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### EU legislation in progress: Reform of the European Small Claims Procedure

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# Reform of the European Small Claims Procedure

## SUMMARY

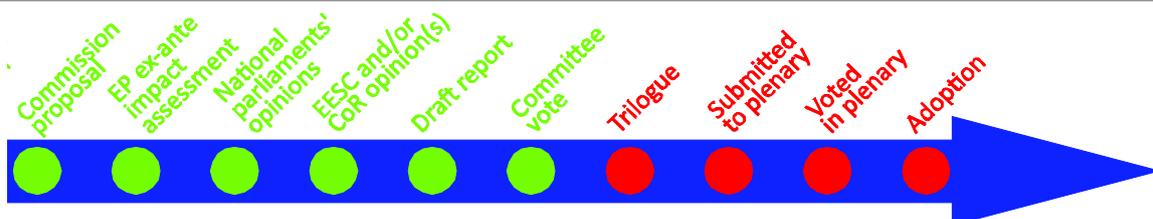
The European Small Claims Procedure (ESCP) became operational on 1 January 2009, as a special, EU-wide procedure available both to consumers and traders for pursuing cross-border claims within the Internal Market of a value not exceeding €2 000. During the first five years of its existence, however, the ESCP has been used only rarely.

In 2013, the Commission proposed to amend the ESCP Regulation, to raise the ceiling for claims to €10 000, expand the definition of a 'cross-border case', increase the use of electronic communication, introduce a ceiling on court fees (10% of the claim's value) and oblige Member States to accept payment of court fees in electronic form.

In April 2015, Parliament's Legal Affairs Committee adopted its report. It proposes to rename the procedure the 'European Simplified Procedure' and raise the ceiling for claims to €5 000 against natural persons, and €10 000 against legal persons. It is against weakening the cross-border requirement, but would allow claims under labour law and privacy law to be included in the regulation. The Committee would also lower the ceiling for court fees from 10% to 5% of the claim's value.

**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**

<i>Committee responsible:</i>	Legal Affairs (JURI)	COM(2013) 794 final of 19.11.2013
<i>Rapporteur:</i>	Lidia Geringer de Oedenberg (S&D, Poland)	<i>procedure ref.:</i> 2013/403(COD)
<i>Next steps expected:</i>	Trilogue discussions	Ordinary legislative procedure



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## Introduction

The European Small Claims Procedure (ESCP) became operational from 1 January 2009, as a special, EU-wide procedure available for pursuing cross-border claims within the Internal Market of up to €2 000. However, during the first five years of its existence, the ESCP has been used only rarely. According to available statistical data, the average number of claims pursued yearly, per Member State amounts to about 120. In many Member States, the number of claims filed is below 10 per year. Having evaluated the functioning of the ESCP through a consultation and by an external study, the Commission has put forward a proposal which is aimed at making the ESCP more widely available and more efficient.

## Existing situation

### *Scope of the ESCP*

Under the existing legislation, for a claim to be eligible to be pursued under the ESCP, it must meet a three-prong test:

- the **value** of the **claim** may not exceed €2 000 excluding all interest, expenses etc.
- the **claim must arise from private law** (it must have a 'civil or commercial' character), with the exclusion of: status or legal capacity of natural persons; matrimonial property rights, maintenance obligations, succession law; bankruptcy law; arbitration; employment law; tenancies of immovable property, except for monetary claims; and violation of privacy and other rights relating to personality,
- the claim must have a **cross-border character**, meaning that at least one of the parties must be domiciled in a different Member State than the one in which the competent court seised is located.

### *Fees*

Currently, the Regulation does not contain any rules on fees. As a consequence, many Member States charge disproportionately high fees on small claims, amounting, for example, to 50% of the value of the claim, or even exceeding the value of the claim altogether. Furthermore, some Member States do not accept payment of the court fee by electronic means such as credit card, or even require payment in person at the cash desk of the court or by way of buying fiscal stamps.

### *Use of electronic communications*

Currently, courts are not obliged to use electronic means of communication if they decide to hold a hearing. Parties and witnesses may therefore face the high costs of travel to a different country in order to give testimony regarding a small value claim.

### *Language regime*

The language regime of the procedure is left to the Member States. All countries conduct proceedings in their official language, and only a few countries accept the statement of claim in a different language.

### *Appeal*

Whether an appeal is available and under what circumstances, as well as how an appeal is decided upon is left to the Member States. Most countries provide for an appeal, although usually limit either its scope or availability in comparison to standard cases.

