

CAN HARMONIZED TIME LIMITS IN EUROPEAN CIVIL PROCEDURE ENHANCE THE EFFECTIVENESS OF THE ENFORCEMENT OF EU LAW?

POSSONO TERMINI PROCESSUALI ARMONIZZATI IN MATERIA CIVILE INCREMENTARE L'EFFETTIVITÀ NELL'ESECUZIONE DEL DIRITTO DELL'UNIONE EUROPEA?

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Abstract: The article focuses on the judgment *Al Bosco*, rendered by the ECJ on 4th October 2018. *Al Bosco* gives a new insight as to how the ECJ interprets the following questions: firstly, it clarifies the relationship between the doctrine of extended effects and that of equivalent effects; secondly, it underlines the importance of the principle of legal certainty; finally, it addresses issues concerning the time limit for the enforcement of a provisional measure issued in a Member State other than the Member State in which enforcement is sought. Against such a background, I will examine the possibility of introducing a uniform and autonomous concept of harmonized time limits within the EU.

Keywords: Time limits, provisional measures, recognition and enforcement of judgments in civil and commercial matters, civil judicial cooperation, harmonisation.

Riassunto: lo scritto è di commento alla sentenza “*Al Bosco*”, pronunciata dalla CGUE il 4 ottobre 2018. L’arresto in parola si segnala per il *quid novi* introdotto dalla Corte di Lussemburgo sull’interpretazione di talune questioni: inizialmente, chiarifica il rapporto tra il principio di estensione dell’efficacia e quello di equivalenza degli effetti; sottolinea, quindi, la centralità del principio di legalità giuridica. Affronta, da ultimo, talune problematiche relative all’applicazione del termine per l’esecuzione di una misura cautelare (un sequestro conservativo) in un contesto transfrontaliero. La sentenza mi fornisce lo spunto per svolgere alcune brevi considerazioni circa l’opportunità di valutare l’introduzione di un concetto autonomo ed uniforme di termini processuali armonizzati all’interno dell’Unione Europea.

Parole chiave: termini processuali, misure cautelari, riconoscimento ed esecuzione di decisioni in materia civile e commerciale, cooperazione giudiziale in materia civile, armonizzazione.

Summary: I. Introduction. II. The *Al Bosco* case. 1. Question referred to the CJEU for a preliminary ruling. 2. The opinion of Advocate General Szpunar. 3. CJEU’s judgment. III. Ensuing comments. 1. Doctrine of extended effects vs doctrine of equivalent effects. 2. Legal certainty and effectiveness of EU law. 3. The time limit for the enforcement of provisional measures in a cross border context. A. Consistency in EU law. B. The *dies a quo*. IV. Potential improvements.

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I. Introduction

1. Time limits play a key role in civil litigation. In the past, it was up to the Member States to regulate time limits. This led to vastly diverging rules across the European Union. In light of the increasing development of European civil procedural law¹, it is thus by no means a surprise that time limits have come under increasing scrutiny from the EU legislator.

2. Time limits appear to be a mere technical question, but in fact they raise much broader issues that are at the heart of civil procedure. Their role in the development of proceedings is indeed crucial, as the activities of parties and judges must often be completed within a definite temporal period. All modern legal systems establish a precise timeframe to ensure the protection of rights. It follows that parties must act within and comply with these time limits. On the one hand, time limits are necessary to ensure the structured development of proceedings and to achieve finality of judgments, which are both required by the public interest in legal disputes being resolved swiftly, so as not to create a source of uncertainty, or unfairness or increased costs of litigation (*interest rei publicae ut sit finis litium*). However, on the other hand it is hard for a party to accept that they have lost a right just because a time limit has elapsed. In this regard, it is manifestly unjust to hold a party accountable if they were unable or could not reasonably be expected to exercise their right (assuming that they acted without any fault).

