

The European Small Claims Procedure:

Striking the Balance between Simplicity and Fairness in European Litigation

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[355] I Introduction

The Regulation establishing a European Small Claims Procedure, which was adopted on 11 July 2007, introduces the second European procedure, after the European Order for Payment Procedure¹ that was adopted seven months earlier.² The Regulation shall apply in all Member States from 1 January 2009³, except in Denmark.⁴ The proposal of the European Commission of 15 March 2005⁵ has been intensively debated and many amendments have been proposed by the Council and the European Parliament⁶, but the core of the procedure remained intact. The European Small Claims Procedure (abbreviated as: ESCP) is a simple procedure for claims not exceeding € 2000. It is available in cross-border cases, as an alternative to the existing, national procedures. The objective of the ESCP is to facilitate access to justice, by simplifying, speeding up and reducing costs of small claims litigation.

Whereas other European instruments in the field of international procedure, such as Brussels I and II, and the Evidence, Service and Insolvency Regulations, primarily aim at coordinating national proceedings in cross-border cases, the ESCP and European Order for Payment Procedure (abbreviated as: EPO) are the first ones to create autonomous European procedures for cross-border recovery of debts. This new approach to tackling problems inherent to international litigation also poses many challenges. For the European Small Claims Procedure, which as a full, adversarial procedure is in a way more essential than the primarily administrative European Order for [356] Payment Procedure for uncontested claims⁷, the important task is to combine a simple, speedy and relatively cheap procedure with a fair trial.

¹ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, O.J. 2007 L 199/1.

² Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, O.J. 2006 L 399/1. See *Sujecki*, *Europäisches Mahnverfahren*, *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2006, 124 ff; *idem* *Das Europäische Mahnverfahren*, *Neue Juristische Wochenschrift (NJW)* 2007, 1622 ff; *Xandra Kramer/Bartosz Sujecki*, *De Europese betalingsbevelprocedure. Een kritische beschouwing*, *Nederlands Internationaal Privaatrecht (NIPR)* 2006, 365 ff.

³ See Art. 29(2) ESCP.

⁴ See Art. 2(3) ESCP. Denmark opted out, as it did in regard of other regulations based on Title IV EC Treaty.

⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2005) 87 final, 15 March 2005. See *Georg Haibach*, *The Commission Proposal for a Regulation Establishing a European Small Claims Procedure: An Analysis*, *European Review of Private Law (ERPL)* 2005, 593 ff. See for a review of the text of the political agreement of 1 June 2006 *Xandra Kramer*, *The proposal for a European Small Claims Procedure*, *Int'l Lis* 2006, 109 ff.

⁶ European Parliament, Legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing a European Small Claims Procedure (COM(2005)0087), 14 June 2006.

⁷ Another difference is that the EPO primarily involves commercial litigation and the ESCP consumer litigation.

In section II attention will be paid to the background of harmonization of small claims proceedings in the European Union. Section III focuses on the need for a European small claims procedure. In section IV the ESCP is discussed. Section V contains the evaluation of the ESCP in view of the aims to simplify and speed up small claims litigation and to reduce costs, while respecting the right to a fair trial.

II Background of Harmonization of Small Claims Proceedings in the European Union

The first effort of the European Commission to regulate small claims was the proposal for a Directive combating late payment in commercial transactions of 1998.⁸ Article 6 of this proposal provided that Member States shall ensure simplified procedures for debts less than 20.000 ECU (indicated as small debts), and that these procedures shall provide for simple, low-cost methods for taking legal action for the settlement of debts. This provision, however, did not meet the approval of the Council and was abandoned. A uniform procedure on the recovery of unchallenged claims, as the Commission initially proposed, was not acceptable either.⁹ Other previous attempts to promote harmonization of civil procedure, in particular the extensive work of the Storme-group that presented its report to the Commission in 1993¹⁰, were mostly neglected or rejected.¹¹

The political climate regarding the harmonization of civil procedure, however, changed at the end of the 1990's. The Treaty of Amsterdam introduced Article 65 of the EC Treaty, which empowered the Community to adopt measures in the field of judicial cooperation in civil matters having cross-border implications and which are needed for the proper functioning of the international market.¹² The [357] ESCP is based on sub c of Article 65, which includes measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure in the Member States. The introduction of Article 65 in 1999 was followed by the establishment of numerous regulations.¹³ The harmonization of European civil procedure has furthermore been boosted by

⁸ Proposal for a European Parliament and Council Directive combating late payment in commercial transactions, 23 April 1998, COM(1998) 126 final.

⁹ Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions only provides in Art. 5 that Member States shall ensure that an enforceable title in relation to unchallenged claims can be obtained within 90 days.

¹⁰ Marcel Storme (ed.), *Rapprochement du Droit Judiciaire de L'Union européenne/Approximation of Judiciary Law in the European Union*, 1994.

¹¹ See on the harmonization of procedural law before the Treaty of Amsterdam: Konstantinos Kerameus, *Procedural Unification: The Need and the Limitations*, in: Ian Scott (ed), *International Perspectives on Civil Justice. Essays in honour of Sir Jack I.H. Jacob*, Q.C., 1990, 47 ff; Wolfgang Grunsky/Rolf Stürner/Gerhard Walter/Manfred Wolf (eds), *Wege zu einem europäischen Zivilprozeßrecht*, Tübinger Symposium, Zum 80. Geburtstag von Fritz Baur, 1992; Marcel Storme, *Rechtsvereinheitlichung in Europa. Ein Plädoyer für ein einheitliches europäisches Prozeßrecht*, *RabelsZ* 1992, 291 ff; Marcel Storme, *Procedural Consequences of a Common Private Law for Europe*, in: Arthur Hartkamp (ed.) *Towards a European Civil Code*, 1994, 87 ff; Eberhard Schilken, *Die Vorschläge der Kommission für ein europäisches Zivilprozeßgesetzbuch*, *Zeitschrift für Zivilprozess (ZZP)* 1996, 315 ff.

