



Practice guide for the application of the **European Small Claims Procedure**

under Regulation (EC) No 861/2007 of the European
Parliament and of the Council of 11 July 2007
establishing a European Small Claims Procedure

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Chapter One

Introduction



1.1. Aim and purpose of the European Small Claims Procedure

In the context of the objectives of securing access to justice and constituting an area of freedom, security and justice in the EU, the European Small Claims Procedure has the key aim of simplifying, speeding up and reducing costs of litigation in cross-border small claims cases within the EU (see Article 1 and Recitals (1), (7), (8) and (36)).

To achieve this the procedure places emphasis on the need for relative simplicity of the proceedings, notably that the procedure should largely be conducted by means of standard forms annexed to the Regulation. Furthermore the role of the court is strengthened significantly as regards managing the progress of the case and in determining the issues between the parties in relation to the claim. Parties can make use of the procedure without the need for, and attendant expense of, legal advice. The requirement that the Member States ensure practical assistance (Article 11) helps parties to navigate the procedure without legal expertise. The e-Justice Portal has a section dedicated to the European Small Claims Procedure, including the forms and the information provided by the Member States pursuant to Article 25. The judgment is enforceable in other Member States without the need for

any intermediate procedure for recognition and enforcement (known as 'exequatur').

The procedure is available both for individuals or consumers, for whom it may be particularly appropriate, and for businesses – in particular small and medium-sized businesses – confronted with cross-border disputes as part of their affairs. The aim for the procedure to be speedy is to be achieved by the observance of the specific time limits set in respect of various stages of the procedure. Restriction of costs is also an important aim and the duty is placed on the court to ensure that the costs awarded are not disproportionate to the value of the claim.

1.2. General background

One of the main continuing concerns voiced over the functioning of Civil Justice systems, notably in relation to the possibility of ordinary citizens accessing the courts and seeking redress for claims quickly and without having to spend large sums of money on legal advice, has been in the area of claims of low value. In these cases, especially those taken by individuals against businesses or other individuals, the time, effort and cost involved can often be grossly disproportionate to the value of the claim.

To address this most Member States have devised special procedures characterised by efforts to simplify, accelerate the resolution and reduce expense of such claims by individuals or small businesses⁽¹⁾. In many of these procedures a number of common features are found such as restriction of costs awarded, absence of lawyers, simplification of rules of evidence and generally the placing of more responsibility to manage cases and to achieve speedy resolution by decision or agreement of the parties.

The concerns which have led to such initiatives in domestic legal systems are all the more present when claims of low value are made across the borders of EU Member States given the additional problems attendant on such situations of unfamiliarity with the procedures in other Member States and the need to work in different languages. This has resulted in the creation of the European Small Claims Procedure (paragraph 1.3) as well as the establishment of ADR and ODR mechanisms at the EU level, including the ODR platform (paragraph 1.5.3).



(1) For a description of some of the features typified in national small claims procedures reference can be made to the Green Paper – COM(2002) 746 final; see paragraph 1.4.1 and footnote 8 below.

1.3. Historical and political background to the proposal

1.3.1. The Down Hall Conference⁽²⁾

Given the difficulties as noted in the foregoing paragraph it was quite logical that an early initiative should be taken to explore the possibility of establishing a special procedure at European level for dealing with consumer claims and claims of low value. Thus discussions about the possibility of creating a European procedure for dealing with consumer and other claims of low value took place at a conference held in England during the UK Presidency of the first half of 1998.

This conference was attended by a significant number of experts from various EC Member States as well as representatives of the European Institutions and heard presentations about different types of procedure within Europe and elsewhere⁽³⁾. The overall consensus which emerged from the conference was that the development of

a special European procedure for consumer and other claims of low value could be of value for litigation within the EC especially having regard to the increased mobility of individuals and trade across borders and the manifest difficulties which present themselves to individuals and small businesses in seeking to obtain redress in respect of such claims.

⁽²⁾ The Conference took place at Down Hall, Hatfield Heath, Hertfordshire on 22 and 23 June 1998. A reference to this conference and the resulting report can be found on pp. 59/60 and in footnote 185 of the Green Paper.

⁽³⁾ For example, delegates were interested to hear about small claims procedures in Singapore carried out online and in Lisbon for dealing with small consumer claims and which also dealt with some cross-border claims between Portugal and Spain.

1.3.2. Political context

Once the Amsterdam Treaty was in place a number of political statements were made, the most significant of which is to be found in the conclusions of the Tampere summit which was the first occasion on which EC Heads of Government met to discuss matters of Justice⁽⁴⁾. This was followed by the programme of measures put in place to implement the Tampere conclusions⁽⁵⁾ subsequently reiterated in the Hague Programme⁽⁶⁾.

1.4. Development of the ESCP

1.4.1. First steps towards the proposal

In 2000 the European Commission took the initiative in issuing a questionnaire to establish the current availability of small claims

procedures in the EC Member States⁽⁷⁾. This was followed by a Green Paper which was issued in the light of the changes to the EC Treaty resulting from the Amsterdam Treaty and the Tampere conclusions, containing various suggestions for action to fulfil the political commitments already made, notably the need for a simplified procedure for low value claims to facilitate access to justice. It also covered matters relating to a European payment order for uncontested debts⁽⁸⁾.

The Commission came forward with a proposal for the Regulation in March 2005⁽⁹⁾ having earlier made the proposal for the European Order for Payment procedure⁽¹⁰⁾. The European Small Claims Regulation became applicable on 1 January 2009.

(4) See Recital (4); paragraphs 30 and 34 of the Conclusions, which can be found at http://www.europarl.europa.eu/summits/tam_en.htm, are in the following terms as regards Small Claims – paragraph 30 – “The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims...” and, in paragraph 34 – “In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims...”.

(5) See section 1.B.4 of the programme as published in the Official Journal on 15 January 2001, C 12/1 on p. 4; see also Recital (5).

(6) See paragraph 3.4.2 of the programme as published in the Official Journal on 3 March 2005, C 53/1 on p. 53.

(7) See Report by Evelyne Serverin under the title “Des Procédures de Traitement judiciaire des demandes de faible importance etc” published by Cachan, 2001 as noted at footnote 2 on page 8 of the Green Paper.

(8) Green Paper COM(2002) 746 final, published on 20 December 2002; the Green Paper is referred to in Recital (6).

(9) COM(2005) 87 final published on 15 March 2005.

(10) COM(2004) 173 final published on 25 May 2004.

1.4.2. The negotiations and the six principles

Given that there was general political agreement about the desirability of creating a European Small Claims Procedure to deal with cross-border cases as an alternative to national procedures, the negotiations were free to concentrate on the substance of the procedure. One of the difficult sticking points was the value of the financial limit, that is the answer to the question – ‘What is a Small Claim?; there were some Member States which sought a relatively low limit whilst others wanted a limit which would enable most claims by consumers to be dealt with. A compromise on this issue was eventually achieved during the discussions in the European Parliament and the Council.

A key moment in the Council discussions was the adoption by Justice Ministers of a number of principles which were to be the basis of the negotiations as well as of the procedure itself. These are to be found in a Presidency document submitted to the Ministers in November 2005⁽¹¹⁾ and are as follows:

- the European Small Claims Procedure should primarily be a written procedure – see Article 5(1) and Recital (14);

- an oral hearing should be held if the court considers this to be necessary;
- to ensure that the procedure is accelerated and efficient there should be time limits set at specific stages;
- the use of modern communications technology was to be encouraged to facilitate the conduct of hearings and the taking of evidence – see Articles 8 and 9(1);
- legal representation should not be mandatory – see Article 10;
- the court should ensure that any costs recoverable from the unsuccessful party are proportionate having regard to the value of the claim – see Article 16.

As can be seen from the text of the Regulation, the principles referred to in the previous paragraph were indeed adopted and form an important foundation for the procedure.

⁽¹¹⁾ Note from the Presidency to the Council No 15054/05 of 29 November 2005; JUSTCIV 221/CODEC 1107.

1.4.3. The amended European Small Claims Regulation – an overview

The European Small Claims Procedure was evaluated in 2013⁽¹²⁾ and in the same year the European Commission published a report⁽¹³⁾ and adopted a proposal⁽¹⁴⁾ amending the Regulation. The main conclusions were that the procedure had facilitated cross-border litigation for small claims in the EU, and that it had reduced costs and the duration of proceedings. However, the procedure was underused due to the limited scope and unfamiliarity with the procedure in legal practice in some of the Member States. In addition a few minor shortcomings in the rules were reported.

In 2015, Regulation No 2015/2421 was adopted, amending the European Small Claims Regulation. The amended version of the European Small Claims Regulation became effective on 14 July 2017. The most significant amendment is the raising of the monetary limit of the procedure from €2000 to €5000 (Article 2). Most other amendments aim at strengthening the use of distance communication technology, including to conduct oral hearings (Article 8), and the taking

of evidence (Article 9) and enabling the e-service of documents (Article 13) and distant payment of court fees (Article 15a).

Other amendments are that the primacy of the written procedure is underlined (Article 5), the practical assistance of parties is strengthened (Article 11) and the rule on minimum standard for review is clarified (Article 18). New provisions are inserted regarding the requirement that court fees should be proportionate (Article 15a), the language of the enforcement certificate (Article 21a) and the enforcement of court settlements (Article 23a).

In addition, Regulation No 2015/2421 amended one provision of the Order for Payment Procedure⁽¹⁵⁾. Article 17 of that Regulation now envisages a transfer to the European Small Claims Procedure in cases where a statement of opposition is lodged against the payment order, where the European Small Claims Procedure is applicable.

⁽¹²⁾ Assessment of the socio-economic impacts of the policy options for the Future of the European Small Claims Regulation, Final Report, RDT-L05-2010, Deloitte, Brussels, 19.07.2013.

⁽¹³⁾ COM(2013) 795 final.

⁽¹⁴⁾ COM(2013) 794 final.

⁽¹⁵⁾ Regulation No 1896/2006.

1.5. Evolution of EU Civil Justice and Relation to Other Instruments

1.5.1. Development of New Instruments and Abolition of Exequatur

Since the enactment of the European Small Claims Regulation, a number of new instruments have been brought about and existing instruments have been amended. A novelty of the European Small Claims Regulation and the European Order for Payment procedure was the abolition of exequatur, the procedure to allow a judgment from one Member State to be recognised for enforcement in another. In the meantime, the key instrument in the area of cross-border litigation – the Brussels I (recast) Regulation⁽¹⁶⁾ – has also abolished exequatur but this does not have the features which facilitate the resolution of small claims. In addition, in the Brussels I (recast) Regulation, the grounds on the basis of which the refusal of enforcement can be invoked in the Member State of enforcement, using a national procedure, are more extensive under that Regulation, than those under the European Small Claims and European Order for Payment Regulations respectively, which may speed up enforcement. Chapter 7 of this guide deals with appeal and review.