3. Specifically, conflicting interests underlie time limits provisions: on the one hand, the necessity to respect parties' rights and, on the other hand, the necessity for legal certainty. All legislation tries to strike a fair balance between these interests, improving in such a way the efficiency of proceedings. However, how each country has weighed and balanced these interests varies considerably and this factor may represent a practical hurdle in cross border proceedings. These differences risk making the exercise of a judicial right unequal, preventing the achievement of the objectives put forth by EU instruments. Some systems are more rigid as they tend to have one-size-fits-all time limits, while others allow a more tailored organisation of deadlines. Consequently, time limits provisions significantly influence the development of a trial in its different stages. It follows that the importance of setting reasonable time limits is paramount and can hardly be underestimated by the Member States. In that respect, the lack of uniformity concerning some time limits may represent an obstacle to the free circulation of judgments in the area of Freedom, Security and Justice, hindering, as such, the intention of the European instruments².

4. Against this backdrop, I will comment on the *Al Bosco* judgment³, which was rendered by the CJEU on 4 October 2018. This decision gives new insight into how the CJEU interprets several issues. Firstly, it clarifies the relationship between the doctrine of extended effects and that of equivalent effects; secondly, it underlines the core function of the principle of legal certainty; and finally it addresses the issues concerning time limits for the enforcement of a provisional measure issued in a Member

¹ For a closer look see B. HESS, "Harmonized rules and minimum standards in the European law of civil procedure", 2016, available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556971/IPOL_IDA\(2016\)556971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556971/IPOL_IDA(2016)556971_EN.pdf), pp. 5-14; B. HESS, "The State of the Civil Justice in the Union", in B. HESS, M. BERGSTROM, E. STORSKRUBB, *EU Civil Justice Current Issues and Future Outlook*, Hart publishing, 2016, Volume 7, pp.1-23; B. HESS, X. KRAMER, "From common rules to best practices in European Civil Procedure: An introduction", in B. HESS, X. KRAMER, *From common rules to best practices in European Civil Procedure*, Studies of the Max Planck Institute Luxembourg for International and Regulatory Procedural Law, Hart Publishing, Nomos, 2017, pp. 9-31; X. KRAMER, "Strengthening Civil Justice Cooperation: the Quest for Model Rules and Common Minimum Standards of Civil Procedure in Europe", in M. A. RODRIGUES AND H. ZANETI JR (ed.), *Repercussões do CPC - Processo Internacional*, Editora Juspodivm, 2019, pp. 591-606; T. EVAS, W. VAN BALLEGOOL, "Common minimum standards of civil procedure", November 2019, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/642804/EPRS_STU\(2019\)642804_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/642804/EPRS_STU(2019)642804_EN.pdf), pp. 1-23.

² As shown for instance in B. HESS, M. REQUEJO ISIDRO, F. GASCON INCHAUSTI, P. OBERHAMMER, E. STORSKRUBB, G. CUNIBERTI, C. KERN, E. WEITZ, X. KRAMER, "An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law", <https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en>, June 2017, pp. 106-112, pp. 265-269, pp. 296-300.

³ CJEU, 4 October 2018, C-379/17, Società Immobiliare Al Bosco Srl, ECLI:EU:C:2018:806.

State other than the Member State in which enforcement is sought. More precisely, *Al Bosco* has been adopted in the context of the Brussels I Regulation⁴, but the main terms of the question are unchanged under the regime of the Brussels I bis Regulation⁵. Thus, in such a context the free circulation of judgments in civil and commercial matters is involved.

II. The *Al Bosco* case

1. Question referred to the CJEU for a preliminary ruling

5. *Al Bosco* involved an Italian property company (*Al Bosco*) that obtained from an Italian district Court (Gorizia) a preventive attachment (freezing) order authorizing it to attach debtor's movable and immovable, tangible and intangible assets. The regional Court of Munich, pursuant to Regulation 44/2001, declared that preventive attachment order enforceable in Germany. However, the claimant applied for its enforcement⁶ after the time limit of one month, provided under Section 929(2) German Code of Civil Procedure (ZPO), had already elapsed. On this ground, the Land Registry attached to the Local Court of Munich rejected the application. This rejection was, subsequently, confirmed by the Higher Regional Court of Munich. Nevertheless, *Al Bosco* appealed against the decision on the grounds that the time limit for enforcement of the attachment laid down in the law of the Member State in which that instrument was issued (Art. 675 Italian Civil Procedure Code⁷) had been observed. In line with this submission, it considered that the time limit in accordance with the law of the Member State where the title was declared enforceable (Germany, Section 929(2) ZPO) was not relevant for the enforcement of the attachment order.