¹² See Burkhard Heß, *Die „Europäisierung“ des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag – Chancen und Gefahren*, *Neue Juristische Wochenschrift (NJW)* 2000, 23 ff; Thomas Drappatz, *Die Überführung des internationalen Zivilverfahrensrechts in eine Gemeinschaftskompetenz nach Art.65 EGV*, 2002.

¹³ Regulation No 1348/2000 on the Service of Documents, Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), Regulation No 805/2004 creating a European Enforcement Order for uncontested claims (EEO) and Regulation No 1896/2006 creating a European Order for Payment Procedure (EPO) are especially relevant for the ESCP.

the famous Conclusions of the European Council Tampere of 1999, which 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.¹⁴ These Conclusions specifically mentioned the establishment of special common procedural rules for small consumer and commercial claims. The subsequent Programme of Mutual Recognition¹⁵ of 2000 also referred to simplifying and speeding up the settlement of cross-border litigation in small claims. The Hague Programme of 2004¹⁶ called for active pursuance of the work on the small claims procedure.

Both the EPO and ESCP were prepared by means of a Green Paper.¹⁷ The Commission emphasized the disproportionate costs and long duration of proceedings relating to small claims and launched a consultation on measures to simplify and to speed small claims litigation. The Member States generally supported the establishment of European measures in relation to small claims, and this led to the mentioned Commission proposal of March 2005, which after intensive negotiations resulted in the ESCP Regulation of 11 July 2007.

Important limitations to the harmonization of civil procedure are the principles of subsidiarity and proportionality, as laid down in Article 5 EC Treaty.¹⁸ Two main implications for the ESCP – and for the EPO as well – are that the European procedure is optional and that it is only available in cross border cases (see Article 1(1) ESCP).¹⁹ The optional nature implies that the creditor can choose whether to make use of the existing national procedures or the ESCP. Thus, harmonization as such is not the objective of the ESCP Regulation, since national procedures remain in force. The limitation to cross-border cases as a consequence of these principles and of Article 65 EC Treaty that provides that measures can be **[358]** taken in civil matters ‘having cross border implications’ has been much debated. The Commission proposals for both the EPO and ESCP extended to cover purely national cases as well.²⁰ The Commission argued that procedural law, by nature, may have cross-border implications. A measure also applicable to purely internal cases which is necessary for the international market, in particular because it eliminates distortions of competition, necessarily has cross-border implications since the ESCP will facilitate access to justice under equal conditions in all Member States. A restrictive interpretation of Article 65 EC Treaty, according to the Commission, is counter-productive and would create new obstacles to access to justice. However, 21 of the 25 Member States did not support the view of the Commission and neither did the European Parliament.²¹ The ESCP is consequently limited to cross-border cases, as is the EPO.

III Need for a European Small Claims Procedure

¹⁴ Tampere European Council, 15 and 16 October 1999, Presidency conclusions, no 28-39 (no 30).

¹⁵ Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, 30 November 2000, O.J. 2001 C 12/1 (in particular point I.4).

¹⁶ The Hague Programme: strengthening freedom, security and justice in the European Union, 13 December 2004, O.J. 2005 C 53/1 (section 3.4.2).

¹⁷ Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, 20 December 2002, COM(2002) 746 final.

¹⁸ These indicate that the European Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and that the content or form of the action shall not exceed what is necessary to achieve the objectives of this treaty.

¹⁹ Idem Art. 1 EPO.

²⁰ See for the ESCP the Explanatory Memorandum to the proposal, COM(2005) 87 final, 5-6.

²¹ See House of Lords (European Union Committee), 15 February 2006, European Small Claims Procedure, Report with Evidence, Minutes of Evidence, 2; European Parliament, Legislative resolution (n. 6). The EESC, on the contrary, supported the view of the Commission, see Opinion EESC, O.J. 2006, C 88/61.

Most Member States have introduced simplified procedures for small claims. The requirements for these procedures, amongst others the quantitative threshold and the type of cases for which the procedure is available, as well as the procedure itself vary considerably. The Green Paper of 2002 provides some general features of existing small claims procedures in the (old 15) Member States, based upon a survey.²² First of all, in all Member States there are quantitative thresholds, varying between € 600 (in Germany²³) and £ 5000, currently around € 7.500 (in England/Wales²⁴). The use of standard forms to initiate the procedure is quite common. Legal representation is not compulsory in any Member State. Several Member States have the possibility of a purely written procedure, without any oral hearing. In other countries, such as England, where a successful small claims procedure exists, an oral hearing is however, essential.²⁵ In some Member States the small claims procedure is limited to pecuniary claims or other specific types of litigation. In all Member States several rules of procedure are relaxed, such as those concerning evidence. Several Member States have time limits for the delivery of the judgment. The rules concerning the recovery of costs differ considerably per Member State and the same goes for the possibility of appeal.

[359] In the Green Paper the Commission explicated that costs, delays and vexation connected with judicial remedies do not necessarily decrease proportionally with the amount of the claim.²⁶ On the contrary, the weight of these obstacles increases in small claims litigation. At the same time, the number of cross-border disputes is rising, and the obstacles to obtaining a fast and inexpensive judgment in these cases are clearly intensified. The service of documents, taking of evidence and the enforcement of the judgment will inevitably take longer and cost more in cross-border cases. Practical implications of cross-border litigation are the extra need for legal aid due to unfamiliarity with foreign proceedings (even when representation by a lawyer is not obligatory), the costs of translations, and traveling expenses.²⁷

The establishment of the ESCP, as the Preamble clarifies, is justified by the requirement of the internal market²⁸, which also Article 65 mentions as prerequisite for taking measures in the field of judicial cooperation. 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 the ESCP – 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 validity of the internal market argument is to some extent questionable. In relation to the harmonization of contract law it has been argued from an economical perspective that in case competitors in the same Member

²² Explanatory Memorandum (n. 20) 4-5; Green Paper 2002, 51-58.

²³ See Art. 495a Code of Civil Procedure (*Zivilprozessordnung*) that provides that the court can determine its procedure in its reasonable discretion (*nach billigem Ermessen*) for claims with a maximum value of € 600.

