
European Small Claims Procedure

Legal analysis of the
Commission's proposal to remedy
weaknesses in the current system



IN-DEPTH ANALYSIS

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This publication provides an overview of the existing EU Regulation 861/2007 on a European Small Claims Procedure, its functioning in practice and identified shortcomings, as well as an initial legal evaluation of the Commission's proposal to amend the Regulation.

In Parliament, the proposal has been assigned to the Legal Affairs Committee, which has appointed Lidia Geringer de Oedenberg (S&D, Poland) rapporteur.

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EXECUTIVE SUMMARY

The number of cross-border consumer transactions in the EU is growing at a rapid pace: the number of EU consumers entering into such transactions doubled over the decade 2002-12. Particularly significant growth is visible with regard to online cross-border transactions, with the number of EU consumers engaging in these having grown six times in the same period. However, the individual value of such transactions remains relatively small, with almost half of them falling below the threshold of €100.

Just as in the case of domestic transactions, cross-border bargains too do not always end with the outcome desired by both parties, with a dispute the result. If these cannot be resolved amicably, the creditor has the choice either to pursue the case in court, or to give up the claim. However, the costs and burdens of ordinary civil procedures often act as a deterrent to pursuing claims. Therefore, most EU Member States have introduced some form of simplified track for small claims. These procedures, often successful with regard to domestic litigation, are not, as a rule, well adapted for cross-border disputes. With the aim of overcoming this gap, the EU legislature adopted a European Small Claims Procedure (ESCP) in 2007.

The ESCP is a simplified and accelerated civil procedure, available only in cross-border cases, for claims up to €2 000. It is an optional procedure, in that it does not replace similar national procedures. Whereas the Regulation covers several aspects of the procedure, in particular the standard forms to be used by parties, deadlines imposed upon the court and parties, rules on the written phase of proceedings, as well as minimum standards for review of the judgment, many other key aspects have been left to national law. This applies in particular to the jurisdiction of courts, court fees, detailed rules of evidence law, rules on appeals and finally details of the enforcement procedure.

Despite its potential to facilitate cross-border enforcement of small debts in the EU, the Regulation has not been a major success in practice. The limited statistical data available indicates that very few cases are being filed, with an average of approximately 100 per Member State each year. Various reasons for this have been identified, in particular lack of knowledge about the procedure among citizens and judges, the high costs of translation, the absence of clear rules on the service of judgments, and the fact that rules on enforcement proceedings have not been unified, but are left to the Member States.

In 2013, the Commission put forward a proposal for amending the ESCP Regulation with a view to increasing its attractiveness. Four key issues have been addressed. Firstly, the threshold of a 'small' claim would be raised from €2 000 to €10 000. Secondly, expanding the notion of a 'cross-border' claim would be considerably liberalised. Thirdly, there would be a maximum cap on court fees set at 10% of the value of the claim. Finally, the use of means of distant communication would become obligatory when parties are domiciled in different Member States. Nevertheless, a number of key aspects of the ESCP would continue to be regulated by domestic civil procedure, in particular the jurisdiction of courts within a Member State, the language of proceedings, admissibility and forms of appeal, rules on evidence and on computation of time, and rules concerning enforcement proceedings.

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1. Introduction

Save for the purchase of expensive, durable goods such as housing, vehicles or furniture, the vast majority of consumer transactions are of relatively low monetary value. If, following the transaction, a conflict arises between the consumer and the trader which cannot be resolved amicably, the consumer essentially faces the alternatives of either pursuing their rights in court, or giving up the claim. The costs and complexity of ordinary civil proceedings deter many consumers from seeking judicial redress of their claims, thus making their rights illusory in practice. In order to remedy such situations, many countries have introduced special, simplified and cheaper forms of civil procedure designed for the pursuit of 'small' claims: that is those of relatively low monetary value and low legal complexity.

However, national small claims procedures are designed for domestic litigation and do not include mechanisms facilitating their application in cross-border disputes. This leaves EU consumers engaging in cross-border transactions without an adequate procedural remedy.

In this context it should be remembered that the number of cross-border consumer transactions is growing fast.¹ Whilst in 2002, 13% of EU consumers had entered into a cross-border transaction for goods or services during the previous 12 months, this figure more than doubled, reaching 30%, by 2012. Undoubtedly, the role of the internet has been a major factor: whereas in 2002 only 2% of EU consumers had entered into cross-border transactions online, this figure tripled by 2010 (reaching 7%) and grew almost six times (to 11%) in 2012. The same applies to Europeans making shopping trips to other Member States: whereas in 2002 only 5% undertook one, by 2010 this figure had nearly doubled (to 9%) and by 2012 had tripled, to 14%. Shopping trips are most popular among inhabitants of Austria (44%), Slovakia (39%) and Luxembourg (38%). From the retailers' side, in 2006 as many as 29% of EU retailers sold cross-border to at least one other EU Member State, and 9% sold to buyers in three or more EU Member States. However, the value of individual cross-border retail transactions is relatively low. In 2006, 53% of consumer cross-border internet transactions were less than €100. The growth of cross-border consumer contracts inevitably entails disputes between consumers and traders in different Member States.

According to available estimates,² each year in the EU there could be as many as 588 000 cross-border consumer cases of a value below €2 000, and a further 84 000 such cases ranging from €2 000 and €10 000 in value. As regards cross-border litigation between businesses, the same estimates note 129 700 cross-border cases valued below €2 000 initiated by businesses, and 208 700 such cases of between €2 000 and €10 000 in value.

These figures indicate the need for efficient forms of judicial cooperation in civil matters between the Member States. This is because differences between national civil procedures and a lack of interconnection between national civil justice systems pose considerable obstacles to efficient cross-border access to courts.³ The problem seems to be particularly serious with regard to small claims, where the relationship between the value of the claim on the one hand, and the costs as well as burdens of litigation on the other hand, is often imbalanced, deterring consumers from seeking justice. Therefore in 2005 the European Commission proposed a regulation on a European

¹ Data in the following paragraph according to/calculated on the basis of: [Standard Eurobarometer 57.2](#) (2000), p. 6, 13; [Special Eurobarometer 395](#) (2013), p. 10, 20, [Flash Eurobarometer 186](#), p. 11.

² Deloitte study, p. 26-27. The estimates are an extrapolation of data from Eurobarometers.

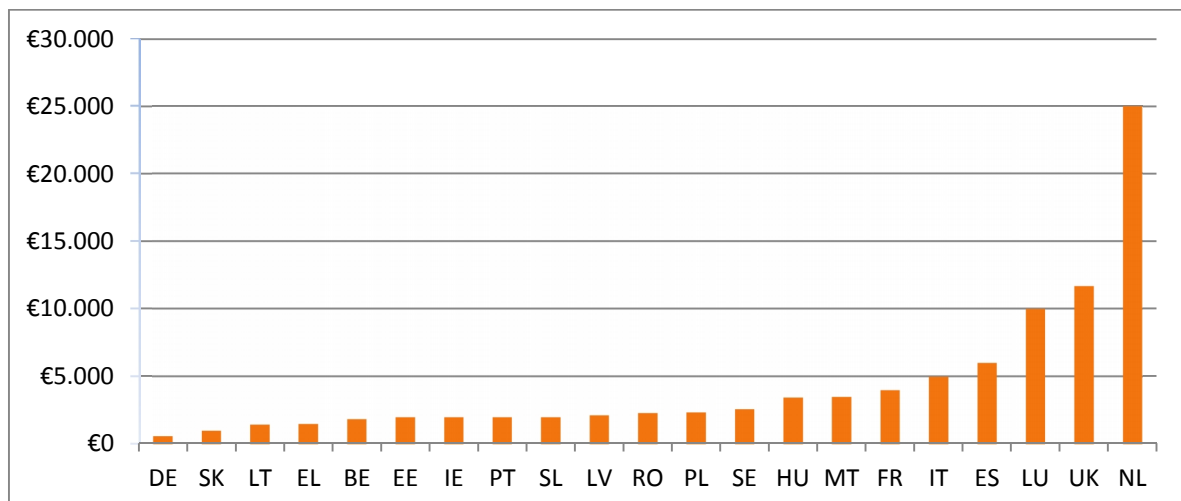
³ M. Freudenthal, ['The Future of European Civil Procedure'](#), *EJCL* 7.5 (2003), p. 2.

Small Claims Procedure ('ESCP'). It was enacted in 2007 and has been applicable since 2009.⁴ However the procedure has not been a 'success' in terms of popularity. The Commission's recent proposal aims to remedy this situation and make the ESCP a more efficient tool for cross-border debt enforcement.

2. Small claims procedures in selected Member States

According to a comparative study prepared for the Commission in 2013, 21 EU Member States have some kind of simplified civil procedure for small claims.⁵ The maximum threshold of a claim defined as 'small' extends from €600 (in Germany) to €25 000 (Netherlands), with an average of €4 400. However, these procedures vary greatly,⁶ from a simple rule allowing the judge to make proceedings less formal (Germany), to fully fledged procedures with their own, special rules on delivery of documents, taking of evidence, and appeal (e.g. Poland, UK). The following paragraphs give an overview of small claims procedures in six selected EU jurisdictions: England and Wales, Germany, France, the Netherlands, Poland and Sweden.

Figure 1 - Monetary threshold of 'small claims' in national civil procedures



Data source: Deloitte study, p. 53.

2.1 England and Wales

The monetary threshold for the 'small claims track' in England and Wales⁷ is set at £10 000; for claims arising from personal injuries, the value of damages claimed may not exceed £1 000; and in cases brought by a tenant against a landlord for repair or other works, the value of such works may not exceed £1 000, and the value of any

⁴ [Regulation \(EC\) No 861/2007](#) of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199 of 31.7.2007, p. 1. The proposal was published as COM(2005)0087 final.

⁵ Deloitte, [Assessment of the socio-economic impacts of the policy options for the future of the European Small Claims Regulation](#) (European Commission 2013), p. 53-54. The study did not cover Croatia or Denmark.

⁶ X.A. Kramer, '[A Major Step in the Harmonization of Procedural Law in Europe: The European Small Claims Procedure](#)', in *The XIIIth World Congress of Procedural Law. The Belgian and Dutch Reports* (Intersentia 2008): 253-283, p. 261; A. Fiorini, '[Facilitating Cross-Border Debt Recovery: The European Payment Order and Small Claims Regulations](#)', *ICLQ* 57.2 (2008): 449-465, p. 457.

⁷ See Part 26 and 27 of the Civil Procedure Rules – Rules and Directions; '[Small Claims – England and Wales](#)' on the website of the *European e-Justice Portal*; D. Haines, T. Trinder, 'England & Wales', in *Debt Recovery in Europe*, ed. G. Holzhauser, C. Sutter (Nomos 2007), p. 142ff.

other claim for damages from the landlord must also be within this threshold. The threshold of £10 000 is not absolute, and a claim for above £10 000 may be admitted to the small claims track, if both parties agree to that and the case seems simple.

As regards subject matter, the small claims track is available, in principle, for all types of claims, save for claims by tenants against landlords for harassment or unlawful eviction. Furthermore, a judge may decide that a claim whose value is under the threshold seems too complex, and should go onto the standard track. The decision to reallocate a case to the standard track can still be taken once proceedings are under way.

