

# Partial Regulatory Impact Assessment on a EU Proposal for a Regulation creating a European Small Claims Procedure

## The Objective

1. The objective of proposed regulation Number COM (2005)87 is to:
  - Simplify and speed up litigation concerning low value civil claims (€2,000) by creating an European Small Claims Procedure (ESCP) available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected; and
  - Abolish the intermediate measures to enable the recognition and enforcement of a judgment given in an ESCP in another Member State.
2. The creation of a uniform ESCP would go a long way towards providing easier access to efficient justice, promoting rights and responsibilities for individuals and businesses. The procedures, costs, and time taken to litigate should be proportionate to the value of the claims. In particular it will enable a person (or business) to bring or defend a claim in another member state and the successful claimant to enforce the judgment directly in defended cases. This may also provide an incentive for consumers to buy products and services in other Member States.

## The Background

The current situation in the European Union

3. A number of Member States in the European Union already provide small claims procedures for low value cases. Although the values are relatively low they can be significant for the individuals and the businesses concerned. The solutions devised by those Member States with a small claims procedure differ technically but, the small claims procedures are typified by simplified procedures, which apply to both monetary and non-monetary claims. The aim of such procedures is to ensure that the procedures, cost and time involved in litigating low value cases are proportionate to the value of the claims. Where appropriate, litigation brought under the small claims procedures is transferred to the more formal procedure by the judge or, with the court's permission, on application of a party. The simplified procedures recognise that the cost and complexity of ordinary litigation can inhibit parties bringing cases, potentially denying them access to justice.

### **The current situation in England and Wales**

4. A claimant with an undefended claim, will normally seek a default judgment, regardless of the value of the claim. If a claim is defended it will be allocated to the most appropriate track. The small claims track is for low value straightforward claims (generally not more than £5,000); the fast track is for moderate value straightforward claims and the multi-track is for high value, complex cases or cases which raise important issues. The small claims track has

simplified procedures, evidence including experts evidence is restricted to that required by the court and exposure to costs is limited. It is designed to enable litigants to bring cases without legal representation and, if the parties agree, a paper adjudication may be made. Judges take an informal approach. (The ESCP broadly follows the principles of national procedures).

5. The rules for enforcement of a default or small claims judgment in England and Wales are set out in Parts 70 – 75 of the Civil Procedure Rules. Part 74 specifies that the claimant must apply for a declaration of enforceability to enforce a judgment in another Member State. (This is a requirement of Council Regulation (EC) No44/2001 of 22 December 2000 on jurisdiction and the recognition of judgments). A certified copy of the judgment is also required and an application must include written evidence about the proceedings, the judgment, information on any appeals and evidence that the claim form and judgment have been served on the defendant.
6. Once a certificate of judgment has been obtained it is necessary to have the Member State, in which enforcement is sought, to recognise the judgment. Under Article 34 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (also known as Brussels I), a court can currently refuse to recognise a foreign judgment if:
  - the judgment is manifestly contrary to public policy;
  - the defendant has not been properly served or has had insufficient time to prepare a defence;
  - the judgment is irreconcilable with a judgment given in a dispute between the same parties in the requested state; and
  - it is irreconcilable with an earlier judgment.

Once the judgment is recognised an application must then be made to that Member State for a declaration of enforceability.

7. From October 2005 creditors will have the option to bypass the recognition procedure under Brussels I in uncontested cases by using a European Enforcement Order (EEO) under Regulation 805/2004. Provided that certain minimum procedural standards are met a judgment will be automatically recognised and enforced in another Member State. The Commission has another proposal for a common procedure for uncontested claims, the European Order for Payment (EOP), which provides a uniform procedure for obtaining a judgment with direct application in another Member State. Neither the EEO nor the EOP have financial limits.

### **The ESCP proposal**

8. The European Council in Tampere in October 1999 endorsed a programme of work on mutual recognition in civil and commercial matters and on new procedural legislation in cross-border cases including for small claims and is the basis of the ESCP proposal.
9. The proposed ESCP follows the general principles of the small claims procedures that currently exist in 4 Member States (although other Member States may adapt

their procedures or simplify for introducing such claims)<sup>1</sup>. The ESCP would facilitate the introduction of the claim using a specific form, allow claimants to pursue a simplified procedure for obtaining judgment and provides for a purely written procedure, unless the court considers an oral hearing is necessary. The nature and extent of evidence, and the ability to use expert evidence is at the court's discretion. Parties may, but need not be, legally represented, however, litigants can have unpaid and non-professional representation. Costs will be payable by the losing party, or at the court's discretion. However, where the losing party is an unrepresented natural person they will not be liable for the fees of legal professionals of the other party. In certain circumstances, such as a failure of service, the defendant may apply for a review of a judgment. It is left to the law of individual Member States whether there is a right of appeal.