²⁴ Regulated in Part. 27 of the Civil Procedure Rules (CPR). The judge has discretionary power to allocate a case to the small claims track; for some cases the small track is excluded or limited.

²⁵ See CPR 27.8 and Practice Directive (PD) 27, rule 5.5 and 5.6. See also *Neil Andrews*, English Civil Procedure. Fundamentals of the New Civil Justice System, 2003, 531.

²⁶ Green Paper 2002, 59.

²⁷ See *Paulien van der Grinten/Paul Meijknecht/Frans van der Velden* (ed.), Practical obstacles in cross border litigation: speeches and presidency conclusions of the international conference organised by the Dutch Presidency on 8 and 9 November 2004 in the Hague, 2005.

²⁸ Preamble no 7 ESCP. See also Explanatory Memorandum (n. 20) 5.

State are treated equally, there is a level playing field.²⁹ 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 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, however, this is 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, in fact, be irrecoverable. 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 contributes to reducing the costs and the duration of proceedings.

IV The European Small Claims Procedure

In this section the ESCP will be analyzed. The objective of the ESCP is to facilitate access to justice.³⁰ Article 1 ESCP explicates its two folded aim. 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 throughout the EU without exequatur.

1 Scope of Application

Pursuant to Article 2 the Regulation shall apply, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal³¹, where the value of a claim, excluding interest, expenses and outlays, does not exceed € 2000.

(a) Threshold of € 2000

The ESCP is only available as an optional tool in case the value of the claim does not exceed € 2000 at the time when the claim form is received by the court with jurisdiction, excluding all interest, expenses and disbursements. This threshold has been much debated during the negotiations on the proposal. Several countries found it too low, and others – including many of the new EU Member States – found it too high. For example Germany, that has a threshold of € 600 for its national procedure, pleaded to lower the limit to € 1000.³² In the Netherlands, where the threshold is currently set at € 5000 (though this will be substantially raised shortly) it

²⁹ Wagner, The Economics of Harmonization: The Case of Contract Law, Common Market Law Review (CMLR) 2002, 995 ff.

³⁰ Preamble no 6 ESCP.

³¹ The Regulation mentions “court or tribunal” in all relevant provisions. In this contribution reference will from hereon only be made to the “court”.

³² See Deutscher Bundestag, Drucksache 16/1684, 31 May 2006, 4-5; Stellungnahme des Deutschen Anwaltvereins, Nr. 44/2005, August 2005, 8-9; Stellungnahme der Bundesrechtsanwaltskammer, June 2005, Nr. 15/2005, 3.

has been argued that the limit should be € 5000 in order for the ESCP to be effective.³³ For England the threshold was acceptable, though it should be allowed that parties choose the ESCP if the value of the claim exceeds € 2000.³⁴ Also ideas to define minimum and maximum limits or to establish a maximum ceiling or minimum floor have been launched.³⁵ The EESC expressed in its opinion on the proposal that **[361]** 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.³⁶ It remains to be seen whether this threshold will be enough to cover a substantial number of cases.

In regard of this threshold, there has also been a discussion on dealing with counterclaims.³⁷ The Commission proposal provided that in case the value of the counterclaim exceeds € 2000, the counterclaim shall only be considered if it arises from the same legal relationship and if the court considers it appropriate to proceed in the ESCP.³⁸ This did not meet the approval of the Council and Article 5(7) ESCP rules that if the counterclaim exceeds the limit of € 2000, the claim and counterclaim shall not proceed in the ESCP, but be dealt with in accordance with national law.

(b) Civil and Commercial Matters and Excluded Matters

The ESCP is applicable in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (“*acta jure imperii*”). This formulation is derived from Article 1 of the Brussels I Regulation and the case law of the European Court of Justice in relation to this provision.

In Article 2(2) the following matters are excluded: a) the status or legal capacity of natural persons, b) rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession, c) bankruptcy, d) social security, e) arbitration, f) employment law, g) tenancies of immovable property, with the exception of actions on monetary claims and h) violations of privacy and of rights relating to personality, including defamation. Sub a-e largely coincide with the exclusions in Article 1 Brussels I.³⁹ The other subject matters are excluded because some Member States have special procedures or even special courts for these cases.⁴⁰

(c) Cross-border Cases

As explained above, the ESCP can only be opted in a cross-border case and is not applicable in a national case.⁴¹ According to Article 3 ESCP for the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a

³³ See Sociaal-Economische Raad, Commissie voor Consumentenaangelegenheden, Briefadvies small claims procedure, 13 January 2006, available at <http://www.ser.nl/nl/publicaties/adviezen.aspx>. A short English abstract of this advice is available at the same website.

³⁴ See House of Lords Report (n. 21) 28-30.

³⁵ Council, 5 September 2005, 11522/05, JUSTCIV 150, CODEC 660.

³⁶ Opinion EESC (n. 21), comment 6.1.

³⁷ The concept of counterclaim should be interpreted within the meaning of Art. 6(3) Brussels Regulation as arising from the same contract or facts on which the original claims was based, see Preamble no 16 ESCP.

³⁸ See Art. 4(2) of the Commission proposal.

³⁹ Except that maintenance cases are included in the Brussels Regulation.

⁴⁰ See also Council of the European Union Comments on the specific articles of the proposal, 21 March 2005, JUSTCIV 54, CODEC 177.

⁴¹ See on the debate on this issue section II.

Member State other than the Member State [362] of the court seized. This definition coincides with the one in Art. 3 EPO Regulation.

