

## THE EUROPEAN SMALL CLAIMS PROCEDURE AND THE FUTURE OF EU-WIDE PROCEDURAL INSTRUMENTS

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**ABSTRACT:** Recent data shows that multiple EU Member States do not offer a simplified, effective, and harmonized procedure for domestic small claims. This data also shows that the European Small Claims Procedure (ESCP) and other European procedural instruments are not being widely used by litigants in Member States. In light of these developments, this paper argues that the EU legislature should extend the ESCP to domestic small claims in all Member States in addition to cross-boarder small claims. This expansion will have several advantages, including the protection of litigants' access to justice, the harmonisation of small claims procedure across the EU, and the increased popularity of the ESCP amongst legal professionals. The paper also argues that extending the ESCP to domestic claims is a balanced and limited solution, and it does not violate the procedural autonomy of Member States, nor the fundamental principles of subsidiarity and proportionality.

**KEYWORDS:** EU small claims; domestic small claims; EU civil procedure; regulation No. 861/2007; expansion.

**SUMARIO:** 1. INTRODUCCION.— 2. THE ESCP AND ITS LIMITED USE IN MEMBER STATES.— 3. EXTENDING THE ESCP TO DOMESTIC CASES.— 4. LEGAL HURDLES IN EXTENDING THE ESCP TO DOMESTIC CASES.— 5. CONCLUSIONS.— BIBLIOGRAPHY

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## 1. INTRODUCTION

This paper argues that the European Small Claims Procedure (ESCP) should be extended to apply to domestic small claims, in addition to cross-border small claims. This argument aims to address two serious problems. The first problem is that some Member States do not currently have a small claims procedure or, if they do, it is less efficient than the ESCP. The second problem is that the ESCP is not being widely used and litigants in Member States are unfamiliar with it. This is also the case with the other uniform European procedural instruments, such as the European Payment Order (EPO) and the European Account Preservation Order (EAPO). In light of these problems, extending the scope of the ESCP to domestic small claims will ensure that the litigants' right to access justice is better protected, that Member States will have a harmonised and compatible set of rules on small claims procedure, and that the ESCP will be far more popular.

## 2. THE ESCP AND ITS LIMITED USE IN MEMBER STATES

The ESCP was established by Regulation No. 861/2007 of the European Parliament and of the Council<sup>1</sup>, as amended, and it entered into force on 1 January 2009<sup>2</sup>. The Regulation provides that the ESCP applies to civil and commercial matters in cross-border cases where the value of a claim does not exceed €5,000, excluding any interest, expenses, and disbursements<sup>3</sup>. The term "cross-border case" is defined in Regulation No. 861/2007 as any case "in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised"<sup>4</sup>. The general purpose of Regulation No. 861/2007 was to create a faster, simpler, and less expensive process of pursuing small claims across the EU. As it is also noted in Article 1 of Regulation No. 861/2007, the ESCP was "intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs"<sup>5</sup>. Some other important benefits of the ESCP is

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<sup>1</sup> Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure, OJ L 199, 31.7.2007, p. 1-22.

<sup>2</sup> Regulation No. 861/2007, art. 29.

<sup>3</sup> Regulation No. 861/2007, art. 2(1). Art 2(2) further limits the scope of application of Regulation No. 861/2007 since it provides that the ESCP does not apply to matters concerning: (a) the status or legal capacity of natural persons; (b) rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (c) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (d) wills and succession, including maintenance obligations arising by reason of death; (e) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (f) social security; (g) arbitration; (h) employment law; (i) tenancies of immovable property, with the exception of actions on monetary claims; or (j) violations of privacy and of rights relating to personality, including defamation.

<sup>4</sup> Regulation No. 861/2007, art. 3(1).

<sup>5</sup> Regulation No. 861/2007, art 1.

that it encourages the use of computer technology and electronic communication between the parties and the court in adjudicating small claims<sup>6</sup>, and additionally, parties are not required to be represented by a lawyer in these type of proceedings<sup>7</sup>. The ESCP does not override any small claims procedure that exists under the laws of a Member State, but it is available to litigants as an alternative<sup>8</sup>.

