

# ***Harmonisation of Procedures in Europe: the proposal for a European Small Claims Procedure***

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***Abstract: In this article the proposal for a European Small Claims Procedures is analyzed. Following the proposal for a European Order for Payment Procedure, this proposal introduces the second European harmonized procedure. It is concluded that the European Small Claims Procedure is an asset to international litigation, but it has some weak points. The Regulation is far from exhaustive and this could lead to different practices in the Member States. Further question are raised as to the threshold of € 2000,-, the consumer friendliness, and the cost effectiveness. Nevertheless it might result in a more effective and less expensive way of litigating small claims in international cases.***

## **I Introduction**

The unification and harmonisation of private international law, and more particularly international procedural law have been at the centre of interest in the European Union since the end of the 1990's. The Treaty of Amsterdam introduced the competence to enact regulations in the field of private international law and the well-known conclusions of the European Council of Tampere subsequently gave an important impulse to regulate international procedural issues.<sup>1</sup> This resulted in the establishment of many regulations within just a few years of time. All these regulations – and in particular Brussels I and II(b), the Insolvency Regulation, the Service Regulation and the Evidence Regulation – are typical private international law regulations. Their aim is to regulate and coordinate certain matters that arise in cross-border proceedings, such as the international jurisdiction and the recognition and enforcement.

Two more recent proposals go a step further than these traditional private international law regulations and aim at establishing a uniform European procedure. These are the proposals creating a European Order for Payment Procedure (March 2004; amended proposal February 2006)<sup>2</sup> and the proposal establishing a European Small Claims Procedure (March 2005)<sup>3</sup>. Though they are limited to cross-border cases and are available as an alternative besides the existing national procedures, they introduce the first genuine harmonized European procedures.

This article focuses on the proposal for a European Small Claims Procedure of 15th March 2005, and will take into consideration all important documents and agreed amendments since then.<sup>4</sup> On the 1<sup>st</sup> of June 2006 the Council reached a general agreement on the text of the Regulation and this brings its final establishment closer.<sup>5</sup> The (amended) recitals and the annexes (standard forms) are still under deliberation. In Section II attention will be paid to the harmonisation of procedures in Europe in general and with regard to small claims in particular. Section III is dedicated to the proposed European Small Claims Procedure. In Section IV some important aspects of the proposal will be evaluated.

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<sup>1</sup> Tampere European Council, 15<sup>th</sup> and 16<sup>th</sup> October 1999, Presidency conclusions, no 28-39.

<sup>2</sup> Commission, 19<sup>th</sup> March 2004, COM(2004)173 final, 2004/0055 (COD) and 25<sup>th</sup> May 2004, COM(2004)173 final/3; amended proposal Commission, 7<sup>th</sup> February 2006, COM(2006)57 final.

<sup>3</sup> Commission, 15<sup>th</sup> March 2005, COM(2005) 87 final.

<sup>4</sup> This article was finalised on 28<sup>th</sup> July 2006.

<sup>5</sup> Council of the European Union, 2732<sup>nd</sup> Council Meeting Justice and Home Affairs, Luxembourg, 1<sup>st</sup>-2<sup>nd</sup> June 2006, Press Release 9409/06 (Presse 144), 15-16.

## II Harmonisation of Procedures in Europe and Small Claims Procedures

### 1. Towards Harmonisation of Procedural Laws in Europe

In several respects civil procedural law has an even stronger national identity than substantive private law.<sup>6</sup> The *lex fori processus* rule indicates that a court will always apply its national procedural law, whereas the application of foreign private law as *lex causae* is generally accepted. Also in European law the point of departure is that the Member States possess procedural autonomy.<sup>7</sup> This means that, in the absence of community rules, every Member State applies its own procedural rules to effectuate community law. During the 1990's the ECJ, however, made some important exceptions to the procedural autonomy of the Member States. Procedural rules concerning the effectuation of community law must not be less favorable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.<sup>8</sup> Furthermore, in the context of the Brussels Convention (now Regulation) the ECJ ruled that, although national measures and procedures are in principle governed by national procedural law, the application of national procedural rules may not impair the effectiveness of the Convention.<sup>9</sup>

In the academic world the harmonization of procedural law in Europe had already received attention on a limited scale in the early 1990's. On the request of the European Commission, the Storme-Commission published its report containing proposals for uniform procedural rules in 1994.<sup>10</sup> This ambitious project hardly received attention, mainly due to lack of political interest.

This, however, rapidly changed towards the end of the 1990's, when the Treaty of Amsterdam was established and the Conclusions of Tampere emphasized the need to improve access to justice, the mutual recognition of judicial decisions and greater convergence in civil law, amongst others by preparing new procedural legislation in cross-border cases. Since then the codification and harmonization of (international) procedural law have been a priority on the Brussels agenda.

An important step in the implementation of the conclusions of Tampere and the subsequent Programme of Mutual Recognition<sup>11</sup> was the establishment of the Regulation for a European Enforcement Order for uncontested claims (in force since 2005). This Regulation, apart from abolishing the exequatur for uncontested claims, is also relevant within the context of harmonisation of procedures, since it establishes minimum requirements for the service, the provision of due information to the debtor about the claim and for review (see Art. 12-19). Another important step was the launching of the Green Paper on the European Order for Payment Procedure and Small Claims Litigation at the end of 2002.<sup>12</sup> This Green Paper resulted in the currently pending proposals for a European Order for Payment Procedure and the European Small Claims Procedure.<sup>13</sup>

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<sup>6</sup> See e.g. M. Storme, *Procedural Consequences of a Common Private Law for Europe*, in: A.S. Hartkamp (red.), *Towards a European civil Code*, Nijmegen: Ars Aequi Libri, 1994 (first edition), 87-99.

