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SCOPE AND LIMITATIONS OF LITIGATION COST RECOVERY IN EUROPEAN SMALL CLAIMS PROCEDURE

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ABSTRACT: This study examines the allocation of costs in cross-border small claims disputes under Regulation 861/2007, focusing on the types of costs incurred and the expenses that are recoverable under the loser-pays principle. It differentiates between cases covered by Article 16 and those subject to national cost rules, highlighting the complexity created by this dual framework. In line with the Regulation's aim of preventing cross-border litigation costs from exceeding the value of the claim, it proposes ways to improve simplicity and predictability in cost allocation.

KEYWORDS: European Small Claims Regulation; litigation costs; necessity; proportionality; cost recovery.

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A. INTRODUCTION

The scope and allocation of litigation costs in civil proceedings have traditionally been regarded as marginal or secondary issues, often remaining in the background of civil litigation. This approach stems from the teleological connection between cost regulation and the principle of procedural economy, which promotes the simplification of cost-related provisions.[1] Although the law governing litigation costs is considered secondary to civil proceedings and is guided by the principles of simplification and speed, this does not diminish its legislative significance. Its importance derives from its intrinsic link to the fundamental right to judicial protection, as well as its dual function as a mechanism for state revenue collection and as a determinant of the parties' procedural behavior[2].[3] Furthermore, claims for cost recovery often represent a significant percentage of a party's economic interest in litigation.[4]

Litigation costs play a particularly significant role in cross-border disputes, as their inherent complexity compared to domestic cases generates additional economic burdens absent in national proceedings.[5] These supplementary expenses may include pre-trial legal consultation in the Member State where litigation is initiated, costs for serving documents abroad, translation fees, expenses arising from the application of foreign law, and enforcement costs.[6] The absence of harmonized rules on cost allocation at the European level means that—apart from a few provisions of binding European civil procedural law[7]—each Member State determines cost allocation according to the principle of procedural autonomy.[8] Consequently, in the absence of unified European procedural rules governing litigation expenses, parties must rely

[1] Smid & Hartmann (2015), Vor § 91 ZPO, para.1 and 2.

[2] European Law Institute & UNIDROIT (2021), p. 270. The law on litigation costs constitutes the direct financial dimension of litigation, influencing and directing the procedural conduct of the parties involved [*Steuerungsfunktion*, see Wolf (2015), p. 70]. This regulatory function aligns with the parties' interest in accurately estimating costs in advance, both qualitatively and quantitatively [see Schulz (2025), § 91 ZPO, para. 9].

[3] Douka (2021), p. 398.

[4] European Law Institute & UNIDROIT (2021), p. 270.

[5] Dori & Richard (2017), pp. 331-332.

[6] See in detail Dori & Richard (2017), p. 332 et seq.

[7] At the level of binding (hard) procedural law, rules on the allocation of litigation costs are embedded in several legislative acts. These include Directive 2003/8/EC on common minimum rules for legal aid in cross-border civil and commercial disputes (Article 3 para. 2), Directive 2004/48 on the enforcement of intellectual property rights (Article 14), Regulation 861/2007 on the European Small Claims Procedure (Article 16), Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Recital 36 and Article 67), the Agreement on a Unified Patent Court (2013/C 175/01) (Article 69), Regulation 2017/1001 on the European Union Trade Mark (Article 109), Directive 2020/1828 on representative actions for the protection of the collective interests of consumers (Recital 38 and Article 12), and Directive 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic Lawsuits Against Public Participation') (Article 14).

[8] CJEU 14 February 2019, Rebecka Jonsson v Société du Journal L'Est Républicain, ECLI:EU:C:2019:124, para. 27, available at eur-lex.europa.eu.

on the cost-shifting criteria established by the national procedural system of the forum where proceedings take place. These domestic rules on cost allocation significantly influence—and may even determine—the choice of forum for resolving cross-border disputes.[9]

Regulation 861/2007 on the European Small Claims Procedure[10] is one of several fragmented initiatives that establish, inter alia, common rules governing the allocation of litigation costs. Small cross-border claims often require initiating proceedings before a foreign court, which entails navigating an unfamiliar legal system and seeking the assistance of a local lawyer. It is therefore difficult to estimate both the anticipated lawyers' and court costs and the expected duration of proceedings. As a result, the total time and financial investment required remain uncertain. Reducing litigation costs is a primary objective of the European Small Claims Procedure (Recital 8 and Article 1 of Regulation 861/2007). Accordingly, determining and allocating litigation costs under this Regulation is not merely a procedural consideration. It is closely linked to the Regulation's overarching purpose and provides a basis for interpreting its provisions.

This study investigates both the initial allocation of costs (costs incurred) and the final allocation of costs (cost recovery) between the parties within the framework of the European Small Claims Procedure. At the stage of the initial allocation, each party is required to bear its own litigation costs. At the stage of the final allocation, the losing party is ordered to cover not only its own costs but also those of the opposing party, insofar as these are deemed necessary and proportionate (Article 16 of the Regulation). Concerning costs incurred, the study analyzes the efforts of the European legislator to reduce them, particularly in light of the amendments introduced by Regulation 2023/2844 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial, and criminal matters. Regarding the final allocation of costs, the study outlines the criteria used to determine which expenses may be recovered from the unsuccessful party. It further explores the distinction between cost-related issues regulated autonomously by the Regulation and those determined by the law of the court seized (*lex fori*), highlighting the practical challenges generated by this dual regulatory framework. The study concludes by proposing avenues for a more autonomous and coherent approach to the final cost allocation under the Regulation.

[9] Paterson (1993), p. 157, 166 et seq. and 169. For instance, companies may shift all disputes arising from their commercial activities to member states whose procedural systems are least favorable to consumers with respect to litigation costs [see Vernadaki (2013), p. 302].

[10] It constitutes the first legislative instrument to introduce an autonomous and genuinely adversarial procedure for cross-border disputes within the European Union [see Kramer and Ontanu (2014), p. 9].

B. OBJECTIVE AND REACH OF REGULATION 861/2007 ON EUROPEAN SMALL CLAIMS PROCEDURE

Regulation 861/2007, as amended by Regulation 2015/2421, Commission Delegated Regulation 2017/1259, and, more recently, Regulation 2023/2844, establishes a European Small Claims Procedure, which is simplified, fast-track, written, and applies to cases involving small cross-border claims.[11]

The European Small Claims Procedure is not exclusive in nature; it is an optional tool that complements the procedural possibilities offered by the laws of the Member States (Recital 8 and Article 1 of Regulation 861/2007). This effectively means that creditors have the freedom to choose between the existing national procedures or the European Small Claims Procedure. Consequently, the Regulation does not aim to harmonize civil procedural law across Member States, as domestic procedures remain applicable in parallel.[12]

The European Small Claims Procedure aims to facilitate access to justice (Recital 7 of Regulation 861/2007) by promoting the procedural principle of economy of proceedings. The economy of proceedings manifests itself in two ways: as a saving of time and expense, and as a means of achieving the civil justice goals by selecting the most efficient and cost-effective procedural route.[13] In this framework, the main objective of establishing the European Small Claims Procedure is to simplify and speed up litigation for small claims in cross-border cases, as well as to reduce litigation costs (Recital 8 and Article 1 of Regulation 861/2007). Furthermore, it aims to facilitate recognition and enforcement of judgments issued under the European Small Claims Procedure in other Member States (Recital 8 of Regulation 861/2007). A judgment issued under the European Small Claims Procedure is recognized and enforceable in another Member State, without the need for a declaration of enforceability or the possibility of opposing its recognition (Recital 30 and Article 1 of Regulation 861/2007).

A small cross-border claim is defined as a civil or commercial case involving an amount of up to €5,000 (Article 2 para. 1 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421). The calculation of the value of the claim does not take into account any interests, expenses or disbursements (Recital 10 and Article 2 para. 1 of Regulation 861/2007). A case is considered cross-border if at least one of the parties is domiciled or resides in an EU country other than the country in which the court hearing the case is based (Article 3 para. 1 of Regulation 861/2007). Although the European Small Claims Procedure is not restricted to consumer disputes, in practice it tends to be used more frequently for consumer-related matters rather than

[11] *https://eur-lex.europa.eu/EN/legal-content/summary/european-small-claims-procedure-rules-governing-cross-border-legal-disputes.html*

[12] Kramer (2008), p. 357.

[13] Douka (2021), p. 35 with further references.

purely commercial ones.[14] It is used primarily for aviation-related claims under Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.[15] The European Small Claims Procedure does not apply to certain matters listed in Article 2 para. 2 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421.[16]

Regulation 861/2007 applies to the European Union, including Ireland (see Recital 25 of Regulation 2015/2421), but excluding Denmark (see Recital 38 of Regulation 861/2007 and Recital 26 of Regulation 2015/2421). Following its withdrawal from the EU on January 31, 2020, it no longer applies in the United Kingdom, except for certain transitional cases under the Withdrawal Agreement.[17]

The application of the Regulation by the Member States remains limited.[18] The literature correctly identifies the high and often unpredictable costs of litigation as one of the principal factors hindering its effective implementation before national courts.[19] Precisely because of this limited practical use, an extension of the Regulation's scope to include domestic (non-cross-border) small claims has been proposed.[20]

C. TYPES OF COSTS INCURRED

1. Court Costs

An autonomous interpretation of court costs is provided for in Recital 15 of Regulation 2015/2421. Under this interpretation, court costs consist of fees and charges payable to the court. An indicative list of amounts paid to third parties during the proceedings—including lawyers' fees, translation expenses, costs for the service of documents by entities other than the court, and costs paid to experts or witnesses—is excluded from the definition of

[14] Kramer and Ontanu (2014), p. 9 and 27.

[15] Kramer and Ontanu (2014), p. 32.

