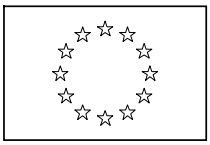

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.12.2002
COM(2002) 746 final

GREEN PAPER

ON A EUROPEAN ORDER FOR PAYMENT PROCEDURE AND ON MEASURES TO SIMPLIFY AND SPEED UP SMALL CLAIMS LITIGATION

TABLE OF CONTENTS

OBJECTIVE OF THE GREEN PAPER

This Green Paper launches a consultation with all interested parties on possible measures to be taken at Community level

- to create a European order for payment procedure, that is to say a specific speedy and cost-efficient procedure for claims that are presumed to remain uncontested available throughout all Member States, and

- to simplify and speed up small claims litigation, an area in which it is particularly essential to streamline proceedings and to limit their costs in order to prevent the pursuit of these claims from becoming economically unreasonable.

The paper is based on a comparative study of how Member States currently deal with the pertinent procedural issues. This presentation is intended to facilitate the identification of best practices that could serve as a source of inspiration for European instruments.

CONSULTATION ON THE GREEN PAPER WITH ALL INTERESTED PARTIES

Chapters 1, 2, 3 and 5 of the paper contain a number of questions on what the Commission sees as the most important issues to resolve in the assessment of possible initiatives on a European order for payment procedure on the one hand and on measures to speed up and simplify small claims litigation on the other. A summary of these questions is also listed at the end of the Green Paper. The Commission would appreciate to receive reasoned answers from all interested parties to these questions. Interested parties should of course not feel confined to these questions if other aspects of those subjects, included in the paper or not, give rise to comments they wish to make. Answers to the questions as well as any other comments should be sent before the 31 May 2003 to:

The European Commission
Directorate-General for Justice and Home Affairs, Unit A.3
B-1049 Brussels
Fax: +32 2 299.64.57

E-mail: jai-coop-jud-civil@cec.eu.int

To facilitate the handling of incoming answers and comments, interested parties who communicate them by several different means (e.g. by e-mail and in the paper form) are kindly requested to indicate, where appropriate, that the same document has already been sent to the Commission earlier on. Answers and comments may be made public on the Commission's website, unless the sender explicitly requests otherwise. In the spring of 2003 the Commission will assess the need for organising a public hearing to further debate the issues raised in the paper.

1. PART I : INTRODUCTION

The programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters[1] as the Commission's current working programme is, true to its name, primarily focused on facilitating the recognition and enforcement of judgments that were delivered in another Member State and not on the approximation or harmonization of procedural law. Nevertheless, the program recognizes that in some areas the abolition of intermediate measures that are still necessary to enable recognition and enforcement might coincide with the creation of a specific procedure laid down within the Community, either a uniform procedure laid down in a regulation or a harmonized procedure set up by each Member State pursuant to a directive.

In line with the conclusions of the Tampere European Council, the program of mutual recognition explicitly calls for the establishment of such common rules

- for a specific procedure for the speedy and efficient recovery of uncontested claims (European order for payment procedure) and

- for the simplification and acceleration of litigation on small claims.

Although small claims procedures and an order for payment procedure are two distinct areas of procedural law the questions raised by harmonization or the creation of a uniform European procedure are partly identical or overlapping. After all, these will be the first initiatives in the field of civil judicial co-operation directly concerning the rules that govern the procedure to obtain an enforceable decision.

The two major issues concerning the general approach to European legislation that both areas in question have in common (although the solutions need not necessarily be the same) are the following:

1.1. The applicability of a European instrument to cross-border cases only or to purely internal litigation as well

It is conceivable to devise rules that are exclusively applicable to litigation on small claims or to order for payment proceedings involving two parties who are domiciled in two different Member States and thus to envisage a European order for payment or small claims procedure for cross-border litigation only. On the other hand, the cross-border dimension of a case may become apparent only once the creditor proceeds to the stage of enforcement and realizes that enforcement has to be sought in another Member State because the debtor has moved to that State or only has assets worth seizing there. It could also be considered unsatisfactory to make a specific efficient European procedure available only for claims with an international dimension whilst plaintiffs in purely internal cases are possibly left with a burdensome ordinary civil procedural system that does not meet their justified needs. Beyond questions of practicability and equity, a marked disequilibrium with regard to the efficiency of the procedural means afforded to creditors from different Member States for the recovery of their claims, be they small or uncontested, could have a direct bearing on the proper functioning of the internal market. Such an impact would be arguable if litigants in the European Union did not have access to instruments of equal performance levels whereas equality of citizens and

[1] OJ 12, 15.01.2001, p.1.

business partners in an integrated area presupposes equal access to the weapons of law. It is plausible that a company operating in a Member State where the judicial system provides for a fast and effective enforcement of claims has a significant competitive advantage over a firm which does its business in a judicial environment where such effective judicial remedies are not available. Such differences may even have as a consequence that companies are deterred from exercising their rights of freedom of establishment in other Member States under the EC Treaty. Therefore the application of possible instruments on order for payment proceedings and on small claims could be deemed useful also in cases of purely internal litigation.

Question 1:

Should European instruments on order for payment proceedings and on small claims be applicable to cross-border cases only or to purely internal litigation as well ? Please comment on the benefits and disadvantages of a reduced or extended scope of application for both of these possible instruments

1.2. The choice of the appropriate instrument to pursue the approximation of procedural law

The repercussions of the choice of the legal instrument deemed suitable in order to pursue the approximation of procedural law are of considerable significance. A directive could be limited to the core principles and leave the Member States with some leeway to shape the procedure according to their individual needs. Yet, the obligation to adapt their legislation to the requirements of the directive would inevitably entail the replacement of the preceding national system. On the other hand, a regulation in its direct applicability allows the Member States no room for manoeuvre. But the introduction of a uniform European procedure does not necessarily supersede national legislation. Such a new European procedure could also be considered an additional option happily coexisting with the national method of dealing with small or uncontested claims.

How much uniformity is necessary, in line with the principle of subsidiarity, to achieve the desired gain in efficiency and user-friendliness? How much freedom and flexibility can the Member States be awarded without undermining the original purpose of facilitating equal and equally efficient access to justice?

It should also be recalled in that respect that the dividing line between uniform and harmonized procedures is not as clear-cut as it might appear. Even in the case of the adoption of a regulation all issues consciously not addressed by such instrument would remain open to and actually call for complementary national rules. It may well be imaginable, for example, to prefer a regulation as the appropriate instrument to guarantee full uniformity concerning the core principles of a European order for payment procedure whilst leaving less central matters open for possibly divergent rules devised by the Member States according to their individual needs. At the same time, a directive may appear to be the more suitable legislative device with regard to the fundamental elements of a small claims procedure. Either way, it is necessary to determine those crucial procedural aspects that warrant harmonization and have to be covered by a legislative instrument, be it a regulation or a directive. The remainder of this paper will be dedicated to the identification of these fundamental issues separately for a European order for payment procedure and for small claims.

Question 2:
What is the appropriate legislative instrument for order for payment proceedings and small claims, a regulation or a directive?

2. PART II : A EUROPEAN ORDER FOR PAYMENT PROCEDURE

2.1. INTRODUCTION

2.1.1. Access to efficient justice where debtors do not meet their obligations without any conceivable dispute over the justification, nature and extent of the claim at issue

It is an established fact of life that the main purpose of a substantial percentage of court proceedings in the Member States is not to obtain an authoritative impartial decision on contentious questions of fact or law. Rather, it is increasingly not the exception but the rule that in the verifiable absence of any dispute the creditor has to turn to the judiciary to attain an enforceable title allowing him to collect a claim by means of forced execution that the debtor is simply unwilling or unable to honour[2].

This situation implies a multi-faceted challenge for the Member States' judicial systems. It has become essential to distinguish the truly contentious cases at the earliest possible stage of the proceedings from those where no real legal dispute exists. Such a differentiation is a necessary, albeit not sufficient condition to make efficient use of the limited resources allocated to the courts. It enables them to concentrate on the controversial litigation and to adjudicate it within a reasonable period of time. This desired result can be achieved, however, only if a speedy and effective procedure for uncontested claims is available and produces the relief of the judiciary that is indispensable for the prevention of considerable backlogs. Thus, given the mere number of non-contentious cases referred to above, the existence of a procedural legislation that ensures their efficient adjudication is a determining factor for the performance of a judicial system as a whole.