The establishment of ESCP has been a significant contribution towards shaping a *corpus iuris processualis europaeum*, that is, a European set of procedural rules<sup>9</sup>. In particular, the ESCP has been characterised as “a significant example of the action of the EU in the field of civil proceedings”<sup>10</sup> and “an important step towards the establishment of a European civil procedural law and the enforcement of small claims”<sup>11</sup>. Overall, the ESCP has simplified the pursuit of a multi-jurisdictional small claim by introducing a standard and uniform process of filing, defending, and enforcing the claim.

Nevertheless, the ESCP has not been widely used by litigants in cross-border cases. Although there has been 15 years since the enactment of Regulation No. 861/2007, it appears that litigants in many Member States are still skeptical about pursuing a cross-border small claim in accordance with the ESCP. Statistics concerning the use of the ESCP implemented by Regulation No. 861/2007 show that this mechanism has not been as successful as expected. In Portugal, for example, there were only 220 ESCP claims adjudicated between 2011 and 2019, which means an average of 24.4 per year; even though there was positive increase from 2011 to 2019 by 1,800%, the number of adjudicated ESCP claims is still low<sup>12</sup>.

In Spain, until 2017, the annual number of ESCP claims was relatively small, with an average of 50 per year. With some exceptions, this minimal use of the ESCP fitted the general trend across Europe<sup>13</sup>. However, from 2017 to 2018 the number of ESCP claims in Spain increased by 286.6%. Against the 60 ESCP claims issued in 2017, 172 were issued in 2020. In 2019, the number of ESCPs continued climbing to 492 ESCPs. This trend was reversed in 2020, when there were just 179 ESCP claims. One might wonder if a similar increase in the use of the ESCP could be appreciated in other Member States. Available public statistics in Portugal, Lithuania, and Luxembourg do not reveal any significant change in the use of the ESCP after 2017, the year that the amendment entered into force. In Lithuania, the number of ESCP claims even decreased from 2018 to 2019. By contrast, in Germany, statistics

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<sup>6</sup> Regulation No. 861/2007, art. 8.

<sup>7</sup> Regulation No. 861/2007, art 10.

<sup>8</sup> Regulation No. 861/2007, art. 1.

<sup>9</sup> See Inchausti (2020), p. 93. See also Storskrubb (2018) and Vernadaki (2013).

<sup>10</sup> Mellone (2014), p. 246.

<sup>11</sup> Kramer (2011), p. 131.

<sup>12</sup> Mesquita and Cebola (2022), pp. 9-10.

<sup>13</sup> European Commission: Directorate-General for Justice. (2013). *Assessment of the socio-economic impacts of the policy options for the future of the European Small Claims Regulation: final report.*

reveal a steady growth over those years. Against the 478 ESCP claims issued in Germany in 2017, 2380 ESCP claims were issued in 2020, standing for an increase of 498%<sup>14</sup>.

Furthermore, in the last European Judicial Network Meeting<sup>15</sup>, delegations from Member States presented statistics concerning the volume of the ESCP claims initiated in their jurisdictions. It seems that generally the numbers are stable, albeit large differences were noted between the jurisdictions of comparable size. These statistics also show the relatively low use of the EPO and EAPO in most Member States.

It is suggested that the reluctance of litigants to pursue ESCP claims is attributable to several factors, including the following: (a) litigants, lawyers, and judges are unfamiliar with Regulation No. 861/2007 and its provisions;<sup>16</sup> (b) there is little case law on the application and interpretation of Regulation No. 861/2007, and the decisions from other Member States on the application and interpretation of the Regulation are not always translated in English nor easily accessible; and (c) there is little to no public information or guidance on the use of the ESCP. As a result of these difficulties, many litigants, lawyers, and judges remain unaware of the existence and applicability of the ESCP in cross-border disputes. Although Article 11(1) of Regulation No. 861/2007 requires Member States to “ensure that it is possible for the parties to receive both practical assistance in filling in the forms and general information on the scope of application of the ESCP”, in multiple Member States, there are no available service desks or other information sources to assist litigants in this respect, or to generally promote or recommend the use of ESCP<sup>17</sup>.

### 3. EXTENDING THE ESCP TO DOMESTIC CASES

In light of the limited use of the ESCP and the unfamiliarity of litigants, lawyers, and judges with this process, which was discussed previously, the argument that is put forth in this paper is that the ESCP should not only apply to cross-border cases, but it should be extended to domestic cases as well, *i.e.* cases that fall under the jurisdiction of only one Member State. This new ESCP will not override any existing small claims procedures in national law, but it will only operate as an alternative process. Thus, litigants will be free to choose the procedure by which to pursue their small claims.