### *National small claims procedures*

A number of Member States have domestic small claims procedures, in particular the UK, Poland and Sweden. These procedures are widely used in practice, in contrast with the ESCP. The Regulation does not provide for any form of coordination with national procedures. Furthermore, the Regulation does not apply in domestic cases.

## **The changes the proposal would bring**

### *Scope of application*

The proposal would greatly enlarge the scope of application of the ESCP. First of all, **the maximum value of the claim would rise** from €2 000 to €10 000, arguably enabling more use of the procedure by SMEs, whose claims statistically often fall below the proposed ceiling of €10 000. Furthermore, **the cross-border filter would be relaxed**. Currently, only two connecting factors are taken into account – (1) the place of domicile of a litigant; and (2) the seat of the court. These must be located in two different Member States. The Commission would add three additional factors to be taken into account:

- the place of performance of the contract;
- the place where the facts giving rise to the claim took place;
- the place where the judgment is to be enforced.

It would then be sufficient for two of the five factors to point to different Member States for the procedure to be available.

### *Fees*

Whilst the issue of fees is currently left completely to the Member States, leading to difficulties for litigants, the Commission would introduce a **double cap on fees** of 10% and €35. Member States would not be allowed to charge a fee higher than 10% of the claim's value, and the maximum value of the minimum fee for particularly low claims would not be higher than €35. As regards the **methods for paying the court fee**, the Commission proposal would oblige the Member States to accept bank transfers, as well as online payments by credit and/or debit card.

### *Use of electronic means of communication*

The Commission proposal would make the use of electronic means of communication, such as videoconferencing, obligatory for hearings if a party is domiciled in a different Member State. On-line hearings would be obligatory whenever a party, witness or expert needed to be heard, although the person heard would still have the option to request being heard in person.

### *Written vs. oral procedure*

The principle of a written procedure, whereby no hearing (on-line or off-line) is organised would be strengthened. A court would hold a hearing only if it is impossible to decide a case without that (now it can hold it if it considers it 'necessary'). However, a party would still be able to request a hearing. A court would have to hold one, if the claim exceeds €2 000 or if the litigants want to opt for an in-court settlement.

### *Multilingualism*

The principle of multilingualism would be strengthened, in that each Member State would have to indicate at least one official EU language, other than its own official language, which it will accept for enforcement of small claims judgments.

### **Preparation of the proposal**

The legislative proposal was preceded by a [public consultation](#) held between March and June 2013. 14 entities submitted written replies, including consumer stakeholders (BEUC, ECCs), lawyers' representatives (Bar Council of England & Wales, ENCJ), as well as business organisations (Business Europe). Furthermore, 85 entities answered an [on-line questionnaire](#), including just two consumers who had been plaintiffs in the procedure and not a single person who had been a defendant in such a procedure. An [external expert study](#) on the functioning of the procedure was delivered to the Commission by Deloitte. In November 2013 the Commission published a [report](#) on the functioning of the procedure. The proposal was accompanied by an impact assessment, essentially based on the Deloitte study.

### **Parliament's starting position**

In its June 2013 [resolution on improving access to justice](#) [(2012/2101(INI)], issued before the tabling of the Commission proposal later that year, the Parliament pointed out that the ESCP is not well known, and 'will not achieve a high profile if the current information policy continues to be pursued'. It also pointed out that with regard to (digital) forms used in the ESCP their temporary and permanent 'storability' needs to be improved, so that the forms are equally visible in all languages, including on the website of the European Judicial Atlas in Civil Matters and on the European e-Justice Portal.

### **Stakeholders' views**

#### **Citizens' views**

According to the 2013 [Special Eurobarometer 395](#) on small claims, EU consumers would be more willing to pursue small claims if they could rely on free legal assistance. Asked what 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.

#### **European Consumer Centres Network (ECC Network)**

A number of recommendations have also been [formulated](#) by the ECC 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, based on consumer protection organisations providing information about the procedure, is needed. They recommend choosing one common language in which small claims can be pursued EU-wide, in order to reduce translation costs for consumers. Finally, they urge greater coordination between enforcement officers.

**Academic opinion**

For **Pablo Cortés**,<sup>1</sup> going to court should be the last resort in disputes of a small monetary value. Therefore, he has been advocating a closer linkage between the ESCP and alternative dispute resolution (ADR), as well as on-line dispute resolution (ODR). He points out that ADR and ODR have already been an effective tool for resolving small-value claims. In his view, litigants should first be encouraged to resort to ADR/ODR before they use the ESCP. He is critical of the limitation of the ESCP to cross-border cases only, the low monetary ceiling for claims and the limitation to disputed claims. Cortés advocates the use of ESCP for purely domestic disputes also, which, in his view, would be beneficial for those Member States which do not have small claims procedures and would remove the domestic limitations in those states where such procedures exist already.

