



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

THE EUROPEAN SMALL CLAIMS
PROCEDURE AND THE COMMISSION
PROPOSAL OF 19 NOVEMBER 2013

IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this study provides an analysis of the operation of the Regulation for a European Small Claims Procedure. It examines the 2013 Commission proposal and its rationale for the changes while it also identifies a number of recommendations that should be included in the amendments of the Regulation. The study highlights that more efforts should be made in order to facilitate enforcement in consumer cases as well as in promoting and interconnecting out-of-court processes with the European Small Claims Procedure, particularly when these processes operate at national level and rely on distance means of communications.

DOCUMENT REQUESTED BY THE COMMITTEE ON LEGAL AFFAIRS

AUTHOR

Dr Pablo Cortés

The author grateful to those who provided feedback for this report; in particular thanks are due to Ms Jo Holland, Mrs Anne-Marie Cortés, Dr Naomi Creutzfeldt, Prof Fernando Esteban de la Rosa, Prof Cosmo Graham, Prof Susan Prince and Prof Christopher Hodges.

RESPONSIBLE ADMINISTRATOR

Udo Bux
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@ep.europa.eu

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

Policy Departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny.

To contact the Policy Department or to subscribe to its monthly newsletter please write to: poldep-citizens@ep.europa.eu

Manuscript completed in February 2015.
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LIST OF ABBREVIATIONS

- ADR** Alternative Dispute Resolution
- ECC-Net** European Consumer Centre Network
- ESCP** European Small Claims Procedure
- FIN-Net** Financial Dispute Resolution Network
- ICT** Information and Communications Technology
- ODR** Online Dispute Resolution
- The Regulation** Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, (OJ 2007 L 1999/1)
- Brussels I** Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12/1)
- Brussels Ia** Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L351/1)

EXECUTIVE SUMMARY

Background

The European Small Claims Procedure Regulation (EC) 861/2007, implemented since January 2009, allows cross-border litigants to use a European written process with standard forms. The European procedure is available in all the Member States, except in Denmark, as an alternative to the national procedure for resolving civil claims under €2,000. The Regulation aims to provide an informal procedure, which does not require parties to have legal representation and sets short deadlines to ensure the expeditious resolution of cross-border claims. Judgments from the European procedure are enforceable in another Member State without the need for a declaration of enforceability (*exequatur*). After a number of studies were carried out, the European Commission decided in November 2013 to present a legislative proposal to expand its use.

Aim

- To examine critically the European Small Claims Procedure Regulation (EC) 861/2007 and the Commission proposal of 19 November 2013 as well as the existing studies which informed the Commission's proposal.
- To propose what further issues should be included when amending the Regulation.
- The study briefly examines best practices in domestic small claims procedures in England and Ireland, particularly in the context of informal dispute settlement options, and proposes pathways so that the two redress options can complement each other.

Proposals

- Commission's proposal is welcome, but this study found that more has to be done in terms of facilitating parties with information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes.
- The synergy between the ESCP and ADR mechanisms would increase awareness and empower EU citizens.
- Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.
- Claim and response forms should include clear provisions requesting parties to consider the use of ADR before and during the ESCP.
- National court-annexed ADR schemes that operate through distance means of communication should be extended for cross-border claims. These schemes should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages.

GENERAL INFORMATION

KEY FINDINGS

- The European Small Claims Procedure (ESCP) is offered as an alternative to the national procedures to resolve cross-border claims up to €2,000.
- It is a written procedure that only allows oral hearings in exceptional circumstances.
- The procedure is intended to be informal. Litigants can participate without legal representation using standard forms available in all the EU official languages.
- Judgments are enforceable without the need for an intermediary procedure to declare their enforceability.

Small claims procedures provide a middle ground between formal litigation and Alternative Dispute Resolution (ADR) methods, where low-value disputes can be resolved in courts through a less formal and expeditious judicial procedure.¹ The European Small Claims Procedure (ESCP) is **intended to be a user-friendly procedure** that allows parties to resolve cross-border low-value civil and commercial disputes (**up to €2,000**) through a simplified procedure **without the need for legal representation**.² This procedure is usually carried out **entirely in writing**, using standard forms available online in all languages.³ The ESCP is available to parties as an **alternative to the procedures existing under the laws** of the EU countries.

Member States determine which national courts have jurisdiction to give judgment in the ESCP and the Member States jurisdiction is subject to the rules of the Brussels Ia Regulation.⁴ Subject to the exceptions laid down in the Brussels I, the *actor sequitur forum rei* principle applies, meaning that defendants shall normally be sued in the courts of the Member State where they are domiciled. An important exception applies to consumers, who in many cases are given the option of bringing claims to their local courts.⁵ Member States must allow **the submission of claims and other documents by post or via electronic means**, removing the need to travel to another country. **Oral hearings can only be required in exceptional circumstances**, and they are encouraged to be held using distance means of communication in order to obviate the parties' need to travel to the hearing. Furthermore, the main advantage of the ESCP is that **judgments can be enforced without the need for an intermediary procedure to declare their enforceability** –i.e. the *exequatur*.

¹ P. Cortés 'Small Claims in Ireland and the EU: The Need for Synergy between National Courts and Extrajudicial Redress' in N. Neuwahl and S. Hammamoun *The European Small Claims Procedure and the Philosophy of Small Change* (Les Éditions Thémis, 2014).

² Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, O.J. 2007 L 1999/1. Hereinafter, ESCP.

³ P. Cortés 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' (2008) 27(1) *Civil Justice Quarterly* 83-97.

⁴ Brussels I Regulation (EC) 44/2001.

⁵ Art. 15 Brussels I Regulation allows consumers to use their own jurisdiction when the business activity had been directed to the consumers' domicile. See generally, N. Marchal Escalona 'La Protección del Consumidor en los Litigios Transfronterizos de Escasa Cuantía en la Unión Europea y en América Latina' in F. Esteban de la Rosa, *La Resolución Alternativa de Litigios de Consumo en los Estados Miembros de la UE: Impacto del Nuevo Derecho Europeo* (2015, Tirant) and R. Miquel Sala, *El Proceso Europeo de Escasa Cuantía* (Aranzadi, 2009) 81-85.

1. EVALUATION OF THE EUROPEAN SMALL CLAIMS PROCEDURE

KEY FINDINGS

- On average the ESCP has reduced the cost of litigating cross-border cases up to 40% and the duration from 2 years and 5 months, to 5 months only –while this is a significant improvement, it is often too expensive and too long for many small claims.
- The use of the ESCP has been very low.
- It removes the parties' requirement to have legal representation –though in practice one third of users employ a lawyer.
- Lack of legal representation can impact on the principle of equality of arms of an adversarial judicial process.
- The main obstacles identified by the Commission were the lack of awareness about its existence as well as unpredictable costs and time in litigating small claims.
- Unlike with ADR processes, EU citizens still find the ESCP too complicated and they do not feel confident to start it on their own.
- It will be important that research is carried out to find out who the beneficiaries of the ESCP are –as currently it is unclear whether these are consumers, SMEs or others –and which steps, if any, can be taken to make the procedure more user-friendly, faster and more cost-effective.
- ECC-Net and many other consumer bodies have observed that the main obstacle to the effectiveness of the ESCP is the enforcement in consumer cases.
- There is a need to complement the ESCP with more effective and informal out-of-court redress options.

The ESCP increases access to justice as it makes it easier to bring a cross-border claim within the EU. The Commission has reported that **on average the ESCP has reduced the cost of litigating cross-border cases up to 40% and the duration from 2 years and 5 months, to 5 months only.**⁶ This is a significant improvement, but it is still too expensive and too long for many small claims, which could benefit from quicker and more informal resolution. Indeed, during this time consumers complainant will feel frustrated and they will be encouraged to publish negative postings that will damage businesses reputation, while businesses complainants with unpaid invoices may not survive the wait.

⁶ European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 861/2007 of the European Parliament and the Council establishing a European Small Claims Procedure COM(2013) 795 final. Hereinafter, the Commission Report.

Two-thirds of those who used it were overall satisfied with the procedure.⁷ Some of the most obvious advantages are that the ESCP offers claimants a judicial procedure that is the same in every Member State. It is also a fast track process with strict deadlines.

The Regulation removes the parties' requirement to have legal representation – though in practice one third of users had to employ a lawyer.⁸ This feature of the Regulation has affected the national small claims procedures –for instance, in Spain the requirement to have legal representation was increased for claims over €900 to claims over €2000.⁹ In addition, the claim and response forms are available online in all the EU languages and just over half of the users (62%) found them easy to fill in.¹⁰ The ESCP thus attempts to facilitate self-representation, and so it does not require parties to make any legal assessment to support their claims. It is however obvious that submitting a claim presupposes that claimants are at least aware of their legal rights.¹¹ It must be noted that while limiting and discouraging legal representation may keep costs down, making the process more proportionate to the value of the claim, it could also raise access to justice concerns. Indeed, consumers as claimants are more likely self-represented, which **can impact on the principle of equality of arms in an adversarial judicial process** to their detriment.