If the ESCP was applicable to domestic cases, it would confer a number of advantages on litigants in all Member States. First, it would safeguard the

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<sup>14</sup> Santaló Goris (2022).

<sup>15</sup> 95th Meeting of The European Judicial Network in Civil and Commercial Matters (Brussels, 25-26 April 2024).

<sup>16</sup> The lack of awareness about the ESCP Regulation was one of the issues that the Commission aimed to tackle with the 2015 reform.

<sup>17</sup> See Giacalone et al (2021) pp. 316-317, 318. For the argument that the ESCP requires a higher level of legal interoperability between the subjects involved, such as courts, citizens, and judiciary functionaries, see Mellone (2014) p. 245.

litigants' right to access justice through a simplified, fast, and inexpensive small claims procedure in their home country. Some Member States do not currently offer an effective procedure for claims under €5,000<sup>18</sup>. Even in jurisdictions that there is some form of simplified procedure for smaller claims, the design of these simplified procedures differs significantly across Member States<sup>19</sup>. As a result, litigants who wish to pursue a small claim under the existing rules of civil procedure in these Member States, may still incur higher court fees, legal representation fees, and huge delays. Needless to say, litigants are often discouraged from pursuing a small claim in these conditions. From the litigants' perspective, having a small claim that is extremely cumbersome to pursue in court is equal to having *no* claim at all. The current system does not incentivise or motivate litigants, who are usually consumers, to attempt to vindicate their rights in court. This, of course, undermines the litigants' right to access justice<sup>20</sup>.

Second, the applicability of the ESCP in domestic cases would achieve a certain level of harmonization of civil procedure across the EU. If the adjudication of domestic small claims in all Member States was regulated by the same small claims procedure, it would be possible for litigants and lawyers in one Member State to engage in constructive dialogue with litigants and lawyers in other Member States, *e.g.* to seek advice or guidance on how to deal with certain issues, to discuss the strengths or weaknesses of the procedure, to develop best practices, and more generally, to share and better understand their respective experiences. Furthermore, a harmonized set of rules on small claims procedure would help overcome some current difficulties generated by the diversity of national procedural law, such as evidence, time limits, the use of computer technology, enforceability of judgment, *etc.*<sup>21</sup>. Should the ESCP apply to domestic cases in all Member States, it will be easier to resolve the tensions between multiple national procedural approaches in relation to small claims.

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<sup>18</sup> See European Commission. (2002). *Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation*, p. 52. In fact, some sources show that Belgium, Bulgaria, Cyprus, and the Czech Republic do not have a dedicated small claims track at all (Harley and Said, 2017).

<sup>19</sup> For example, Finland does not have a dedicated small claims procedure, but it offers other ordinary procedures regardless of the value of the claim, such as procedures that allow the case to be conducted entirely in writing. Similarly, Austria and Germany do not have a small claims track in the strict sense, but they also offer simplified procedures. However, in Germany, the choice of procedure is at the court's discretion, while in Austria the procedure is mandatory and neither the parties nor the court can opt out (Harley and Said, 2017).

<sup>20</sup> In some Member States, such as Spain, a claim's cross-border dimension was even fabricated to access European uniform procedures. The EPO was more effective than the domestic equivalent and, like the ESCP, is only applicable in cross-border claims. Against this background, creditors assigned the debt to a creditor abroad (in many cases, vulture funds and companies specialised in debt recovery) in order to transform a purely internal claim into a cross-border one. Statistics in Spain show that, at least in this Member State, the connection between the EPO and ESCP Regulations functioned and gives more visibility to the ESCP.

<sup>21</sup> See Inchausti (2020). See also Onãanu (2017).

Finally, the third advantage of the extension of the ESCP to domestic small claims is the increased familiarity of legal professionals with the parallel small claims procedure in cross-border cases. As we mentioned previously, despite the strengths of Regulation No. 861/2007, the ESCP has been of limited use in the Member States due to a general lack of awareness and assistance regarding its availability. As a consequence, the effectiveness of the ESCP has been hindered. If, however, the ESCP was also applicable to domestic small claims, then a lot of litigants and legal professionals, as well as the courts, would be “forced” to familiarize themselves with the process. Further, if a domestic small claim followed the same procedure with a cross-border small claim, litigants and lawyers would be more confident in pursuing both types of claims, and ultimately the cross-border ESCP would become more popular.

