leaves a notice in the mailbox, indicating where and when the official document can be picked by the addressee (or other person authorized by him). All the information is indicated on the attached notice of receipt. Aside postal or personal service through a civil law notary, however, the claimant may also request that the order is served by a bailiff (Section 16 of Act L of 2009 on the Order for Payment Procedure). Finally, in **Scotland** the order for payment or 'decree for payment' granted by a court is directly enforceable. This can be enforced using various 'diligence' (enforcement) procedures. Despite there is no requirement to serve the decree in order for it to be enforceable, in order to activate specific diligence procedures, the document must be served on the defendant. This will be carried out by a sheriff officer.⁵⁰ **The Netherlands** does not have a specific national payment order procedure. There was a national order for payment procedure (*betalingsbevelprocedure*) until 1991, but it was repealed. Money claims are submitted in the ordinary court proceedings and are handled as a default procedure in which the party is responsible for the service of documents.

4.1.2. *Methods of service*

An aspect that should be also taken into account when investigating the service of documents is the methods of service to be used, such as for instance the postal service or the in person delivery. With regards to the *methods of service* of national payment orders, the investigated countries can be divided between those in which postal service is employed and those in which only service in person is allowed (see table 2).

⁴⁹ Hungarian Civil Law Notaries are appointed by the minister of justice for indefinite term and their number is regulated by a ministerial decree. Civil law notaries are supervised by regional chambers and the Hungarian National Chamber. The presidents of the county courts act as legal supervisors over the actions of the notary. The notaries provide different types of service from statements to transactions and may be also involved for the service of documents to a defendant in a payment order case.

⁵⁰ The sheriff officer is an officer of the Scottish sheriff court, responsible for serving judicial documents and enforcing court orders by the payment of fees. Sheriff officers in Scotland are under the control of the local Sheriff.

	By Postal Service	In person	Electronic	Court Service
Countries	AT, DE, ES, HU, MA, PL, PT, RO, UK (England and Wales)	CZ, FR, DE, GR, HU, IT, NL, SC	IT, EE, CZ, RO	RO
Number in sample	9	8	4	1

Table 2 How Documents are Served to the Defendant in the National Order for Payment Procedures

In 9 out of 16 justice systems (**Austria, Estonia, Hungary, Germany, Malta, Poland, Portugal, Romania, and England and Wales**), the regular postal service is employed. In the majority of these countries, postal service is used by the court to serve documents on a defendant. It is worth mentioning, that in **England and Wales**, (where there is not an order for payment procedure) the usual method of service in the money claim procedures is the regular mail.

In 8 other systems (**Czech Republic, France, Germany,⁵¹ Greece, Hungary, Italy, the Netherlands and Scotland**), the service of the payment order has to take place in person at the domicile of the defendant. In the 7 countries investigated in which the personal service is allowed, the claimant has to employ a bailiff or a civil law notary (as in Hungary) in order to notify a payment order on the defendant. It is important to highlight that in **the Netherlands**, in a money claim case the defendant is in principle serviced in person by a bailiff.

It is interesting to notice that in several Member States, the electronic delivery of documents is available. As shown in table 2, electronic delivery is allowed in **Italy, Estonia, Czech Republic and Romania**. In **Italy**, in addition to the possibility for lawyers authorized by the local bar association to serve the defendant directly by post or in person,⁵² Article 25 of the 12/11/2011 Law n. 183 introduced the possibility for this professional to notify the order by a certified e-mail system. Moreover, the Law 24-12-2012 n. 228 completed the normative by disciplining the power of lawyers of authenticating the digital or paper copies of the documents. As with the direct service of documents in person or by postal service without using a bailiff, the Italian lawyers who want to serve proceedings through the certified e-mail (CEM) system have to be authorised by the local bar association.⁵³ In order to serve a payment order by CEM, when the documents are paper based, the lawyer has to scan and attach them to a certified e-mail. Scanned documents before being served on a defendant have to be authenticated by the lawyer. He/She will have to sign a document attesting that the scanned documentation is a copy of the original. In **Estonia**, the electronic delivery of documents to a defendant is allowed by the system called Public E-File system. Estonian citizens can log into the portal in order to have access to all the documents delivered to them in relation to any court proceedings. Moreover, the system sends an e-mail notification when a new document is delivered. The service of documents includes a link to the document and a note asking the user

⁵¹ For the service of enforceable payment order (typically done ex officio), the claimant may request party-to-party service, in which case the enforceable payment order is submitted to the claimant for service to the defendant (Sec. 699 Para. 4, Sec. 191 Civil Procedure Code).

⁵² On the ground of law 21-01-1994 n. 156.

⁵³ The service of documents through CEM can be pursued by gathering certified electronic addresses from public lists as the bar associations' lists or from the Chambers of Commerce's lists. From 2013, lawyers can look into the National List of CEM Addresses of Companies and professionals. The lists were created on the basis of Article 6 of the Digital Administration Code (Legislative Decree 7/3/2005, n. 82 and disciplined by a Decree of the Ministry of Economic Development of 19/3/2013).

to go to the portal and sign in. Citizens have access to the system through the national ID card that is delivered to all Estonian citizens and that can be utilized as a smart card. It is interesting to note that in Estonia, when it comes to payment order procedures, the electronic delivery is the main method of service. Therefore, the Estonian national payment order procedure is a 100% electronic proceeding and there is no paper involved. In the **Czech Republic**, aside from the ‘in person delivery’, two electronic methods of service are available. First, the electronic delivery to a data-box when the defendant has one. The data-box is an electronic storage of documents registered under a special legal regulation. Second, through an e-mail to an electronic address when the defendant agreed to such type of service. In the latter case, the defendant has to have an advanced electronic signature in order to sign the documents. The court asks the defendant to acknowledge the receipt of the document within three days from its delivery, by means of a data message accompanied by an advanced electronic signature. Without the signature, the service of such a document is not valid. In **Romania**, the new code disciplines the possibility to communicate documents electronically by regular e-mail when the party provided the necessary details.⁵⁴ When this method is used, the party receiving the documents will have to fill in and sign a form containing information about the date of service and his/her personal details. This will serve as a proof of communication for the court.