1.5.2. Interaction with Other Instruments – the EOP and the Brussels I (recast) Regulation

The two Regulations that are most closely connected to the Small Claims Regulation are the European Order for Payment procedure (EOP) and the Brussels I (recast) Regulation, referred to in paragraph 1.5.1 of this guide. The ESCP and EOP were negotiated in the same period and were the first two genuine uniform European civil procedures. While the ESCP applies to both contested and uncontested claims in cross-border cases with a value of maximum €5 000, the EOP applies to uncontested claims only, but its application is not limited to a maximum amount. As described in paragraph 1.4.3 of this guide, the relationship between these two instruments is set out in Article 17 of the EOP Regulation, which refers to the ESCP in the case where the order for payment is opposed, and provided that the claim is within the scope of the ESCP. In addition, the special rules on service of documents laid down in the EOP Regulation apply as default rules (Article 13(4) ESCP). See in more detail paragraph 2.4.3 of this guide.

The Brussels I (recast) Regulation is of importance in determining which court has jurisdiction for a claim in the ESCP within the meaning of Article 4 ESCP. To this effect, Claim Form A refers to the jurisdiction rules of this Regulation. Article 3 ESCP – defining cross-border cases, further refers to this Regulation to determine the domicile of the parties. In addition,

⁽¹⁶⁾ Regulation No 1215/2012.

certain terms used in the ESCP are to be interpreted with those of the Brussels I (recast) Regulation, most notably 'civil and commercial matters' within the meaning of Article 2(1). See further paragraph 2.4.1.

Other instruments that are important for the application of the ESCP are the Regulation on the service of documents (Service Regulation)⁽¹⁷⁾ and the Regulation on the taking of evidence (Evidence Regulation)⁽¹⁸⁾, which apply as default rules in so far as the ESCP does not include special rules on cross-border service or evidence. See also paragraph 2.4.2 of this guide.

1.5.3. European ADR and ODR Instruments

The European Small Claims Procedure should also be viewed in the context of the aim of EU civil justice to resolve disputes in the best possible way. Alternative Dispute Resolution (ADR) schemes in the consumer area and smaller business disputes for which the ESCP is suitable are of increasing importance in the Member States. To facilitate out of court dispute resolution, the Mediation Directive of 2008⁽¹⁹⁾

provides minimum rules for mediation in cross-border disputes. In 2013, the Directive on Consumer ADR (ADR Directive)⁽²⁰⁾ and the Regulation on consumer online dispute resolution (ODR Regulation)⁽²¹⁾ were adopted. The ADR Directive applies to both domestic and cross-border cases and includes rules on ADR entities and procedures, on information to be provided to consumers and traders, and on the cooperation between ADR entities and designated national authorities. The ODR Regulation has created an online dispute resolution platform (the [ODR platform](http://www.odreurope.com)) through which complaints can be filed to be resolved by the appropriate qualified national ADR entities⁽²²⁾.

⁽¹⁷⁾ Regulation No 1393/2007.

⁽¹⁸⁾ Regulation No 1206/2001.

⁽¹⁹⁾ Directive 2008/52/EC.

⁽²⁰⁾ Directive 2013/11/EU.

⁽²¹⁾ Regulation (EU) No 524/2013.

⁽²²⁾ See <http://www.odreurope.com/eu-odr-platform>



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Chapter Two

The ESCP: Scope of application



The scope of the Regulation is set out in Articles 2 and 3 ESCP. Of most significance are the financial limit, the subject matter and the cross-border nature. Where a claim is outside the scope of the Regulation, the court or tribunal shall inform the claimant to this effect. Unless the claimant withdraws the claim, the case shall proceed in accordance with the national procedural rules of the Member State in which the procedure is conducted (Article 4(3)).

2.1. Material scope of the Regulation

The Regulation provides for the two elements of the material scope of the ESCP, namely the financial limit of claims which can be made under the procedure and the subject matter of the claims themselves. In general, claims whose subject matter falls within the general description of 'civil and commercial' matters are within the scope but this is subject to a number of restrictions and exclusions. The expression 'civil and commercial' has itself been interpreted extensively by the European Court of Justice.

2.1.1. The financial limit of a European Small Claim

The ESCP is, since the amendments brought about by Regulation No 2015/2421 (see paragraph 1.4.3 of this guide), applicable to claims not exceeding €5 000. Similar upper limits, though the range of values varies

in the Member States, also apply in national small claims procedures. This limit also applies to a counterclaim, and should the counterclaim exceed the limit, both the claim and the counterclaim proceed in accordance with national procedural law (Article 5(7)).

Article 2(1) sets out how the value of the claim is to be determined. In the first place the value is taken at the date on which the claim is received by the court or tribunal which has jurisdiction to determine the claim. Secondly, the value is computed excluding all interest sought on the principal claim itself, any expenses and disbursements which might be added to the claim. This exclusion would not exclude a stand-alone claim, for example, which related only to interest payments on a debt which had already been paid⁽²³⁾.

2.1.2. Subject matter – Monetary and non-monetary

Unlike the procedure for the European Order for Payment which is limited to monetary claims, non-monetary claims can be the subject of a claim under the ESCP, and provision for this is made in the Claim Form in Part 7; as to the completion of this, see paragraph 3.2 of this guide. In a non-monetary claim, a claimant might for example seek an order to prevent a legal wrong, say trespass or damage to property, or to seek to secure the performance of an obligation such as delivery of goods

⁽²³⁾ See paragraph 4.5 below for the implications of the value of the counterclaim in determining whether a claim is within the scope or not.

or other performance of a contract. If the claim is non-monetary, it must be given a value which falls within the financial limit of the ESCP.

2.1.3. Subject matter – Excluded subjects

2.1.3.1. General exclusions

In the Regulation, certain matters are excluded specifically from the material scope of the ESCP which might otherwise be considered to be included within the scope of ‘civil and commercial matters’. These are specified as revenue, customs and administrative matters as well as the liability of a State for acts or omissions in the exercise of State authority, also known as *acta iure imperii*. If a claim deals with such excluded matters then the court receiving it will generally be required to reject it of its own motion as falling outside the scope of the European Small Claims Procedure.

2.1.3.2. Subjects excluded specifically by Article 2(2)

In addition, the Regulation specifies that it does not apply to certain other specific matters which would be considered to fall within the notion of civil and commercial matters. These exclusions, which are more extensive than and not entirely similar to those specified in the EOP Regulation, are detailed in Article 2(2) and are set out in the attached box.

- (a) the status or legal capacity of natural persons;
- (b) rights in property arising out of a matrimonial relationship, or out of a relationship deemed by law applicable to such relationship to have comparable effects to marriage;
- (c) maintenance obligations arising from a family relationship, parentage, marriage or affinity;
- (d) wills and succession including maintenance obligations arising by reason of death;
- (e) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- (f) social security;
- (g) arbitration;
- (h) employment law;
- (i) tenancies of immovable property, with the exception of actions on monetary claims; or
- (j) violations of privacy and of rights relating to personality, including defamation.

2.1.4. Subject matter - Included subjects

2.1.4.1. Civil and commercial matters – general

The subject matter which falls within the material scope of the ESCP relates principally to what are considered to be *civil and commercial matters*. As set out in Article 2(1) for the purposes of the Regulation the meaning of this expression does not depend on which court or tribunal is involved in considering the claim or on the national law of any Member State. It is also to be understood as being in line with the autonomous interpretation of the words as used in other EU instruments including the Brussels I (recast) and EOP Regulations.

2.1.4.2. The meaning of civil and commercial matters

The expression is not defined in the Regulation, but it is generally understood that there is a distinction between civil matters on the one hand and public law matters on the other, and the European Court of Justice has issued a number of judgments determining the extent and effect of this distinction in the context of the various instruments. Despite the distinction, the ECJ has held that there are certain public law matters which would nevertheless be considered as falling within the meaning of civil and commercial matters. This depends to a degree on decisions taken by the ECJ in interpreting other instruments notably the Brussels I (recast) Regulation and its predecessors. Details of these decisions are given below in paragraph 2.1.5.

2.1.5. Civil and commercial matters – interpretation by the CJEU

2.1.5.1. An autonomous meaning

In a number of cases, the European Court of Justice has held that, in order to ensure that the rights and obligations flowing from the relevant instruments are applied in an equal and uniform manner, the term ‘civil and commercial matters’ cannot be interpreted in relation to only one legal system but must be given an autonomous meaning derived from the objectives and scheme of the EU legislation concerned and the general principles which stem from the corpus of the national legal systems as a whole. The Court has held generally that two elements are relevant for deciding whether or not a dispute is of a civil and commercial nature:

- the subject matter of the dispute and so the basis and the nature of the action; and
- the parties involved and the nature of the relationship between them.

For a statement of the thinking of the CJEU on the matter, see the case of *Apostolides v Orams*⁽²⁴⁾ in which the court summed up the position in relation to the Brussels I Regulation (the predecessor of the Brussels I (recast) Regulation) as follows:

“... it is to be remembered that, in order to ensure, as far as possible, that the rights and obligations which derive from Regulation No 44/2001 for the Member States and the persons to whom it applies are equal and uniform, ‘civil and commercial matters’ should not be interpreted as a mere reference to the internal law of one or other of the States concerned. That concept must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of the regulation and, second, to the general principles which stem from the corpus of the national legal systems. The autonomous interpretation of the concept of ‘civil and commercial matters’ results in the exclusion of certain judicial decisions from the scope of Regulation No 44/2001, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action...”

⁽²⁴⁾ (C-420/07[2009] ECR I-3571), in particular in paragraphs 41 and 42, in which reference was made *inter alia* to the cases of *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol*, (C-29/76 [1976] ECR 1541), and the more recent case of *Lechoritou v Dimisiotis Omospondikis Dimokratias tis Germanias*, (C-292/05 [2007] ECR I-1519).

2.1.5.2. Actions involving a public authority

With respect to actions involving a public authority, the Court of Justice has specified that a matter is not 'civil or commercial' when it concerns a dispute between a public authority and a private person when the former is acting in the exercise of a public power. The Court, therefore, has drawn a distinction between such actions, known as *acta iure imperii*, which in any event are not included within the notion of 'civil or commercial matters' for the purposes of the ESCP, and *acta iure gestionis*, generally actions of a commercial nature carried out by a State which are included within that notion. The CJEU also commented on this point in the case of *Apostolides*⁽²⁵⁾ as follows:

"... the Court has held that, although certain actions between a public authority and a person governed by private law may come within the concept, it is otherwise where the public authority is acting in the exercise of its public powers... The exercise of public powers by one of the parties to the case, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such a case from civil and commercial matters..."

⁽²⁵⁾ Cit. supra footnote 17.



2.1.5.3. CJEU cases illustrating the distinction

The distinction between cases which do not fall within the notion of ‘civil and commercial’ and those which do is not always easy to make in practice. The CJEU has examined this in a number of specific cases examples of which are given in the box on the following page.

Claims which the CJEU decided were ‘civil and commercial’:

In *Sonntag v Waidmann* (Case C-172/91, ECR 1993, I-1963), a claim for compensation for injury to an individual resulting from a criminal offence is civil in nature. However, such an action falls outside the scope of the term ‘civil or commercial matters’ where the author of the damage must be regarded as a public authority which acted in the exercise of public powers (in that case a teacher supervising pupils was not considered to have been ‘acting in the exercise of public power’).