The swift recovery of outstanding debts whose justification is not called into question is of paramount importance for the economic operators in the European Union. A legal framework that does not guarantee a creditor access to the rapid settlement of uncontested claims may afford bad debtors a certain degree of impunity and thus provide an incentive to withhold payments intentionally to their own advantage[3]. Late payments are a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized ones, and resulting in numerous job losses. The necessity to engage in lengthy, cumbersome and costly court proceedings even for the collection of uncontested debts inevitably exacerbates those detrimental economic effects.

---

2 In 2000 the Commission launched a study on specific procedures on small claims as available in the Member States. The questionnaire distributed to the Member States in that context also contained some question on uncontested claims. The answers of the Member States as summed up in a table in the final report by Evelyne Serverin, Directeur de recherche au CNRS IDHE-ENS CACHAN (*Des Procedures de traitement judiciares des demandes de faible importance ou non contestées dans les droits des Etats-Membres de l'Union Européenne*, Cachan 2001, p. 30) reveal that where comprehensive statistical data is available the percentage of uncontested claims ranges between around 50 % (Ireland) and more than 80 % (Germany, Austria, Sweden) out of all cases dealt with by ordinary lower civil courts.

3 Based on the results of a study conducted at the Commission's request in 1994 ('European Late Payment Survey' – Intrum Justitia), the Commission estimated the proportion of intentional payment delays throughout the European Union at 35 % in its Communication to the Council and the European parliament 'towards greater efficiency in obtaining and enforcing judgments in the European Union', OJ C 33, 31.1.1998, p. 3, para. 38.

2.2. Definition of an order for payment procedure

All the Member States try to tackle the issue of mass recovery of uncontested claims through their courts from their national perspectives within the framework of their procedural systems and traditions. Not surprisingly, the solutions that have been devised differ widely, both in their technical nature and in their success. In some Member States, judgments by default, special summary proceedings within the structure of ordinary civil procedure or even provisional measures that are quasi-definitive as in practice main proceedings hardly ever ensue[4] are the principal procedural instruments to cope with uncontested claims.

In several Member States, however, a specific payment order procedure has proven to be a particularly valuable tool to ensure the rapid and cost-effective collection of claims that are not the subject of a legal controversy. As of today, eleven Member States (Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, Portugal, Spain, Sweden) know such a procedure as an integral part of their civil procedural legislation[5], the French *injonction de payer* and the German *Mahnverfahren* being the most famous examples. In fact, the recent years have seen the new introduction of payment orders in two Member States (Spain, Portugal) that had not offered an enforceable title of that nature to their creditors before[6]. This development testifies to the growing appreciation of this type of procedure throughout the European Union.

The payment order procedures available in the Member States vary considerably with regard to such crucial aspects as the scope of application, the attribution of competence to issue an order or the formal and substantive requirements for obtaining a favourable decision. In spite of these discrepancies between the existing models of legislation that will be dealt with in more detail in this Green paper, all of them share the following distinctive features that can serve as elements of a definition of a payment order procedure:

Upon application by the plaintiff, the court or other competent authority takes a decision on the claim at issue *ex parte*, i.e. without any prior possibility for the defendant to participate. This decision is served on the defendant with an instruction to abide by the order or to contest the claim within a certain time limit. If the defendant fails to act either way, the payment order acquires enforceability. Only if he lodges opposition the case can be transferred to ordinary proceedings. Hence, as opposed to normal procedural rules the burden to initiate adversarial proceedings rests with the addressee of the payment order. This shift of responsibility, referred to in particularly lucid terms in French as '*inversion du contentieux*', combined with the protection of the rights of the defence as embodied in the opportunity to prevent an enforceable title from coming into being constitutes the core characteristic of the payment order procedure.

---

4 In the Netherlands, the unavailability of a speedy, simple and inexpensive debt collection procedure has stimulated an extesive use of provisional measures (*kort geding*) by the courts.

5 With the exception of Belgium where due to some structural defects (e.g. the payment order has to be preceded by a formal notice) the *procédure sommaire d'injonction de payer* procedure has turned out to be more cumbersome than ordinary civil proceedings and has, therefore, not met broad acceptance among legal practitioners

6 In Portugal the legislation on a payment order procedure adopted in 1993 has undergone a reform significantly improving its performance in 1998. In Spain, the *proceso monitorio* has been introduced in 1999.

2.3. The need for action at Community level

It appears to be rather self-evident that the duration and cost of ordinary civil proceedings that are inappropriate for claims where no legal dispute exists tend to grow even more disproportionate in cases with cross-border implications. The lack of knowledge of the legal systems of other Member States and the consequential need to consult a lawyer, the time-consuming service of court documents on parties in a Member State other than the one where the proceedings take place and the expenses related to translation are only the most conspicuous factors that complicate the lives of creditors of cross-border claims. These problems are inherent in every cross-border litigation irrespective of the contested or uncontested nature of a claim. Nevertheless, the contrast between a rapid recovery procedure available for purely internal lawsuits and the delays and expenses that ensue where parties are domiciled in different Member States reaches an intolerable extent if the justification of the claim at stake is not even challenged by the defendant. This situation privileges bad debtors in cross-border relations and may provide a disincentive for economic operators to extend their activities beyond their Member State of origin, thus limiting commercial transaction between Member States. Even the availability of an effective national procedure for the recovery of uncontested debts in every Member State, a far cry from the current situation[7], would not necessarily be a decisive improvement since the profound differences between such procedures and the lack of familiarity with them present significant obstacles to the settlement of cross-border cases in themselves. A harmonized European order for payment could go a long way towards improving easier access to efficient justice.

It also needs to be taken into consideration that cases with cross-border implications are by no means only those where the main proceedings involve parties from different Member States. A previously purely domestic case can acquire an international dimension because a judgment delivered in one Member State has to be enforced in another Member State, for example because the debtor has moved to that State or only has assets worth seizing there. The declaration of enforceability (*exequatur*) that is necessary to enable enforcement on the territory of another Member State than the one in which a judgment was delivered[8] is a source of delays and expenses, so much so that the Council and the Commission have established the abolition of such intermediate measures as one of their ultimate priorities in the programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters[9]. Providing the opportunity, subject to the rules of international jurisdiction, to obtain an enforceable title in the Member State where enforcement is sought through a harmonized payment order procedure would remove the need to cross a border for the purposes of enforcement altogether in a number of cases. Where enforcement in another Member State than the one where the decision was taken is inevitable the general introduction of a European order for payment could greatly facilitate the recognition and enforcement procedures or even render them obsolete[10]. The reservation of the right to refuse the

---

7 Even in those Member States where payment order procedures exist, these are often (in Austria, Belgium, Italy and Luxembourg) not applicable if the defendant is domiciled abroad.

8 The exequatur procedure, originally laid down in Articles 31 et seq. of the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters (consolidated version OJ C 27, 26.1.1998, p. 1), has been modified and is now governed by Articles 38 et seq. of Council Regulation (EC) No 44/2001 of 22 December 2000, OJ L 12, p. 1, which has entered into force on 1 March 2002.

9 OJ C 12, 15.1.2001, p.1

10 This position, has already been set out in the Commission communication to the Council and the European Parliament 'towards greater efficiency in obtaining and enforcing judgments in the European Union', OJ C 33, 31.1.1998, p.3

enforcement of a foreign judgment is to a large extent the consequence of the diversity of national legislation and the lack of knowledge of foreign rules, especially as regards their compatibility with the requirements that are implied in the list of grounds for refusal or revocation of exequatur[11]. As far as judgments by default are concerned – and an order for payment is a judgment by default in that it acquires enforceability only if the defendant remains passive and fails to contest[12] – this reasoning applies in particular to the sensitive issue of the proper observance of the rights of the defence that are enshrined in Article 34 (2) of Council Regulation (EC) No 44/2001. If a European payment order procedure contained uniform common rules including those safeguarding the rights of the defence the complete disappearance of intermediate measures for the purposes of recognition and enforcement would appear to be within reach[13].

It is open to discussion if a European order for payment procedure should be exclusively applicable to cross-border litigation. In addition to the general reflections on this issue for the purposes of the different subject matters of this Green Paper[14] the following thoughts could be taken into consideration. In the light of the fact that an order for payment procedure is, in the essence, a method for the mass collection of debts that are undisputed and that is operated through the courts because they have a monopoly on the delivery of enforceable titles it could be considered reasonable to regard a situation implying a marked disequilibrium with regard to the efficiency of the procedural means afforded to creditors in different Member States as amounting to a distortion of competition within the internal market[15]. The creation of a European *o*rder for payment could represent an endeavour of harmonization in compliance with the principle of subsidiarity as this type of procedure is not inextricably interrelated with the other rules governing civil procedure but rather a chapter apart. It is the end of the payment order procedure caused by the defendant's opposition that triggers the possible transfer to ordinary civil proceedings. Hence, the introduction of a European order for payment would not entail the need for further approximation of national procedural legislation.

