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General Principles in European Small Claims Procedure – How Far can Simplifications go?

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Abstract

The European Small Claims Regulation has been offering an alternative proceeding for small claims litigation in cross-border cases for almost four years now. Along with several important procedural simplifications, however, came considerable restrictions regarding the principles of public and oral proceedings established in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Critics claim especially that the court's power to omit any oral hearing in a Small Claims Procedure cannot fulfill the requirements of the Convention and the Charter. This question is going to be further investigated in the course of this paper. Before doing so, however, a rough overview of the scope, of some general principals and of the conduct of the European Small Claims Procedure shall be provided.

Keywords: • European Small Claims Procedure • procedural simplifications • written procedure • principle of public proceedings • principle of oral proceedings • compliance

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Osnovna načela evropskega postopka v sporih majhnih vrednosti – kje so meje poenostavitve?

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IN PHILIPP ANZENBERGER

Povzetek

Uredba o evropskem postopku v sporih majhne vrednosti že skoraj štiri leta ponuja alernativni postopek v čezmejnih sporih majhnih vrednosti. Poleg številnih pomembnih postopkovnih poenostavitev pa vendarle obstajajo znatne omejitve glede načela javnosti in ustnega postopka, kot je to predvideno v Evropski konvenciji o človekovih pravicah in v Listini o temeljnih pravicah Evropske unije. Kritiki zlasti menijo, da pristojnost sodišča po neupoštevanju kakršnegakoli ustnega zaslišanja v postopku o sporih majhne vrednosti ni v skladu z zahtevami omenjene Evropske konvencije in Listine. Avtorja se v prispevku ukvarjata predvsem s tem vprašanjem, prav tako pa tudi orišeta vsebino posameznih splošnih načel in delovanje evropskega postopka v sporih majhnih vrednosti.

Ključne besede: • evropski postopek v sporih majhne vrednosti • postopkovne poenostavitve • pisni postopek • načelo javnosti postopka • načelo pisnosti postopka • skladnost

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1. Overview of the European Small Claims Procedure

1.1. Genesis and aims of the Regulation[1]

The idea of creating a European Small Claims Procedure goes back to the Presidency Conclusions of the Tampere European Council in 1999 (Brokamp, 2008: 2; Scheuer, 2010: Vor Art. 1 EuBagatellVO p. 1; Varga, 2010: Einl EG-BagatellVO p. 14). Three years later, in 2002 (after extensive exploratory talks), the European Commission published a "Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation."[2] At the same time, the European Commission made a call for statements regarding a pool of questions published in this green paper (Brokamp, 2008: 2; Mayr, 2011: p. I/98; Scheuer, 2010: Vor Art. 1 EuBagatellVO p. 2; Varga, 2010: Einl EG-BagatellVO p. 16). Three further years later, in 2005, the European Commission presented a "Proposal for a regulation of the European Parliament and of the Council establishing a European Small Claims Procedure".[3] After certain adaptations, the Regulation entered into force in 2007 and is applicable since 1 January 2009 in all member states of the European Union (except Denmark).[4]

The creation of a European Small Claims Regulation served multiple purposes (cf. Varga, 2010: Einl EG-BagatellVO p. 25–28). One of the main goals was to simplify and to speed up litigation concerning small claims in cross-border cases.[5] Another important aim was to facilitate recognition and enforcement in those matters.[6] In this respect, it served as a sort of "sounding balloon" for the planned abolition of the *exequatur* procedure. Like all European Regulations, the Small Claims Regulation is directly applicable and takes precedence over national law (Mayr, 2011: VI/3). Therefore, national procedural law is only applicable if it is not subject to the provisions of the Regulation (Article 19 of the Regulation; cf. Rechberger, 2009: 313). Yet, the European Small Claims Procedure is not mandatory within its scope; instead, it is available to litigants as an alternative to the proceedings existing under the laws of the Member States (Article 1 (1) of the Regulation; cf.

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[1] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199/2007 (hereinafter: Regulation).
[2] COM (2002) 746 final.
[3] COM (2005) 87 final 2005/0020 (COD).
[4] Art. 29 of the Regulation.
[5] Cf. recitals 7 and 8 of the Regulation.
[6] Recital 30 of the Regulation.

Mayr, 2011: p. VI/4; McGuire, 2008: 101; Rechberger, 2009: 308; Varga, 2010: Einl EG-BagatellVO p. 31–35).