2 Key Elements of the Procedure

The Regulation provides the most important procedural rules and some minimum requirements for the ESCP, but is not exhaustive. According to Article 19, subject to the provisions of this Regulation, the ESCP shall be governed by the procedural law of the Member State in which the procedure is conducted. The Regulation thus upholds the principle of *lex fori processus*. The Preamble expresses that the court should respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing and on the means of taking evidence and the extent to which evidence is to be taken.⁴²

Special features and simplifications are that the procedure is in principle conducted in writing (Art. 5), that representation by a lawyer or another legal professional is not mandatory (Art. 10), that there are special rules for the taking of evidence (Art. 9) and that on a hearing the court may make use of video conferences or other communication technology if the technical means are available. There are time limits for conducting certain procedural acts and for giving judgment (Art. 4, 5, 7 and 14). The Regulation is accompanied by four standard forms. These are the claim form (A), a form to request completion or correction of the claim form (B), an answer form (C), and a certificate concerning a judgment in the ESCP (D).

3 Commencement of the Procedure and Jurisdiction

The ESCP is commenced by lodging the claim form A (Annex I) at the competent court, pursuant to Art. 4(1). 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.⁴³ The claim form shall include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents.

The claim form is developed with special care, since the claimant should be able to fill it in without help of a lawyer. It contains closed fields and uses a tick-box system where possible, and provides a short explanation per item. The claimant is instructed that the form should be filled out in the language of the court.⁴⁴ The form is (electronically) available in all official languages of the EU, which facilitates the claimant when filling in the form in the language of the [363] court.⁴⁵ According to Article 11 Member States shall ensure that the parties can receive practical assistance in filling in the forms. The Preamble clarifies that the practical assistance should include technical information concerning the availability and the filling in of

⁴² Preamble no 9 ESCP.

⁴³ Member States shall inform the Commission which means are acceptable and this will be made publicly available (Art. 4(2)). Electronic communication is preferable since this increases accessibility and lowers costs, but since not all Member States are sufficiently equipped yet, it is not possible to oblige Member States to receive electronic claims forms.

⁴⁴ See also Art. 6 ESCP on the language requirements.

⁴⁵ These will be made available on the website of the European Judicial Atlas, at http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm.

the forms.⁴⁶ Information about procedural questions can also be given by the court staff in accordance with national law.⁴⁷

One of the points of debate during the negotiations on the proposal was whether evidence should be lodged to the court together with the claim form. The Commission proposal stated that the claim should be lodged together with any relevant additional document. In order to avoid unnecessary translation costs, however, the current Regulation, provides that the claim form shall include a description of the evidence, and only where appropriate be accompanied by supporting documents. It goes without saying that, if necessary, submission of written evidence or other evidence can be requested during the proceedings.⁴⁸

Where a claim is outside the scope of the Regulation, the court shall inform the claimant and the court will proceed in accordance with national law, unless the claimant withdraws the claim (Art. 4(3). Where the court considers the information provided inadequate or insufficiently clear, or the form is not filled in properly, it will give the opportunity to complete or rectify the form (using standard form B of Annex II), unless the claim appears to be clearly unfounded or the application inadmissible (Art. 4(4). Where the claim appears to be clearly unfounded or the application inadmissible or where the claimant fails to complete or rectify the claim form within the time specified, the application shall be dismissed. The Preamble clarifies that the concepts “clearly unfounded” and “inadmissible” should be determined in accordance with national law.⁴⁹

The ESCP does not contain jurisdiction rules, which means that the ordinary jurisdiction rules of Brussels I apply. Contrary to Art. 6(1) sub d of the European Enforcement Order Regulation (abbreviated as: EEO) and Art. 6(2) EPO, the ESCP neither has an exclusive jurisdiction rule for consumers, which is wider than that of Art. 15-1 Brussels I.⁵⁰ The background probably is that those Regulations concern uncontested claims while the ESCP, in principle, does not, so it will be up to the consumer to contest jurisdiction. This, however, does not explain why the definition of “consumer” is broader under those regulations than under the ESCP. Furthermore, contrary to under Brussels I, the decision in the ESCP is enforceable throughout the EU, so the consumer does not get any protection in the stage of recognition and enforcement.⁵¹ Since small claims litigation mostly involves consumer cases a similar protective rule for the ESCP would in my opinion have been appropriate.

[364] 4 *Conduct of the Procedure*

Article 5(1) ESCP provides that the ESCP shall be a written procedure. During the negotiations the right to an oral hearing has been one of the debated issues.⁵² The Commission proposal provided that an oral hearing may take place when the court deems it necessary, taking into account the demands of the parties. Article 5 ESCP however provides that the court shall hold an oral hearing if it considers this to be necessary or if a party so requests. This request may be refused if it considers that with regard to the circumstances of the case, an oral hearing is

⁴⁶ Preamble no 21 ESCP.

⁴⁷ Preamble no 22 ESCP.

⁴⁸ See Art. 9 ESCP on the taking of evidence.

⁴⁹ Preamble no 13 ESCP.

⁵⁰ These include all natural persons, and do not contain the restrictions of Art. 15 Brussels I Regulation.

⁵¹ See Art. 35(1) Brussels I Regulation.

⁵² See also Council of the European Union, 29 November 2005, doc.no. 15054/05, JUSTCIV 221, CODEC 1107.

obviously not necessary for the fair conduct of the case. The reasons thereto shall be given in writing.

Within 14 days of receiving the properly filled in claim form, a copy of the claim form and possible supporting documents, together with the standard answer form C (Annex III), shall be served on the defendant in accordance with Article 13 (Article 5(2)). The defendant shall submit his response within 30 days of service by filling in standard answer form C, where appropriate accompanied by any relevant supporting documents, or in any other appropriate way, and returning it to the court (Art. 5(3)). Within 14 days of receipt of the response from the defendant, the court shall dispatch a copy thereof, together with any relevant supporting document to the claimant (Art. 5(4)).⁵³ The claimant shall have 30 days from service to respond to any counterclaim (Art. 5(6)).

The language requirements are laid down in Article 6. These rules have received particular attention since the necessary translations may excessively increase the costs of proceedings.⁵⁴ The claim form, the response, the counterclaim and response thereto, and any description of relevant supporting documents shall be submitted in the language or one of the languages of the court. The court may require a translation of documents received not in the language of the proceedings only if the translation appears to be necessary for giving the judgment. Furthermore, the rules of Article 8 of the Service Regulation, and the amendment thereof, have been incorporated.⁵⁵ A party may refuse to accept a document when it is not in the official language of a) the country or place where service is to be effected or where the document is to be dispatched, or b) in a language which the addressee understands.⁵⁶ The court shall inform the other party of a refusal with a view to that party providing a translation of the document.