It is worth mentioning that in **England and Wales**, despite the fact that the general method of delivery is postal service carried out by the court, some activities related to the payment order procedure can be pursued electronically. In England and Wales, there is no specific order for payment procedure but there is, however, an equivalent procedure by which a claimant can obtain a judgment by default. This procedure can be activated also by filing a money claim through the Money Claim Online (MCOL) website.⁵⁵ MCOL is an online service for the e-filing of money claims that enables citizens and lawyers to issue a money claim through a user-friendly website.⁵⁶ The website allows users, identified through the UK Government Gateway, to file documents, to check the claim status, and to request both judgment entry and enforcement (by way of a warrant of execution).⁵⁷ The registered claim is sent from the website to the court staff of an HMCTS (Her Majesty’s Courts and Tribunals Service) agency, the CCBC (County Court Bulk Centre), which manages it in the name of the Northampton County. Successively, the claim is included in a ‘claim pack’ and sent for service on the defendant by regular postal service. The defendant may use the information provided in the claim pack in order to pursue several actions within the time limit of 14 days, including: asking for more time to pay, admitting only part of the claim, filing an acknowledgement of service in order to extend the time to respond to the claim, submitting a counterclaim, disputing the claim and admitting the claim. All the mentioned activities can be pursued on paper, but also online by accessing to the MCOL website by using the identification code and the claim code included in the claim pack.⁵⁸

⁵⁴ Article 154(6) New Code of Civil Procedure.

⁵⁵ Her Majesty's Courts and Tribunals Service. www.moneyclaim.gov.uk. See 7E PD Civil Procedure Rules.

⁵⁶ The procedure is available only for national claims between residents in England and Wales.

⁵⁷ M. Velicogna, e-Justice developments in Europe from CEPEJ data and in-depth case studies, presentation at the CEPEJ-GT-EVAL 26th meeting Strasbourg, 20 – 21, (November 2014). Available at: https://www.coe.int/t/DGHL/COOPERATION/CEPEJ/Source/GT_EVAL_20_21_Nov_2014_MF.pdf; G. Lupo and J. Bailey, (2014), *supra* note 15.

⁵⁸ J. Kallinikos, *Institutional Complexity and Functional Simplification: The Case of Money Claim Online Service in England and Wales*, in F. Contini, and G.F. Lanzara (eds.), *ICT and Innovation in the Public Sector*, 174–210, (Basingstoke: Palgrave, 2009).

4.1.3. Time limits and deadlines

The procedural norms on the service of a payment order may also discipline the deadlines within which the order must be served on a defendant. The norms establishing such deadlines for service are related to the service methods employed and to whom is responsible for the action (see table 3).

	No deadline for service	5 Days	60 Days	2 Months	6 Months	10 days before the hearing
Countries	AT, CZ, DE, EE, ES, HU, NL, PL, UK (England and Wales)	PT	IT	GR	FR	RO
Number in sample	9	1	1	1	1	1

Table 3 Deadlines for Service of Documents in the National Order for Payment Procedures

Indeed, in most of the justice systems where the court takes care of the service of documents, there is no deadline for service. These countries are **Austria, Czech Republic, Estonia, Germany, the Netherlands, Poland, Romania, Spain, and England and Wales.**⁵⁹

The **Estonian** law does not foresee a deadline for service. However, the court does not enforce a payment order if the service of the proposal for payment on the debtor has failed within a reasonable time and it cannot be served by public announcement. Despite there is no specific deadline for service, in **Romania** the Article 1019(1) New Code of Civil Procedure states that court has to send a notification to the parties 10 days prior to the hearing. With the notification, the defendant receives a copy of the claim and of the documents submitted by the claimant (Article 1018(2) New Code of Civil Procedure). Subsequently, the defendant has to submit a statement of defence at least 3 days before the hearing (Article 1018(3) New Code of Civil Procedure). The missed submission of the statement of defence may be interpreted by the court as a recognition of the claims. However, the defendant can contest it during the public hearing.

By contrast, in all the justice systems in which the claimant has to employ professional actors, as bailiffs or notaries, for serving an order on a defendant, the procedural norms also discipline the deadlines for such service. In all 4 justice systems (**Hungary, Italy, Greece, France**) there are specific deadlines for the service of documents. In **Italy**, the plaintiff is required to serve the order for payment within 60 days from the issuing of the order, otherwise the order for payment is declared void (Article 644 Code of Civil Procedure). The same deadline applies in **Greece**. In **France**, the order for payment has to be served within 6 months from the date of issuing (Article 1411(2) Code of Civil Procedure). In **Hungary**, the civil notary issues the payment order within 15 days from the receipt of the request or within 3 days in case of an electronically submitted request. The issuance is automatically followed by the service of the payment order. In addition to these four cases, in **Portugal**, notwithstanding the

M. Velicogna, *Electronic Access to Justice: From Theory to Practice and Back*, Vol. 61, *Droit et cultures. Revue internationale interdisciplinaire*, (2011). G. Lupu and J. Bailey, (2014), *supra* note 15.

⁵⁹ With regards to the analysis of deadlines for service of national order for payments, data for Malta and Scotland are missing.

fact that the service of a payment order is a responsibility of the court, a deadline of 5 days is set. This is an interesting exception as the majority of justice systems where the court has the task of serving the order for payment are characterised by a lack of established deadlines for this procedural step. This may be related to an attempt to provide quick justice services in order to support the economy.

4.2. SERVICE OF DOCUMENT IN THE EOP PROCEDURE

After the EOP is issued by the judge, the order is set to be ‘served on the defendant in accordance with the national law of the Member State in which the service is to be effected’ by ‘a method that shall meet the minimum standards’ laid down by the Regulation.⁶⁰ Articles 13 and 14 EOP Regulation establish two categories of minimum requirements regarding the methods of service, for modes with proof of receipt by the defendant, and for those without proof of receipt, but in which case it is presumed that the defendant has been notified.⁶¹ In order to preserve the right of the defence, this second category of methods can only be used when the defendant’s address is known with certainty. The rules set by Articles 13-15 are ‘a strict requirement for a valid service’ of the order on the debtor or his representative.⁶² The Regulation establishes the minimum standards to which the national provisions need to comply, seeking to achieve some uniformity as well as eliminating the use of methods that do not provide sufficient guarantees that the service effectively took place.⁶³ As pointed out by Advocate General Bot in the *eco cosmetics* Case, ‘service under the system established by Regulation No. 1896/2006 seeks to preserve the rights of the defence’.⁶⁴ The observance of the conditions laid down by the text ‘is of prime importance in maintaining the balance between the different objectives pursued’ by this instrument.⁶⁵ The methods that are based on a legal fiction are put aside as they do not provide sufficient guarantee for the purpose of this

⁶⁰ Article 13 and Article 14(1) in conjunction with Article 12(5) EOP Regulation.

⁶¹ These Articles restate the methods of service enacted by the EEO Regulation. However, in this case the minimum rules are not criteria for enforcement purposes, but regard the validity of the service in order to secure the right to defence and access to justice. C. Crifò, *Europeanisation, Harmonisation and Unspoken Premises: The Case of Service Rules in the Regulation on a European Small Claims Procedure (Reg. No. 861/2007)*, Vol. 30, N. 3, *Civil Justice Quarterly*, 290-291, (2011). 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, (Remco) and A. Uzelac (eds.), *Enforcement and Enforceability: Tradition and Reform*, p. 25, (Intersentia, 2010). A. Fiorini, *Facilitating Cross-Border Debt Recovery – The European Payment Order and Small Claims Regulations*, Vol. 57, N. 2, *International Civil Law Quarterly*, p. 456, (2008). M. Lopez de Tejada and L. D’Avout, *Les non-dits de la procédure européenne d’injonction de payer*, Vol. 96, N. 4, *Revue critique de droit international privé*, p. 726, (2007).

