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## Improving Access to Courts and Access to Justice in Cross-border

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# **Improving Access to Courts and Access to Justice in Cross-border Litigation: Lessons from EU Experiences**

## **Melhorar o Acesso aos Tribunais e o Acesso à Justiça na Litigação Transfronteiriça: Lições de Experiências da União Europeia**

**M. Velicogna<sup>1</sup>**

Institute of Legal Informatics and Judicial Systems, National Research Council of Italy, Italy

**E.A. Ontanu<sup>2</sup>**

Erasmus University Rotterdam, Netherlands

### **Abstract**

Seeking to guarantee both citizens and companies the possibility to defend and enforce their rights in a Europe of open borders, a number of EU legal instruments have been adopted to support access to justice in cross-border litigation. Several years into their application, key questions remain to be answered. Do these instruments actually facilitate parties' access to courts and justice? What are the problems encountered in practice and which are the envisaged solutions? What are the reasons why European procedural instruments are rarely used? Through quantitative and qualitative data, the paper explores the legal practitioners' experience with European instruments, and their perception of the usefulness and usability of these instruments dedicated to cross-border litigation. Furthermore, the analysis seeks to determine whether these instruments succeed in facilitating parties' access to courts in a transnational setting, and looks into the use of information and communication technology as an additional means contributing to achieving justice.

**Keywords:** access to justice, cross-border litigation, EU cross-border judicial procedures, e-justice

### **Resumo**

Ao procurar garantir aos cidadãos e às empresas a possibilidade de defenderem e fazerem valer os seus direitos numa Europa de fronteiras abertas, foram adotados vários instrumentos jurídicos na UE para apoiar o acesso à justiça em litígios transfronteiriços. Após vários anos da sua aplicação, há questões importantes que ainda precisam de ser respondidas. Esses instrumentos facilitam efetivamente o acesso das partes aos tribunais e à justiça? Quais os problemas encontrados na prática e quais as soluções previstas? Por que razão os instrumentos processuais europeus raramente são utilizados? Através de dados quantitativos e qualitativos, o artigo explora a experiência dos profissionais do direito com instrumentos europeus e a sua perceção sobre a utilidade e funcionalidade desses instrumentos dedicados a litígios transfronteiriços. Além disso, a análise procura determinar se esses instrumentos conseguem facilitar o acesso das partes aos tribunais num cenário transnacional e analisa o uso das tecnologias de informação e comunicação como meio adicional que contribui para alcançar a justiça.

**Palavras-Chave:** acesso à justiça, litigação transfronteiriça, procedimentos judiciais transfronteiriços na UE, e-

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<sup>1</sup> Institute of Legal Informatics and Judicial Systems, National Research Council of Italy. E-mail: marco.velicogna@irsig.cnr.it.

<sup>2</sup> Assistant professor of Private International Law, Erasmus University Rotterdam.

## **1. Introduction**

Access to justice and, implicitly, access to courts, is crucial for a European Union built on the rule of law. The national procedural rules together with the present fragmented EU procedural framework have the task of assuring parties have proper access to justice, guarantee their rights, support economic activities and provide for expeditious and efficient mechanisms to enforce court decisions (see Ontanu, 2017a).

Seeking to guarantee both citizens and companies the possibility to defend and enforce their rights in a Europe of open borders and free circulation of goods, the EU and the Member States have taken actions to facilitate access to justice (and more recently to prevent abusive litigation). Over the last two decades, the EU has adopted a number of instruments addressing specific areas of cross-border litigation: jurisdiction and enforcement (Brussels I bis), service of documents and taking of evidence (Service and Taking of Evidence Regulations), special enforcement mechanisms (European Enforcement Order), alternative uniform procedures (European Order for Payment, European Small Claims Procedure, European Account Preservation Order), family matters (Brussels II bis and Maintenance Regulation), as well as alternative dispute resolution (ADR Directive and ODR Regulation). The legislative approach is based on a mix of solutions that look to coordinate the application of national procedural rules, harmonize legal provisions, establish uniform procedures, and extend the use of information and communication technology (ICT). While intended to harmonize and simplify cross-border litigation, these developments have been fragmented and sometimes overlapping. The result is that the number of sectorial instruments has increased the complexity of the regulatory framework. The increased complexity makes it more challenging for practitioners and courts to be familiar and at ease with the whole area of private international law and the available instruments, especially, when they handle, only occasionally, cross-border cases (Hess and Kramer, 2017). This does not favor an increase in familiarity with the available instruments, nor does it allow most courts and judges to develop an expertise in cross-border litigation or establish practices that would streamline the handling of such cases (Ontanu, 2017b). As empirical studies show, despite the European legislator's intention to simplify and facilitate cross-border litigation, procedures remain quite complex (Ontanu, 2017a; Gascon Inchausti & Requejo Isidro, 2017; Velicogna & Lupo, 2017). Furthermore, procedures designed for in-person litigation (e.g., European Order for Payment, European Small Claims Procedure) have been recognized as being too complex for non-professional users and require

specialization, even for legal practitioners. A series of obstacles remain in the application of European cross-border procedures: namely, differences in national approaches and extensive reliance on domestic rules for the application of the European regulations (e.g., service methods, court fees, jurisdiction, activities that parties are expected to undertake, challenging mechanism), availability of too general information in relation to the European procedures and relevant national provisions, language requirements, difficulties in filling in the standard forms, identifying the competent enforcement authorities, and carrying out the enforcement (Ontanu, 2017a; Hess, 2017; Velicogna, 2017; Kramer, 2016; Mellone, 2014; Ng, 2013).

In view of the identified obstacles and the limited familiarity practitioners and courts might have at times with European uniform procedures and with the whole area of European private international law instruments, several questions arise. For example, do these EU instruments facilitate access to courts and justice? What are the problems encountered in practice and which are the envisaged solutions? What are the reasons why available European instruments are rarely used?

The paper explores the legal practitioners' experience with European instruments and their perception of the usefulness and usability of these instruments dedicated to cross-border litigation. Furthermore, it seeks to determine whether these instruments succeed in facilitating parties' access to courts in a transnational setting.

To answer these questions, the authors make use of quantitative and qualitative data. Section 2 is dedicated to the methodology aspects related to the collection and analysis of data. Section 3 focuses on presenting the quantitative data collected on the critical issues identified in relation to European legal instruments regulating cross-border civil procedures, as well as on their perceived usefulness and usability in Italy and Austria. Section 4 explores these instruments from a qualitative approach addressing the challenges that the application of cross-border instruments poses to users and legal practitioners. Lastly, the paper concludes with the possible further steps that can be envisaged in order to facilitate access to courts in a cross-border setting, and access to justice.