1.2. Scope of the Regulation

The Regulation applies, in cross-border cases, to civil and commercial matters (Art. 2 (1) of the Regulation; cf. Rechberger, 2009: 308). For the purposes of the Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State (except for Denmark) other than the Member State of the court or tribunal seized (Art. 3 (1) of the Regulation). Though generally applicable in cases on civil and commercial matters, the Regulation does not apply on matters concerning (Art. 2 (2) of the Regulation):

a. the status or legal capacity of natural persons;
b. rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession;
c. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
d. social security;
e. arbitration;
f. employment law;
g. tenancies of immovable property, with the exception of actions on monetary claims; or
h. violations of privacy and of rights relating to personality, including defamation.

Furthermore, the Regulation applies only to matters where the value of a claim does not exceed € 2.000 at the time when the claim form is received by the court or tribunal. In order to simplify calculations of the value in dispute, all interest, expenses and disbursements are excluded for the purpose of calculation (Art. 2 (1) of the Regulation). This, of course, does not limit the court or tribunal's power to award those interest, expenses and disbursements in its judgment,[7] nor does it affect the national rules for interest calculation.[8] Apart from those (few) restrictions in Art. 2 (2) of the Regulation, however, the calculations of the value of a claim are carried out according to national civil procedure law (Art. 19 of the Regulation; cf. Brokamp, 2008: 10–11; Freitag and Leible, 2009: 3; Scheuer, 2010: Art. 2 EuBagatellVO p. 29). This

[7] Recital 10 of the Regulation; Varga, 2010: Art. 2 EG-BagatellVO p. 6.
[8] Recital 10 of the European Small Claims Regulation; Varga, 2010: Art. 2 EG-BagatellVO p. 7.

obviously leads to a slightly varying scope of the Regulation in the individual Member States (Brokamp, 2008: 11; Jahn, 2007: 2891). Admittedly, this variation may pose difficulties such as the arising of forum shopping[9] (cf. Brokamp, 2008: 11; Varga, 2010: Art. 2 EG-BagatellVO p. 8–9). However, for practical reasons (Kropholler and von Hein, 2011: Art. 2 EuGFVO p. 9), those complications were deliberately taken on board (Scheuer, 2010: Art. 2 EuBagatellVO p. 29).

1.3. Procedural simplifications for small claims litigation

As stated above, the European Small Claims Procedure provides several important procedural simplifications in order to reduce costs, while at the same time speeding up the actual procedure. For one, the Small Claims Procedure is based mainly on the use of standard forms, which have become a very common tool in European Civil Procedure Law in the course of European integration. Those standard forms are available in all official languages of the European Community and shall be submitted in the language or one of the languages of the court or tribunal (Art. 6 (1) of the Regulation).[10]

One of the main features of the Small Claims Procedure is its generally written character.[11] An oral hearing shall only be held if the court considers this to be necessary or if a party so requests (Rechberger, 2009: 313). The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings. The refusal may not be contested separately (Art. 5 (1) of the Regulation). An oral hearing may as well be held through video conference or other communication technology if the technical means are available (Art. 8 of the Regulation). Any use of "other communication technology" has to include the transfer of words and images; the mere transfer of words (such as through a telephone conference) cannot fulfill the requirements of the Regulation (Scheuer, 2010: Art. 8 EuBagatellVO p. 3; Schoibl, 2009: 338).

Another very important characteristic of the European Small Claims Procedure is the restricted taking of evidence. The court or tribunal shall determine the means of taking evidence and the extent of the evidence

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[9] Forum Shopping can be understood as the practice to find the jurisdiction most favorable for the claimant's interests; for more definitions cf. Reuss, 2011: 81.
[10] Cf. annex I – IV of the Regulation.
[11] Cf. recital 14 of the Regulation.

necessary for its judgments. It may admit the taking of evidence through written statements of witnesses, experts or parties as well as the taking of evidence through video conference or other communication technology if the technical means are available (Art. 9 (1) of the Regulation). Expert evidence or oral testimony may only be taken if they are thought to be necessary for giving the judgment. In making this decision, the court has to take costs into account (Art. 9 (2) of the Regulation). In any case, the court shall use the simplest and least burdensome method of taking evidence (Art. 9 (3) of the Regulation).

Additionally, the European Small Claims Procedure does not mandatorily require representation by a lawyer or another legal professional (Art. 10 of the Regulation). Still, the successful party is entitled to reimbursement for necessary and appropriate legal representation (Jelinek, 2009: 76; Scheuer, 2010: Art. 16 EuBagatellVO p. 8).