6. Thus, with regard to these facts a significant question arose: is it in line with Art. 38(1) Brussels I Regulation⁸ to apply a time limit for the enforcement of a provisional measure (that of Section 929(2) ZPO) which is laid down in the law of the State in which enforcement is sought (Germany), to a preventive attachment instrument issued in another Member State (Italy) and recognized and declared enforceable in the State in which enforcement is sought? Might the German time limit undermine the effectiveness of the Brussels I Regulation?

7. On this basis, the German Federal Court of Justice decided to stay the proceedings and refer the question to the CJEU for a preliminary ruling.

8. To answer the latter question it is firstly necessary to determine whether the German provision of the ZPO (Section 929(2) ZPO) pertains to the enforceability of the order authorizing a preventive attachment issued by a court of a Member State other than the Member State in which enforcement is sought, or whether that provision comes within the scope of enforcement in the strict sense. It is a subtle distinction, but the implications are very relevant. Indeed, according to general principles established in Regulation 44/2001 (and in Regulation 1215/2012), in the former case, the law of the Member State that delivered the provisional measure (Italy) will apply. Otherwise, the procedural rules of the Member State in which enforcement is sought are to apply to matters relating to enforcement, given that neither Regulation 44/2001 nor Regulation 1215/2012 have provided for harmonization of enforcement rules.

⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

⁵ 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 [2012] OJ L351/1.

⁶ According to German law a preventive attachment order is enforced through the registration of a debt-securing mortgage in the Land Register (Section 932(1) ZPO) within the time limit of one month provided for in Section 929(2) ZPO.

⁷ In order to enforce a preventive attachment order Art. 675 Italian Code of Civil Procedure provides for a time limit of 30 days starting from the rendering of the decision.

⁸ Art. 38 states that "a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there".

This opposition of views is particularly visible in the disagreement between the opinion of Advocate General Szpunar⁹ and the judgment of the CJEU in the context of the *Al Bosco* case.

9. Secondly, whether the German time limit is compatible with the objectives laid down in the Brussels I and in the Brussels I bis Regulations will be examined. There exists no uniform interpretation on this point and this lack of consistency led to dissimilar solutions being proposed by the Advocate General and the CJEU.

2. The opinion of Advocate General Szpunar

10. Advocate General Szpunar observed that under German law, a preventive attachment order loses legal validity owing to the expiry of a time limit. It follows that the time limit laid down in Section 929(2) ZPO does not concern enforcement in the strict sense of the *lex fori* in connection with the enforcement of foreign judgments in Germany, but rather its enforceability¹⁰. To classify that provision, Advocate General Szpunar did not take into account its classification under domestic law, but he underlined its autonomous nature in the context of EU law. Furthermore, to consolidate this conclusion he pointed out that the latter time limit is strictly related to the conditions under which preventive attachment may be ordered in Germany. It follows that it cannot be applied in isolation, irrespective of the origin of a judgment for which enforcement is sought¹¹. Consequently, it does not apply to the provisional measure issued in Italy and declared enforceable in Germany. In that regard, in order to take into account certain cross-border aspects of the case in the main proceedings, Advocate General Szpunar affirmed that rights which are not granted in the Member State of origin¹² should not be granted to a judgment given in one Member State, when it is enforced in another Member State (he considered in such a way prevalent the principle of extended effects rather than that of equivalent effect). Thus, according to German law, in national situations, when the German authorities issue a preventive attachment order and then enforce it, a creditor who has not observed the time limit provided for in Section 929(2) of the ZPO, may immediately obtain another preventive order. However, in a cross border context, where Section 929(2) ZPO applies as a rule of the *lex fori* of the Member State addressed, there is no clear rule as to how the creditor must proceed when he has not observed the time limit laid down by that provision. Therefore, according to Advocate General Szpunar this lack of clarity and consistency may create a “deadlock”¹³, which may undermine the attainment of the objectives of Regulation 44/2001 and the effectiveness of its provision, preventing in such a way the free circulation of judgments in civil and commercial matters