The small claims track differs from the standard track on numerous accounts. Parties must use standard forms. They do not have to be represented by lawyers, and the court must conduct proceedings in a way allowing litigants-in-person to understand what is going on. Parties may also appoint a 'lay representative', that is a non-lawyer who will accompany them in court and speak for them. In general, the small claims track is less formal than the standard track, which means that evidence rules are relaxed, and the court enjoys more discretion in organisation of the proceedings. An opinion or testimony by an expert witness may be admitted, but only at the court's discretion. Furthermore, it is possible to do away with the hearing altogether and decide the case through a purely written procedure, although any party may object to this. As to reimbursement of costs, the winning party may claim any court fees. However, costs of legal advice (up to £260) may be claimed only in certain types of cases (if the claim included an application for an injunction or an order for specific performance). Other types of costs, such as loss of earnings or expert's fees, are also limited, in comparison to the standard track. The possibility of launching an appeal is not available as a matter of right: the party who wishes to appeal must ask the trial judge for permission, and give persuasive reasons for the appeal. There are no special courts for dealing with small claims, which are heard by County Courts.

2.2 Germany

Although German⁸ civil procedure does not have a small claims track in the strict sense, there is a rule allowing the local court (*Amtsgericht*) hearing a claim for less than €600 to simplify proceedings at its discretion. The scope of this simplification is set only by reference to the monetary threshold and not to subject matter. Deviations from the ordinary rules of civil procedure with a view to simplification and acceleration are at the court's discretion, although it has been argued that the scope of such adaptation is greatly limited by the constitutional principles of procedural law developed in the case-law of the Federal Constitutional Court. However, proceedings may be conducted in written form, unless a litigant demands that a hearing be held, and appeals are not allowed, unless the first-instance court grants explicit leave for appeal.

2.3 France

A simplified form of civil procedure for small claims was established in France⁹ in 2002 and will exist until the end of 2014. The monetary threshold has been set at €4 000.

⁸ § 495a ZPO. H.P. Mayer, J. Lindemann, G. Haibach, *Small Claims Verordnung* (C.H. Beck 2009), p. 9-11., para. 55. *Münchener Kommentar zum ZPO* (4th ed., 2012 – accessed via [Beck online](#)), ad § 495a.

⁹ C. Elliott, E. Jeanpierre, C. Vernon, *French Legal System* (Pearson, 2006), p. 89-90, 173; L. Cadiet, 'Civil Procedure' in *Introduction to French Law*, ed. G. Bermann, E. Picard (Kluwer, 2008), p. 311. See also Art. 847-4(1) of the French Code of Civil Procedure; Loi no 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles (JORF n°0289 du 14 décembre 2011 page 21105 ; Loi n° 2012-1441 du 24 décembre 2012 relative aux juridictions de proximité (JORF n°0300 du 26 décembre 2012 page 20395).

Cases are heard by a single judge and there is no possibility of appeal to a higher court. Jurisdiction is vested in special 'Neighbourhood Courts' (*juridictions de proximité*) staffed not with professional career judges, but by other persons with a knowledge of the law, such as lawyers, retired judges, lecturers in law or civil servants, who are appointed for a period of seven years, and after following a five-day training course. If a Neighbourhood Court considers a case to be very complex, either due to the complexity of the legal provisions in question, or the terms of the contract between the parties, it may refer the case to the competent District Court (*Tribunal d'instance*). The Neighbourhood Courts have been abolished by an Act of 2011, but they will continue to hear civil cases until the end of 2014.

2.4 The Netherlands

Since 1991, there have been procedural rules regarding the simplification of proceedings in cases of small claims in Dutch¹⁰ courts. The monetary threshold was initially set at €5 000, but from 2011 it has been raised to €25 000. The main deviations from the standard track include reduced formality, the lack of obligatory representation by a lawyer and greater emphasis on the oral hearing, rather than written exchanges between parties. Jurisdiction is vested in sub-district divisions of district courts, which, apart from small claims, also hear all labour cases as well as landlord and tenant litigation.

2.5 Poland

A simplified procedure for small claims was created in Poland¹¹ in 2000. The monetary threshold has been set at PLN 10 000 (approximately €2 400), but there are exceptions depending on the subject of the claim. As regards subject-matter, the procedure is available for contractual claims (both for money and specific performance) if the value of the claim does not exceed PLN 10 000, as well as for payment of rent for an apartment and for fees due to a housing cooperative by an apartment holder, regardless of their value. In the case of a buyer's claim under a sales contract (warranty, guarantee, non-conformity of goods), the threshold of PLN 10 000 applies to the value of the sales contract regardless of the value of the claim.

Therefore, if someone bought a car worth PLN 50 000 and has a minor claim on the seller for replacing a part worth only PLN 2 000, they cannot use the simplified procedure track to pursue the claim because the overall value of the original transaction exceeds the threshold.

Furthermore, claims regarding intellectual property rights, even if arising under a contract and below the threshold, may not be pursued on this track. Finally, if in the course of simplified proceedings the court concludes that, despite the low value, the case is particularly complex or that it requires the opinion of an expert witness, it may decide to reallocate it to the standard track.

The simplified procedure differs from the standard track: first of all, most submissions, such as the statement of claim and the defence, must be filed on standard forms. Court

¹⁰ Kramer, Xandra E. and Ontanu, Elena Alina, '[The Functioning of the European Small Claims Procedure in the Netherlands: Normative and Empirical Reflections](#)', *Nederlands Internationaal Privaatrecht* 3/2013, p. 320; Mayer et al., *Small Claims...*, p. 18-20.

¹¹ Art. 505¹ – 505¹⁴ of the Polish Code of Civil Procedure, as amended in particular by Acts of 24 May 2000 (Dz.U. no. 48 item 554) and of 2 July 2004 (Dz.U. no. 172, item 1804).

fees (payable upon launching a statement of claim) are lower than the standard ones.¹² The claimant may use a statement of claim to pursue one claim; additional claims are allowed only if they arise from the same contract or from a series of contracts of the same type. Evidence rules are simplified, and expert witnesses may not be called. If the court is not able to ascertain the exact value of the claim, it may grant the defendant damages according to a discretionary estimate. An appeal is allowed only on a point of law and is decided upon by a single judge (instead of three), in written procedure. Parties may be heard on appeal only if they request so.

2.6 Sweden

In Sweden¹³ a small claims procedure is available for claims up to a threshold of SEK 22 250 (approximately €2 600), which is subject to indexation. The scope as to subject matter excludes family law claims. As regards procedural aspects, special forms are not obligatory, but there is an optional model form which can be used for all civil claims. The court may decide not to organise a hearing if there is no need of one, and none of the parties requests it. The rules on costs depart from the standard track. The winning party may get reimbursed only for one hour of a lawyer's advice, apart from fees, costs of travel and translation, provided they were necessary. An appeal is allowed, but requires permission from the court. It is granted if there are good reasons, such as that the case has a wider impact upon the development of the law or it is expected that the judgment could be overturned on appeal. Courts of ordinary jurisdiction are competent for the procedure.

3. The current European Small Claims Regulation

3.1 Enactment, relationship to national law and other EU instruments

The European Small Claims Procedure was established by Regulation No 861/2007¹⁴ which has applied since 1 January 2009 in all Member States except Denmark (Article 2(3)). The procedure is an alternative, within its scope, to using existing national civil procedures in cross-border litigation (Article 1-2). The ESCP neither replaces nor harmonises national civil procedures, but coexists with them in parallel.¹⁵

Although the Regulation lays down rules on the ESCP in some detail, a number of essential elements have been left to the background rules of national law, which fill in gaps in any situation not specifically provided for in the instrument.¹⁶ This applies in particular to aspects such as the competence and organisation of courts, the possibility of and detailed rules on appeal, detailed rules on service of documents and taking of evidence, as well as court fees.

¹² Whereas the standard court fee amounts to 5% of the value of the claim, in simplified proceedings they amount to: PLN 30 (€ 7) for claims up to PLN 2000; PLN 100 (€ 24) for claims between PLN 2000 but lower than PLN 5000; PLN 250 (€ 60) for claims between PLN 5000 and PLN 7500, and PLN 250 (€ 71) for claims between PLN 7500 and PLN 10,000.

¹³ Mayer et al., *Small Claims Verordnung...*, p. 23-24; Deloitte, *Assessment...*, p. 53.

¹⁴ [Regulation \(EC\) No 861/2007](#) of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31/07/2007, p. 1-22 (hereinafter: 'the Regulation')

¹⁵ M. Tulibacka, 'Europeanization of Civil Procedures: In Search of a Coherent Approach', *Common Market Law Review* 46 (2009): 1527-1565, p. 1544.

¹⁶ Kramer, 'A Major Step...', p. 265-266; C. Crifò, 'Europeanisation, harmonisation and unspoken premises: the case of service rules in the Regulation on a European Small Claims Procedure (Reg. No. 861/2007)', *Civil Justice Quarterly* 30 (2011): 283-303, p. 286.

The Brussels I Regulation¹⁷ covers three aspects of cross-border civil proceedings in the EU: jurisdiction of courts, recognition of judgments and enforcement of judgments. It applies only to cases with an international element,¹⁸ but is not applicable if the defendant is domiciled outside the EU.¹⁹ Therefore, Brussels I partly complements the ESCP Regulation (jurisdiction of courts) and partly overlaps with it (recognition and enforcement of judgments). In the overlapping part, the Brussels I regime does not apply to claims brought under the ESCP. In particular, whilst under Brussels I *exequatur* is necessary, this requirement is abolished under the ESCP. Furthermore, the grounds for refusal of enforcement are more narrowly defined in the ESCP Regulation in comparison to Brussels I. In some aspects, the ESCP Regulation explicitly refers to Brussels I, as is the case for the definitions of 'domicile' (Article 3(2)), 'claim' and 'counter-claim' (preamble, para. 16).

The recast Brussels I²⁰ will enter into force in 2015. It abolishes the requirement of *exequatur*, but maintains the longer list of grounds of refusal of enforcement.²¹

The Regulation does not affect the operation of EU conflict-of-law instruments, such as in particular Rome I²² (contracts) and Rome II²³ (delicts/torts). Therefore, whilst the ESCP Regulation prescribes procedural rules, the substantive law applicable to the dispute will be the national law determined according to Rome I or Rome II.

Despite setting the threshold and its scope, the Regulation does not provide for any detailed rules on how exactly a judge must proceed in evaluating the value of a claim, especially if it is of a non-monetary character (e.g. return of an object, injunction to stop certain behaviour, etc.). National procedural rules are therefore applicable. The same holds if the value of the claim is not expressed in euros: the Regulation does not contain any rules on how a claim should be converted into euros.

3.2 Criteria of applicability

3.2.1 Cross-border character of the claim

Under the original Commission proposal (2005), the procedure was intended to apply to both domestic and cross-border claims,²⁴ but the enacted text has limited its scope to cross-border litigation only. The cross-border character of a case is defined by reference to the domicile or habitual residence of the parties in relation to the seat of the court at the moment when the application reaches the competent court (Article 3(1), (3)). At least one of the litigants must be domiciled or habitually resident in a Member State other than that whose court is seised of the case. Therefore, it is not necessary for the litigants to live in different Member States: they may be domiciled or resident in the same Member State, provided that the court is in a different one.