⁶² X.E. Kramer, (2010), p. 25, *supra* note 61. See also comments to Article 12 EOP Regulation in F. Carpi, V. Colesanti and M. Taruffo (eds.), *Commentario Breve al Codice di Procedura Civile*, 8th Edition, p. 3538, (Wolters Kluwer CEDAM, 2015).

⁶³ Recitals 19-20 EOP Regulation. See M. Mellone, *L’onere della notifica nell’ingiunzione di pagamento europea: il difficile rapporto tra modello processuale europeo e norme nazionali*, (2014)2, *Il Diritto dell’Unione Europea*, p. 282-283, (2014). M. R. Cultera, *Il procedimento d’ingiunzione europeo. Le ragioni della scelta regolamentare*, *Le nuove leggi civili commentate*, p. 714, (2008). A. A. Romano, *Il procedimento europeo di ingiunzione di pagamento*, p. 126-127, (Giuffrè Editore, 2009).

⁶⁴ Opinion of Advocate General Bot, Joint Cases C-119/13 to C-121/13, *eco cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy, Raiffeisenbank St. Georgen reg. Gen. mbH v. Tetyana Bonchyk and Rechtsanwaltskanzlei CMS Hasche Sigle, Partnerschaftsgesellschaft v. Xceed Holding Ltd*, 9 April 2014, ECLI:EU:C:2014:248, point 41.

⁶⁵ *Supra* note 64.

procedure.⁶⁶ The extended lists of means provided by the two articles allows the party in charge of serving the order on the defendant to choose the one that better resembles the method usually employed at national level.⁶⁷ Hence, maintaining the application of the national methods and their variety. This does not appear to be ‘highly effective’ in a uniform procedure aiming to simplify and facilitate cross-border litigation.⁶⁸ The solution chosen by the European legislator was criticised for putting on an equal footing almost all the national methods of service.⁶⁹ This plethora of methods was perceived as problematic for practice,⁷⁰ especially for one-time users that would be responsible for serving the EOP on the defendant. The *eco cosmetics* case has shown that the effects of a defective service can have serious implications for the defendant’s access to justice, even though the European Commission’s report states that ‘no major problem concerning the service of documents has been reported’.⁷¹ The claimant should be made aware that not all the methods enumerated by the EOP Regulation are accepted or considered valid in all Member States. For example, a service without proof of receipt on the basis of Article 14 by depositing the order in the defendant’s mailbox will not be considered sufficient in Italy.⁷² However, these aspects are not brought to the attention of the user from the beginning. The Guidelines published by the European Commission on the application of the EOP present a summary of the methods that are available for carrying out the service of the order on the defendant. As provided for in Article 14(2) EOP Regulation, the document stresses the fact that the means without proof of receipt cannot be used unless the address of the defendant is ‘known with certainty’.⁷³ In case of service abroad in a different Member State than that of the court seised, the user is informed in a footnote that the transmission needs to be accomplished in accordance with the provisions of the Service Regulation.⁷⁴ The Guidelines do not provide the claimant with any specific information as to the national specificities that he/she could face when choosing to use this European procedure. As legal representation is not mandatory for

⁶⁶ Recital 19 and 20 in conjunction with Article 12(5) and Articles 13-15 EOP Regulation. Such as, for example, the service of the document with the prosecutor’s office, displaying the order on the Court’s notice-board. See also the *Practice Guide for the Application of the Regulation on the European Order for Payment*, European Commission, 2011, p. 21.

⁶⁷ C. Crifò, (2011) *supra* note 61.

⁶⁸ X. E. Kramer, (2010), *supra* note 61, p. 25; C. Legros, *Commentaire du règlement CE n° 1896/2006 instituant une procédure d’injonction de payer européenne*, Vol. 151, *Chronique de droit international privé*, Les petits affiches, p. 14, (2007).

⁶⁹ E. Guinchard, *Règlement (CE) n°1896/2006 du Parlement européen et du Conseil du 12 décembre 2006 instituant une procédure européenne d’injonction de payer*, in G. de Leval, (eds.), *La jurisprudence du Code judiciaire commentée. Droit judiciaire européen et international*, Volume V, p. 576, (la Charte, 2012).

C. Crifò, *First steps towards the harmonisation of civil procedure: the regulation creating a European enforcement order for uncontested claims*, Vol. 24 N. 2, *Civil Justice Quarterly*, p. 217, (2005).

C. Legros, (2007), *supra* note 68, p. 14. M. Lopez de Tejada, and L. D’Avout, *Les non-dits de la procédure européenne d’injonction de payer*, Vol. 96 N. 4, *Revue critique de droit international privé*, p. 725-726, (2007).

⁷⁰ X.E. Kramer, (2010), *supra* note 61, p. 25.

⁷¹ Joined Cases C-119/13 to C-120/13, *eco cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy, Raiffeisenbank St. Georgen reg. Gen. mbH v. Tetyana Bonchuk*, 4 September 2014, ECLI:EU:C:2014:2144; European Commission, *Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure*, COM(2015) 495 final, 13 October 2015, p. 7.

⁷² G. Campeis and A. De Pauli, *Prime riflessioni sul procedimento europeo di ingiunzione di pagamento (Regolamento n. 1896/2006/CE)*, P II Supplemento, *Giustizia civile*, p. 367-368, (2007).

⁷³ European Commission, *Practice Guide for the Application of the Regulation on the European Order for Payment*, p. 21, (2011).

⁷⁴ European Commission, *Practice Guide for the Application of the Regulation on the European Order for Payment*, footnote 3, p. 20, (2011).

submitting an EOP claim, a layperson or a user that is not acquainted with the system can find it difficult to proceed.

4.2.1. EOP coordination with national rules

The EOP Regulation leaves the responsibility of serving the order on the defendant to the application of national procedural rules designating the party or institution in charge. This creates a variety of solutions through which the user needs to find his/her way, as no general information is made available at EU level. One possible comforting finding is that in the countries where the national courts are responsible for the service of the national order for payment continue to take care of this aspect within the European procedure. Between the justice systems investigated in this study, in 11 cases the service falls under the responsibility of the court, while in the other Member States (**Italy, France, Greece, Hungary, Scotland**) it is the claimant who will need to make the necessary arrangements for the EOP to be communicated to the debtor. In these circumstances, a unitary approach would have contributed to the simplification of the rules and a uniform application of the procedure. Nonetheless, political consensus over a unitary solution was difficult to achieve during the negotiation of the text considering the diversity of existing national solutions.