<sup>7</sup> ECJ 16<sup>th</sup> December 1976, C-33/76, *ECR* 1976, 1989 (*Rewe*) and C-45/76, I-765 (*Comet*); 14<sup>th</sup> December 1995, C-312/93, *ECR* 1995, I-4599 (*Peterbroeck*) and C-430/93 and C-431/93, *ECR* 1995, I-4705 (*Van Schijndel*). See also W. van Gerven, *Of rights, remedies and procedures*, *CMLR* 2000, 501-536.

<sup>8</sup> *Van Schijndel* (footnote 7). See C.N. Kakouris, *Do the Member States possess judicial procedural "autonomy"?*, *CMLR* 1997, 1389-1412.

<sup>9</sup> ECJ 15<sup>th</sup> May 1990, C-365/88, *ECR* 1990, I-1845 (*Hagen*); 27<sup>th</sup> April 2004, C-159/02, *ECR* 2004, I-3565 (*Turner*).

<sup>10</sup> M. Storme (ed.), *Rapprochement du Droit Judiciaire de L'Union européenne/Approximation of Judiciary Law in the European Union*, Dordrecht/Boston/London: Martinus Nijhoff Publishers 1994.

<sup>11</sup> Council, 30<sup>th</sup> November 2000, *OJ* 15<sup>th</sup> January 2001, 1.

<sup>12</sup> Commission, 20<sup>th</sup> December 2002, COM(2002)746 final.

<sup>13</sup> In this Green Paper the efforts of the Storme-Commission are also finally recognized, see p. 12 and p. 50.

## 2. Existing Small Claims Procedures in the Member States

Most Member States have introduced simplified procedures for small claims. The requirements however vary considerably and this is one of the reasons a harmonized European procedure has been proposed.<sup>14</sup> Below attention will be paid to some main features of procedures in England and Wales (that have a widely used small claims procedure), Germany (that has special rules for a simplified procedure in limited cases) and the Netherlands (that is mentioned by the Green Paper as one of the countries that do not have a special small claims procedure).

### a) England and Wales

In England and Wales the small claims procedure is in principle available for claims up to £ 5000 (around €7.300).<sup>15</sup> It plays an important role in practice and though primarily meant for consumers, businesses predominate as claimants.<sup>16</sup> The rules for the small claims track are provided in Part 27 of the Civil Procedure Rules (CPR). It is for the judge to decide whether or not the small claims track will be used. Some special cases, such as personal injury, will not be allocated to the small claims track (unless their value is less than £ 1000)<sup>17</sup>, whereas some simple cases with a value of more than £ 5000 will be permitted in case parties consent to it. The claim should not involve complicated issues of law or evidence. Parties are obliged to use standard forms for commencing the procedure, for the defence, for setting aside a default judgment and for appeal.<sup>18</sup> Also the court makes use of standard forms to notify parties that the case is allocated to the small claims track. Legal representation by a lawyer is not compulsory; court staff is able to assist parties in filling in the forms.<sup>19</sup> The rules differ substantially compared to those of ordinary proceedings. The rules concerning interim remedies, disclosure, evidence, settlement offers or payments and hearings do not apply.<sup>20</sup> The procedure is of an informal nature and the summarily reasoned decision will usually be given orally.<sup>21</sup> Appeals are allowed according to the general rules.<sup>22</sup> The possibility of recovery of the costs from the winning party is considerably restricted.<sup>23</sup>

### b) Germany

In Germany there is no special small claims procedure, but there is a specific procedural provision on small claims. Art. 495a Code of Civil Procedure (*Zivilprozessordnung*) states that the local court (*Amtsgericht*) can determine its procedure in its reasonable discretion (*nach billigem Ermessen*) for claims with a maximum value of €600.<sup>24</sup> The local court is not obliged to apply this procedure. There are no specific forms to initiate the simplified procedure. Legal representation is not

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<sup>14</sup> See further below, section III.1.

<sup>15</sup> See CPR 26.6(1). See on the small claims procedure amongst others N. Andrews, *English Civil Procedure. Fundamentals of the New Civil Justice System*, New York: Oxford University Press 2003, 527-535; W. Rose, S. Sime and D. French, *Blackstone's Civil Practice*, New York: Oxford University Press 2005, 464-473.

<sup>16</sup> Andrews (footnote 15), 528.

<sup>17</sup> See CPR 26.6(1).

<sup>18</sup> See CPR 27.4.

<sup>19</sup> Practice Direction (PD) 27, rule 3. See also Andrews (footnote 15), 531.

<sup>20</sup> See CPR 27.2.

<sup>21</sup> See CPR 27.8 and PD 27, rule 5.5 and 5.6. See also Andrews (footnote 15), 531.

<sup>22</sup> See CPR 27.12 and 27.13 (within 14 days).

<sup>23</sup> See CPR 27.14 (limitations both for the types of costs and to the amount of money).