In the light of the foregoing remarks and in order to enable the Commission to better assess the extent of the need for action at Community level as well as the nature of the action needed, it is one of the purposes of this Green paper to gather more information on the functioning of the procedural rules for the recovery of uncontested claims, be it an order for payment procedure or another procedure, in the Member States. Analyzing the statutory framework in place does not in itself allow drawing the right conclusions as to the performance of a specific procedure in its day-to-day use. The greater the divergence of acceptance and success of methods intended to simplify and accelerate the attainment of an

---

11 Article 45 (1) read together with Articles 34 and 35 of Council Regulation (EC) No 44/2001

12 The European Court of Justice has scrutinized the compliance of orders for payment with Article 27 (2) of the 1968 Brussels Convention which applies to judgments given in default of appearance in *Hengst Import BV v. Campese (C-474/93), 13.7.1995, ECR 1995 I-2113* (Italian *procedimento d'ingiunzione*) and in *Klomps v. Michel (C-166/80), 16.6.1981, ECR 1981, 1593* (German Mahnverfahren).

13 The inevitable risk of the misconstruction or misapplication of those rules in individual cases does not constitute an obstacle in that respect since mistakes of that nature do not bar the enforceability of a judgment in a purely domestic setting unless the judgment itself is challenged by the losing party.

14 *Supra* 1.1

15 According to the Commission communication to the Council and the European Parliament 'towards greater efficiency in obtaining and enforcing judgments in the European Union', OJ C 33, 31.1.1998, p. 3, para. 38 the study 'European Payment Habits Survey'- Intrum Justitia (see *supra*, footnote 3) has demonstrated that the proportion of intentional payment delays is substantially below the Union-wide average of 35% in Member States where judgments can be obtained and enforced more quickly, more cheaply and more efficiently.

enforceable decision on a claim that turns out to be uncontested, the bigger the disequilibrium outlined above and the more urgent the need for approximation throughout the Community.

Question 3:

Which problems, if any, have arisen in the application of the order for payment procedure or another procedure for the recovery of uncontested claims available in your Member State? Please indicate the level of acceptance and success of these procedures in practice. Are these procedures also available in cross-border cases where either the plaintiff or the defendant is domiciled in another Member State? If yes, which problems, if any, have occurred in the application? If no, how are uncontested claims in a cross-border situation to be adjudicated?

2.4. BACKGROUND

2.4.1. Initiatives aiming at the creation of a European order for payment procedure prior to the entry into force of the Treaty of Amsterdam

2.4.1.1.Storme Proposal

In 1993, a working group of experts on procedural law, presided by Professor *Marcel Storme*, presented to the Commission a draft proposal for a Directive on the approximation of laws and rules of the Member States concerning certain aspects of the procedure for civil litigation (the so-called *Storme Proposal*)[16]. This first comprehensive attempt at addressing the most fundamental features of civil procedure[17], clearly based on an internal market rationale[18], comprises a section setting up detailed rules of an order for payment procedure, thus recognizing the particular importance of harmonization in that area[19]. Although this proposal was never converted into a legislative initiative of the Commission, it is a valuable point of reference and source of inspiration.

2.4.1.2.Late payment Directive

In 1998, the Commission presented the Proposal for a European Parliament and Council Directive combating late payment in commercial transactions[20]. Based on the reasoning that the consequences of late payment, such as a deterring interest to be collected by the creditor after expiry of the due date, can be dissuasive only if they are accompanied by redress procedures which are rapid, effective and inexpensive[21] the draft, in its Article 5, contained a provision obliging Member States to ensure the availability of an accelerated debt recovery

---

16 The text was published in 1995, *Storme (ed.), Rapprochement du droit judiciaire de l'Union Européenne – Approximation of judiciary law in the European Union, Dordrecht/Boston/London.*

17 It is worth mentioning that prior to this proposal the Council of Europe had suggested in its Recommendation No R (81) 7 On Measures Facilitating Access to Justice of 14.5.1981 that "*provisions should be made for undisputed or established liquidated claims to ensure that in these matters a final decision is obtained quickly without unnecessary formality, appearances before the court or costs*".

18 The introductory report by *Prof. Marcel Storme* deals extensively with the necessity of harmonizing civil procedural law following from the creation of an internal market both from an economic point of view and with regard to the legal basis of Community legislation in this field.

19 The working group originally intended to draft a complete European model code of civil procedure. The final proposal is, however, characterized by a marked difference between some areas (such as the order for payment) that are dealt with in detail and where a harmonized common procedure is suggested and others limited to the setting up of general principles or minimum standards.

20 COM (98) 126 final, OJ C 168, 3.6.1998, p. 13.

21 Recital 14 of the proposal which became recital 20 of the Directive.

procedure for undisputed debts and outlining some essential minimum characteristics of that procedure. Although the term 'order for payment' was not mentioned in the text it is probably safe to assume that a procedure along these lines was what the drafters of the proposal primarily had in mind[22]. The Directive that was finally adopted on 29 June 2000[23] based on Article 95 of the Treaty establishing the European Community took a more cautious approach. Instead of the introduction of a (potentially new) specific procedure Article 5 requires the Member States to ensure the possibility of obtaining an enforceable tile within a period of 90 days in conformity with their respective national legislation[24]. It remains to be seen if the transposition of Article 5 will entail noticeable changes in the Member States' procedural systems[25]. At any rate, this provision has to be considered a careful first stage, not the final step of the process towards the establishment of an efficient European recovery procedure for uncontested claims.

2.5. The Amsterdam Treaty and its ramifications

The entry into force of the Treaty of Amsterdam entailed the transfer of judicial co-operation in civil matters from the third pillar (Article K.1 (6) TEU) to the first pillar. According to Articles 61 (c) and 65 of the Treaty establishing the European Community, the Community adopts measures in the field of judicial co-operation in civil matters having cross-border implications and insofar as necessary for the proper functioning of the internal market. Pursuant to Article 65 (c) these measures include the elimination of obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

This new Community competence gave a fresh impetus to the discussion of farther-reaching approximation of procedural legislation including the field of uncontested claims[26].

---

22 The explanatory memorandum of the proposal explicitly referred to the French *injonction de payer* and to the German *Mahnverfahren*.

23 Directive 2000/35/EC, OJ L 200, 8.8.2000, p. 35. The time limit for transposition expired on 8 August 2002.

24 Article 5 ('*Recovery procedure for unchallenged claims*') reads:
"*1. Member States shall ensure that an enforceable title can be obtained, irrespective of the amount of the debt, normally within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority, provided that the debt or aspects of the procedure are not disputed. This duty shall be carried out by Member States in conformity with their respective national legislation, regulations and administrative provisions.*
2. The respective national legislation, regulations and administrative procedures shall apply the same conditions for all creditors who are established in the European Community.
3. The 90 calendar day period shall not include the following:
(a) periods for service of documents
(b) any delays caused by the creditor, such as periods devoted to correcting applications.
4. This Article shall be without prejudice to the provisions of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters."
Recital 23 specifically points out that Member States are not required to adopt a specific procedure or to amend their existing legal procedures in a specific way.

25 It appears to be not improbable that most if not all Member States will claim that their procedural legislation already meets these conditions. In that respect, much hinges on the interpretation of the term "normally". Does it take into account only the legal framework or also the empirical facts of the courts' factual efficiency in practice?

26 This is not to say, however, that Articles 61 (c) and 65 are the only possible legal basis for a European order for payment procedure.

2.6. The Tampere Conclusions

The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial co-operation to be established within the Union. Under the heading "Greater convergence in civil law" it invited the Council and Commission to prepare new procedural legislation in cross-border cases, in particular on those elements that are instrumental to smooth judicial co-operation and to enhanced access to law. Orders for payment were explicitly mentioned as featuring among those crucial issues[27].

The European Council asked the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition including the commencement of work on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary to facilitate the application of the principle of mutual recognition.

2.7. The programme of mutual recognition

The joint programme of the Commission and the Council of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted by the Council on 30 November 2000 singled out the abolition of exequatur for uncontested claims as one of the Community's priorities. Pointing to a contradiction in terms in the delay of enforcement of judgments concerning claims that have not been challenged by the debtor caused by an exequatur procedure, the programme designated this area as the first one in which exequatur should be abolished as rapid recovery of outstanding debts is an absolute necessity for business and a constant concern for the economic sectors whose interest lies in the proper operation of the internal market[28].