1.4. Conduct of the Procedure

The claimant commences the procedure by filling in standard claim Form A and lodging it with the court or tribunal with jurisdiction. The claim form shall include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents (Art. 4 (1) of the Regulation). Where the court or tribunal considers the information provided by the claimant to be inadequate or insufficiently clear, or if the claim form is not filled in properly, it uses standard Form B to give the claimant the opportunity to complete or rectify the claim form, or to supply additional information or documents, or to withdraw the claim. The court specifies a time period within which such a completion or rectification is possible. Where the claim appears to be clearly unfounded or the application to be inadmissible, or where the claimant fails to complete or rectify the claim form within the given time, the application shall be dismissed (Art. 4 (4) of the Regulation). After having received the properly filled in claim form, the court or tribunal fills in Part I of the standard answer Form C. A copy of the claim form and, where applicable, of the supporting documents, together with the answer form thus filled in, are served on the defendant within 14 days after receiving the properly filled in claim form (Art. 5 (2) of the Regulation).

The defendant has to submit his response within 30 days of service by filling in Part II of standard answer Form C and submitting any relevant supporting documents (Art. 5 (3) of the Regulation). Within 14 days of the receipt of the response from the defendant, the court or tribunal shall dispatch a copy

thereof, together with any relevant supporting documents to the claimant (Art. 5 (4) of the Regulation). If, in his response, the defendant claims that the value of a non-monetary claim exceeds the € 2.000 limit, the court or tribunal shall decide within 30 days of dispatching the response to the claimant whether the claim is within the scope of the Regulation or not. Such a decision cannot be contested separately (Art. 5 (5) of the Regulation).

In addition to his response, the defendant may submit a counterclaim, adding another standard claim Form A and any relevant supporting documents to his answer Form C. Those documents shall be dispatched within 14 days of receipt. The claimant has 30 days from service to respond to any counterclaim (Art. 5 (6) of the Regulation); this response shall (again) be dispatched to the counterclaimant within 14 days (Art. 5 (7) (2) of the Regulation). If the counterclaim exceeds the € 2.000 limit, the claim and counterclaim shall not proceed in the European Small Claims Procedure. Instead, they shall be dealt with in accordance with the relevant procedural law of the Member State in which the procedure is conducted (Art. 5 (7) (1) of the Regulation).

If the court or tribunal has not received an answer from the relevant party within the time limits, it shall give a judgment on the claim or counterclaim (Art. 7 (3) of the Regulation). Otherwise (in other words: if the court or tribunal did receive an answer), within 30 days the court or tribunal shall either give a judgment or take one of the following procedural steps (Art. 7 (1) of the Regulation):

- It demands further details concerning the claim from the parties within a specified period of time, not exceeding 30 days;
- it takes evidence in accordance with Art. 9 of the Regulation; or
- it summons the parties to an oral hearing to be held within 30 days of the summons.

Within 30 days of any oral hearing or after having received all necessary information, the court or tribunal shall give the judgment (Art. 7 (2) of the Regulation). Adding all those time frames together, the total duration of the procedure should not exceed four and a half months; in case a counterclaim is submitted, the maximum duration[12] increases to six months (cf. Brokamp, 2008: 24).

[12] The time frames for completion or rectification of forms as well as time limit extensions in order to safeguard the rights of the parties (Art. 14 (2) of the Regulation) are not included in this calculation.

1.5. Enforcement

Another major procedural simplification is generated by the direct enforceability of the judgment in other Member States. According to Art. 20 (1) of the Regulation, judgments given in the European Small Claims Procedure shall be recognized and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition. Also, those judgments shall be enforced under the same conditions as a judgment given in the Member State of enforcement. The enforcement procedures shall be governed by the law of the Member State of enforcement (Art. 21 (1) of the Regulation).

At the request of one of the parties, the court or tribunal issues a certificate concerning the judgment at no extra costs (Art. 20 (2) of the Regulation). The party seeking enforcement needs to produce a copy of the judgment as well as a copy of the certificate concerning the judgment. Where necessary, the certificate has to be translated into one of the official languages of the Member State of enforcement (Art. 21 (2) of the Regulation).

According to the aims of the Regulation, any refusal of the enforcement is strictly limited to cases in which the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country.[13] Also, the enforcement of the judgment can be refused only upon application by the person against whom enforcement is sought (Art. 22 (1) of the Regulation). In addition to that, any refusal requires that (Art. 22 (1) of the Regulation):

a. the earlier judgment involved the same cause of action and was between the same parties;
b. the earlier judgment was given in the Member State of enforcement or fulfills the conditions necessary for its recognition in the Member State of enforcement; and
c. the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State where the judgment in the European Small Claims Procedure was given.