In *Verein für Konsumenteninformation v Karl Heinz Henkel*, (Case C-167/00, ECR 2002, I-8111), a claim brought as a preventative action by a consumer protection organisation to prevent a trader from using unfair contract terms in contracts with private individuals.

In *Gemeente Steenbergen v Baten* (Case C-271/00, ECR 2002, I-10489), a claim under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid

by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. However where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that claim cannot be regarded as being included within ‘civil matters’.

In *Préservatrice foncière TIARD v Netherlands* (Case C-266/01, ECR 2003, I-4867), a claim by which a State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals.

In *Frahuil SA v Assitalia*, (Case C-265/02, ECR 2004, I-1543), a claim by way of legal subrogation against an importer who owed customs duties by the guarantor who paid those duties to the customs authorities in performance of a contract of guarantee under which it had undertaken to the customs authorities to guarantee payment of the duties in question by the forwarding agent, which had originally been instructed by the principal debtor



to pay the debt, must be regarded as coming within the concept of 'civil and commercial matters'.

In *Apostolides* (see above), a claim for recognition and enforcement of an order for payment of damages for unlawfully taking possession of land, the delivery up of that land, its restoration to its original state and the cessation of any other unlawful intervention where, in the main proceedings, the action is between individuals and is brought not against conduct or procedures which involve an exercise of public powers by one of the parties to the case, but against acts carried out by individuals.

In *Realchemie Nederland BV v Bayer CropScience AG*, (Case 406/09, ECLI:EU:C:2011:668), a claim for recognition and enforcement of an order for payment of a fine in order to ensure compliance with a judgment given in a civil and commercial matter, namely infringement of a right to intellectual property held as a matter of private right by a limited company.

In *Pula Parking d.o.o. v Sven Klaus Tederahn* (C-551/159, ECLI:EU:C:2017:193), enforcement proceedings brought by a company owned by a local authority against a natural person domiciled in another Member State, for the purposes of recovering an unpaid debt for parking in a public car park, the operation of which has been delegated to that company by that authority, which are not in any way

punitive but merely constitute consideration for a service provided, are to be considered a civil and commercial matter.

Claims which the CJEU decided were not 'civil and commercial':

In *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol*, see above, a claim by a public authority created by an international treaty to recover from a private party charges for the use of its equipment and services where such use was obligatory and the charges were fixed unilaterally.

In *Netherlands v Rüffer* (C-814/79, ECR 1980, 3807), a claim by a public authority responsible for policing public waterways in the exercise of its public powers suing a ship-owner for the recovery of costs incurred during the removal of a collision wreck from such waterways.

In *Lechoritou v Dimosiotis Omospondikis Dimokratias tis Germanias*⁽²⁶⁾, see above, a claim by representatives of victims and survivors of a wartime massacre by military forces seeking compensation from the State concerned.

⁽²⁶⁾ Cited in note 17 above.

2.2. Geographical Scope of the Regulation

2.2.1. General geographical scope

The ESCP Regulation applies in all the Member States except Denmark (Recital 38).

2.2.2. Cross-border cases

The ESCP only applies to cases defined as ‘cross-border’, that is cases in which at least one of the parties is domiciled or habitually resident in a Member State other than that of the court or tribunal seised with the claim; for the definition see Article 3(1). Recital (5) of amending Regulation No 2015/2421 specifies that a cross-border case should be considered to exist when at least one of the parties is domiciled or habitually resident in a Member State *bound by this Regulation* other than the Member States of the court or tribunal seised. The addition of ‘bound by this Regulation’ implies that such a situation does not exist when the party not residing or domiciled in the Member State of the court seised is habitually resident or domiciled in Denmark.

In Article 3(3) it is provided that the relevant moment for determining whether a case is a cross-border case is the date on which the Claim Form is received by the competent court or tribunal. It should be borne in mind that the factual basis of this condition has to be stated in the Claim in Part 5 of Claim Form A.

2.2.2.1. Non-EU claimants

Given the definition of ‘cross-border’, and having regard to the effect of the jurisdiction provisions in the Brussels I (recast) Regulation, in certain circumstances a claimant domiciled or habitually resident in a non-EU Member State may be able to make use of the ESCP against a defendant who is domiciled or habitually resident within the EU. This would be the case where the defendant is domiciled or habitually resident in a Member State other than that of the competent court since then that party is not in the same State as the court since this meets the conditions of Article 3(1).

2.2.2.2. Non-EU defendants

Also, a claimant domiciled or habitually resident in a Member State other than that of the competent court may be able to make a claim under the ESCP against a defendant domiciled or habitually resident outside the EU. The ground on which a court in the EU will be able to take jurisdiction for this purpose will be as set out in the relevant EU instrument, in particular the Brussels I (recast) Regulation.

2.3. Applicability in time

The ESCP Regulation has applied in all the Member States except Denmark since 1 January 2009. However a claim can be made under the procedure even though it pre-dates that date provided that the

obligation on which the claim is based has not prescribed or that any period of limitation applicable in respect of the claim has not elapsed under the relevant applicable law. The amendments brought about by Regulation No 2015/2421 have applied since 14 July 2017.

2.4. The Applicability of other EU instruments

2.4.1. The Brussels I (recast) Regulation

2.4.1.1. Jurisdiction rules

The ESCP Regulation contains no rules as regards jurisdiction, so in order to establish the competence of courts and tribunals within the meaning of Article 4 ESCP the rules provided under the Brussels I (recast) Regulation have to be applied. Further explanation of this as regards the working of the ESCP is given below in paragraph 3.1.1 in the section dealing with the commencement of the procedure.

2.4.1.2. Recognition and Enforcement of judgments

One of the key features of the ESCP is the abolition of exequatur which means that a judgment given under the procedure is recognised and can be enforced in another EU Member State without the need for the holder of a judgment to obtain a declaration of enforceability. As set out in paragraph 1.5.1, exequatur has also been abolished under the

Brussels I (recast) Regulation, but the grounds of refusal to be invoked in a national procedure are more extensive under the Brussels I (recast) Regulation. A separate procedure for enforcement is provided in the Regulation and this is set out later in this guide in paragraph 8.2 in the chapter which deals with that subject. It should be noted that the provisions on recognition and enforcement in the Brussels I (recast) Regulation are still available to be used to enforce a judgment granted under the ESCP, the choice as to which procedure to be used resting with the person in right of the judgment.

2.4.2. The Service and Evidence Regulations

Each of these Regulations is applicable to the ESCP given that they apply generally to civil proceedings where documents have to be transmitted from one EU Member State to another and evidence has to be taken in one EU Member State from another (see also paragraph 1.5.2 of this guide). However, the ESCP Regulation contains certain provisions dealing with both service of documents and the taking of evidence which prevail over the general provisions in the other instruments (Articles 13 and 9 respectively). It also refers to certain provisions on service of documents included in the EOP Regulation which also prevail over the rules in the Service Regulation in so far as they are different (Article 13(4)).

2.4.3. The EEO and EOP Regulations

2.4.3.1. Similarities with and differences from the ESCP

To a certain extent, these two Regulations can be grouped together with the ESCP since they share some key features such as simplified rules for recognition and enforcement through the abolition of exequatur and provision for a review of decisions given and of certificates issued under the respective procedures where certain minimum standards are not met. For this purpose, apart from the issues of service noted in the previous sub-paragraph, the ESCP Regulation 'borrows' from the EEO Regulation certain rules regarding review of decisions which are applied to the ESCP itself.

Another common feature of these three Regulations is that they put into practice the principle of mutual recognition of judgments in civil matters. Their main aim is to simplify and speed up the cross-border recognition and enforcement of creditors' rights in the European Union. In this respect they contribute both to building a genuine area of justice in the European Union, and to implementing the Single Market. Each of the Regulations has a different scope – not all of them can be used in every cross-border civil case.

In addition, although there are similarities between the three Regulations, there is one very important difference. The ESCP, unlike the EEO and EOP, deals with both defended as well as undefended cases. It is therefore

necessary for a decision to be taken at the outset by a prospective claimant as to which procedure is best to use and such a decision will very much depend on the actual circumstances of each case, in particular whether it is likely that the claim will be defended or not, and of course on the value of the claim concerned.

2.4.3.2. Use of the EEO, EOP and ESCP compared

EEO – this is suitable only when there is need to enforce a judgment in an undefended case, as a result of a court settlement or where an obligation is set out as an authentic instrument which is enforceable in the Member State of origin. What is an undefended case for this purpose is defined in the EEO Regulation; in principle it is a case in which a defence was never offered and the judgment is given in absentia or by default or where the case having been defended originally had the defence later withdrawn.

EOP – this procedure is particularly suitable for a claimant making a claim where there is no defence for the claim; the application is made by the claimant to the court which, if it accepts the application, issues the order and serves it on the defendant who can then lodge a notice of opposition, but there is no further court procedure involved under the EOP because if the defendant simply opposes the granting of the order the case ceases to be dealt with under the EOP and is instead dealt with under the ordinary rules of civil procedure; if the defendant does not oppose the order when it is served, the claimant can then take such

enforcement measures as may be necessary to secure payment. It is particularly suitable for use by claimants dealing with multiple claims as is the case with energy supply and similar businesses claiming against non-paying customers.

While the scope of the EEO and EOP is similar, the difference between them is that an EEO certifies the outcome of a domestic procedure as suitable for enforcement in another Member State while the EOP is a stand-alone EU procedure largely followed in the same way in all Member States. A creditor needs to decide which of these to use in order to pursue a claim which is, or is likely to be, uncontested. The EOP is of particular use to a creditor wishing to pursue claims in a number of Member States because he/she/it needs only to understand the one procedure rather than the different procedures in the domestic systems of each of the relevant Member States.

ESCP – this is to be distinguished from the other two procedures since it is available for both defended as well as undefended cases where the value of the claim is not more than €5 000; therefore the procedure is available for cases across borders where such a claim is disputed. Where a claimant considers that there is no defence, the option of using the EOP may be preferable and will be the only specific stand-alone EU procedure available for cross-border claims above €5 000.

2.4.4. Other EU instruments

It is necessary to bear in mind that there are various EU instruments which will apply to claims under the ESCP in their own terms because of the material scope of the Regulation. Two examples are the Regulations Rome I and Rome II on applicable law in contract and non-contractual matters respectively. The rules set out in one of these Regulations will determine which law is to be applied as regards a claim under the ESCP just as for a claim under any other procedure.

Those dealing with claims under the ESCP will need to also bear in mind that, depending on the specific subject matter of the claim, there may well be other EU instruments which will apply to that subject. For example a claim may be within the scope of the EU consumer protection instruments and if so the provisions of these may have a bearing on the rights and obligations of the parties to the claim if disputed. In paragraph 1.5.3 of this guide the EU rules on ADR and ODR were highlighted and reference was made to the possibility of submitting a consumer claim through the ODR platform where appropriate.