<sup>24</sup> See on this procedure amongst others K. Reichold, in: Thomas/Putzo, *Zivilprozessordnung*, München: Verlag C.H. Beck 2005 (27<sup>th</sup> edition), comments to § 495a; K.G. Deubner, in: G. Lücke and P. Wax, *Münchener Kommentar zur Zivilprozessordnung*, München: Beck 2000 (2<sup>nd</sup> edition), comments to § 495a. The general jurisdiction for the local court is for claims up to €5000 and some special subject-matters, see § 23 *Gerichtsverfassungsgesetz*.

compulsory, and support by a court clerk is available for filing the claims.<sup>25</sup> The judge has the discretion to determine the proceedings in a reasonable way, but an oral hearing is compulsory when one of the parties requests it.<sup>26</sup> The ordinary rules of evidence do not apply.<sup>27</sup> In view of the low value of the claim appeal is not possible, but may in exceptional cases be allowed with permission of the judge.<sup>28</sup> The judgment has to be in writing, but its contents may be simpler.<sup>29</sup> There are no special rules or restrictions for the recovery of costs compared to the ordinary proceedings.

### c) *The Netherlands*

Although the Green Paper mentions The Netherlands as one of the countries without a special procedure for small claims, in The Netherlands the procedure at the local/cantonal judge (*kanton-rechter*) is usually regarded as a special procedure for small claims. Until the 1<sup>st</sup> of January 2002 the cantonal court was a separate court, but on this date it merged with the District Court (*Arrondissementsrechtbank*) and became a sector of this Court.<sup>30</sup> The cantonal procedure is regulated in Art. 93-98 Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).<sup>31</sup> The cantonal judge has exclusive jurisdiction for claims up to €5000 (and in some special subject-matters). Special features compared to the normal procedure at the District Court are that legal representation is not compulsory, that there is always just a single judge, that oral hearings take place more often, and that the procedure is a bit simpler. There are no specific forms to initiate the procedure.<sup>32</sup> The ordinary rules for the service of documents, evidence, interim remedies<sup>33</sup>, motivation of the judgment and appeal apply.<sup>34</sup> In principle the losing party has to pay the costs of the procedure, but there are certain limitations to reimbursement of the costs of legal representation.<sup>35</sup>

### d) *General features Small Claims Procedures in the Member States*

The Green Paper of 2002 and the Explanatory Memorandum to the Commission proposal provide some general features of existing small claims procedures in the Member States, based upon a survey.<sup>36</sup> First of all, in all Member States the Small Claims procedures have quantitative thresholds, which however vary considerably. Furthermore, in many Member States standard forms are used to initiate the procedure. Legal representation is not compulsory in any State. Many States have the possibility of a purely written procedure, without any oral hearing. Several rules of procedure are relaxed, such as those concerning evidence. Several Member States have time-limits for the delivery of the judgment. Sometimes the rules concerning the requirements of the judgment are different from ordinary judgments. The rules concerning the recovery of costs differ considerably per State and the same goes for the possibility of appeal.

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<sup>25</sup> See § 78 CCP. Legal representation is not compulsory in any procedure at the local court.

<sup>26</sup> See § 495a CCP.

<sup>27</sup> See *Münchener Kommentar* (Deubner) (footnote 24), comments to § 495a, no 32.

<sup>28</sup> See § 511, para 4 (the matter is of fundamental importance or it is in the interest of the development of the law).

<sup>29</sup> See § 313a CCP.

<sup>30</sup> Most of the locations of the cantonal courts are however still in use.

<sup>31</sup> See on this procedure amongst others P.A. Stein and A.S. Rueb, *Compendium Burgerlijk procesrecht*, Deventer: Kluwer 2005 (15<sup>th</sup> edition), 222-225; C.J.J.C. van Nispen, A.I.M. van Mierlo and M.V. Polak, *Tekst & Commentaar, Burgerlijke Rechtsvordering*, Deventer: Kluwer 2005, Comments on Art. 92-98, Kantonzaken (by M. Ynzonides and M. Koedoot).

<sup>32</sup> Standard forms were actually introduced in the 1990's, but they were unsuccessful and abolished in 2001.

<sup>33</sup> See Art. 254, para 4 CCP.

<sup>34</sup> See Art. 332, para 1 CCP (within 3 months and provided that the value of the claims is higher than €1750).

<sup>35</sup> See Art. 233 CCP. In practice the costs are based upon a standard 'liquidation tariff' for lawyers, based upon the interests of the case, and the real costs may be higher. Also the judge will determine which costs are reasonable.

<sup>36</sup> Explanatory Memorandum Commission Proposal 2005, 4-5; Green Paper 2002, 51-58.

### III The Proposed Regulation for a European Small Claims Procedure

#### 1. *Background of the Commission Proposal*

The political background of the proposal for a European Small Claims Procedure (hereafter abbreviated as ESCP) is two-fold. Firstly, there is the protection of consumers, which has been European policy for many years. Secondly, there is the creation of a European judicial area, as is envisaged by the Conclusions of Tampere and the Programme for Mutual Recognition.<sup>37</sup>

The high costs, long duration and complexity of procedures are especially disproportionate in small claims. In cross-border cases the obstacles to obtaining a fast and relatively cheap decision of course increase, as it involves extra costs of legal aid (one lawyer in the home country and one in the country where litigation takes place), of translation of the relevant documents and traveling expenses of parties, lawyers and possibly witnesses.<sup>38</sup> Also the cross-border service of documents and recognition and enforcement lead to an increase in costs and duration of proceedings.

As justification for harmonization the Commission mentions, as usual, the internal market requirement.<sup>39</sup> The substantial differences amongst the national small claims procedures cause a distortion in competition within the internal market. The ESCP will help to eliminate obstacles to the free movement of goods, persons, services and capital. The objective of this proposal –to simplify and speed up litigation in small claims procedures – cannot be sufficiently accomplished by the individual Member States, since they cannot guarantee the equivalence of the rules. There is no level playing field if some operators have access to efficient and effective procedures while others do not. The Commission reasons that these arguments equally apply in case parties are domiciled in the same Member State. As in the case of the proposal for a European Order for Payment Procedure, the Commission argues that Art. 65 EC Treaty also allows for European instruments to apply in purely internal cases, and proposes that the ESCP is also applied in domestic cases.<sup>40</sup> However, 21 of the 25 Member States do not support the view of the Commission and the same goes for the European Parliament.<sup>41</sup> The ESCP will therefore be limited to cross-border cases.