Great expectations have been put on the ESCP to increase access to justice for European litigants with cross-border claims.¹² However **its use has been very low** –it has been estimated 3,500 cases in the year 2012.¹³ **The three main obstacles identified by the Commission were: (i) the lack of awareness about the ESCP; (ii) disproportionate costs and time in litigating small claims; and (iii) the lack of transparency about the costs of litigation and the methods of payment.**¹⁴

Research carried out in the EU concluded that there was a **significant lack of awareness**,¹⁵ where only 12% of EU citizens are aware of the ESCP. More surprisingly, only half (53%) of the judges and courts of the Member States are aware of the ESCP; and out of those courts that are aware, many are not fully informed about the ESCP.¹⁶ The European Parliament has called for the Commission to take immediate steps to ensure that consumers and businesses are made aware of the availability of the ESCP.¹⁷ In its response, the Commission developed a number of activities to increase awareness:¹⁸ the publication of general information about the ESCP and the court forms in various European websites (e.g. European Judicial Network, European Judicial Atlas, and e-Justice portal); running a number of training modules for judges and lawyers and workshops for trainers; the provision of a user guide for citizens and lawyers; and financial support to the European

⁷ Special Eurobarometer 395, European Small Claims Procedure (April 2013). Hereinafter, Eurobarometer 395. Available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_395_en.pdf.

⁸ Ibid.

⁹ Arts. 23, 31 and 539 Ley 1/2000 de Enjuiciamiento Civil. See generally, J.C. Ortiz, 'La Aplicación en España de los Procesos Europeos Monitorio y de Escasa Cuantía: La Reforma de la Legislación Española en Virtud de la Ley 4/2011, de 24 d Marzo' (2011) 24 *Revista General de Derecho Procesal* 2.

¹⁰ Also 16% of users reported difficulties in filling-in the forms. See Commission Report p. 6.

¹¹ M. Loos, 'Individual Private Enforcement of Consumer Rights in Civil Courts in Europe' Centre for the Study of European Contract Law Working Paper Series No. 2010/01. p.4

¹² The European e-Justice Portal is a single point of entry to all relevant information about the ESCP. Forms to be used in the European Small Claims Procedure can be accessed at https://e-justice.europa.eu/content_small_claims_forms-177-en.do and to find out which court has jurisdiction over a ESCP see http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_courtsjurisd_en.jsp#statePage0

¹³ Deloitte, 'An Assessment of the Socio-Economic Impacts of the Policy Options for the Future of the European Small Claims Regulation' Final Report (19 July 2013) p. v. Hereinafter, the Deloitte Report.

¹⁴ Ibid.

¹⁵ Ibid and ECC-Net, European Small Claims Procedure Report (September 2012). Hereinafter ECC-Net. Available at http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf

¹⁶ European Commission, Impact Assessment of the Proposal for a Regulation of the European Small Claims Procedure SWD(2013) 460, p. 24. Hereinafter, Impact Assessment.

¹⁷ See European Parliament resolution of 25 October 2011 on Alternative Dispute Resolution in Civil, Commercial and Family Matters (2011/2117(INI)) para. 40.

¹⁸ Commission Report p. 8.

Consumer Centres (ECCs), which in turn provide consumers assistance on how to participate in the ESCP.

The other two obstacles identified are related to the **unpredictability of costs and time employed for resolving a cross-border claim** of small value. Parties often face uncertainty about the potential costs related to translations, travelling, lawyers' fees, and there is a lack of clarity about the details of the procedure.¹⁹ Previous research has already noted that national small claims procedures generally only benefit well-informed and articulate individuals.²⁰ As a result, not only vulnerable consumers, but a large portion of society may not see the ESCP as an accessible redress option, which explains why research shows that the ESCP is rarely used.²¹ This situation contrasts with that of some national small claims procedures and ADR processes which are proving to be more effective.²²

Another key reason that neither the Commission, nor the Deloitte report mentioned as a main obstacle, is that, **unlike with ADR processes, EU citizens still find the procedure too complicated and they do not feel confident to start it on their own.**²³ Accordingly, before further investment is poured into the system to raise awareness **it will important that research is carried out first to find out who the beneficiaries of the ESCP are –as currently it is unclear whether these are consumers, SMEs or others– and which steps, if any, can be taken to make the procedure more user-friendly, faster and more cost-effective.**²⁴

For instance, as it is discussed below in this report, both, the **Eurobarometer and the Deloitte report found that there were no problems with the enforcement of judgments.**²⁵ **This finding clearly suggests that the ESCP is mainly used by businesses** which have legal representation and are often required to sue in the defendant's forum. **Hence, it is not used by consumers in their own jurisdictions,** because if they used it, then they will surely have found great difficulties in seeking the enforcement of judgments in a different language and through a foreign enforcement procedure. This is why the **ECC-Net and many other consumer bodies have observed that the main obstacle to the effectiveness of the ESCP is the enforcement.**²⁶

Although there is limited empirical research comparing the ESCP with extra-judicial or ADR options (e.g. mediation or ombudsman schemes) to resolve low value claims, it appears that the latter, when available, is a more informal and cost-effective option that offers a higher degree of satisfaction amongst its users.²⁷ Judicial and ADR options (saved for arbitration) are not often mutually exclusive, rather they complement each other. Indeed, best practices recommend parties to consider the most informal and cost-efficient way of resolving disputes, which is often ADR, and only when they cannot find a satisfactory resolution, then to choose the court avenue. The European Commission also concluded that **there is a need to complement court access to justice with more effective and**

¹⁹ F. Alleweldt et al, 'Cross-Border Alternative Dispute Resolution in the European Union' IMCO (June 2011) IP/A/IMCO/ST/2010-15, pp. 52-63; ECC-Net (2012) pp. 3-6.

²⁰ J. Balwin 'The Small Claims Procedure and the Consumer' (1995) Office of Fair Trading, London. See also F. Cownie, A. Bradley and M. Burton *English Legal System in Context* (5th ed, 2010, OUP) 208; C. Hodges, I. Benohr, and N. Creutzfeldt-Banda, *Consumer ADR in Europe* (2012, Hart) 397.

²¹ Eurobarometer 395 p. 82; Hodges et al. (2012) op. cit. p. 127; European Parliament, Cross-border ADR Final Report (2011) IP/A/IMCO/ST/2010-15. pp. 52-63.

²² ECC Ireland, *The Development of Alternative Dispute Resolution in Ireland – An Analysis of Complaints, Best Practices and Future Recommendations*, 2008.

²³ Eurobarometer 395 p. 79.

²⁴ I would like to thank Prof Christopher Hodges for raising this point.

²⁵ Eurobarometer 395 p. 8 and Deloitte Report p. v.

²⁶ ECC-Net, 'European Small Claims Procedure Report' (2012) p. 22. See also the discussion below in part 3 of this Study.

²⁷ Hodges et al (2012) op. cit. p. 385.

informal out-of-court redress options.²⁸ Yet, with regards to the ESCP, there does not seem to be any articulated channels to complement these redress options.

²⁸ European Commission Staff Working Paper, Impact Assessment Accompanying the document of the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and the Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes SEC(2011) 1408 final.

2. COMMISSION'S PROPOSAL OF 19 NOVEMBER 2013

KEY FINDINGS

- The Commission proposal amends the European Order for Payment so that, when a defence is submitted, the procedure will continue through the ESCP when the claim falls within its scope.
- Lifting the financial limit from €2,000 to €10,000 will benefit mainly small and medium enterprises, while the costs of litigating these claims are likely to remain similar. The threshold should be the same for natural and legal persons.
- Expanding the definition of cross-border cases to include all cases that are not entirely domestic. With the entry in force of Brussels I Bis, the removal of the exequatur from national procedures may encourage the use of the national small claims procedures instead of the ESCP, especially so when the claimant is able to sue from his own jurisdiction. If this happens, it may put an additional burden on defendants, who in most cases will not have benefited from participating in a written procedure.
- Requiring courts to use electronic means of communication is welcome but it will require investment and Member States may need additional time to install the new equipment. A pan European system, such as the e-Codex pilot, or a centralised single national court would benefit from economies of scale and the use of a specialised court.
- Requiring courts to use distance means of communication for conducting oral hearings and taking of evidence will remove the need to travel for oral hearings. The right to a fair trial will be respected as long as the individuals retain the right to appear in court.
- A €35 as the minimum fee can be effective in discouraging frivolous claims while allowing small claims. However, setting a maximum limitation on court fees at 10% may still be too high for the highest value claims. The cap could be set by the Member States, but it should never be higher than that required in their national procedures. Alternatively, a progressive fee scheme should be established, lowering the cap to 5% when claims go over €2,000. To ensure the effectiveness of the processes, these caps could also be extended to the enforcement process.
- Requiring Member States to ensure the availability of distance means of payment of court fees may find opposition in some Member States, but remains essential to enable an effective ESCP.
- Limiting the requirement to translate the part of the judgment of Form D will cut down on the costs of enforcement.
- Increasing the information obligations in respect of court fees, methods of payment of court fees and the availability of assistance in filling in the forms are a welcome development. But it remains unclear whether a party who has to submit the claim or a response in another jurisdiction would be able to obtain this assistance in his local court. Also, lack of information on enforcement can be an obstacle.