10. The Commission proposes that the ESCP should not be confined to cross-border cases. It argues that claimants should be given the opportunity to use the procedure in internal cases as an alternative to the current procedures in each Member State. However, this is subject to debate in the Council with most Member States believing it should be restricted to cross-border cases only. If the procedure applies to national cases, it will ensure direct application of the uniform procedure, but it will leave untouched the Member States' domestic rules to run alongside the ESCP. No primary legislative changes would be needed to bring the ESCP into effect in England and Wales, but changes to court rules would be required. ESCP is also optional for cross-border cases and places the ultimate decision on claimants to judge which procedure to use. Claimants will consider the accessibility or the performance of each of the different procedures in deciding which system to use.

The procedure

11. The claimant will lodge a claim, with any relevant additional documents, at the court by hand, fax, post, or by e-mail [T1]. The court will issue the claim [T2] the defendant has up to 1 month of service of the claim to lodge a defence [T3]. If a response is received from the defendant the court will serve a copy of the response and any other documents on the claimant [T4]. The court will decide whether to:

- deliver judgment;
- ask for further details; or
- summon a hearing, which may be by video conferencing, telephone [T5].

Judgment will be served on the parties and is immediately enforceable [T6].

12. In:

- **An uncontested claim once the court has issued judgment the claimant may only pursue enforcement following the procedures set out in CPR Part [T7].**
- **A contested claim the judgment (if it complies with the rules on jurisdiction set out in sections 3 and 6 of Chapter 2 of Regulation (EC) No 44/2001) will be certified, recognised and enforceable in another Member State without intermediate measures [T8].**

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<sup>1</sup> Spain, Ireland, Sweden and the United Kingdom have simplified procedures, Germany's courts may determine their procedures as they see fit for low value cases and France use a 'declaration au greffe' to introduce small claims.

It is left to the law of individual Member States whether there is a right of appeal [T9]. A defendant may apply for a review of an ESCP judgment in limited circumstances, such as a failure of service [T10]. The unsuccessful party bears the costs of the proceedings unless the court thinks this is unfair or unreasonable. However, where the losing party is an unrepresented natural person they will not be liable for the fees of legal professionals of the other party.

### The UK position

13. The UK Government supports the introduction of an ESCP as a complement to the EEO and EOP by providing an alternative to creditors as a single EU-wide procedure. However, it believes that the scope should be restricted to cross-border cases.

### Devolution

14. This Regulation will apply to the whole of the United Kingdom and its scope will also include Gibraltar.

## Risk Assessment

15. The ESCP aims to provide an optional procedure to simplify litigation in both nationally and for cross-border cases. Member States' own procedures would operate unchanged alongside the ESCP. The proposal needs to be considered together with:

- Brussels I which provides for enforcement of judgments in other member states;
- The EOP which provides litigants with a method of bringing and enforcing undefended claims; and
- EEO Regulation 44/2001 which enables enforcement of judgments in undefended claims in another member state.

It will be for claimants to decide which measures to use.

16. There are currently no statistics on the number of low value court cases that need to be enforced in another country. It is anticipated that relatively few low value civil claims will be affected. However, the simplified procedure provided by the ESCP, EOP and EEO might persuade consumers and businesses to pursue more cross-border cases.

17. If the ESCP operates as an alternative to national procedures, maintaining simultaneously the national and ESCP systems will be more costly and is likely to be confusing for court users. The ESCP provides that any unrepresented losing party, as a natural person, will not be liable for the legal fees of the other party. This is in contrast to the national system where costs for small claims are strictly limited.

### Disadvantages of the current system

18. A person wishing to bring and enforce a claim in another country may be unfamiliar with the procedures of the other Member State, which is likely to make bringing and enforcing a claim more difficult and potentially more costly. The Brussels I procedure for enforcement (described above) that currently applies is overly complicated and costly and may deter claimants from bringing or enforcing a claim. The EEO and EOP will simplify that

procedure but only for uncontested claims and would still mean that there will be different procedures in each Member State with the potential for costs and delays.