A claimant resident abroad will not be able to undertake personally the service of the EOP on the defendant, when this is required by the legislation of the Member States of the court having jurisdiction. In **Italy** for example the claimant is responsible for this stage of the proceedings. He/she will need to employ the services of a local bailiff who will serve the EOP document on the defendant.⁷⁵ In this situation, the user resident abroad will need to name a representative, an Italian lawyer to carry out the required procedural steps for him.⁷⁶ The situation of the claimant is to a certain extent facilitated in the Member States where in accordance with the national rules, the service is to be carried out by the court. For simplification purposes, it could have been easier if the Regulation would have expressly established that the court would proceed to service the EOP on the defendant.⁷⁷ Furthermore, this has the potential of facilitating the task the court has in ensuring that the order was served on the defendant in accordance with the national law and the minimum standards set by the Regulation.⁷⁸ Some national legislators have chosen to establish specific rules for the service of the EOP, attributing this task to the court. This is the case of the **Netherlands**. The national legislator shifted the duty from the claimant to the court for the European procedure.⁷⁹ Though this solution might be expected to facilitate the service of the EOP to the defendant, in practice, it remains problematic. This appears to be particularly the case when the court is not responsible for this aspect of procedure in national proceedings, and when service is carried out cross-border in a different Member State.⁸⁰ Nonetheless, the solution of making the court responsible

⁷⁵ The same situation applies in France.

⁷⁶ M. Mellone, (2014), *supra* note 63, p. 283.

⁷⁷ Finocchiaro G., *Con l'introduzione delle norme processuali uniche, fatto un balzo in avanti per l'armonizzazione europea*, Vol. 16 N. 1, Guida al diritto – Il sole-24 ore, Dossier 1, p. 53, (2009).

⁷⁸ Article 12(5) EOP Regulation.

⁷⁹ Article 5 Implementation Act regarding the European Order for Payment Regulation (*Uitvoeringswet verordening Europese betalingsbevelprocedure*). X.E. Kramer, (2010), *supra* note 61, p. 33.

⁸⁰ X.E. Kramer, M.L. Tuil, I. Tillema, M.I. Hazelhorst, and E.A. Ontanu, *Verkrijging van een executoriale titel in incasso zaken*, p. 115-117, (Den Haag: WODS, 2012), (available at www.wodc.nl/onderzoeksdatabase/executoriale-titel.aspx).

for the service of the EOP could represent an alternative to be explored for supporting the parties' access to justice in uniform European procedures. This has the potential of facilitating the task of the parties (the claimant in the EOP, but also the defendant in other procedures), especially in the Member States where they are responsible to serve the documents of the proceedings according to the national procedural rules. In these cases such solution could be clearly envisaged, as they uphold the idea of a uniform procedure from the court user perspective. It goes without saying that courts will need to be provided with the required means and expertise to properly carry out the task.

Additionally, the different treatment between the duty to serve the EOP on the defendant and the notifications the court is set to undertake for various aspects of the proceedings (e.g. making the claimant aware of the fact that the defendant lodged a statement of opposition) can be confusing for the claimants coming from Member States where the court is in charge of all these communications. They might not immediately realise that they will need to have an active role in the service of the order on the defendant. Clear information in this respect, available for each Member State, would be an asset.

Another aspect that requires coordination between the European and national procedural rules is the argument of the period within which the EOP has to be served on the defendant. As pointed out in the literature, the regulation does not establish any foreclosure period within which the debtor has to be informed of the order, nor a moment when the EOP is reputed to have been notified.⁸¹ Though no specific deadline for service applies in the case of most of the Member States responding to the e-Codex questionnaire,⁸² some exceptions seem to exist. The user should be made aware of such important constraints that can affect the validity of the title, when these exist.⁸³ However, the interpretation of the application of such deadlines is not always unitary. For example, in **Italy** there are scholars who consider that the deadline applicable in the national procedures should not be extended to the EOP.⁸⁴ Such interpretation appears to be in line with a uniform interpretation and application of the EOP. The alternative of submitting the European procedure to additional requirements does not correspond to the objective for which the regulation was enacted, hence, to establish a uniform instrument for the recovery of uncontested monetary claim in cross-border litigation. An interpretation of the

⁸¹ M. Farina, *Titoli esecutivi europei ed esecuzione forzata in Italia*, p. 246, (Aracne Editrice, 2012).

C. Graziosi, *Alcuni tratti pratici dell'ingiunzione di pagamento europea*, Vol. 65 N. 1, *Rivista trimestrale di diritto e procedura civile*, p. 244, (2011).

O. Porchi, *Il procedimento europeo di ingiunzione di pagamento: il regolamento comunitario n. 1896/2006*, in B. Capponi (eds.), *Il procedimento d'ingiunzione*, p. 66, (Zanichelli Editore, 2009).

A.A. Romano, *Il procedimento europeo di ingiunzione di pagamento*, p. 130-131, (Giuffrè Editore, 2009).

M.A. Lupoi, *Di crediti non contestati e procedimento di ingiunzione: le ultime tappe dell'armonizzazione processuale in Europa*, Vol. 62 N. 1, *Rivista trimestrale di diritto e procedura civile*, p. 199, (2009).

⁸² This is France, Germany, Austria, Estonia, Poland, Greece, Hungary, England and Wales (United Kingdom), Czech Republic, Malta.

⁸³ Spain established a period of 30 days for the service of the EOP on the defendant following its issuance, but there are no consequences for not respecting this period. Italy has a 60 days period based on Article 644 of the Code of Civil Procedure. Portugal established multiple deadlines (5-10-15-30 days) based on the type of service method and place where the order has to be served. In Scotland (United Kingdom), the 'warrant for service' remains valid for a year and a day. See M. Velicogna, G. Lupo, M. Mellone, (2015), *supra* note 19, p. 14 and 33-34.

⁸⁴ See F. Carpi, V. Colesanti, M. Taruffo, (2015) *supra* note 62. See in particular comments to Article 12 EOP Regulation in F. Carpi, V. Colesanti, M. Taruffo, (2015) *supra* note 62.

C. Graziosi, (2011), *supra* note 81, p. 244.

matter by the CJEU would facilitate the application of the EOP and contribute to a unitary and consolidated practice in all Member States.