## **2. Methodology**

The core data set analyzed in this paper was collected through a survey that was conducted as part of an EU co-funded research project called Pro-CODEX. The survey was carried out to investigate cross-border procedures and the perception legal practitioners have of these instruments in order to collect information to support a decision concerning which

procedures could be more suitable for digital support from the legal professional perspective, and to guide the choice over possible development activities to be carried out within the project. The survey targeted legal practitioners in Italy, Austria, the Netherlands, and Greece. The questions were drafted in English, German, and Italian, and distributed online to practitioners by using Google Forms (Velicogna *et al.*, 2017, p. 32). The data collection was carried out between July 2016 and January 2017. The survey questions aimed to identify the main issues that affect EU cross-border procedures, the usefulness of the European instruments regulating specific steps of cross-border proceedings, the usefulness of the European uniform procedures, and practitioners' personal experience with these instruments (Velicogna *et al.*, 2017, p. 32). The questionnaire required the respondents to provide an indication of how significant a given aspect is by using a Likert scale (i.e., serious problem, a problem, a minor problem, or if it is not a problem) (Velicogna *et al.*, 2017 p. 34). Furthermore, the survey looked to collect information also on the legal and technical components that the respondents consider necessary for a proper implementation of these European instruments at the national and EU level in order to support cross-border procedures. Open-ended questions integrated the data collection allowing the respondents to provide additional information which did not emerge from the closed questions.

A total number of 257 valid answers were collected. The majority of respondents in the sample are lawyers working in small law firms or organizations having between two and five personnel units (Velicogna *et al.*, 2017 p. 33). Other categories of respondents participating in the study are notaries, researchers, and consultants. Divided by country, the sample is composed of 37 respondents from Austria, 6 from Greece, 206 from Italy (Bars of Florence, Milan, Pordenone and Verona), and 8 from the Netherlands. Based on the size of the sample, the analysis will focus on Austria and Italy, the two Member States with the highest number of replies.

From the entire data set, the paper chooses to zoom in on the general perception of the EU cross-border civil procedures, the critical issues regarding these procedures, the perceived usefulness of EU cross-border procedural instruments, their usability, and the experience practitioners have with regard to these instruments. This perspective is, so far, unexplored, and this initiative allows the authors to investigate some aspects that have a significant influence on the use of the procedures and their success in facilitating access to justice. A better handling of these instruments will certainly improve access to justice in claims where parties opt for, or need to make use of, available European instruments, and, furthermore, improve access to

courts.

The data used for the analysis present a number of limits, which should be kept in mind by the reader. This concerns in particular a) the focus of the data collection effort, aimed at acquiring theoretical understanding of the legal and practical context for supporting the Pro-CODEX project objective,<sup>3</sup> and not seeking to obtain a statistical representative sample; and b) the limited geographical representativeness of the data analyzed (e.g., only two EU Member States selected, data collection limited to the Central and Northern part of the country in the case of Italy). Although opened to possible methodological criticism, at the same time, this data analysis provides valuable input for useful qualitative reflections and theoretical explanations because no comparable data set is available to allow a similar exercise. Furthermore, the results of two additional studies are taken into consideration as additional sources of information and for data, theory, and methodological triangulation purposes (Patton, 1987; Yin, 2003). These studies are the study coordinated by the Max Planck Institute Luxembourg for Procedural Law regarding ‘Mutual Trust and Free Circulation of Judgments’ (Hess, 2017), and a doctoral research on the functioning European Order for Payment and European Small Claims Procedure (Ontanu, 2017a). This step significantly enhances the reliability of the results of the present analysis (Stavros & Westberg, 2009; Fusch & Ness, 2015).

### **3. Access to Justice and Access to Courts: A Theoretical Perspective**

At first hand, for court users, access to court can be seen from the perspective of easiness of finding the court premises and specific offices or courtrooms, the availability of information on opening hours, the presence of physical and language barriers, the attention of the personnel to the court users’ needs, and availability of procedural forms that need to be filled with the court (Velicogna, 2011). However, access to court has to be understood from a much broader perspective and in close connection with the fundamental right of access to justice, as guaranteed by Article 6 European Convention of Human Rights and Fundamental Freedoms (ECHR) and Article 47 of the Charter on Fundamental Rights of the European Union (the Charter) (Reiling, 2009, p. 18). Although not an absolute right, access to court is ‘inherent to a right to fair trial’ (Stadler 2009). Furthermore, effective access to justice is not limited to the

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<sup>3</sup> Pro-CODEX objective was “to investigate the possibilities and to create the appropriate conditions to support the development of the technological components needed to make interoperable e-CODEX Digital Service Infrastructure (DSI) and the applications used by legal professionals at national level. This endeavor is based on an empirical research of feasible options to facilitate the use of the e-CODEX infrastructure and to increase the number of users among the different legal professions.” (Pro-CODEX 2019 p. 3).

existence of a competent court and a formal entitlement to instituting proceedings. It also relates to the possibility of the parties to claim their rights in court and receive a judicial decision that is fair and of good quality, within a reasonable time, and at a reasonable cost (Velicogna 2011). In cross-border litigation, simplification of court proceedings through uniform European procedures or other procedural regulations should not result in a breach of procedural guarantees that have been recognized by the ECHR or the Charter. It is therefore imperative for courts and justice systems to address access to justice and reflect on the barriers that potential and actual court users must overcome, especially in cross-border litigation (Velicogna 2011). From a user's perspective, the justice system is frequently weakened by: (1) formalistic and expensive legal procedures; (2) long procedural delays; (3) prohibitive costs of using court systems; (4) lack of available and affordable legal representation; (5) lack of adequate information about legal provisions, prevailing practices, and limited knowledge of own rights; (6) lack of adequate legal aid systems; and (7) weak enforcement.

The predictability of procedural requirements as well as of the outcome demand clear norms and consistent case law. Unclear or conflicting norms and divergent judicial decisions reduce the predictability of the cases increasing their complexity (See Reiling, 2009, p. 118). This leads to higher justice costs and delays that for small and simpler disputes might easily reach disproportionate levels to the actual claims. In such circumstances, parties are incentivized to stay out of court and, possibly, use the threat of resorting to court as a bargaining tool. Thus, access to justice is limited and the result might be disconnected from the 'actual rights and obligations prescribed by the law' (Velicogna 2011).