[16] Excluded from the scope of application are matters concerning the status or legal capacity of natural persons; rights in property arising out of a matrimonial relationship or out of a relationship deemed by the applicable law to have comparable effects to marriage; maintenance obligations arising from a family relationship, parentage, marriage or affinity; wills and succession, including maintenance obligations arising by reason of death; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; social security; arbitration; employment law; tenancies of immovable property, with the exception of actions on monetary claims; or violations of privacy and of rights relating to personality, including defamation.

[17] Article 67 para. 3(e) of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19.10.2019).

[18] Kyriakides & Ppasiou (2025), pp. 10-12 with further citations.

[19] Giacalone, Abignente & Salehi (2021), p. 311.

[20] See Kyriakides & Ppasiou (2025), p. 12 et seq.

court costs. Furthermore, when determining court fees applicable to claims brought under the European Small Claims Procedure, the basic principles of simplicity, speed and proportionality should be respected.

To promote transparency and enhance the predictability of litigation expenses, the European legislator has required Member States to communicate information regarding applicable court fees to the European Commission. Pursuant to Recital 21 of Regulation 2015/2421 and Article 25 para. 2 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421, this information is subsequently made publicly accessible via the European e-Justice Portal.[21] With the exception of Spain, Cyprus, Luxembourg, and to a certain extent France, most European legal systems impose court fees on small claims. In the majority of Member States, these fees are calculated based on the amount in dispute. However, Ireland, Poland, Sweden, France, Malta, and Finland apply a fixed fee to proceedings under the European Small Claims Procedure.

2. Translation Costs

Translation costs constitute a significant component of overall litigation costs and may arise at various stages of the European Small Claims Procedure, particularly due to the requirements laid down in Article 6 of Regulation 861/2007. Such costs may arise during the proceedings, in connection with the service of documents on the opposing party, and at the enforcement stage.

The procedural documents (the claim form, the response, any counterclaim, any response to a counterclaim) as well as any description of relevant supporting documents must be submitted in the official language of the court (Article 6 para. 1 of Regulation 861/2007). Where documents are provided in a language other than the language of the proceedings, the court may request a translation only if it is necessary for issuing the judgment (Article 6 para. 2 of Regulation 861/2007).[22] This means that not all documents submitted to the court must automatically be translated into the language of the court; translation is required solely where the court deems it essential for its decision-making.[23]

The linguistic burden associated with completing procedural documents in the language of the court is partially mitigated by the availability of automatically translated standard forms.[24] Since many sections of these forms

[21] *https://e-justice.europa.eu/topics/taking-legal-action/european-judicial-atlas-civil-matters/small-claims_en* [last visited on 10.02.2026].

[22] In practice, Dutch courts are willing to take into account standard forms written in another language they can understand —most commonly English [see Rechtbank Noord-Holland (District Court of North Holland) 29 May 2019, ECLI:NL:RBNHO:2019:4282, para 4.5. and Fernhout (2023), p. 215] as well as French or German [see Kramer and Ontanu (2014), p. 29 and 33].

[23] Ontanu & Pannebakker (2012), p. 180.

[24] Ontanu & Pannebakker (2012), p. 178.

consist of closed questions, translation is generally required only for narrative fields and supporting documents, and even then, only where the court considers it necessary.[25]

Many national judges are reluctant to rely on documents drafted in foreign languages. This reluctance is understandable: judges typically receive their legal training exclusively in the official language of the court in which they serve, and it is unrealistic to expect them to possess full command of legal terminology in other languages such that they can efficiently assess cross-border cases without translation.

Additional translation costs may arise if the party receiving the documents refuses to accept them because they are not drafted in the official language of the Member State to which they are addressed. In Member States with multiple official languages, the official language (or one of the official languages) of the place where service is to be effected, or where the document is to be dispatched, should be used. The same applies if the addressee does not understand the language of the document (Article 6 para. 3 of Regulation 861/2007). Notably, the language used for communication with the court (language of procedure) does not necessarily coincide with the language required for communication with the opposing party.[26]

At the enforcement stage, translation costs may again be incurred if the losing party does not voluntarily comply with the judgment. Although judgments issued under the European Small Claims Procedure are enforceable without a declaration of enforceability (Article 20 para. 1 of Regulation 861/2007), the court shall, upon request of the parties, issue a certificate concerning a judgment given in the European Small Claims Procedure using the standard Form D (see Annex IV, as amended by Commission Delegated Regulation 2017/1259) free of charge. The court may also issue the certificate in any other official language of the Union's institutions using the multilingual dynamic form available on the European e-Justice Portal (Article 20 para. 2 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421). In this regard, the court is entitled to rely on the accuracy of the translation made available on the Portal (Recital 19 of Regulation 2015/2421). This mechanism reduces potential translation costs where the language of the procedure differs from the language required for enforcement in another Member State.

To further minimize translation-related costs, the European legislator obliges each Member State to indicate which official EU languages—other than its own—it is willing to accept for this certificate [Article 25 para. 1 (i) of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421]. The European e-Justice Portal[27] provides an overview of the languages accepted for this certificate by each Member State. The accepted languages vary: while

[25] Ontanu & Pannebakker (2012), p. 178.

[26] See on this issue extensively Ontanu & Pannebakker (2012), p. 179.

[27] *https://e-justice.europa.eu/topics/taking-legal-action/european-judicial-atlas-civil-matters/small-claims_en* [last visited on 10.02.2026].

the majority of Member States (Belgium, Czech Republic, Germany, Croatia, Cyprus, Lithuania, Hungary, the Netherlands[28], Poland, Romania, Slovakia, Bulgaria, Greece, Italy, Latvia, Luxembourg, Malta, Slovenia) accept the certificate only in their own official language(s), certain Member States additionally accept other official languages of the Union (Spain, Sweden, Estonia, France, Austria, Portugal, Finland).

Any translation of the information on the substance of a judgment provided in this certificate shall be done by a person qualified to carry out translations in one of the Member States (Article 21a para. 2 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421).

3. Evidence Costs

Costs relating to evidence may arise in the European Small Claims Procedure. The court shall determine the means of taking evidence and the extent of the necessary evidence for its judgment under the applicable rules of evidence admissibility. It shall use the simplest and least burdensome method of gathering evidence (Article 9 para. 1 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421). Evidence may be admitted in the form of written statements from witnesses, experts or parties (Article 9 para. 2 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421). Where evidence involves a person being heard, that hearing shall be conducted using distance communication technology, such as videoconferencing or teleconferencing, which is available to the court. However, the court may decide that the use of such technology is inappropriate for the fair conduct of the proceedings due to the particular circumstances of the case (Article 9 para. 3 of Regulation 861/2007 and Article 8 para. 1, as amended by Article 1 of Regulation 2015/2421). The court may only take expert evidence or oral testimony if it is not possible to give the judgment on the basis of other evidence (Article 9 para. 4 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421).

4. Service Costs

To further reduce litigation costs, Article 13 para. 1 of Regulation 861/2007—substantially revised by Article 1 of Regulation 2015/2421 and, more recently, by Article 20 of Regulation 2023/2844 (on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial, and criminal matters, and amending certain acts in the field of judicial cooperation)—establishes postal and electronic service of documents[29] as the gen-

[28] Article 7 para. 2 of the Implementation Act (*Uitvoeringswet verordening Europese procedure voor geringe vorderingen*).

[29] Electronic service is carried out by electronic means of service [see Articles 19 and 19a of Regulation 2020/1784 on the service in the Member States of judicial and extrajudicial documents in civil

eral rule. Service of documents must be confirmed by an acknowledgement of receipt (Article 13 para. 1 of Regulation 861/2007). If service by post or by electronic means is not possible, documents may instead be served using any of the methods provided for in Articles 13 or 14 of Regulation 1896/2006 creating a European order for payment procedure (Article 13 para. 4 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421).

5. Legal Representation Costs

In theory, lawyers' fees can be avoided where self-representation is permitted, as is usually the case in small claims proceedings in most Member States.[30] Under the European Small Claims Procedure, lawyers' fees should not be incurred, since parties are not required to be represented by a lawyer or other legal professional (Recital 15 and Article 10 of Regulation 861/2007).

Furthermore, to ensure that litigants do not need to hire a lawyer merely to pay court costs, Member States shall enable parties to make electronic payments of court fees through distance payment methods, allowing payments also to be made from a Member State other than the one in which the court is situated (Article 15a para. 2 of Regulation 861/2007, as amended by Article 20 of Regulation 2023/2844). According to information published on the e-Justice Portal (Recital 21 of Regulation 2015/2421 and Article 25 para. 1 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421), remote payment of court fees is available in almost all Member States, with Greece being the exception.[31]

To reduce the risk that litigants feel compelled to seek legal representation, the European legislator requires Member States to provide free-of-charge practical assistance to parties completing the relevant forms, as well as general information on the scope of the European Small Claims Procedure and on the competent courts. This free-of-charge practical assistance does not amount to legal aid or legal advice in the sense of assessing the merits of a specific case (Article 11 para. 1 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421). In addition, to further limit the need for legal representation, courts shall, where necessary, inform parties about procedural questions (Article 12 para. 2 of Regulation 861/2007).

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or commercial matters (Service of Documents), as amended by Article 24 of Regulation 2023/2844] or through the European electronic access point established under Article 4 para. 1 of Regulation 2023/2844 (Article 13 para. 1 of Regulation 861/2007, as amended by Article 20 of Regulation 2023/2844). The validity of electronic service is contingent upon the addressee's prior express consent to the use of this means for the service of documents in the course of the European Small Claims Procedure concerned (see Articles 19 para. 1 and 19a para. 1 of Regulation 2020/1784, as amended by Article 24 of Regulation 2023/2844; Article 13 para. 1 of Regulation 861/2007, as amended by Article 20 of Regulation 2023/2844).

[30] Reimann (2012), p. 30.