On 19 November 2013 the Commission published a proposal to amend the ESCP Regulation.²⁹ In doing so, it has also proposed to **reform the European Order for Payment so that when a defence is submitted by the debtor**, instead of going automatically to the national procedure, **it will go to the ESCP** if the claim falls within the scope of the ESCP Regulation.³⁰ This is a welcome change, but it will not be addressed in this study, which focuses exclusively on the amendments made to the ESCP. The Commission has proposed the following key amendments:

1. Lifting the financial limit from €2,000 to €10,000;
2. Expanding the definition of cross-border cases;
3. Requiring more use of electronic communication;
4. Requiring courts to use means of distance communication for conducting oral hearings and taking of evidence;
5. Setting a maximum limitation on court fees at 10% of the value of the claim;
6. Requiring the availability of distance means of payment of court fees;
7. Limiting the translation of the enforcement form to the actual judgment;
8. Incrementing the information obligations of the Member States

1. Increasing the Small Claims Limit to €10,000

The ESCP Regulation has maintained the initial economic threshold at €2,000. This limit contrasts with that of some Member States, which have increased their limits for their national small claims procedures.³¹ The Commission noted that these changes have left the current limit outdated for dealing with civil and commercial cross-border claims.³² Arguably, this limit has always been too low. Although the ESCP reduces the costs of litigating cross-border claims, this cost remains disproportionately high, particularly for the lowest-value claims. According to the data collected on behalf of the Commission, presently costs range from €579 to €1,511 for parties without legal representation, and €3,011 for parties who have hired a lawyer.³³ Leaving legal representation aside, the bulk of the remaining costs come from the translation of documents, court fees, costs for servicing documents, and, sometimes, the travel costs for attending hearings.

The formality of a judicial process can in itself be a barrier for small claims. The Commission noted that 45% of businesses would not take a case to court because the cost of doing so was disproportionate in terms of costs and lengthy proceedings.³⁴ Similarly, most consumers are also unlikely to go to court for a small claim, especially if it is one under €786.³⁵ Yet, it must be noted that while 71% of consumer claims are below €2,000 only 20% of business disputes fall under the €2,000 bracket. For that reason, as it is noted below in this study, litigants dealing with small claims should be offered more informal means of dispute resolution when these are available.

²⁹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) 1896/2006 of the European Parliament and the Council of 12 December 2006 creating a European Order for Payment Procedure COM(2013) 794 final.

³⁰ Art. 17 of Regulation (EC) 1896/2006.

³¹ Impact Statement pp. 15-16. The thresholds in national procedures vary greatly, from €600 in Germany to €25,000 in the Netherlands.

³² Ibid, p. 17.

³³ Deloitte (2013) p. iv.

³⁴ Commission Report p. 3.

³⁵ Eurobarometer 395.

The proposal increases the economic threshold from €2,000 to €10,000.³⁶ This increase is a welcome reform as lifting the economic threshold does not necessarily increase the cost of litigating higher value disputes. In fact, **the estimated cost of litigating a cross-border claim of €5,000 is very similar (and sometimes the same) to the cost of litigating a claim of €10,000.**³⁷ This change has also found support from the majority of stakeholders. According to a public consultation carried out by the Commission, 66% of respondents supported the extension of the economic threshold up to €10,000.³⁸ **This change is expected to benefit mainly small and medium enterprises** since about 30% of cross-border commercial claims fall within the new bracket of €2,000 to €10,000.³⁹ Yet, this Study recommends that **the same economic threshold should be the same for natural and legal persons**—this approach would avoid confusion amongst its users while it will provide litigants with a more cost-effective process without removing their rights to a fair trial.

Increasing the economic threshold will in turn increase access to justice for these cross-border claims which are often left as unmet legal needs. This amendment would therefore capture cross-border claims that would be otherwise withdrawn as well as claims that were never submitted in court, **increasing the number of cases using the ESCP, and as a result its awareness.**

2. Broadening the Definition of Cross-Border Cases

The Regulation applies when one of the parties is domiciled or habitually resident in a different Member State of the competent court. **The proposal extends the scope of cross-border claims to include all cases that are not entirely domestic.** The proposal includes cases where both parties are domiciled in the same Member State, but where the cross-border element of another Member State comes from the performance of the contract, the tort, or the country of enforcement.⁴⁰ Similar to national judicial procedures, the proposed amendment would also allow claims to be lodged against third country residents.

The Regulation, similar to other EU instruments,⁴¹ states that Member States could extend the use of the ESCP for domestic cases. Although at the time of writing the ESCP has not been adopted for domestic claims in any of the Member States, a higher use of this procedure might increase the interest in expanding its use for national disputes. Conversely, the Regulation remains as an alternative procedure to the national ones offered for settling cross-border claims. However, until very recently the ESCP had an important advantage to the national procedure: the removal of the exequatur. This situation changes on 1 January 2015 with the coming into force of **Brussels I a** as it removes the exequatur for most national civil and commercial judgments.⁴² It must be noted that some differences remain in the enforcement process. Namely, the ESCP contains a review mechanism in the country of origin, which is further restricted under the Commission proposals setting a time limit of 30 days from when the defendant becomes aware of the judgment or from the

³⁶ Draft art. 2(1) ESCP. It must be noted that the method calculation in other currency remains with the national laws. See R. Manko, 'European Small Claims Procedure –Legal Analysis of the Commission's Proposal to Remedy Weakness in the Current System' In-depth Analysis, November 2014, PE 542.137. para. 5.2.2.

³⁷ Deloitte Report, Executive Summary, p. x.

³⁸ The online consultation was carried out between March and June 2013.

³⁹ European Commission Impact Assessment SWD(2013) 460 final. p. 2.

⁴⁰ Draft art. 2(2) ESCP.

⁴¹ E.g. Mediation Directive (2008/52/EC).

⁴² Regulation (EC) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), OJ 2012, L 351/1.

commencement of the enforcement, while the Brussels I Bis maintains a public policy exception in the country of enforcement.⁴³ Yet, **the removal of the exequatur from national procedures may encourage the use of the national small claims procedures instead of the ESCP, especially so when the claimant is able to sue in his own jurisdiction. If this happens, it may put an additional burden on defendants, who in most cases will not benefit from participating in a written procedure.**

3. More Use of Electronic Communications

There are many reasons for introducing ICT in the courts, including the delivery of a more efficient justice system making the process cheaper and simpler as well as facilitating the collection and analysis of data. The use of technology in the court system was expected to grow organically as it did in other economic sectors, such as in communications and business transactions. However, the provision of ICT in the courts largely depends upon the political will to invest in it, and in times of economic turbulence, investment in e-Justice across the EU has been rather limited, often reducing, rather than increasing, in the investment of their civil justice systems. Furthermore, inserting ICT in the courts is a challenging task, where the expectations of those investments often proved too optimistic as many attempts to implement technology based projects achieved moderate improvements if not failures.⁴⁴

The full potential of the ESCP however will only be met once its written procedure becomes user-friendly and is assisted by online communications as foreseen by the ESCP Regulation.⁴⁵ This is also what court users would want. According to a public consultation carried out by the Commission, **63% of respondents were in favour of using electronic means in the procedure and 71% in favour of equipping courts with videoconferencing facilities.** This figure changes depending on the level of access to the Internet that citizens have. Currently, half of EU consumers shop online. This is particularly so in those countries where there is a high level of Internet penetration and where the majority of the population uses Internet services, such as online banking. However, the use of ICT has not been translated into the court system. Some Member States have provided in their national laws for the electronic submission of the ESCP claims and other documents, yet most Member States have not actually implemented this technology in their courts.⁴⁶

Currently the availability of electronic means of communications varies greatly amongst the Member States. While in some jurisdictions there is very limited or no possibility for the use of ICT in the courts, others have ICT tools in all the courts.⁴⁷ In general terms, the incorporation of ICT in the court system can be carried out at two levels. On one hand, it can facilitate litigants and their representatives to communicate with the court through e-mail or online filing of documents, the use of video-conferencing for hearing, the electronic payment of fees, etc. On the other hand, courts may use an electronic means to

⁴³ See generally, X. Kramer 'Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance Between Mutual Trust and National Control over Fundamental Rights' (2013) 60(3) *Netherlands International Law Review* 343-373.

⁴⁴ R. Staudt, 'All the Wild Possibilities: Technology that Attacks Barriers to Justice' (2008-2009) 42 *Loyola of Los Angeles Law Review* 1117, 1121-1122.

⁴⁵ See Cortés (2008) above pp. 94-95 arguing that the ESCP will become more accessible if parties could employ electronic communications.

⁴⁶ See e.g. art. 33 of the Civil Procedure Code (Netherlands), art. 130a ZPO (Germany), and 135(5) Civil Procedure Code (Spain). See generally, Miquel Sala (2009) op. cit. 105-106.

⁴⁷ See Deloitte Report and Commission Report 2014, para. 4.2.

communicate with other courts and enforcement bodies; they can also use case management tools for their own internal communications and access to files and databases.