### **3.1 A quantitative perspective on European cross-border litigation instruments**

This section explores the Pro-CODEX survey data focusing on two areas: 1) the EU cross-border judicial procedures' critical issues as perceived by the legal professionals and 2) the perceived usefulness and the usability of European cross-border litigation instruments, and the experience of legal professionals with specific EU cross-border procedural instruments. For each of the two categories, the data is first analyzed at country level, and then a cross-country comparison is undertaken.

## **4. The Critical Issues of EU Cross-Border Judicial Procedures**

Pro-CODEX questionnaire stated that empirical research has shown the existence of a number of critical issues for the use of cross-border judicial procedures, and provided the

respondents with a list of such issues asking them to provide an indication of how significant a problem each one of these is. In terms of assessing the significance of the issue, the respondents were given five options to choose from: namely, ‘not a problem’, ‘minor problem’, ‘problem’, ‘serious problem’, and ‘I don’t know’.

The issues the respondents were presented with included: (1) finding practical information on how to carry out the European procedure; (2) assessing the complexity of the European procedure for first-time or non-repetitive users; (3) having to deal with differences between procedures (e.g., different structure of the forms, diverging definitions, etc.); (4) determining the jurisdiction or competence of the court; (5) existing language barriers; (6) unstructured requests or communication needs between the parties and the court, not identified in the European procedures or supported by their standard forms; (7) calculating and paying the (court) fees; (8) carrying out the service of documents; and (9) undertaking communication exchange with the court (e.g., no feedback, no direct channel of communication).

In the Italian case, the respondents indicated the following aspects as most problematic in practice: (1) the communication exchange with the court, (2) the complexity of the procedure for first-time or non-repetitive users, and (3) the fact that the communication needs between the parties and the court were not identified in the procedures or supported by forms. These issues were identified as being a ‘problem’ or a ‘serious problem’ by over 70 percent of the respondents who expressed an opinion. With regard to language barriers, there appears to be a significant problem of cross-border litigation: more than 50 percent of Italian respondents rated this aspect as ‘not a problem’ or only ‘a minor problem’. The reasons behind this result are not completely clear, but they may be related to the fact that the procedures were conducted before the Italian courts in Italian; hence, the use of a foreign language was not necessary. Another element that might contribute to these results could be related to the fact that the cross-border litigation involved the use of a language the legal practitioner was familiar with, or the parties used translated documents. Further qualitative research would be necessary in order to clarify the precise reasons for this outcome, and whether the result is matched by situations in other Member States. Figure 1 below provides a visual representation of Italian respondents’ opinions on the critical issues identified in cross-border judicial procedures involving European instruments. The results are ordered in an ascending trend based on the seriousness of the issue.



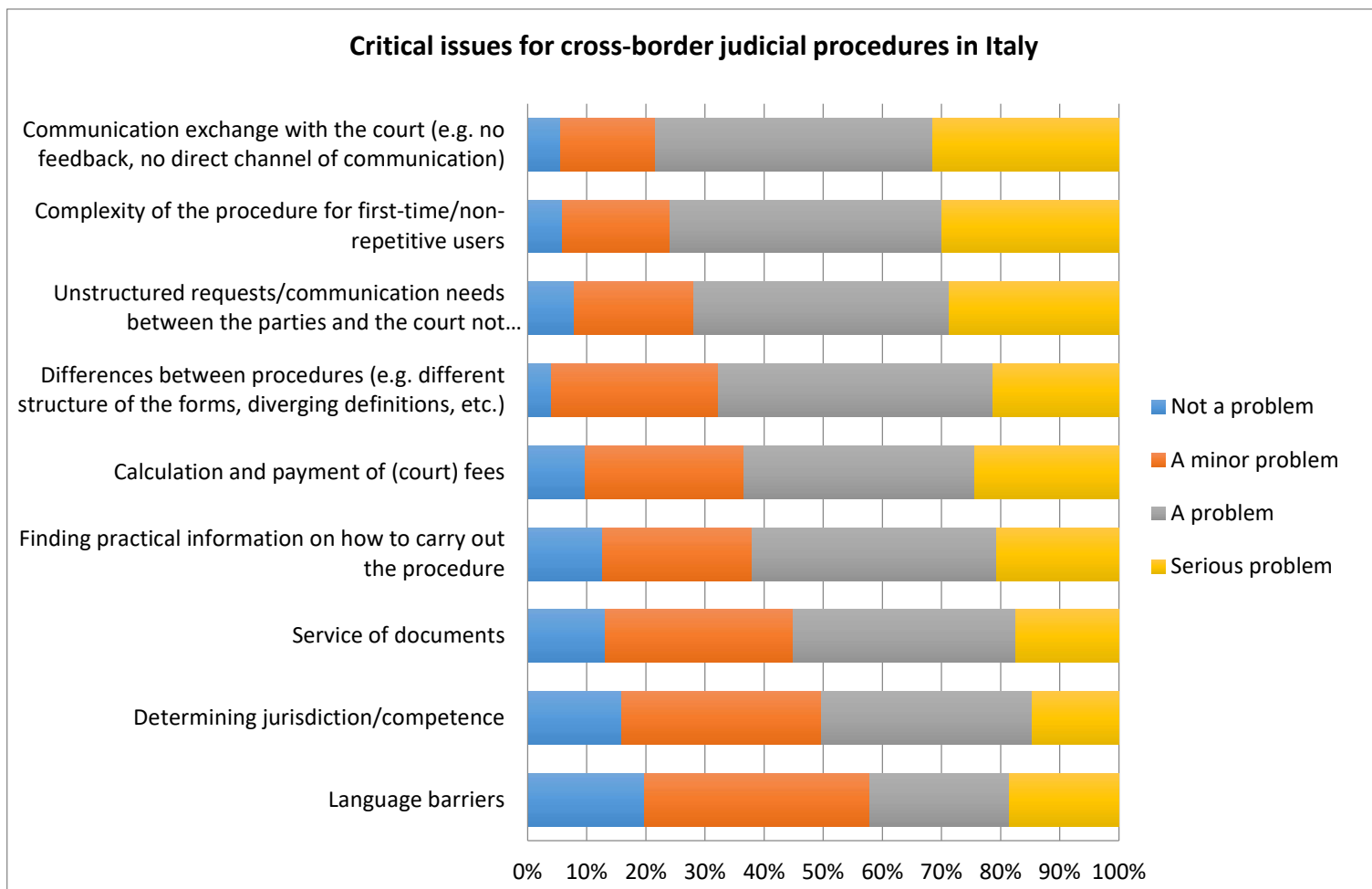


Figure 4 - Cross-border procedures' critical issues in Italy.