[31] See also Chronopoulou (2019), p. 186, fn. 3.

However, to ensure effective access to justice across the EU, Recital 16 of Regulation 2015/2421 stipulates that legal aid should be provided in accordance with Council Directive 2003/8/EC.

D. THE LOSER-PAYS PRINCIPLE

1. Application Scope

Article 16 of Regulation 861/2007 explicitly states that the unsuccessful party bears the costs of the proceedings. It adopts the loser-pays principle in the form of a full shift of litigation costs to the losing party,[32] meaning that all types of costs mentioned above can be borne by the losing party.

The loser-pays principle, as established in Article 16 of Regulation 861/2007, applies only to cases where a party has been defeated, and not to cases that end in settlement.[33] The scope of the rule is limited to situations in which: a) the action is dismissed in its entirety (in which case the unsuccessful party is the claimant), or b) the action is upheld in its entirety (in which case the unsuccessful party is the defendant).[34]

The loser-pays principle is found in almost every European civil litigation system.[35] In the context of small claims, the English rule (loser-pays principle) encourages litigants to seek justice.[36] Conversely, the American rule—where each party must pay its own attorney's fees regardless of the outcome of the proceedings—may discourage potential claimants from pursuing small claims. This is because, even if they prevail, the amount remaining after litigation expenses have been deducted will be minimal or negligible.[37]

The reference in Article 16 of Regulation 861/2007 to the exclusion of unnecessary costs from recoverable costs provides a dogmatic justification for the loser-pays principle based on the prevailing theory of the initiation of unnecessary litigation costs under German civil procedural law. This theory stems from the principle of economy of proceedings, which specifies effective legal protection by identifying the losing party as the party that caused unnecessary litigation costs, which are then logically imposed on that party.[38]

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[32] Reimann (2012), p. 11.

[33] Kropholler & von Hein (2011), para. 1. See also Peiffer (2025), para. 2.

[34] CJEU 14 February 2019, Rebecka Jonsson v Société du Journal L'Est Républicain, ECLI:EU:C:2019:124, paras. 20-24, available at eur-lex.europa.eu, Vathrakokilis (2019), p. 596 et seq.

[35] *https://europeanjusticeforum.org/glossary/loser-pays-rule/*, Hodges, Vogenauer & Tulibacka (2010), p. 17, Reimann (2012), p. 9.

[36] Mause (1969), p. 33.

[37] Mause (1969), p. 33.

[38] See extensively Douka (2025), p. 482 et seq.

2. Requirement to Submit a Formal Request

The award of litigation costs requires the submission of a formal request and the determination of the type and amount of costs by completing the appropriate form.[39]

The mandatory Claim Form A (No. 7.3 Annex I of Regulation 861/2007) includes an application for cost reimbursement. In the optional Standard Response Form C (Part II No. 5 Annex III of Regulation 861/2007, as amended by Commission Delegated Regulation 2017/1259), the defendant must also indicate whether they are requesting reimbursement of costs. If the defendant does not use Form C and fails to submit a separate application for reimbursement, the court should inform them of the requirement to file such a request.[40]

Litigation costs are awarded solely upon the request of the parties, making their allocation contingent on party initiative. The European legislator views litigation costs as falling within the scope of party authority, consistent with the principle of party disposition. Notably, although Regulation 861/2007 does not explicitly prescribe this requirement in any article, it can be inferred from the Annexes. This approach may diverge from national procedural laws in various Member States. For instance, under Greek procedural law, in accordance with the principle of party disposition (Article 106 of the Greek Code of Civil Procedure), courts do not award litigation costs unless a specific request has been submitted (Article 191 para. 2 of the Greek Code of Civil Procedure).[41] By contrast, German procedural law requires courts to allocate costs ex officio [§ 308 (2) of the German Code of Civil Procedure (ZPO)], on the ground that such provisions serve the public interest.[42] Similarly, Austrian procedural law stipulates that decisions on the reimbursement of costs are to be rendered ex officio, provided that a statement of costs has been submitted within the prescribed timeframe [§ 52 (5) of the Austrian Code of Civil Procedure (öZPO)]. Under Dutch procedural law, likewise, even if neither party requests a costs order, the court is required to determine the allocation of litigation costs on its own initiative.[43]

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[39] Chronopoulou (2019), p. 185.

[40] Wolber (2025), para. 12.

[41] Areios Pagos (Supreme Court of Greece), Decision 615/1971, published in Nomiko Vima (Νομικό Βήμα, NoB) 1972, p. 68 (at p. 69), Athens Court of Appeal, Decision 1182/1990, published in Elliniki Dikaiosyni (Ελληνική Δικαιοσύνη, ΕλλΔνη) 1991, p. 1015 et seq., Athens Court of Appeal, Decision 4395/1989, published in Elliniki Dikaiosyni (Ελληνική Δικαιοσύνη, ΕλλΔνη) 1993, p. 1379, Court of First Instance of Athens, Decision 600/2021, published in the Greek legal database Nomos, Court of First Instance of Zakynthos, Decision 53/1971, published in Nomiko Vima (Νομικό Βήμα, NoB) 1972, p. 1477 (at p. 1481).

[42] Elzer (2025), para. 77.

[43] Hoge Raad (Supreme Court of the Netherlands) HR 28 november 1986, ECLI:NL:HR:1986:AC9604, para. 3.1, available at rechtspraak.nl.

3. Determination of the Losing Party

The Court of Justice of the European Union (CJEU) has ruled that only the claimant and the defendant qualify as parties to the proceedings under Article 3 of Regulation 861/2007, thereby excluding interveners. This is because the objective of the Regulation is to resolve cross-border small claims in a simple, speedy, and cost-efficient manner.[44] However, in theory it has been argued that a principal intervener should also be regarded as a party within the meaning of the Regulation. This argument rests on the premise that main intervention involves a substantive request for judicial protection and introduces a new right to judicial review. Furthermore, main intervention promotes procedural efficiency by facilitating the expedited resolution of pending cases and reducing costs through the consolidation of hearings.[45]

E. DETERMINATION OF RECOVERABLE COSTS

1. The Requirements for Cost Recovery by the Unsuccessful Party

According to Article 16 of Regulation 861/2007, the court shall not award costs to the prevailing party, to the extent that they were unnecessarily incurred *or* are disproportionate to the claim. In other words, the recoverable costs are determined by the principles of necessity and proportionality. Neither the text of the Regulation[46] nor the CJEU has yet provided an autonomous interpretation of these two principles. Furthermore, the ELI–UNIDROIT Model European Rules of Civil Procedure[47] cannot serve as a source of guidance in this context, as they do not encompass proceedings under the European Small Claims Procedure.[48] Even if they were applicable, they would only serve as an interpretative guide for the principle of proportionality and not for that of necessity, since the criteria for imposing litigation costs on the

[44] CJEU 22 November 2018, ZSE Energia a.s. v RG, ECLI:EU:C:2018:941, paras. 21–30, available at eur-lex.europa.eu.

[45] Vathrakokilis (2019), p. 596 et seq. For a broader interpretation of the notion of 'parties to the proceedings', one that encompasses all persons who are directly affected by the legal consequences of the judgment, see Huber (2018), p. 629.

[46] Kotzur (2014), p. 99.

[47] European Law Institute & UNIDROIT. (2021). ELI–UNIDROIT Model European Rules of Civil Procedure: From Transnational Principles to European Rules of Civil Procedure. Oxford University Press.

[48] European Law Institute & UNIDROIT (2021), p. 21: "The Rules do not cover small claim proceedings and proceedings for payment orders. Both special proceedings are addressed by European Regulations applying to cross-border cases. These Regulations not only regulate cooperation between, and the competences of, European Union Member States in cross-border cases, they also contain a complete and detailed set of rules on on-going proceedings, which only leave Member States with a limited amount of discretion to add to them."

losing party in the ELI–UNIDROIT Model European Rules of Civil Procedure are based on the principles of reasonableness and proportionality.[49]

The disjunctive wording of Article 16 implies that litigation costs will be awarded if the following two conditions of necessity and proportionality are met cumulatively.[50] This means that litigation costs will only be awarded to the prevailing party if they are deemed necessary for the proceedings and proportionate to the dispute in question. For instance, while the cost of translating crucial evidence may be necessary for the conduct of proceedings, it may be considered disproportionate—and therefore not recoverable under Article 16 of Regulation 861/2007—if the translator's fee is not proportionate to the value of the claim. The scope of recoverable costs is clearly narrower than that adopted by national procedural laws of the Member States.[51] This is because national procedural laws generally apply only the principle of necessity—and not the principle of proportionality—to determine the costs to be awarded to the prevailing party.[52]

2. The Principle of Necessity

The principle of necessity determines the type and amount of litigation costs awarded, referring to those deemed necessary for conducting the pro-

[49] European Law Institute & UNIDROIT (2021), pp. 272-274: "Rule 240. Scope and Amount of Costs (1) Parties may seek to recover the costs of the proceedings, in particular (a) reasonable and proportionate costs of their legal representation in the proceedings, (b) court and other fees such as those of court-appointed experts, interpreters, court reporters etc., (c) other reasonable financial outlays resulting from the conduct of the proceedings, such as costs of party-appointed experts, travel expenses, and fees for the service of documents. (2) Costs under Rule 240(1) may also include costs reasonably incurred for the preparation of proceedings before they were commenced. (3) Parties may only recover costs which they have reasonably and proportionately incurred for the conduct of the proceedings, taking into account the amount in dispute, the nature and complexity of the issues, the significance of the case for the parties. (4) Where national law specify tariffs for the recovery of certain fees (such as, where relevant, court fees and fees for the parties' legal representation, for experts, and interpreters), any award of costs should nevertheless be consistent with the Rules of this Part."

[50] Wedel (2010), p. 286. See also Peiffer (2025), para. 7.