The use of electronic communications is further encouraged in the Commission proposal as it believes that the greater use of technology would decrease the time involved in exchanging documents and the cost of attendance at hearings through the use of telephone and video conferencing. It is thus not surprising that online access to the ESCP has been listed as one of the top factors for encouraging litigants to take the case to court.⁴⁸ With the aim of promoting the use of electronic communications the Commission has proposed the following requirements:

First, when a national court offers electronic means of communications through its national proceedings, including the lodging of claims, then they must extend its use for the ESCP where a party has accepted such electronic means of communications.⁴⁹ Presently, there are a number of jurisdictions, such as Ireland, England and Wales, which offer claimants the possibility of submitting their claims online through a website platform. In Ireland under its Small Claims Procedure parties may submit the claims under €3,000 (and the response or defence) online. In England and Wales parties cannot submit all types of small claims online, but they can use the Money Claim Online to submit claims of debts for a fixed amount of money under £100,000 (c. €127,000).⁵⁰ However, it must be highlighted that both parties must have a domicile in the same country in order to use the online features of these procedures. So, although these two national procedures have been running successfully for nearly a decade, they have not been extended to cross-border cases, where litigants could also reap the benefits of using electronic means of communications.

Secondly, when documents need to be served, the Commission proposal gives the **choice to the national laws to choose between the postal service and the electronic service.** Under the current Regulation the electronic service can only be used when the postal service is not available. The amendment allows for electronic service under two conditions: (i) when a party has expressly accepted to be serviced electronically, and (ii) when the service is accompanied by an electronic means to attest an acknowledgement of receipt that includes the date of delivery.⁵¹ However **it would be preferable to encourage electronic communications as the preferred method**, while recognising it valid only when the respondent acknowledges electronically the receipt within the specified timeframe. Only when the respondent does not acknowledge the receipt, the postal delivery should then be required.⁵² Fee discounts could be used for parties who decide to use the digital channel in order to discourage less efficient and more expensive paper and telephone options.⁵³ This is what Money Claims Online does in England and Wales.⁵⁴

⁴⁸ Eurobarometer 395.

⁴⁹ Draft art. 13(2) ESCP.

⁵⁰ It should be noted that the Deloitte Study incorrectly states that it is possible to submit small claims in England and Wales; this is only the case for money claims. Deloitte Report, Executive Summary, p. xii.

⁵¹ Draft art. 13(1) ESCP.

⁵² Darin Thompson observes that this approach should be extended to other elements of the judicial process, such as with the identification of the parties, using electronic versions of evidence, and text-based testimonies submitted electronically –and only when this is not possible, to require physical or video verification. D. Thompson 'Legal and Procedural Aspects of ODR in a Justice System' Society for Computers & Law (8 September 2014). Available at <http://www.scl.org/site.aspx?i=ed38444>.

⁵³ D. Thompson 'Addressing 'New' Challenges to ODR Implementation' System' Society for Computers & Law (24 September 2014). Available at <http://www.scl.org/site.aspx?i=ed38571>.

⁵⁴ <https://www.moneyclaim.gov.uk/web/mcol/welcome> Money Claims are simplified procedures which are particularly suited for being supported by technology means. In Money Claims the claimant –who is a creditor– has written evidence of the debt and requests the court to make an order of payment. The debtor may choose to contest the creditor's right, in which case an ordinary civil procedure will be initiated. In practice, however, the great majority of claims are not contested. In these cases the court order affirming the creditor's right is issued without the need of a hearing. The online system issues more claims (133,546 in 2010/11) than any county court

Lastly, for **the rest of written communications between the courts and the parties, electronic means of communications will be preferred to the postal service.** Yet, importantly, when the electronic means are available, parties would still be able to choose the traditional postal service for all the communications, including the submission of a claim, the service of documents, as well as the rest of communications. Therefore, the Commission's proposal is welcome as the use of ICT is not imposed on to the litigants, but only to the courts.

It thus remains questionable whether Council will accept a proposal that makes mandatory the provision of ICT in all their courts.⁵⁵ **Requiring courts to use of electronic means of communication is welcome but it will require investment and Member States may need additional time (at least 12 months after its approval) to install the new equipment. Providing a centralised system, such as e-Codex,**⁵⁶ would make it easier for national governments to agree to the change as it will not affect their national budget for civil justice.

Another option to reduce costs would be for Member States to concentrate all the claims into a single court, which would benefit from economies of scale. The Commission reported that a number of Member States have introduced a few specialised courts to deal with ESCP (e.g. Finland and Malta).⁵⁷ Similarly, other jurisdictions, such as England and Wales, have developed specialised court centres for distributing money claims, which are also fully equipped with ICT tools. An additional benefit of having a single or even a small group of competent courts is that it would address the important issue of the lack of awareness about the ESCP amongst the court staff, though this approach would not necessarily raise awareness amongst potential litigants.⁵⁸ Another advantage of a single court is that they may have adequate expertise on how to apply the Brussels I, as it has been noted that currently not all courts apply it correctly.⁵⁹ A final advantage of having a single court is that, with the aim of cutting the costs of translation, it may be feasible that these courts would operate in a second common language,⁶⁰ which would inevitably be English.

4. Imposing the Use of Distance Communications for Public Hearings

The ESCP is essentially a written process, but in exceptional circumstances, when the competent court considers it necessary it may require an oral hearing. Although the Regulation encourages the use of electronic communications for the oral hearing,⁶¹

in England and Wales. See R. Susskind, 'Virtual Courts for the Internet Generation' *The Times* (24 April 2014) <http://www.thetimes.co.uk/tto/law/columnists/article4070943.ece>.

⁵⁵ Deloitte Report, Executive Summary, p. xvii.

⁵⁶ e-Codex pilot project on small claims is assessing the feasibility of a centralised online system for the ESCP, hence enabling European Union citizens and companies to process civil claims and deliver related documents online. The pilot enables European Union citizens and companies with a digital signature to process civil claims and deliver related documents online through the e-Justice Portal. The pilot took place in the autumn of 2014 with several participant Member States (Austria, Czech Republic, Estonia, France, Germany and the Netherlands). Similarly, in July, Austria, Estonia, Germany and Italy started piloting on the European Order for Payment. See <http://www.e-codex.eu/about-the-project.html>.

⁵⁷ European Commission Report 2014, para. 4.1.

⁵⁸ ECC-Net Report 2012, p. 20.

⁵⁹ ECC-Net 2012 Report p. 22.

⁶⁰ ECC-Net 2012 Report p. 4 and Guinchard, p. 305.

⁶¹ Art. 8 and 9.1. National courts can also take advantage of the provisions set in the Evidence Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters seeks to improve, which simplifies and accelerates the cooperation between courts in the taking of evidence. The support of ICT has also been reinforced by all the EU institutions. See Opinion of

currently the majority of the hearings require the presence of the parties, witnesses and experts. According to the Commission, travel costs to attend an oral hearing are between €400 and €800, which discourages low-value claims as the costs for these claims would be disproportionate. The ESCP Regulation states that the rules of the ESCP are to be supplemented by the procedural law of the Member States in which the procedure is conducted.⁶² The national procedural law will also be relevant at the time of determining the necessity of the oral hearing and the collection and validity of evidence in compliance with the right of fair trial.⁶³

In general terms, the types of cases that are appropriate for a written procedure (online or by post) are those where the key documentation for assessing the merits is accessible in writing, such as with money claims. By contrast, **cases where there is little or no reliable documentation are less suited to written processes.** Interestingly, the Financial Ombudsman Services, which is the largest ombudsman scheme in the world, reported that it conducted three telephone hearings over its half million complaints received in the past year. Thus, nearly all its cases were resolved through shuttle negotiation, where an adjudicator or an ombudsman communicated with the parties separately, by either email or by phone.

The Commission's proposal further restricts the use of public hearings and requires the availability of distance communications for the oral hearings with witnesses, experts, and the parties.⁶⁴ Expert evidence and oral testimony would only be allowed when the evidence submitted by the parties is insufficient to render a judgment.⁶⁵ Under the proposal an oral hearing can only be held when one of the following factors occurs: (i) when the written evidence is insufficient for the court to render a judgment; (ii) when it is requested by at least one of the parties and the value of the claim exceeds €2,000; and (iii) when both parties request it to conclude a court settlement.⁶⁶ **However, parties retain their right to appear in court if they decide to do so.**⁶⁷ This is in line with the interpretation of the right to a fair trial (article 6 of the European Convention of Human Rights and article 47 of the EU Charter of Fundamental Rights) which require that access to a hearing should be incorporated at least at an appeal or review route.

5. Capping Court Fees

Currently, court fees vary significantly depending on Member State.⁶⁸ The Commission believes that high court fees may be a factor for citizens' decision not to pursue legal

Advocate General Jääskinen delivered on 6 September 2012 (1) in Case C-332/11 at para. 64 which states "Member States should encourage the use of modern communication technology. The court or tribunal should use the simplest and least costly means of taking evidence." See DG JUSTICE, European Commission 'Practice Guide for the Application of the European Small Claims Procedure' p. 47 Available at

<https://e-justice.europa.eu/fileDownload.do?id=1bc12074-2018-440f-b6bb-570d03f341f2> Practical Guide on Using Video-Conferencing under the Evidence Regulation http://ec.europa.eu/civiljustice/publications/docs/guide_videoconferencing_en.pdf.

