

CCBE COMMENTS ON THE EUROPEAN COMMISSION'S PROPOSAL FOR A REGULATION AMENDING REGULATION 861/2007 ESTABLISHING A EUROPEAN SMALL CLAIMS PROCEDURE AND REGULATION 1896/2006 CREATING A EUROPEAN ORDER FOR PAYMENT PROCEDURE

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 12 further associate and observer countries, and through them more than 1 million European lawyers. It is registered in the Transparency Register (ID nr 4760969620-65).

The CCBE wishes to comment on some of the European Commission proposals to amend the existing Regulation 861/2007 on the European Small Claims Procedure.

The CCBE also refers to its [response to the public consultation on the European small claims procedure](#) published in May 2013.

As a preliminary remark the CCBE would like to underline the crucial role that lawyers play in small claims proceedings. Citizen's legal interests are best safeguarded by the use of a lawyer. Lawyers have the training to protect the needs of citizens, whether claims are large or small. Especially in cross-border cases, it is of particular importance that legal advice is provided by a professional who has the necessary qualifications and expertise. Lawyers also have an important role to play in order to avoid the risk of misjudgement and unprofessional or unethical handling of cases, which are detrimental to citizens and to general trust in the legal system. Therefore, the CCBE stresses the necessity of maintaining high professional standards in all legal proceedings, whether large or small, in the interest of citizens. We know from certain Member States that the European Small Claims Procedure is mainly used by lawyers and that lawyers act as information disseminators in these countries. Citizens should be made aware of the risks of initiating a small claims procedure without seeking prior advice from a lawyer, especially if the threshold is increased.

CCBE proposed amendments to the European Commission's proposal are highlighted below in ***bold and italics***.

Article 2, paragraph 1

European Commission proposal	CCBE suggested amendment
1. This Regulation shall apply to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 10 000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta jure imperii).	<p style="text-align: center;"><i>[Commission proposal shall be rejected: Regulation 861/2007 should remain unchanged]</i></p>

Justification

As stressed in its response to the 2013 consultation, the CCBE considers that there is no need to increase the threshold. The Regulation is intended to cover small claims only. The amount of 10,000 € cannot be considered as a small claim¹. Besides, in some Member States, when the value of a claim is 5,000€ and upwards, a higher jurisdiction is competent and representation by a lawyer is mandatory. This system has proved successful both in the interest of the proper administration of justice as well as the interests of the parties involved. Particularly in cross-border cases, lawyers play an important role safeguarding the citizen's legal interests.

Article 2, paragraph 2

European Commission proposal	CCBE suggested amendment
<p>2. This Regulation shall not apply where, at the time when the claim form is received by the court or tribunal with jurisdiction, all of the following elements, where relevant, are in a single Member State:</p> <p>(a) the domicile or habitual residence of the parties;</p> <p>(b) the place of performance of the contract;</p> <p>(c) the place where the facts on which the claim is based arose;</p> <p>(d) the place of enforcement of the judgment;</p> <p>(e) the court or tribunal with jurisdiction.</p> <p>Domicile shall be determined in accordance with [Articles 59 and 60 of Regulation (EC) No 44/2001]/[Article 62 and 63 of Regulation (EU) No 1215/2012].</p>	<p style="text-align: center;"><i>[Commission proposal shall be rejected: Regulation 861/2007 should remain unchanged]</i></p>

Justification

The CCBE expresses some doubts about the Commission competence to widen the definition of "cross-border" case. Article 81 of the Treaty on the Functioning of the European Union does not seem to provide a legal basis for this approach. The CCBE wonders whether widening the scope of the small claims procedure would be in conformity with the principle of proportionality. The proposal should at least restrict the scope of the regulation to concrete cases with a cross-border dimension and should not include purely domestic cases (when both parties are from the same Member State). Furthermore the Commission's proposal affects consumer protection since it does not provide extensive procedural safeguards.