[51] For instance, under German and Greek civil procedural law, recoverable costs include those arising from procedural and extrajudicial actions that appeared appropriate and objectively necessary at the time they were undertaken in order to pursue or defend the disputed claim before a civil court [see Bundesgerichtshof (Federal Court of Justice of Germany) 25.02.2016 - III ZB 66/15, para. 8, BeckRS 2016, 05436, Bundesgerichtshof (Federal Court of Justice of Germany) 23.11.2006 - I ZB 39/06, para. 17, BeckRS 2007, 8380, see also Peiffer (2025), para. 4, Douka (2021), p. 224]. Actions are considered necessary when, from the perspective of a prudent litigant, the expenses appear *ex ante* necessary for the assertion or defense of the disputed right [see Bundesgerichtshof (Federal Court of Justice of Germany) 20.12.2011 – VI ZB 17/11, para. 12, BeckRS 2012, 06072, Bundesgerichtshof (Federal Court of Justice of Germany) 1.4.2009 - XII ZB 12/07, para. 11, BeckRS 2009, 11883]. Similarly, Slovenian civil procedural law limits recoverable costs to those necessary for the litigation [Article 155 of the Slovenian Code of Civil Procedure, see Betetto (2012), p. 254, Gale & Zajc (2020), p. 264]. Under Finnish civil procedural law, the losing party is required to reimburse all reasonable legal costs incurred by the winning party in taking steps deemed necessary for the conduct of the proceedings [Männistö (2012), p. 127]. Under Austrian civil procedural law, the losing party is obliged to reimburse all costs, provided that such costs were both reasonable and necessary [Roth (2012), p. 69].

[52] Wolber (2025), para. 7.

ceedings.[53] The principle of necessity is linked to the principle of economy of proceedings, which is a key feature of the entire litigation costs law.[54] It is also related to the parties' obligation to conduct the proceedings in good faith. This obligation arises from the parties' duty to limit, as far as reasonably possible while safeguarding their legitimate interests, the costs they intend to recover from the opposing party in the event of a successful outcome.[55]

Regulation 861/2007 further specifies the principle of necessity in Articles 8 para. 3 (travel expenses for oral proceedings) and in Article 9 para. 3 (travel expenses for persons being heard in terms of evidence gathering), as amended by Article 1 of Regulation 2015/2421. If a party or a person being heard for the purpose of evidence gathering are summoned to attend an oral hearing via distance communication technology, they may request to be physically present at that hearing. The judge of the competent court may deem the costs resulting from physical presence during the oral hearing requested by the party/person being heard unnecessary and therefore not shiftable to the losing party. Forms A (standard claim) and C (standard answer) (see Annexes I and III, as amended by Commission Delegated Regulation 2017/1259) inform the parties of this cost risk (Article 8 para. 3 and Article 9 para. 3, as amended by Article 1 of Regulation 2015/2421). This provision reflects the European legislator's intention to strictly control the necessity of litigation costs.[56]

Court costs are always recoverable.[57] However, the recovery of legal representation costs is questionable. Although the instructions for completing section 7.3 of claim form A (see Annex I) expressly state that reimbursement of attorney's fees can be requested, their reimbursement seems surprising in light of the lack of mandatory attorney representation (Article 10 of Regulation 861/2007).[58] While it is generally advisable to seek legal assistance due to the cross-border nature of the proceedings,[59] a strict examination of their necessity by the competent judge may prevent them from being awarded to the prevailing party. This approach contradicts the view that, according to Recital 29 of Regulation 861/2007, lawyers' fees are generally considered necessary under the Regulation and are subject only to the proportionality test set out in Article 16.[60] It should be noted that according to the wording of Recital 29 ("*including for example*") the recording of eligible expenses is indicative, and these litigation expenses are subject to both necessity and proportionality checks, with the exception of court costs. In any event, the costs of legal representation should be regarded as necessary where a claim cannot be filed in

[53] Douka (2021), p. 209.
[54] Smid & Hartmann (2015), Vor § 91 ZPO, para. 3.
[55] Bundesgerichtshof (Federal Court of Justice of Germany) 11.9.2012 – VI ZB 59/11, para. 9, BeckRS 2012, 20764, Bundesgerichtshof (Federal Court of Justice of Germany) 31.8.2010 - X ZB 3/09, para. 10, BeckRS 2010, 23619, see also Smid & Hartmann (2015), § 91 ZPO, para. 8.
[56] Wolber (2025), para. 6.
[57] Peiffer (2025), para. 5.
[58] Hess & Bittmann (2008), p. 312.
[59] Kropholler & von Hein (2011), para. 2, Netzer (2021), para. 3.
[60] Garber (2020), para. 2, Kotzur (2014), p. 104, Varga (2015), para. 6, Brokamp (2008), p. 143.

another Member State by electronic means or by post, and where court fees cannot be paid by bank transfer.[61]

The approaches to legal representative reimbursement in small claims proceedings vary across Member States. In Ireland, for instance, lawyers' fees in small claims are not recoverable from the unsuccessful party, reflecting the underlying purpose of the small claims procedure to enable claimants to bring an action without the assistance of a solicitor or barrister.[62] Similarly, in Luxembourg lawyers' costs are excluded from recoverable expenses; however, the court retains discretion to award a lump sum where it would be inequitable for one party to bear the expenses incurred.[63] In Spain, by contrast, if the prevailing party does not reside in the location of the hearing, the costs of a court representative may be reimbursed, even though representation is not mandatory.[64] In Sweden, the prevailing party is entitled only to compensation for one hour of legal advice on one occasion before each court.[65]

From the wording of Article 16 of Regulation 861/2007 ("*to the extent that they were unnecessarily incurred*") it follows that unnecessary litigation costs are not awarded to the prevailing party; rather, they remain borne by the party whose conduct caused them. Such unnecessary litigation costs arise from (specific) (culpable) procedural behaviors of the parties, which in the national procedural laws of the Member States are reflected either through open norms (*open normen*) or strict norms (*scherpe normen*). Open norms are provisions where the legislator does not identify in advance which concrete procedural behaviors give rise to unnecessary costs. In contrast, strict norms directly link a specific procedural behavior to a costs order.[66]

An example of an open norm is Article 237 para. 1 sentence 3 of the Dutch Code of Civil Procedure (Rv)[67], which provides in general terms that the court may impose unnecessarily incurred or unnecessarily caused costs on the party responsible for them.[68] Another example is Article 156 para. 1 of the Croatian Civil Procedure Act, which provides that, irrespective of the outcome of the case, a party must reimburse the opposing party for costs incurred through their own fault or by an event that they suffered.[69]

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[61] Chronopoulou (2019), p. 186.

[62] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/ie_en* [last visited on 10.02.2026].

[63] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/lu_en* [last visited on 10.02.2026].

[64] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/es_en* [last visited on 10.02.2026].

[65] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/se_en* [last visited on 10.02.2026].

[66] For the distinction between open and strict norms see in detail Sluijter (2011), pp. 186-187.

[67] *"Ook kan de rechter de kosten die nodeloos werden aangewend of veroorzaakt, voor rekening laten van de partij die deze kosten aanwendde of veroorzaakte"*.

[68] Sluijter (2011), p. 186. For the very limited application of this provision by the Dutch courts, see Sluijter (2011), p. 79 et seq.

[69] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/hr_en* [last visited on 10.02.2026].

Examples of strict norms include provisions under which the claimant is ordered to bear litigation costs when the defendant did not give cause for an action to be brought and immediately acknowledged the claim [e.g. § 93 of the German Code of Civil Procedure (ZPO)[70], Article 177 of the Greek Code of Civil Procedure[71], § 45 of the Austrian Code of Civil Procedure (öZPO)[72], Article 101 of the Polish Code of Civil Procedure[73]]. Similar provisions allow courts to impose the costs of unsuccessful [§ 96 of the German Code of Civil Procedure (ZPO)[74]] or belatedly asserted [Article 185 number 2 of the Greek Code of Civil Procedure[75]] means of challenge or defense on the party who advanced them, even if that party prevails on the merits. Similarly, Article 103 of the Polish Code of Civil Procedure[76] provides that, regardless of the outcome of the case, if the prevailing party acted unreasonably during the proceedings—for example, by refusing mediation after the parties had initially agreed to it—the court may order that party to bear the litigation costs.[77] A further strict norm is found in Article 467 of the Greek Code of Civil Procedure, as amended by Article 39 of Law 5221/2025, which provides that the claimant must bear the costs for failing to consolidate claims in small claims proceedings.[78] Other examples concern rules imposing litigation costs on the

[70] *„Hat der Beklagte nicht durch sein Verhalten zur Erhebung der Klage Veranlassung gegeben, so fallen dem Kläger die Prozesskosten zur Last, wenn der Beklagte den Anspruch sofort anerkennt“*. See Hau (2022), para. 3.

[71] Article 177 of the Greek Code of Civil Procedure: "If the defendant has not, through their conduct, caused the bringing of the action and immediately after its filing accepts it or fully admits its basis, the court shall order that the claimant bear the costs". See extensively Douka (2021), p. 288 et seq.

[72] *„Hat der Beklagte durch sein Verhalten zur Erhebung der Klage nicht Veranlassung gegeben und den in der Klage erhobenen Anspruch sofort bei erster Gelegenheit anerkannt, so fallen die Processkosten dem Kläger zur Last. Er hat auch die dem Beklagten durch das eingeleitete gerichtliche Verfahren verursachten Kosten zu ersetzen“*.

[73] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/pl_en* [last visited on 10.02.2026], Tulibacka (2010), p. 466.

[74] *„Die Kosten eines ohne Erfolg gebliebenen Angriffs- oder Verteidigungsmittels können der Partei auferlegt werden, die es geltend gemacht hat, auch wenn sie in der Hauptsache obsiegt“*.