¹⁷ [Council Regulation \(EC\) No 44/2001](#) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

¹⁸ *Lindner*, para. 29, 35.

¹⁹ P.A. Nielsen, '[The New Brussels I Regulation](#)', *CMLR* 50 (2013): 503-528, p. 503. In that case national law of the member state in question determines the international jurisdiction.

²⁰ [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.

²¹ Nielsen, 'The New...', p. 505, 524-528; Deloitte Report, p. 31-32.

²² [Regulation \(EC\) No 593/2008](#) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

²³ [Regulation \(EC\) No 864/2007](#) of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

²⁴ COM(2005)0087, art. 1 and 2.

In most typical situations the parties to the litigation will be from different Member States, as in the case of a consumer who files a claim against a foreign trader or vice versa.

As to the exact understanding of the notion of domicile, the Regulation (Article 3(3)) refers to Brussels I.

3.2.2 *Value of the claim*

The value of the claim may not exceed €2 000 at the time when the claim is received by the competent court, excluding any interest, expenses and disbursements (Article 2(1)). Therefore, the claim is admissible under the ESCP as long as the principal sum is €2 000 or less, even if together with interest and other expenses the threshold would be exceeded. The reason behind this rule is the fact that the calculation of interest, expenses and disbursements, which can be claimed in court together with the principal sum, varies from state to state; this could lead to the admissibility of the claim under the ESCP in one country but not in another one.²⁵

There are no exceptions to the €2 000 rule and even a claim marginally exceeding the threshold would not be admissible under the Procedure.

The limit of €2 000 refers to the value of the claim,²⁶ and not the value of the entire contract. If the claim is of non-monetary character, the claimant must indicate its value. The defendant can question this value, claiming that it exceeds the ESCP threshold. In that event, the court must decide, within 30 days, whether the claim actually exceeds the threshold, and must be moved onto the standard track, or does not and may continue on the ESCP track (Article 5(5)). The limit also applies to any counter-claim, although a counter-claim is not added to the claim, but evaluated independently.²⁷ However, if the defendant raises a counter-claim exceeding the €2 000 threshold, the case is automatically moved onto the standard track (Article 5(7)).

3.2.3 *Subject matter of the claim*

The subject matter of the claim (Article 2) is defined by resorting to one positive criterion (it must fall within the scope of civil or commercial proceedings) and a series of negative criteria. Although the Regulation does not state this explicitly, it has been argued that the notion of a civil or commercial matter must be understood in the light of Brussels I, and given an autonomous, EU-wide meaning.²⁸

First of all, public law claims, in particular those relating to revenue, customs, administrative matters and state liability for the exercise of its authority, as well as social security claims are excluded. However, a civil action (for compensation) heard by a criminal court falls within the scope of the Regulation.²⁹

However, not all private law claims qualify either, and the Regulation lists eight areas of private law to which it is not applicable. These are: status or legal capacity of natural persons; matrimonial property rights, maintenance obligations, succession law; bankruptcy law; arbitration; employment law; tenancies of immovable property, save for monetary claims; and violation of privacy and other rights relating to personality. The last two exclusions were not included in the original proposal.³⁰ The list of

²⁵ Scarafoni, 'Il regolamento...', p. 607.

²⁶ Mayer et al., *Small Claims...*, p. 7, para. 39 ('Streitwert der Klage').

²⁷ Scarafoni, 'Il regolamento...', p. 607.

²⁸ Ibid., p. 605; Nioche, 'Reglement', p. 279.

²⁹ Nioche, 'Reglement', p. 278. Cfr. ECJ Case 172/91 *Volker Sonntag*, interpreting Brussels I in this sense.

³⁰ COM(2005)0087, Art. 2(2).

exclusions is different in comparison e.g. to the European Order for Payment procedure, which covers claims arising under employment law.³¹

Although it seems that the most typical claims pursued under the ESCP are those arising out of contracts, claims on the basis of extra-contractual liability, such as tort, unjust enrichment or benevolent intervention in another's affairs, as well as under property law are also admissible.³² The claim need not necessarily be for money: a party may also demand the return of an object or specific performance, or a certain forbearance.³³

The ESCP is not limited to consumer claims only, and may also be used in cases brought by traders against consumers, between traders, or between private persons, none of whom are acting as a trader or consumer.

3.3 General features of the procedure

3.3.1 Jurisdiction of courts

The claim must be filed in a competent national court. Brussels I determines which country's courts are competent, but the specific court in a given country is determined in light of the national law of that country.³⁴

The Regulation does not provide any rules for a situation in which an application is filed in the correct Member State, but with a court which is incompetent under national law. To remedy such situations, national civil procedure must be applied.³⁵

In most Member States, the ordinary civil court of first instance has jurisdiction (e.g. IT, FR, ES).³⁶ At the moment, only some Member States have designated one or more specialised courts to deal with the ESCP procedure (e.g. FI, MT and Hessen in DE).³⁷

3.3.2 Representation by lawyer

Representation by a lawyer is not obligatory (Article 10). This rule is of general character and is applicable regardless of the court which hears a case under the ESCP, even if representation by a lawyer would normally be obligatory before that court.³⁸

3.3.3 Fees, costs and expenses

Fees payable to a court in order to commence proceedings are not laid down in the Regulation, and therefore left entirely to the Member States. This has led to serious discrepancies both as regards the amount of fees and their payment methods. Whilst some countries allow payment by bank transfer (e.g. AT, FI, DE, IT, LV, PL), and others even allow online payments by a debit card (e.g. FI), or both debit and credit card (e.g. UK³⁹) others accept only payment by cash (e.g. GR) or require the fee to be paid through a lawyer (e.g. NL).⁴⁰

³¹ Nioche, 'Reglement', p. 279.

³² Scarafoni, 'Il regolamento...', p. 607.

³³ Nioche, 'Reglement', p. 280.

³⁴ Mayer et al., *Small Claims...*, p. 36, para. 320.

³⁵ Nioche, 'Reglement', p. 281; Scarafoni, 'Il regolamento...', p. 609. See also Art. 25(1)(a) of the Regulation.

³⁶ F. Rota, 'Droit italien', in *Droit processuel...*, p. 294-295; Scarafoni, 'Il regolamento...', p. 608-609. Nioche, 'Reglement', p. 281. A.J. Valencia Miron Gomez Amigo, 'Droit espagnol' in *Droit processuel...*, p. 291-292.

³⁷ Report from the Commission..., p. 4.

³⁸ Scarafoni, 'Il regolamento...', p. 610.

³⁹ <https://www.gov.uk/court-fees-what-they-are> [last accessed: 12/10/2014]; the Deloitte study, p. 50, table 48, notes that in the UK fees are 'normally paid by cheque or cash'.

⁴⁰ Deloitte study, p. 50, table 48.

The level of fees in many Member States constitute a very high percentage of the value of the claim, often even exceeding it.⁴¹ Thus, for very small claims of €50, six Member States would charge a court fee exceeding the value of the claim, and seven others would charge a court fee of 50% or more of the claim's value.

For claims of €200, the situation is somewhat better, but still two states would charge a fee of 50% or more of the claim, and five others of 20% or more of that value. At the other end of the spectrum, Cyprus, Luxembourg and Spain do not charge any court fees at all in the ESCP. In Poland, all ESCP applications are subject to a flat fee of PLN 100 (€24) regardless of the value of the claim.⁴²

Costs of proceedings must be borne by the unsuccessful party to the extent that they were necessary and proportionate to the claim (Article 16). Such costs may include costs of legal representation, costs arising from service of documents or costs of translation, provided that these were proportionate or necessary (preamble, para 29). Further details on calculating costs are explicitly left to national law.

3.3.4 Assistance to parties

Whilst representation by a lawyer is not obligatory, Member States must ensure that parties can receive practical assistance in filling out the forms (Article 11). If necessary, the court must inform the parties about any procedural issues.

3.3.5 Linguistic regime

Within ESCP the language of the court must be observed. This applies not only to the claim, but also to all other documents submitted to the court, such as responses, counter-claims, responses to counter-claims and descriptions of relevant supporting documents (Article 6(1)), but not to the attached documents as such.⁴³ As for the latter, the court may require their translation if the document appears to be necessary for deciding the case (Article 6(2)). Defendants may refuse to accept documents in a language other than the language of the country having jurisdiction if they do not understand it (Article 6(3)).

Member States have the option of accepting, within enforcement proceedings, forms in one or more of the working languages of the institutions⁴⁴ other than their own. Only some states have made use of this option, usually selecting English (Estonia, Cyprus, Sweden and France),⁴⁵ France also accepts, besides English, forms in German, Italian and Spanish.⁴⁶

3.3.6 Service of documents

All documents within the proceedings should be sent by post, with an acknowledgement of receipt (Article 13(1)). However, should this form of service be unavailable, the court and parties may use the methods provided for in Articles 13-14 of the Regulation on a European Enforcement Order.⁴⁷ These include four methods of service with acknowledgment of receipt, as well as six methods without proof of delivery.

⁴¹ Data from Deloitte study, p. 60, table 52.

⁴² Art. 27b of Act of 28.7.2005 on court fees in civil cases (Dz.U. 2010, no. 90, item 594).

⁴³ Scarafoni, 'Il regolamento...', p. 612.

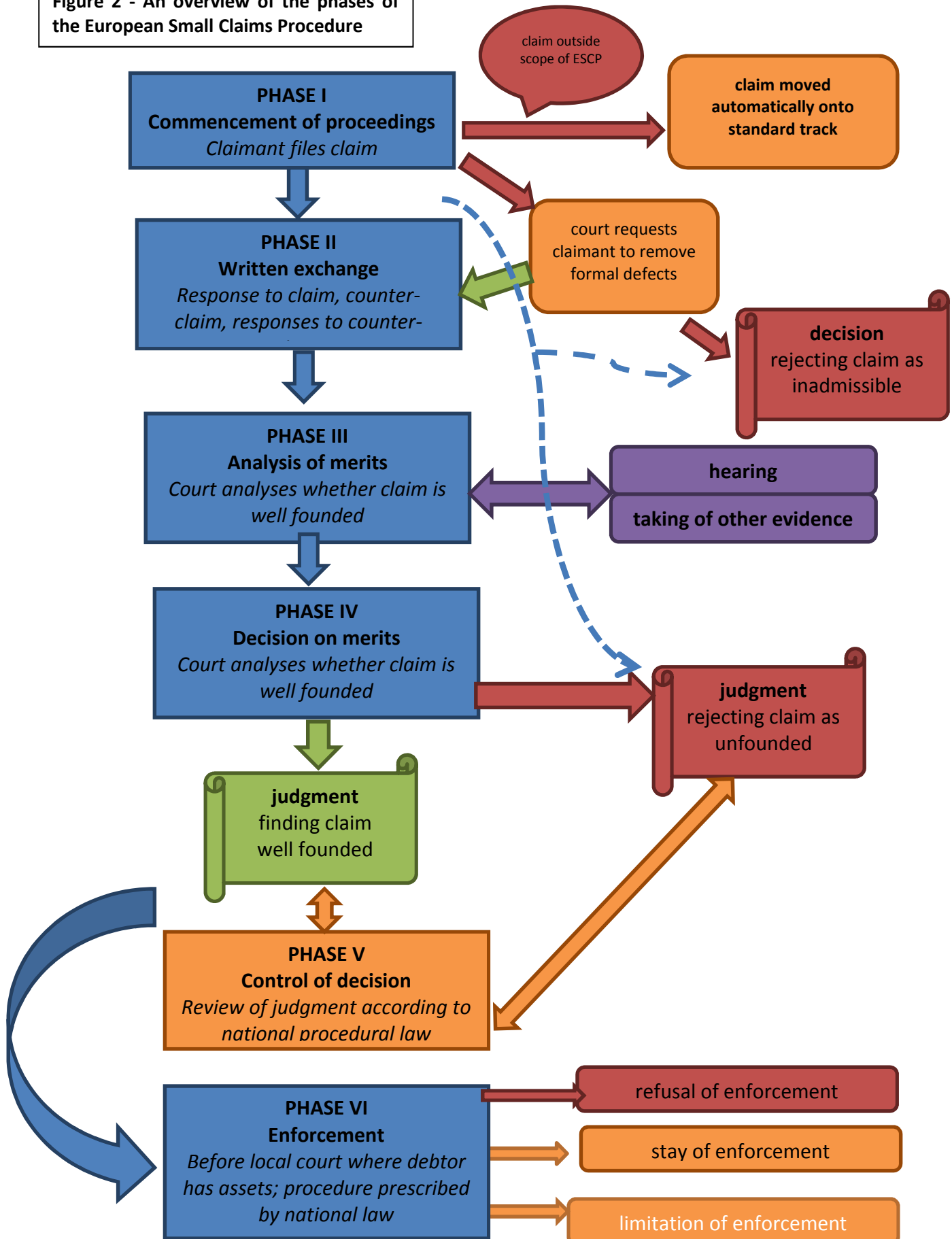
⁴⁴ Currently, these are: BG, HR, CZ, DK, EN, EE, FI, FR, DE, FR, HU, IE, IT, LV, LT, MT, PL, PT, RO, SK, SL, ES and SV. See Regulation No 1 determining the languages to be used by the EEC as amended by [Council Regulation \(EU\) No 517/2013](#).