As already pointed out earlier, the programme of mutual recognition is clearly focused on facilitating the recognition and enforcement of judgments that were delivered in another Member State. It is not a program of harmonization of national procedural law. Approximation of procedural legislation taking the form of setting minimum standards or harmonization is envisaged not as an objective in itself but as an accompanying measure that may, in some areas, be a precondition for the desired progress in attempting to gradually dispense with any exequatur procedure[29]. In the same document, it is underscored that in some areas abolition of exequatur might take the form of establishing a true European enforcement order, obtained following a specific, uniform or harmonised procedure laid down within the Community[30]. It has to be emphasized that the abolition of exequatur and the harmonization of procedural law are two distinct issues. The former presupposes the delivery of a decision and concerns the access to enforcement where a border has to be crossed for the purposes of enforcement whereas the latter relates to the efficient access to justice in order to obtain a decision regardless of whether or not this decision has to be enforced abroad. In spite of the interrelation between these matters as just outlined above it is important to bear in mind

---

27 Presidency Conclusions point 38.

28 OJ C 12, 15.1.2001, p. 1, section I B 3.

29 It is illustrative in that respect that the programme deals with issues suitable for harmonization or the setting of minimum standards under the heading of '*measures ancillary to mutual recognition*'.

30 Section II A 2 b of the Programme. Although no mention of an order for payment procedure (nor any other specific procedure) is made in this section the later proposal of a European enforcement order for uncontested claims at the first stage of the implementation in section III A proves that harmonization along these lines has been envisaged particularly for the recovery of uncontested claims.

their separate nature and the fact that both of them can be addressed independently and on their own merits. Suffice it to recall here that the abolition of exequatur is of no relevance to a creditor who, in a cross-border case, has to sue a defendant in another Member State where an efficient procedure for the collection of uncontested debts is not available. Vice versa, the use of such a procedure leading to a decision issued in the State in which the defendant is domiciled will, in the vast majority of cases, remove the need to enforce this decision in a third Member State. On the other hand, there will always be judgments or other enforceable titles on uncontested claims (court settlements, authentic instruments) including those obtained through non-harmonized procedures that have to be enforced in a Member State other than that of their origin.

2.8. The European Enforcement Order for uncontested claims as the first layer of a two-tiered approach

Taking into consideration the above-mentioned circumstances, the Commission has chosen a two-tiered strategy aiming both at

- the abolition of exequatur on the condition of the observance of certain minimum standards for all enforceable titles on uncontested claims regardless of the nature of the proceedings that have led to the decision or enforceable document

and

- the creation of a specific harmonized procedure for the recovery of debts that are presumed to remain uncontested, namely the European order for payment,

albeit not simultaneously in the same legislative instrument. This approach allows swift progress in dispensing with exequatur for all situations that are characterized by the verifiable absence of any dispute over nature and extent of a debt (not only orders for payment) while carefully preparing the establishment of a harmonized order for payment procedure.

In April 2002, the Commission has adopted the proposal for a Council Regulation creating a European Enforcement Order for uncontested claims[31]. This legislative initiative constitutes the first stage of the two-step strategy and provides for the abolition of exequatur for all enforceable titles on uncontested claims, its scope of application not being limited to decisions resulting from a specific procedure. The elimination of intermediate measures is conditional upon the compliance with a number of minimum procedural standards regarding the service of documents covering the methods of service, the time period between service and the judgment enabling the preparation of a defence and the proper information of the defendant. Only the conformity with these requirements which is certified by the court of origin justifies the elimination of a control of the observance of the rights of the defence in the Member State in which the judgment is to be enforced. This system of certification by means of completing multilingual standard forms is intended to provide a tangible benefit for creditors who gain access to speedy and efficient enforcement abroad without the involvement of the judiciary of the Member State where enforcement is sought and the ensuing delays and expenses.

---

31 COM (2002) 159 final.

2.9. A Green Paper as the second leg of this approach

The present Green Paper represents the second leg of this strategy and has to be seen in the context of the Commission's policy of tackling the issues raised by the programme of mutual recognition with regard to uncontested claims as a whole.

It should follow quite logically from the above considerations relating to the implementation of the programme of mutual recognition and from the general reflections concerning the rationale for a European order for payment[32] that the purposes of procedural harmonization pursued in this Green Paper and of facilitated recognition and enforcement are neither mutually exclusive nor contradictory or even overlapping. Rather, the two Commission initiatives are complementary to one another. The existence of a European order for payment procedure would not only create a level playing field for creditors and debtors throughout the Member States in terms of affording them equal access to justice. It could also bring about further progress in the field of recognition and enforcement by rendering superfluous even the requirement of certification envisaged under the proposal for a European Enforcement Order.

---

32 Supra 2.3.

3. THE EUROPEAN ORDER FOR PAYMENT

3.1. The general approach

It is the purpose of this paper to launch a broad consultation on possible ways towards the creation of a specific uniform or harmonized European order for payment procedure. To that end, the rules that could govern such a procedure will be addressed individually, as far as possible in their chronological order in the course of the proceedings. Each issue will be presented based on an initial concise summary of the pertinent legislation in the Member States. This survey should serve as an inspiration for discussion in order to identify the best practices existing in the European Union – or new innovative solutions wherever appropriate - and translate the result of this analysis into a new Union-wide order for payment that offers a value added for the European citizens.

The isolated examination of the detailed characteristics of an order for payment procedure, one by one, would, however, be incomplete and insufficient if it stood alone as it would necessarily lose sight of the big picture, that is to say of the goal to construct a procedure the individual parts of which fit together in a harmonious way and form a well-balanced whole. Therefore, before turning to the particulars a brief overview will be given of the different "families" of order for payment procedures in Europe, thus offering an insight into the procedural features that are typically combine by the various national systems. When dealing with the single aspects of the procedure the possible interrelationship between them has to be taken into consideration. It will be a crucial choice to either follow one of the leading models or create something new matching up elements of divergent existing patterns and possibly innovative features.

3.1.1. Summary overview of the different models that exist in the MS

Roughly speaking, one can distinguish between two types of order for payment procedures in Europe. In spite of deviations in minor details the legislation of all Member States that do know an order for payment can be grouped into one of those two categories.

The key defining feature of what could be called the "evidence" model (Belgium, France, Greece, Luxembourg, Italy, Spain) is the requirement for the plaintiff to produce a piece of written evidence which proves the justification of the claim at stake. Without such documentary proof an application for an order for payment is considered inadmissible. This condition provides a safeguard against frivolous demands. It has to be seen in the context of a system that allows the delivery of an order for payment only after a summary examination of the merits of the case by a judge. It is at the stage of this test that the documentary proof plays its pivotal role. Does such written evidence exist and does it support the claim sufficiently to justify the judge's decision to issue an order for payment? The necessary assessment of these questions by the judge constitutes a means of protection of the defendant even at the *ex parte* stage of the proceedings when he has no opportunity to pronounce on the justification of the demand himself. Claims that are unfounded even based exclusively on the information supplied by the plaintiff or that cannot be supported by any written proof are to be filtered out very early in the proceedings by the judge himself. If an order for payment is issued, however, it bears the stamp of having passed a certain test of reasonableness. In most Member States that belong to the "evidence" family (France, Greece, Italy, Spain) the defendant only has one shot to object to the claim. Once the deadline for opposition has passed the order for payment immediately acquires the force of *res iudicata* and no further appeal lies against it.

The "no-evidence" order for payment procedure, however, that Austria, Finland, Germany, Sweden and Portugal adhere to is characterized by the complete absence of any examination by the court relating to the merits of the claim at issue. Whenever an application is admissible and satisfies the basic formal requirements the court issues an order for payment without any further assessment of the well-founded nature of the demand[33]. Where the "evidence" school apparently considers some minimum protection of the defendant by the court indispensable the "no-evidence" model puts its main emphasis on the responsibility of the defendant himself. In a certain sense, this is the pure implementation of the principle of the "*inversion du contentieux*" as the fate of the case fully depends on the reaction (or non-reaction) of the defendant without further interference by the court. If the defendant has the possibility of preventing an enforceable decision by simply saying "no", by opposing to the claim, no further safeguard is deemed necessary. The other main differences are the logical consequence of that different philosophical approach. If no examination takes places, there is obviously no need for documentary proof of the claim valid only as a tool to enable such control. Furthermore, if the claim is not assessed by the court and the whole procedure thus approaches a rather administrative nature[34] it does not appear to be necessary to involve a judge; consequently, in all Member States belonging to this group the power to deliver an order for payment is delegated either to clerks of the court or, as in Sweden, to the enforcement authorities, administrative bodies outside the sphere of the judiciary. Interestingly enough, in most Member States falling within that category the lack of protection through a court assessment of the merits of the claim is somewhat counterbalanced by awarding the defendant two opportunities to object instead of one. In Finland, Germany and Sweden, in the absence of opposition within the time limit a second (and enforceable) decision is rendered which is not final but can be challenged by the defendant within yet another time limit. Only if the defendant lets this second chance pass by the order for payment becomes *res iudicata*.