In a recent (2015) **study for the JURI committee**,<sup>2</sup> Pablo Cortés developed these views and made concrete legislative recommendations allowing for a strong interconnection between ESCP and ADR/ODR. In particular, Cortés recommends that ESCP claimants should be asked, before the hearing, whether they have attempted ADR and should be encouraged to try it first. If parties have already reached an out-of-court agreement, the small claims court should simply approve it, without holding a hearing. Cortés believes that existing court-annexed domestic ADR schemes should be extended to cross-border disputes, and an important role in providing ADR services could be played by European Consumer Centres (ECCs). Finally, he sees the need to interconnect the ODR platform with ESCP.

**Xandra Kramer** proposed introducing an overall time limit for delivering a judgment, instead of the existing piecemeal limits which are capable of being extended.<sup>3</sup> 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.'<sup>4</sup>

**Alina Ontanu and Ekaterina Pannebakker** propose to modify the rules on the use of languages, so that any document to be sent to a court should be drawn up in the language of that court or translated into that language, whilst any document to be delivered to a defendant should be drawn up in a language known to the defendant, or an official language of that country.<sup>5</sup>

**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.<sup>6</sup>

**Advisory committees**

On 23 March 2014 the **European Economic and Social Committee** issued an opinion on the Commission proposal (rapporteur: Reine Claude Mader, France).<sup>7</sup> The Committee supported the higher ceiling of €10 000 but at the same time expressed some reservations. It criticised the cap on court fees of 10% as being set too high and pointed to the need to define the notion of 'costs of proceedings' in the regulation. As to the use of videoconferencing, the EESC pointed out that its use in small claims courts could be difficult and drew attention to issues of security and confidentiality. Pointing to Articles

47-48 of the [EU Charter of Fundamental Rights](#), the Committee stressed that parties should always have the right to use their official language for the entire procedure. Attention was also drawn to the need to provide effective assistance to parties (inter alia via the ECC network) and for the spread of information about the ESCP by universities, judicial training centres and courts.

### Parliamentary advice

The EPRS Members' Research Service prepared a [briefing](#) on the ESCP, presenting the existing legislation (October 2013, 4 pp.), followed by an [in-depth analysis](#) of the Commission's amendment proposal (November 2014, 34 pp.). In the meantime, the EPRS Ex-Ante Impact Assessment Unit prepared an [initial appraisal](#) of the Commission's impact assessment on the proposal (March 2014, 8 pp.). In January 2015, the EPRS Members' Research Service organised a [policy hub on the ESCP and its forthcoming reform](#) with the participation of Prof. **Xandra Kramer** and **Jacek Garstka** (DG Justice, European Commission). Policy Department C commissioned an [external study](#) on the Commission's proposal from Dr **Pablo Cortés**, which was presented at the [Civil Law and Justice Forum](#) (26.2.2015) and published as part of the Forum materials (February 2015, 30 pp.).

### Legislative process

#### Parliament: initials steps

The Commission proposal was published on 19 November 2013, and on 9 December it was referred to the Legal Affairs Committee which, on 20 January 2014, appointed Lidia Geringer de Oedenberg (S&D, Poland) as the rapporteur. In the current legislative term, Lidia Geringer de Oedenberg was reappointed rapporteur on 3 September 2014.<sup>8</sup>

#### Council

Within the Council, the Commission proposal was referred to the **Working Party on Civil Law Matters (Small Claims)** which examined the bill at regular meetings from February 2014. By November 2014, the working party [found](#) compromise solutions on a number of aspects. It was against the Commission's proposal to expand the definition of a cross-border claim, and therefore wants to maintain the current scope of the ESCP. It supported the obligation of Member States to offer at least one means of payment at distance for the payment of court fees, and the minimising of the translation requirement as regards the certificate for the enforcement of a judgment given in the ESCP. Finally, it supported making a bridge between the ESCP and the [European order for payment procedure](#) by allowing the claimant to use the European Small Claims procedure when a statement of opposition has been lodged against a European order for payment.

On its meeting on 4-5 December 2014, the Council reached agreement on a [general approach](#) on the Commission proposal which constitutes the basis for negotiations with the EP in order to hammer out the final text of the regulation. The Council would opt for elevating the ceiling for ESCP cases only to €4 000, instead of the €10 000 proposed by the Commission.