For the Austrian respondents, the complexity of the procedure for first-time or non-repetitive users is the most problematic issue. More than 86 percent of the respondents thought this is a 'problem' or a 'serious problem'. This difficulty is followed by the differences existing between cross-border judicial procedures. 77 percent of the respondents think this is a 'problem' or a 'serious problem'. Subsequently, the calculation and payment of (court) fees and the service of documents are the issues perceived as least problematic in practice. Less than 50 percent of the respondents rated these aspects as a 'problem' or a 'serious problem'. Figure 2 hereafter provides a visual representation of the results of the Austrian respondents' opinions ordered on an ascending trend based on the seriousness of the problem.

### Critical issues for cross-border judicial procedures in Italy

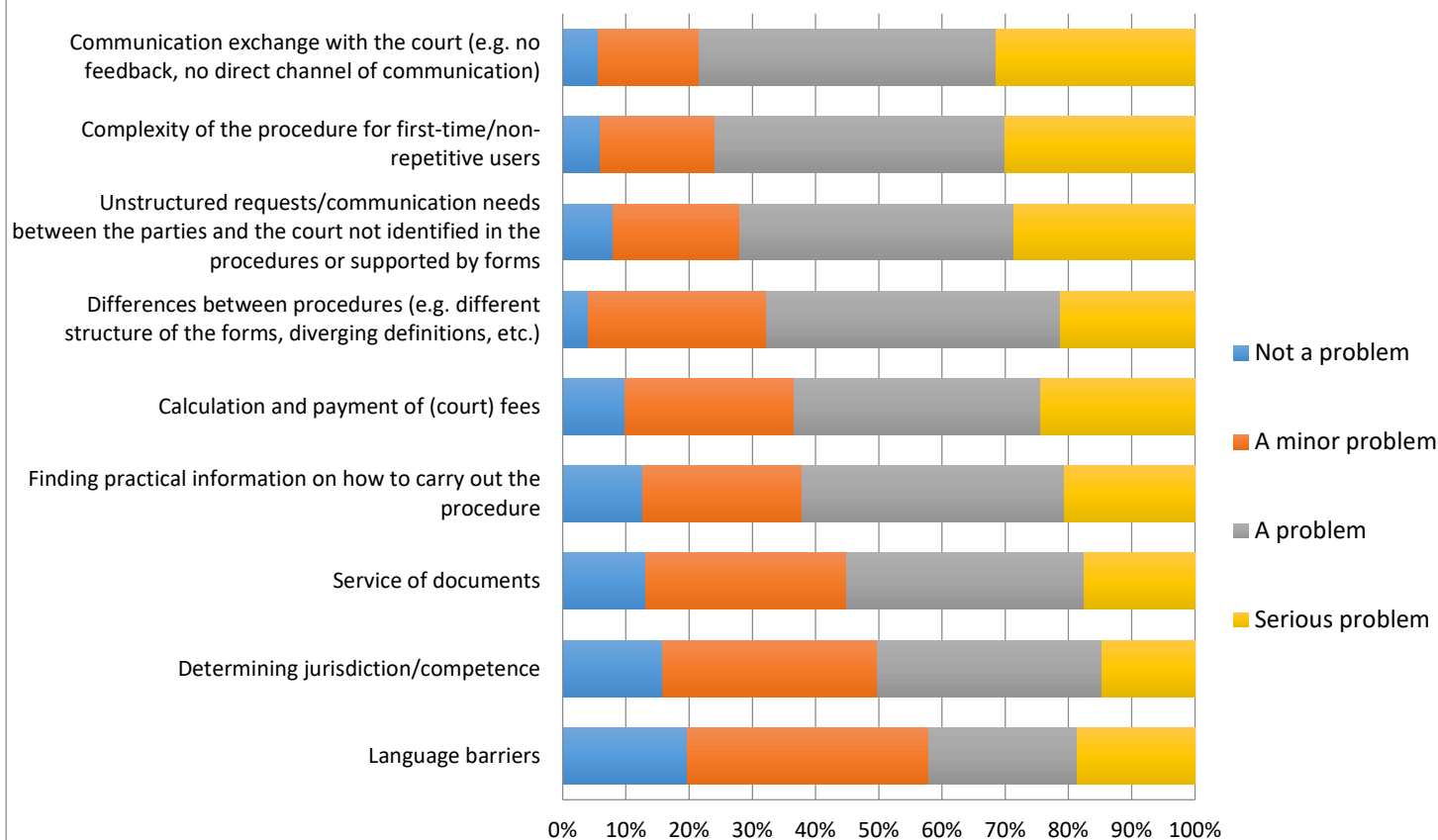


Figure 5 - Cross-border procedures' critical issues in Austria.

Based on the country results, Figure 3 confronts the Italian and Austrian legal professional perception on the relevance of the cross-border judicial procedures issues. The appreciation of the seriousness of a problematic is given a weight between 0 ('not a problem') and 3 ('serious problem') and then an index is calculated as the arithmetic average of the replies which have been weighted. Although relying on an uneven sample of responses between the two Member States analyzed, this numerical treatment of the data allows an immediate glance into the significant difference existing between national perceptions of the extent of the seriousness which various issues pose to practitioners. According to this assessment of the data, it becomes obvious that Italian legal professionals consider the communication exchange with the courts, the service of documents, and the calculation and payment of court fees much more problematic than their Austrian colleagues do. In return, the Austrians assess the differences between procedures, the language barriers, and the complexity of the procedures for first-time or non-repetitive users as more problematic than the Italian practitioners.

While this research is a helpful step in revealing some critical aspects related to the

application of European cross-border procedural instruments, further more in-depth qualitative research would be necessary in order to acquire a more extensive understanding of the causes leading to these difficulties and why specific aspects are more problematic than others in an investigated legal system. Additional qualitative research could also reveal whether these identified issues are related to specific characteristics of the national justice system, and of the applicable procedural rules, or whether other elements play a key role in leading to these specific outcomes.

Comparing perception of cross-border procedures' critical issues in Italy and Austria				
	IT	AT		IT-AT
Calculation and payment of (court) fees	1,78	1,39		0,39
Communication exchange with the court (e.g. no feedback, no direct channel of communication)	2,04	1,54		0,50
Complexity of the procedure for first-time/non-repetitive users	2,00	2,14		-0,14
Determining jurisdiction/competence	1,49	1,46		0,03
Differences between procedures (e.g. different structure of the forms, diverging definitions, etc.)	1,85	2,06		-0,21
Finding practical information on how to carry out the procedure	1,70	1,64		0,06
Language barriers	1,41	1,58		-0,17
Service of documents	1,60	1,20		0,40
Unstructured requests/communication needs between the parties and the court not identified in the procedures or supported by forms	1,93	1,59		0,34

Figure 6 - Comparing the perception of cross-border procedures' critical issues in Italy and Austria.