4.2.2. *Language requirements*

An additional element that has the potential of creating difficulties for the user is the fact that the EOP Regulation does not include any express provision as to the language in which the documents of the proceedings should be served on the other party.⁸⁵ This is a particular important element for the guarantee of the defendant's procedural rights. National case law point to various solutions in this respect. Romanian courts requests the claimants to provide a translation of the forms they will communicate to the defendant.⁸⁶ Some French and Italian case law shows that the defendant is sending sometimes the opposition form (Form F) in a different language than that of the proceedings.⁸⁷ In both French and Italian case law a declaration of enforceability (Form G) was issued because the court did not understand and/or took into consideration the form he/she could not read. Additionally, in some Romanian cases the court had to request the re-submission of the application form in Romanian, as this was filed in a different language than the one of the proceedings.⁸⁸ The language in which the court proceedings should take place in a Member State is in many cases set in the Constitution or established by the national procedural rules or codes.⁸⁹ The Guidelines accompanying the application form (Form A) contain an indication only to the language in which the forms have to be submitted with the court having jurisdiction. This is 'the language or one of the languages accepted by the court to be seised'.⁹⁰ The only alternative harmonised instrument containing rules on the language of documents to be served in cross-border litigation is the Service Regulation. According to Article 27 EOP Regulation, the application of the provisions of this Regulation are set not to affect the application of the Service Regulation in the Member States. Therefore, the provisions of later regarding the language in which the service has to be effected,

⁸⁵ See C. Crifò, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment*, p. 123, (Kluwer Law International, 2009). The scholar points to the possible language and translation issues that may arise in relation to the service of the EOP and copy of the application form on the defendant.

⁸⁶ For example, the claimant had to translate the EOP for its communication in a different Member State in District Court, Case No 7750/233/2012, Galați; District Court, Case No. 2492/270/2013, Onesti; District Court, Case No. 12197/1748/2012, Cornetu.

⁸⁷ Cour d'appel de Douai, Chambre 2, Section 2, n° 12/02210, arrêt 14 mars 2013; Tribunale di Mantova 7 July 2011, Case No. 1964/11.

⁸⁸ For example, District Court Craiova Case, No. 19646/215/2010; Case No. 1297/94/2012, District Court Buftea; Case no. 319/265/2013, District Court Năsăud.

⁸⁹ For example, in France the proceedings will take place in French, the language of the Republic (Article 2(2) Constitution, but Article 23 Code of civil procedure authorise the judge not to use an interpreter when he/she understands the foreign or regional language in which the parties express themselves. In Italy the court proceedings are set to be carried out in Italian and normally all foreign language documents need to be translated (Articles 122-123 Code of Civil Procedure). In Romania, according to the provisions of the Constitution (Article 128) and the new Code of Civil Procedure (Article 18), legal proceedings before the Romanian courts have to be carried out in Romanian.

⁹⁰ See the first paragraph on Important Information in the Guidelines for Filling in the Application Form, Annex I EOP Regulation. Note that Article 29 EOP Regulation does not set a duty on the Member States to communicate the language or languages they accept for the filing of an application in accordance with this uniform European procedure.

as well as on the duty of providing translations are applicable in the EOP procedure.⁹¹ This should be understood in the light of the equality of arms requirement,⁹² set to secure the protection of the debtor's right to a defence and his/her access to justice, as resulting from Article 6 ECHR and Article 47 of the Charter. Hence, situations may arise where the same form should be established in two languages: the language of procedure in order to communicate with the court, and the language of the other party for service purposes.⁹³ The reasons for the complains the European Commission report mentions in relation to cross-border service may be related to translation costs as well as service costs when these have to be undertaken by the claimant.⁹⁴ The claimant might be required by the court in a Member State to provide a translation of the order and of the copy of the application form for service purpose.⁹⁵ A lay user may not be able to foresee this from the beginning. This adds to the intricacy of the service of documents rules and the national requirements. The Practice Guide for the application of the EOP warns the potential claimant only of the possible translation requirements that he/she might face at the enforcement stage of the procedure.⁹⁶ In practice, seldom the court might proceed to arrange the translation of the EOP and of necessary copies for communication purposes. Published case law does not often provide information on this aspect. Little is known of whether the court took this duty upon it or requested the claimant to proceed to the translation of the documents for service purposes.⁹⁷

4.2.3. Compliance with minimum standards

⁹¹ See Articles 5 and 8 Service Regulation. On the basis of Article 8(1) Service Regulation, the defendant may refuse the EOP (Form E) and the copy of the application for (Form A) served on him/her when these are 'not written in or accompanied by a translation' into a language that the defendant understands or in the official language of the Member State where service is to be effected. The defendant should be informed in writing of the possibility to refuse or to send back the documents that are not in a language that he or she understands, or are not in the official language (or one of the official languages) of the place of service within one week from the moment of receiving the documents. In a EOP case decided by the 's-Gravenhage District Court (the Netherlands), a refusal submitted several months later on the basis of Article 8 Service Regulation was rejected by the judge. The debtor had signed an acknowledgement of receipt almost 6 months earlier that he/she received the service of the EOP in accordance with Article 14 EOP. The documents serviced did not include a translation of the forms in Greek (Rechtbank 's-Gravenhage, 30 September 2010, 354991/HA RK 09-695).

E. Guinchard, (2012), *supra* note 69, p. 670. See also, E.A. Ontanu and E. Pannebakker, *Tackling Language Obstacles in Cross-Border Litigation: the European Order for Payment and the European Small Claims Procedure Approach*, Vol. 5 N. 3, Erasmus Law Review, p. 176, (2012).

⁹² E.A. Ontanu and E. Pannebakker, (2012), *supra* note 91, p. 177.

⁹³ This might be the case when the service is to be performed in a Member State with a different official language than the one in which the court having jurisdiction is situated. See also E.A. Ontanu and E. Pannebakker, (2012), *supra* note 91, p. 176.

⁹⁴ European Commission Report on the application of the EOP Regulation, which states that Member States 'are encouraged to use cheap methods of service such as postal service'. European Commission, *Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure*, COM (2015) 495 final, 13 October 2015, p. 7.

⁹⁵ See the example of Romanian courts' practice in E.A. Ontanu, (forthcoming publication), *supra* note 10.

⁹⁶ *Practice Guide for the Application of the Regulation on the European Order for Payment*, European Commission, 2011, p. 28.

⁹⁷ In Case no. 12197/1748/2012, Cornetu District Court, the EOP and the copy of Form A were served on the debtor in accordance with the mechanisms set by the Service Regulation in Bulgarian. The necessary translations were submitted by the claimant. See further in E.A. Ontanu, (forthcoming publication), *supra* note 10.