As a consequence of the principle of proportionality the ESCP is, just like European Order for Payment Procedure, of an optional nature. The creditor can choose whether to make use of the existing national procedure or the ESCP. Thus, harmonization as such is not the objective of this proposal; national procedures remain in force.

#### 2. *Developments since the original proposal*

Since the Commission proposal was published many developments took place, especially at the Council. The first (published) Council text dates from 30 September 2005<sup>42</sup>, proposed under the Presidency of the United Kingdom, which gave priority to this proposal. One of the important amendments is the limitation to cross-border cases. Further amended texts were published in De-

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<sup>37</sup> Explanatory Memorandum Commission Proposal 2005, 2; Green Paper 2002, 50-51.

<sup>38</sup> Explanatory Memorandum Commission Proposal 2005, 3.

<sup>39</sup> Explanatory Memorandum Commission Proposal 2005, 5.

<sup>40</sup> Explanatory Memorandum Commission Proposal 2005, 6.

<sup>41</sup> See in regard of the European Order for Payment Procedure the minutes of the Justice and Home Affairs Council of 14<sup>th</sup> April 2005, available at <http://register.consilium.europa.eu>, and for the ESCP House of Lords (European Union Committee), European Small Claims Procedure, Report with Evidence, Minutes of Evidence, 2 (15<sup>th</sup> February 2006). See for the EP, Committee on Legal Affairs, Draft Report 8<sup>th</sup> February 2006, 2005/0020 (COD). The EESC supports the view of the Commission, see Opinion EESC OJ 11<sup>th</sup> April 2006, C 88/61.

<sup>42</sup> Council, 30<sup>th</sup> September 2005, 12503/05, JUSTCIV 165, CODEC 776.

ember 2005 and three versions in May 2006.<sup>43</sup> The latest available text dates from 29 May 2006. The Council reached a general agreement on this text in its meeting of 1 and 2 June 2006.<sup>44</sup>

The European Parliament, that has co-decisive authority in this matter, published its draft legislative resolution in February 2006.<sup>45</sup> In this draft 54 major and minor amendments are being proposed, which for the greater part coincide with the latest Council text.

Furthermore, two external reports have been published at the beginning of 2006. These are the opinion of the European Economic and Social Committee<sup>46</sup> and an extensive research report by the House of Lords accompanied by detailed evidence based upon witnesses' hearings from all interested parties.

In the following analyses of the ESCP the developments since the original proposal will naturally be taken into account, and in particular the latest Council text of 29 May 2006.

## ***2. Aims and Key Elements of the Proposal***

The aims of the proposed ESCP are twofold. Pursuant to Art. 1 the Regulation is intended to simplify and speed up litigation concerning small claims, and to reduce costs. Furthermore it eliminates intermediate measures necessary to enable recognition and enforcement in other Member States. In other words, the judgment in the ESCP is enforceable without exequatur throughout the EU.

Key elements of the proposal are that it introduces an optional, uniform procedure for claims that do not exceed €2000 (Art. 1 and 2). The ESCP shall in principle be a written procedure (Art. 4). Procedural simplifications are that legal representation is not compulsory (Art. 8), that hearings can take place using technical means such as videoconference (Art. 6), that the rules concerning the taking of evidence are relaxed (Art. 7) and that documents can in principle be served by postal service attested by an acknowledgement of receipt (Art. 11).<sup>47</sup> Furthermore, time limits are introduced (Art. 4 and 5)<sup>48</sup>, as well as a provision to regulate who bears the costs of the proceedings (Art. 12). The proposal is accompanied by three standard forms – a claim form, an answer form and a certificate concerning the judgment.

## ***3. Scope of application***

Pursuant to Art. 2 the Regulation applies in civil and commercial matters where the total value of monetary or non-monetary claims, excluding interest, expenses and outlays, does not exceed € 2000 at the time of commencement of the proceedings. The threshold of €2000 has been much debated. Several countries found it too low, and even more countries found it too high. For example Germany (national threshold: €600) pleaded to lower the limit to €1000.<sup>49</sup> In the Netherlands (national threshold: €5000) it has been argued that the limit should be €5000 in order for the

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<sup>43</sup> Council, 20<sup>th</sup> December 2005, 15954/05, JUSTCIV 244, CODEC 1203; 2<sup>nd</sup> May 2006, 8408/06, JUSTCIV 100, CODEC 346; 19<sup>th</sup> May 2006, 9329/06, JUSTCIV 122, CODEC 472; 29<sup>th</sup> May 2006, 9886/06, JUSTCIV 139, CODEC 555.

<sup>44</sup> See footnote 5.

<sup>45</sup> Committee on Legal Affairs, Draft Report 8<sup>th</sup> February 2006, 2005/0020 (COD).

<sup>46</sup> Opinion EESC on the Proposal ESCP OJ 11<sup>th</sup> April 2006, C 88/61.

<sup>47</sup> See also G. Haibach, *The Commission Proposal for a Regulation Establishing a European Small Claims Procedure: An Analysis*, *European Review of Private Law* 2005, 599-600.