⁴⁵ X.E. Kramer, 'Small Claim...', p. 130.

⁴⁶ Nioche, 'Reglement', p. 290.

⁴⁷ [Regulation \(EC\) No 805/2004](#) of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

Figure 2 - An overview of the phases of the European Small Claims Procedure



3.4 Course of the ESCP proceedings

3.4.1 Phase I: Commencement of proceedings

A claim under the ESCP must be filed on a standard form (Article 4(1), Annex I), which contains all essential elements for the action, as well as practical information such as the contact details of the parties (address, telephone, email) and bank account details (optional). The claim form has a space for describing the facts on which the claim is based, as well as to describe evidence. Relevant supporting documents may be attached. Parties need not specify the legal basis of the claim (Article 12(1)). The claimant must file the form with the competent court, either directly at the court's registry,⁴⁸ or using a means of communication determined by national procedural law.

The methods accepted by Member States vary:⁴⁹ for example, Italy accepts only postal delivery, but France accepts both postal and electronic delivery. In fact, only 10 Member States and five German *Länder* allow for applications to be submitted electronically in cross-border cases, and postal service still remains the primary method of delivery of documents within the procedure. Furthermore, the use of telecommunications technology in courts remains very limited, and only 10 Member States offer the possibility of using such technology in all courts.

The claim may have defects. First of all, it may fall outside the scope of the ESCP Regulation altogether (on account of value, subject matter or lack of a cross-border element). Secondly, whilst falling within the scope of the Regulation, it may have defects due to mistakes in filling out the forms, omission of essential information regarding the claim or an infringement of the linguistic regime. These two situations should be distinguished from a third situation, in which the claim is not defective (i.e. it falls within the scope of the Regulation, the forms were filled out correctly and in the appropriate language), but nevertheless is *clearly unfounded* or *inadmissible*. The notions of 'clearly unfounded' and 'inadmissible' are to be determined under national procedural law (preamble, para. 13). It is also up to national law to determine whether a decision declaring a claim to be clearly unfounded or inadmissible is susceptible to appeal; for example in France it is not, but the claimant may then file an ordinary civil action.⁵⁰

For each of the three situations described above, the Regulation prescribes what the court seised of the application should do. First of all, if the claim falls outside the scope of the Regulation, the court informs the claimant, and unless they withdraw the claim, it is automatically moved onto the standard track of domestic civil procedure (Article 4(3)).

Secondly, if the claim falls under the scope of the Regulation, but contains defects (insufficient information or mistakes), the court, also using a standard form, invites the claimant to complete or rectify the form or to supply additional information or documents, and sets a deadline (Article 4(4)). The same applies if the language in which the claim was filed is not accepted by the court.⁵¹ The deadline is not set explicitly by the Regulation, but the court should use the shortest possible deadline (preamble, para. 23). Only if a claimant fails to cure such defects within the deadline, does the

⁴⁸ Mellone and Pancardi, 'Il nuovo...', p. 304; Scarafoni, 'Il regolamento...', p. 611.

⁴⁹ Rota, 'Droit italien', p. 295; Scarafoni, 'Il regolamento...', p. 611; Nioche, 'Reglement', p. 282; Report from the Commission..., p. 4-5.

⁵⁰ Nioche, 'Reglement', p. 283. Art. 1385 of the French Code of Civil Procedure.

⁵¹ Scarafoni, 'Il regolamento...', p. 614. This conclusion follows from the appropriate rubric in standard form B (Annex B to the Regulation) where the court may indicate to the claimant that his "claim has not been filled in the correct language", specifying the language which should have been applied.

court dismiss the claim (Article 4(4)). Finally, if the claim is filed not on a standard form, but by means of an ordinary application or orally (if allowed by national law), the ESCP will not be triggered (even if all other criteria, i.e. value, cross-border character and subject matter are fulfilled) and the court will hear the case on the domestic standard civil track, rather than under the ESCP, with all the consequences of this, e.g. obligatory representation by a lawyer, as the case may be.⁵²

Thirdly, if the claim falls under the scope of the Regulation, does not contain procedural defects, but is clearly unfounded or inadmissible, the court simply dismisses the claim (Article 4(2)). It has been argued that the 'clear' lack of foundation of a claim may not be determined on the basis of the fact that certain elements are lacking in the application: the judge must invite the claimant to supplement the application and only once all necessary elements are present, may it be dismissed as manifestly unfounded.⁵³

3.4.2 Phase II: Written exchange between the parties

In contrast to the European Order for Payment procedure, which is unilateral, the ESCP procedure has an adversarial nature and engages both claimant and defendant.⁵⁴

Therefore, within 14 days of receiving the complete application,⁵⁵ the court sends a copy to the defendant together with a special form on which the defendant may reply to the claim (Article 5(2)). The defendant then has 30 days to reply from the day they receive the form (art. 5(3)). The reply may be made on a standard form (but this is optional⁵⁶), and the defendant may also raise counter-claims (the standard form is obligatory for this⁵⁷). The response may also contain defences, such as that the value of a non-monetary claim exceeds €2 000 or that the court does not have jurisdiction.⁵⁸ The court must decide on the defence of excess of threshold within 30 days, and if it agrees, the case is moved onto the standard track.⁵⁹ As to other defences raised by the defendant, the manner of proceeding with them is determined by national procedural law.⁶⁰

Once the court receives the defendant's response, and possibly also a counter-claim, it sends a copy to the claimant. If the defendant raised a counter-claim, the claimant has 30 days to respond (Article 5(6)). If the counter-claim has defects other than excessive value, it may be corrected at the court's demand. If the subject matter does not fall within the scope of ESCP, the counter-claim is separated from the main claim and is dealt with under the domestic standard track, whereas the main claim remains on the ESCP track.⁶¹ However, if the counter-claim's value exceeds €2 000, the counter-claim is not separated from the main claim, and the entire case is removed from the ESCP track onto the domestic standard track.⁶²

⁵² Scarafoni, 'Il regolamento...', p. 612.

⁵³ Scarafoni, 'Il regolamento...', p. 614.

⁵⁴ Nioche, 'Reglement', p. 284.

⁵⁵ The deadline of 14 days starts running from the original application if the form is complete, or from the correct application if defects have to be remedied (Scarafoni, 'Il regolamento...', p. 615).

⁵⁶ Nioche, 'Reglement', p. 285; Scarafoni, 'Il regolamento...', p. 615.

⁵⁷ Scarafoni, 'Il regolamento...', p. 616.

⁵⁸ Scarafoni, 'Il regolamento...', p. 617.

⁵⁹ Scarafoni, 'Il regolamento...', p. 617.

⁶⁰ Scarafoni, 'Il regolamento...', p. 617-618.

⁶¹ Scarafoni, 'Il regolamento...', p. 616.

⁶² Scarafoni, 'Il regolamento...', p. 616.

If appropriate, the court should seek the reaching of a settlement between the parties (Article 12(3)), but the court is not under a duty to do so.⁶³

3.4.3 Phase III: Analysis of the merits

In principle, the competent court is expected to analyse the merits of the claim only on the basis of documents submitted by the claimant and defendant, and without organising a hearing, in line with the principle that the ESCP is a written procedure (Article 5(1)). However, there is an option of a hearing and it can take place either because the court 'considers this to be necessary', or upon a party's request. The court may refuse the party's request only if the hearing would be 'obviously not necessary for the fair conduct' of the ESCP. The judge's refusal to hold a hearing may not be challenged independently from the final judgment (preamble, para. 14). Therefore, if there is no appeal against the judgment allowed in a given state, the judge's decision not to hold a hearing will not be subject to any review. Refraining from organising a hearing has the obvious advantage of avoiding that (at least) one of the parties would have to come from abroad and, in many cases, need to use the services of an interpreter.⁶⁴

The analysis of the claim should not take too long, and the Regulation imposes deadlines upon the court which may be deviated from only 'in exceptional circumstances', and even then the court must take all the steps 'as soon as possible' (Article 14(3)).

Within 30 days of receiving the last document from the parties (response from the defendant, or, if applicable, claimant's response to the defendant's counter-claim), the court needs to decide whether the case is ready for decision, or whether additional evidence is necessary.⁶⁵ In the former case, the court should go directly to phase IV and issue a judgment on the merits, whereas in the latter case it may either demand more information from the parties, setting them an appropriate deadline of no more than 30 days, or take other evidence, or arrange a hearing which must be held within 30 days of the summoning the parties (Article 7(1)).

If evidence needs to be taken in a different Member State, the Regulation on taking of evidence will be applicable.⁶⁶ Because national rules of civil procedure apply to evidence, these rules may vary between Member States, in particular with regard to the types of admissible evidence and the methods for their evaluation or the possibility and technical details of using videoconference for taking evidence. In particular, many Member States still do not allow evidence in this form.

3.4.4 Phase IV: Decision on the merits

The Regulation does not specify the form or content of the judgment, and does not prescribe any standard form to be followed by the court, leaving the matter entirely to national law.⁶⁷ In particular, it is for national law to determine whether, and if yes, in what cases, to what extent, the court must give reasons for its decision.

⁶³ Scarafoni, 'Il regolamento...', p. 620.

⁶⁴ Nioche, 'Reglement', p. 287.

⁶⁵ Scarafoni, 'Il regolamento...', p. 619.