2.5. Relationship with national law

2.5.1. National procedural law

National law plays a role in the ESCP in two ways. Firstly, as regards the procedure itself, the Regulation makes it clear that except as provided in the Regulation, the ESCP is to be governed by the procedural law of the Member State in which the procedure is conducted (Article 26). In the second place, the Regulation makes specific provision for national law to apply at certain specific stages of the procedure; examples of these are whether or not there is an appeal from a judgment under the ESCP (Article 17) and the situation where a counterclaim exceeds the financial limit for a European small claim⁽²⁷⁾. Secondly, the national procedural law will also have to be applied bearing in mind the objectives of the procedure as set out in Recital (7) to the Regulation. It should be borne in mind that the national procedural law should not be applied in contradiction of the ESCP, however it should be applied so as to enhance the achievement of the purposes of the ESCP itself.

This is also expressed in the CJEU case law in relation to a similar provision in the EOP Regulation. As regards the provision on court fees and costs in that regulation and national law provisions, the CJEU ruled that domestic law can be applied provided that those rules are no less favourable than those governing similar domestic actions and do not make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (Case C-215/11 *Iwona Szyrocka v SiGer Technologie GmbH*, ECLI:EU:C:2012:794). In the same case, the CJEU ruled that a domestic rule regarding the division of costs in the case where the claimant is only rewarded part of the claim does not contradict the ‘loser pays’ rule of Article 16 ESCP, as long as that rule is not less favourable than for national cases and does not discourage the claimant to use the ESCP (Case C-554/17 *Rebecka Jonsson v Société du Journal L’Est Républicain*, ECLI:EU:C:2019:124).

⁽²⁷⁾ See paragraph 9.2 below as to information to be supplied about national procedural law for the purposes of the ESCP.

2.5.2. National substantive law

Apart from this general procedural situation, national substantive law will most likely have to be applied to the subject matter of any claim. However, the applicable law may not be the law of the Member State of the court or tribunal seised of the claim, depending on which law is to be applied according to the relevant rules in the applicable law instruments.



3

Chapter Three

Commencing the Procedure



3.1. Commencement and practical assistance

In accordance with Article 4, the claimant shall commence the procedure by filling in Claim Form A (Annex 1) and lodging it with the court or tribunal with jurisdiction (see paragraph 3.2 on the competent court). The Claim Form should be available at all courts and accessible through relevant national websites (Article 4(5)). The form should be lodged by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced. Information on how the Claim Form can be lodged in the court of the Member State seised is available on the e-Justice Portal.

Since through Article 11 of the Regulation the Member States are under the duty to ensure that the parties can receive practical assistance in filling in the forms, such assistance should be available in all the Member States as regards completion of the Claim Form as well as all the other forms. Practical assistance is of particular importance as representation by a lawyer or another legal professional is not mandatory (Article 10). Article 11 specifies that the practical assistance also encompasses general information as to which courts or tribunals in the Member States are competent to give judgment. Assistance shall be provided free of charge. This provision does not require the Member States to provide for legal aid or for legal assistance in the form of a legal assessment of a specific case. The ordinary provisions on legal aid apply in the Member States. The organisation of the practical

assistance varies between the Member States. In many Member States the local European Consumer Centre (ECC) plays a role in advising on the procedure. Practical assistance in filling in the forms may also be available within the court. In accordance with Article 25(1)(c) information on the organisation of the practical assistance has to be provided to the European Commission. This information is made available on the e-Justice Portal.

3.2. The competent court or tribunal

The Claim Form has to be lodged with the court of the Member State having international jurisdiction (see paragraph 3.2.1) and that has local jurisdiction (see paragraph 3.2.2) in accordance with Article 4(1).

3.2.1. The EU rules on jurisdiction – Brussels I (recast)

The rules which apply are those set out in the Brussels I (recast) Regulation. This means that in order to establish to which court a claim should be sent initial consideration will have to be given as to which rule or rules on jurisdiction apply to the dispute on which the claim is based. The rule or rules to be applied will depend on the precise facts of each situation, one of the basic distinctions being whether the claim arises from a contractual obligation or a non-contractual obligation such as an obligation arising through the fault or negligence of the defendant which has given rise to loss, injury or damage on the part of the claimant.

Part 4 of the Claim Form provides a non-exhaustive list of grounds of jurisdiction and links to the relevant section on the e-Justice Portal dealing with the Brussels I (recast) Regulation.

3.2.1.1. Jurisdiction in cases involving consumers

There are special jurisdiction rules under the Brussels I (recast) Regulation which apply to cases involving consumers. A consumer is defined as a person who is not acting for business purposes. In certain circumstances the consumer may be entitled to bring the claim to a court within the Member State where she or he is domiciled or habitually resident and which has jurisdiction to take a European Small Claim under the local national rules. In many cases this will be a court in her or his home town or city. This is also important for other types of case involving consumers including a claim made by a business against a consumer, by an individual ‘consumer’ against another consumer as well as claims between businesses.

The ‘consumer’ jurisdiction rules in Brussels I (recast)

Articles 17 to 19 of the Brussels I (recast) Regulation contain special rules for jurisdiction over consumer contracts.

If a contract

- is for sale of goods on instalment credit,
- is a loan or other credit repayable on instalments, or
- was concluded by the consumer with a business which pursues business activities in or directs such activities by any means, such as advertising, to the Member State where the consumer is domiciled

the consumer may bring a claim under the contract either

- in the courts of the Member State where the business is domiciled, or
- in the courts of the place where the consumer is domiciled

and the business may bring a claim under the contract against the consumer only in the courts of the place where the consumer is domiciled. In either case a counterclaim may be brought in the court where an original claim is pending.



It is not possible to alter these jurisdiction arrangements by agreement between the consumer and the business unless

- the agreement is entered into after the dispute which is the subject of the claim has arisen;
- such agreement allows the consumer to make a claim in courts other than as indicated by the rules; or
- the agreement is between a consumer and a business both domiciled in the same Member State and the agreement confers jurisdiction on the courts of that Member State and is not contrary to the laws of that State.

Notes:

1. Where the contract out of which the claim arises is between a consumer and a business which, though not domiciled in the same Member State as the consumer, has a branch agency or establishment in one of the Member States and the dispute arises out of the activities of the branch, agency or establishment, the business is deemed to be domiciled in the same Member State as the consumer.
2. The special consumer rules do not apply generally in the case of contracts for transport; however they do apply where the contract is for an inclusive price and provides for a combination of travel and accommodation as, for example, is the case with package holidays.
3. The criterion 'pursuing business' in a certain Member State has been clarified by the CJEU in relation to contracts concluded over the internet or businesses that attract consumers through their websites. A key case is Case C-585/08, *Pammer and Alpenhof*, ECLI:EU:C:2010:740. Requirements for directing activities at the Member States of the consumer include the language used being other than that of the domicile of the business, whether directions are given for access to the business from the other State, the currency that can be used for transactions, telephone numbers with an international code, use of a top level domain name and other evidence indicating that the trader was directing activities at other Member States, including that of the consumer.

3.2.2. The local or ‘national’ rules on jurisdiction

National rules of the Member State seized determine the local court having competence. In some Member States a specific court is designated to deal with European Small Claims, while in others the ordinary rules on territorial and subject matter jurisdiction apply. The relevant information on the court(s) having competence in the Member States is available on the e-Justice Portal.

3.3. Using the Claim Form

As noted earlier in this guide, the intention of the European Small Claims Procedure is that it should essentially be a written procedure. Therefore the procedure is to be commenced using the Claim Form which is prescribed by the Regulation and is to be found as Form A in Annex I thereto (see paragraph 3.1 of this guide). Apart from the information available through the e-Justice Portal, the Claim Form itself contains, throughout, guidance as to what is required to be inserted by the claimant, and this guidance should be followed closely. There are two specific aspects however which merit special mention, namely the assessment of the claim itself and the question of how to treat interest for the purpose of the claim.

3.3.1. Assessing the claim

3.3.1.1. Stating the claim

Assessing the basis and amount of the claim is necessary for completion of Part 8 of Form A – ‘*Details of the claim*’ where the claim is stated – as well as to determine that the claim does in fact fall within the financial limit of the ESCP. As regards the first issue, it is very important that each separate element of the claim, and the basis thereof, is stated as clearly as possible bearing in mind that the defendant may seek to deny the claim. The factual basis of the claim to be given in box 8 of the Claim Form needs to be supported by as much written material as is necessary to enable the court which receives the claim to determine the value of the claim, the basis of the claim and the evidence which supports the claim. If this is not done, there is a risk that the court may reject the claim as unfounded or, at the very least, require further information from the claimant which will cost time and delay the procedure.

3.3.1.2. The value of the claim

As regards the value of the claim, it should be borne in mind that the financial limit applies subject to the exclusion of all expenses, disbursements and interest that are added to the principal claim. If there are several elements in the principal claim, these should be stated separately, but if the value of all the elements taken together exceeds

the financial limit then the claim will not be within the scope of the ESCP, currently set at €5000.

3.3.2. The treatment of interest

Although the claim is assessed without taking interest claimed into account, the interest figure or rate still has to be stated, as does the basis on which interest has accrued or is accruing to the principal claim, and this has to be shown in box 7 in paragraph 7.4. However, if the claim itself is based on a requirement to pay interest then that will have to be stated in paragraph 7.1, and the value of the claim will be assessed on the basis of that principal claim albeit that it is for interest. An example of such a situation might be if the principal claim is for interest on a loan the capital of which has been repaid by the defendant.

3.4. The cost of lodging the claim

In most of the Member States, the courts charge a fee for accepting a claim under the ESCP and will not process a claim unless and until the fee is paid. That means that it is necessary to establish first of all if the court to which the claim is to be sent, that is the court with jurisdiction under the EU and national rules, requires payment of a fee for the lodging of the claim. If so, then the next step is to establish how much the fee is and how it should be paid. Again this information may be accessible through local websites and also through the e-Justice Portal. In accordance with Article 15a, court fees need to be proportionate and

not be higher than those charged for comparable national procedures. Distance means of payment should be available by way of either (a) bank transfer; (b) credit or debit card payment; or (c) direct payment from the claimant's bank account.

3.5. Attachments with the Claim Form

Because the ESCP is intended to be essentially a written procedure, it is necessary to send with the Claim Form all necessary supporting material in the shape of documentary evidence. This material is needed to vouch for the value of the claim, the basis of the claim and the evidence which will be relied on if the claim is defended bearing in mind that the ESCP applies both to defended as well as to undefended cases. All this is set out in Article 4(1) of the Regulation and in Part 8 of the Claim Form. Although the court may request further information from the claimant, as to which see paragraph 5.2 below, if the information received with the Claim Form, when taken with that given in the Claim Form itself, is insufficient to found the claim, then there is a risk that the claim may be rejected, so it is preferable to send all relevant information when the Claim Form is lodged, always bearing in mind that there may be a need for translation with attendant cost implications.