<sup>48</sup> In the Commission proposal also in Art. 10, but this provision is deleted in the Council text and the draft legislative resolution by the EP.

<sup>49</sup> See Deutscher Bundestag, Drucksache 16/1684, 31<sup>st</sup> May 2006, 4-5; Stellungnahme des Deutschen Anwaltvereins, Nr. 44/2005, August 2005, 8-9; Stellungnahme der Bundesrechtsanwaltskammer, June 2005, Nr. 15/2005, 3.

ESCP to be effective.<sup>50</sup> For the United Kingdom the threshold was acceptable, though it should be allowed that parties choose the ESCP in case the value of the claim exceeds €2000.<sup>51</sup> Also ideas to define minimum and maximum limits or to establish a maximum ceiling or minimum floor have been launched.<sup>52</sup> The EESC is of the opinion that the ceiling of €2000 is clearly insufficient given the current value of goods and services, and that it should be at least €5000 in order to contribute to a more-than-proportional reduction in costs.<sup>53</sup> The Council sticks to the fixed threshold of €2000. It remains to be seen whether this will be sufficient to outweigh the costs.

The Council text and the draft resolution by the Parliament express that the Regulation only applies in cross-border cases. An article is added to specify that this case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the seized court. This provision is taken from the amended proposal for a European Order for Payment Procedure (Art. 3 thereof).

In the Commission proposal the substantive scope is the same as that of the Brussels Regulation, except that it does not apply to employment law since several Member States have special procedures or even special courts for employment issues.<sup>54</sup> In subsequent Council texts three exceptions were added and these are also included in the Council's general agreement. These are 1) maintenance obligations, 2) tenancies of immovable property, except actions on monetary claims, and 3) violations of privacy and rights related to personality, including defamation.

#### **4. The procedure**

The Regulation lays down the most important procedural rules of the ESCP, but is not exhaustive. According to Art. 17, subject to the provisions of the Regulation, the ESCP is governed by the procedural law of the Member State in which the procedure is conducted. The court or tribunal shall respect the right to a fair trial and the principle of an adversarial process, in particular with regard to the necessity of an oral hearing and the taking of evidence.<sup>55</sup>

##### *a) Commencement of the procedure*

The ESCP is commenced by lodging the claim form set out in Annex I at the competent court or tribunal, pursuant to Art. 3. The ESCP does not contain jurisdiction rules, which means that the rules of Brussels I apply.<sup>56</sup> Contrary to Art. 6, paragraph 1, sub d and Art. 6, paragraph 2 of the (amended) proposal for a European Order for Payment Procedure no exclusive jurisdiction rule for consumers, which is wider than that of Art. 15-1 Brussels Regulation, is included.<sup>57</sup> The background probably is that in those Regulations it concerns uncontested claims and under the ESCP in principle not, so it will be up to the consumer to contest jurisdiction. This, however, does not explain why the concept of what is to be understood by "consumer" is broader under those regulations than under the ESCP. Furthermore, contrary to the Brussels Regulation, the decision in the ESCP is enforceable throughout the EU, so the consumer does not get any protection in the stage

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<sup>50</sup> See Sociaal-Economische Raad, Commissie voor Consumentenaangelegenheden, Briefadvies small claims procedure, 13<sup>th</sup> January 2006, 13.

<sup>51</sup> See House of Lords Report 2006 (footnote 41), 28-30.

<sup>52</sup> Council, 5<sup>th</sup> September 2005, 11522/05, JUSTCIV 150, CODEC 660.

<sup>53</sup> Opinion EESC 2006 (footnote 46), *OJ C* 88/63 (comment 6.1).

<sup>54</sup> Explanatory Memorandum Commission Proposal 2005, 2.

<sup>55</sup> Recital 16 Commission Proposal 2005; Council text 29<sup>th</sup> May 2006/9886/06, JUSTCIV 139, CODEC 555, note 1 Art. 2a.

<sup>56</sup> Member States should indicate which court or tribunals are competent in regard of the ESCP, see Art. 20A Council text 29<sup>th</sup> May 2006, 9886/06, JUSTCIV 139, CODEC 555.

<sup>57</sup> They aim at all natural persons, and do not contain the restrictions of Art. 15 Brussels Regulation.

of recognition and enforcement.<sup>58</sup> In view of the aim of this Regulation, to protect consumers, a rule similar to that of the European Enforcement Order and the proposal for a European Order for Payment Procedure would in my opinion have been appropriate.

The claim form is designed in a way that in principle it can be completed without legal assistance. Indeed the (provisional) claim form seems relatively simple.<sup>59</sup> Member States have to ensure that claim forms are available at the courts where the ESCP can be commenced. The Commission proposal adds that practical assistance should be made available at these courts to assist the claimant to complete the form (Art. 3, paragraph 7). In the latest Council text a separate provision (Art. 8a) is included stating that Member States shall ensure that practical assistance is available to (both) parties to complete the forms. The claim form may be lodged directly, by post or by any other means of communication such as fax or e-mail, as long as this is acceptable to the Member State in which the procedure is commenced.<sup>60</sup> A wide use of electronic means to lodge claims would be favourable and increase the accessibility and lower the costs. However, not all Member States are far advanced in the use of electronic means, so it is not possible (yet) to oblige Member States to receive electronic claims forms. The Commission proposal states that the claim should be lodged together with any relevant additional document. In order to avoid unnecessary translation costs the Council text, however, provides that the claim form shall include a *description* of the evidence, and only where appropriate be accompanied by supporting documents.