3. CJEU’s judgment

11. Contrary to Advocate General’s Szpunar opinion, the CJEU stated that the German time limit comes within the remit of procedural rules laid down in German law for the enforcement of orders authorizing preventive attachments. It follows that the latter time limit restricts the enforcement of a preventive attachment order, but not its validity. On this basis, the CJEU affirmed that it, certainly, belongs to the phase of enforcement in the strict sense¹⁴. In that regard, the CJEU balanced the relationship between the principle of equivalent effects and that of extended effects in a different way to the Advocate General. Indeed, according to settled case-law, once a judgment is incorporated into the legal order of the Member State in which enforcement is sought, national legislation of that Member State relating to enforcement applies in the same way as to judgments delivered by national courts (principle

⁹ Opinion of Advocate General Szpunar, 20 June 2018, C-379/1, *Società Immobiliare Al Bosco Srl*, ECLI:EU:C:2018:472.

¹⁰ See paragraph 46 of Advocate General Szpunar’s opinion in *Al Bosco*.

¹¹ See paragraph 53 of Advocate General Szpunar’s opinion in *Al Bosco*.

¹² See paragraph 63 of Advocate General Szpunar’s opinion in *Al Bosco*.

¹³ See paragraph 72 of Advocate General Szpunar’s opinion in *Al Bosco*.

¹⁴ See paragraph 31 and 32 of the *Al Bosco* judgment.

of equivalent effects)¹⁵. In light of the foregoing, the CJEU affirmed that the time limit laid down in Section 929(2) ZPO applied to the Italian provisional measure recognized and declared enforceable in Germany. Moreover, in the view of the CJEU the starting point of the analyzed time limit is calculated from the date on which the declaration of enforceability was notified to the creditor¹⁶. Finally, despite Advocate General's opinion, the CJEU, ensuring respect of legal certainty, observed that attainment of the objectives set out in Regulation 44/2001, i.e. to ensure the free circulation of judgments in civil and commercial matters within Member States, is not undermined by the application of the time limit laid down in Section 929(2) ZPO. Indeed, in the reasoning of the CJEU that time limit affects only the enforcement of a title which has already been recognized and declared enforceable. Therefore, Regulation 44/2001 (and especially Art.38) does not prevent the application of such a time limit.

III. Ensuing comments:

12. In light of the foregoing, I would like to provide some comments that follow from the *Al Bosco* Judgment.

1. Doctrine of extended effects vs doctrine of equivalent effects

13. A problematic topic in the solution of this case concerns the legal effects of a decision in the law of the Member State where enforcement of a foreign title is sought. Namely, which law should be applied for the purpose of determining the scope of a foreign judgment? Which prevails between the doctrine of extended effects and that of equivalent effects?¹⁷.

14. Previously, in the *Hoffmann* case¹⁸, the CJEU affirmed that recognition must result in principle in the conferral on foreign judgments of the same effects and authority accorded to them in the State in which they were given. Here, the CJEU adhered to the doctrine of extended effect and that case law has been reiterated in its subsequent case law. In contrast, in *Apostolides*¹⁹ the CJEU explored some variations of the doctrine of extension, stating that “there is... no reason for granting to a judgment, when it is enforced... effects that a similar judgment given directly in the Member State in which enforcement is sought would not have” The CJEU confirmed the above dictum in *Prism Investments*²⁰ and the EU lawmaker in Regulation 1215/2012 (in Art. 41 read in conjunction with Art. 39 and Recital 26), made express reference to that statement. Consequently, against such a backdrop, it is reasonable that the CJEU, in *Al Bosco*, excluded the application of Italian law and affirmed that German procedural rules (Section 929(2) ZPO) alone were applicable.