3.6. Sending the claim to the Court

The Regulation, in Article 4(1), makes it clear that the claim can be sent by post and by any other means of communication such as fax or e-mail acceptable to the Member State in which the ESCP is commenced. Information on what means are acceptable in the Member State seised is available through the e-Justice Portal.

Claimants will need to be careful to establish what, and in what form, the court will require as regards supporting material, especially documentary and other material, which might be used as evidence. Not all courts will accept copies, whether scanned or otherwise, of documentary material and a court may require originals under its national evidence rules. Depending on the exact position in this respect, therefore, even if a court could accept the Claim in electronic form it may not be possible to send the supporting material electronically and so it would make sense to send the Claim Form with the documentary material by some other means acceptable to the court.

3.7. Language

Under Article 6(1), the Claim Form must be submitted in a language of the court or tribunal, and this also applies to the description of the supporting documents in Part 8.2 of the Claim Form. See also paragraph 4.7 below as regards the other forms and documents. Care has to be taken to select the appropriate language in those Member States

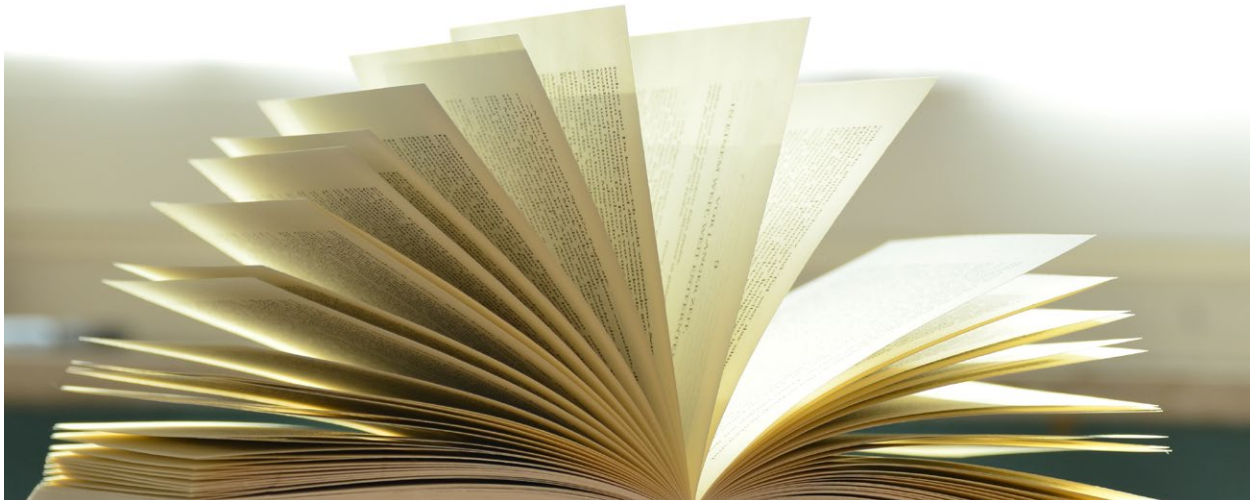
where there are several 'official' languages. Some Member States are also prepared to accept claims in a language other than an 'official' language. It should also be borne in mind that the defendant is entitled to refuse service of the Claim Form and documents if the relevant language requirements for service are not met; this is explained further in paragraph 4.2. The Claim Form is available in all the official languages of the EU on the e-Justice Portal, and translation tools are available if the form is filled out in another language. It should be noted that if translation is necessary for the purposes of Article 6(3) the responsibility for providing translation and hence the cost falls on the party required by the court to do so. The same applies where a party has refused to accept service of a document because it is not in the correct language as set out in Article 6(3).

3.8. Court settlements

The European Small Claims Procedure is in essence a written procedure conducted through use of standard forms in which, apart from ensuring that the time limits are met and reviewing the facts and evidence and other management duties, interaction between the court and the parties may be limited. Nevertheless, in accordance with Article 12(3) the court is placed under a duty to seek a settlement between the parties. Should an oral hearing be held in accordance with Articles 5(1) and 8 (see paragraphs 5.3 and 5.5 of this guide) this would provide a good opportunity to seek a settlement. This duty is, however, not

confined to the oral hearing but extends throughout the proceedings on claims and counterclaims.

A settlement approved by or concluded before a court or tribunal in the course of the European Small Claims Procedure that is enforceable in the Member State where the procedure was conducted shall be recognised and enforced in the other Member States, in accordance with Article 23a (see further paragraph 8.6).



4

Chapter Four

Procedure after the Court Receives the Claim



4.1. Rectification or completion of the Claim Form by the claimant

4.1.1. The court checks the Claim Form

The first thing the court has to do on receipt of the Claim Form and the supporting materials, and before it serves the documents on the defendant, is to check that the form has been completed properly in accordance with the requirements of the Regulation. If that is not the case and unless the court takes the view from the outset that the claim is unfounded or completely inadmissible, in which case it can dismiss the claim, the court can request the claimant to complete or rectify the Claim Form or to supply supplementary information or documents. The court or tribunal shall inform the claimant of such dismissal and whether an appeal is available against such dismissal. This is set out in Article 4(4).

4.1.2. The court informs the claimant if the claim is outside the scope of the ESCP

If the court concludes that the claim is outside the scope of the Regulation, say if it deals with subject matter which cannot be the basis of a claim under the ESCP or if the value of the claim is above the

financial limit of the ESCP, under Article 4(3) of the Regulation it must notify the claimant of this⁽²⁸⁾. The claimant can then decide to withdraw the claim or, if she or he does not do so, the court is required to proceed with it under an appropriate national procedure.

4.1.3. Request to the claimant to complete or rectify the Claim Form

Such a request is to be made using Form B prescribed by the Regulation. The Form can also be used where the Claim Form has not been submitted in the language of the court in order to request the claimant to provide a form in the correct language. In the form, the court sets out the time by which the claimant must provide the information requested or return the rectified form. Article 14(2) of the Regulation provides that this time limit may be extended by the court in exceptional circumstances. If the claimant does not do so by that time or if the form is still not completed correctly or in the appropriate language the claim may be dismissed. The effect of dismissal on this ground is not to decide the substance of the claim which could be re-made as a European small claim or under the appropriate national procedure.

⁽²⁸⁾ If the court decides to accept the claim but to proceed with it under the appropriate national procedure it should also advise the claimant of this decision and some Member States have prescribed a form for this purpose also. More generally, in some Member States forms have been prescribed to be used in connection with the ESCP in addition to those prescribed in the Regulation.

4.2. Sending the Claim Form to the Defendant

4.2.1. Court sends copy of Claim Form A and Form C

Once the court has decided that the claim can proceed as a European Small Claim, whether in its original form as submitted by the claimant or after rectification of the Claim Form or the provision of supplementary information or documents by the claimant, the court sends to the defendant a copy of the Claim Form and the supporting documents along with Answer Form C of which the court has to complete the first part⁽²⁹⁾.

4.2.2. Time limit

The court is required to send these to the defendant within 14 days of having received the Claim Form properly completed for the purpose of the ESCP. That time limit will run either from the original date of receipt of the Claim Form when no rectification or supplementary information was required, or from such later date as is appropriate having regard to

the time limit set for the request to the claimant to rectify or complete the form or to provide supplementary information.

4.2.3. Methods of service

4.2.3.1. Service by post or electronically

According to Article 13(1), the court has to send Form C with the copy of the Claim Form and supporting documents in one of the following ways:

- (a) by postal service, or⁽³⁰⁾
- (b) by electronic means:
 - (i) where such means are technically available and admissible in accordance with the procedural rules of the Member State in which the European Small Claims Procedure is conducted and, if the party to be served is domiciled or habitually resident in another Member State, in accordance with the procedural rules of that Member State; and
 - (ii) where the party to be served has expressly accepted in advance that documents may be served on him or her by electronic means or is, in accordance with the procedural rules of the Member State

⁽²⁹⁾ Care has to be taken as to the language of the forms – see paragraph 4.2.3 as regards the requirements for service; some courts send forms in both the language of the court and the language of the recipient.

⁽³⁰⁾ If the service needs to take place in another Member State, the documents must be transmitted to that other Member State in accordance with the Service Regulation.

in which that party is domiciled or habitually resident, under a legal obligation to accept that specific method of service.

Service by post or electronic means shall be attested by an acknowledgment of receipt including the date of receipt.

4.2.3.2. Other communications

In accordance with Article 13(2), other written communications between the court and the parties or other persons involved in the proceedings shall be carried out by electronic means attested by an acknowledgment of receipt, where such means are technically available and admissible in the Member State where the procedure is conducted, provided that the party or person has accepted in advance such means of communication or is, in accordance with the procedural rules of the Member State in which that party or person is domiciled or habitually resident, under a legal obligation to accept such means of communication. Claim Form A, Part 10, and Answer Form C, Part 7, ask questions on this.

4.2.3.3. Default rules for service

If service by post or electronically, within the meaning of Article 13(1), is not possible, Article 13(4) prescribes the rules of Article 13 or 14 of the EOP Regulation. More details about these default rules are given in the box on service below.



4.2.3.3.1. Default Rules for Service of Documents pursuant to Articles 13 and 14 of the EOP Regulation

Service with proof of receipt by the recipient or by a representative of the recipient

In summary, the methods of service with proof of receipt specified in Article 13 of the EOP Regulation allow:

- personal service with acknowledgement of receipt signed by the recipient;
- declaration by the competent person who effected the service that the recipient received the document or refused to receive it without any legal justification⁽³¹⁾;
- service by post attested by an acknowledgment of receipt signed by the recipient;
- electronic service with an acknowledgment of receipt signed by the recipient.

Service without proof of receipt by the recipient or by a representative of the recipient

Likewise, the methods of service without proof of receipt specified in Article 14 of the EOP Regulation allow:

- service at the recipient's personal address on persons who are living in the same household as the recipient or are employed there;
- in the case of a recipient who is self-employed or which is a legal person, service to also be effected at the business premises of the recipient on persons who are employed by the recipient;
- deposit of the document in the recipient's mailbox;
- deposit of the document at a post office or with competent public authorities and the placing in the recipient's mailbox of a written notification of such deposit in which is stated clearly the character of the document as a court document or the legal

⁽³¹⁾ In this connection it is necessary to bear in mind in particular the right to refuse service under Article 8 of the Service Regulation (Regulation (EC) 1393/2007) where the documents are not in or accompanied by a translation into a language which the recipient understands or the official language or one of the official languages of the place where service is effected; see also Recital (12) to the Regulation; this does not mean however that a defendant is entitled to refuse service of a document which is not in a language of the Member State where he or she is capable of understanding the language of the document; in this connection see the CJEU Case No C14/07, *Weiss und Partner*, ECLI:EU:C:2008:264.

effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits.

If any one of these four methods is used, service must be attested either:

- by an acknowledgement of receipt signed by the person on whom the documents were served; or
- by a document signed by the person who effected the service, indicating the method of service used, the date of service, and the name of the person who received the documents as well as the latter's relation to the recipient.