#### Report of the EP Legal Affairs Committee

##### *Draft report of 7 November 2014*

In the initial draft report presented to the Committee on 7 November 2014,<sup>9</sup> the rapporteur wanted to keep the ceiling for claims at €10 000, as proposed by the Commission. She proposed to enlarge the scope of the ESCP *ratione materiae* to claims

for violation of privacy and the right of personality. Court hearings should not be mandatory to reach a settlement, unless it cannot be reached by correspondence. The introduction of videoconferencing would be obligatory only two years after the amendment enters into force. Member States would be obliged to allow citizens with a very low income to use the ESCP for free; this income threshold would be determined at national level. The rapporteur proposed to raise the threshold above which a judge would be obliged to grant a request for an oral hearing from €2 000 (as proposed by the Commission) to €5 000.

*Final report of 16 April 2015*

On 16 April 2015 the Legal Affairs Committee adopted its report. JURI would rename the ESCP as '**European Simplified Procedure** for Claims of up to EUR 10 000'. The ceiling for claims would be raised to €5 000, for cases against natural persons, and to €10 000 against legal persons. Legal Affairs Committee Members argued that claims up to €10 000 are no longer 'small', and allowing such claims against natural persons in summary proceedings could be disproportionate in comparison to monthly minimum wages and would bring benefits only to legal persons.

JURI is against broadening the **definition of a cross-border claim**, and wants to retain the *status quo*. Members have argued that following the Commission's proposal to widen the definition could entail the risk of forum shopping which would run contrary to the aim of the Regulation.

As regards the ESCP's **ratione materiae**, JURI would include disputes under employment law, as well as disputes regarding violations of privacy rights relating to personality, including defamation. JURI points out that since disputes relating to personality rights are no longer excluded from the scope of Brussels I, neither should they be excluded from the ESCP. Legal Affairs Committee MEPs want to add a rule according to which the court *meriti*, if it dismisses a claim, should inform the claimant about possibilities of appeal against its decision.

As regards a **settlement**, JURI would allow reaching one without a court hearing. The mandatory introduction of **videoconferencing** technology by the Member States would be postponed by three years from the entry into force of the regulation. Member States would be obliged to make sure that courts which have jurisdiction to hear claims under the ESCP are equipped with appropriate devices.

A new rule proposed by JURI would allow parties to address **written questions** to witnesses, who would also provide written answers within a deadline set by the court. JURI would also introduce a rule whereby experts are appointed by the court, rather than by the parties, as civil procedure in some countries provides. Assistance to the parties, e.g. with filling out forms, should be provided free of charge.

With regard to **electronic means of communications**, JURI would add a rule whereby they must be of such a kind as to avoid abuse and preserve confidentiality. The use of electronic communications would be regulated by national law, and if such law prescribes them without the party's consent, such consent would not be obligatory (as under the Commission proposal).

The ceiling for court fees would be lowered from the 10% proposed by the Commission to 5%. Additionally, each Member State would have to set a minimum income threshold under which parties would be allowed to use the ESCP for free.

### Further steps

On 23 April 2015, the Committee report was tabled for plenary and the indicative plenary sitting date is forecast for September 2015. Lidia Geringer de Oedenberg, the rapporteur, received a mandate from the Legal Affairs Committee to start negotiations with the Council with view to seeking agreement at first reading. (Rule 70 RoP)

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### Endnotes

<sup>1</sup> J.P. Cortès Dieguez, '[Does the proposed European procedure enhance the resolution of small claims?](#)', *Civil Justice Quarterly* 27.1 (2008): 83-97.

<sup>2</sup> P. Cortés, '[The European Small Claims Procedure and the Commission proposal of 19 November 2013](#)' in U. Bux (ed.), *Cross-border activities in the EU: Making life easier for citizens*, Policy Department C study (2014): 249-269.

<sup>3</sup> 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; eadem, 'The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation', in: *ZEuP* 2 (2008): 355-373, p. 368-372.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> M. Nioche, 'Règlement (CE) N° 861/2007 du Parlement Européen et du Conseil du 11 juillet 2007 instituant une procédure européenne de règlement des petits litiges' in *Droit processuel civil de l'Union européenne*, ed. L. Cadiet et al. (Paris: LexisNexis, 2011), p. 285.

<sup>7</sup> [Opinion](#) of the EESC, INT/724, 25 March 2014.

<sup>8</sup> The shadow rapporteurs are: Daniel Buda (EPP, Romania); Sajjad Karim (ECR, UK); Viktor Uspaskich (ALDE, Lithuania), Kostas Chrysogonos (GUE/NGL, Greece) and Heidi Hautala (Greens/EFA, Finland).

<sup>9</sup> [PE 539.630](#).

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