Having said that, however, it is important to point out that two Member States have departed from this pattern in their legislation. Both Austria and Portugal have subscribed to the "no-evidence" model but for even greater efficiency they have chosen a one-step procedure. Once the defendant has missed his one and only option to object, no further decision subject to opposition or appeal has to be taken; rather, the order for payment becomes final right away.

The Austrian and Portuguese examples illustrate the possibility of picking and matching the most performing elements from both existing classic models of order for payment procedures. The Austrian Mahnverfahren combines the simplicity of the "no-evidence" model (no documentary proof, no examination of the claim, no involvement of a judge) with the severe restriction of possibilities to appeal inspired by the "evidence" system and enables a creditor to obtain a decision that is not only enforceable but carries the full effect of res iudicata in just a little more than two weeks[35]. Is this hybrid an inspiration for a solution at the European level?[36] Or should one stick to one of the standard systems as described above? Can the

---

33 Note has to be taken of the fact, though, that in Austria recently adopted new legislation prescribes a summary assessment of the merits of the claim by the court; for further detail infra 3.3.5.

34 The use of the term "administrative" refers to the lack of the evaluation of the well-founded nature of the claim. It should not be misunderstood as calling into question the judicial nature of the procedure as such. Only Sweden has gone so far as to entrust an administrative body with the conduct of order for payment proceedings.

35 It has to be added, however, that the time limit for opposition of currently 14 days will be doubled to 4 weeks as from 1 January 2003; infra 3.3.9.1.

36 It should be noted in that respect that both Austria and Portugal limit the scope of application of their order for payment scheme by a ceiling amount. This could be understood as a precautionary measure to avoid intolerable results of a new ultra-efficient procedure.

cultural gap between the "evidence" and the "no-evidence" traditions be bridged and if so how? How much responsibility can be left to the defendant? Is there a minimum standard of protection of the defendant by the courts against the pursuit of unfounded demands through orders for payment?

The following discussion of possible strategies to deal with every single detail of an order for payment procedure has to be seen in the light of these all-encompassing questions. The solutions found by different Member States cannot and should not be analyzed out of the context of the general approach they have chosen. And every possible proposal for a European order for payment needs to establish its own balance given the complicated interplay between different procedural aspects. In the following, special mention will be made of the implications of certain options for the character of the procedure as a whole wherever deemed appropriate.

3.2. Scope of application of the instrument

3.2.1. Restriction to pecuniary claims?

Whilst in most Member States (Austria, Belgium, Germany, Greece, Luxembourg, Portugal, Spain) the scope of application of a specific procedure for the acquisition of an enforceable decision that is based on the presumption that the claim will remain uncontested and implies the "*inversion du contentieux*" is limited to pecuniary claims for a specific amount. France, Finland, Italy and Sweden make it available for other obligations as well. In these Member States, the sphere of an order for payment or "*injonction de payer*" is transcended and an "*injonction de faire*" can be obtained. The range of demands that are eligible varies but typically includes the delivery or restitution of movable property and eviction[37].

When considering the question whether or not non-pecuniary claims should be covered by a harmonized European procedure it needs to be borne in mind that, given the overwhelming predominance of claims for payment in civil litigation, compared to an order for payment an order for performance will be of relatively little practical relevance[38]. Besides, by definition such obligations are less amenable to standardization such as the use of forms and of data processing since the claim itself (and the wording of an enforceable decision) always requires a precise description that is much harder to come by than the mere expression of a pecuniary demand in Euros and Cents (or other currencies).

Question 4:

Should a European order for payment procedure be limited to pecuniary claims? If not, which types of non-pecuniary claims should be included?

---

37 In Italy, according to Article 639 c.p.c. claims referring to a specified quantity of fungible goods or to the restitution of a specific movable object are admissible. The Swedish procedure for "ordinary assistance" (*handräckning*) is available for eviction, the surrender of movable property, the performance of a duty to deliver, the removal of property, the performance of an employment contract and the implementation of prohibition or provision of access to land or premises. In France, pursuant to Article 1425-1 N.C.P.C. an *injonction de faire* is available for every non-monetary obligation based on a contract if not all the parties to the contract are merchants.

38 In that respect it is important to take note of the fact that in France the *injonction de faire* procedure has enjoyed very little success and its abolition has been recommended in a reform proposal by the President of the *Tribunal de Grande Instance de Paris*.

3.2.2. Should the procedure be available for certain types of claims only or should certain types of claims be excluded from the procedure?

Within the field of pecuniary claims, several Member States (Austria, Belgium, Greece, Italy, Spain, Sweden[39]) do not limit the order of payment procedure with respect to the nature or legal basis of the claim at issue. Among the other Member States, two different approaches of reducing the scope of application of this procedure can be observed. France and Portugal allow an order for payment only for claims resulting from *contractual obligations* and thus exclude matters relating to delict[40]. Instead of defining the claims that are eligible for an order for payment Germany, Finland and Luxembourg prohibit the delivery of such a decision in certain well-defined cases[41].

It has to be underscored, however, that the differences outlined above are not as manifest as they might appear at first sight. It is of particular relevance in that context to bear in mind that many Member States make an order for payment conditional on the production of a documentary proof of the claim. This requirement will hardly ever be met for claims that are based on tortious liability. In practice, therefore, the discrepancy between an order for payment available for contractual claims only on the one hand or for all types of claims but only upon presentation of written proof (as in Belgium, Greece, Italy and Spain) will be rather marginal.

It will have to be carefully analyzed if and to what extent the scope of application of a European *injonction de payer* needs to be confined to certain types of claims and if so by which method such restriction should be achieved. It goes without saying that the admission of all (pecuniary) claims would be the clearest solution as every restriction would inevitably give rise to interpretative difficulties concerning the distinction between eligible and ineligible claims[42] and necessitate an examination by the court or competent authority before issuing the order. Any such limitation would appear to be justified only in case of a compelling need to exclude certain subject matters from the scope of application of the procedure. For example, a typical structural weakness of defendants in specific areas may be assessed as jeopardizing the adequate protection of the rights of the defence in spite of the possibility to contest the claim and thus prevent an enforceable decision from coming into being.

Question 5:

Should a European order for payment procedure be available for claims relating to certain areas of civil and commercial law only or should certain types of claims be excluded? In either case please indicate the categories of claims that should be included or excluded

---

39 The requirement of an obligation that is unconditional and has fallen due is considered self-evident and not a limitation as covered by this section of the Green Paper.

40 In France, in addition to contractual obligations Article 1405 N.C.P.C. permits an *injonction de payer* for certain statutory obligations such as contributions to the pension scheme.

41 In Luxembourg, an order for payment is not admissible for claims resulting from real estate tenancy, labour and apprenticeship contracts. In Germany, the restriction is much more limited and covers only consumer credits if the interest rate goes beyond the threshold established in § 688 (II) (1) ZPO. In Finland, the procedure is not available in matters where an out-of-court settlement between the parties is not permitted.

42 For example, claims for damages that have arisen from a precontractual relationship (*culpa in contrahendo*) are considered as being of a contractual nature in some Member States (e.g. Germany) and as a matter relating to delict in others (e.g. France).

3.2.3. Ceiling for the amount that can be claimed? (or – if non-pecuniary claims are included – for the value of the claim)

The availability of an order for payment procedure can be restricted not only by the definition of the nature of admissible claims but also by introducing a ceiling as to the amount that can be claimed (or if non-pecuniary claims are to be included to the value of such claims). Some Member States (Austria, Belgium, Portugal, Spain) only offer an order for payment up to a maximum amount[43] whereas the others (Finland, France, Germany, Greece, Italy, Luxembourg and Sweden) refrain from any such limitation[44].