[75] Article 185 of the Greek Code of Civil Procedure: *"All costs, or part of them, may be imposed on the successful party if: (1) the judge considers that this party has not complied with the duty of truth; (2) the party has belatedly introduced means of challenge or defense or produced evidence which, in the judge's view, could have been submitted earlier; or (3) the party is at fault for the nullity of a procedural act or of the hearing."*

[76] "§ 1. Regardless of the outcome of the case, the court may impose on a party or an intervener the obligation to reimburse the costs caused by their dishonest or manifestly improper conduct. § 2. Paragraph 1 applies in particular to costs arising from evading explanations or giving explanations that are untrue, concealing or belatedly presenting evidence, as well as from a manifestly unjustified refusal to submit to mediation. § 3. If a party: despite being summoned to appear in person, fails to appear in order to participate in a court activity and does not justify such absence, or without justification fails to appear at a mediation session during the proceedings, despite having previously agreed to mediation, the court may, regardless of the outcome of the case, impose on that party the obligation to reimburse costs in an amount higher than would follow from the outcome of the case, or even to reimburse all costs. § 4. The court shall inform the parties of this possibility when summoning them to appear in person or when referring the parties to mediation."

[77] Tulibacka (2010), p. 466.

[78] Article 467 of the Greek Code of Civil Procedure promotes procedural economy by mandating the consolidation of multiple claims when their total value does not exceed €8,000. Breaching this obligation—intended to expedite and economize proceedings in line with the principle of good faith

party that, through its culpable conduct, delays or obstructs the proceedings and thereby breaches the duty to conduct litigation in good faith [e.g. § 95 of the German Code of Civil Procedure (ZPO)[79], Article 184 sentence 2[80], and Article 185 number 3 of the Greek Code of Civil Procedure[81]].

These provisions of national procedural laws—whether in the form of open or strict norms—constitute apparent (non-genuine) exceptions to the loser-pays principle. They detach the imposition of litigation costs from the objective fact of losing the case and instead connect it to the conduct of the party who generated unnecessary litigation expenses. These "apparent" exceptions are grounded either in the theory of initiation of unnecessary costs, which justifies the loser-pays principle itself, or in the theory of compensation, which is fault-based and requires examination of the losing party's motives for initiating litigation.[82].[83] They are characterized as "apparent" because they remain situated within the framework of unnecessary litigation costs; the difference lies in requiring the party who caused such unnecessary costs to bear them, irrespective of the outcome of the case. When a litigant, through culpable behavior, causes or delays proceedings—thereby undermining procedural economy in terms of time and expense—this fault may constitute an independent ground for allocating litigation costs to that party.[84] Apparent exceptions based on the theory of initiation of unnecessary costs encompass situations in which a party's (pre-)procedural conduct leads to the incurrence of unnecessary expenses, thereby obliging that party to bear them regardless of the final outcome. Apparent exceptions grounded in the theory of compensation include cases where, irrespective of who prevails, a party must reimburse the opponent for unnecessary costs incurred due to their own culpable conduct.

3. The Principle of Proportionality

Unlike the principle of necessity, the principle of proportionality presupposes a comparative assessment. Proportionate in relation to what?[85] Regulation 861/2007 provides the answer in Recital 29: for costs to be recoverable, they must be proportionate to the value of the claim. At the level of binding (hard) European civil procedural law, the principle of proportionality as a cri-

(Article 116 of the Greek Code of Civil Procedure)—results in a sanction whereby the claimant must cover the litigation costs for all claims except the first [see also Douka (2021), p. 294].

[79] *„Die Partei, die einen Termin oder eine Frist versäumt oder die Verlegung eines Termins, die Vertagung einer Verhandlung, die Anberaumung eines Termins zur Fortsetzung der Verhandlung oder die Verlängerung einer Frist durch ihr Verschulden veranlasst, hat die dadurch verursachten Kosten zu tragen"*.

[80] The second sentence of Article 184 of the Greek Code of Civil Procedure provides that, if the adjournment is attributable to the fault of the opposing party, the costs shall be imposed on that party.

[81] See fn. 75.

[82] Zuckerman (2013), para. 27.51.

[83] Douka (2021), p. 277.

[84] Douka (2021), p. 277.

[85] Smith (2023), p. 640, para. 21.032.

terion for awarding costs against the unsuccessful party is expressly reflected in Article 14 of Directive 2004/48 on the enforcement of intellectual property rights and in Article 69 of the Agreement on a Unified Patent Court (2013/C 175/01). Both provisions stipulate that recoverable costs must be reasonable and proportionate.

The principle of proportionality applies to court costs under the Regulation, which should be proportionate to the value of the claim and not higher than the costs charged for national simplified court procedures (see Recital 14 of Regulation 2015/2421 and Article 15a para. 1, as amended by Article 1 of Regulation 2015/2421). In addition, the principle of proportionality applies primarily to lawyers' fees, but also to incidental expenses incurred by the parties, such as travel expenses to attend an oral hearing requested by them or expenses for experts commissioned by them.[86]

Furthermore, the Regulation does not specify at what point the proportionality limit is exceeded.[87] There is a diversity of opinion on this issue in theory. According to one opinion, litigation costs are considered disproportionately expensive if they amount to more than the value of the claim.[88] Opposing this view, it is argued that the costs of the proceedings are only disproportionate if they significantly exceed the amount of the claim.[89] It has also been suggested that as a rule of thumb, costs are disproportionate if they exceed the amount in dispute by more than fifty percent.[90]

In some of the national legal systems that impose various restrictions on the amount of lawyers' fees that can be shifted to the losing party[91], the recoverable lawyers' fees are proportional to the value of the claim. If lawyers' fee agreements are permitted in the European Small Claims Procedure, it is likely that the limit of proportionality will be exceeded quickly.[92]

The principle of proportionality is said to be a problematic criterion for awarding litigation costs under the Regulation. Within this framework, it has been argued that the non-recovery of necessary but disproportionate expenses means that recoverable expenses are partially unpredictable.[93]Furthermore, the question arises as to whether the intended reduction in cost risk for the creditor provides an additional incentive to enforce a small claim. Even if the creditor prevails, they may be denied some of the costs incurred, which would further minimize the already small claim. Ultimately, it is argued that this favors those who were in the wrong.[94]

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[86] Schlosser (2021), para. 3.
[87] Peiffer (2025), para. 8, Hau (2022), para. 4.
[88] Jahn (2007), p. 2893, Schlosser (2021), para. 3, Kotzur (2014), pp. 104-105. See opposing view in Hau (2022), para. 4, Kropholler & von Hein (2011), para. 4, Wolber (2025), para. 9.
[89] Hackenberg (2007), p. 340.
[90] Wedel (2010), p. 287.
[91] Reimann (2012), pp. 10-11, Butler & Colley (2025), p. 8, fn. 18.
[92] Peiffer (2025), para. 10.
[93] Varga (2015), para. 9. See also Garber (2020), para. 6.
[94] Brokamp (2008), p. 144, Garber (2020), para. 6.

Moreover, it is debatable whether such a limited obligation to reimburse costs is consistent with the right to effective legal protection under Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union. It has been argued that this issue may become particularly significant when viewed from the perspective of a defendant who has successfully defended themselves against an unjustified claim. They too could potentially be denied part of their defense costs, bearing in mind that the European Small Claims Procedure is an optional procedure only for creditors. The defendant, on the other hand, is forced into the European Small Claims Procedure if the creditor opts for it.[95]

Similarly, it is argued that the principle of proportionality should only be implemented in exceptional circumstances. This is because it would be unacceptable to give citizens and companies the impression that they can engage in cross-border transactions with confidence under the European Small Claims Regulation, only to be deprived of the benefits of their litigation success by being refused reimbursement of their costs if they prevail.[96]

The principle of proportionality clearly restricts the shifting of litigation costs to the unsuccessful party. However, the previous views fail to consider the rationale behind introducing the principle of proportionality as a criterion for allocating litigation costs in small claims cases, which is to prevent national courts from awarding costs that exceed the value of the claim. Compared to other litigation proceedings, small claims concern disputes of low value, up to €5,000. There is a risk that litigation costs may exceed the value of the dispute in these cases, especially when legal representation is involved. The European legislator protects and safeguards in this manner the right to access to justice for creditors, as they are encouraged to bring small claims without legal representation, so that even if they lose, they will not be required to pay the whole amount of the opposing party's costs. Therefore, the limited shifting of litigation costs does not impose an unbearable financial burden on the parties involved, but rather reduces the financial risks associated with bringing a lawsuit, thereby facilitating access to justice.[97] Using the principle of proportionality to allocate litigation costs is consistent with the specific characteristics of the European small claims procedure, which is designed to provide a rapid, autonomous and effective way of resolving cross-border disputes involving small claims. The fact that this is a non-binding procedure, the choice of which is left to the creditor claimant, is an inherent flaw in the Regulation which is not linked to the principle of proportionality as a criterion for allocating litigation costs.

Absent an autonomous interpretation of the principle of proportionality within the framework of Regulation 861/2007, German procedural theory has partly argued for the downgrading of the criterion of the principle of pro-

[95] Brokamp (2008), p. 145. See also Garber (2020), para. 7.
[96] Hau (2022), para. 4.
[97] Reimann (2012), p. 17.

portionality to a mere obligation to reduce costs (*Kostenminderungspflicht*), originally applied to the costs of legal counsel.[98] This is a *contra legem* interpretation of the Regulation that disregards the European legislator's requirement to observe the principle of proportionality when awarding litigation costs (Recital 29 and Article 16 of Regulation 861/2007). While the principle of necessity serves the principle of economy of proceedings and prohibits the award of unnecessary costs, the principle of proportionality protects both parties' right to access justice and prevents excessive costs from being imposed. Furthermore, this approach complicates the law on litigation costs by disrupting the consistent framework for their regulation and applying different criteria to different categories of litigation costs. In any case, the CJEU/ European legislator are required to provide an autonomous interpretation of the principle of proportionality within the framework of the Regulation, given that national laws of Member States ignore this principle as a criterion for allocating litigation costs.