In case the claim is outside the scope of the Regulation, the procedure will proceed according to national law (Art. 3, paragraph 5). The Commission proposal rules that where the court considers that the information provided is insufficiently clear or adequate or the form is incomplete, it *may* give the claimant the opportunity of rectification. The Council text and the draft resolution by the Parliament state that the court *shall* give the claimant the opportunity of rectification unless the claim appears to be clearly unfounded or the application to be inadmissible, and that the court should specify a period for rectification. In case the claim appears to be clearly unfounded or the application to be inadmissible, or the claimant fails to complete or rectify the claim within the time specified, it should be dismissed.

#### *b) Conduct of the procedure*

Art. 4 states that the ESCP shall be a written procedure. According to the Commission proposal an oral hearing may take place when the courts deems it necessary, taking into account the demands of the parties. During the negotiations the right to an oral hearing has been one of the important issues. According to the Council text the court should in principle grant a request to an oral hearing. This request may be refused if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair administration of the case, and this refusal shall be reasoned in writing.<sup>61</sup>

According to the Commission proposal the court should serve a copy of the claim form, together with the answer form, within eight days of receipt. The latest Council text, however, fixes a period of fourteen days to dispatch the documents to the defendant. The defendant shall submit his response within 30 days (Council text) by filling in the answer form. The response shall be dispatched to the claimant within fourteen days. The claimant has 30 days to respond to a counterclaim (Art. 4, paragraphs 2-5). The time limits may only be prolonged in exceptional circumstances, in order to safeguard the rights of the parties (Art. 12).

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<sup>58</sup> See Art. 35, paragraph 1, Brussels Regulation.

<sup>59</sup> The Annexes were published on 21<sup>th</sup> March 2005. Several amendments will, however, be made. The amended forms are not yet publicly accessible.

<sup>60</sup> Member States shall inform the Commission which means are acceptable and this will be made publicly available.

<sup>61</sup> The draft resolution by the Parliament is slightly different on this point.



How to deal with counter-claims has also been an issue during the negotiations. The Commission proposal (Art. 4, paragraph 6) states that in case the value of the counterclaim exceeds € 2000, the counterclaims shall only be considered if it arises from the same legal relationship and if the court considers it appropriate to proceed in the ESCP. The latest Council text is stricter on this point. In case the counterclaim exceeds the fixed threshold, the claim and the counter-claim should not at all proceed in the ESCP, but shall be dealt with in accordance with national law.

Another topic of discussion in the Council has been the required language of the forms and other relevant documents, since the high costs of translation are an important obstacle of international litigation. Art. 4, paragraph 7 of the Commission proposal states that a translation of additional documents that are received in another language than that of the procedure will only be required if this is necessary for rendering the judgment. Furthermore it provides that if a party has refused to accept a document because it is not in one of the language provided for in Article 8 of the Service Regulation, the court of tribunal shall inform the other party thereof and advise it to provide a translation.<sup>62</sup> The latest Council text devotes a separate article to the language (Art. 4a). According to this provision the claim form, the response, any counterclaims, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language of the court. Any other document only needs translation if this appears to be necessary for rendering the judgment. As to the language requirements for documents to be served, the Council text is more flexible than the current Art. 8 Service Regulation, since the document can only be refused if it is not in the official language of the Member State (or area) addressed, or in a language which the addressee understands, not necessarily being one of the official languages of that Member State. This is in conformity with the proposed amendment of the Service Regulation.<sup>63</sup>

Other relevant provisions are Art. 6 on hearings and Art. 7 on taking evidence. These both aim at keeping the costs of the procedure as low as possible. Hearings may take place through an audio, video or email conference. Unlike in the Commission proposal, in the amended Council text the use of these technical means is not subject to the permission of the parties, but it is dependant upon the *lex fori*. On the taking of evidence the Commission proposal provides that the means of proof and the extent to which evidence is taken are to the discretion of the court, and that it may admit taking of evidence through telephone, written statements, and audio, video or email conference. However, the latest Council text refers for the means of taking evidence and the extent of the evidence necessary to the rules applicable to the admissibility of evidence. Evidence it thus not fully up to the discretion of the court. For the use of communication technology the Council text refers to the *lex fori*.

As mentioned above, legal representation is not compulsory (see Art. 8), but to compensate this Member States should make practical assistance available to complete the forms. According to Art. 9 parties are not required to make any legal assessment of the claim, and the court or tribunal shall inform the parties about procedural questions. When appropriate, the court shall seek to reach a settlement between the parties (Art. 9, paragraph 4).

### *c) Conclusion of the procedure*

The Commission proposal states in Art. 5 that within one month following receipt of the response from the defendant or claimant the court shall deliver a judgment, demand further details within a certain time or summon parties to a hearing. If the defendant does not answer within the time limit specified by Art. 4, the court shall deliver a default judgment. The Council text provides a period of 30 days for delivering the judgment after receipt of the response, and also specifies that further

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<sup>62</sup> Art. 8 Service Regulation provides that a party can refuse the document if it is in a language other than that of the official language of the Member State addressed, or in case of a multi-language State, in the official language of the place of service, or in a language of that State which the addressee understands.

