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European small claims procedure
An opportunity for enhancing cross-border enforcement

SUMMARY
Legislatures in some EU Member States (MS) have introduced special, simplified and accelerated tracks for small claims in legally uncomplicated cases. Those procedures vary both as regards the threshold and level of simplification.

The Treaty of Amsterdam gave the EU powers to harmonise civil procedure. As part of that mandate, the EU has adopted a number of coordination instruments (regulating conflicts of jurisdiction and mutual recognition) and created two autonomous EU civil procedures, including the European Small Claims Procedure (ESCP).

The ESCP is a simplified and accelerated civil procedure, available only in cross-border cases for claims up to 2 000 EUR. It is an optional procedure and does not replace similar national procedures.

Recent reports indicate that in practice the ESCP has not (yet) been a major success with very few cases being brought. The main reasons seem to be a lack of awareness, translation costs and also an uneasy interplay between the ESCP and the remaining rules of national civil procedures.

In order to remedy this situation, a number of proposals to amend the ESCP regulation have been made. A European Commission report on its functioning is due in January 2014.

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Background
Small claims and consumer protection
The vast majority of consumer transactions are of relatively low monetary value. This, in comparison with the costs and complexity of litigation, deters many consumers from seeking justice if they are unhappy with the transaction. Therefore, some EU MS have introduced accelerated and simplified small claims procedures. Such national procedures vary both from the point of view of the quantitative threshold and the types of cases admitted, as well as on the detailed procedural rules.1

For instance, in England and Wales claims up to £10 000 (approximately €12 000) count as ‘small claims’, whilst in Poland, a ‘simplified procedure’ is available for claims up to PLN 10 000 (approximately €2 500). In France the threshold is set at €3 800. National small claims procedures are usually informal and often involve the use of standard forms. The possibility of bringing an appeal is limited or even excluded.

EU civil procedure instruments
EU competence
EU involvement in civil procedure is a relatively recent development.2 The Treaty of Amsterdam introduced the objective of creating an area of freedom, security and justice within the EU, adding Article 65 to the EC Treaty (now Article 81 TFEU). The political impulses enshrined in the Tampere
Conclusions of the European Council (1999), the Hague Programme (2005) and the Stockholm Programme (2009) emphasised the importance of procedural enforcement in the creation of an area of freedom, security and justice.

Types of EU civil procedure instruments
Judicial cooperation in civil matters is part of the implementation of this objective, and it resulted in the adoption of EU instruments in three areas. First of all, in the field of conflict of laws and jurisdictions, including inter alia the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Regulation on the European Enforcement Order. Secondly, EU instruments have established common rules on civil procedure, for instance the Regulation on taking evidence or the Directive on legal aid in cross-border cases. Finally, the EU legislature has established two autonomous European civil procedures in the Regulation on the European Small Claims Procedure (ESCP) and the Regulation on the European Order for Payment (EOP).

Autonomous EU civil procedures
What is special about autonomous EU civil procedures is that they are entirely new EU-wide civil procedures, and not a form of harmonisation or coordination of existing national procedures. Having the legal form of a regulation, they are directly applicable in the MS. They are optional in that they exist besides national procedures, but do not replace them. Finally, they are available exclusively in cross-border cases.

Legal framework of the ESCP

Availability of the procedure
The ESCP was established by a Regulation which has applied since 1 January 2009. The monetary threshold has been set at €2 000. The procedure applies to cross-border civil cases, but not in all areas of the law, as there are a number of exclusions. For instance, cases regarding the capacity of natural persons, succession law, family law, insolvency law, violations of privacy or labour law cannot be brought under the ESCP. Claims under the ESCP may be brought both by consumers (against traders or other consumers) and by traders (for instance, against consumers).

Features of the procedure
The detailed features of the ESCP have been shaped in order to speed up and simplify proceedings. Therefore, it is a written procedure, and claims as well counter-claims are brought on standard forms. Oral hearings are an exception: they can take place only if the court deems it necessary and a party actually requests it.

The case must be brought in the language of the court, but translations may be required if necessary. MS are encouraged to use remote communications for taking evidence. Deadlines are imposed on the court to deliver a speedy judgment, although no overall deadline applies.

Representation by a lawyer is not obligatory. Judgments are directly enforceable, notwithstanding an appeal, in all MS. There is no need to take any additional procedural steps. The losing party pays the costs of the other party, including lawyer’s fees.