4. Appeal Costs

Article 17 para. 2 of Regulation 861/2007 extends the application of the loser-pays principle to appellate proceedings[99], provided that they are permitted under the *lex fori*. Court fees charged in a Member State for appealing a judgment issued under the European Small Claims Procedure should not exceed the fees charged for national simplified court procedures in that Member State, nor should they be disproportionate (Article 17 para. 2 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421). Furthermore, to avoid the need to employ a lawyer to pay court costs, Member States should ensure that court fees can be paid by means of distance payment (Article 17 para. 2 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421).

Some Italian courts have overlooked the explicit reference in Article 17 para. 2 to Article 16 of Regulation 861/2007, particularly with regard to the principle of proportionality in allocating litigation costs. Notably, there have been cases in which the awarded costs have significantly exceeded the value of the claim, reaching amounts three to four times higher.[100] Although the Regulation and the jurisprudence of the CJEU do not provide an autonomous definition of the principle of proportionality in this context, awarding litigation costs exceeding three to four times the value of the dispute clearly breaches the principle of proportionality. This judicial practice undermines the Regulation's overarching objective of reducing litigation costs in small claims disputes (Recital 8 and Article 1 of Regulation 861/2007).[101]

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[98] Brokamp (2008), p. 148. See also Garber (2020), paras. 4 and 5.

[99] Landgericht Frankfurt (District Court of Frankfurt) 21.2.2019 – 2-24 S 195/18, para. 20, BeckRS 2019, 2501.

[100] D'Alessandro (2025), pp. 25-26.

[101] D'Alessandro (2025), p. 25.

5. Cost Determination Decisions

According to Recital 33 of Regulation 861/2007, decisions relating to the determination of costs made by court officers following a judgment given in accordance with the European Small Claims Procedure are directly enforceable across borders.

F. APPLICATION OF THE COSTS LAW OF THE FORUM

1. General Overview

Article 19 of Regulation 861/2007 states that, unless otherwise specified in this Regulation, the European Small Claims Procedure shall be governed by the *lex fori*. However, the application of domestic cost-allocation rules should comply with the objective of simplicity (as set out in Recital 29 of Regulation 861/2007), as well as the principles of equivalence and effectiveness. This means that it should not result in less favorable treatment than that applicable to similar situations governed by domestic law, nor should it prevent the exercise of rights recognized by EU law.[102]

Domestic rules on cost allocation apply in situations such as settlements, the apportionment of litigation expenses among multiple parties,[103] cases of partial victory or defeat of the litigants and genuine exceptions to the loser-pays principle. Furthermore, the exact determination of litigation costs is governed by the applicable national law (Recital 29 of Regulation 861/2007). In particular, the amount of court costs is determined in accordance with the *lex fori* (Recital 15 of Regulation 2015/2421). The European legislator provides an indicative list of the potential costs, including attorneys' fees, fees for other legal professionals, service costs, and translation costs (Recital 29 of Regulation 861/2007).

Information on basic national procedural rules for cost reimbursement is available on the e-Justice Portal. While it is not feasible to present the national provisions on cost reimbursement for all 26 Member States in detail on the portal, it is noteworthy that certain jurisdictions enhance legal certainty by offering comprehensive and accurate guidance on this key aspect of small claims proceedings (e.g. Croatia, the Netherlands, Estonia, Latvia, Luxembourg and Portugal). In contrast, others either omit any (specific) reference to it (e.g. Belgium, Cyprus, Lithuania, Hungary, Bulgaria and Slovenia), provide only general references to their national procedural laws (e.g. Czech Re-

[102] CJEU 14 February 2019, Rebecka Jonsson v Société du Journal L'Est Républicain, ECLI:EU:C:2019:124, para. 27, available at eur-lex.europa.eu.

[103] Article 16 governs solely the allocation of legal costs between the claimant and the defendant. In situations involving multiple parties—whether through simple or compulsory joinder—the distribution of costs is determined by the applicable national procedural law [Vathrakokilis (2019), p. 596 et seq.].

public, Germany, Poland, Romania, France, Italy and Austria) or even supply incorrect information. Greece exemplifies the latter, as the portal incorrectly indicates that litigation costs are not awarded in small claims cases. This assertion is flawed for two principal reasons: a) it disregards the supra-legislative effect of Article 16 within the domestic legal order when the European Small Claims Procedure is applied pursuant to Regulation 861/2007; and b) it overlooks that domestic special provisions governing small claims follow the general rules on cost allocation, thereby applying the loser-pays principle (Article 176 et seq. of the Greek Code of Civil Procedure), subject to an additional exception concerning the non-accumulation of claims valued at €8,000 (Article 467, as amended by Article 39 of Law 5221/2025).

2. Cost Allocation in the Event of Partial Victory/Defeat

The CJEU ruled that it follows from the wording of Article 16 of the Regulation that it applies only in cases where a party has been unsuccessful in all its claims and not in cases where it has been unsuccessful in part.[104] It pointed out in this regard that the aim of the Regulation was only to partially harmonize the procedural rules applicable to small claims and that if the EU legislature had wished to include cases of partial defeat within the scope of the provision, it would have done so expressly.[105] The latter are regulated by the *lex fori* (Article 19 of Regulation 861/2007).

The procedural laws of the Member States generally adopt one of two approaches in cases where the parties achieve only partial success in litigation. The first approach is proportional allocation, whereby procedural costs are distributed in accordance with the degree of success or failure of each party, as applied in Croatia[106], Greece[107], Germany[108], Austria[109], Latvia[110], Portugal[111] and

[104] CJEU 14 February 2019, Rebecka Jonsson v Société du Journal L'Est Républicain, ECLI:EU:C:2019:124, para. 21, available at eur-lex.europa.eu.

[105] CJEU 14 February 2019, Rebecka Jonsson v Société du Journal L'Est Républicain, ECLI:EU:C:2019:124, para. 23, available at eur-lex.europa.eu.

[106] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/hr_en* [last visited on 10.02.2026]. The used formula for proportional allocation here has been heavily criticized for not taking into account the costs of the less successful party in the proceedings [see in detail Tomljenović & Poretti (2025), pp. 160-161].

[107] Art. 178 para. 1 of the Greek Code of Civil Procedure. Nevertheless, a portion of case law sets off litigation costs between the parties in cases of partial victory and partial defeat, instead of allocating them proportionally based on the extent of each party's success and failure [see in detail Douka (2021), p. 259].

[108] § 92 of the German Code of Civil Procedure (ZPO). In the judgment of Amtsgericht Gießen (Local Court of Gießen) 23.4.2013 - 49 C 381/12, BeckRS 2013, 8741, litigation costs were allocated proportionally according to each party's degree of success and failure.

[109] § 45 of the Austrian Code of Civil Procedure (öZPO). *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/at_en* [last visited on 10.02.2026].

[110] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/lv_en* [last visited on 10.02.2026].

[111] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/pt_en* [last visited on 10.02.2026].

Slovenia[112]. The second approach reflects the American rule, under which no cost-shifting occurs and neither party is deemed the prevailing party (or both are considered non-prevailing), as in the Netherlands[113].

A hybrid application of these approaches is also permissible. Under Estonian civil procedural law, where a claim is only partially upheld, the default rule provides that the parties shall bear the procedural costs in equal shares. However, the court retains discretion to: (i) apportion costs proportionally to the extent to which the claim was satisfied; or (ii) order either party to bear the costs, in whole or in part, independently.[114]

Jurisdictions that generally apportion costs proportionally according to the degree of success or failure often apply the American rule where both parties achieve approximately equal success, as seen, for example in Croatia[115] and Germany.[116]

In certain jurisdictions, courts may also exercise discretion to order one party to bear all costs incurred by the opposing party if the latter was unsuccessful only in a relatively minor part of its claim, as in Croatia,[117] Greece[118] and the Netherlands.[119]

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[112] Gale & Zajc (2020), p. 264.

[113] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/nl_en* [last visited on 10.02.2026]. Article 237 para. 1, sentence 2 of the Dutch Code of Civil Procedure (Rv) [*"De kosten mogen echter geheel of gedeeltelijk worden gecompenseerd […] indien partijen over en weer op enkele punten in het ongelijk zijn gesteld"*] has been applied in various judgments in the European Small Claims Procedure [see, e.g., Rechtbank Noord-Holland (District Court of North Holland) 27 January 2021, ECLI:NL:RBNHO:2021:2804, para. 4.8, Rechtbank Noord-Holland (District Court of North Holland) 15 May 2019, ECLI:NL:RBNHO:2019:3794, para. 4.11, Rechtbank Oost-Brabant (Court of East Brabant) 31 January 2019, ECLI:NL:RBOBR:2019:599, para. 4.14, all available at rechtspraak.nl]. Nevertheless, some courts have awarded full compensation of litigation costs even in situations where approximately half of the claim was dismissed [see Rechtbank Noord-Holland (District Court of North Holland) 27 January 2021, ECLI:NL:RBNHO:2021:2798, paras. 4.4 and 4.7, Rechtbank Amsterdam (District Court of Amsterdam) 27 June 2011, ECLI:NL:RBAMS:2011:BT8420, para. 10, all available at rechtspraak.nl, see also Fernhout (2023), p. 211].

[114] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/ee_en* [last visited on 10.02.2026].

[115] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/hr_en* [last visited on 10.02.2026].

[116] Schulz (2025), § 92 ZPO, para. 14.

[117] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/hr_en* [last visited on 10.02.2026].

[118] Art. 178 para. 2 of the Greek Code of Civil Procedure, Douka (2021), p. 261.