Service may also be effected:

- by post without proof of receipt where the recipient has his or her address in the Member State where the court seised of the substance of the claim is situated;
- by electronic means attested by an automatic confirmation of delivery, provided that the recipient has expressly accepted this method of service in advance.

NB: Service by one of these methods is not admissible if the debtor's address is not known with certainty.

4.3. What the defendant can do on receipt of the Claim Form

On receipt of the Claim Form, the defendant may in accordance with Articles 5(3) and 5(4):

- respond within 30 days of service of the Claim Form:
 - by completing Part II of Answer Form C and returning it to the court with any relevant supporting documents; or
 - without using the Answer Form, in any other appropriate way;
- not respond, in which case the court will give judgment on the claim after 30 days from the date of service.

The defendant, in any response, may amongst other things:

- admit the claim or dispute it in whole or in part;
- challenge the ground of jurisdiction on which the claim is based;
- challenge the claim by arguing:
 - that it is outside the material scope of the ESCP as regards the subject matter – paragraph I of Part II of Answer Form C contains space for this purpose; or
 - that it is not a cross-border case within the meaning of Article 3 of the Regulation;
- contend that the value of a claim, if non-monetary, exceeds the limit set for the European Small Claims Procedure;
- dispute the claim on the substance or on the amount claimed;

- indicate, using paragraph 2 of Part II of the Answer Form, what witnesses and other evidence are to be submitted and attach any relevant supporting documents;
- ask for an oral hearing using paragraph 3 of the Answer Form; and
- state a counterclaim using Claim Form A and submit it along with any relevant supporting documents as well as the answer form.

NB: The defendant is not required to send any documents to the claimant; that is for the court to do in accordance with the terms of Articles 5(4) and 5(6) of the Regulation.

4.4. Claim or counterclaim exceeds the limit

If the defendant contends that the value of a non-monetary claim exceeds the ESCP financial limit, the court has to take a decision on the matter within 30 days of despatching the response to the claimant. Where the defendant contends a counterclaim, the claimant will have a similar right to state that the counterclaim exceeds the financial limit. It follows from the terms of Articles 2(1) and 5(5) as applied to the counterclaim by Article 5(7) that the claimant and defendant respectively will have an opportunity to contest each other's positions on this point within the procedure. The decision of the court on this matter is not a decision on the merits of the claim or counterclaim but a decision

as to whether the claim is within the scope of the procedure⁽³²⁾. The Regulation, in Article 5(5) and 5(7), provides that the court's decision on this point may not be contested as a separate matter.

4.5. The counterclaim

If the defendant states a counterclaim then, as provided by Article 5(7), all the provisions of the Regulation, specifically Articles 4, and 5(3) to 5(5) as well as Article 2, will apply to the counterclaim as to the principal claim. This means that the counterclaim must be within the scope of the Regulation, and the provisions about the commencement of the procedure also apply to the counterclaim⁽³³⁾. The following additional points apply as regards the counterclaim:

- the court has to serve the counterclaim and supporting documents on the claimant within 14 days of receipt;
- the claimant must respond within 30 days of service;
- if the value of the counterclaim is above the financial limit for the ESCP, the whole case, that is both claim and counterclaim, comes out of the ESCP and will be dealt with in accordance with the relevant procedures in the Member State of the court seized whether in that court or another court which is competent under national law.

⁽³²⁾ See also paragraph 4.1.2 above as to what happens when the claim or counterclaim falls outside the scope of the ESCP.

⁽³³⁾ See, in this regard, Chapter Three of this guide to which reference should be made.

NB: The claim and counterclaim are to be treated as separate claims for the purpose of their valuation. Again this follows from the fact that Article 2 is applied to the counterclaim by Article 5(7). It also follows that it is not the case that the cumulative value of the claim and counterclaim should be within the financial limit for the case to continue under the ESCP; so the court is not entitled to look beyond the respective values of the claim and counterclaim in taking that decision.

4.6. Timescales

It should be noted that there are fixed timescales applied to all of the stages of the ESCP, and it is especially important that these are followed at the commencement and when the court starts to consider the issues. In particular, the timescales set out in Article 5 are critical in achieving a speedy procedure notably those in relation to the service of the documents and for the responses from the defendant and the Claimant depending on how the claim is developing. Under Article 14(2), the court has power to relax the time limits set for the defendant to submit an answer to the claim – under Article 5(3) – and for the claimant to submit a response to the counterclaim – under Article 5(6) but only in exceptional circumstances.

4.7. Language

It is to be borne in mind that the rules as regards the language to be used for the ESCP proceedings are the same for the response from the defendant, the counterclaim, and any response thereto, as well as the description of any documents supporting the counterclaim, as they are for the principal claim; reference is made to paragraph 3.7 above in this respect.

5

Chapter Five

Establishing the facts



5.1. Duty of the court as regards disputed matters

5.1.1. The court takes the initiative in establishing the facts

The court has the primary duty to establish any facts in dispute in a claim or counterclaim under the ESCP. This is because under the relevant articles of the Regulation – Articles 4(4), 7(1) and 9(1) – the duty is placed on the court to do so and to take the initiative in indicating to the parties what information the court requires from them in order to be able to reach a decision on matters in dispute. In this way the management and control of the procedure is with the court and the intention is that the court will thereby ensure that the objectives of the Regulation that the procedure be speedy, simple and relatively less expensive, will be achieved.

5.1.2. The court to specify means of taking and nature of evidence

Article 9 provides that the court is to specify the means of taking evidence, that it shall use the simplest and least burdensome method of taking evidence, and will hear oral evidence and evidence from expert witnesses only if it is necessary to do so in order to be able to give a judgment. In evaluating this issue, the court has to bear in mind what the cost of such evidence might be, this against the background of the

policy, set out inter alia in Articles 1 and 16 and Recital (29), that the ESCP should aim to reduce cost for the pursuit of low value cross-border claims. It is provided by Article 5(1) that the procedure shall be in writing. In accordance with Article 5(1)(a), an oral hearing shall only be held if it is not possible to give the judgment on the basis of the evidence or if a party so requests (see in more detail paragraph 5(3) of this guide).

5.2. Additional information from claimant and defendant

As noted earlier in this guide in paragraph 4.1, and as provided by Articles 4(4) and 5(7), on receipt of the Claim Form or a counterclaim, the court can request the parties to provide further information if it considers that to be necessary. Because the duty is laid on the court to establish the facts and to determine issues as regards the claim, Article 7(1)(a) also enables the court to request further details concerning the claim once a response has been received regarding the claim or counterclaim after service. The court sets a time limit within which the information has to be provided and, as provided by Article 14(2), that time limit can also be extended in exceptional circumstances. Under Article 7(3), as read with Article 14(1), the court has to inform the party to whom the request is made about what the consequences will be if the time limit is not complied with, and these could include finding against that party or dismissing the claim. All of these provisions are intended to strengthen the role of the court in managing the case so as to reach a speedy decision.

5.3. The court decides to hold a hearing

5.3.1. Court to hold a hearing only if necessary

As noted earlier, it is for the court to decide whether to have a hearing to determine the facts. This follows the principle set out in Article 5(1) that the ESCP shall be a written procedure. Recital (9) of the original Regulation states that the court has to respect the right to a fair trial and the adversarial process, but a hearing should be regarded the exception in view of the objectives of the ESCP to provide a speedy and low-cost procedure. According to Article 5(1)(a), the court shall only hold an oral hearing when it is not possible to give the decision on the basis of the written materials or if a party requests so and the court agrees. The court should, in carrying out its functions in accordance with this provision and applying the general principle that the ESCP is to be seen as a paper-based procedure where the holding of a hearing is exceptional, decide whether or not to hold a hearing on a case by case basis taking into account the written evidence. Should an oral hearing be necessary, this should in principle be done using appropriate distance communication technology in accordance with Article 8 (see paragraph 5.5 for more details).

5.3.2. Court can refuse to hold a hearing

The Claim Form informs the claimant about the ESCP being a written procedure and provides information on how to request an oral hearing

(part 9). Question 9.1 asks whether the claimant wants an oral hearing to be held, and if yes, to indicate the reasons. The Answer Form, Part 3, asks the defendant the same question. The court may refuse the request if it considers that, having regard to the circumstances of the case, an oral hearing is not necessary for the fair conduct of the proceedings (Article 5(1)(a)). If the court refuses a request for an oral hearing, it must give its reasons in writing, but as this provision makes clear the decision on refusal cannot be the subject of a separate appeal or review.

5.4. Taking of evidence

Article 9(1) leaves no doubt that it is for the court to decide by what means evidence will be taken and also the extent of the evidence necessary for it to reach a judgment. Article 9(2) provides that the court may admit written statements from witnesses, experts and parties. Expert evidence or oral testimony may only be taken if it is not possible to give the judgment on the basis of other evidence, in accordance with Article 9(4). The hearing of persons shall be done in accordance with the conditions of Article 8, referring to the use of appropriate distance communication technology (see paragraph 5.5). Where evidence has to be taken from another Member State, the court will need to consider using the procedures established under the relevant EU rules and in particular those set out in the Regulation on the Taking of Evidence in Civil and Commercial Matters (Evidence Regulation)⁽³⁴⁾.

⁽³⁴⁾ Regulation (EC) No 1206/2001.

5.5. Use of ICT in oral hearings and taking of evidence

The use of ICT in courts has become very important and this is also reflected in the (amended) ESCP. As the actual use depends on the technology available in the court seised, the use of ICT during the procedure is not compulsory. According to Article 8(1), an oral hearing shall be held making use of any appropriate distance communication. This includes video conference or teleconference, available to the court of tribunal, unless the use of such technology is not appropriate for the fair conduct of the proceedings on account of the particular circumstances of the case. The Evidence Regulation applies where the person to be heard is domiciled or habitually resident in a Member State other than the Member State of the court seised, including the arrangements for the appropriate distance communication. A party summoned to be physically present may request the use of distance communication on the ground that the arrangements for being physically present is – in particular in view of the costs – disproportionate to the claim, provided that the technology is available at the court (Article 8(2)). A party summoned to attend an oral hearing through distance communication technology may request to be physically present using Part 9.2 of the Claim Form, and Part 4 of the Answer Form. The forms should provide information to the parties that the recovery of costs is subject to the conditions of Article 16 (see paragraph 3.4). The court's

decision on whether an oral hearing should be held and if so whether by videoconference or other technology or by the party being physically present may not be contested separately from a challenge to the judgment itself (Article 8(4)).

The same provisions apply to an oral hearing of a witness, pursuant to Article 9(3) (see paragraph 5.4).

5.6. The role of the court

5.6.1. The court determines the procedure

The central aims of the ESCP as set out in Article 1 of the Regulation are to speed up, simplify and reduce the costs of litigation concerning small claims in cross-border cases within the EU and in so doing to facilitate access to justice⁽³⁵⁾. In fulfilling these aims, the courts are given a key role to take the initiative to control and determine the procedure to be followed in the ESCP and to apply national procedure law accordingly. Apart from determining the extent of the evidence and the means by which it is to be taken, the court has generally to manage the procedure in accordance with the principles of adversarial process and the right to a fair trial of the case. Furthermore, according to Article 12(3) the court is placed under a duty wherever appropriate to seek a settlement between the parties and this duty is not confined to the oral hearing

⁽³⁵⁾ See also Recitals (5), (7) and (8).

but extends throughout the proceedings on claims and counterclaims (see also paragraph 3.8).