In seeking to find a balance between providing an effective remedy in cross-border litigation and the rights of defence, the EOP Regulation stresses the duty of the court to ‘ensure that the order is served on the defendant in accordance with the national law that shall meet the minimum standards laid down in Articles 13, 14 and 15’.⁹⁸ In this case the judge is called to make a double assessment, whether the method of service used complies with the provisions of the national legislation and, subsequently, with the minimum standards set by the EOP Regulation.⁹⁹ The variety of methods contributes to the difficulties and uncertainties the judge is faced with in the process of verifying the compliance of the means of service with the minimum standards that should apply in the context of the EOP. This is especially the case for the methods provided for in Article 14 EOP (e.g. deposit of the order in the defendant’s mail box).¹⁰⁰ The compliance with the minimum standards was particularly problematic for the national judge to assess in the *eco cosmetics* joined cases referred to the CJEU.¹⁰¹ The service had been performed in a different Member State by one of the methods provided by Article 14 EOP (deposit of the letter in the mailbox, and postal service with advice of receipt). No opposition was received within the timeframe set by the Regulation. Hence, the court issued a declaration of enforceability. Following the initiation of execution activities on the debtors, these filed an opposition and subsequently a review contesting the fact that they were not actually informed of the proceedings. They were no longer living at the addresses where service had been carried out. Therefore, they did not have the necessary information in order to enable them to oppose the orders issued against them. In not complying with the minimum requirements set by the Regulation, the respect of the right of defence of the debtors was jeopardised. Thus, the balance between the objectives pursued by the Regulation of establishing a simple, speedy and efficient solution for the recovery of uncontested debt in cross-border litigation and the right of defence and fair access to justice was undermined.¹⁰² The CJEU rightfully pointed in its judgment that when the EOP ‘has not been served in a manner consistent with the minimum standards laid down in Articles 13 to 15’ the order ‘cannot benefit from the application of the enforcement procedure’.¹⁰³ The compliance with the uniform standards established by the Regulation plays a key part in guaranteeing an equal protection of the parties’ rights and of their interests. The existing intricacy of solutions offered by the national legislations and the need of coordinating the two levels of rules regarding service is not always an easy task for the parties involved, as well as for the courts. There are still situations when the application of the service standards is not fully satisfactory and

⁹⁸ Article 12(5) EOP Regulation.

⁹⁹ M. Lopez de Tejada and L. D’Avout, (2007), *supra* note 61, p. 726-727.

¹⁰⁰ A. Picciotto, and M. Carlisi, *Entrata in vigore il regolamento n. 1896 del 2006: la competitività del sistema Europa passa anche attraverso la rapida esazione dei crediti transfrontalieri*, Vol. 42 N. 2, *Giurisprudenza di merito*, p. 323-324, (2010).

O. Porchi, (2009), *supra* note 81, p. 66. F. Seatzu, *Il procedimento d’ingiunzione di pagamento nel Regolamento comunitario n. 1896/2006*, Volume II, Studi in onore di Vincenzo Starace, Editoriale Scientifica Srl, p. 1613-1614, (2008). F. Fradeani, I presupposti per la concessione dell’ingiunzione di pagamento europea, in A. Carratta (eds.), *Verso il procedimento ingiuntivo europeo*, p. 132-143, (Dott. A. Giuffrè Editore, Milano 2007).

¹⁰¹ Joined Cases C-119/13 to C-120/13, *eco cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy, Raiffeisenbank St. Georgen reg. Gen. mbH v. Tetyana Bonchyk*, 4 September 2014, ECLI:EU:C:2014:2144.

¹⁰² Joined Cases C-119/13 to C-120/13, *eco cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy, Raiffeisenbank St. Georgen reg. Gen. mbH v. Tetyana Bonchyk*, 4 September 2014, ECLI:EU:C:2014:2144, paragraph 37.

¹⁰³ Joined Cases C-119/13 to C-120/13, *eco cosmetics GmbH & Co. KG v Virginie Laetitia Barbara Dupuy, Raiffeisenbank St. Georgen reg. Gen. mbH v. Tetyana Bonchyk*, 4 September 2014, ECLI:EU:C:2014:2144, paragraph 48.

consistent. The analysis of the responses to the e-CODEX questionnaire clearly shows the heterogeneity of the application of the EOP Regulation in the European Member States. On the one hand this is the result of the provisions of the Regulation that allow multiple interpretations of the service of documents rules, and on the other hand, of the variety of national procedures which are followed.

4.2.4. Responsibility for the service of the EOP

The variety of methods used to carry out the service is doubled by the national approach regarding the actor that is responsible for the service of the EOP across the Member States.

	Court	Bailiff under request of Creditor	Civil Law Notary
Countries	AT, CZ, DE, EE, ES, MA, NL, PL, PT, RO, UK (England and Wales)	FR, GR, IT, SC	HU
Number in sample	11	4	1

Table 4 Who Takes Care of the Delivery in the European Order for Payment Procedure

As table 4 clearly shows, out of the 16 justice systems analysed, the majority of the countries foresee the delivery of documents to a defendant in an EOP case as a responsibility of the court addressed. In 11 cases out of 16 (**Austria, Czech Republic, Germany, Estonia, Malta, the Netherlands, Poland, Portugal Spain, Romania and England and Wales**), the court is responsible for the delivery of documents on a defendant subsequent to the issue of an EOP. In **Estonia**, the Code of Civil Procedure, Art. 490,¹⁰⁴ states that the Act on expedited procedures in matters of payment order also applies to the EOP. The code establishes that the seised court is responsible for the service of the EOP on a defendant. In **the Netherlands**, the EOP can be served on the defendant by the court (Article 5, Implementation Act regarding the European Order for Payment Regulation - *Uitvoeringswet verordening Europese betalingsbevelprocedure*). However, this rule does not work out for service effected abroad. While in theory it is possible, when applied, in many cases it resulted in no proof of receipt. As a consequence, an arrangement with a bailiff office was made and the service of documents is done now through a bailiff.

In 5 out of 16 Member States, the service of document in an EOP case is the responsibility of the claimant who has to employ a legal professional in order to notify to a defendant. In 3 countries, **France, Italy and Greece**, the EOPs (and in particular, form E) issued by the court are served following a request of the claimant by the bailiff. In **Italy**, as it happens in a national payment order (*ingiunzione di pagamento*), the claimant's lawyer has to request an original copy (*copia conforme*) of the claim to the court and, subsequently, to serve the order through the Italian judiciary service authority (*ufficiale giudiziario*) within a 30 days period. The service of an issued EOP on a defendant entails a considerable level of complexity for a foreign claimant, given that it requests the physical presence of the creditor or of a person acting on his/her behalf and the payment of further court fees (aside the court fees paid when the claim has been filed). Also in **France**, the bailiff is responsible for service of an EOP at the request

¹⁰⁴ Implementation of Regulation (EC) No 1896/2006 of the European Parliament and of the Council, <https://www.riigiteataja.ee/en/eli/513122013001/consolide> (last visited 04/08/2015)

of the creditor. The Article 1424-5 of the French Code of Civil Procedure states that ‘A certified true copy of the petition and of the order will be served, at the request of the creditor, on each of the debtors’. The ‘act of service’ included in the documents served, must contain a set of information useful for defendant in order to respond to the claim. These concern the indication of the court before which the opposition must be brought, the deadline and the forms under which the opposition should be made. The act of service notifies the defendant that in absence of an opposition within the time specified, calculated in accordance with Regulation (EEC, Euratom) No. 1182/71,¹⁰⁵ he/she may be forced by any legal means to pay the sums claimed. The act also informs the defendant of his/her right to request a review of the EOP before the court which ruled the order. This request of revision can be filed after the expiry of the opposition period as well. However, this concerns only the exceptional cases provided by Article 20 EOP Regulation.