[119] Although Dutch civil procedural law does not contain an equivalent explicit provision, Dutch courts consistently adhere to the principle that the rejection of a (relatively) minor part of a claim—or, from the defendant's perspective, the awarding of only a small portion of the claimed amount—does not render that party unsuccessful. In such instances, costs are typically awarded in full to the claimant or the defendant [Rechtbank Noord-Holland (District Court of North Holland) 12 September 2018, ECLI:NL:RBNHO:2018:7863, para. 4.8, Rechtbank Noord-Holland (District Court of North Holland) 11 April 2018, ECLI:NL:RBNHO:2018:2872, para. 4.5, Rechtbank 's-Hertogenbosch (District Court of 's-Hertogenbosch) 29 November 2012, ECLI:NL:RBSHE:2012:BY8206, para. 9, Rechtbank 's-Hertogenbosch (District Court of 's-Hertogenbosch) 6 July 2010, ECLI:NL:RBSHE:2010:BN0588, para. 3.9, all available at rechtspraak.nl, see also Fernhout (2023), p. 211]. The Dutch courts adopt the same approach in multi-claimant proceedings, where some claimants (partially) succeed while others do not. [Rechtbank Noord-Holland (District Court of North Holland) 21 October 2020, ECLI:NL:RBN-

Based on the above case law of the CJEU, and in the absence of a specific provision in the Regulation governing the allocation of costs in proceedings involving multiple claimants—where some succeed while others fail—the *lex fori* applies.[120] In proceedings with multiple claimants, where certain claims were dismissed while others were upheld, Dutch courts have generally applied Article 237 paragraph 1, sentence 2 of the Dutch Code of Civil Procedure (Rv), which provides that courts may fully or partially compensate litigation costs when both parties have been unsuccessful on certain points and order each party to bear its own costs. Relying on this provision, the prevailing judicial practice has been to order each party to bear its own costs.[121] However, a few Dutch courts have departed from this approach and have awarded full reimbursement of litigation costs, even where some of the claims were unsuccessful.[122]

3. Genuine Exceptions to the Loser-Pays Principle

Genuine exceptions to the loser-pays principle are determined by the cost rules of the forum. Assuming that the loser-pays principle is grounded in the theory that unnecessary litigation costs should be borne by the party initiating unnecessary litigation, exceptions based on equity should be regarded as true exceptions, as equity reflects the social dimension of civil proceedings. These exceptions are considered genuine because they allocate litigation costs to each party individually (following the American rule), not due to the initiation of unnecessary costs, but in recognition of the social nature of civil proceedings.[123]

In the context of the European Small Claims Procedure, genuine exceptions to the loser-pays principle include situations where the court may order the parties to bear the costs in full or in part themselves, if imposing the costs of the opposing party on the unsuccessful party would be manifestly unfair or unreasonable, as is the case under Estonian law.[124]

A provision allowing partial set-off of costs where, based on the assessment of circumstances, there is reasonable doubt as to the outcome of the proceedings was reintroduced into Greek civil procedural law through the

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HO:2020:7718, para. 4.9, Rechtbank Noord-Holland (District Court of North Holland) 22 April 2020, ECLI:NL:RBNHO:2020:3608, para. 4.4, both available at rechtspraak.nl].

[120] Vathrakokilis (2019), p. 596 et seq.

[121] See Rechtbank Noord-Holland (District Court of North Holland) 10 February 2021, ECLI:NL:RBNHO:2021:2805, Rechtbank Oost-Brabant (District Court of East Brabant) 17 December 2020, ECLI:NL:RBOBR:2020:6159, Rechtbank Noord-Holland (District Court of North Holland) 6 May 2020, ECLI:NL:RBNHO:2020:2938, Rechtbank Limburg (District Court of Limburg) 7 November 2018, ECLI:NL:RBLIM:2018:10576, all available at rechtspraak.nl.

[122] See e.g. Rechtbank Noord-Holland (District Court of North Holland) 5 February 2020, ECLI:NL:RBNHO:2020:444, available at rechtspraak.nl.

[123] Douka (2021), p. 277.

[124] *https://e-justice.europa.eu/topics/money-monetary-claims/small-claims/ee_en* [last visited on 10.02.2026].

amendment of Article 179 sentence 2 of the Greek Code of Civil Procedure by Article 8 of Law 4842/2021. The explanatory memorandum indicates the legislator's intention to grant civil courts a quasi-blanket discretion to order set-off of costs when, for reasons of equity towards the parties, they seek to mitigate the financial consequences of litigation.[125]

In contrast to Greek law, which expressly grants courts the discretion to offset costs where reasonable doubt exists as to the outcome of the proceedings, Dutch procedural law contains no equivalent provision. Against this background, the decision of a Dutch court[126] applying the European Small Claims Procedure appears erroneous,[127] as it applied the American rule and declined to award costs against the unsuccessful claimant on the ground that the claimant could reasonably believe that the claim was valid.[128] This amounts to an equity-based exception to the loser-pays principle, an exception that is provided for neither in Article 16 of Regulation 861/2007 nor in Dutch costs law, which recognizes deviations from the loser-pays rule only under narrowly defined circumstances[129] and offers no basis for compensating litigation costs despite any of the grounds invoked by the court.[130] Legal certainty requires predictability in litigation costs, and such predictability presupposes a strict interpretation of the exceptions to the loser-pays principle (*exceptio est strictissimae interpretationis*).[131] The Dutch court may have reached this conclusion because, in the Netherlands, the rationale underpinning the loser-pays principle is rooted in the principles of equity (*billijkheid*) and justice (*rechtvaardigheid*), further developed through the concepts of procedural risk and policy.[132] This highlights the practical significance of correctly establishing the doctrinal foundation of the loser-pays principle. Selecting procedural risk and policy theory as the doctrinal basis for the loser-pays principle—which mainly supports the exceptions to the loser-pays principle—leads to confusion over the definition and interpretation of the exceptions to this principle, which can result in legal uncertainty.[133]

[125] Douka (2024), p. 563.

[126] See Rechtbank 's-Hertogenbosch (District Court of 's-Hertogenbosch) 19 January 2012, ECLI:NL:RBSHE:2012:BV1931, para. 5, available at rechtspraak.nl.

[127] Fernhout (2023), p. 212.

[128] See Rechtbank 's-Hertogenbosch (District Court of 's-Hertogenbosch) 19 January 2012, ECLI:NL:RBSHE:2012:BV1931, para. 5, available at rechtspraak.nl: "*In de omstandigheid dat [eiseres 1] in redelijkheid kon menen dat zij een aanspraak kon geldend maken ziet de kantonrechter grond, de proceskosten te compenseren*".

[129] See the exceptions to the loser-pays principle in the Netherlands [Article 237 para. 1 of the Dutch Code of Civil Procedure (Rv)] in Vrendenbarg (2018), p. 114 et seq.

[130] In the same line see Gerechtshof Arnhem-Leeuwarden (Court of Appeal Arnhem-Leeuwarden) 4 April 2023, ECLI:NL:GHARL:2023:2932, para. 4.2: "*De wet biedt geen ruimte om desondanks vanwege de door de rechtbank genoemde redenen alsnog over te gaan tot het compenseren van de proceskosten*".

[131] Douka (2025), pp. 485-486.

[132] See in detail Douka (2025), pp. 479-482, with further citations.

[133] Douka (2025), pp. 481-482 and 485-486.

4. Enforcement Costs

Enforcement costs are added to the other expenses incurred to obtain a judgment and may even exceed the amount awarded. However, Regulation 861/2007 does not autonomously deal with the recovery of enforcement costs[134], leaving this issue to national procedural laws.

Any costs arising from the translation of text entered into the free text fields of the certificate concerning a judgment given in the European Small Claims Procedure (standard Form D) are to be allocated as provided for under the law of the Member State in which the court is located (see Recital 19 of Regulation 2015/2421).

5. Cost Shifting to the Losing Party - Legal Aid Recipient?

To ensure effective access to justice in the context of the European Small Claims Procedure, Recital 16 of Regulation 2015/2421 provides that legal aid shall be granted in accordance with Council Directive 2003/8/EC. Directive 2003/8/EC of 27 January 2003[135] governs legal aid in cross-border disputes[136], aiming to enhance access to justice in such cases by establishing minimum common rules on legal aid.

The Directive's objective scope encompasses civil and commercial matters, irrespective of the nature of the court (Article 1 para. 2 of the Directive). Its personal scope extends exclusively to natural persons, excluding legal persons (Article 3 para. 1 of the Directive). Although Member States are not obliged to grant legal aid where the party can appear in person (Article 3 para. 3 of the Directive)—as it is generally the case in small claims proceedings—from the direct reference of Recital 16 of Regulation 2015/2421 to the Directive it follows that European small claims fall within the Directive's scope, provided that the applicant is a natural person. While legal persons may avail themselves of the European Small Claims Procedure for claims up to €5,000, they are not entitled to legal aid under the Directive.

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[134] Kramer and Ontanu (2014), p. 22.

[135] The Directive was adopted on 27 January 2003 and entered into force on 31 January 2003 (Article 22 of the Directive). It applies to all Member States except Denmark, which opted out of its adoption and is therefore neither bound by nor subject to its provisions (Recital 34 of the Directive). The Directive was introduced in response to the growing prevalence of cross-border disputes within the EU and the resulting challenges faced by economically disadvantaged individuals due to limited access to justice (Recitals 5 and 10 of the Directive). It further acknowledges that differences among national judicial systems and the additional costs inherent in cross-border litigation should not impede citizens' ability to seek justice (Recital 18 of the Directive).

[136] A dispute qualifies as cross-border when the applicant for legal aid is domiciled or habitually resident in a Member State other than the one in which the court is situated or where enforcement of the judgment will occur (Article 2 para. 1 of the Directive). The relevant point in time for determining the cross-border nature of the dispute is the submission of the application (Article 2 para. 3 of the Directive).