⁶⁶ [Council Regulation \(EC\) No 1206/2001](#) of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1).

Scarafoni, 'Il regolamento...', p. 622.

⁶⁷ Scarafoni, 'Il regolamento...', p. 622.

The judgment must be pronounced within 30 days either of the day when the court received the submissions from the parties, or – if requested – additional submissions from the parties, or – if held – of the day of the hearing, or – if ordered – of the day of taking evidence outside the hearing, whichever is the latest.⁶⁸

At the request of one of the parties the court which issued the judgment must issue an accompanying certificate on a standard form (Article 20(2)). Such a certificate contains information (name, address, etc.) on the court, the claimant, the defendant, as well as on the judgment (date, case number, substance) including detailed information regarding the amount that the court ordered one party to pay to the other (principal sum, interest, costs) or details of the court's injunction to act in a certain way or abstain from a specific act. The form states: 'The judgment will be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.' (Annex IV). National procedural rules may specify which body is responsible for delivering such a certificate.

3.4.5 Phase V: Control of the decision

Judgments issued in the ESCP may be challenged by way of appeal or review. The appeal is not codified in the Regulation, and it is up to the Member States to decide whether judgments given in the ESCP may be subject to an appeal, and to lay down the necessary procedural rules (Article 17(1)). These may also include rules on court fees for launching an appeal, which inevitably differ across the EU.⁶⁹

National procedures vary greatly with respect to appellate proceedings. Most Member States (or jurisdictions within them) allow for an appeal.⁷⁰

Exceptions include Northern Ireland, where no appeal is allowed, save for the petition for review foreseen directly in the Regulation.⁷¹ Some other countries (FR, GR, NL, PT) allow only certain of the usual forms for challenging the judgment,⁷² for instance in France, the opposition (*l'opposition*), petition for revision (*recours en révision*) and motion for cassation (*pourvoi en cassation*), but not the ordinary appeal (*appel*).⁷³ Poland allows for a limited appeal which differs from the standard one in that it may be based only a point of law, and on a point of fact only if that fact was not known during first-instance proceedings; the limited appeal is heard only by a single judge (whilst a standard appeal is heard by three judges), and decided *in camera* (whilst a standard appeal entails a hearing).⁷⁴ A petition for *cassation* to the Supreme Court is not allowed. Apart from the appeal, an ESCP judgment issued by a Polish court may also be challenged by way of an interlocutory appeal (*zażalenie*) and an opposition to a judgment issued in the defendant's absence (*sprzeciw od wyroku zaocznego*).⁷⁵

Whereas the availability of an appeal is left to national law, the Regulation prescribes a minimum review procedure (Article 18). It may be launched only if the defendant's rights of defence were seriously infringed. Two situations are envisaged by the

⁶⁸ Scarafoni, 'Il regolamento...', p. 622.

⁶⁹ Scarafoni, 'Il regolamento...', p. 625.

⁷⁰ According to Nioche, 'Reglement', p. 287, these are: Germany, England, Bulgaria, Spain, Finland, Hungary, Ireland, Italy, Lithuania, Latvia, Poland, Czech Rep., Slovakia and Sweden.

⁷¹ Nioche, 'Reglement', p. 287-288.

⁷² Nioche, 'Reglement', p. 288.

⁷³ Nioche, 'Reglement', p.288.

⁷⁴ A.M. Arkuszewska, 'Zaskarżanie orzeczeń i zarządzeń wydanych w europejskim postępowaniu w sprawie drobnych roszczeń', *Europejski Przegląd Sądowy* 8 (2001): 11-23, p. 12.

⁷⁵ Ibid., p. 11.

Regulation. Firstly, if the claim form or summons to an oral hearing were served on the defendant without proof of receipt, and service was not effected early enough to allow the defendant to arrange their defence, and this happened without any fault on their side. Secondly, if the defendant could not object to the claim by reason of a *force majeure* or other extraordinary circumstances, again without any fault on their part. The defendant must 'act promptly' in order to exercise this right. If a court agrees with the defendant's petition for review, it sets aside the judgment, making it null and void. Otherwise, the judgment remains in force.

The review procedure is a minimum standard which must be allowed in any Member State, even those which do not allow for ordinary appellate proceedings.⁷⁶

However, if such proceedings are provided for, the review may be absorbed by a national form of challenging the judgment,⁷⁷ such as the appeal (*apello*) in Italy,⁷⁸ the restitution of deadline (*przywrócenie terminu*) in Poland,⁷⁹ or the opposition (*l'opposition*) in France.⁸⁰ In Spain, the review is subsumed either by the appeal (if the deadline had not passed) or by other proceedings (if the deadline for an appeal had expired), namely defence of nullity, request for annulment, and petition for revision.⁸¹

3.4.6 Phase VI: Recognition and enforcement

Judgments pronounced in ESCP proceedings are enforceable directly, regardless of any appeal, and throughout the EU without the need for a declaration of enforceability or any possibility of opposing its recognition (Articles 15(1), 20(2)). In particular, there is no need to obtain a so-called '*exequatur*', that is a decision of a national court declaring the judgment to be enforceable in that country.⁸² It should be noted that the formula with regard to enforceability and recognition of ESCP judgments is identical to that used in the Regulations on the European Enforcement Order and the European Order for Payment.⁸³ However, with regard to the EEO, for recognition and enforceability across the EU it is necessary that the order be enforceable in the country of origin, and the EOP Regulation refers, as to formal conditions of enforceability, to the law of the state of origin; in contrast, the ESCP Regulation, for the first time for an EU civil justice measure, provides for fully autonomous and uniform criteria of enforceability, not referring in this respect to domestic civil procedures.⁸⁴

Enforcement proceedings are governed by the national law of the Member State where enforcement takes place (Article 21(1)). Such procedures differ considerably.⁸⁵

However, the Regulation contains a limited set of rules. It lays down what kind of documents the party seeking enforcement must produce, that is, a copy of the judgment as well as a copy of the certificate, and if necessary its translation (Article 21(2)). Member States may also accept certificates issued in other languages, but this is not obligatory (Article 21(2)(b)).

⁷⁶ Scarafoni, 'Il regolamento...', p. 626.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Arkuszewska, 'Zaskarżanie', p. 20-23.

⁸⁰ Nioche, 'Reglement', p. 288.

⁸¹ Gomez Amigo, 'Droit espagnol', p. 293.

⁸² Nioche, 'Reglement', p. 289-290; Scarafoni, 'Il regolamento...', p. 623.

⁸³ Scarafoni, 'Il regolamento...', p. 623. See Art. 5 of Regulation 805/2004 and Art. 19 Reg. No. 1896/2006.

⁸⁴ Scarafoni, 'Il regolamento...', p. 623-624.

⁸⁵ X.A. Kramer, '[Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure](#)', *International Journal of Procedural Law* 2 (2011): 202-230, p. 228.

The Regulation also stipulates that Member States may not require that the party seeking enforcement establish a representative in the state of enforcement or have a postal address there or establish any form of security, bond or deposit on account of the fact that they are not domiciled or resident in the state of enforcement (Article 21(3)-(4)).

The Regulation also lays down provisions on refusal, stay or limitation of enforcement. A national court may refuse enforcement if the judgment given in the ESCP procedure 'is irreconcilable' with an earlier judgment which was pronounced between the same parties and involved the same cause of action, was given in the state of enforcement or can be recognised in that state, and the irreconcilability was not and could not have been raised as a defence in the state in which the ESCP took place (Article 22(1)).

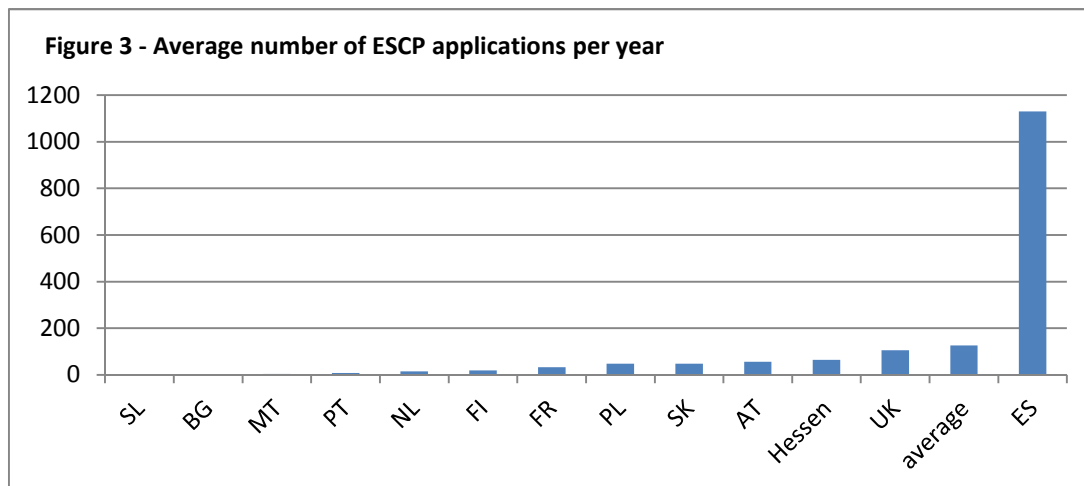
The Regulation explicitly prohibits the state of enforcement from reviewing the judgment as to its merits (Article 22(2)).

The unsuccessful party has the possibility of requesting the court competent for enforcement to limit the enforcement to protective measures only, or to make enforcement conditional on provision of security by the successful party, or, in exceptional situations, to demand that the enforcement be stayed (suspended) until the appeal is decided (Article 23). Such a request may be filed by the unsuccessful party only if that party has actually challenged the judgment in question, or has a right to challenge that judgment and the deadline for challenging it has not yet expired. It is for national procedural rules to lay down details of this procedure and specify the competent authorities.

4. Functioning of the ESCP in practice

4.1 Number of applications

The ESCP procedure has not been a success story. According to available statistical data (see figure 3 below), the number of ESCP applications filed in the Member States has been very low, with a yearly average of only 118 per Member State.⁸⁶ Apart from Spain, where the average yearly number of applications exceeds 1 000, in the remaining Member States for which data were available, the figure has been below 100, with as few as three applications per year in Bulgaria, eight in Portugal and 15 in the Netherlands.



Data source: see annex 2.

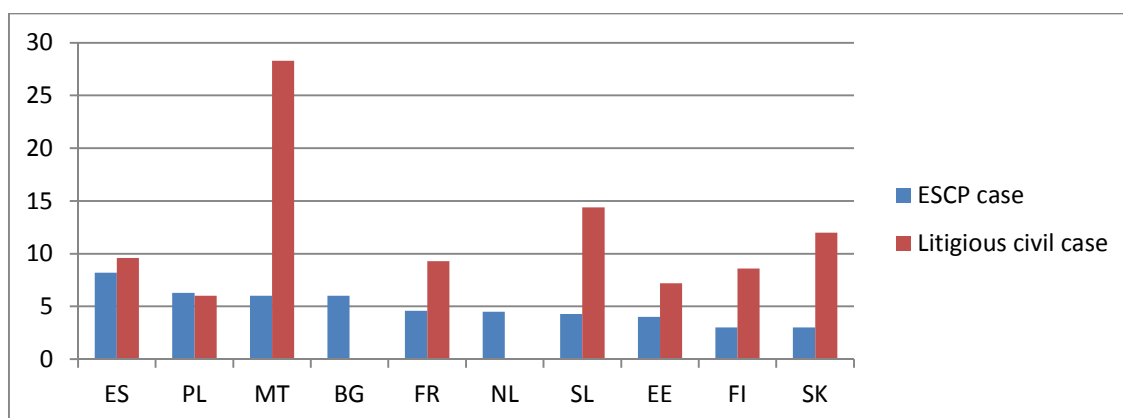
⁸⁶ Calculated on the basis of data for 12 Member States, plus the German region of Hessen.