<sup>63</sup> See Brussels 7 July 2005, COM(2005)305 final, 2005/0126(COD).

details from the parties should be provided within 30 days, or that the hearing should take place within 30 days of the summons. The Commission proposal provides in Art. 10 for a ‘final deadline’ for the judgment; it should be rendered within six months following the registration of the form. However, many delegations had doubts on a binding overall limit for the whole procedure besides the time limits for specific procedural phases.<sup>64</sup> Art. 10 is therefore deleted in the Council text and the draft legislative resolution by the Parliament. Instead, Art. 5 provides that the judgment shall be delivered within 30 days following the receipt of the response from the defendant or claimant, or within 30 days after the hearing or after receiving the relevant information. In my view to add a clear time limit for the whole procedure – with the possibility to extend in exceptional circumstances – as proposed by the Commission, would have been preferable. This gives parties a clear indication of the maximum duration of the proceedings, and it can have a good impact on speeding up the whole procedure.

#### *d) Service of Documents*

To reduce costs the service of documents can, pursuant to Art. 11, paragraph 1, take place by postal service attested by acknowledgement of receipt, including the date of the receipt. The Commission proposal provides that in case documents have to be served in the State where the procedure is conducted, documents shall be served by registered letter with receipt or by simpler means such as a simple letter, fax or email (paragraph 2). If in exceptional circumstances it is not possible to effect service according to paragraph 1 or 2, service may be effected through other means ensuring personal service (paragraph 3). The Council text and the draft legislative resolution by the Parliament, however, abandon the flexible provisions of paragraph 2 and 3 and refer to the methods specified in Art. 13 and 14 of the European Enforcement Order. In view of the uniformity of European instruments the Council text is preferable, though it may increase the costs.

#### *e) Appeal and Review*

According to Art. 15, whether or not an appeal is possible, is dependent upon national procedural law. Information on the possibilities of appeal will be made publicly available. Since the rules on appeal differ too much, taking up a uniform rule is regarded undesirable.<sup>65</sup> In order to speed up the procedure, the Commission proposal states that further appeal or cassation is not possible. In the Council text this last paragraph is, however, removed. Thus, national law is fully unimpeded.

Minimum standards for review in special circumstances are laid down in Art. 16. The defendant shall be entitled to apply for a review before the competent court of the Member State of origin in case the claim form or summons to a hearing were served by a method without proof of receipt by him personally, as provided for in Art. 14 of the European Enforcement Order, and service was not effected in sufficient time to enable him to arrange for his defence without any fault on this part, or the defendant was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances. The defendant should act promptly. This provision is taken from Art. 19 of the European Enforcement Order, and can also be found in Art. 20 of the proposed European Order for Payment Procedure. However, Art. 19 of the European Enforcement Order refers explicitly to the law of the court of origin, which means that exact terms can be set by the individual Member States.<sup>66</sup> Neither of the two the proposals for the ESCP and the European Order for Payment Procedure refer to the national law. Since Art. 17 states that procedural issues that are not settled by the regulated are governed by national law, it however is assumable that further rules are to be provided by national law.

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<sup>64</sup> Council, 29<sup>th</sup> November 2005, 15054/05, JUSTCIV 221, CODEC 1107.

<sup>65</sup> Commission, 15<sup>th</sup> March 2005, Comments on the specific articles of the proposal, Art. 15.

<sup>66</sup> E.g. the Implementation Law of the Netherlands states that review should take place within four weeks.

*f) Recognition and enforcement*

According to article 13 the judgment shall be enforceable notwithstanding any possible appeal, and it shall not be necessary to provide a security. Apart from this rule, the Commission proposal contains only one provision on recognition and enforcement. Art. 18 states that a judgment in an ESCP shall be recognized and enforced without the need for a declaration of enforceability and without the possibility of opposing it. In the Council text the provisions of recognition and enforcement are extended, and as far as possible brought into line with the European Enforcement Order (Art. 20, 21 and 23), and are similar to those of the proposed European Order for Payment Procedure (Art. 19, 21, 22 and 23). Art. 18 states that at the request of a party the court shall issue the judgment form of Annex III (certificate).<sup>67</sup> Art. 18A states that the enforcement procedure shall be governed by the law of the Member State of enforcement and shall be enforced under the same conditions as a national judgment. Furthermore, it lays down requirements as to the documents that shall be produced. Art. 18B provides the same grounds of refusal concerning irreconcilability as the European Enforcement Order (see Art. 21 thereof). Art. 18C provides that where a judgment is challenged or appeal is still possible, or an application for review has been made, the enforcement court may limit the enforcement proceedings to protective measures, or make it conditional on the provision of security, or under exceptional circumstances stay enforcement proceedings.

*g) Costs*

In view of the accessibility of the ESCP the costs-rule has also been a point of debate. According to Art. 14 of the Commission proposal the unsuccessful party shall bear the costs of the proceedings, unless where this would be unfair or unreasonable. However, when the unsuccessful party is a natural person and is not represented by a lawyer, he shall not be obliged to reimburse the lawyer fees of the other party. This is meant to encourage parties not to employ a lawyer.<sup>68</sup> During the negotiations it turned out that several delegations preferred to apply the principle that the losing party has to pay irrespective of whether he is a natural or legal person.<sup>69</sup> Both Council text and draft legislative resolution by the Parliament therefore simply state that the unsuccessful party shall bear the costs of the proceedings. The court shall, however, not award costs that were unnecessarily incurred or disproportionate to the claim.

## **IV Evaluation and outlook**

### ***1. Assessment of the Necessity and Desirability for a European Small Claims Procedure***

Litigation is expensive, and it is obvious that international litigation is even more costly. As a consequence the recovery of small claims will in many cases not be economically sensible. The Commission furthermore imposes the interests of the internal market as justification for action at EU-level. The validity of the internal market argument is to some extent questionable. In relation to the harmonisation of contract law it has been argued from an economical perspective that in case competitors in the same Member State are treated equally, there is a level playing field.<sup>70</sup> In this case only *between* Member States there is no level playing field, but that leads to healthy competition and is part of international trade. The validity of the internal market argument is undoubtedly weakened as a consequence of the limitation to cross-border cases. This might very

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<sup>67</sup> The Commission proposal states that this should be done *ex officio* in case enforcement in another Member State is to be expected.