Advantages of the ESCP

**19. A common procedure for bringing a civil claim in another Member State should make pursuing claims easier for litigants. For defended cases the direct application of judgments in other Member States will make enforcement easier and less expensive. For undefended claims the Brussels 1 procedure will continue to apply. Where it is more advantageous, e.g. because of a higher financial limit, the national procedures can still be used.**

#### Who is affected?

**20. This proposal will potentially affect all those in the UK (including Gibraltar) who wish to pursue a low value claim against a defendant in another Member State. The proposed regulation will operate across Member States of the EU only (excluding Denmark) and will apply regardless of the nationality of the parties to the legal proceedings. The ESCP is potentially available to anyone that travels abroad on holiday or business or does business with someone in another Member State. It may be of particular assistance for dealings between commercial businesses established in different Member States.**

**21. As mentioned before, the effect will be limited to those who choose to make use of the procedure. It will remain open to creditors to continue to use the current procedures either in national cases or in cross-border litigation.**

#### Equity and fairness

**22. This proposal has been considered in terms of impact on**

- race equality as specified in the Race Relations (Amendment) Act 2000;
- sex discrimination as specified in the Sex Discrimination Act 1975
- disability discrimination as specified in the Disability Discrimination Act 1995.

**23. This proposal should not undermine equity or fairness. Its purpose is to create a single mechanism for consumers and businesses with low value claims whereby they can swiftly and efficiently pursue the defendant who may reside in another Member State. In addition, the procedure does not aim to replace or harmonise the existing national mechanisms for small claims procedures but would merely constitute an additional option.**

**24. The rights of the defendant will also be protected because of the provisions regarding service and because the interim measures for enforcement continue to apply to undefended claims. Before an ESCP can become enforceable a payment notification would need to be served informing the defendant of his options to pay the claimed amount, including any interest and costs, or to submit a statement of defence to the claim. The defendant**

may, as indicated above apply for a review in specified circumstances, e.g. where service has failed.

25. Both parties will be able to appeal under national provisions.

## Options

Option 1: **No change. Low value claims will be brought as now, subject to the specific provisions of each Member State. (This may change for uncontested cases if the European Order for Payment Regulation is agreed). The recognition and enforcement of judgments will continue to be governed by Regulation 44/2001 and 805/2004.**

- **Potential of Option 1 achieving the objective:** Option 1 would not achieve the objective of providing a simplified method of bringing and, for defended cases, enforcing low value claims. It would also conflict with the UK Government's support for the ESCP proposal, providing its scope is limited to cross-border cases only
- **Risks** The situation would be inconsistent with UK policy. Claimants would continue to face difficulty in bringing claims, securing judgments and enforcement with the higher costs associated with enforcing judgments through Regulation 44/2001 and 805/2004.
- **Likelihood of risks occurring:** There is potential for damage to relationships with the EU institutions and other Member States if the UK were to oppose this measure. As the status quo would be maintained the existing risks for litigants regarding claims, costs and enforcement would remain the same.
- **How can they be mitigated:** The UK is supportive of the adoption of the ESCP for cross border cases and will seek to promote the initiative as it applies to such cases.
- **Implementation** No implementation required. This is the current procedure.
- **Costs** Data is not available about the number of current cases that would potentially fall within the scope of the ESCP consequently costs cannot be quantified and it is too early to say what the effects of the EEO and, if adopted EOP will have.
- **Benefits:** There would be no need for new procedures, with the associated training costs for court staff. Litigants would not be required to learn new procedures.
- **Viability of Option1:** This option is inconsistent with UK policy, which is to promote the use of the ESCP (for cross border cases only) because of the advantages it offers litigants in low value cases,.

Option 2: **ESCP limited to cross-border cases only.**

- **Potential of this option achieving the objective:** This option achieves the objective of creating a unified, simplified method of bringing, and for defended cases, enforcing low value claims. It will complement the EEO and EOP, which deal with uncontested claims. For consumers and businesses it should provide a quicker and more efficient system for securing their rights at potentially lower costs. It is consistent with the stance of the UK Government.
- **Risks** There is an existing small claims system in England and Wales and litigants would have the option of using either the ESCP or the national system for cross border cases. Risks are therefore thought to be minimal.
- **Likelihood of risks occurring:** As the use of the ESCP is entirely optional, the onus will be on the claimant to assess the risks of using the ESCP as compared with the national system together with the Brussels 1 or the EOP or EEO procedures for enforcement.
- **How can they be mitigated:** Through the claimant's exercise of choice over the alternative procedures.
- **Implementation** Changes to rules of court for England and Wales will be necessary, together with training for the Judiciary and court staff. This is achievable and should not present problems for the UK.
- **Costs** The full costs are unquantifiable for a number of reasons. For litigants costs will depend on whether they choose to use the ESCP, the EOP for uncontested claims or the National system (with or without the EEO). Consequently the take up rate of the ESCP cannot be determined. In addition, costs will vary according to the Member States involved. However, there will be some, limited and affordable costs for training the judiciary and court staff and changing rules of court.
- **Benefits:** The ESCP will provide a common, simple and, for defended claims, an immediately enforceable judgment for cross border cases. Additionally, litigants will have a range of options as to how to bring and/or enforce a claim and may choose the optimum system to meet their needs, the ESCP, the EEO, the EOP, the national system and Brussels 1.
- **Viability of Option1:** The UK Government welcomes this proposal which provides litigants with an additional and effective method in bringing and enforcing a cross border claims in low value cases.