There are two ways in which the ESCP can be extended to apply to domestic cases, either indirectly by the national legislator or directly by the European Parliament and the European Council. The first approach requires the national legislator of each Member State to enact a statute that extends the scope of Regulation No. 861/2007 to domestic cases. However, waiting for the national legislator to extend the scope of Regulation No. 861/2007 to domestic cases may not be a wise solution, since the legislator has not offered any procedural framework for small claims so far. In addition, even if some Member States were willing to apply the provisions of Regulation No. 861/2007 to domestic cases, there would still be some discrepancies in the method of application and interpretation of these provisions. If each Member State took a different approach on the application and interpretation of the ESCP in domestic cases, then its harmonised character would be undermined<sup>22</sup>.

The second approach avoids these problems. The European Parliament and the European Council could enact a new Regulation, or amend the existing Regulation No. 861/2007, to extend the ESCP to domestic small claims in all Member States. This Regulation should create a complete and ready-to-apply small claims procedure for domestic cases, without requiring the intervention of the national legislator, so as to ensure its harmonized character. This procedure should not affect any existing small claim procedure in Member States, but it should only operate as an alternative.

The legal basis for this expansion under the new Regulation can be found in Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), which provides that the European Parliament and the Council shall adopt measures aimed at ensuring *inter alia* “effective access to justice” and “the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”<sup>23</sup>. The EU’s competence over procedural matters is implicit in the principle that, in order to achieve the *effet utile* of

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<sup>22</sup> See Onțanu (2017), pp. 469-470.

<sup>23</sup> TFEU, art 81(2)(e) and (f).

EU substantive law, *i.e.* in order to reach a full realization of its effect, it is necessary to establish procedural norms<sup>24</sup>.

The compatibility or approximation of procedural rules in Member States was attempted in the past. For instance, the European Commission in 1998 proposed the introduction of “simplified legal procedures for small debts” in all Member States<sup>25</sup>. Following the Commission’s proposal, the European Parliament and the Council established Directive 2000/35/EC on combating late payment in commercial transactions, but the Directive did not include a provision for small debts procedure<sup>26</sup>. Although the Commission’s attempt was not successful in this regard, it highlighted the need for a uniform procedural framework on domestic small claims. More recently, in 2017, the European Parliament took the initiative to request by resolution the European Commission to prepare a proposal for a Directive on common minimum standards of civil procedure<sup>27</sup>. This initiative is crucial in that it shows the Parliament’s general eagerness to promote a harmonized set of procedural rules in Member States<sup>28</sup>. Thus, extending the ESCP to domestic small claims in order to ensure the litigants’ minimum access to justice does not fall far from the EU legislator’s modern objectives<sup>29</sup>.

#### 4. LEGAL HURDLES IN EXTENDING THE ESCP TO DOMESTIC CASES

One potential objection to the argument is that extending the ESCP to domestic cases *prima facie* violates the principle of procedural autonomy. Although this is a legitimate concern, a proper examination of this principle shows that there is no violation whatsoever. The meaning and scope of the principle of procedural autonomy has been debated in literature<sup>30</sup>. The notion of the states’ power to regulate procedural law is said to derive from the case of *Lück v. Hauptzollamt Köln-Rheinau*, in which the European Court of Justice stated that the (then) Article 95 of the EEC “does not restrict the

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<sup>24</sup> Galetta (2010), pp. 16-17, 121-122.

<sup>25</sup> European Commission. (1998). *Proposal for a European Parliament and Council Directive combating late payment in commercial transactions*, art 6.

<sup>26</sup> Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p. 35), repealed by Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ L 48, 23/02/2011, p. 1–10).

<sup>27</sup> European Parliament Resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)).

<sup>28</sup> See Kramer (2019).

<sup>29</sup> See also the discussion of the effect of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union: Van Cleynenbreugel (2016).

<sup>30</sup> See the discussion in Bobek (2012); Law and Nowak (2020); Kakouris (1997). The principle of procedural autonomy has been considered as an expression of the fundamental principle of subsidiarity (Skouris, 2009, p. 494).

powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law”<sup>31</sup>. This notion was again enunciated by the European Court of Justice in the landmark case of *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, as follows:

[I]n the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law<sup>32</sup>.