## 5. Usefulness, Usability, and Experience with EU Cross-Border Instruments

The Pro-CODEX questionnaire investigated also the experience of the respondents with the European procedural instruments and their perception on the usefulness and usability of these instruments in EU cross-border litigation. The instruments assessed were:

- Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Regulation (EU) No 1215/2012 Brussels I bis*);
- Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims (*Regulation (EC) No 805/2004 European Enforcement Order - EEO*);

- 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 (*Regulation (EC) No 1393/2007 Service of documents*);
- Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (*Regulation (EC) No 1206/2001 Taking of evidence*);
- Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis) (*Regulation (EC) No. 2201/2003 Brussels II bis*);
- Regulation (EU) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (*Regulation (EU) No 4/2009 Maintenance*);
- Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession with the Commission Implementing Regulation (EU) No 1326/2014 establishing the Forms referred to in Regulation (EU) No 650/2012 (*Regulation (EU) No 650/2012 Succession*);
- Regulation (EU) No 606/2013 on mutual recognition and protection measure in civil matters with the Commission Implementing Regulation (EU) No 939/2014 establishing the certificates referred to in Regulation (EU) No 606/2013 in OJ 263/3.9.2014 (*Regulation (EU) No 606/2013 Protection measures in civil matters*);
- Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (*Regulation (EU) No 2016/679 General Data Protection*);
- Regulation (EC) No 1896/2006 creating a European order for payment procedure (*Regulation (EC) No 1896/2006 European order for payment - EOP*);
- Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (*Regulation (EC) No 861/2007 European Small Claims Procedure - ESCP*);

- Regulation (EU) 2015/2421 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure (*Regulation (EU) 2015/2421 amending ESCP and EOP*);
- Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (*Regulation (EU) No 655/2014 European Account Preservation Order - EAPO*);
- Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*Regulation (EU) No 1259/2010 Rome III*).

With regard to each of the above regulations, the respondents were requested to rate their experience on the basis of the following scale: ‘none’, ‘theoretical’, ‘1 case’, ‘2-5 cases’ or ‘more than 5 cases’ handled. Furthermore, on the perceived usefulness and usability of EU cross-border civil procedure instruments, the respondents had to choose between ‘very low’, ‘low’, ‘average’, ‘high’ or ‘very high’.

In Figure 4 below, the usefulness and usability of the legal instruments assessed have been compared on the basis of an index calculated as the arithmetic average of the replies that have been weighted between 1 (‘very low’) and 5 (‘very high’). Further, the personal experience index regarding the cross-border procedural instruments has been calculated also as an arithmetic average of the replies that have been weighted between 0 (‘no experience’) and 4 (‘more than 5 cases’).

For the Italian respondents, the Service of documents, the Brussels I bis and the European Order for Payment (EOP) appear to be the most known procedures as well as the European instruments perceived to be the most useful and usable (Figure 4). The Austrian legal practitioners indicate more experience with two of the aforementioned procedures – Brussels I bis and the EOP – which are indicated also as the most useful and usable, in addition to the European Enforcement Order (EEO). The Service of documents Regulation, while perceived as useful and usable by Austrian respondents, appears to be relatively less known in practice (Figure 5). The high scores of perceived usefulness and usability of Brussels I bis are likely influenced also by the central role this regulation plays within European private international law, and other European regulations’ reliance on its provisions, especially when it comes to jurisdiction (e.g., EOP, ESCP, EEO, EAPO).

<b>ITALY</b>	<b>Usefulness of the legal instrument (1-5)</b>	<b>Usability of the legal instrument (1-5)</b>	<b>experience (0-4)</b>
Regulation (EU) No 1215/2012 Brussels I bis	3,35	3,11	1,48
Regulation (EC) No 805/2004 European Enforcement Order (EEO).	2,95	2,87	1,16
Regulation (EC) No 1393/2007 Service of documents	3,50	3,18	1,66
Regulation (EC) No 1206/2001 Taking of evidence.	3,22	2,86	0,61
Regulation (EC) No. 2201/2003 Brussels II bis	3,26	2,94	0,67
Regulation (EU) No. 4/2009 Maintenance	3,03	2,70	0,46
Regulation (EU) No. 650/2012 Succession	3,08	2,82	0,40
Regulation (EU) No. 606/2013 Protection measures in civil matters	2,98	2,87	0,31
Regulation (EU) 2016/679 General Data Protection	2,79	2,47	0,42
Regulation (EC) No 1896/2006 European order for payment (EOP)	3,16	3,03	1,34
Regulation (EC) No 861/2007 European Small Claims Procedure (ESCP)	2,87	2,68	0,47
Regulation (EU) 2015/2421 amending ESCP and EOP	2,97	2,83	0,59
Regulation (EU) No 655/2014 European Account Preservation Order (EAPO)	3,38	2,96	0,29
Regulation (EU) No. 1259/2010 Rome III	3,13	2,96	0,53

Figure 7 - Usefulness, usability and experience of EU cross-border civil procedure legal instruments in Italy.

<b>AUSTRIA</b>	<b>Usefulness of the legal instrument (1-5)</b>	<b>Usability of the legal instrument (1-5)</b>	<b>experience (0-4)</b>
Regulation (EU) No 1215/2012 Brussels I bis	3.68	3.39	2.38
Regulation (EC) No 805/2004 European Enforcement Order (EEO).	3.70	3.55	1.49
Regulation (EC) No 1393/2007 Service of documents	3.83	3.30	1.00
Regulation (EC) No 1206/2001 Taking of evidence.	3.27	2.90	0.65
Regulation (EC) No. 2201/2003 Brussels II bis	3.36	3.25	0.53
Regulation (EU) No. 4/2009 Maintenance	3.50	3.33	0.41
Regulation (EU) No. 650/2012 Succession	3.75	3.00	0.43
Regulation (EU) No. 606/2013 Protection measures in civil matters	2.00	2.00	0.05
Regulation (EU) 2016/679 General Data Protection	3.00	3.00	0.16
Regulation (EC) No 1896/2006 European order for payment (EOP)	3.68	3.70	2.27
Regulation (EC) No 861/2007 European Small Claims Procedure (ESCP)	3.14	3.50	0.78
Regulation (EU) 2015/2421 amending ESCP and EOP	2.75	3.43	0.47
Regulation (EU) No 655/2014 European Account Preservation Order (EAPO)	2.67	3.00	0.14
Regulation (EU) No. 1259/2010 Rome III	3.75	2.75	0.22

Figure 8 - Usefulness, usability and experience of EU cross-border civil procedure legal instruments in Austria.