⁶² Art. 19 ESCP.

⁶³ Recital 9 ESCP. See also X. Kramer, 'A Major Step in the Harmonization of Procedural Law in Europe: The European Small Claims Procedure. Accomplishments, New Features and Some Fundamental Questions of European Harmonisation' in A.W. Jongbloed *The XIII World Congress of Procedural Law: The Belgian and Dutch Reports* (2008, Intersentia) 265.

⁶⁴ Draft art. 8(1) ESCP.

⁶⁵ Draft art. 9(2) ESCP.

⁶⁶ Draft art. 5 ESCP.

⁶⁷ Draft art. 8(2) ESCP.

⁶⁸ Deloitte Report, Executive Summary, p. xiii.

action,⁶⁹ so it has proposed to set a maximum limitation for court fees.⁷⁰ According to the proposal, court fees cannot be higher than 10% of the value of the claim and the minimum fee to discourage frivolous claims cannot be higher than €35. Member States can decide on the method of calculation and the amount of court fees, but such calculation cannot include the interest, the expenses and the disbursements. This cap may encounter opposition in the Council. For instance, although the UK has announced that it is opting into measures to expand the use of the ESCP,⁷¹ it has also singled out its opposition to the capping of court fees.⁷² Concerns may be related to budgetary issues and the interest of applying a strict interpretation to Article 81 of the Treaty on the Functioning of the European Union.

A minimum fee of €35 may be effective in discouraging frivolous claims while allowing to process most small claims. However, setting a maximum limitation on court fees at 10% may still be too high for the highest value claims (e.g. €1,000 in fees for a claim of €10,000). The cap could be set by the Member States, but should never be higher than that required in their national procedures. Alternatively, a progressive fee scheme should be established, lowering the cap to 5% when claims go over €2,000 (e.g. the cap for a claim of €3,000 would be €250, while for a claim of €10,000 would be €600).

The proposed cap for **the court fees does not appear to extend to the enforcement stage**, which takes place in a court of a different Member State. This fee would vary depending of the Member State. For example, in England and Wales this fee is normally £60 (c. €75). It must be noted that even though this fee would be an additional cost added in the process, such fee may be recoverable from the defendant at the point of the enforcement. The same rule is applicable to court fees, which may be recoverable according to the judgment issued by the country of origin. Thus, the cost rule remains unchanged, allowing the successful party to recover the costs, though the national court may not allow the recovery of costs in so far as these were unnecessarily incurred or are disproportionate to the claim.⁷³ The recovery of costs may also include legal representation and expert witnesses, but these are often strictly limited with the aim of discouraging legal representation. In England and Wales the cap is set at £270 (c. €330) for legal representation and £750 (c. €950) for each expert witness.⁷⁴

6. Availability of Distance Means of Payment of Court Fees

At present some national courts require the payment of the court fees in their premises. In some cases the payment has to be done in cash, with cheques or by lawyers –these obstacle add more hurdles making claims unworthy to pursue.⁷⁵ The proposal requires Member States to put in place distance means of payment of court fees, which can be processed through bank transfers, debit or credit card payments, or through online payments.⁷⁶ It has been noted that the mandatory use of distance means of payments, as well as the capping of court fees and imposing distance means of communications, are

⁶⁹ Impact Assessment p. 3.

⁷⁰ Draft art. 15a ESCP.

⁷¹ Hansard, House of Lords Debate (25 Feb 2014) Column WS97. See also M. Cross, Government Opt in to Expanded EU Small Claims Track, Law Society Gazette (25 February 2014). Under a protocol of the 1997 Treaty of Amsterdam, EU legislative measures covering civil judicial cooperation do not apply to the UK unless it expressly opts in

⁷² Hansard, House of Lords Debate (25 Feb 2014) Column WS97.

⁷³ Art. 16 ESCP.

⁷⁴ Practice Direction 27 –Small Claims Track.

⁷⁵ Impact Assessment p. 3.

⁷⁶ Draft art. 15a ESCP.

amongst the **sensitive issues for the Member States as these will affect their national budgets for civil justice.**⁷⁷ Unfortunately, electronic payments are not always as common as one might expect. For instance, in England and Wales county courts do not accept online payments for the ESCP, nor for its national small claims procedure, which has to be paid in the court house or sent by cheque – a payment method which is not common in many Member States. Hence, **we welcome the Commission proposal for accepting distance means of payment of court fees.** In this time and age, this type of facility in the courts is expected by the majority of European citizens and businesses, which can already send and accept electronic payments.

7. Limiting the Requirement to Translate only the Substance of the Judgment of the Enforcement Form D

When a judgment is served on a defendant based in another Member State other than that of the court seized, the service must be done in a language that the defendant understands or in the language of the Member State where the service is affected.⁷⁸ Hence, **a translation is often required for an effective service.**

A party who seeks to enforce a judgement will need to produce an original copy of the judgment and a certificate contained in Form D. Where a translation is required, often parties are required to translate the whole Form D. Indeed, only a small number of Member States accept Form D in more than one language. Since the Form D is a standard form already available in all the EU languages, the Commission has proposed to **limit the translation requirement to Section 4.3 of the form**, which contains the substance of the judgement.⁷⁹ This is a welcome amendment as it would cut down on the costs of those seeking the enforcement.

8. Information Obligations

The ESCP Regulation already requires Member States to provide information on a number of issues, such as the competent courts, valid means of communications, the possibility of appeals, the accepted languages for the enforcement, the competent enforcement authorities, and the availability of practical assistance to litigants for filling the forms;⁸⁰ though the latter information is not always available in practice. The Commission has reported that 41% of Member States do not provide such assistance to the parties and that 10% of citizens that requested this assistance did not receive it.⁸¹ Furthermore, the Regulation does not require Member States to provide information on court fees and payment methods, which in practice represent an obstacle for lodging a claim.

The proposal imposes information obligations on the Member States in respect of court fees, methods of payment of court fees and the availability of assistance in filling in the forms. It is recommended for this information to be free of charge and easily available on the Internet through both, online guidance and contact

⁷⁷ A. Maniaki-Griva, 'Initial Appraisal of a European Commission Impact Assessment: European Small Claims Procedure' (March 2014) PE 514.109.

⁷⁸ Regulation (EC) 1393/2007 on the Service in the Member States of Judicial and Non-Judicial Documents in Civil or Commercial Matters.

⁷⁹ Draft art. 26 ESCP.

⁸⁰ Arts. 11 and 25 ESCP.

details on how to obtain personal advice. In addition, standard claim forms should be available in paper form and online in all courts with jurisdiction to process cases through the ESCP.⁸² It is hoped that greater information would improve transparency and, ultimately, access to justice.

In order to determine the jurisdiction the claimant will need to apply the Brussels I Regulation, so it is very unrealistic that an average consumer, even a well-informed one, would be able to do so without the assistance of someone with legal expertise.⁸³ Indeed, sometimes even national courts dealing with small claims are not often acquainted with Brussels I. Under the Commission proposal the practical assistance will extend not only to determining the court with jurisdiction, but also to filling out the forms, calculating the interests, and identifying the documents that need to be attached when submitting the forms.⁸⁴

It is unclear whether a party who has to submit the claim or a defence in another jurisdiction would be able to obtain this assistance in his local court. Nothing in the proposal impedes this assistance, but it would be helpful if the amendments spell out the extension of this obligation to assist individuals who have to submit a claim or a defence in another Member State. In addition, a number of ECCs have provided some free legal advice to consumers on the use of the ESCP. Yet, national ECCs have competence to provide advice to consumers only, which excludes small traders and businesses that could also benefit from this assistance. Thus, if the ECCs are expected to provide a more extensive and individualised support, especially to SMEs which often face similar barriers to those of consumers, this may require an increase in their budgets.⁸⁵

A more important issue is the information about the enforcement. Despite the fact that the Regulation requires Member States to provide information on the enforcement authorities, **applicants often face difficulties in identifying not only the competent court, but also in the ability to understand the national procedure** in the country of enforcement. This issue however has not been included in the Commission proposal.

The Commission proposal has developed the conditions for reviewing a judgment in the jurisdiction of origin (i.e. where the judgment was given) if the defendant was not served adequately or when there were extraordinary circumstances that did not enable him to contest the claim.⁸⁶ The judgment will be void if one of the former two circumstances are met, and if the defendant raises the issue within 30 days from the moment the defendant was aware of the judgment or the beginning of the enforcement. The limitation periods will be suspended during this period, but the review procedure itself remains governed by the national law.⁸⁷

⁸¹ Commission Report p. 7. See also ECC-Net Report and Eurobarometer 395.

⁸² Draft art. 4 and 11(2) ESCP.

⁸³ E. Guinchard, '¿Hacia una Reforma Falsamente Técnica del Reglamento sobre el Proceso Europeo de Escasa Cuantía y Superficial del Reglamento sobre el Proceso Monitorio Europeo?' (2013) *XII Anuario Español de Derecho Internacional Privado* 229-308, 303.

⁸⁴ Draft art. 11(1) ESCP.

⁸⁵ *Ibid.*, p. 304.

⁸⁶ Draft art. 18 ESCP.