<sup>68</sup> Commission, 15<sup>th</sup> March 2005, Comments on the specific articles of the proposal, Art. 14.

<sup>69</sup> Council, 21<sup>st</sup> November 2005, 14638/05, JUSTCIV 208, CODEC 1037, 6.

<sup>70</sup> G. Wagner, *The Economics of Harmonization: The Case of Contract Law*, CMLR 2002, 995-1023.

well lead to a different level of protection between operators from the same Member State on the national market and operators on the international EU-market. In my view this is, however, an inevitable consequence of the limits set by Art. 65 EC-Treaty. Nonetheless, this leaves the fact unimpeded that international litigation is expensive and that this causes small claims to be unrecoverable. Private international law rules can set some of the boundary conditions to simplify international litigation, but cannot solve the problems of the necessity of hiring two lawyers when litigating abroad, the inconveniences of unfamiliarity with foreign proceedings, translation costs etc. Many of these problems can be reduced by creating a simple, uniform procedure that contains effective provisions that contribute to reducing the costs and the duration of proceedings.

An Extended Impact Assessment that was made in relation to the proposal shows that the potential impact of the Regulation is considerable, since it might involve 7 million citizens per year and have a “turnover” of at least €8.000.000.000.<sup>71</sup> It is estimated that the abolition of the enforcement procedure will reduce the costs and duration by 20%. In the potential impact, however, also the domestic claims are included because it departs from the Commission proposal. Now that the scope is limited to cross-border cases, the impact will be considerably less.

## ***2. Some remarks on the contents of the Proposed Regulation***

One of the weak points of the Regulation could be that many issues are left to be decided by national law. In the Council text this is even more. The course of proceedings, the enforcement as well as the costs might therefore differ considerably per Member State. For example the possibility of appeal is to be determined by national law. Already this will cause considerable differences in the level of protection and have a big impact on the duration and costs of the procedure.

Some more detailed comments have already been made above. It was argued that as a political compromise the threshold of €2000 might be a good solution, but in view of the economic analysis made by amongst others the EESC it remains to be seen whether this threshold is enough to cover a substantial amount of cases, in order to outweigh the costs that are involved. Furthermore, it was argued that it would be desirable to have a jurisdiction rule for consumers, similar to that of the proposed European Order for Payment Procedure. The Council text is even less ‘consumer friendly’ on the point of the costs. Therefore, it might very well be that businesses gain more from the introduction of the ESCP than consumers, as is for example also the case for the English small claim procedure. Furthermore, the overall time-limit of six months as proposed by the Commission has been abolished in the Council negotiations. In my view this would nevertheless for both the parties and the courts contribute to providing a strict guideline as to how long the whole procedure may take at most.

A last more general remark concerns the effectiveness of the procedure with regard to costs. Two important factors that increase the costs of international litigation are the increased need of legal aid, even when it concerns a small claim procedure, and the high costs of translation. In normal circumstances, when an oral hearing is not necessary, the only action to be taken by the claimant and defendant should be to fill out the standard forms and to hand over relevant documents. It is of crucial importance that the forms are simple and are accompanied by clear instructions. Also the assistance at the courts should be well arranged. For example in The Netherlands the experience with the use of a standard claim form in the 1990’s was bad, since claimants were in many cases unable to express what they wanted and why.<sup>72</sup> In England, on the other hand, the experiences with standard forms are positive. The proposal also aims at reducing translation costs. The forms should be submitted in the language of the court, but supporting documents do not

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<sup>71</sup> Commission Staff Working Document, 15<sup>th</sup> March 2005, Extended Impact Assessment, SEC(2005)351, 17-18.

<sup>72</sup> See Sociaal-Economische Raad 2006 (footnote 50), 12; P.M.M. van der Grinten, *Kroniek Europese ontwikkelingen, Tijdschrift voor Civiele Rechtspleging* 2005, 87.

need translation, unless translation appears to be necessary for rendering the judgment. As of next year the European Union will have 23 official languages. How many consumers will be able to fill out the forms (even though for the greater part it consists of closed fields) in even one other language than their own? How many courts will be able to analyse contracts and other relevant documents in, for example, Greek, Polish, Finnish or Hungarian? Of course many international contracts are concluded in English, or in German or French, but also analysing contracts and other documents in these languages will give problems. This is a practical problem that is hard to tackle, and the ESCP does not seem to provide the solution.

### ***3. Prospects***

The negotiations in the Council are reaching their end. Before a political agreement can be finalized, the European Parliament should deliver its final opinion at first reading. After that the Commission should amend the proposal. At this point it is not clear how much time it will take. For the proposal for a European Order for Payment Procedure it took almost two years since the original proposal before the Commission published its amended proposal this February, and after that several other amendments have been proposed, so the final Regulation has not been fixed yet. It is to be expected that the procedure of establishing the ESCP will take less time, since some fundamental and technical issues that also came up with regard to the European Order for Payment Procedure have already been resolved. After that it will take two years before it comes into force.

Whether the ESCP will become successful of course remains to be seen. Providing solid information to the public and training of legal professionals will be essential. Since the ESCP is optional it will really have to prove itself by competing with the existing national procedures. This might as a positive side-effect have a good impact on the operation of national procedures and give inspiration for improvement of national legislation.