As the order for payment procedure is designed to enable the efficient and inexpensive settlement not of small claims but of uncontested claims and as the uncontested nature of a claim is by no means linked to the magnitude of the amount involved the justification of any such constraint of access can only conceivably be found in the protection of the defendant against the peril of irreparable harm in the case of the enforcement of a decision that is later overruled[45]. This reasoning appears to hold up, however, only if the ordinary proceedings that the plaintiff has to resort to actually offer a higher degree of protection to the passive defendant than the order for payment procedure. That is doubtful since almost all Member States allow the delivery of a judgment by default if the defendant does not enter an appearance at a court hearing irrespective of the value of the claim at stake and without intensified scrutiny of the justification of the claim as compared to the order for payment procedure[46]. Interestingly enough, the comparative analysis of the Member States' order for payment legislation reveals no clear correlation between unrestricted access to such procedure and an increased protection of the defendant's rights. In fact, most of the Member States with the exception of Austria that do not require documentary proof or an examination of the well-founded nature of the claim and empower officials other than judges to issue the decision (Germany, Sweden, Finland) do not provide a ceiling for the access to an order for payment. Possibly, in Portugal and Spain the limitation of the amount that can be claimed can partly be explained by the novelty of an order for payment to the procedural systems of those Member States and a resulting caution[47].

---

43 The sums that constitute the ceiling vary considerably between these Member States. They are approximately EUR 1850 in Belgium, EUR 3750 in Portugal and EUR 30.000 in Spain. In Austria new legislation has recently been adopted pursuant to which the ceiling amount will be raised from EUR 10.000 to EUR 30.000 as from 1 January 2003.

44 In Luxembourg, two different procedures (*ordonnance conditionelle de paiement* and *provision sur requête*) are available depending on the amount that is claimed. The *provision sur requête* that is applicable for claims of more than € 10.000 has only been introduced in 1997 and is largely inspired by the rules governing the *ordonnance conditionelle de paiement* but differs from it in that it is essentially a provisional measure and cannot acquire the status of *res iudicata*.

45 The Austrian ceiling is based on the intention to prevent the danger of annihilation of the defendant's existence. In the recent debate on the increase of the ceiling amount the relationship between the value of a claim and the probability of its contested nature also played a considerable role. This criterion has to be seen in the light of the fact that the use of the order for payment procedure is obligatory in Austria (infra 3.2.4). In all other Member States it is the plaintiff's decision to opt for this procedure if he deems it sufficiently likely that the defendant will not oppose the claim.

46 It has to be taken into consideration, nonetheless, that generally speaking a judgment by default can be ordinarily appealed against whereas in several Member States an order for payment cannot (infra 3.3.11.2).

47 It is also worthy of note that in Austria and Portugal the ceiling has been raised considerably in the recent past and that a further move upward has just been adopted (Austria) or is currently being discussed.

As a result of the above reflections, the question arises if and for which reasons a limitation of the amount that can be claimed in an order for payment procedure is considered necessary (and what that limit should be) or if the procedure should be available regardless of the value of the claim.

Question 6:

Should a European order for payment procedure be available only for claims up to a certain value? If so what should be that ceiling value?

3.2.4. Should the use of the instrument be obligatory?

With the sole exception of Austria, all the Member States that know an order for payment provide this procedure as an optional method for the recovery of the claim that will generally be chosen by the creditor only if he has reason to believe that the justification of his demand will not be disputed. In Austria, the *Mahnverfahren* is obligatory and does not depend on an application by the plaintiff. Whilst this nature of the order for payment procedure as a mandatory first step of all proceedings dealing with pecuniary claims below the ceiling established by Austrian law can be explained by the specific circumstances in that Member State[48], it remains to be seen if this reasoning is considered appropriate at the European level. Contrary to its original purpose, an obligatory order for payment procedure may well cause additional delays if the parties have to go through the motions although it is clear from the very outset that the defendant will contest[49].

Question 7:

Should the use of a European order for payment procedure be obligatory or optional only if the creditor believes that the claim will remain uncontested?

3.3. The rules governing the procedure

3.3.1. International jurisdiction in cross-border cases -Forum of the defendant's domicile?

If the plaintiff and the defendant are domiciled in two different Member States, international jurisdiction is governed by the rules of Council Regulation (EC) No 44/2001. Under those provisions, as a general rule defendants are to be sued in the courts of the Member State in which they are domiciled (Article 2 (1)). The Regulation contains a considerable number of exceptions, however, either affording the plaintiff the option of an additional forum other than that of the defendant's domicile or even providing for exclusive jurisdiction irrespective of the defendant's domicile.

---

48 Prior to the reform of the *Mahnverfahren* in 1983 the opposition by the defendant simply invalidated the order for payment. To further pursue the claim, the creditor was obliged to file a new lawsuit following the rules on ordinary proceedings which was considered as being overly cumbersome and sharply limited the general acceptance of this procedure. The introduction of an obligatory order for payment procedure which is automatically continued as an ordinary procedure if the claim is contested is apparently perceived as a satisfying solution to this problem. Nevertheless, the obligatory initiation of proceedings by means of application for a payment order does not appear to be a necessary prerequisite for a smooth transfer to ordinary proceedings if the defendant contests the claim.

49 Austrian authorities claim, however, that the obligatory nature of the order for payment procedure does not entail any delays because the time-limit for contesting the claim simultaneously serves the purpose of preparing the defence and therefore contributes to a speedier handling of the case in the ordinary procedure.

It appears to be worthwhile to consider if a legislative instrument on a European order for payment should contain special provisions on international jurisdiction taking precedence over Council Regulation (EC) No 44/2001. It could be discussed for this type of procedure to attribute exclusive competence to the courts of the Member State in which the defendant is domiciled. This would deprive the plaintiff of the convenience of being able to sue the defendant in his own Member State of domicile or at least in the Member State that is (exclusively) competent for the main ordinary proceedings in the case of opposition in some instances. As a consequence, if the defendant objects to the claim litigation may have to be transferred to another Member State for the contentious proceedings since any special rule for the *injonction de payer* procedure should be without prejudice to the rules on jurisdiction as far as the ordinary procedure is concerned. This transfer could present considerable procedural difficulties. Nevertheless, these possible disadvantages in a limited number of cases could be offset by the legal certainty resulting from a simple and clear rule on international jurisdiction. Such a provision could also contribute to the guarantee of the rights of the defence. In particular, by enabling an order for payment procedure only in the Member State in which the defendant is domiciled it would ensure that no border has to be crossed for the purpose of serving the order for payment on the defendant. Given the crucial importance of the service of that document for the rights of the defence[50] potential complications and delays of cross-border service could be avoided and thus the speed and efficiency of the procedure be enhanced. At any rate, it needs to be carefully analyzed if the potential advantages of a jurisdictional rule to that effect really warrant a deviation from the well-balanced system of international jurisdiction established by Council Regulation (EC) No 44/2001.

Question 8:

Should the courts of the Member State in which the defendant is domiciled have exclusive international jurisdiction for a European order for payment procedure in cross-border cases?

3.3.2. Rules determining the jurisdiction within the MS whose courts have jurisdiction

As regards the distribution of competence for order for payment proceedings within a Member State, the legislation of those Member States that know such a procedure varies considerably. In some Member States (Austria, Italy, Luxembourg) the general rules of jurisdiction in ordinary proceedings apply. Others have special rules. In almost all Member States the courts of the domicile of the defendant have jurisdiction for order for payment proceedings. Often the plaintiff has the additional possibility of turning to the court of the place where the obligation in question (in most cases the payment) has to be performed and/or the place where the enforcement of the order will be sought. Germany is the notable exception in that respect as in principle the courts of the domicile of the plaintiff are always competent for the purposes of the *Mahnverfahren* there[51].

---

50 On this aspect in more detail infra 3.3.8.

51 § 689 (2) ZPO. This specificity is probably intended to increase the user-friendliness of the system for mass creditors who are granted the advantage of having to turn to one court only for all their claims regardless of where the defendant lives. It has to be seen in the light of the fact that the order for payment procedure is a purely written procedure and that it does not make a considerable difference for the defendant where he gets the order from or where he has to return the opposition to. It is worth noting, however, that this rule is modified by § 703 d if the defendant is not domiciled in Germany. In these cases jurisdiction is attributed to the court that would be competent for the main proceedings (if the defendant objected to the claim) according to the ordinary rules on jurisdiction. The same rule

Identical rules throughout the European Union would, of course, be easier to use for plaintiffs from other Member States who would not have to deal with the particularity of the legal system of the Member State where the proceedings take place. Nevertheless, it appears to be somewhat questionable if a European instrument should contain provisions on the internal distribution of jurisdiction within the Member States. Rather, it would be in line with Council Regulation (EC) No 44/2001 to limit the jurisdictional rules to the determination of the competent Member State in cross-border cases. At any rate, different rules governing jurisdiction would entail the need to make information on these rules readily available, for example via the European Judicial Network.

Question 9:

Should a European instrument on an order for payment proceeding contain rules determining the competent courts within the Member States? If so what should these rules be?