[365] Other procedural rules are laid down in Articles 8-14 ESCP. An oral hearing may be held through video conference or other communication if the technical means are available (Article 8). The court shall determine the means of taking evidence and the extent of the evidence necessary for its judgment under the (national) rules applicable to the admissibility of evidence (Article 9). The court may admit the taking of evidence through written statements of witnesses, experts or parties. It may also admit the taking of evidence through video conference or other available technical means. In view of the costs, the court may take expert evidence or oral testimony only if it is necessary for giving the judgment. The court shall use the simplest and least burdensome method of taking evidence. The Preamble states that in the context of oral hearing and the taking of evidence, the Member States should encourage the use of modern communication technology.⁵⁷ This is a fast and cheap way of hearing parties or witnesses, and will therefore promote the aims of the Regulation. As mentioned above, representation by a lawyer or another legal professional shall not be mandatory (Article 10), and practical assistance in filling in the forms should be made available (Article 11). Parties are

⁵³ If the defendant claims that the value of a non-monetary claim exceeds € 2000, the court shall within 30 days of dispatching the response to the claimant decide whether the claim is within the scope of the ESCP (Art. 5(5)).

⁵⁴ The relevant provision (Art. 4(7) of the Commission proposal is slightly different from the Regulation.

⁵⁵ Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, O.J. 2000 L 160/37 and Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, O.J. 2007 L 324/79.

⁵⁶ Art. 8(1) sub b Service Regulation provides that it must be in a language *of the Member State of transmission* that the addressee understands. In the new Service Regulation (see previous footnote), the phrase “of the Member State of transmission” is deleted.

⁵⁷ Preamble no 20 ESCP.

not required to make any legal assessment of the claim, the court shall inform the parties about procedural questions, and whenever appropriate, the court shall seek to reach a settlement between the parties (Article 12). As to the time limits the court sets, the party concerned shall be informed of the consequences of not complying with it (Art. 14). The fixed time limits provided for in Articles 4(4), 5(3), 5 (6) and 7(1), may be extended in exceptional circumstances, if necessary to safeguard the rights of the parties. If in exceptional circumstances the court cannot respect the time limits for the court, provided for in Articles 5(2-6) and 7, it shall take the steps required by those provisions as soon as possible.

5 *Service of Documents*

In order to reduce costs, the ESCP has an autonomous rule which provides for a simple means of service of documents. Article 13(1) ESCP provides that documents shall be served by postal service attested by acknowledgement of receipt, including the date of receipt. Not all Member States know this simple means of service, and this means the ESCP introduces a new way of serving documents in cross-border cases covered by the ESCP. If service in accordance with Article 13(1) is not possible, service may be effected by any of the methods provided for in Articles 13 or 14 EEO. These articles provide for ten different methods of service of documents, which are relevant in the context of the EEO Regulation as minimum requirements for the certification of a judgment as European title.⁵⁸ These methods are also prescribed under the EPO Regulation (Article 14 and 15 thereof).⁵⁹

[366] 6 *Conclusion of the Procedure and Enforceability of the Judgment*

According to Article 7, within 30 days of receipt of the timely response from the defendant or claimant to the counterclaim the court shall give judgment, or demand further details within a maximum period of 30 days, or take evidence in accordance with Article 9, or summon the parties to an oral hearing to be held within 30 days of the summons. The court shall give judgment either within 30 days of any oral hearing or after having received all information necessary for giving the judgment. If it has not received an answer from the relevant party within the set time limits, it shall give a judgment on the claim or the counterclaim. The Commission proposal provided for a ‘final deadline’ for the judgment of 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, and it was therefore deleted.⁶⁰ In my opinion, this is regrettable. Though clear time limits per stage of the proceedings are more important, an additional overall limit of six months would have provided a good indication to the parties and guideline to the courts of the maximum duration of proceedings.

The judgment shall be enforceable notwithstanding any possible appeal, and without security required (Article 15). Enforcement in another Member State is regulated by Articles 20-23.⁶¹

⁵⁸ See for a comprehensive discussion of these methods *Thomas Rauscher*, *Der Europäische Vollstreckungstitel für unbestrittene Forderungen*, 2004, 45 ff.

⁵⁹ See *Bartosz Sujecki*, *Mahnverfahren. Mit elektronischem und europäischen Mahnverfahren*, 2007, 153 ff.

⁶⁰ Council of the European Union, 29 November 2005, doc.no. 15054/05, JUSTCIV 221, CODEC 1107.

⁶¹ See section IV.8.

7 *Appeal and Review*

The ESCP does not provide a uniform rule on appeal. In view of the substantial differences in the Member States on this issue, taking up a uniform rule was regarded undesirable.⁶² According to Article 17, Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the ESCP and within what time limit. The Commission shall make that information publicly available. In my view a rule on appeal would have been preferable to promote the uniformity of the procedure.

The ESCP, however, does provide for minimum standards for review of the judgment. Pursuant to Article 18 the defendant shall be entitled to apply for a review before the court with jurisdiction of the Member State where judgment was given where a) the claim form or summons to an oral hearing were served by a method without proof of receipt by him personally as provided for in Article 14 EEO, and service was not effected in sufficient time to enable him to arrange for his defense without any fault on his part, or b) the defendant was prevented from objecting to the claim by reason of *force majeure*, or due to extraordinary circumstances without any fault on his part. In both cases the defendant should act [367] promptly. It is not clear what exactly is to be understood by ‘extraordinary circumstances’. What is clear is that the defendant was not able to defend his case without his fault. This rule is intended to guarantee a possibility of review in situations where the defendant was not able to contest the claim.⁶³ This provision is derived from Article 19 EEO⁶⁴ and partly coincides with the provision laid down in Art. 20 EPO⁶⁵.