2. Legal certainty and effectiveness of EU law ²¹

15. Furthermore, the CJEU ensured respect for the principle of legal certainty linked, in the present case, on the one hand to the fact that the recovery of an interim measure (related to a requirement

¹⁵ See paragraph 37 and 38 of the *Al Bosco* judgment. Furthermore, in the view of the CJEU, this interpretation is borne out by recital 26 of Regulation 1215/2012, read in conjunction with Article 39 thereof.

¹⁶ See paragraph 50 of the *Al Bosco* judgment.

¹⁷ For further clarifications, see X. KRAMER, “The Recognition and Enforcement of Member State Judgment”, in A. DICKINSON, E. LEIN, *The Brussels I Regulation Recast*, Oxford University Press, 2015, pp. 416, 417.

¹⁸ CJEU, 4 February 1988, C- 145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, ECLI:EU:C:1988:61.

¹⁹ CJEU, 28 April 2009, C-429/07, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271.

²⁰ CJEU, 13 October 2011, C- 139/10, *Prism Investments BV v Jaap Anne van der Meer*, ECLI:EU:C:2011:653.

²¹ In this regard see R. MANKO, “Europeanisation of civil procedure: Towards common minimum standards?”, 2015, available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA\(2015\)559499](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2015)559499), p.7.; CJEU, 12 February 2015, C-48/14, *European Parliament v Council of the European Union*. (Radioactive Water Directive), paragraph 45.

of urgency) cannot be pursued for an indefinite period of time; and, on the other hand, to the certainty of registrations in land registers. In that regard the CJEU considered that the length of the time limit (one month), laid down in Section 929 (2) ZPO, complied with EU rules. Indeed, in their reasoning the European judges considered the importance of respecting legal certainty and underlined its core function for the protection of human rights. Therefore, to disregard legal certainty would entail, in the view of the CJEU, the risk of considerably reducing respect for individual's rights. The necessity to establish a fair balance between legal certainty and other EU principles follows. Namely, this was the case in *Al Bosco*, where the CJEU, rightly so, pointed out that the objective of making the free circulation of judgments in civil and commercial matters more effective cannot be achieved at the cost of legal certainty.

3. The time limit for the enforcement of provisional measures in a cross border context:

A) Consistency in EU law

16. Moreover, in the context of the *Al Bosco* case, the relevance of Advocate General Szspunar's conclusions which deeply analyzed the conditions and effects that may result from the application of the German time limit for the enforcement laid down in Section 929 (2) German Code of Civil Procedure to a provisional measure issued in a Member State other than Germany should be underlined. As pointed out above, according to the Advocate General, the application of that time limit is strictly related to the requirements under which a preventive attachment may be ordered in Germany. Its application in a cross border context would raise some doubts, namely as to how the creditor who did not respect the time limit for the enforcement of a preventive attachment order must proceed to obtain a new one. Thus, in the Advocate General's view, that situation of uncertainty may create a deadlock which may prevent the free circulation of judgments in civil and commercial matters. Therefore, despite the formalistic classification of the CJEU, the impact of the Advocate General's conclusions cannot be underestimated. Indeed, in my opinion it is evident, as it arises from the considerations of Advocate General Szspunar in the case at hand, that national provisions on time limits for the enforcement of provisional measures are not consistent within EU territory. The fact that the CJEU did not consider a frustration of the objectives of the Brussels I Regulation does not solve that issue for the future. A solution characterized by a higher level of uniformity is clearly required.