3.3.3. Rules determining who exactly is in charge of the procedure

One of the crucial dividing lines between what has been referred to as the "evidence" and "no-evidence" schools lies in the fact that the former (Belgium, France, Greece, Italy, Luxembourg, Spain) attributes the authority to issue the order for payment to the competent judge whereas the latter (Austria, Finland, Germany, Portugal, Sweden[52]) delegates that power to clerks of the court (greffier, Rechtspfleger) or, in the Swedish case, to the civil servants at the enforcement authorities.

As indicated above, this difference can be at least partly explained by the structural discrepancy between decisions that are the result of a summary assessment of the merits of the case at issue based on written proof and those that are based on the mere circumstance that the defendant did not contest the claim.

In choosing between those models, combining elements of them or leaving this particular issue to the Member States, it is an important aspect that the creation of an order for payment procedure that is handled by court clerks can contribute significantly to relieving the judges' workload and to enabling them to concentrate on the truly "hard cases". Nevertheless, it

---

applies to the order for payment procedure before the labour courts. In general, the existence of separate jurisdictional rules for the *Mahnverfahren* on the one hand and for ordinary proceedings on the other entails the necessity of transferring the case to another court if the defendant has lodged an opposition and triggered ordinary proceedings.

Furthermore, § 689 (3) ZPO allows the *Länder* to concentrate the jurisdiction for order for payment proceedings in order to facilitate a quicker and more efficient handling of these cases, mainly by the extensive use of automatic data processing which allows the procedure to take place and result in an enforceable decision without any interference by a human being (on this aspect in more depth, *infra 3.3.4.4*). Several *Länder* have made use of this possibility and have created courts centrally dealing with these matters.

For the sake of completeness, it should be said that in Italy certain liberal professionals such as lawyers, notaries or *huissiers de justice* can apply for an order for payment at the court at which the bar association or other professional association to which they belong is registered (*art. 637 c.p.c.*).

52 This delegation to court clerks in the case of an uncontested claim can also be found in Member States where an order for payment procedure does not exist, e.g. in the UK in default proceedings.

As regards Austria this delegation of power is somewhat limited in practice in that judges themselves commonly handle the order for payment proceedings at bigger district courts or at courts where court clerks are not available for that purpose. Furthermore, the competent judge can always decide to become involved and decide himself at any given moment in the proceedings.

should be taken into account that even if the claim itself is not contested by the defendant the person actually in charge of the order for payment proceedings might be confronted with intricate legal problems such as the following: Has the document which instituted the proceedings been properly served on the defendant? Has the plaintiff given a justification of the claim that is contradictory in itself or could even hint at fraudulent conduct? Has the plaintiff sufficiently explained why he is entitled to a higher interest rate than the legal one? Has the defendant who has missed the deadline for his opposition and applies for relief from the effects of the expiration of time not been able to object on time without any fault on his part[53]? Needless to say that the capacity of clerks to face this challenge depends on the extent and quality of their legal training that appears to differ substantially between Member States[54].

Therefore, if a delegation of powers was the favoured option it would have to be carefully considered what should be the limits of the clerks' powers in dealing with a European *injonction de payer*. Some Member States appear to have attempted to solve this problem by either giving the clerks the opportunity or obliging them to refer "hard cases" to the competent judge[55]. In the latter case, the criteria for a mandatory involvement of a judge may have to be clearly defined.

Question 10:

Should an instrument on a European order for payment contain provisions determining who exactly at a court (judges, court clerks) is in charge of the procedure and has the authority to deliver an order for payment? If yes what should those rules be?

3.3.4. Application for a payment order

3.3.4.1. The content of the application, in particular on the description of the claim and its legal foundation

The basic information that needs to be included in an application for an order for payment such as the names and addresses of the parties, the amount claimed including interest and costs where appropriate and the description of the circumstances invoked as the basis of the claim, appears to be fairly straightforward and not overly prone to controversy. One issue that could conceivably stir some debate is the content of the requirements for a sufficient description of the origin of the claim. Current legislation of the Member States on orders for payment ranges from conditions identical with those of an ordinary writ (Italy) to a mere reference of telegraphic brevity to the basis of the claim (Sweden, Austria, Germany, Finland)[56]. The approach to be selected in that regard is inextricably linked to the decisions on

53 At least in Austria the decisions on an application for relief (*Wiedereinsetzung in den vorigen Stand*) and the rejection of opposition where appropriate (e.g. if belated) fall within the competence of the *Rechtspfleger* (subject to the limitations explained in the previous footnote) whilst in Germany these matters are dealt with by a judge.

54 In Austria and Germany the court clerks (*Rechtspfleger*) have several years of legal education.

55 In Portugal issues on which the clerk has doubts have to be decided by a judge. In Finnish order for payment proceedings the clerks who do not necessarily have any legal training have to refer "hard cases" to legally trained staff, i.e. notaries or judges.

56 The Swedish information leaflet attached to the standard application form illustrates the requirements of a clear statement of what the claim refers to by giving the following example: purchase of a car, reg. No. BMG 689 on 19 January 1996.

some other fundamental matters raised in this Green paper. Obviously, the necessary quality and detailed nature of the justification of the claim depends largely on the degree of examination of the claim by the court. If the order for payment is the result of a (summary) legal assessment by the court the account of the underlying facts that supposedly support the claim has to be sufficiently comprehensive to enable the court's examination. If, by contrast, the defendant carries the responsibility for triggering an examination of the merits by objecting to the claim and in the absence of such opposition the payment order is delivered without even a superficial test of its justification, it is satisfactory to provide enough information to put the defendant in a position of being able to identify the claim and then decide whether or not he wants to challenge it.

Question 11:

What should be the requirements relating to the content of the application for a European order for payment? In particular, which conditions should apply to the description of the circumstances invoked as the basis of the claim?

3.3.4.2. The requirement of documentary proof of the claim

The requirement to provide some documentary evidence of the claim has already been characterized as the key defining element of the "evidence" model of an order for payment procedure. The clear advantage for the protection of the defendant against unfounded demands is predicated on a legal examination of the merits of the case by the court based on the account of the plaintiff and the written proof supplied by him. This effect has to be weighed against the losses in efficiency resulting from the need for such an examination and from the difficulties to reconcile the necessary submission of written evidence with the use of electronic data processing. In simple terms, it boils down to the question if a check conducted by the court on whether or not the claim appears to be well-founded is considered indispensable or if it can be left entirely to the responsibility of the defendant to challenge the claim and the lack of an objection in itself is sufficient to justify a decision in the plaintiff's favour.

In order to thoroughly assess the meaning and impact of a requirement of documentary evidence it is of utmost importance to know how generously or restrictively it is to be understood, in other words which types of documents are admitted as satisfactory proof of the claim. Overly strict conditions effectively demanding an express recognition of the claim by the defendant would deprive the order for payment procedure of most of its practical relevance. By contrast, rules that are too lax could dilute the control that can be effected by the court to the point of calling into question the value of the requirement of documentary proof itself. The Member States that belong to the "evidence" school (Belgium, France, Greece, Luxembourg, Italy, Spain) do not apply the same criteria in that respect, to say the least. The degree of precision and detail of the provisions dealing with this issue differs widely. In France, Article 1407 NCPC limits itself to spelling out the condition that the application must be accompanied by documents justifying it[57] without any further indication

---

The modified Austrian system that will enter into force on 1 January 2003 and foresees a summary assessment of the justification of the claim at issue will probably entail the need to be somewhat more detailed in the description of the basis of the claim to enable the courts to perform their task.

[57] Art. 1407 alinéa 3: "*La requête doit être accompagnée des documents justificatifs* ". Article 11.2 (4) of the "Storme proposal" which reads "*The application… shall be accompanied by all documentary evidence in support of the claim*" appears to be equally imprecise in qualitative but more demanding in quantitative terms.

as to what could be considered necessary to meet this requirement, thus leaving it to the courts to develop more concrete guidelines in their case law. The Belgian legislation goes one step further and demands a document emanating from the defendant while clarifying that it does not have to amount to an acknowledgement of the claim[58]. The Spanish and particularly the Italian law contain long and detailed lists and definitions on what constitutes documentary proof for the purposes of the order for payment procedure[59]. It goes beyond the scope of this Green Paper to deal in depth with all the documents covered by those provisions. Suffice it to say here that in both Member States the claim can be supported by documents that do not carry the defendant's signature but have been drawn up by the plaintiff unilaterally[60].

In the light of these discrepancies it appears as though the complexity of an attempt to develop a definition of the documents admissible as evidence in order for payment proceedings should not be underestimated. Possibly, this is also an aspect to be taken into account when considering the general question whether the passing of a European order for payment should depend on the production of a written proof of the claim.