Article 8, paragraph 1

European Commission proposal	CCBE suggested amendment
<p>1. An oral hearing shall be held through videoconference, teleconference or other appropriate distance communication technology in accordance with Council Regulation (EC) No 1206/2001 where the party to be heard is domiciled in a Member State other than the Member State of the court or tribunal with jurisdiction.</p>	<p>1. An oral hearing shall be held through videoconference, teleconference or other appropriate distance communication technology if the technical means are available. A high technical standard must be guaranteed in order to eliminate any possibility of misuse and to ensure confidentiality.</p>

Justification

¹ Minimum wage varies from 159€ to 1874€ within the EU According to Eurostat, the level of minimum wage is between 30 % and 50 % of average gross salaries in the area of industry, construction and services.

The CCBE considers that hearings via teleconference do not suit the purpose of an oral hearing. The parties must have the possibility to be present in court to pursue their procedural rights and to actively participate in the court proceedings. The oral hearing is a key element of a fair trial, especially the right to a fair hearing guaranteed by Article 6 (1) of the European Convention of Human Rights. The use of videoconferences might be an appropriate distance communication technology, but it is not very likely that a EU-wide - not even a nationwide - functioning can be guaranteed by the Member States. It might be difficult for all courts in the Member States to have a videoconferencing system. Moreover it is difficult to expect consumers to participate in this rather modern communication technology, when even courts do not have the necessary means to fully participate. Misuse should be avoided and confidentiality guaranteed by high technical standards.

Article 15a, paragraph 1

European Commission proposal	CCBE suggested amendment
<p>1. The court fee charged for a European Small Claims Procedure shall not exceed 10% of the value of the claim, excluding all interest, expenses and disbursements. If Member States charge a minimum court fee for a European Small Claims Procedure, that fee shall not exceed EUR 35 at the time when the claim form is received by the court or tribunal with jurisdiction.</p>	<p><i>[The first sentence of paragraph 1 should be replaced by the following]:</i></p> <p><i>1. Where applicable, the amount of the fees is to be assessed in the light of the particular circumstances of the case, including the applicant's ability to pay them, the access to an effective legal aid system depending on each Member State, and the phase of the proceedings at which that restriction has been imposed, as provided by the case law of the European Court of Human Rights in order to guarantee an effective right of access to a court to litigants.</i> If Member States charge a minimum court fee for a European Small Claims Procedure, that fee shall not exceed EUR 35 at the time when the claim form is received by the court or tribunal with jurisdiction.</p>

Justification

The CCBE considers that Court fees should be proportionate to the amount of the claim. They should be transparent and should not impede access to justice. The Commission proposal should reflect the case law of the European Court of Human Rights, who stated, on several occasions, that a court fee levied on parties to civil proceedings constituted a restriction that impaired the very essence of the applicants' right of access to a court as guaranteed by Article 6 § 1 of the European Convention on Human Rights (Kreuz v. Poland no. 28249/95). The Court considered in cases such as Urbanek v. Austria (no. 35123/05) that the court-fee system should be sufficiently flexible, so the applicant may dispose to obtain full or partial exemption from the requirement to pay court fees if he was eligible for legal aid or was liable to suffer particular hardship.

Article 15, paragraph 1

(Current) REGULATION (EC) No 861/2007	CCBE suggested amendment
<p>1. The judgment shall be enforceable notwithstanding any possible appeal. The provision of a security shall not be required.</p>	<p><i>[In case of adoption of the amendment of Art. 2 paragraph1 of the Commission's Proposal (Increase of the threshold), Article 15.1 should read]:</i></p> <p>1. The judgment shall be enforceable notwithstanding any possible appeal. The provision of a security shall <i>not</i> be required <i>if the matter on which the sentence is handed down exceeds the amount of EUR 2.000.</i></p>

Justification

If a judgment declared provisionally enforceable is reversed or modified, the plaintiff shall be obliged to compensate the defendant for the damages he has suffered by the judgment being enforced. In order to secure the potential claim, a provision of service shall be provided. The court may at its sole discretion determine the nature and the amount in of such security. The enforceability of the judgment without any provision of a security can threaten notably the existence of small companies.

Article 16

(Current) REGULATION (EC) No 861/2007	CCBE suggested amendment
<p>The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.</p>	<p>The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim. <i>This does not apply to legal costs calculated on the basis of a statutory fee system.</i></p>

Justification

The current clause is too vague; it needs to be clarified that all legal costs of the proceedings that are based on a statutory fee system are always proportionate and therefore have to be imposed on the other party.