Option 3: ESCP available in all cases, including domestic.

- **Potential of this option achieving the objective:** Option 3 meets the objective of creating, for domestic and cross border cases, a simplified procedure for low value cases. Most Member States, including the UK, object to its extension to domestic cases because of the lack of legal and political mandate and because it offends the principles of subsidiarity and proportionality. The duplicate provision for domestic cases through national and ESCP systems is likely to be confusing for litigants and costly for the courts.

- **Risks** The UK and other Member States which do not favour the proposal are of the view that the legal basis for the domestic application of this proposal is unfounded. The proposal is beyond the powers conferred on the Community under the EC Treaty, Article 65 of which limits application to cross border situations only. The European Council Legal Service supports this view. An alternative Treaty basis will need to be found if the provision is to apply to domestic cases. To extend the ESCP to domestic cases will be confusing for litigants and court staff who would be faced with two different procedures, which may take longer and be more costly (the domestic system has strict limits on costs). It may have an adverse impact on the national system. This will act as deterrent to bringing small claims on either system and potentially undermines access to justice.
- **Likelihood of risks occurring:** The extension of the ESCP to domestic cases is beyond the powers conferred on the Community under the EC Treaty and is opposed by the UK Government and most other Member States. Consequently, the current likelihood of Option 3 being adopted is low. If however it is adopted, the dual system are likely to be confusing for litigants and maintaining the two systems may delay cases with possibly costs consequences, potentially making both systems unattractive for court users.
- **How can they be mitigated:** A new Treaty basis would have to be found to enable the ESCP to apply to both domestic and cross-border cases. The Government's position is that the ESCP Regulation under Article 65 of the EC Treaty should be limited to cross-border cases only, a view supported by most of the Member States.

Because the ESCP is optional, litigants may prefer not to use the ESCP preferring known national systems, with perhaps the EEO or the EOP. This would avoid the potential confusion between the two systems.

- **Implementation** Unless the legal basis of this option were changed, the majority of Member States including the UK would continue to oppose the application of the procedure to domestic cases. If, however it were adopted, changes to rules of court for England and Wales will be necessary, together with significant training for the Judiciary and court staff. The use of the procedure may however be limited because of the duplication with the domestic small claims track.
- **Costs** The full costs are unquantifiable. For litigants costs will depend on whether they choose to use the ESCP, the EOP for uncontested claims or the National system (with or without the EEO). Consequently the take up rate of the ESCP cannot be determined. In addition, costs will vary according to the Member States involved. However, there will be additional costs (higher than for option 2) for training the judiciary and court staff because of the potential confusion between the ESCP and the domestic system. Changes to the rules of court would also be required. Litigants potentially face higher costs for the ESCP used internally because the exposure to costs is higher than in the domestic system that has stringent costs limits for small claims.
- **Benefits:** The ESCP will provide a common, simple and, for undefended claims, an immediately enforceable judgment for cross border cases.

Claimants will have a range of options as to how to bring and/or enforce a claim and may choose the optimum system for their type of case, the ESCP, the EEO, the EOP, the national system and Brussels 1. For domestic cases the benefits are likely to be outweighed by the confusion and complexity of having two systems in place and the greater exposure to costs.

**Viability of Option1:** For legal reasons as well as practical (the confusion, complexity and cost) the UK Government considers that the domestic application of the ESCP is not viable.