⁸⁷ Art. 21 ESCP.

3. THE NEED TO FACILITATE ENFORCEMENT

KEY FINDINGS

- Research findings on the effectiveness of the enforcement appear to be contradictory.
- Empirical research should distinguish between those applicants who find out about the process of enforcement (when, for instance, the enforcement takes place in the same jurisdiction of the court which issued the judgment, or when the applicant has hired a lawyer) to those cases where applicants do not seek enforcement because of the lack of information and resources.
- Member States should facilitate details of how to contact lawyers who can assist applicants during the enforcement process. There would also be important improvements made if the enforcement procedures in the Member States could be accessible online.
- Another strategy which would diminish the problems related to enforcement is to divert suitable claims (but not judgments) to ADR schemes.
- An amendment should be included for appealed judgments to be enforced under the ESCP regime.

Judgments from a ESCP are enforceable in any Member State (with the exception of Denmark)⁸⁸ without the need of going through the formal mutual recognition procedure for judgements.⁸⁹ The enforcement requires an official translation of the judgment and it is subject to the national procedure –in other words, national court orders will be enforced in the same manner as those coming from other Member States.⁹⁰ A key issue in the enforcement stage is finding the appropriate court in the enforcing Member State. For example, Irish courts refer consumers who seek to enforce an order in their favour outside Ireland to the Irish ECC, which assists claimants through their ECC partners to identify the enforcement authorities in the country where the respondent is based.⁹¹

When a judgment from the ESCP needs to be enforced in another European jurisdiction, it can result in unforeseen costs, as the enforcing party may require legal advice in order to secure the enforcement. **Research findings on the effectiveness of the enforcement of the ESCP seem to be very contradictory.** The study carried out by Deloitte for the Commission found that there were no difficulties in the enforcement of judgments, with 97% of judgments enforced (23% of respondents said that the defendants complied voluntarily while 74% obtained a successful enforcement order).⁹² This information led the

⁸⁸ Art. 2(3) ESCP.

⁸⁹ Art. 18 ESCP abolishes the intermediate measures of exequatur, whereby under the Brussels Regulation 44/2001 a second judgement is necessary before recognising a judgement from another country.[is this up to date with the entry into force of Brussels Ia? Please check]

⁹⁰ Art. 21(1) ESCP.

⁹¹ ECC-Net, European Small Claims Procedure Report (September 2012) p.27.

⁹² Eurobarometer 395, p. 35.

Deloitte Report to state that there were no difficulties with the enforcement,⁹³ and accordingly, the Commission did not take measures to tackle this problem. However, the Deloitte study also stated that in more than four out of ten cases (42%) the case was still ongoing, without clarifying for how long these cases have been opened. A key question would be to assess which percentage of these cases were in the enforcement stage and who the parties who used the ESCP were. Indeed, the argument for lack of enforcement problems contrasts with the ECC-Net 2012 Report which stated that “a much bigger problem than the lack of awareness and other issues described before is the question concerning the enforcement of judgments.”⁹⁴ This is because the difficulty with the enforcement mainly arises when it is the consumer who uses the ESCP in his country of residence and then needs to enforce the judgment in a different Member State.⁹⁵ The enforcement stage will often be in a different language and subject to a foreign national procedure. This problem has also been addressed in other ECC-Net reports which noted that “only a minority of the positive rulings made by the courts in consumers’ home countries are actually enforced across borders.”⁹⁶ Although this challenge has been noted by the Commission,⁹⁷ the proposal has not taken any measures to overcome hurdles during the enforcement.

Empirical research should distinguish between those applicants who find out about the process of enforcement (when, for instance, the enforcement takes place in the same jurisdiction of the court which issued the judgment, or when the applicant has hired a lawyer) to those cases where applicants do not seek enforcement because of the lack of information and resources. Accordingly, it seems that the first group do not face difficulties in the enforcement, but the policy priority should be to find out how large the second group is.

Furthermore, a measure that would help with the enforcement is if **Member States facilitate details on how to contact lawyers who can assist claimants in the enforcement process. There would also be important improvements made if the enforcement procedures in the Member States could be accessible online.**

Another strategy that would diminish the problems related to enforcement is to **divert suitable claims (but not judgments) for those who volunteer to consensual ADR schemes**, as settlements from these out-of-court schemes do not present problems with the enforcement.⁹⁸

The appeal process, if available, remains subject to the national procedure. Hence, it remains unlikely that an appellate court decisions from an ESCP judgment could benefit from using the standard form D for its enforcement in another Member States since the court decision would be delivered not by the ESCP, but by a national procedure.⁹⁹ The enforcement process would also fall under the Brussels I bis rules, and not under the ESCP Regulation that restricts the grounds for refusal. **It would therefore be desirable if the**

⁹³ Deloitte Report p. 65.

⁹⁴ ECC-Net, ‘European Small Claims Procedure Report’ (2012) p. 22.

⁹⁵ Research found that only a minority of ESCP judgments made in the consumer’s jurisdictions in the UK are enforced in a different Member State. See A. Bradney and F. Cownie, ‘Access to Justice?: The European Small Claims Procedure in the United Kingdom’ in N. Neuwahl and S. Hammamoun *The European Small Claims Procedure and the Philosophy of Small Change* (Les Éditions Thémis, 2014) p. 118.

⁹⁶ See European Commission Press Release ‘EU Consumers: Settling Small Cross-Border Disputes Without Any Hassle’ (20 September 2012) Available at http://europa.eu/rapid/press-release_IP-12-985_en.htm

⁹⁷ See Answer given by Ms Reding on behalf of the Commission to Ms Flasikova Benova’s Parliamentary Question E-003638-13 (6 June 2013) and to Mr Melo’s Parliamentary Question E-009293-12 (22 October 2012).

⁹⁸ A study carried out on behalf of the European Commission found that ADR schemes that comply with the due process criteria established by the Commission have a compliance rate averaging 99%. See Civil Consulting, ‘A Study on the Use of Alternative Dispute Resolution in the European Union’ 16 October 2009.

⁹⁹ X. Kramer, ‘Small Claim, Simple Recovery? The European Small Claims Procedure and its Implementation in the Member States’ (2011) 12 *ERA Forum* 119-133, 126.

amendment included a provision that states that appealed judgments will be enforced under the ESCP regime.

4. THE PROMOTION OF ALTERNATIVE DISPUTE RESOLUTION OPTIONS

KEY FINDINGS

- The ESCP should encourage parties to consider ADR options and see court litigation as a last resort.
- Claimants should be asked in the claim form whether ADR was attempted and whether they would consider an ADR option if this were available as part of a court-annexed program. The respondent should be asked the same questions, and in the event that both parties agree to it, then ADR should be attempted.
- Parties should also have the option to request the court to stop proceedings for a short period of time while they participate in an ADR scheme. In addition, courts should have the discretion in recommending parties to attempt ADR.
- If parties have already reached an agreement, such settlement should be given the court's stamp of approval obviating the need for a hearing.
- Court-annexed ADR schemes available for domestic disputes should be extended to cross-border claims falling within the scope of the ESCP. In order to deal effectively with cross-border claims, these ADR services should offer the use of distance means of communications and specialised third neutral parties (e.g. court-annexed mediators) who, in addition to their own national languages, can also offer the ADR services in English, and ideally in another major EU language.
- These ADR services could be provided by the ECCs on consumer matters and by other nationally certified ADR schemes for civil and commercial matters.
- ADR options should not be mandatory, especially if there is a fee involved.
- Courts' power to impose cost sanctions should only be used exceptionally when they consider that one party has behaved wholly unreasonably in rejecting a settlement or in refusing to attempt an ADR scheme.
- The Online Dispute Resolution (ODR) Platform will be an optimum instrument to increase awareness about the ESCP by channelling consumer disputes, which could not have been resolved through ADR, to the competent national courts.
- The ODR platform could in due course incorporate a plug-in to e-Codex, enabling litigants and the courts to communicate through electronic means.
- A central online platform could be a very useful instrument for the public authorities to monitor the types of cases that go to the ESCP.

4.1. Alternative Dispute Resolution Methods are Suitable for Settling Small Claims

Access to justice, particularly in cross-border cases, is identified in connection, not only with the courts, but also with ADR/ODR schemes, especially in the consumer context as these extrajudicial processes are becoming the main route to ensure compliance, and hence enforce consumer law. Courts are increasingly seen as a last resort, performing a supervisory function rather than a default redress option for small claims. Litigants should be expected to explore more informal and cost-efficient redress options before embarking on a judicial process and thus settle more efficiently those claims that are ripe for early resolution.¹⁰⁰ A higher level of voluntary settlements will not only increase parties' satisfaction in the redress process, but will also facilitate a swifter and more effective compliance of resolutions. **The advantage of an ADR process, such as mediation, is not simply offering the parties the possibility of achieving a quicker and cheaper resolution, but it is also a more informal process that often delivers higher parties' satisfaction levels.** These ADR processes are better adapted to deal with the new way of how claimants (especially consumers) complain. Often online forums, such as TripAdvisor, Twitter and Facebook, can be used to damage businesses reputation, but also they can operate as important incentives to bring parties with small claims to the negotiating table.