4.2.5. *Methods of service*

With regard to how documents are served on the defendant, the results highlight the fact that as in most national order for payments procedures (see table 2), also in the EOP, in the majority of the judicial systems, the documents are served through the postal service (see table 5).

	By Postal Service	In person	Electronic
Countries	AT, DE, EE, ES, HU, MA, NL, PL, PT, RO, UK (England and Wales)	CZ, FR, GR, IT, SC	EE, RO, CZ
Number in sample	11	5	3

Table 5 How Documents are Served to the Defendant in the European Order for Payment Procedure

This is in line with the aim of using cheaper methods of service that would be less burdensome for the parties in cross-border litigation.¹⁰⁶ This is the case of **Austria, England and Wales, Estonia, Hungary, Germany, Malta, the Netherlands, Poland, Portugal, Romania and Spain**). In the **Netherlands**, the service is pursued by the court through registered post. In addition, the delivery of documents by the bailiff is available (Article 5(1) Implementation Act regarding the European Order for Payment Regulation) and it is particularly used when service needs to be carried out abroad.¹⁰⁷ In cross-border cases, the court serves the documents in accordance with the provisions of the Service Regulation (Article 5(2) Implementation Act in conjunction with Article 277 Code of Civil Procedure). Also in **Poland**, even though the national method of delivery applies, the method of service changes in case the debtor resides abroad. In this case, two ways of delivery prevail. First, requesting the

¹⁰⁵ Regulation (EEC, Euratom) No. 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits, in OJ L124, 8.6.1971, p. 1.

¹⁰⁶ See the European Commission Report on the application of the EOP Regulation, which states that Member States ‘are encouraged to use cheap methods of service such as postal service’. European Commission, *Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure*, COM (2015) 495 final, 13 October 2015, p. 8

¹⁰⁷ When the court does not receive back the acknowledgement of receipt, it will employ the services of a bailiff office. Given that in many cases the acknowledgement of receipt is not received, the service through the bailiff became consolidated practice in all cases in which the person to be served is domiciled abroad.

host entity that usually deals with service of documents in the country of debtor's residence (Articles 4-11 of Regulation No 1393/2007). Second, by making a direct service of the order on the defendant by registered letter with acknowledgment of receipt (Article 14 Regulation No 1393/2007).

Differently from the cases presented above, in **France, Italy, Greece, Scotland and Czech Republic**, the EOP must be served in person (see table 5). In **France**, Article 1424-6 of the French Code of Civil Procedure states that if the order is served on the debtor personally and unless this is carried out by electronic means, the bailiff must inform orally the debtor of the important information contained in the European payment order's form together with the indications specified under Article 1424-5. The compliance of this formality is stated in the service of documents act. In the **Czech Republic**, if the debtor is a resident, the EOP has to be served on the defendant in person. When he/she cannot be reached, the delivering body deposits the EOP and notifies the addressee so that he can collect it.

Electronic service in the EOP procedure is not yet a reality in practice. Articles 13 and 14 of the Regulation foresee the electronic service between the methods that can be employed, but legal and technical reasons are still an obstacle.¹⁰⁸ Only a limited number of Member States have the national legislative framework that establishes electronic service as a valid method of service within their national procedure. Theoretically, having the necessary legislation allowing this method of service would be a first step to set the basis for future developments in cross-border litigation that could validly allow electronic service. However, at technical level the differences and the incompatibilities between the existing national systems allowing electronic service or communication between the parties and the authorities are significant, and their extension to the EOP procedure does not appear to be possible within the near future.¹⁰⁹

4.2.6. Time limits and deadlines

Similar to the national order for payment, the existence of particular deadlines for serving the EOP on a defendant depends on the justice system (see table 6).

	No Deadline	5, 10, 15, 30 Days	30 Days	60 Days	1 Year
Countries	AT, CZ, EE, FR, DE, GR, HU, MA, NL, PL, RO, UK (England and Wales)	PT	ES	IT	SC
Number in sample	12	1	1	1	1

Table 6 Deadlines for Service of the Documents in the European Order for Payment Procedure

¹⁰⁸ The EOP Regulation makes electronic service subject to national law on electronic service. Further, the Service Regulation does not provide the framework for direct electronic service of documents between the Member States. See European Commission, *Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure*, COM (2015) 495 final, 13 October 2015, p. 8.

¹⁰⁹ See also the European Commission, *Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure*, COM (2015) 495 final, 13 October 2015, p. 8.

In the majority of cases (12 out of 16 justice systems: **Austria, Czech Republic, Estonia, France, Germany, Greece, Hungary, Malta, Netherlands, Poland, Romania, and England and Wales**) there are no provisions on deadlines. In most of these cases, this can be related to the fact that the court takes care of the service of documents. The exception is **France**, where despite the fact that the service of documents is pursued by the bailiff following the claimant's request, there is no specific provision on deadline. Apart from these 12 cases, the remaining 4 Member States present different approaches. In **Italy**, the plaintiff, in accordance with the national procedural rules seems to be required to serve the EOP within 60 days from the issuing of the order. In **Spain**, there is a deadline of 30 days for the court to serve the documents on the defendant. The situation is more complex in **Portugal** where the deadlines for service change according to the method of delivery used. This is: (a) 5 days when the documents are serviced on a person different from the defendant; (b) 10 days when the service is on a person who is located in a different place than the court where the case is pending; (c) 15 days in case the service is carried out on a defendant resident in one of the Portuguese Autonomous Regions, provided the case is pending in the court of the mainland or vice-versa; and (d) 30 days if the service is on a defendant residing in another Member State.

As resulting from the national practices on the service of the EOP on the defendant presented above, no harmonised solution exists in this area of law. Even though some common approaches can be identified between particular Member States, the format of the rules adopted by the EOP Regulation on service is the response of this lack of uniform solutions. The use of an extensive variety of methods that appear equivalent in their result when the minimum standards are complied with will legitimise the Member States to continue to apply the methods that better suit their own traditional ones, rather than switching to a uniform mechanism. A common single solution regarding service of the EOP on the defendant seems still far at this point, though a simpler frame of rules and methods would be welcomed for the interested parties and for practitioners. An immediate solution to improve the present situation would be to strengthen the parties and practitioners' knowledge of the EOP and to provide them with information on the national procedural systems of the Member States through European dedicated websites. Also, a rise in the number of EOP cases should be useful. A more extensive application of the procedure by the national courts could help them create a practice and specific manner of handling and dealing with this type of claims. This can encourage practitioners to familiarise themselves with the EOP in order to be able to apply the instrument quickly and easily in cross-border litigation.