#### **Costs and benefits**

26. Option 1- No change: This would have the benefit of not requiring any changes to the Civil Procedure Rules or judicial and staff training. However, in the light of the the Council's decision to simplify procedures this is not a viable option. The UK must implement this Regulation when it is agreed.
27. Option 2 - Cross-border cases: **Costs** Under the current proposal there will be a need to amend the Civil Procedure Rules with a consequent need for judicial and staff training. Both will lead to extra costs, but these changes would be limited in effect. There is potentially a greater exposure to costs for litigants even though an unrepresented loser, who is a natural party, is not liable for the winner's legal fees. This is because the ESCP will not exercise the same degree of control over costs as the national scheme. It has not been possible to quantify costs as the procedure is optional and costs vary between Member States.
28. **Benefits** For consumers and businesses this procedure is optional and can be used instead of any national system and may provide a quicker and more efficient method of obtaining a judgment and, for defended cases, securing enforcement in another Member without the costs associated with the Brussels 1 procedure. For undefended cases, pursuing enforcement will continue, as now. Under the Brussels I procedure claimants are involved in additional costs and work to secure enforcement. For example, a court fee is payable for a certified copy of the judgment in the England and Wales and once this is obtained the claimant must still have the judgment declared as enforceable and to enforce the judgment in the other Member State. As with costs quantification is problematic and for the same reasons, i.e. the ESCP is optional and Member States procedures and costs and savings will vary.
29. Option 3 – internal and cross-border cases: The Government believes that the Commission's proposal to apply the ESCP to domestic as well as cross border litigation exceeds their legal and political mandate and offends the principles of subsidiarity and proportionality. There is currently very little support for this extension within the Council.
30. **Costs** If the Regulation was to apply to domestic as well as cross-border cases it is likely to increase costs to the Department because it would be necessary to run the two systems in tandem involving extensive training for the judiciary and court staff. For court users this procedure would be optional (they could still use existing national procedures). However, for

example, in an undefended case the claimant would still be subject to the interim measures for enforcement and their associated costs. In a defended case the claimant may get judgment and enforcement more quickly but may also face higher costs because he could not reclaim his legal costs from an undefended natural person.

31. **Benefits** There would be a uniformity of ESCP procedures for cross border and for domestic cases. Litigants could choose how to bring and enforce a claim, i.e. ESCP, EOP national and Brussels 1. However, this very range of options is likely to produce confusion and complexity, which could offset the benefits through increased costs and delays.

#### **Costs for a typical business**

32. The procedure is optional whether or not this proposal extends to national as well as cross-border cases. If it is restricted to cross-border cases only those consumers and businesses involved in legal cases across EU borders will be directly affected by this proposal and only then if they choose to follow this option.

33. Consultation with small business is to be undertaken and will inform the final regulatory impact assessment

#### **Competition assessment**

34. The competition filter has been completed and did not indicate that this proposal would have any effects on competition in the relevant markets, namely amongst those providing legal services to those wishing to pursue or enforce a civil judgment in another Member State.

#### **Enforcement and Sanctions**

35. This is an optional procedure and consumers and businesses will not be compelled to opt for this process consequently there will be no enforcement and sanctions for non-use by these court users. The European Commission, however, will be able to impose sanctions on Member States who do not implement the Regulation.

#### **Monitoring and review**

36. If this proposal is adopted for cross-border cases only there will be a need to monitor its use to test whether it proves popular. If its scope includes national cases we will see whether consumers and businesses decide to use it instead of current national procedures. There may also be a need to consult with stakeholders to obtain views on its effectiveness. The information we gather will contribute to any review of the Regulation undertaken by the Commission to monitor its effectiveness.

## Consultation

Those to be consulted in England and Wales include:

The Master of the Rolls  
Lord Justice Dyson  
The Senior Master  
The Council of Circuit Judges  
The Association of District Judges  
The Law Society  
The Bar Council  
The Confederation of British Industries  
The Small Business Federation  
The Small Business Service  
The Consumer Credit Association  
Internet Service Providers  
The Association of British Travel Agents  
The Association of British Insurers  
The Trading Standards Institutes  
Advice Services Alliance  
Age Concern  
Disability Rights Commission  
The Consumers Association  
The National Consumer Council  
Citizen's Advice  
Other Government Departments  
The Scottish Executive  
The Northern Ireland Court Service

## Summary and Recommendation

- 37. The decision by the Council of Ministers to call for a specific European Small Claims Procedure means that Option 1, to do nothing, is not viable.**
- 38. As the majority of Member States question the legality of Option 3, i.e. applying ESCP to domestic claims, the preferred Option is 2 and is the most likely to be agreed. Option 2 would only require minimal changes to court procedures and rules in the UK and there should not be any significant adverse impact on court users. Consumers and businesses would remain free to use either this or the existing procedures. The effectiveness of the changes will be monitored.**

## Contact point