8 *Recognition and Enforcement*

The rules for recognition and enforcement are laid down in Articles 20-23 ESCP and for the most part duplicates the relevant rules of the EEO and EPO Regulations.⁶⁶ The judgment given in a Member State in the ESCP shall be recognized and enforced in another Member State without the need for a declaration of enforceability or the possibility of opposing its recognition (Article 20). At the request of one of the parties a certificate concerning a judgment in the ESCP, using standard form D, will be issued. The enforcement shall be governed by the law of the Member State of Enforcement, and the judgment shall be enforced under the same conditions as a national judgment (Article 21). The party seeking enforcement shall produce an authentic copy of the judgment, and a copy of the certificate mentioned in Article 20(2), where necessary with a translation thereof in the language of the country or place of enforcement, or into another language that the Member State has indicated to accept. An authorized representative and a postal address in the Member State of enforcement are not necessary.

Enforcement can only be refused, upon application of the person against whom recognition is sought, if the judgment in the ESCP is irreconcilable with an earlier judgment of an EU Member State, or of a third country, provided that it involves the same cause of action

⁶² Commission staff working document, Comments on the specific articles of the proposal, COM(2005) 87 final, Art. 15.

⁶³ Preamble no 31 ESCP.

⁶⁴ See on this provision *Rauscher* (n. 58) 61 ff.

⁶⁵ See on this provision *Sujecki* (n. 59) 176 ff. Art. 19 EPO is broader since it also covers situations where the payment order was clearly wrongly issued (see Art. 19(2) EPO).

⁶⁶ See Art. 20, 21 and 23 EEO and Art. 19, 21, 22 and 23 EPO. See on these rules of the EEO *Rauscher* (n. 58) 66 ff; on EPO *Kramer/Sujecki* (n. 2) 372.

and that it was between the same parties, and that it is given by the Member State of enforcement or enforceable in that Member State, and the irreconcilability could not have been raised as an objection in the Member State where the judgment in the ESCP was given (Article 22). Where a party has challenged the judgment in the ESCP or where such a challenge is still possible, enforcement proceedings may be limited to protective measures, or be made conditional on the provision of security, or under exceptional circumstances be stayed (Article 23).

9 Costs

In view of the accessibility of the ESCP the rule on the costs has also been a point of debate. The Commission proposal provided that the unsuccessful party [368] shall bear the costs of the proceedings unless where this would be unfair or unreasonable, and that when the unsuccessful party is a natural person and is not represented by a lawyer, he shall not be obliged to reimburse the lawyer's fee of the other party. This was meant to encourage parties not to employ a lawyer.⁶⁷ However, several delegations preferred to apply the principle that the losing party has to pay irrespective of whether he is a natural or legal person.⁶⁸ Art. 16 ESCP therefore provides 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.

As to the costs of the proceedings the Preamble states that it should be necessary to have regard to the principles of simplicity, speed and proportionality when setting the costs of dealing with a claim under the ESCP.⁶⁹ It is appropriate that details of the costs to be charged be made public, and that the means of setting any such costs are transparent.

V Evaluation

1 Some General Comments on the ESCP

Some comments on the rules of the ESCP have already been presented above. The question was raised whether the threshold of € 2000, which as a political compromise might be a good solution, will in view of the economic analysis made by, amongst others, the EESC be enough to cover a substantial amount of cases, in order to outweigh the costs that are involved.⁷⁰ This shall be one of the issues to be taken into account when the operation of the Regulation is reviewed after five years pursuant to Article 28 ESCP, as this provision explicates. Another comment that has been made was that in my opinion a special jurisdiction rule for consumers, as the EEO and EPO provide, would have been in place. The consumer friendliness of the ESCP is further reduced by abandoning the rule that when the unsuccessful party is a consumer, he shall not be obliged to reimburse the lawyer's fee of the professional party, in

⁶⁷ See Art. 14 Commission proposal; Comments on the specific articles of the proposal, Art. 14.

⁶⁸ Council of the European Union, 21 November 2005, doc.no. 14638/05, JUSTCIV 208, CODEC 1037, 6.

⁶⁹ Preamble no 7 ESCP.

⁷⁰ The Extended Impact Assessment made in relation to the proposal (see Commission Staff Working Document, 15 March 2005, SEC(2005)351) showed 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. It was estimated that the abolition of the enforcement procedure will reduce the costs and duration by 20%. In these numbers, however, domestic claims are included. The limitation to cross-border cases limits the impact considerably.

case he was not represented by a lawyer himself. As for the time limits included in the Regulation, it would in my view have been preferable to include an additional time limit of six months for the whole procedure, as the Commission proposal provided.

Another weak point of the Regulation could be that many issues are left to be decided by national procedural law. The course of proceedings, the enforcement [369] 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. This will cause already considerable differences in the level of protection and have an impact on the duration and costs of the procedure. The fact that many issues are left to be decided by national law, necessitates a careful implementation of this Regulation by the Member States. These implementation laws and the operation in practice of the ESCP in the various Member States shall be thoroughly evaluated. Art. 28 ESCP provides for this. By 1 January 2014 the Commission shall present a detailed report reviewing the operation of the ESCP. To that end, and in order to ensure that best practice in the EU is duly taken into account and reflects the principles of better legislation, Member States shall provide the Commission with information relating to the cross-border operation of the ESCP.⁷¹

A last general remark concerns the prospected effectiveness of the ESCP in view of the costs. In practice especially the costs of legal aid and translations appear to be the most important expenses. As to legal aid, it is to be hoped that the standard forms and the conduct of the proceedings is indeed simple and make support of a lawyer in normal cases unnecessary. Though the standard forms are carefully developed and contain clear instructions, it may still be difficult for the average consumer to fill in these forms.⁷² It is important that the practical assistance in the Member States is well arranged. Another aim of the ESCP is to reduce the need, and consequently costs, of translations. The claim form and answer form should be submitted in the language of the court. It is helpful that forms are available in all official languages of the court, so by reading the questions in his own language he knows what the question entails, and can find out which box to tick for the closed questions. But part of the forms consists of open questions. How many consumers will be able to answer these questions in another language? For most (educated) consumers English might, with a little help, still be possible, but how about Polish, Dutch or Greek? Of supporting documents the court may only require translation when this appears to be necessary for giving the judgment. The question is how many courts throughout the EU will be able to analyze for example a contract in other languages than their own language, except maybe for English, or German or French. It must be noted that in most cases a consumer will, be able to litigate in his own country⁷³, and therefore not encounter language problems, at least not in his communication to the court. A (counter)party may refuse to accept a document if it is not in his official language or a language he understands.