This patently low popularity of the ESCP procedure (when compared to the total number of litigious civil cases), is confirmed in a 2013 Special Eurobarometer survey on small claims.⁸⁷ Although among those EU consumers who had encountered problems with traders during the previous 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. In fact, 75% consumers have not heard of a national small claims procedure in their Member State, and 86% have not heard of the ESCP. Only 3% of citizens interviewed have used a national small claims procedure, and 1% has used the ESCP. On the other hand those few who did file an ESCP application were generally satisfied (67%).

4.2 Duration of proceedings

According to data available for nine Member States, the average duration of an ESCP procedure amounts to five months, with individual Member States' periods ranging from three months (Finland and Slovakia) to 8.2 months (Spain). In comparison to the average duration of litigious civil proceedings, the ESCP procedure is on average 2.4 times faster. The greatest difference between the duration of ESCP and ordinary civil litigious proceedings is in Slovakia (where ESCP is four times faster). Poland is the only country where the ESCP is slower than the average civil litigation.

Figure 4 - Average duration of ESCP litigation and ordinary civil litigation (in months)



Sources: *Deloitte study*, p. 31 on the basis of data collected by Deloitte in June 2013; Average duration of litigious civil cases in selected Member States according to CEPEJ study (2012, data for 2010), p. 184 (data adapted from days to months, whereby 1 month = 30 days); Data for Netherlands according to: Kramer, Xandra E. and Ontanu, Elena Alina, [The Functioning of the European Small Claims Procedure in the Netherlands: Normative and Empirical Reflections](#) (27 September 2013). *Nederlands Internationaal Privaatrecht* 2013(3), p. 322.

4.3 Evaluation of ESCP's functioning

The European Consumer Centres Network (ECC-Net) conducted an in-depth study of the actual functioning of the ESCP in the Member States, presented in a report in 2012.⁸⁸ The main problems identified by ECC-Net include a lack of awareness of the existence of ESCP among judges and consumers, high translation costs, lack of clear rules regarding the service of judgments on the defendant and the fact that rules on enforcement are not unified, but left to national laws.

A 2011 EP Policy Department Study⁸⁹ suggested that consumers wishing to bring a small claim may face several practical problems, such as difficulties in completing the

⁸⁷ [Special Eurobarometer 395](#) (2013).

⁸⁸ ECC-Net, [European Small Claims Procedure Report](#) (September 2012).

⁸⁹ Alleweldt (ed.), *Cross-Border...*

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 Member State. Finally, consumers are not fully aware that due to the numerous gaps in the ESCP Regulation, which are filled by national law, differences persist with regard to the costs and actual length of the proceedings.

From the point of view of the judiciary, practical difficulties have been identified with regard to the rules on jurisdiction.⁹⁰ Firstly, the system of jurisdiction under Brussels I 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 may be launched in different Member States.

4.4 Commission Practice guide

On 19 September 2013 the Commission published a *Practice guide for the application of the European Small Claims Procedure*.⁹¹ This 68-page publication explains the origins of the Regulation and its policy context, and contains practical explanations regarding its application. However, despite the fact that many important aspects of the ESCP are left to national law (e.g. court fees and method of their payment, competent courts, appellate proceedings), the *Practice guide* does not contain any information on those aspects, referring only to the European Judicial Atlas. The data submitted to the Atlas by national judicial authorities vary between Member States as regards level of detail, quality and is not always up-to-date; this considerably reduces the usefulness of the Commission's guide.

4.5 Views of citizens, stakeholders and experts

According to the 2013 Special Eurobarometer on small claims,⁹² EU consumers would be more willing to pursue small claims if they could rely on free legal assistance. Asked which factors would encourage them to go to court, respondents also mentioned written proceedings, lack of the need to appear in court in person, lack of the requirement to use a lawyer, the possibility of carrying out the proceedings online and cutting down on translation costs. These views must be placed in the broader context of EU citizens being largely unaware of the ESCP procedure (86%). Some of the aspects mentioned by citizens, such as the lack of obligatory presence at a hearing or the possibility of filing a case without a lawyer, have already been addressed in the existing legal framework. However, the two remaining aspects – the possibility of conducting the proceedings online and reducing translation costs remain an issue.

A number of recommendations have also been formulated by the European Consumer Centres Network. In particular, they call for the establishment of one or more central authorities competent for the ESCP in each Member State. 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

⁹⁰ Mellone, 'Legal Interoperability...', p. 4.

⁹¹ http://ec.europa.eu/justice/civil/files/small_claims_practice_guide_en.pdf.

⁹² Special Eurobarometer 395.

translation costs for consumers. Finally, they urge greater coordination between enforcement officers.

Academics have put forward further proposals for changes. Xandra Kramer proposed introducing an overall time limit for delivering a judgment, instead of the existing piecemeal limits which are capable of being extended.⁹³ 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. Being aware that the current regime of EU competences and political factors requiring the limitation of the ESCP only to cross-border cases, she nevertheless considers that 'this is highly undesirable from the viewpoint of coherence, transparency, legal certainty, and non-discrimination'.⁹⁴

Alina Ontanu and Ekaterina Pannebakker proposed 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.⁹⁵ Marie Nioche proposed that the standard form of the defendant's response should contain information that the claim may not exceed €2 000, so that defendants are aware of the possibility of pleading an appropriate defence.⁹⁶

5. Commission proposal to amend Regulation 861/2007

5.1 General matters

On 19 November 2013, the Commission presented a proposal for a regulation amending the ESCP Regulation,⁹⁷ together with a Report on the application of the ESCP Regulation.⁹⁸ The amendment would affect 12 of the Regulation's 29 articles, and add one new article. The proposal was accompanied by an impact assessment,⁹⁹ which has been subject to an initial appraisal¹⁰⁰ by the Ex-Ante Impact Assessment Unit of EPRS. The impact assessment identified three main problems arising in the application of the Regulation: firstly, narrow scope due to the low monetary threshold and narrowly conceived cross-border element; secondly, high costs and lengthiness of litigation, as well as lack of transparency and practical assistance for litigants; thirdly, limited

⁹³ X.E. Kramer, '[A Major Step in the Harmonisation of Procedural Law in Europe: The European Small Claims Procedure Accomplishments, New Features and Some Fundamental Questions of European Harmonization](#)' (September 2007), p. 268, 270, 274; idem, 'The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation', in: *ZEUP* 2 (2008): 355-373, p. 368-372.

⁹⁴ Kramer, 'Cross-Border Enforcement in the EU...', p. 228.

⁹⁵ E.A. Ontanu, E. Pannebakker, '[Tackling Language Obstacles In Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach](#)', *Erasmus Law Review*, 5.3 (2012): 169-186.

⁹⁶ Nioche, 'Reglement', p. 285.

⁹⁷ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, COM(2013) 794 final, inter-institutional file [2013/0403\(COD\)](#).

⁹⁸ Report from the Commission...

⁹⁹ [Impact Assessment](#) (SWD (2013) 459).

¹⁰⁰ A. Maniaki-Griva, '[Initial Appraisal of a European Commission Impact Assessment: European Small Claims Procedure](#)', 31 March 2014, document no. PE 514.109.

awareness of the existence of ESCP among litigants and courts alike. The impact assessment analysed four hypothetical options for remedying the problems identified: firstly, not to do anything; secondly, to repeal the Regulation altogether; thirdly, to revise the Regulation; and fourthly, to harmonise national small claims procedures through a Directive.

In considering the possible options, the impact assessment quoted very detailed monetary values, derived from a study prepared for the Commission by Deloitte. For instance, the cost of installing tele-conference equipment was indicated at €500 per court and the cost of installing credit/debit card payment systems for court fee at €14 400 per territorial authority.

However, as Alexia Maniaki-Griva points out, 'no information is provided within the [impact assessment] itself on how these estimations of costs and savings were calculated, making it impossible to assess their reliability and representativeness.'¹⁰¹ She added that 'the figures in the [impact assessment] are simply taken from the Deloitte study and provided without any explanation as to the reasoning and calculations behind them. Merely referring to the supporting study, without even including it in the annexes, compromises the reader's ability to understand and assess the reliability of the information provided in the [impact assessment]. The fact that the numbers provided are extremely, if not surprisingly, precise, would suggest that an explanation should have been provided in the core text itself.'¹⁰² Another question is the method of calculation used in the Deloitte study itself, which is often based on the extrapolation of statistical data available in Eurobarometer surveys, rather than in-depth empirical fieldwork. Leaving aside the quality of the Commission's impact assessment and the underlying study prepared by its external contractor, the following paragraphs address the legal content of the Commission proposal and comparison it with the existing framework.

5.2 Changes to criteria of applicability

5.2.1 Cross-border character of the claim

A major amendment is foreseen with regard to the scope of the Regulation. Whilst currently the ESCP is available only exceptionally – if the requirement of a 'cross-border case' is fulfilled – under the new rules the ESCP would be available as a matter of principle, and excluded as a matter of exception. Currently, for the ESCP to apply it is necessary that at least one litigant have their domicile or habitual residence outside the Member State where the competent court has its seat. Under the proposal, the ESCP would *not* be available *only if* five relevant connecting factors, enumerated in the regulation, point to the same Member State. These connecting factors would include: (1) domicile or habitual residence of the parties, (2) place of performance of the contract, (3) place where the facts giving rise to the claim took place, (4) place of enforcement of the judgment, and (5) the court having jurisdiction. Conversely, if at least one of those connecting factors points to a different Member State, the Regulation would be applicable, even if four other connecting factors point to the same state. Furthermore, the proposal uses the expression 'where relevant', which means that if one of the factors is not relevant (for instance, there was no contract between the parties) it should not be taken into account.

The practical consequences of this change would be significant. Currently, if, for instance, a French resident wants to take another French resident to court, they may

¹⁰¹ A. Maniaki-Griva, op.cit., p. 5.

¹⁰² A. Maniaki-Griva, op.cit., p. 6.

not use the ESCP, unless a court outside France is competent. Even if this were the case, a French consumer would have to bring a case abroad in order to be able to use the ESCP, which would not be convenient. Under the proposal, the ESCP would be applicable between two French litigants before a French court if, for instance the contract was performed outside France (e.g. a dispute over a tourist package holiday to Greece). Similarly, the ESCP could be used by residents of the same country before their country's court if the fact giving rise to the claim occurred in a different Member State (for instance, if a Polish consumer, who bought a car from a Polish trader, wished to sue the trader before a Polish court due to the car breaking down in Croatia). The ESCP would also be applicable if the judgment were to be enforced in a different Member State (for instance, if an English creditor sues an English debtor under a contract performed in the UK, before an English court, but the creditor knows that the debtor has a bank account in Luxembourg and plans to enforce the judgment in the Grand Duchy). In sum, the scope of application of the ESCP would expand greatly, partly following the views of those experts and stakeholders who have been advocating its applicability in purely domestic cases. Nevertheless, the necessity of at least one foreign connecting factor would remain.