5.6.2. The court informs the parties on procedural questions

The duty of the court to control and determine the procedure in the ESCP is reinforced by Article 12(2) whereby the court also has the duty to support the parties as regards procedural matters by informing them about procedural questions, and it follows from Recital (9) that the court in so doing must be even-handed as between the parties in order to ensure the fairness of the procedure. The duty to inform the parties about procedural questions can be carried out in various ways depending on national procedures. For example it could be achieved orally in the course of the proceedings or by means of electronic communications such as e-mail or tele-conference or by such other means as may be permitted by national law⁽³⁶⁾. Article 12(1) provides that it is not required that the parties should make a legal assessment of the claim thereby leaving this task to the court. This provision is of particular importance in the absence of a lawyer or other professional acting as representative (Article 12). For the purposes of the ESCP, a court or tribunal should

include at least one person qualified to serve as a judge under the law of the Member State of the court where the claim is proceeding⁽³⁷⁾.

5.7. Time limits

Within 30 days of the receipt of the answer from the defendant to the claim, or from the claimant to the counterclaim, the court has to decide whether to take evidence, or to summon the parties to an oral hearing once it decides that one is to be held. Bearing in mind that speed is important, the court has to hold the hearing within 30 days of summoning the parties. As noted earlier in paragraph 5.2, Article 14(2) provides that certain time limits can be extended but only in exceptional circumstances and that also applies to the 30-day periods set out in Article 7. However, as the intention is that all the steps of the ESCP should be taken as speedily as possible and because that time limit is stated as a maximum it could be possible for the court to fix a shorter time limit than 30 days⁽³⁸⁾.

⁽³⁶⁾ See Recital (22).

⁽³⁷⁾ See Recital (27).

⁽³⁸⁾ See generally, as regards the duty of the court to expedite the proceedings, Recital (23).



6

Chapter Six

The judgment



6.1. Issuing a judgment

A judgment in a claim under the ESCP is issued at one of the following points:

6.1.1. Judgment in default – general

If the defendant does not answer the claim within the period of 30 days from service of the Claim Form and the Answer Form, Form C, the court shall issue the judgment. Also, if the court has requested a rectification of the claim, additional information or further details, and the party to whom the request has been made does not respond within the time limit set, then the court may grant judgment in favour of the other party. If the court has itself set a time limit for any of these purposes, then it has to inform the party concerned of the consequences of not complying with it, including the possibility that a judgment might be granted against that party in the circumstances.

6.1.2. Judgment in default – counterclaim

As with the principal claim if the claimant does not respond within the period of 30 days from service of the counterclaim the court can give a judgment on the counterclaim. In such a situation, it is to be presumed that the claimant will wish to pursue the principal claim, so in that situation the court cannot dismiss the claim unless it has requested further information from the claimant following receipt of

the response to the claim. The court will then have to determine, as between the parties, what is the fairest method of proceeding including deciding to seek additional information or evidence under Article 7(1) (a) or organise a hearing.

6.2. Judgment after receiving all information including after taking evidence

6.2.1. Where no hearing is held

If the court decides to reach a decision on the substance of the case without holding a hearing either after receiving the defendant's answer to the claim, if any, or having requested further information within a specific time limit and it has received that information, the court is to issue the judgment within 30 days of receipt of that information. In addition, if the court has taken evidence as necessary for giving the judgment but without holding a hearing it must issue the judgment within the period of 30 days of having done so.

6.2.2. After a hearing

If the court holds an oral hearing, it must issue the judgment within 30 days of the date of the hearing. It is implicit that the court will have received all the necessary information and evidence to reach a decision on the substance of the claim or, if there is one, counterclaim by the

close of the hearing, and there is no provision for the court to seek any further information or evidence from the parties once the hearing is completed. According to Article 14(3), the time limit of 30 days can be extended but only if in exceptional circumstances the court is not able to issue the judgment within the period of 30 days specified in the Regulation and in such an exceptional situation the court is to take all steps required to issue the judgment as soon as possible. In order to expedite matters, the court can of course issue the judgment earlier than 30 days if it is ready to do so.

6.3. The form, content and service of the judgment

6.3.1. Judgment to be in writing for service on parties

Although the Regulation does not specify that the judgment should be in writing, and the legal systems of the Member States may vary as to whether or not a written judgment is required for small claims, it is implicit from the fact that the judgment in a European Small Claim has to be served on the parties that it should be in written form. Otherwise there is no particular form and content of the judgment specified in the Regulation and, following Article 19, these will therefore be determined

by the law of the Member State in which the court hearing the claim is situated.

6.3.2. Language of judgment for service

Although the Regulation does prescribe a form of Certificate which is to be issued by the court on request of one of the parties for the purposes of recognition and enforcement⁽³⁹⁾, the judgment is separate. The Regulation does not specify that the judgment should be written in a language other than the language of the court which issues it given that the judgment is to be served on the parties, however, it will be necessary for the appropriate language version to be available for service in order to meet the terms of the relevant EU law on the subject⁽⁴⁰⁾. Where the text of the judgment has to be translated in order for the requirements for service to be met, it is likely, subject to the provisions of the relevant procedural law, that the cost of doing so will fall in the first instance on the person in right of the judgment and in whose interests, it is that the judgment should be implemented. This may be recoverable from the judgment debtor as part of the costs of the proceedings.

⁽³⁹⁾ See paragraph 8.3 below as regards the certificate and Chapter 8 generally as regards recognition and enforcement.

⁽⁴⁰⁾ See above paragraph 4.2.3 and Recital (19).

6.3.3. Judgment served on the parties

Once the judgment has been issued, Article 7(2) provides that it must be served on the parties using one of the methods of service specified in the Regulation as to which see Article 13 and paragraph 4.2.3.

6.4. Costs

The judgment will contain an order for payment of costs. One of the key aims of the ESCP is to keep costs to the minimum, as is clear from the terms of Article 1 and Recital (29), and therefore Article 16 provides that costs should not be awarded if they are unnecessarily incurred or are disproportionate to the claim. This is particularly important if the successful party is represented by a lawyer or other legal professional since the costs of such representation should be awarded in the judgment only if they are proportionate to the value of the claim and were necessarily incurred. Subject to that principle, the rule to be applied following Article 16 of the Regulation is that the unsuccessful party should be ordered in the judgment to meet the costs of the proceedings and these are to be determined under the relevant national law. See also paragraph 3.4 of this guide.



7

Chapter Seven

Review and appeal



7.1. Review under the European Small Claims Procedure

In Article 18 of the Regulation, provision is made for a review of a judgment issued under the ESCP. This is available either where the judgment is given against the defendant in favour of the claimant, or where the defendant has stated a counterclaim, and the court has granted a judgment against the claimant.

7.1.1. Grounds for a review

The defendant who did not enter an appearance shall be entitled to apply for a review of the judgment – using the available procedure under national law – before the competent court in the Member State where the judgment was given, where the defendant

- was not served with the Claim Form, or, in the event of an oral hearing, was not summoned to that hearing in sufficient time and in such a way as to enable him to arrange for his defence, or
- was prevented from contesting the claim by reason of *force majeure* or due to extraordinary circumstances without any fault on his part

provided in either case that they did not fail to challenge the judgment when it was possible to do so using the available appeal or review proceedings under national law.

The review should be applied for within 30 days, starting from the day the defendant was effectively acquainted with the contents of the judgment and was able to react, at the latest from the date of enforcement measures having the effect of making the property of the defendant non-disposable in whole or in part. No extension may be granted (Article 18(2)).

NB: A review under Article 18 of the judgment given in the ESCP can only take place in the Member State in which the judgment was issued irrespective of where the judgment is to be enforced.

In relation to the review provision set out in Article 20 EOP, the Court of Justice ruled in case C 119/13, *eco cosmetics*, (ECLI:EU:C:2014:2144) that in a case in which the service requirements of Articles 13-15 EOP were not observed, Article 20 does not apply, and eventually a national remedy would have to resolve the issue. This ruling may also be of relevance for the interpretation of Article 18 of the ESCP Regulation.

7.1.2. Outcome of a Review

If the review is upheld on the basis of one of the grounds set out in the Regulation, the judgment reviewed shall be null and void. The defendant does not lose the benefit of any applicable national rules on the interruption of prescription or limitation periods. Where the review is rejected the judgment remains in force (Article 18(3)).

7.2. Appeal

Under Article 17, the question of whether or not an appeal against the judgment is available in the Member State where the judgment is issued is a matter regulated under the national law of the Member States. If there is an appeal available, the same rules as to costs apply to the appeal as apply to the original proceedings in the claim. The information on whether an appeal is available and if so which court is competent is available on the e-Justice Portal.

7.3. Legal representation at Review and Appeal

The provisions of Article 10 on legal representation apply to the proceedings for review under Article 18 just as they do to the original proceedings on the principal claim and any counterclaim so that it will not be necessary for parties to have legal representation for these proceedings. It is for consideration whether this is also the position as

regards an appeal against a judgment under the ESCP under national procedure law. This is particularly significant as regards the awarding of costs since, in the case of appeals, by virtue of Article 17(2), the costs regime under Article 16 is applied to any appeal as it is applied to the original proceedings. Likewise, Article 16 applies to proceedings for review under Article 18. In this connection, the terms of Recital (29) should be borne in mind to the effect that any expenses awarded against an unsuccessful appellant need to be proportionate to the value of the claim or necessarily incurred including those arising from the fact that the other party was represented by a lawyer⁽⁴¹⁾.

⁽⁴¹⁾ See also paragraph 9.1.2.



8

Chapter Eight

Recognition and Enforcement



8.1. Recognition and Enforcement – General Principles

8.1.1. Abolition of Exequatur

A judgment in a claim or counterclaim under the ESCP which is enforceable in the Member State in which it was given is equally enforceable in any other Member State. By virtue of Article 20(1), there is no need to obtain a declaration of enforceability in the Member State of enforcement and there is no possibility of opposing recognition of the ESCP judgment⁽⁴²⁾. In any event, no review as to the substance is allowed in the Member State of enforcement. The judgment shall be enforceable notwithstanding the possibility of an appeal⁽⁴³⁾. It should be borne in mind, however, that a person who wishes to enforce a judgment given by a court under the ESCP has the option of using the procedures under the Brussels I (recast) Regulation.

Article 20(2) provides that at the request of one of the parties, the court or tribunal shall issue a judgment certificate using the standard Form D (Annex IV) at no extra cost. Upon request, the court or tribunal shall provide that party with the certificate in any other official language of the institutions of the Union by making use of the multilingual dynamic standard form available on the European e-Justice Portal. The court is

⁽⁴²⁾ See also Recital (30).