Any review of the judgment as to its substance in the Member State of enforcement is inadmissible (Art. 22 (2) of the Regulation).

[13] Cf. recitals 8 and 30 of the Regulation.

2. The principles of public and oral proceedings

As stated above, critics have claimed that the written character of the European Small Claims Procedure may not match the requirements of the European Convention on Human Rights (hereinafter: Convention) and the Charter of Fundamental Rights of the European Union (hereinafter: Charter). Before being able to investigate this specific problem however, we need to take a closer look at the principles of public and oral proceedings according to Art. 6 (1) of the Convention and Art. 47 (2) of the Charter.

The Convention is a treaty between the Member States of the Council of Europe. It not only determines a catalogue of fundamental rights but also establishes institutions and procedures to enforce those rights. In Austria, the convention is raised to the status of constitutional law; therefore the provisions on fundamental rights are directly applicable (Öhlinger, 2009: p. 129–133a). The situation, however, varies in different states party to the Convention; in Germany for example, the Convention has the status of an ordinary statute (Meyer-Ladewig, 2011: Art. 6 p. 33). Within the European Union, the fundamental rights of the Convention are incorporated into the third pillar of the EU fundamental right protection system of Art. 6 (3) of the Treaty on European Union.[14] Thereby, they were transformed into general principles of European Union law (Streinz, 2012: 737). Additionally, the Charter was transformed into primary European Union law with the entry into force of the Lisbon Treaty on 1 December 2009. It therefore now represents the first pillar of the EU fundamental right protection system (Art. 6 (1) of the Treaty on European Union). As a consequence, the institutions and bodies of the European Union are obliged to directly apply the Charter as well as the Member States "when they are implementing European Union law" (Art. 51 (1) of the Charter; cf. Lenaerts, 2012: 3; Streinz, 2012: 732).

With regard to the European Small Claims Procedure, it is especially the procedural guarantees set up in Art. 6 of the Convention and Art. 47 of the Charter that are of particular importance. Art. 6 (1) of the Convention states, that *"in the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing […] by an independent and impartial tribunal […]"*. This implies not only procedural access to the proceedings for the parties and for other involved persons, but for society as a whole (Grabenwarter and Pabel, 2012: § 24 p. 73). Art. 6 (1) of the Convention thereby protects the parties from "secret justice" (Meyer-Ladewig, 2011: Art. 6 p. 183) and ensures the

[14] As soon as the European Union accedes to the Convention, it will represent the second pillar of the EU fundamental right protection system according to Art. 6 (2) of the Treaty on European Union; cf. Streinz, 2012: 745.

holding of a fair trial. In essence, Art. 47 (2) of the Charter grants the same procedural rights as Art. 6 (1) of the Convention, including the principle of public proceedings (Blanke, 2011: Art. 47 EU-GRCharta p. 16–17; Eser, 2011: Art. 47 p. 20). The principle of the public proceedings is (naturally) closely connected with the principle of oral proceedings, (Morscher and Christ, 2010: 272; Blanke, 2011: Art. 47 EU-GRCharta p. 16–17) since the public is generally excluded in any merely written procedure (Grabenwarter and Pabel, 2012: § 24 p. 73).

According to the European Court of Human Rights (ECtHR), the principles of public and oral proceedings must not, however, be seen as a "holy grail". Instead, in its opinion there are some (rare) circumstances, in which the omission of an oral hearing can be properly justified (Grabenwarter and Pabel, 2012: § 24 p. 90).This was approved:

- in exceptional circumstances, when for example the case raises no questions of fact or law, which cannot be adequately resolved on the basis of the case-file and the parties' written observations (e.g. in certain legal issues of social security);[15]
- in cases where the entitled party waived the right to an oral procedure (Brokamp, 2008: 124; Grabenwarter and Pabel, 2012: § 24 p. 91). If a procedure provides the right to apply for an oral hearing, the European Court of Human Rights interprets the omission of such an application as a conclusive waiver to that right.[16]

3. The compliance of the European Small Claims Procedure with Art. 6 (1) of the Convention and Art. 47 (2) of the Charter

With regard to the essentially written nature of the European Small Claims Procedure arises the (controversial[17]) question of its compliance with the principles of public and oral hearing laid down in Art. 6 (1) of the Convention and Art. 47 (2) of the Charter.

Obviously there are no complications in cases where the court or tribunal conducts an oral hearing *ex officio* (Art. 5 (1) of the Regulation) or upon the

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[15] ECtHR 12.11.2002, Case of Döry v. Sweden, No. 28394/95, p. 37-45; cf. Grabenwarter and Pabel, 2012: § 24 fn. 463.