The EU has recently approved legislation to ensure the availability of quality ADR schemes for consumers across the EU.¹⁰¹ The European Commission has also expressed its commitment to see the **courts at the last resort and to promote settlements when this is possible.**¹⁰² **Accordingly, the ESCP should promote a more holistic redress model that combines judicial procedures with ADR options.** This synergy would also assist in meeting the (often exaggerated)¹⁰³ political claim that small claims procedures provide greater access to justice to the population.

The rationale behind the policy of setting the courts as the last resort varies depending on the countries, but there are two main drivers: the high cost of litigation and the time spent in resolving claims by overloaded courts. While English courts are often blamed for being too costly and Italian courts for being too slow, other jurisdictions with more cost-effective and efficient courts, such as Germany, still appreciate the appeal of ADR schemes given its informality and expertise.¹⁰⁴ Whatever the reasons behind the need to promote ADR and discourage litigation, there is a common policy question that seeks to identify which cases are suited for ADR and which cases are better suited for court litigation. One of the frequent methods to put this strategy into practice has been the use of court-annexed ADR schemes. Furthermore, consumer ADR schemes can process many more claims than small

¹⁰⁰ C. Hodges, 'Collective Redress in Europe: The New Model' (2010) 29(3) *Civil Justice Quarterly* 370.

¹⁰¹ Directive 2013/11/EU on Consumer Alternative Dispute Resolution OJ L165/63 and Regulation (EC) 524/2013 on Consumer Online Dispute Resolution OJ L165/1.

¹⁰² Viviane Reding, Vice-President of the European Commission and EU Commissioner for Justice 'Towards a More Coherent Enforcement of EU Consumer Rules' (19 of March 2013). Available at http://europa.eu/rapid/press-release_SPEECH-13-237_en.htm

¹⁰³ Bradney and Cownie (2014) op. cit. 123.

¹⁰⁴ It must be noted that there is an academic movement against consumer ADR in Germany. See G. Wagner, 'Private Law Enforcement Through ADR: Wonder Drug Or Snake Oil?' (2014) 51(1) *Common Market Law Review*. 174 and H. Eidenmullery and M. Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (July 7, 2013) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290654.

claims courts. In England and Wales last year there were under 30,000 small claims adjudicated by the courts, while consumer ADR schemes resolved over half million claims.¹⁰⁵

Consensual ADR methods can be effective in resolving those disputes where both parties are acting in good faith and are willing to reach an agreement. When two parties settle a dispute amongst themselves the result will be somewhat satisfactory for both of them; by contrast, when a dispute is resolved in court the final judgment is unlikely to satisfy both parties. As a result parties are more likely to comply with settlements crafted amongst them than when the outcomes are imposed by a court. The use of ADR is limited however to the parties' willingness to participate in the process. Yet, ADR is more effective when combined with accessible and efficient civil court processes as they represent the most persuasive incentives for parties to sit at the negotiating table.¹⁰⁶ While consensual ADR should be a complement, and not a substitute, to effective judicial redress,¹⁰⁷ when effective ADR schemes are available they should be offered before the judicial options.¹⁰⁸ This view is in line with those jurisdictions that justify in certain cases the use of mandatory mediation, such as in Italy, and are tilted towards the promotion of appropriate dispute resolution, which in any event leaves the courts as the final forum for adjudicating unresolved disputes.

It is particularly important for small claims to be channelled through an appropriate process, which should typically be the most cost-effective of those available to the parties. If this line of argument is to be followed, then it would be desirable for the ESCP to encourage more clearly the use of ADR and ODR. Currently, the only reference to ADR is made in Art. 12.3 of the ESCP Regulation, which simply states: "Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties."

The Deloitte Report, upon which the Commission based its proposal, found that mediation offers "a quicker and less expensive solution for the creditor than initiating [ESCP] proceedings [...] if the mediation process can be expected to be successful. On the other hand, the existence of the ESCP protects the weaker party, offering him/her the possibility to take the stronger party to court if he/she refuses to engage in mediation. The ESCP thus functions as an incentive for the stronger party to contribute to a successful outcome of the mediation process."¹⁰⁹ Similarly, a number of ECC reports suggested that consumers often prefer informal redress processes than court processes, which are inevitably more formal than ADR schemes.¹¹⁰

Yet, the only measure that the Commission proposal has introduced is contained in the proposed article 5(1), which states that national courts should offer parties an oral hearing when both parties declare their willingness to reach a court settlement. It is however unclear why an oral hearing would be necessary for this purpose. **If parties have already reached an agreement, such settlement should be given the court's stamp of approval obviating the need for a hearing.** On the contrary, if parties need the

¹⁰⁵ C. Hodges, N. Creutzfeldt and S. Macleod, 'Reforming the EU Consumer ADR Landscape: Implementation and its Issues' Third Oxford Consumer Conference Report (30-31 October 2014) p. 7.

¹⁰⁶ Ibid.

¹⁰⁷ Speech by Lord Neuberger of Abbotsbury, Master of the Rolls (The Gordon Slynn Memorial Lecture 2010, 10 November 2010) para. 17.

¹⁰⁸ Hodges (2010) above p. 386.

¹⁰⁹ Deloitte Report p. vi.

¹¹⁰ ECC-Net, ADR in the APR sector (2012) and ECC Ireland (2008) above. Available at http://www.eccireland.ie/pub_reports.php.

assistance of a third neutral party to reach a settlement, then the instructing judge may not be the best person to provide this service as the judge may be required to adjudicate the case if parties were unable to reach an amicable settlement. Indeed, a preferred option would be a court-annexed scheme, such as those that already operate in some Member States such as in Ireland and England, which offer parties the services of a professional mediator or another third neutral party who assists litigants in reaching a settlement.

4.2. Court-Annexed Schemes for Small Claims in Ireland and England

Under the pre-action protocols in England and Wales parties must consider the suitability of resolving their dispute through ADR (i.e. negotiation or mediation) before they lodge a claim in court. If this option is not considered, or if it is refused unreasonably by one of the parties, the judge has the discretion to impose legal fees on that party (regardless of whether they are successful in the proceedings).¹¹¹ It should be noted however that given the restriction in the recovery of legal costs in small claims, these costs penalties are more relevant for the high-value claims.

In addition, parties can be automatically diverted to the Small Claims Mediation Service if both of litigants have requested it pre-allocation via the Directions Questionnaire.¹¹² The mediation service is free to all court users for one hour. It is not means tested, so it is also used by some large companies, such as a number of airlines, which as a rule do not comply with the pre-action protocol of considering mediation (when proposed by the claimant) but then opt in the free court mediation service once a claim has been lodged in the court.¹¹³ The service is done over the phone and has obtained very high satisfaction levels amongst users. The satisfaction is very high with both the service and the mediation (97%).¹¹⁴ Nearly 65% of those who attempt the mediation settle their claims successfully.¹¹⁵ Interestingly, the great majority (91%) of those who did not settle in mediation were still satisfied with the scheme, and most users (94.4%) stated that they would use the small claims mediation again.¹¹⁶

In Ireland, in the event that a respondent contests the claim, the court clerk, called the Registrar, if he speaks the same language as the parties (e.g. when the disputes are between parties based in Ireland and the UK) will contact the parties and negotiate with each of them separately with the intention of reaching a pre-trial settlement.¹¹⁷ The same

¹¹¹ HMCS leaflet EX301 'Making a claim- some questions to ask yourself' p.1 "Court rules require you to think about whether alternative dispute resolution is a better way to reach an agreement before going to court. If you refuse to consider this, you may not get your costs back, or the court may order you to pay the other party's costs, even if you win the case." This has also become a practice in ordinary English civil procedures. See *Burchell v Bullard* [2005] EWCA Civ 358 and *Halsey v Milton Keynes General NHS Trust* [2004] 1WLR 3002. See generally S. Prince, 'ADR After The CPR: Have ADR Initiatives Now Assured Mediation an Integral Role in the Civil Justice System in England and Wales?' in Dwyer D (eds) *Civil Procedure Rules: 10 Years On* (OUP, 2009) 316-343.

¹¹² See Rule 26.4A Civil Procedure Rules 1998 (England and Wales).

¹¹³ I thank Jo Holland for raising this point.

¹¹⁴ J. Rustidge 'Analysis of Qualitative Data Small Claims Mediation Service – April 2011 – March 2012' HM Courts & Tribunals Service (11 April 2012) p. 4. The survey upon which this study is made received just over 2,200 responses.

¹¹⁵ *Ibid*, p. 5. It must be noted that initially the settlement rate was around 80%, but this figure appears to have dropped over the last year. According to a recent report from the UK Ministry of Justice the settlement rate from April to October 2013 was 65%.

¹¹⁶ *Ibid*, p. 6.

¹¹⁷ SCP [is this the Irish code of SCP? please clarify abbreviation] (1999) Rule 4 and 8 (1).

as the small claims mediators in England, the Irish Registrars may propose solutions when so requested by the parties. There is no officially available data for the settlement of ESCP claims, but over half of admitted domestic cases are settled by the Registrars before the trial. However, according to the Registrar in Dublin District Court, which accounts for nearly a quarter of the population in Ireland, during the first six months of 2013, the Registrar settled six out of the 26 claims received; out of the remaining, seven claims were undefended so a judgment was granted, and the remaining ones were at the time of the consultation at various stages of the process.¹¹⁸ These figures suggests that court-annexed mediation, if we can classify the Registrar's role at that akin to a court mediator, carries out an effective role in settling cross-border cases.