Under Article 3 para. 2 of the Directive, Member States retain discretion as to whether litigation costs may be imposed on an unsuccessful legal aid recipient and whether such costs should be covered by legal aid. This discretion significantly limits the level of protection granted to economically disadvantaged parties. According to information available on the European e-Justice Portal concerning legal aid in cross-border (small) claims,[137] most EU Member States—including Greece[138], Lithuania, Finland, Austria, Slovenia, Luxembourg, Poland[139] and the Netherlands—do not cover the opposing party's costs under legal aid. Consequently, legal aid beneficiaries remain liable for costs awarded to the opposing party if they lose the case. Here, it should be noted that the 2017 Proposal for a Directive on common minimum standards of civil procedure—ultimately not adopted by the European Commission—explicitly stipulated that legal aid should cover the opposing party's costs where the legal aid recipient is unsuccessful.[140]

G. ASSESSMENT AND OUTLOOK

At the stage of the initial allocation of litigation costs (incurred costs), the amount of such costs—particularly court fees and lawyers' fees—is determined by the *lex fori*. Consequently, the claimant's choice of forum automatically triggers the application of the corresponding national rules governing litigation costs. The EU legislator has sought to reduce the financial burden arising in the European Small Claims Procedure by enhancing transparency and predictability, primarily through the exchange of information among Member States on the e-Justice Portal (Article 25 para. 1 of Regulation 861/2007, as amended by Article 1 of Regulation 2015/2421). Nevertheless, substantial divergences persist among Member States concerning the accepted languages of documents and proceedings, which increase translation-related expenses and may necessitate legal representation. Similar disparities exist regarding the imposition or non-imposition of court costs in small claims proceedings.

At the stage of the final allocation of litigation costs, the framework becomes significantly more complex for the adjudicator. Although the European Small Claims Regulation incorporates the loser-pays principle in cases of complete success by one party, it does not autonomously define the substantive criteria governing cost recovery, namely, the principles of necessity and proportionality. The interpretation and application of these principles are therefore left to national courts. As the case law of the CJEU has not yet de-

[137] *https://e-justice.europa.eu/topics/taking-legal-action/legal-aid_en* [last visited on 10.02.2026].
[138] Article 9 para. 6 of Law 3226/2004.
[139] Tulibacka (2010), p. 466.
[140] See Article 15 para. 2 (d) of the Annex to European Parliament's resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX*:52017IP0282

veloped a consistent or harmonized approach, domestic procedural law plays an increasingly influential role within the European Small Claims Procedure. While the necessity of litigation costs as a prerequisite for cost recovery is broadly recognized across Member States, an *ex post* proportionality assessment—evaluating the relationship between the costs incurred and the value of the claim—remains largely absent in practice. As a result, Member States adopt divergent solutions regarding whether lawyers' fees, which constitute the largest share of litigation expenses, qualify as necessary recoverable costs under the Procedure.

Regarding the allocation of costs to a losing party who has benefited from legal aid, the EU legislator refers to the Legal Aid Directive (Recital 16 of Regulation 2015/2421). However, the Directive leaves the issue of cost-shifting to Member States, with the practical consequence that a losing legal-aid recipient is typically subject to cost liability (Article 3 para. 2 of the Directive).

From the CJEU case law, it follows that the allocation of litigation costs in multiparty disputes, as well as in situations of partial success and partial defeat, is governed by the *lex fori*. Although the e-Justice Portal provides an overview of national cost-allocation rules, this information is insufficient for litigants to accurately assess their financial exposure. The divergent approaches adopted by Member States in cases of partial success and partial defeat exemplify these inconsistencies.

A significant portion of costs law—particularly deviations from the loser-pays principle—remains regulated by the *lex fori*, resulting in substantial fragmentation among Member States. This lack of harmonization weakens incentives for amicable dispute resolution and undermines good-faith conduct in cross-border civil litigation. The divergence in cost-allocation rules within a nominally autonomous but procedurally non-exclusive European mechanism undermines the Regulation's primary aim: ensuring swift, cost-effective, and accessible cross-border justice. Furthermore, the cost-allocation regime under the Regulation fails to uphold the principle of simplification that should characterize litigation costs law, thereby generating legal uncertainty and hindering parties' ability to predict the financial implications of accessing justice.

The current regulatory framework for litigation costs in the European Small Claims Procedure is therefore inadequate and misaligned with the Regulation's overarching purpose. A more harmonized and transparent system of cost allocation would better support the Regulation's objectives and enhance its practical effectiveness. As an autonomous mechanism of EU civil procedural law, the European Small Claims Procedure should be rendered genuinely effective; otherwise, it risks becoming another example of excessive and ineffective EU-level regulation that, rather than facilitating justice, obstructs access to it.

To further promote simplification and procedural efficiency, the Regulation should autonomously define the final allocation of litigation costs in the

European Small Claims Procedure, rather than deferring to national procedural laws. Although the precise quantification of litigation costs cannot be autonomously harmonized due to structural differences among national judicial systems, the adoption of a specific, uniform set of cost-allocation provisions is both feasible and desirable, especially given the low value of small claims. In particular, the Regulation should designate lawyers' fees as necessary recoverable costs. It is unrealistic to expect that a cross-border dispute can be effectively pursued without legal assistance, given linguistic barriers, the inherent complexity of a procedure that combines elements of EU and national procedural law, and the absence of any possibility for remote payment of court fees, as is the case in Greece. The proportionality of recoverable litigation costs should be autonomously defined as a fixed percentage of the claim value.

As regards the loser-pays principle, the legislator should establish explicit rules governing cost allocation in multiparty disputes without recourse to national law, and should clarify the rules for partial success and partial defeat. In addition, the legislator should define the apparent exceptions to the loser-pays principle by further elaborating the notion of necessity, particularly by requiring that unnecessary or avoidable expenses be imposed on the party who, whether negligently or otherwise, caused them.

One of the apparent exceptions should relate to the refusal of a reasonable settlement offer. From the content of the Regulation,[141] it is evident that the European legislator systematically seeks to strengthen the institution of settlement, in view of the Regulation's objective of promoting procedural economy. The European legislator should therefore consider providing that unsuccessful efforts to reach a settlement be reflected in cost orders and introduce an apparent[142] exception to the loser-pays principle. Such an exception would allow the court to order the party who declined a reasonable settlement offer to bear the litigation costs when that party failed to obtain a more favorable judicial outcome. The reasonableness and advantageous nature of a settlement offer are assessed *ex post* and always by comparison with the outcome of the proceedings. In general, a settlement offer is regarded as reasonable and beneficial when the result of the litigation for the party who rejected it ultimately proves to be worse. This occurs, for example, when the party refusing the settlement offer is defeated in the ensuing litigation or when the amount awarded is lower than the amount offered in the settlement proposal.[143] Rules providing for the imposition of costs on a party who declines a

[141] See Recital 5 and Article 12 para. 3 of Regulation 861/2007.

[142] This exception is grounded in the principle of the initiation of unnecessary litigation costs and is characterized as non-genuine (apparent), due to its detachment from the objective fact of defeat and its connection instead to another objective fact, namely the refusal of a reasonable and advantageous settlement offer. In this context, the reason for imposing litigation costs on the party who rejected such a settlement offer is the activation of the judicial machinery for conducting a civil procedure that ultimately proves unnecessary, thereby generating avoidable litigation expenses [see Douka (2021), p. 295].

[143] Douka (2021), p. 295.

reasonable and advantageous settlement offer exist in Finland[144] and Italy.[145] It should also be noted that the allocation of litigation costs to a party that acted in bad faith during settlement efforts was included in the 2017 Proposal for a Directive on common minimum standards of civil procedure, which was ultimately not adopted by the European Commission.[146]

Genuine exceptions to the loser-pays principle—particularly those relating to family or labor disputes, which fall outside the scope of the Regulation—should be excluded. Likewise, a broad discretionary power to depart from the loser-pays principle for reasons of equity is unnecessary given the low value of small claims and could further undermine legal certainty.

Although the limited degree of harmonization in EU civil procedure may render this endeavor challenging, the European Small Claims Procedure should be made truly effective if it is to remain viable. Otherwise, EU-level overregulation risks hindering, rather than facilitating, citizens' access to justice.

H. CONCLUSION

The objective of an autonomous European procedure should be to strengthen European citizens' access to justice. Cost-allocation rules are essential in the European Small Claims Procedure due to the low monetary value of the disputes. A core weakness of the Regulation lies in its extensive reliance on the *lex fori* for the final allocation of litigation costs in situations involving multiple parties, partial success or failure of the parties, and genuine exceptions to the loser-pays principle. Moreover, the absence of an autonomous interpretation of the principles of necessity and proportionality set out in Article 16 results in national courts interpreting these principles according to the *lex fori*.

Any future amendment of the Regulation intended to enhance the predictability of recoverable costs should take into account the technical nature of cost-allocation rules. It should establish a comprehensive set of provisions governing the allocation of litigation costs without recourse to domestic procedural law. In particular, it should provide autonomous definitions of the principles of necessity and proportionality, with detailed guidance as to their application to lawyers' fees. It should also include a provision clearly addressing the apparent exceptions to the loser-pays principle, which should be interpreted narrowly, and should prevent potential judicial constructions of additional exceptions to the loser-pays principle on grounds of equity.

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[144] Männistö (2012), p. 130.

[145] De Luca (2012), p. 189.

[146] See Article 14 para. 4 of the Annex to European Parliament's resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0282*

Excessive reliance on the *lex fori* for determining cost allocation renders the amount of recoverable legal costs unpredictable and fosters legal uncertainty. This undermines European citizens' access to justice and contributes to the limited practical application of the Regulation.

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