It might be that in practice consumers will more often be involved in this procedure as defendant than as claimant and that it especially benefits companies active in the consumer business, such as mail order companies and phone companies.⁷⁴

[370] 2 *Balancing Simplicity and Fairness*

⁷¹ This shall cover court fees, speed of the procedure, efficiency, ease of use and the internal small claims procedures of the Member States.

⁷² For example to answer question 4 of the claim form on jurisdiction of the court.

⁷³ Pursuant to Art. 15-17 Brussels I Regulation.

⁷⁴ The English small claims procedure is also criticized on this point. See recently *Paul Lewis*, *The Consumer's Court? Revisiting the Theory of the Small Claims Procedure*, *Civil Justice Quarterly* (CJQ) 2006, 52 ff.

The Preamble expresses that this Regulation seeks to promote fundamental rights and takes into account, in particular, the principles recognized by the Charter of Fundamental Rights of the European Union.⁷⁵ The court should respect the right to a fair trial and the principle of an adversarial process, in particular when deciding on the necessity of an oral hearing and on the means of taking evidence and the extent to which evidence is to be taken. In this regard Article 6(1) of the European Convention of Human Rights (abbreviated as: ECHR) plays an important role.⁷⁶ The Regulation introduces several measures to improve access to justice and to promote a simple, speedy and relatively cheap procedure. These measures, discussed more in detail above, will be shortly revisited in the context of the fair trial principles set out by Article 6(1) ECHR.

a) Access to the Court

One of the main principles of Article 6 ECHR is the right of access to a court, as recognized and explicated in the famous *Golder* case of 1975.⁷⁷ In later case law the European Court of Human Rights recognized that this also implies *effective* access to the court. This may entail the provision of legal aid or simplified procedures.⁷⁸ In *Kudla v. Poland*⁷⁹ the Court held, contrary to previous case law, that even if it had already found a violation of the reasonable time requirement of Article 6(1), it could further examine whether the right to an effective remedy under Article 13 was violated. In this regard the establishment of the ESCP, which aims at facilitating access to justice in view of the disproportionate costs, complexity and long duration of national (small claims) proceedings in cross-border disputes, is more than welcome. Access to the court is further facilitated by the use of simple standard forms, the possibility of electronic communication (if available at the court), the practical assistance that should be available at the courts and the fact that representation by a lawyer is not compulsory.⁸⁰

[371] b) Right to an Oral Hearing

According to Article 5(1) ESCP the court shall hold an oral hearing if it considers this to be necessary or if a party so requests. 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 conduct of the case. Under Article 6(1) ECHR the right of access to the court and a public hearing usually does entail a right to an oral hearing, but this is not an absolute right.⁸¹ Relevant is for

⁷⁵ Preamble no 9 ESCP.

⁷⁶ See also Art. 6 EC Treaty and Art. 47 Charter of Fundamental Rights.

⁷⁷ ECHR 21 February 1975, no 4451/70, Series A, No 18 (*Golder v. United Kingdom*). See *Aalt Heringa/Jeroen Schokkenbroek et.al*, EVRM Rechtspraak & Commentaar (loose leaf, Art. 6 updated 2004), § 3.6.1; *Johan vande Lanotte/Yves Haeck* (eds.), *Handboek EVRM*, 2/I, 2004, 492 ff; *Clare Ovey and Robin White*, Jacobs and White, *the European Convention on Human Rights*, 2002, 151 ff; *Jochen Frowein/Wolfgang Peukert*, *Europäische MenschenRechtsKonvention*, 1996, 196 ff; *Peter Smits*, *Artikel 6 EVRM en de civiele procedure*, 1996, 19 ff.

⁷⁸ ECHR 9 October 1979, no 6289/73, Series A, No 32 (*Airey v. Ireland*). A minimum standard of legal aid is guaranteed by Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, O.J. 2003 L26/41.

⁷⁹ ECHR, 26 October 2000, no 30210/96, *European Human Rights Reports* (EHRR) 2000-XI (*Kudla v. Poland*). See *Vande Lanotte/Haeck* (n. 77) 434; *Ovey/White* (n. 77) 168.

⁸⁰ Preamble no 27 ESCP further states that the court must include a person qualified to serve as a judge in accordance with national law. This as far as possible guarantees the impartiality and independence of the court, as required by Article 6(1) ECHR, as well as the quality of the proceedings and judgment.

⁸¹ See on this issue *Ovey/White* (n. 77), 155 ff; *Smits* (n. 77), 98 ff and 155 ff (not up to date).

example whether it regards proceedings before a court of first and only instance, and is also depends on the importance of the proceedings in question.⁸² In *Dory v. Sweden*, the Court ruled that a court could, having regard to the demands of efficiency and economy, abstain from holding a hearing if the case could be adequately resolved on the basis of the case-file and the parties' written observations.⁸³ The rule of Article 5(1) ESCP seems to fit into the case law of the Court.⁸⁴ It concerns small claims litigation, and these cases will usually be relatively simple and require efficient proceedings. Though national law might not allow appeal, Article 18 guarantees review in certain cases, so the ESCP cannot be regarded as a proceedings before a court of first and only instance. Furthermore, the court will usually respect the request of a party to a hearing⁸⁵; only when it is obviously not necessary for the fair conduct of the case, the court may refuse the request.