The difference between experience and perceived usefulness and usability of the European procedural instruments by legal practitioners, in Italy and Austria, participating in the study are presented in Figure 6. This creates a clearer image of practitioners' experience and their perception of the appropriateness of the available instruments. In most cases, the Italian respondents assess the usefulness and usability index at a lower level than their Austrian colleagues. This is the case for 11 (usefulness) and 12 (usability) out of 14 instruments respectively. The Italian respondents experience index is higher than the Austrian one for about half of the studied instruments. Given the economy of the paper, we decided not to further explore several interesting areas such as the differences between the perception of respondents with no experience, theoretical experience and practical experience. Such an inquiry will constitute a further research step that we intend to take in the future, also taking into account the feedback already received, the comments, and the discussions generated by the publication of the present work.

IT-AT

	Usefulness of the legal instrument (1-5)		Usability of the legal instrument (1-5)		Experience (0-4)	
Regulation (EU) No 1215/2012 Brussels I bis		-0.33		-0.28		-0.90
Regulation (EC) No 805/2004 European Enforcement Order (EEO).		-0.75		-0.68		-0.32
Regulation (EC) No 1393/2007 Service of documents		-0.33		-0.12		0.66
Regulation (EC) No 1206/2001 Taking of evidence.		-0.06		-0.04		-0.04
Regulation (EC) No. 2201/2003 Brussels II bis		-0.10		-0.31		0.15
Regulation (EU) No. 4/2009 Maintenance		-0.47		-0.63		0.05
Regulation (EU) No. 650/2012 Succession		-0.67		-0.18		-0.03
Regulation (EU) No. 606/2013 Protection measures in civil matters		0.98		0.87		0.25
Regulation (EU) 2016/679 General Data Protection		-0.21		-0.53		0.26
Regulation (EC) No 1896/2006 European order for payment (EOP)		-0.52		-0.68		-0.93
Regulation (EC) No 861/2007 European Small Claims Procedure (ESCP)		-0.28		-0.82		-0.32
Regulation (EU) 2015/2421 amending ESCP and EOP		0.22		-0.60		0.12
Regulation (EU) No 655/2014 European Account Preservation Order (EAPO)		0.72		-0.04		0.16
Regulation (EU) No. 1259/2010 Rome III		-0.62		0.21		0.31

Figure 9 - Different perception of usefulness, usability and experience of EU cross-border civil procedure legal instruments in between Italy and Austria.

## 6. A Qualitative Perspective on the Application of Cross-Border Litigation Instruments

### *Issues generally affecting cross-border procedures*

Based on the qualitative data collected through the open questions of the Pro-CODEX survey, the Austrian and Italian practitioners have identified a number of impaired aspects on the functioning of cross-border procedures. One of the aspects most frequently referred to is ‘limited knowledge’ with regard to cross-border procedures by courts and national practitioners. This overall low level of knowledge with regard to European uniform procedures and procedural instruments across the Member States is confirmed by a number of other empirical and comparative studies carried out prior or covering the temporal framework that the present analysis relies on. (e.g., Hess, 2017; Ontanu, 2017a; Kacevskas, 2012) The



European procedures are often different from the national familiar procedures. Additionally, Austrian practitioners perceive court fees for cross-border procedures as a problematic aspect because information is not always, or easily, available. This problem is more generalized across the Member States in relation to European uniform procedures as well as other procedural instruments. Access to relevant case law across the Member States and courts databases is not generally available at EU level, although different actions and projects are taking steps in identifying and providing easier access to national case law related to the application of cross-border procedural instruments. Both Italian and Austrian practitioners identify this situation as an element that can affect the cross-border procedures. Furthermore, practitioners in both countries see translation needs and lack of harmonized legal terminology as problematic in cross-border procedures. Dedicated legal ontologies are missing at the moment and as previous research revealed, there are language differences and variations. This results also from the translations of the provisions of the regulations in all EU official languages as well as differences of terminology being used between the EU texts and the national procedure (see for example Ontanu 2017a in relation to the EOP and the ESCP). This lack of precision and matching of concepts can create difficulties of interpretation and confusion (Ontanu, 2017a; Crifò, 2016; Oro Martinez, 2016).

*In need of domestic implementation legislation (Usefulness of domestic implementation legislation)*

The majority of European instruments adopted in order to facilitate cross-border litigation are regulations. In principle, this means that for their application they require no specific additional legislative actions at national level. However, the referral to domestic procedural rules when the regulations contain no specific provisions, as well as the explicit reference to national law in some instances, and the need to coordinate national and European procedural rules make additional actions necessary at national level (Ontanu, 2017b, p. 468). In facilitating the interrelation between the two levels of legal norms, Member States are free to choose the technique they retain to be the most appropriate. This ranges from amendment of national legislation to no specific action apart from communicating to the European Commission the information required by the regulations. However, in practice, legal practitioners retain implementation legislation, a useful development. This facilitates also the judges' interpretative tasks with regard to European procedural instruments, and creates certainty as to which domestic procedural rules apply in connection with the European provisions in cross-border litigation, thus making access to courts services smoother.

Austrian and Italian practitioners participating in the Pro-CODEX survey confirm this need for implementation in the domestic legislation. This makes the coordination between national and European procedural rules easier and the necessary requirements clear to comply with for the parties and the practitioners handling such claims. Practitioners and courts require a comprehensive legislation that is practical to apply. This is also beneficial for the user who can receive clearer information as to procedural steps and requirements that need to be complied with in cross-border litigation. There are several areas of interest where the usefulness of implementation is particularly indicated (as needed) by respondents: the opposition stage, electronic service of documents, cross-border validity of proceedings undertaken, and court fees. The usefulness practitioners in these two Member States see in relation to the need for adopting domestic implementation legislation is doubled by a desire to achieve ‘as much unification or standardization as possible’ as cited by an Austrian respondent.

#### ***National legal instruments to support cross-border procedures***

With regard to national legislative actions that can support cross-border procedures, practitioners’ replies have identified a series of areas where such additional measures could be beneficial. Italian and Austrian stakeholders’ answers can be grouped around the following cluster areas: electronic handling of claims and digitalization of procedures, simplification of procedural rules and unification of various procedural aspects, implementation of European regulations, improving access to information in relation to the procedures, and other actions.