5.2.2 Value of the claim

The threshold would rise from €2 000 to €10 000. However, the method for calculation of the value of claims expressed in other currencies would still be left to national laws, which means this could be different in different Member States and claims on the borderline of the threshold might be admissible in some states, but inadmissible in others.

5.3 Changes to general features of the procedure

5.3.1 Fees, costs and expenses

The Commission proposal would bring more harmonisation in this respect (article 15a). First of all, the maximum fee would not be allowed to exceed 10% of the value of the claim (excluding interest, expenses and disbursements). Secondly, if Member States wish to have a minimum fee (in order to deter frivolous litigants), that minimum fee would not be allowed to exceed €35. As to methods of payment, all Member States would be obliged to accept payment by bank transfer, and online payments both by credit and debit cards. The same rules would apply to fees for launching an appeal, if this is allowed by national procedural law.

5.3.2 Assistance to the parties

Currently, the Regulation provides that the claim form (Form A) 'must be available' in all courts at which the ESCP can be launched but it does not specify whether the form should be available on paper, in electronic version, or both. Under the proposal, Form A would have to be available in paper form at all courts where the ESCP can be launched, as well as in electronic form on the websites of those courts or of a central authority.

Whilst the text of the Regulation currently in force requires the Member State to ensure that parties can receive practical assistance in filling in the ESCP forms (Article 11) the Commission proposal would make that duty more concrete. Assistance would in particular allow parties to ascertain whether the ESCP is available at all, to determine which court is competent, to calculate the interest due from the defendant and to identify any documents that should be attached to the claim form. Furthermore, information on where assistance can be sought (organisations, authorities) would have

to be available in paper form in courts, and in electronic form on their websites or on the website of a central authority.

5.3.3 *Linguistic regime*

Despite proposals from academic experts urging the introduction of greater multilingualism to the ESCP, the current linguistic regime of the Regulation, whereby it is up to each state to decide on the admissible languages in the actual procedure, has not been changed in the proposal. However, the linguistic regime of enforcement proceedings would be affected: the designation of a different EU official language, accepted by the Member State for purposes of enforcement, would now be obligatory, not optional as it is now (Article 21(2)(b)).

5.3.4 *Service of documents*

Currently, the Regulation provides that all documents in the ESCP must be sent by postal service with acknowledgment of receipt. Only if such a form of sending is unavailable, is it possible to use the methods of service provided for in Articles 13-14 of the European Enforcement Order Regulation.¹⁰³ The latter include various methods, both with the debtor's acknowledgment of receipt and without it. Service by electronic means with an automatic confirmation of delivery is allowed only if the debtor has agreed to this method earlier.

The Commission proposal would create two separate regimes of service, one, 'heavier', for the two most important documents from the point of view of protecting the rights of the defendant (i.e. Form C informing the defendant of the claim, and the text of the court's judgment), and a second 'lighter' regime of service for all other written communication between the court and the parties. Under the heavier regime, documents would have to be sent either by postal service with acknowledgment of receipt, or by electronic form, also with acknowledgment of receipt. However, just like under the current rules, the electronic form would be allowed only if the party had expressly allowed this. If neither service by post, nor by electronic means is available, the court would have to use the means provided for in the European Order for Payment Regulation,¹⁰⁴ which are identical to the methods prescribed by the European Enforcement Order Regulation.

Under the 'lighter' regime of service, an electronic form would be obligatory, provided that they are allowed by national procedural law and that the party agrees to this form. The proposal does not specify which national procedural law should be taken into account – that of the seat of the competent court, that of the addressee's domicile or habitual residence, or both. It seems that if the electronic form is unavailable, either because the relevant procedural law does not allow it, or because the party does not consent to its use, the 'heavier' regime would apply also to other documents. Furthermore, the rule does not specify what form of communication should be used if the party does not consent to electronic means of communication. It seems that in line with the general fall-back clause, it would be for national procedural law to decide this issue. However, the proposal could have been more explicit in that regard.

Another issue which could have been drafted in less ambiguous terms is the 'unavailability' of service by post with acknowledgment of receipt. This could either

¹⁰³ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

¹⁰⁴ Art. 13 and 14 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

mean physical unavailability, i.e. that a party lives in a place where no postal services are offered, or legal unavailability, i.e. that under the applicable national procedural law this form of service is not allowed (for instance, only service by a court clerk or enforcement officer is recognised).

5.4 Changes to the course of the ESCP proceedings

5.4.1 Phase I: Commencement of proceedings

Currently, the Regulation does not expressly provide that a claimant, whose claim was held to be clearly unfounded or inadmissible, or who failed to complete or rectify their claim (Article 4(4)) must be informed by the court that their claim was dismissed. In line with the general rule of Article 19, it has been left to national law. Under the proposal, the court would be under a duty explicitly to inform the claimant of the dismissal.

5.4.2 Phase III: Analysis of the merits

Currently, the Regulation provides that a court may hold an oral hearing if it 'considers this to be necessary'. The Commission proposal would make this criterion more specific by providing that a court may organise a hearing only if 'it considers that *it is not possible* to render the judgment on the basis of the written evidence submitted by the parties'. Thus, only the actual impossibility of deciding the case without an oral hearing would justify the court's decision to hold one.

Furthermore, under the current rules, if a party requests a hearing, the court may refuse such a request if it considers that oral proceedings are not necessary for the fairness of the proceedings. Under the proposal, the court would not be allowed to refuse if the value of the claim exceeded €2 000 or if both parties indicate their willingness to reach an in-court settlement and they request a hearing to be held for that purpose. Although this is not explicit in the proposal, it seems that *both* parties would have to file a request for a hearing, indicating clearly the purpose of such a hearing. Otherwise, the court could still refuse the request. Nevertheless, this is an issue which could have been drafted in less ambiguous terms.

If a party requests a hearing, and the court refuses, that party may not – under the current rules – contest that refusal 'separately' (e.g. by filing an interlocutory appeal). The proposal would develop this by providing that the refusal 'may not be contested separately *from any challenge of the judgment itself*.' It seems that the amendment explicitly states what is already inherent in the rule currently in force, making it more transparent. In practice the rule means that the court's decision not to hold a hearing may be challenged only by way of an appeal (on the merits) against the entire judgment and not by way of an interlocutory appeal (on procedural issues).

Under the rules currently in force, holding a videoconference hearing is never obligatory, and its availability depends on the technical conditions at the court; and even if the court has the technical means, it still may decide to hold a traditional off-line hearing, with the parties present in person in the courtroom. The proposal would change this. If the party to be heard is domiciled in a Member State other than the one in which the court is seated, an oral hearing by way of videoconference, teleconference or other communication technology would become mandatory. The rule is formulated in a categorical way ('*shall* be held'), and therefore it should be assumed that in such cases the court would actually be prevented from demanding that the party domiciled in a different Member State come to appear in person before the court. Nevertheless, a traditional off-line hearing would still not be excluded, but the initiative to hold one would be vested in the party residing abroad, and not in the court. A practical

consequence of this rule would be that the Member States would have to ensure the technical availability of videoconference equipment at courts having jurisdiction in the ESCP procedure.

Apart from introducing videoconference technology with regard to the hearing, the proposal also aims at increasing its use in the taking of evidence (including outside hearings). The rules currently in force allow the taking of evidence by on-line means as an option, subject to technical possibility (Article 9(1)). The proposal goes farther, and provides that if taking of evidence requires a person (i.e. a party, witness or expert) to be heard, the rules on having an on-line hearing (Article 8) would apply. This means that in practice an on-line hearing would become the rule. It can be inferred therefrom that only litigants could require to be heard in person, although the proposal could have been more explicit on this important aspect.

Finally, the presumption against taking oral testimony would be considerably strengthened. Whilst a court may take such evidence now 'only if it is *necessary* for giving the judgment', the proposal would allow it 'only if it is *not possible to render the judgment* on the basis of the evidence submitted by the parties' (Article 9(2)).

5.4.3 Phase V: Control of the decision

Likewise, the proposal would not, in principle, affect the position of the Regulation with regard to appeals: they would remain governed entirely by national law, which will continue to determine whether challenging an ESCP judgment is allowed, and if yes, specify the forms of appeal and lay down procedural details. Therefore, considerable diversity among the Member States would remain in that regard.

However, the Commission proposal would bring about certain modifications of the review proceedings (Article 18) which are the only form of challenging an ESCP judgment governed directly by the Regulation. First of all, only a defendant who did not enter an appearance in court would be entitled to file a review.

Of the two current alternative conditions for filing a petition for review, the second one (defendant's incapability to contest the claim on account of *force majeure* or extraordinary circumstances) would not be affected, but the first (defendant's incapability to arrange for defence due to defects of service) would be modified. Under the Commission proposal, a defendant would be entitled to request a review of an ESCP judgment simply by proving that 'he was not served with the claim form in sufficient time and in such a way as to enable him to arrange for his defence'. Such a modification would not only simplify the law, but also make it more flexible, allowing defendants to invoke a broader scope of circumstances than they are allowed now.

A further change to review proceedings would affect the deadline for initiating the review. Currently, the deadline for that is set by reference to a standard: the defendant must 'act promptly'. It is therefore left to the judge's discretion to evaluate what 'promptly' exactly means in a given case, and obviously different judges could reach very different results, making the outcome unpredictable. The proposal would replace this standard by a rule, laying down a precise time limit of 30 days, calculated from the day on which the defendant had been effectively made aware of the contents of the judgment and been able to react. In any event the deadline would run, at the latest, from the moment when enforcement proceedings affected the defendant's property, even if they had not yet learnt about the judgment at that moment. The switch from standard to rule would certainly increase legal certainty both for claimants and defendants, and increase predictability of outcomes.

However, the Commission proposal would still leave the detailed rules on calculating the deadline to national law (e.g. with regard to dealing with holidays, exceptional circumstances etc.), stipulating that in any event national law may not grant defendants any extension of the deadline 'on account of distance' (Article 18(2)), but it is not clear what distance is meant.

Whereas switching from standard to rule with regard to the time limit for filing a petition for review would contribute to legal certainty, leaving the details of computation of time to national law could undermine this aim. This is especially so given that defendants, who need to observe the deadline in question, will not easily know the rules on computation of time prescribed by the law of the Member State in which the court which pronounced an ESCP judgment has its seat. The Commission proposal has not, therefore, followed the model of the Common European Sales Law, where a rule on computation of time was introduced.¹⁰⁵

5.4.4 Phase VI: Recognition and enforcement

The recognition and enforcement phase of the ESCP procedure would be affected only minimally. Whereas now the successful party seeking enforcement must produce, where necessary, a translation of the entire special certificate accompanying the judgment, under the proposal it would have to provide only the translation of the 'substance of the judgment indicated in point 4.3 of the certificate'.