c) Reasonable Time and Time Limits

Many cases at the European Court of Human Rights have dealt with the requirement of a trial within a reasonable time, and many EU countries have violated this requirement in civil cases. For small claims litigation it is relevant that the complexity of the case is one of the criteria to determine whether the duration of proceedings is still acceptable or not⁸⁶, since most of these cases are simple. The ESCP strives for reducing the duration of proceedings considerably and to that end introduces time limits for the procedural acts by the parties, such as for responding to the claim, and for providing necessary translations, as well as for the court to dispatch documents to the counter-party, for holding a hearing and for giving judgment.⁸⁷ In general such time limits are acceptable, as long as the very essence of the right is impaired, the limitation has a legitimate aim and there is [372] proportionality between the means and the aim.⁸⁸ According to Article 14 ESCP, time limits may in exceptional circumstances be extended. In my opinion the court should make a limited use of this possibility. As far as it concerns the time limits applicable to the parties, the possibility of extension if necessary in order to safeguard their rights (Article 14(2)) guarantees fair proceedings, since in some cases a time limit of 30 days, in view of the cross-border nature of the case, may be too short.

d) Fairness of the proceedings

The fairness of the proceedings, as required by Article 6(1) ECHR, covers a wide range of issues. In relation to the ESCP it is interesting to see how the tension between a fast, simple and cheap proceedings and the right to an adversarial proceedings is solved, including the right to accession of documents and the taking of evidence.

⁸² See ECHR 10 November 2005, no. 55193/00 (*Schelling v. Austria*), available at <<http://www.echr.coe.int/echr/>>; 23 February 1994, no 18928/91, Series A, No. 283-A (*Fredin v. Sweden*, no 2); 26 April 1995, no 16922/90, Series A, No. 312 (*Fischer v. Austria*).

⁸³ ECHR 12 November 2002, no. 28394/95 (*Dory v. Sweden*), available at <<http://www.echr.coe.int/echr/>>

⁸⁴ The more strict Art. 4(1) of the Commission proposal is in this regard more questionable.

⁸⁵ The claim form and answer form include a question on whether a party wants an oral hearing to be held.

⁸⁶ *Inter alia* ECHR 6 May 1981, no. 7759/77, Series A, No. 42 (*Buchholz v. Germany*). See Smits (n. 77), 206 ff.

⁸⁷ Preamble no 23 ESCP provides that even when this Regulation does not prescribe any time limit of a specific phase of the procedure, the court of tribunal should as soon as possible. For calculating the time limits Regulation (EEC, Euratom) No 1182/71 applies, see Preamble no 24 ESCP.

⁸⁸ ECHR 18 May 1985, no 8225/78, Series A, No 93 (*Ashingdane v. United Kingdom*). See *Vande Lanotte/Haeck* (n. 77) 493 ff; *Ovey/White* (n. 77) 152; *Frowein/Peukert* (n. 77) 208.

The right to an adversarial proceedings is in first instance guaranteed by a correct service of the claim form, and possible supporting documents, to the defendant.⁸⁹ To reduce costs, Article 13 provides that documents shall in principle be served by postal service attested by an acknowledgement of receipt. This acknowledgement shall guarantee that the defendant received the claim form and answer form, and can consequently participate in the proceedings by filling out the answer form and by requesting an oral hearing. If postal service is not possible, service may be effected by any other method provided for in Article 13 or 14 EEO Regulation. Article 14 EEO allows service without proof of receipt by the debtor, and is therefore less certain. In order to compensate for a possible defect in the service, Article 18 provides for a possibility to request review of the judgment where the claim form or summons to an oral hearing were served by a method without proof, in accordance with Article 14 EEO and service was not effected in sufficient time to enable him to arrange for his defence without any fault on his part. It also provides for review where the defendant was prevented from objecting the claim by reason of *force majeure*. In my view this sufficiently guarantees the right to adversarial proceedings.

The language requirements of Article 6 also guarantee that the defendant is able to understand the documents that are served, because it has to be in the official language of his country or place, or in a language he understands.

Finally, Article 6(1) ECHR does not rule on the admissibility of evidence.⁹⁰ What is important is that the taking of evidence does not violate the right to a fair trial, and that there has been equality between the parties in this respect.⁹¹ Limitation of the admission of evidence for reasons of procedural efficiency, especially in claims with a limited value, in the sense of Article 9 ESCP, therefore, does not contradict Article 6(1) ECHR.

3 Concluding Remarks

The establishment of the ESCP is a step in the right direction to promote access to justice, and to speed up, simplify and reduce costs of small claims litigation, while respecting the principles of a fair trial. It vouches for a careful balance between simple and relatively cheap proceedings on the one hand and the principles of a fair, adversarial procedure on the other hand. Whether the ESCP will become successful in practice of course remains to be seen and will be evaluated after five years. The optional nature of the ESCP leads to multiplicity of procedures, which might as such not be preferable, but it also implies that it will really have to prove its value in competition with the existing national procedures. This may well benefit both national small claims procedures⁹² and the ESCP.

⁸⁹ Smits (n. 77) 91 ff.

⁹⁰ European Commission on Human Rights, 16 October 1980, no 8876/80, Decisions and Reports 28, 127 (X. v. Belgium).

⁹¹ ECHR 23 June 1993, 12952/87, Series A, No 262 (Ruiz-Mateos v. Spain); 27 October 1993, Series A, No. 274-A (Dombo Beheer BV v. Netherlands). See *Heringa/Schokkenbroek* (n. 77) § 3.6.4.6; *Vande Lanotte/Haeck* (n. 77) 453 ff; *Ovey/White* (n. 77) 156 ff; *Frowein/Peukert* (n. 77) 224 ff and 230 ff; *Smits* (n. 77) 117 ff.

⁹² In the Netherlands the ESCP has given inspiration for the development of a national small claims procedure. See Xandra Kramer, Vereenvoudiging van de geschillenbeslechting in consumentenzaken: de Europese small claims procedure en nationale initiatieven, *Tijdschrift voor Consumentenrecht en Handelspraktijk* (TvC), 2007, p. 111-121.