Practitioners in both countries consider the introduction of homogeneous or uniform procedural rules for cross-border claims as a much-needed development. To quote an Austrian practitioner ‘the material requirements must be the same for all EU Member States’. Respondents look for further standardization, a set of unified norms, and a unified framework for procedural rules, certifications and forms used. However, from a policy perspective this further unification of national procedural rules seems difficult to achieve for the time being. These suggested actions by respondents are closely connected with the identified need of providing clarity and further simplifying rules related to cross-border procedures. Italian practitioners look for a simplification of the service rules, access to public registers across Member States, and payment order procedure, while their Austrian counterparts are interested in a simplification of aspects related to procedural rights. Furthermore, practitioners in both Member States support the development of a legal framework that can facilitate access to national information and communication platforms, and portals that can simplify, for example, the identification of the competent court. Access to unified databases is also emphasized by

Italian practitioners. These developments can be further enhanced by actions digitalizing cross-border court procedures or certain procedural steps (e.g., service of documents). This could follow on the use of existing ICT infrastructure that is already available for national procedures. Exploratory studies on the topic, though, seem to suggest that this may not be an easy objective to achieve (Amato, 2019; Steigenga *et al.*, 2018; Velicogna *et al.*, 2018; Ontanu & Velicogna, 2018)

Together with national actions, additional European legal instruments can contribute to reinforcing cross-border procedures within the EU. Actions that practitioners consider to be useful developments at EU level are matching, to a significant extent, national suggested developments to support cross-border procedures. These concern actions for the digitalization of procedures, and achieving better coordination between Member States with regard to e-justice systems, further simplification of procedures, harmonization of various procedural aspects that remain regulated by national rules, establishing access to various national registries, and databases. These actions should be reinforced by additional training for practitioners and court staff involved in the handling of such cross-border claims. According to an Austrian respondent, in practice, there are situations in which courts in different Member States (e.g., France, Germany) are having familiarity difficulties (e.g., recognizing claim forms). Such situations have been confirmed also by other studies on the European uniform procedures (e.g., see Ontanu, 2017a).

The EU legal developments related to use of information and communication technology focus on two main aspects. One concerns the setting uniform standards and requirements for the use of technology and security standards related to the use of technology (e.g., signature forms). The other envisaged actions concern steps to achieve coordination between Member States' e-justice systems. According to the respondents, legislative steps at EU level should also be taken to establish and interconnect national registers and databases providing information for enforcement purposes. Together with this, practitioners in both countries aim for more clarity, standardization, and simplification of the European procedures. The simplification can be achieved also through a harmonization of various procedural aspects that are at the moment regulated by national procedural rules (e.g., costs of court proceedings – court fees and representation costs, service, enforcement). However, this is not an easy development to achieve as procedural aspects are deeply rooted in national traditions and policies as well as being perceived as a matter of procedural autonomy and sovereignty of Member States.

Lastly, there are minority opinions voiced by practitioners in Austria and Italy. For example, an Italian stakeholder supports the establishment of a direct appeal to the CJEU for violations of EU law at national level. At the same time, there are Austrian practitioners who consider that no further actions should be taken in relation to cross-border procedures.

### ***Technical developments to support cross-border procedures at national level***

According to respondents, technical developments can further contribute to supporting cross-border procedures. They need to rely on the appropriate legal framework that will allow and support the development of a technical infrastructure that can support the handling of court claims in an electronic format.

The Austrian and Italian practitioners participating in this research agree on three main areas where technical developments are crucial to support cross-border procedures. These are the development and use of appropriate security measures for electronic communications and exchange of documents, the development of appropriate software solutions to connect legal professionals to court systems, and the development of national platforms and databases standards that allow a European interoperability of national systems, and an easy access to information across the EU.

In order to secure a high level of protection and inviolability of electronic communications and secure the authenticity of transmitted documents, practitioners in both analyzed jurisdictions consider the development and use of digital signatures, certified e-mail addresses, and certified security systems and secure accesses as necessary technical developments. Italian respondents welcome the idea of developing uniform digital signatures. However, such an enterprise would require a common agreement between Member States on the format of the digital signature. In this perspective, e-CODEX trusting mechanism based on the verification of the signature in the originating country by a trusted authority (i.e., the Ministry of Justice) would respond to the requirements of national digital signatures' interoperability. At the same time, the legal basis of this mechanism will have to be reinforced in order to satisfy the legal requirements of a full deployment. At this point, harmonization might be more difficult to achieve than securing interoperability and recension of national certifications, but it could be an approach that the European and national legislator may still choose to explore.

Some of the software developments practitioners in both countries refer to as desired advancements to support cross-border litigation are related to reinforcing security in electronic

communication. Additionally, solutions for lawyers' software integration with other electronic solutions used by courts are seen as a useful technical development at national level. Furthermore, other technical solutions practitioners in both countries propose, concern the harmonious aspect of e-justice services in the EU. Respondents are also open to achieving additional standardization of technologies used, and establishing uniform interface standards. These aspects would also support and facilitate cross-border interoperability of national electronic platforms and databases, and contribute to reinforcing European solutions such as the e-CODEX initiative and the e-Justice portal as a 'one-stop-shop in the area of justice' for 'the whole European e-Justice system'.

### ***Technical developments to support cross-border procedures at EU level***

The technical developments suggested by respondents to be developed at EU level mirror developments and improvements retained as necessary at national level.

Both Italian and Austrian practitioners see the importance and usefulness of developing European technical components that lead to the establishment of a European certified e-mail system (or equivalent technology) that practitioners can use in their communication with courts and national authorities, as well as an identification system that would allow legal practitioners to have access to databases, registries, and to facilitate their communication with courts and authorities. Together with this, the development of a unique or dedicated software for cross-border procedures should be considered by national governments and the EU. Software developments can support and facilitate the access to technical infrastructure connection practitioners, courts, and authorities in the EU, as well as access to various registries and legal platforms.

A further step that mirrors national harmonization and unification proposals concerns achieving uniform interface standards and harmonizing access to public books and platforms for various purposes such as digital service of documents, video conferencing, public registries, the European Order for Payment procedure, and access to national information on various procedural aspects.

All these developments at European as well as national level, are also connected to and rely on the availability of information in different EU official languages. Therefore, technology development and use for facilitating access to courts in cross-border litigation has to be doubled by additional steps in different areas that are connected to justice such as access to information in languages both parties and professionals understand, appropriate case management systems,

and procedural rules.