Supplementary national rules
The ESCP Regulation, although it creates a genuinely EU-wide type of civil procedure, still relies on the background national rules in any situation not specifically provided for in the instrument. This applies in particular to aspects such as the competence and organisation of courts, the possibility and modalities of appeal, detailed rules on delivery of documents and the taking of evidence, as well as court fees.

Possibility of appeal
The ESCP Regulation extends only to the trial phase (first instance proceedings). If national law allows for an appeal, it is dealt with under national procedural laws. The approach of the MS is diverse. For instance, in Germany an appeal is allowed, in Poland a summary appeal is available and in England
and Wales an appeal is available only with permission of the judge. In contrast, in the Netherlands an appeal is excluded.

**Conflict of law aspects**
A statement of claim is filed before the court which is competent in accordance with the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. However certain difficulties have been identified. Firstly, the system of jurisdiction under the Regulation is not well known to national courts. Secondly, there is no general rule obliging courts automatically to analyse whether they have jurisdiction. Thirdly, the connecting factors are sometimes difficult to ascertain, and different courts can reach different interpretations. All this creates a risk that two proceedings on the same case can be launched in different MS.

**Functioning in practice**
The ESCP is not frequently used in practice. According to published data, in France only 36 cases were brought in 2010, in the UK 233 cases over a two-year period (2009-2010), and in the Netherlands approximately 10-20 cases are filed yearly.

This trend is confirmed by a 2013 Eurobarometer survey. Although among those EU consumers, who encountered problems with traders during the last year, 54% had one small claim (under €2 000) and 13% had two such claims, only 4% decided to take the trader to court.

The survey also shows that EU consumers are not aware of the existence of special small claims procedures. 75% consumers have not heard of a national small claims procedure in their country, and 86% have not heard of the ESCP. Only 3% of EU citizens have used a national small claims procedure and 1% has used the ESCP. However, those who did use the ESCP were generally satisfied with it (67%).

The European Consumer Centres Network (ECC-Net) conducted an in-depth study of the actual functioning of the ESCP in the MS which was presented in a report (2012). The main problems identified include a lack of awareness of the existence of ESCP among judges and consumers, high translation costs, lack of clear rules on the service of judgments on the defendant and the fact that rules on enforcement are not unified, but left to national laws.

An EP Policy Department Study (2011) suggested that consumers wishing to bring a small claim may face several practical problems. These include difficulties in completing the standard forms, especially the part in which the claimant must specify (in their own words) the nature of the claim. Consumers may also face difficulties in determining which court has jurisdiction, especially if it is a court in a different MS. Finally, consumers are not fully aware that due to the numerous gaps in the ESCP regulation filled with national law, differences persist with regard to the costs and actual length of the proceedings.

**Proposals for reform**

**ECC-Net proposals**
On the basis of its report, ECC-Net made a number of recommendations. They call for the establishment of one or more central authorities competent for the ESCP in each MS. They also believe that a widespread system of assistance on the basis of consumer protection organisations, providing information about the procedure, is needed. They recommend choosing one common language in which small claims can be pursued EU-wide, in order to reduce translation costs for consumers. Finally, they urge greater coordination between enforcement officers.

**Academic proposals**
Xandra Kramer proposes introducing an overall time limit for delivering a judgment, instead of the existing piecemeal limits which are capable of being extended. She also advocates enacting rules which would protect consumers as defendants in ESCP
with regard to the recognition and enforcement of judgments and the introduction of a uniform rule on appeals.

Elena Otanu and Ekaterina Pannebakker propose to modify the rules on the use of languages, so that any document to be sent to a court should be drawn up in the language of that court or translated into that language, whilst any document to be delivered to a defendant should be drawn up in a language known to the defendant, or an official language of that country.

Consumers’ views
According to the 2013 Eurobarometer on small claims, EU consumers would be more willing to pursue small claims if they could rely on free legal assistance. Asked about the factors which would encourage them to go to court, respondents also mentioned written proceedings, lack of the need to appear in court, lack of the requirement to use a lawyer, the possibility of carrying out the proceedings online and cutting down on translation costs.

Consultation and forthcoming review
The ESCP regulation provides that the Commission presents a detailed report on the functioning of the procedure by 1 January 2014. As part of this process the Commission has held a public consultation on the ESCP which ended in June 2013. On this basis, the Commission will assess what improvements are needed in order to enhance the attractiveness of the ECSP.

Main references


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Endnotes


5 Legal Interoperability... at p. 4.


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