This passage identifies an important limitation to the principle of procedural autonomy, namely that it operates only in cases where the EU legislature has not promulgated any harmonising procedural rules on a particular issue<sup>33</sup>. Thus, civil procedure is not a matter exclusively reserved to the Member States<sup>34</sup>, and it may be reduced, firstly, by the adoption of EU procedural norms, and secondly, by the interpretation of such norms by the European Court of Justice<sup>35</sup>. This limitation signifies that Member States cannot, through their national law of civil procedure, undermine the principles of effectiveness and equivalence of EU law<sup>36</sup>. Therefore, the EU legislature retains its competences to promulgate procedural rules to attain the *effet utile* of EU law, subject to the principles of subsidiarity and proportionality. As already mentioned, the legal basis of this competence may be found in Article 81(2) of the TFEU, under which the European Parliament and the Council are responsible for ensuring *inter alia* “effective access to justice” and “the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”<sup>37</sup>. In light of these provisions, the EU legislature can introduce a small claims procedure applicable to domestic cases for the purpose of safeguarding the litigants’ access to justice and eliminating any obstacles to the proper adjudication of small claims in Member States. This new procedure is balanced and limited in that it does not eliminate any existing national procedural rules; it offers an *additional* procedural tool for small claim litigants (usually consumers).

Apart from the principle of procedural autonomy, this proposal does not violate the principles of subsidiarity or proportionality either. Article 5(3) of the Treaty on the European Union (TEU) provides that “[u]nder the principle

<sup>31</sup> *Lück v. Hauptzollamt Köln-Rheinau*, Case 34/67, EU:C:1968:24.

<sup>32</sup> *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case 33/76, ECLI:EU:C:1976:188

<sup>33</sup> Law and Nowak (2020), p. 29; Bonelli (2022), pp. 97-98.

<sup>34</sup> Kakouris (1997), p. 1390; Baghrizabehi and Ferčič (2023), p. 673.

<sup>35</sup> Bonelli (2022), p. 90.

<sup>36</sup> Law and Nowak (2020), pp. 33-43. See also Krans and Nylund (2020), pp. 2-4.

<sup>37</sup> TFEU, art 81(2)(e) and (f).

of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States... but can rather... be better achieved at Union level". Article 5(4) provides that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". Extending the ESCP to domestic small claims does not interfere with the principle of subsidiarity because the objectives of effective access to justice and harmonisation/approximation of national small claims procedures cannot be sufficiently achieved by the Member States. To the extent that the national legislator many Member States has not yet exercised its autonomy to create a simplified, fast, and inexpensive small claims procedure to ensure the citizens' right to access justice, then it would be proper and fair for the EU to step in. Moreover, the action of extending the ESCP to domestic small claims does not interfere with the principle of proportionality since its content and form do not exceed what is necessary to achieve access to justice and to remove any obstacles to the function of small claim procedures in Member States, according to Article 81(2) of the TFEU.

## 5. CONCLUSIONS

This paper argued that the EU legislature should take action to extend the applicability of the ESCP to domestic small claims in all Member States. This action will have a number of advantages, namely the protection of litigants' access to justice, the harmonisation and approximation of small claims procedure across the EU, and the increased familiarity of legal professionals with the ESCP in cross-border cases and therefore increasing its popularity. Although, at first glance, this action may seem to violate the fundamental principles of procedural autonomy, subsidiarity, and/or proportionality, the analysis has shown that there is not truly a violation since the EU is competent to adopt procedural measures to attain the objectives set out in the Treaties. Besides, the action of extending the ESCP to domestic small claims is balanced and limited in that it does not interfere with any national procedural rules, but it operates as an additional/alternative process of pursuing a domestic small claim. On a general note, the action proposed in this paper does not stray away from the EU's modern initiatives and goals. Indeed, the "unstoppable wave" of modern uniform EU procedural instruments, including the ESCP, the EPO and the EAPO, reveals the willingness of the EU legislature to take steps towards a more harmonised system of civil procedure<sup>38</sup>. In this context, the extension of the ESCP to domestic small claims sounds less like a bold or abrupt measure, and more like a giant leap towards harmonisation of European civil procedure.

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<sup>38</sup> Storskrubb (2011).

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