As this analysis reveals, while a number of ideas are shared by the respondents on how to improve cross-border legal instruments and their usability – also through the use of technology – the focus is on incremental improvement of the existing framework, without reflection on possible reconfigurations that could be enabled by potential combinations of normative and technological changes.

## **7. Improving Access to Justice through Law and Technology: Concluding Remarks**

The present research and analysis is a first attempt to identify the developments practitioners and courts consider more desirable and useful in cross-border litigation. Within the limits of the quantitative and qualitative data available (see the methodological section), this first attempt explores ongoing developments and practices that are of importance for European and national policymakers. As the paper shows, cross-border judicial procedures are characterized by a fragmented EU procedural framework and by a dispute over national procedural rules and practices, which generate further complexity to the user not expert in the local way of doing business.

Legal practitioners responding to Pro-CODEX questionnaire clearly indicated that many critical issues identified by the various research initiatives are a problem, even a serious problem to them. A number of suggestions on possible ways to improve the situation have been suggested, which could be used to support the on-going political discussion over legal and procedural evolution.

The use of ICT has been promoted and encouraged by EU as means to facilitate, simplify, and speed up cross-border litigation through the filing of claims, conducting court procedures, and enforcement of judgments. Building on their national experience, respondents think that technology could be helpful in reducing the complexity and uncertainties of cross-border judicial communication. While this may help provide a solution, empirical research and empirical experimentation carried out through projects like e-CODEX, API for Justice, and Pro-CODEX indicate that technical solutions are not sufficient to tackle the present limitations. The technical, legal, and organizational developments have to be addressed together to provide comprehensive solutions for cross-border litigation. The technical developments can support court activities and facilitate parties' access to courts in cross-border litigation, but such solutions must, at first, be available and function at national level in order to build a European

interoperable infrastructure. ICT solutions can support cross-border procedures at EU level, but they cannot solve all the problems related to improving access to courts and access to justice. Particular attention should also be given to achieve a certain user-friendliness of the procedural architecture that guarantees procedural rights for the parties, and clear requirements for legal practitioners and courts.

As a final note, while the data collected by Pro-CODEX project and analyzed in this paper provide a useful contribution to the study of this complex topic, the authors are fully aware of its limits. Therefore, further research is necessary in order to extend the results of the present investigation to a representative sample of national courts and practitioners across the EU, and verify whether additional legislative or technology developments should be considered in supporting cross-border procedural instruments, and maximizing their use and usefulness.

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## Annex 1: Additional Figures

Usefulness of the legal instrument (1-5)

	IT	AT	IT-AT
Regulation (EU) No 1215/2012 Brussels I bis	3.35	3.68	-0.33
Regulation (EC) No 805/2004 European Enforcement Order (EEO).	2.95	3.70	-0.75
Regulation (EC) No 1393/2007 Service of documents	3.50	3.83	-0.33
Regulation (EC) No 1206/2001 Taking of evidence.	3.22	3.27	-0.06
Regulation (EC) No. 2201/2003 Brussels II bis	3.26	3.36	-0.10
Regulation (EU) No. 4/2009 Maintenance	3.03	3.50	-0.47
Regulation (EU) No. 650/2012 Succession	3.08	3.75	-0.67
Regulation (EU) No. 606/2013 Protection measures in civil matters	2.98	2.00	0.98
Regulation (EU) 2016/679 General Data Protection	2.79	3.00	-0.21
Regulation (EC) No 1896/2006 European order for payment (EOP)	3.16	3.68	-0.52
Regulation (EC) No 861/2007 European Small Claims Procedure (ESCP)	2.87	3.14	-0.28
Regulation (EU) 2015/2421 amending ESCP and EOP	2.97	2.75	0.22
Regulation (EU) No 655/2014 European Account Preservation Order (EAPO)	3.38	2.67	0.72
Regulation (EU) No. 1259/2010 Rome III	3.13	3.75	-0.62

Usability of the legal instrument (1-5)

	IT	AT	IT-AT
Regulation (EU) No 1215/2012 Brussels I bis	3.11	3.39	-0.28
Regulation (EC) No 805/2004 European Enforcement Order (EEO).	2.87	3.55	-0.68
Regulation (EC) No 1393/2007 Service of documents	3.18	3.30	-0.12
Regulation (EC) No 1206/2001 Taking of evidence.	2.86	2.90	-0.04
Regulation (EC) No. 2201/2003 Brussels II bis	2.94	3.25	-0.31
Regulation (EU) No. 4/2009 Maintenance	2.70	3.33	-0.63
Regulation (EU) No. 650/2012 Succession	2.82	3.00	-0.18
Regulation (EU) No. 606/2013 Protection measures in civil matters	2.87	2.00	0.87
Regulation (EU) 2016/679 General Data Protection	2.47	3.00	-0.53
Regulation (EC) No 1896/2006 European order for payment (EOP)	3.03	3.70	-0.68
Regulation (EC) No 861/2007 European Small Claims Procedure (ESCP)	2.68	3.50	-0.82
Regulation (EU) 2015/2421 amending ESCP and EOP	2.83	3.43	-0.60
Regulation (EU) No 655/2014 European Account Preservation Order (EAPO)	2.96	3.00	-0.04
Regulation (EU) No. 1259/2010 Rome III	2.96	2.75	0.21

Experience (0-4)

	IT	AT	IT-AT
Regulation (EU) No 1215/2012 Brussels I bis	1.48	2.38	-0.90
Regulation (EC) No 805/2004 European Enforcement Order (EEO).	1.16	1.49	-0.32
Regulation (EC) No 1393/2007 Service of documents	1.66	1.00	0.66
Regulation (EC) No 1206/2001 Taking of evidence.	0.61	0.65	-0.04
Regulation (EC) No. 2201/2003 Brussels II bis	0.67	0.53	0.15
Regulation (EU) No. 4/2009 Maintenance	0.46	0.41	0.05
Regulation (EU) No. 650/2012 Succession	0.40	0.43	-0.03
Regulation (EU) No. 606/2013 Protection measures in civil matters	0.31	0.05	0.25
Regulation (EU) 2016/679 General Data Protection	0.42	0.16	0.26
Regulation (EC) No 1896/2006 European order for payment (EOP)	1.34	2.27	-0.93
Regulation (EC) No 861/2007 European Small Claims Procedure (ESCP)	0.47	0.78	-0.32
Regulation (EU) 2015/2421 amending ESCP and EOP	0.59	0.47	0.12
Regulation (EU) No 655/2014 European Account Preservation Order (EAPO)	0.29	0.14	0.16
Regulation (EU) No. 1259/2010 Rome III	0.53	0.22	0.31