⁽⁴³⁾ See Article 15(1) and Recital (25).

not obliged to provide a translation and/or transliteration of the text entered in the free-text fields of that certificate.

8.1.2. Enforcement Procedure – Applicable Law

By virtue of Article 21, the procedure for enforcement is governed by the law of the Member State of enforcement, subject to the provisions of the Regulation on enforcement, and a judgment given under the ESCP is to be enforced under the same conditions as a judgment issued in the Member State where enforcement is sought.

8.2. Requirements of the ESCP – enforcement procedure

In order to begin the process which could lead to enforcement of the ESCP judgment under the Regulation the person seeking enforcement shall provide an authentic copy of the judgment, and the judgment certificate referred to in Article 20(2) and, where necessary, a translation in accordance with the law of the Member State of enforcement. Member States have to provide information as to which languages other than the official language(s) are acceptable (Article 21a(1)). The translation of the information on the substance of a judgment in the certificate of Article 20(2) shall be done by a qualified translator (Article

21a(2)). Information on which languages are accepted for the purpose of the enforcement is available on the European e-Justice Portal.

The party seeking enforcement is not required to have an authorised representative or a postal address in the Member State of enforcement apart from any agent instructed by that party for the actual process of enforcement (Article 21(3)). Also, it is not necessary for that party to produce in the Member State of enforcement any security, bond or other deposit before enforcement can be carried out (Article 21(4)).

8.3. Use of the certificate of judgment

8.3.1. Form D

The Form of the certificate of Judgment, Form D, is prescribed in Annex IV of the Regulation. This certificate has to be issued by the court which gave the judgment under the ESCP at the request of one of the parties. Such a request can be made at the outset of the procedure, for which there is space provided in paragraph 9 of the Claim Form, Form A and, although this is not specified expressly in the Regulation, at any stage after the judgment has been issued. It is desirable for the person who seeks to enforce a judgment under the ESCP to anticipate the need for the certificate and so to request the court as early as possible to issue it. Furthermore, care needs to be taken by the court in the completion of the certificate because that is the document on which execution will be based. In particular, it is important that all relevant information is

inserted to enable the enforcement officers charged with the actual execution and others who may be involved such as bank staff, say where a bank account is attached, to see and understand the terms of the order, the details of the person against whom it is made and the amounts awarded in the judgment for all of which space is provided in Form D.

8.3.2. Language of the certificate

It may also be necessary for the certificate to be translated into the language which is the appropriate language in the Member State of enforcement. Each Member State has made the information available as to which languages, other than the official language(s), are acceptable for the purpose of enforcement (see Article 21a). This information is available on the European e-Justice Portal. See also paragraph 8.2 of this guide.

8.4. Refusal and limitation of enforcement

8.4.1. Refusal of enforcement in exceptional circumstances

By virtue of Article 22, the court in the Member State of enforcement is to refuse enforcement of the judgment on the ground that it is irreconcilable with an earlier judgment given in any Member State or in a third country provided that:

- the earlier judgment involved the same cause of action and was between the same parties and fulfils the conditions

necessary for its recognition in the Member State of enforcement; and

- the fact of the irreconcilability of the judgment with the earlier judgment was not and could not have been raised as an objection in the ESCP proceedings in the Member State where it was given.

8.4.2. Procedure to challenge enforcement

The Regulation does not provide a procedure for an application to the court to challenge the enforcement of the judgment on the grounds of irreconcilability, and this is a matter to be regulated under the procedural law of the Member State concerned. Similarly it is normally also possible for the court in that Member State under the national law to refuse or stop enforcement if and to the extent that the sums awarded in the ESCP judgment have been paid or the judgment has otherwise been satisfied.

8.4.3. Stay or limitation of enforcement

By virtue of Article 23 where a party against whom enforcement of a judgment given under the ESCP has challenged the judgment or where such a challenge⁽⁴⁴⁾ is still possible or where a party has applied for review of the judgment under the Regulation, the court or other

competent authority in the Member State of enforcement, on application by that party, may:

- limit the enforcement proceedings to protective measures, such as the 'freezing' of a bank account or of wages and salaries;
- make enforcement conditional on the provision of such security as it shall determine; or
- under exceptional circumstances, stay the enforcement proceedings, that is suspend further procedure for a specified or limited period.

8.5. Proceeding to execution of the ESCP judgment

8.5.1. Steps to execution

Obtaining a judgment and certificate under the ESCP is the first step towards actual enforcement of the obligation in respect of which the judgment was granted. In order to secure fulfilment of the obligation in question, further steps need to be taken to secure payment or performance in the event that the person against whom the judgment is granted does not comply voluntarily with the judgment

⁽⁴⁴⁾ The word 'challenge' as used here is to be understood as including an appeal against the judgment, if such an appeal is possible under the law of the Member State where the court is situated and which granted the judgment, and a challenge on the ground of irreconcilability as envisaged in Article 22 of the Regulation. Given that review under Article 18 of the Regulation is expressly mentioned in Article 23, that situation is not to be understood as being included within the meaning of 'challenge' under Article 23.

by making the payment or taking or desisting from action as ordered by the court whereby actual measures of execution of the judgment become necessary.

8.5.2. Enforcement authorities and agencies

In order to secure execution of the judgment, it is necessary to instruct the authorities or agencies in the Member State of enforcement which are competent to take measures of execution. This may involve sending the documents and instructions to a court in those Member States, where execution is court-based, or otherwise direct to enforcement agents where they accept instructions direct on behalf of clients seeking execution of judgments. Details of enforcement agents in the various Member States and information about execution of judgments can be found on national websites as well as on the e-Justice Portal.

8.5.3. Language issues – practical implications for enforcement

A party seeking to enforce a judgment should bear in mind that the question of language can arise as a practical as well as a judicial requirement. For instance, if under the national law applicable to enforcement of judgments papers have to be served in another Member State on the defendant against whom execution is sought the relevant requirements for language as specified in the ESCP Regulation and in the Service Regulation will apply. In addition, it has to be remembered

that courts, enforcement agents and others involved in execution have to understand the terms of the judgment and of the certificate in order to be able to carry out execution effectively. This also applies to those who may be involved as third parties such as persons in banks and other holders of property of the person against whom enforcement is sought on whom the judgment is executed.

8.6. Enforcement of court settlements

Article 12(3) provides that the court or tribunal shall make efforts to reach a settlement between the parties in the course of the proceedings. In accordance with Article 23a ESCP Regulation a settlement that is either approved by or concluded before a court or tribunal in the course of the ESCP and that is enforceable in the Member State where the procedure was conducted shall be recognised and enforced in other Member States on the same basis as a judgment in the ESCP. The provisions on the recognition and enforcement of ESCP judgments as discussed in the subparagraphs above apply, *mutatis mutandis*.



9

Chapter Nine

Final Matters



9.1. Legal representation

9.1.1. No requirement to instruct a lawyer for the ESCP

Article 10 and Recital (15) state that representation by a lawyer is not mandatory so any rule to that effect under the national law of a Member State is not applicable to the ESCP. Similarly, Article 21(3)(a) makes it clear that, for enforcement of a judgment under the ESCP, it is not required that a party should have an authorised representative in the Member State of enforcement. This does not include agents who actually carry out the measures of execution in that State such as Huissiers de Justice, Deurwaarders and Messengers at Arms. The reason for not requiring legal representation is to reduce the litigation costs.

9.1.2. Cost implications of instructing a lawyer

A party considering whether to instruct a lawyer in a claim under the ESCP should bear in mind that even if the claim is successful and leads to a judgment then there is a risk that the court will not allow the costs of instructing the lawyer to be recoverable from the other party since, by virtue of Article 16, the court is not to award costs to the extent that they were incurred unnecessarily or are disproportionate to the claim. Recital (29), invoking the aims and objectives of the ESCP, including the need to achieve simplicity and cost-effectiveness, indicates that the court, in considering what costs are proportionate to the claim, should

take into account the fact that the other party, namely the party in whose favour the judgment was granted, was represented by a lawyer.

9.2. Information and assistance

9.2.1. Information – General

There are various provisions in the ESCP Regulation for information to be made available by Member States about various aspects of the ESCP. By virtue of Article 24, the Member States are enjoined to cooperate, and in particular by way of the European Civil Judicial Network to provide the public in general, and professional circles, with information about the ESCP. Specifically, under Article 25, Member States are required to provide information to the European Commission about the following aspects of the ESCP:

- which courts have jurisdiction to give a judgment under the ESCP;
- the means of communication acceptable to the Member States for receiving a Claim Form under the ESCP;
- the authorities or organisations competent to provide practical assistance in accordance with Article 14;

- the means of electronic service and communication available and admissible in accordance with Article 13, and the persons or types of professions, if any, under a legal obligation to accept electronic service or communication;
- the court fees of the ESCP or how they are calculated as well as the methods of payment in accordance with Article 15a;
- whether an appeal is available and if that is so the time limit within which an appeal should be lodged;
- the procedures for applying for a review as provided for in Article 18, and the competent courts or tribunals for such review;
- the languages in which a certificate of a judgment under the ESCP will be acceptable pursuant to Article 21a(1);
- the authorities competent with respect to enforcement and the authorities competent for the purposes of Article 23;
- the authorities which are competent in the Member States for enforcement including the making of any order to stay or limit enforcement;

and are also required to notify any subsequent changes to that information. The Commission is to make that information available publicly. This is done particularly through the e-Justice Portal.

9.2.2. Information and assistance to the parties

In addition to the general information to be made available about the functioning of the ESCP, individual parties are to be assisted and provided with information at various stages of the procedure. These stages include the following:

- under Article 11 parties are to be given practical assistance (see paragraph 3.1 of this guide);
- under Article 12 courts are, if necessary, to provide information to parties about procedural questions (see paragraph 5.6.2 of this guide);
- under Article 14 courts are to inform parties of the consequences of not complying with any time limit set by the court (see paragraphs 4.6, 5.2, 5.7 and 6.2.2 of this guide).

Also it is to be borne in mind that Member States are to ensure that the Claim Form, Form A, is available at all courts and tribunals at which a ESCP can be commenced.

9.3. Review of the ESCP

In accordance with Article 28, the Regulation is the subject of a review by 15 July 2022. The Commission report should review the operation of the ESCP, including: (a) an evaluation as to whether the financial limit of Article 2(1) – since 15 July 2017 set at €5 000 – is appropriate to attain the objective of facilitating access to justice for citizens and small and medium-sized enterprises in cross-border cases; and (b) an evaluation as to whether an extension of the scope of the ESCP, in particular to claims for remuneration, is appropriate to facilitate access to justice for employees in cross-border employment disputes.



Reference material and Links

The European e-Justice Portal is a single point of entry to all relevant information about the ESCP; responsibility for providing the information about the ESCP is shared between Member States and the European Commission.

A) Forms to be used in the European Small Claims Procedure

https://e-justice.europa.eu/content_small_claims_forms-177-en.do

B) National information on the use of the procedure, including the competent courts and other information in accordance with Article 25

https://e-justice.europa.eu/content_small_claims-354-en.do

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, as amended by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European Order for Payment procedure.

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