6. Outlook: from failure to success story?

A question that needs to be answered within the framework of the legislative process concerning the Commission's proposal for amendment is whether the weaknesses of ESCP, which have led to its failure in terms of actual use, are sufficiently addressed, making it possible to turn the procedure's failure into a success. It seems that three key issues, vital to achieving this, have been addressed: firstly, raising the threshold from €2 000 to €10 000 will make the procedure available in many more cases than up until now, making the ESCP an option viable not only for consumers, but also traders.¹⁰⁶ Whereas currently consumers initiated 588 000 cross-border consumer cases of a value of below €2 000 and businesses 129 700 of cases within that threshold, increasing the threshold of the ESCP to €10 000 would make it potentially available for 84 000 additional cases initiated by consumers and 208 700 more cases initiated by businesses. In fact, according to the Commission, 30% of traders' claims are between €2 000 and €10 000.¹⁰⁷

Furthermore, owing to the fact that most consumer claims fall safely below the new threshold of €10 000, legal uncertainty, arising in borderline cases on account of exchange rates, would be reduced. The increase of the threshold might also increase the popularity of the ESCP in new types of cases, especially small business-to-business disputes, which are more frequent than consumer disputes in the €2 000-€10 000 span.

¹⁰⁵ Article 11 of the proposal for a Common European Sales Law, COM(2011)635 final. The EP, in its Legislative Resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)635 – C7-0329/2011 – 2011/0284(COD)), has retained the rule, introducing only minor amendments.

¹⁰⁶ X.E. Kramer, E.A. Ontanu, 'The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections', *Nederlands Internationaal Privaatrecht* 3 (2013): 319-328, p. 328.

¹⁰⁷ Commission Impact Assessment, p. 6.

Secondly, expanding the scope of the ESCP by considerably liberalising the cross-border requirement will make it more widely available, including in cases when the court and both parties are in the same Member State, but the contract has a connection with a different state. Thirdly, the introduction of a cap on the fee (10% of the value of the claim), and a cap on the minimum fee (€35) could help popularise the ESCP in those countries, which have hitherto charged a fee equivalent to as much as 50% of the claim's value. Finally, greater emphasis on the use of distance communication means, in particular videoconference, for hearing witnesses or even holding a hearing, would certainly contribute to greater efficiency in cross-border disputes.

However, the Commission proposal does not reduce the diversity of the 'national variants' of the ESCP across the Member States, especially with regard to jurisdiction, linguistic regime (save for enforcement), forms of appeal, rules on evidence and on computation of time, and details of enforcement proceedings. These enduring differences will continue to pose obstacles for cross-border enforcement of claims.

Despite the possibility of using standard forms and certain common provisions, the claimant will still need to identify the competent court according to foreign law, file the claim and give evidence in a foreign language (or resort to expensive translation services), as well as ensure compliance with foreign rules on service of documents and taking of evidence. Finally, the great diversity of national rules regarding appeals will, most probably, require in practice resorting to the services of a foreign lawyer at this stage of the procedure, even if technically that is not a legal requirement. One could hypothesise that reducing legal diversity with regard to these aspects by addressing them in uniform rules within the Regulation would contribute to making the ESCP a truly 'autonomous' civil procedure, less dependent on background rules of national civil procedure, and therefore more predictable to litigants contemplating filing a claim abroad. Finally, regardless whether a claim is pursued by way of the ESCP or on the standard track, and whether this happens in the claimant's country or abroad, diversity of national enforcement procedures (despite the abolition of *exequatur*) remains a considerable bottleneck, deterring creditors from enforcing cross-border claims.¹⁰⁸

In sum, it seems that whereas the amendments proposed by the Commission are capable of raising the attractiveness of the ESCP procedure from the perspective of a claimant filing a case in their own Member State, this need not be the case from the perspective of claimants who, due to rules on jurisdiction, will have to file their claim in a foreign court. This is because the ratio of Europeanised aspects of the procedure to aspects left to national law, in particular with regard to language of proceedings, service of documents, evidence law and appellate proceedings, is not necessary sufficient to make the ESCP significantly more accessible than foreign civil proceedings in general. However, the relaxation of the requirement of a cross-border character, and in particular the possibility that both parties and the court are located in the same country, could be a factor increasing the popularity of the ESCP, especially if enforcement also takes place in the same Member State, thereby removing the language barrier. The added value of the use of ESCP in cases where the cross-border element is reduced to a minimum would be that courts and litigants would be able to gain necessary experience in using the ESCP, which would encourage them to make greater use of it in 'truly' cross-border cases. '

¹⁰⁸ X.E. Kramer, E.A. Ontanu, 'The functioning...', p. 327.

Annex 1. Synoptic table of current Regulation and Commission proposal for amendment

		Current law (Regulation No 861/2007)	Commission proposal 2013/0403(COD)
Scope of ESCP	Threshold in €	€2 000	€10 000
	Cross-border element requirement	One litigant must be resident/domiciled in a different Member State (MS) than that in which the court has its seat	At least one of five connecting factors must point to different MS (the factors are: (1) domicile of the parties, (2) place of performance of the contract, (3) place of facts on which claim is based, (4) place of enforcement of judgment, (5) seat of court)
Court fees	Maximum fee	No limit	10% of the value of the claim
	Maximum value of minimum fee	No limit	€35
	Methods of paying	No rules	MS must accept bank transfers and online payments by credit/debit cards
Service of documents, hearing and taking of evidence	Service of procedural documents	In principle, all documents must be delivered by post, with confirmation of receipt. Electronic delivery allowed only if addressee agrees beforehand. If delivery by post or electronic means is impossible, rule on delivery of the European Enforcement Order Regulation apply (with or without receipt)	Form C (information about claim) and form D (judgment) must be sent by post with confirmation of receipt or, if available and parties agreed to it, by electronic means. Other documents may be sent by electronic means with confirmation of receipt, if addressee agrees beforehand. Otherwise, they must be delivered by post with confirmation of receipt. If delivery by post or electronic means is impossible, rule on delivery of the European Order for Payment Regulation apply (with or without receipt)
	Oral hearing ordered by court	A court may hold a hearing if it considers it necessary	A court may hold a hearing if it considers that it is impossible to render the judgment on the basis only of written evidence
	Oral hearing requested by party	Court may refuse party request if it considers that oral hearing is <i>obviously</i> not necessary for a fair trial	Court may refuse party request if it considers that oral hearing is not necessary for a fair trial (also if not obvious). Court may not refuse party request if: (1) claim exceeds € 2,000, or (2) if litigants want to reach an in-court settlement during hearing
	Possibility of on-line hearing	On-line oral hearing as an option subject to technical possibility	On-line oral hearing as obligatory form of hearing if party to be heard is domiciled in another Member State, but court must hear a party off-line, if party makes such a request.
	Possibility of on-line taking of evidence	Option subject to technical possibility	If taking of evidence implies that a person must be heard, the form of on-line hearing is obligatory, but a party may request to appear in person.
Review and enforcement	When review may be sought	Defendant may bring a petition for review if the claim form or summons to hearing were served without proof of receipt <i>and</i> service was not done in sufficient time to enable him to arrange for his defences, without any fault on defendant's part.	Defendant may bring a petition for review if they were not served with the claim form in sufficient time and in a such a way as to arrange for their defence
	Deadline for requesting review	Not specified	30-day deadline
	Languages accepted in enforcement proceedings	Each MS <i>may</i> indicate the official language or languages of the EU institutions other than its own which it will accept in enforcement proceedings	Each MS <i>shall</i> indicate at least one official language of the EU institutions other than its own which it will accept in enforcement proceedings

Annex 2. Number of ESCP applications per year in selected Member States

	ESCP claims					Domestic small claims	All litigious civil claims in first instance courts
	2009	2010	2011	2012	Average per year	2010	2010
Austria	total of 222				56	no data	112 772
Bulgaria	no data	no data	no data	3	3	no data	no data
Finland	12	7	9	46	19	no data	10 845
France	3	27	49	54	33	no data	1 793 299
Hessen (German Land)	no data	34	76	83	64	no data	96 865
Malta	1	3	8	3	4	no data	4 994
Netherlands	10-20	10-20	no data	no data	15	no data	no data
Poland	total of 193				48	no data	819 861
Portugal	no data	3	6	15	8	no data	314 317
Slovakia	total of 190				48	no data	126 087
Slovenia	4	1	2	2	2	no data	37 652
Spain	no data	1 678	666	1 047	1 130	no data	1 940 277
United Kingdom (England, Wales, Scotland)	233 (2009-10); total of 526				105	127,495	1 737 741
Yearly average for the 12 Member States above					123	---	4 421 198

Sources of data: Deloitte, Analysis..., p. 66-67, unless otherwise indicated. Number of litigious civil claims according to: CEPEJ Report (2012), Appendix, Table 4. Number of ESCP applications for France in 2010 amounts to 36 according to Alleweldt et al., *Cross-Border ADR...*, p. 55. Number of litigious civil cases in Hesse concerns only first instance cases before Amtsgerichte (county courts) of the Land Hessen. Source: [Statistisches Bundesamt, Fachserie 10, Reihe 1, Rechtspflege: Zivilgerichte \(2011\)](#). Number of ESCP application for Netherlands according to: Alleweldt et al., p. 55. Number of ESCP applications for UK 2009-2010 according to: Alleweldt et al., p. 55. Number of national small claims applications in UK according to: for England and Wales for 2010 (79,924), source: [Judicial and Court Statistics 2010](#), p. 26,11 added to figure for Scotland (2010/2011), source: [Statistical Bulletin: Crime and Justice Series: Civil Judicial Statistics Scotland, 2010-11](#) and for Northern Ireland [2010] (13,185), source: [Northern Ireland Courts and Tribunals Service, Judicial Statistics 2010](#), p. 14. Overall number of litigious civil cases for UK according to: For England and Wales: claims incoming to County courts in non-family cases ([Ministry of Justice, Judicial and Court Statistics 2010](#), p. 17; added to claims incoming in Sheriff Courts in Scotland (92,308) for 2010/2011, source: [Statistical Bulletin: Crime and Justice Series: Civil Judicial Statistics Scotland, 2010-11](#) [last accessed: 6/5/2014] To this I added figures for Northern Ireland concerning cases incoming to County Courts (ordinary civil bills, equity, ejectment, small claims) (28,797). The CEPEJ study (2012, with data for 2010) gives the figure of only 290,941 incoming litigious civil cases in England and Wales.

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The number of cross-border consumer transactions, especially those concluded on-line, is steadily growing. However, the individual value of such transactions remains relatively small, with almost half of not exceeding even €100. Such transactions sometimes lead to cross-border disputes of a low monetary value.

The European Small Claims Procedure (ESCP), a simplified and accelerated civil procedure, available only in cross-border cases, and for claims of up to €2 000 was introduced in 2008. An optional procedure, it does not replace similar national procedures, but coexists with them.

The procedure has so far been rarely used, with an average of approximately 100 applications a year per Member State. Various reasons have been identified, in particular lack of knowledge about the procedure, high costs of translation, absence of clear rules on the service of judgments, and the fact that rules on enforcement have not been unified, but are left to the Member States, undermining the aims of the procedure.

In 2013 the Commission proposed to amend the ESCP Regulation with view to increasing its attractiveness. Four key issues are addressed. Firstly, the threshold of a 'small' claim would be raised from €2 000 to €10 000. Secondly, the requirement of a 'cross-border' element would be considerably liberalised. Thirdly, there would be a maximum cap on court fees set at 10% of the value of the claim. Finally, the use of electronic payment methods and communication would be increased.

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