The role of the Irish Registrars is more informal than that of the English mediators. In England each party is asked at the time of completing the allocation questionnaire whether they are prepared to attempt mediation.¹¹⁹ Hence, the mediation service in England is more tightly regulated: parties are offered free of cost a one-hour shuttle mediation session (i.e. when the mediator speaks to the parties separately), which is normally provided over the phone by a court employee who has attended a professional mediation course run by an accredited mediation organisation. In sum, litigants are invited to settlement talks once the day for the trial has been set. Respondents are often more willing to compromise and settle a meritorious claim than to have to participate in an oral hearing in front of the judge. Thus, since the ESCP is a mainly written procedure with oral hearings being exceptional, it may be more difficult for the neutrals to convince a respondent to settle a meritorious claim.

Although the overall percentage of claims settled is higher in Ireland (around half of all the defended claims), the settlement rate in mediations in England and Wales is higher for those claims where parties have agreed to participate in mediation (around two thirds of the mediations).¹²⁰ It must be noted that there is a significant disparity in the economic threshold of small claims in these two jurisdictions –while in Ireland the limit is €3,000, in England and Wales the threshold is set at £10,000 (c. €12,7000). It may be argued that the higher the economic stake, the more likely will be the appetite to fight the case in a court hearing. However, adequate incentives, such as progressive costs fees and exchange of information can also contribute to higher number of settlements. Indeed, most common law jurisdictions are characterised for having a very small number of civil claims reaching a hearing followed by a final judgment.¹²¹

Unlike in Ireland, presently, **the small claims mediation in England and Wales is not used for dealing with cross-border claims of the ESCP. In fact, mediators are not allowed to make international phone-calls.** Moreover, mediators are not trained to deal with litigants based in different jurisdictions –let alone, with litigants who speak different languages.

¹¹⁸ Email received by the Ms Bernie Moran, Registrar of the Dublin District Court (26 of June 2013). On file with author.

¹¹⁹ Pt 27 Civil Procedure Rules (England and Wales) 1998.

¹²⁰ According to the UK Ministry of Justice from April to October 2013 there were 26,670 claims referred to the HM Small Claims Service, but only 5,792 claims ended in mediation –the settlement rate of these cases was 65%.

¹²¹ For instance, in 2013 English and Welsh courts received 1,445,344 claims, out of which around 10 per cent (149,637) were allocated to tracks, only around 3 per cent (43,087) of the claims went to trial and received a judgment. The rest of the claims are either withdrawn or settled. In the last decade there has been some fluctuation in the number of claims submitted in courts, but certainly in England there seems to be some consistency in the decline of cases reaching the trial or hearing stage. This declined is particularly pronounced in small claims, which account by almost 70 per cent of the total number of hearings. S. Prince, Draft Report for the ODR Advisory Group, Working Paper on Policy Issues (July 2014) p. 5.

4.3. A Proposal

The ESCP Regulation should encourage, but not compel, parties to attempt ADR options where these are available. To that end the Regulation should be amended in order to ensure that parties are well-informed and able to identify the most suitable method to resolve their dispute. It is recommended that when filling out the standard forms parties should be required to consider the suitability of ADR/ODR for resolving their claims. At this point parties should be informed about the availability of ADR methods, and the cost of these options if any, and how these would differ from a judicial process, so that litigants are empowered to make an informed choice. **The claimant should be asked in the Claim Form A whether ADR was attempted, and if it was not attempted, the claimant should be asked whether he would like to attempt an ADR option if this is available as part of a court-annexed program. The respondent should be asked the same questions, and in the event that both parties agree to it, then ADR should be attempted.**

In addition, **parties should also have the option to request the court to stay proceedings for a short period of time (e.g. 14 days) while they attempt to use an ADR scheme.** Also, **courts should be able to recommend parties to attempt ADR** when they consider that it would be beneficial for them and when these ADR processes can be carried out by distance means of communication. In this regard the Court of Justice of the EU held that judicial protection was secured as long as electronic means are not the only means of accessing a settlement procedure for those parties without access to those means.¹²² This approach follows the line of the Mediation Directive and the EC Recommendation on Collective Redress. Both recommend and encourage parties to attempt mediation and other ADR processes before and during the judicial process. Furthermore, the Mediation Directive empowers courts to recommend mediation during the judicial process.

The ESCP Regulation should encourage Member States to enable channels so that disputes can be resolved by ADR through distance means of communication. Furthermore, **in compliance with the principles of equivalence and effectiveness the ESCP Regulation should extend the offer of court-annexed ADR schemes to cross-border disputes if these services are available for domestic disputes**, e.g. the one-hour free telephone mediation in England or the registrar's mediation in Ireland. The ADR option could be offered either in parallel to the court system or as a model integrated in the court system. When settlements cannot be reached, cases should automatically return to the ESCP.

In order to deal effectively with cross-border claims, ADR services should be offered by specialised third neutral parties (e.g. court-annexed mediators) that in addition to their own national languages can also offer their services in English, and ideally in another major EU language. The specialised ADR schemes should also rely on the use of distance means of communications, such as the use of telephone and online case management tools complemented by translation software.

¹²² *Rosalba Alassini v Italia Telecom SpA* (C-317/08) Para. 60.

These ADR services should be provided with the **support of the national ECCs when parties are involved in a consumer dispute and by other nationally certified ADR schemes when parties are involved with other civil and commercial matters**. The name of court-annexed specialised ADR schemes should be communicated to the European Commission who should ensure that information is available in the EU websites.

ADR options should not be mandatory but offered to parties who have opted into these options, especially so if there is a fee involved. The consideration of ADR could be strengthened if courts have the power to impose **cost sanctions when they consider that one party has behaved wholly unreasonably in rejecting a settlement or in refusing to attempt an ADR scheme**. These sanctions should however be proportional and imposed only in exceptional cases.

The European ODR Platform, which the European Commission is due to launch in 2016, can be instrumental in increasing consumers' access to justice as it could divert those consumers with cross-border disputes that could not have been resolved through ADR to the competent national courts. Ideally, this should be done through an online submission, though exceptionally regular post submissions may need to be allowed as the courts of most Member States may not be equipped to receive claims online.

The ODR Platform could also incorporate a plug-in to e-Codex, enabling litigants and the courts to communicate through electronic means. Furthermore, **the ODR Platform could be instrumental in raising awareness about the ESCP**. In so doing, the ODR Platform could improve consumer redress in a holistic manner, firstly, asking parties to explore the suitability of ADR schemes, and secondly, when out-of-court redress options are not available, to channel consumer claims to the competent court. Raising consumer awareness will have also a positive impact on businesses level of awareness about the ESCP.

Last, but not least, **a central online platform could be a very useful instrument for the public authorities to monitor the types of cases that go to the ESCP**. This information, if adequately captured, would be useful to the European Union when developing legal responses to improve cross-border trade. Monitoring frequent disputes will help to identify patterns upon which to build legal and practical responses that can lead to avoid the arrival of new disputes. This strategy will be more effectively than resolving disputes as isolated events.

5. CONCLUSION

KEY FINDINGS

- The Commission proposal is welcome, but this study found that more has to be done in terms of facilitating information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes.
- Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.
- Claim and response forms should include clear provisions requesting parties to consider the use of ADR before and during the ESCP.
- National court-annexed ADR schemes that operate through distance means of communication should be extended for cross-border claims. These schemes should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages.
- The synergy between the ESCP and ADR mechanisms would increase awareness and empower EU citizens.

The development of effective enforcement mechanisms, such as the ESCP, should become a policy priority to stimulate the internal market. Cumbersome judicial processes for resolving cross-border claims drive out of the court system many individuals with valid claims who are left with unmet legal needs in an inefficient internal market. The rationale behind the Commission's proposal is on one hand to tackle the lack of awareness and low use of the ESCP, and on the other hand aims to overcome certain deficiencies in the Regulation, such as its limited scope and the lack of use of distance means of communications.

The Commission proposal is welcome, but more has to be done in terms of increasing awareness. It is submitted that further amendments are necessary to facilitate information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes. The promotion of ADR options is justified because parties' satisfaction levels are often higher in settlements than they are in court adjudicated judgments. In addition, ADR helps litigants avoid overburdened courts and enables win-win solutions that can sometimes facilitate the continuance of cross-border transactions.

Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.

The claim and response forms should include clear provisions requesting the parties to consider the use of ADR before commencing the ESCP as well as during the court process if there is a court-annexed ADR scheme available in the Member State

of the seized court. **National court-annexed ADR schemes** available through distance means of communications should be extended to cross-border claims. These schemes **should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages.**

Yet, if litigants cannot find a resolution in an ADR process, they should be able to escalate the claim to the ESCP. **The synergy between the ESCP and ADR mechanisms would in turn increase awareness and empower EU citizens.**

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