[16] ECtHR 21.09.1993, Case of Zumtobel v. Austria, No. 12235/86, p 34.

[17] Rather opposed to a compliance Brokamp, 2008: 124–125; Hau, 2007: 96; *idem,* 2008: 1058; Jelinek, 2009: 72; Rechberger, 2009: 313; Schoibl, 2009: 337; Varga, 2010: Art. 5 EG-BagatellVO p. 3; approving a compliance Jahn, 2007: 2892; Kramer, 2008: 371; *eadem*, 2011: 124; Kropholler and von Hein, 2011: Art. 5 EuGFVO p. 3; unidecided Scheuer, 2010: Art. 5 EuBagatellVO p. 15–24.

initiative of a party, since they definitely comply with the requirements of the Convention and the Charter. The same applies to proceedings where nobody applied for an oral hearing. According to the European Court of Human Rights[18] (as stated above), the lack of application can be understood as a conclusive waiver of an oral hearing. In those cases, the omission of an oral hearing does therefore not infringe on the parties' right to a public and oral hearing.

The legal situation gets more sophisticated in cases though, where at least one of the parties applies for an oral hearing, but is turned down by the court or tribunal (Scheuer, 2010: Art. 5 EuBagatellVO p. 24). So far, this situation has not been brought to the European Court of Human Rights in the context of the European Small Claims Procedure. However, it is very doubtful that such an omission of an oral hearing can be justified with the mere reference to the general necessity of efficient proceedings (especially considering the large scope of the European Small Claims Procedure). This is all the more true, because oral proceedings could perfectly be conducted decisively faster and more reasonably than written proceedings (Jelinek, 2009: 72; Kropholler and von Hein, 2011: Art. 5 EuGFVO p. 1). Accordingly, the European Court of Human Rights so far has never tolerated civil proceedings that were carried out in a merely written way against the parties' will (Brokamp, 2008: 124).

Conducting the hearing or the taking of evidence through video conference or other communication technology (Art. 8 and Art. 9 (1) of the Regulation) cannot resolve the problem. A video conference might meet the requirements of an oral hearing, but the procedure is still not open to public.

Finally, one could argue that the rejection of an application for an oral hearing by the court might be legitimate, if only the claimant applied for the oral hearing. After all, the claimant deliberately chooses the (facultative) European Small Claims Procedure; this choice could be interpreted as a conclusive waiver of an oral hearing. The assumption of a conclusive waiver of a fundamental right by the sole choice of proceedings however, cannot be upheld in our opinion; especially if the possibility of filing a counterclaim is taken into account.

This means as a result, that even though the court or tribunal is authorized to reject an application for an oral hearing, it generally has to sustain such a motion due to a legal interpretation in conformity with European law. This view is sustained by the wording of Art. 5 (1) of the Regulation (*"if it considers that […] an oral hearing is obviously not necessary"*), confirming the exceptional

[18] ECtHR 21.09.1993, Case of Zumtobel v. Austria, No. 12235/86, p. 34.

character of any omission of an oral hearing (Kropholler and von Hein, 2011: Art. 5 EuGFVO p. 2). Only under exceptional circumstances (such as the ones that have been approved by the European Court of Human Rights[19]) can the rejection of an application for an oral hearing be in accordance with the principles of public and oral proceedings. However, the court or tribunal has to act within very sharp boundaries here. This means, that in our view, Art. 5 (1) of the Regulation is compatible with the requirements of Art. 6 (1) of the Convention and Art. 47 (2) of the Charter,[20] but has to be interpreted rather restrictively.

4. Conclusion

As of 1 January 2009, a claimant can choose the European Small Claims Procedure for cross-border enforcement of minor claims. With this came considerable simplifications of the proceedings, such as its emphasis on the written medium (mainly through the use of forms), simplifications in the taking of evidence, the liberty of representation and the abolition of the *exequatur* procedure.

Nevertheless, the European Small Claims Procedure has the potential to conflict with the fundamental right to a public and oral procedure laid down in Art. 6 (1) of the Convention and Art. 47 (2) of the Charter. Interpreting Art. 5 (1) of the Regulation in conformity with European law leads to the result that the rejection of an application for an oral hearing can only be legitimate under very exceptional circumstances.

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[19] Cf. above chapter 2.
[20] Also cf. the argumentation of the *Council of the European Union*, Opinion of the legal service, p. 12 and 13.

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