5. PROSPECTIVE FOR THE FUTURE – CONCLUDING REMARKS

In this paper we address one of the main limits to the EU attempt to improve access to justice through uniform procedural frameworks aimed at simplifying, reducing costs and speeding up cross-border litigation: the impact of national service of documents. As discussed in the paper, the apparently easy task of providing the defendant with the order issued by the court according to the EOP procedure has critical implications for both parties. This regards the aspect of securing a fair trial for the defendant, and, guaranteeing an effective access to justice for the claimant. On one hand, the service of document procedure must ensure that the defendant is aware a judicial proceeding initiated against him/her and that he/she has the possibility to oppose such action. This is particularly critical as 1) the order is issued solely on

the basis of the information provided by the claimant and not verified by the competent court and 2) the order becomes enforceable unless a statement of opposition is lodged with the competent court. For this purpose, the EOP regulation provides minimum standards that should apply in the context of the European order for payment procedure. On the other hand, the service of document should not be an obstacle for the claimant in his/her quest for justice. As we clearly point out in the paper, 1) the EOP must be served on the defendant in accordance with the national law of the State in which the service is to be effected, and that 2) the competent court must ensure that the order is served on the defendant in accordance with national law, result in extremely different level of complexity to be faced by the claimant.

Indeed, while no burden is posed on the claimant in the justice systems where the court is in charge of the service of the order on the defendant, in the other Member States, in which the court only ‘supervises’ the procedure, the task must be carried out by the party. In these cases, the claimant may suddenly discover the need to carry out the service of the EOP in a foreign country within a limited amount of time. This is often an unforeseen situation for non-repetitive players because, as previously underlined, the information on the method of service that can be validly used for the EOP within a specific Member State is not always clearly promoted. As the presentation of the forms in the e-Justice portal shows: ‘The procedure does not require presence before the court. The claimant only has to submit his application, after which the procedure will lead its own life. It does not require any further formalities or intervention on the part of the claimant.’¹¹⁰

As shown by both the data provided and by the comparative analysis undertaken, the national service of documents rules continue to have a significant impact on the methods used in the EOP procedure when service is carried out within the Member State of the court having jurisdiction, as well as cross-border. The responsibility for the service and the means that are used in the EOP are often a mirror of the national order for payments procedures that vary from justice system to justice system. The choice the European legislator made in this area of law, seeking to rely on specific mechanisms offering a high degree of certainty or of likelihood that the documents reached the debtor, appears not to fully attain its purpose. As revealed by the *eco cosmetics* case, the methods that are set to provide a high likelihood of service may prove problematic and could jeopardise actual access to justice. The compliance with the minimum standards in such circumstances appears more difficult to satisfy, particularly in cross-border situations. Coordinating the provisions of the EOP Regulation on service of the order on the defendant with the rules of possibly several Member States, is not an easy task for the actor involved as well as for the professionals that are called to make the application of such uniform instrument. A successful application of the procedural rules requires often a good knowledge of various legal systems and national rules. Access to national information regarding service of the EOP on the defendant is still patchy and not always up to date. This could impair parties’ right to a fair trial, leaving space for an abusive use of national differences in the case of repetitive players who are aware of the particularities and the hurdles that need to be overcome for an effective use of the European procedure. EOP claimants should be warned and made aware from the beginning that the national rules and practices applicable in purely internal cases will most probably apply to the EOP cases, exposing them to a different level of complexity depending on the procedural rules applicable in the Member State of the court having jurisdiction.

¹¹⁰ https://e-justice.europa.eu/content_european_payment_order_forms-156-en.do#action (last visited 14 June 2016)

At least three actions appear to be critical and should be pursued in the long term. In a cross-border simplified procedure where representation by a lawyer is not mandatory it makes sense to give the competence to the court. This appears to be better equipped than a foreign non-professional user, especially when the jurisdiction is determined by the residence of the defendant; hence, service needs to be carried out in the same Member State as the one in which the court is situated. The example of the Netherlands shows that a shift regarding the service task from the party to an institutionalised level is possible with regard to European uniform procedures.¹¹¹ However, the shift of duty from parties to the court, when this is not the case at national level, should be backed by the necessary normative and technical means that will allow the courts to properly carry out this task. Second, as a more extensive application of EU procedures by the national courts has been identified as one of the means to improve the current situation, resulting in an increase in practitioners' expertise and the creation of common practices, the idea of having centralized courts with national jurisdiction for European uniform procedures should be also considered. Third, a uniform approach regarding the methods of service to be used in the EOP procedure would facilitate the tasks of the courts and of the parties. Diminishing the number of possible service means in a future revision of the regulation, favouring the ones that actually provide a high degree of certainty that the order has actually reached the defendant. This will reduce the complexity of the present framework. Moreover, this will also facilitate the parties' access to justice and the observance of a fair balance between their procedural rights. In the medium and short term, other solutions appear more likely to mitigate the present intricacies and heterogeneity of service methods. A higher degree of cooperation between national courts and professionals and an improved access to information should be encouraged and endorsed. A better use of present methods may be thus enhanced. Providing easy access to exhaustive information on each national system regarding the detailed aspects that need to be considered for an effective application of the EOP should be one of the first steps to be undertaken. This will not only improve the functioning of the procedure, but it will also encourage the parties and the practitioners to take advantage of the existence of an EU uniform procedure that is automatically enforceable in all Member States (except Denmark). Another aspect that can contribute to improve the application of this procedure is providing sufficient training regarding the EOP and relevant national procedural rules for the professionals that are called to handle this type of claims. The provision of the necessary information by the European e-Justice Portal should also be enhanced. In a way, the effort carried out by e-CODEX in investigating the service of documents in national and EOP procedures is an attempt to provide such information to the general public and to professional users, and to make it available through the EU e-Justice Portal.

With regard to the use of ICT to support the actual service of the EOP cross-border, the solution does not seem realistic, at least for the near future. Even though the EOP Regulation contains the provisions allowing an electronic service (Articles 13 and 14), and some Member States operate in national procedures such methods in order to communicate documents of the proceedings to the parties, in practice, these tools cannot be extended to the EOP application. The national ICT systems for service are usually not open or available (at least in practice) to foreign/non-resident users (due to legal or technical requirements); thus, these tools cannot be used by foreign/non-resident claimants or for serving parties resident abroad.

¹¹¹ It should be noted that a legal framework that enabled this action was present. In the Netherlands the procedure was embedded as 'petition' procedure where the Dutch court is always responsible for the service (these are specific cases of family law, inheritance or some company law cases).