B) The *dies a quo*

17. Finally, in this scenario it is important to deal with the question concerning the starting point of the time limit for the enforcement of preventive attachment orders in the context of measures delivered by the courts of Member States other than the Member State in which enforcement is sought. Thus, in *Al Bosco*, the CJEU explicitly stated that under Regulation 44/2001 the starting point of such a time limit is calculated from the date on which the declaration of enforceability was notified to the creditor. However, the CJEU did not address that specific issue within Regulation 1215/2012. In that regard, a significant issue related to the Brussels I recast arises. Indeed, the Brussels I bis Regulation provided for a new framework, where exequatur has been abolished and a declaration of enforceability is no longer required in the Member State addressed. So, without the decree of exequatur there is no clarity concerning the starting day to calculate the *dies a quo* to lodge an application for enforcement. Will it be calculated according to the law of the Member State that issued the decision or according to that in which enforcement is sought? Given that on this point there is no settled case law, each State is free to calculate the starting point to lodge an application for enforcement according to the *lex fori* or to the *lex causae*. In that regard, I think that the most reasonable solution, in accordance with the jurisprudence developed under the Brussels I Regulation, is to calculate that *dies a quo* from the date on which the certificate issued pursuant to Art. 53 Brussels I bis Regulation is served on the person against whom enforcement is sought. However, that solution cannot easily be applied everywhere within the EU. For instance in Spain, according to domestic

settled case law²² the relevant moment for the mentioned delay to run is the finality of the decision in the Member State of origin²³. Consequently, which law applies may become an issue potentially leading to denial of enforcement of a decision under the regime of the Brussels I bis Regulation. Thus, a frustration of the purposes of the latter Regulation may occur, hampering, in such a way, civil judicial cooperation. Therefore, this lack of uniformity introduces a source of uncertainty, that can counter the objective of simplifying the free circulation of judgments in civil and commercial matters.

IV. Potential improvements

18. In conclusion, the issues discussed above (namely on the one hand, that concerning the application of the time limit laid down in Section 929 (2) German Code of Civil Procedure in a cross-border context; and on the other that related to the starting point of the mentioned time limit) illustrate negative consequences that may follow from the diversity of national procedural rules on time limits.

19. In my opinion, a potential solution to overcome complications and failures in the context of European procedural law (namely in civil and commercial matters), would be the introduction of an autonomous and uniform concept of harmonized time limits within European territory. This could solve several problems connected with the current fragmented scenario in which each Member State lays down its own procedural rules on time limits. I think that the basis for this stronger cooperation may be found in the mutual trust that Member States have in the common administration of justice. Namely, the legal basis to achieve this goal may be Art. 81 Treaty on the Functioning of the European Union, which empowers the EU to enact legislation to improve and guarantee effective access to justice and to eliminate obstacles to the proper functioning of civil proceedings. Thus, two possibilities could be envisaged: on the one hand, the creation of an autonomous EU instrument, which provides for harmonized rules that will, subsequently, apply to other EU instruments (such as for instance the Service Regulation²⁴ or the Regulation determining the rules applicable to periods, dates and time limits²⁵); on the other hand, the introduction of a specific provision laid down in different Regulations (such as for instance Art. 32 Brussels I bis Regulation or Art. 4 (4), Art. 5 (3), and Art. 7 Small Claims Regulation²⁶). Through this harmonization, the effectiveness of EU law would be strengthened and enhanced, so that its application and enforcement would be improved.

²² See Spanish Supreme Court 16-10-2014 (Sala Civil, Sección 1a).

²³ For a closer look on this issue see M. REQUEJO ISIDRO, “The Enforcement of Monetary Final Judgments under the Brussels Ibis Regulation (A Critical Assessment)”, in V. LAZIĆ, S. STUIJ, *Brussels Ibis Regulation Changes and Challenges of the Renewed Procedural Scheme*, Springer, 2017, pp. 71-97; see also R. ARENAS GARCIA, “Plazo para la ejecución en un Estado miembro de una medida cautelar dictada en otro estado”, *La Ley Unión Europea*, n. 65, 2018, pp. 9,10,11.

²⁴ 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 [2007] OJ L324/79.

²⁵ Regulation (ECC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits [1971] OJ L124/1.

²⁶ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1.