Question 12:

Should the submission of documentary proof of the claim at issue be a requirement for the application for a European order for payment? If so what types of documents should be considered sufficient as a proof of the claim?

3.3.4.3. Formal requirements – the use of standard forms

While several Member States with an order for payment procedure make official standard forms available (Austria, Germany, Luxembourg, Portugal, Sweden, Spain)[61], their use is mandatory only in some of them[62] and an optional alternative to a writ in others[63]. In those Member States where a writ can or must be submitted, requirements vary between those of a writ just like in ordinary civil proceedings[64] and a simplified version specifying but the parties and their domiciles, the amount and the origin of the claim[65].

The use of standard forms is a particular fashion of structuring the information that is necessary for the initiation of order for payment proceedings. It can serve a number of different purposes. Firstly, it assists the plaintiff, especially if he is not represented by a lawyer, by providing him with the comprehensive list of issues that have to be addressed in

---

58 Article 1338 of the Belgian Judicial Code (French version: "… *un écrit émanant du débiteur*". The preparatory works regarding this provision give an ordering slip, a receipt of delivery signed by the defendant and an accepted invoice as examples of valid documents.

59 In Spain Article 812 NLEC, in Italy Articles 633 – 636 c.p.c.. In both cases the lists are not exhaustive.

60 The Spanish provision admits documents emanating from the plaintiff unilaterally that bear witness either to circumstances of the concrete claim at issue or, as a complementary document to another one mentioning the amount claimed, to a long-standing relationship between the parties.
The Italian legislation privileges certain categories of creditors by allowing them to create the documents themselves that are admissible as evidence in order for payment proceedings. Thus, under certain conditions lawyers and notaries can submit their own invoices, banks can present a statement on the balance of an account and State or State run authorities can rely on their books and registers.

61 In France, standard forms that are not official are circulated by private publishing houses.

62 In Austria, Germany (except where service has to be effected abroad) and Portugal (unless the form is unsuitable for the case in question).

63 This is the case in Luxembourg where a simplified commencement of proceedings is also possible by means of an oral or written *déclaration au greffe* (application submitted to the court's branch).

64 Italy.

65 Spain (Article 814 NLEC).

order to submit an admissible application, ideally accompanied by some explanatory remarks for each of the items. Secondly, it is an important tool to facilitate the use of electronic data processing particularly if it is combined with the possibility of an electronic transmission of the application to the court. Furthermore, in cross-border cases the existence of multilingual standard forms can contribute significantly to the simplification and acceleration of the proceedings by reducing the need for translation and the resulting cost and delay to a minimum. Lastly, a standardized application would seem to be the necessary prerequisite of a standardized decision that could then circulate freely throughout the Community for the purpose of enforcement.

The creation of a European standard form if deemed essential in the light of the foregoing considerations would present a number of technical problems. On a range of issues such as, for example, the categories of costs whose reimbursement can be demanded, the national rules differ significantly and this would probably have to be reflected in the standard form itself as well as in the explanatory remarks. Maybe a uniformity of the standard form limited to the core issues with some flexibility for the Member States to tailor other questions to their individual needs or to include additional items could constitute a viable strategy to deal with these complexities.

Question 13:

Should it be obligatory to use a standard form in order to present an application for a European order for payment? If so what should be the content of the standard form?

3.3.4.4. The submission of the application to the court by electronic means, and the use of electronic data processing in general

Communication between the court and the parties

Communication between the court and the parties through electronic means, especially via e-mail, offers the potential for a further streamlining of proceedings and for substantial savings both in terms of money and time. This appears to be particularly convincing in cross-border cases in the light of the considerable delays often occurring in the course of ordinary postal service or the formal service of documents from one Member State to another. Moreover, the increasing use of electronic data processing by the courts of the Member States in handling order for payment procedures could be further facilitated by the electronic submission of (standardized) applications as the courts would be spared duplicating the work already done by the plaintiff by feeding the application into its computer system. The electronic transmission of a document by the plaintiff to the court appears to represent a technical rather than a legal challenge as it does not entail the same intricacies as the formal service of judicial documents by electronic means of communication.

Accordingly, several Member States allow or are at least experimenting with the filing of an application by the means of an electronic medium[66]. Not surprisingly, the most advanced

[66] In Germany, an application can be submitted online only in some of those court districts where the competence for order for payment proceedings has been centralized (see *supra 3.3.2*, footnote 50) and is dealt with in a computerized manner as a whole.
In France, applications can be made via Minitel, a particular French method of electronic communication.
In Sweden, a special permission is necessary in order to guarantee that the applicant is able to use electronic media in a secure and technically suitable manner. Although about 1000 applications

Member States in that respect are the ones that also make wide use of electronic data processing in handling the order for payment procedure in general.

A legislative instrument on a European *injonction de payer* should not impede but rather encourage further openness to technological progress in order to promote more efficient case-handling where this does not present any threat to the right of the parties to a fair trial. Yet, it appears to be highly doubtful if a proposal should prescribe the availability of particular methods of communication to the courts as this could stretch the resources of Member States that still have to develop the computer infrastructure of their court systems.

It is a question of further technical developments, particularly with regard to the safety and reliability of electronic communication, if or to what extent such means can be extended to the service of documents on the parties[67].

Management of the case by the court

The potential use of information technology is not limited to the issue of communication between the court and the parties. It can also be a powerful tool in the management of the case by the court. Every relief from tasks that can be performed in a computerized fashion enables courts to dedicate more time to truly complicated matters. As the cases to be dealt with in an order for payment procedure are "easy" cases if they remain uncontested and as they should be submitted to the court in a standardized way they appear to be the natural-born candidates for an increased use of electronic data processing.

As of now, a number of Member States (Austria, Finland, France, Sweden) apply data processing in their respective *injonction de payer* proceedings in a purely supportive way, for enrolling cases, keeping track of time limits, calculating the costs et cetera. The decision on the application for an order for payment itself, is left to the person in charge of the proceedings be it a judge or a clerk of the court. Germany, on the other hand, has carried the use of electronic data processing one significant step further in fully computerizing the procedure in several court districts. The software used in conjunction with special standard forms allows an automatic check of missing information, obvious inadmissibility or unfoundedness or other extraordinary circumstances (a defendant domiciled abroad, unusually high interest rate etc.)[68]. If and only if problems are detected during that check the case is brought to the attention of the court clerk. Otherwise, the system itself sends out the payment order and, in the absence of objections by the defendant, also the second decision, the enforcement order and a cost invoice without the involvement of a human being. If the defendant lodges an opposition on time the file is automatically transferred to the court for ordinary proceedings.

---

annually are necessary to render this procedure cost-effective more than half of all applications are communicated electronically to the enforcement authorities. This data highlights the particular importance of an order for payment procedure for large-scale creditors who also stand to gain the biggest advantages from the use of electronic means of communication.

In Finland, as a general rule all sorts of documents can be sent to the court via fax, e-mail or data processing by the parties and the same methods of transmission are admissible for communications to the parties with the exception of the service of a summons. Large-scale creditors may apply for a permission to communicate with courts in a more extensive fashion than outlined above. In addition, under an agreement between the ministry of justice and the Finnish post judicial documents can be transmitted electronically to a post office near the defendant's home where they are printed out and then served on the defendant.

67 On the service of documents in more detail *infra* 3.3.8.

68 A similar check is automatically conducted also in Austria.

The preceding paragraphs should have illustrated how significant and how multi-faceted the possibilities of the application of computer technology and electronic communication are. In view of the fact that such issues are closely interrelated with other strategic decisions on the core tenets of a European order for payment procedure[69] this Green paper should serve as a platform for a broad discussion on the role of electronic communication and data processing in a European instrument.

Question 14:

What should be the role of computer technology and electronic data processing

a) in the communication between the court and the parties and

b) in the management of the European order for payment procedure by the court?

3.3.5. The extent of the examination of the claim by the court

It appears to be self-evident that the court that has received an application for an order for payment has to check the *admissibility* of the application (does the claim at issue fall within the scope of application of the order for payment procedure, i.e. is it a civil law claim, is it a pecuniary claim, has an obligatory standard form been correctly completed, is the application signed etc.) and its own *international jurisdiction* ex officio[70].

As regards the *merits of the case* the cleavage between what have been referred to as the "evidence" and "no-evidence" types of *injonction de payer* procedures is clearly exposed once again. As a general rule, in the Member States adhering to the "evidence" model an order for payment can be delivered only if the assessment of the information given and the documentary evidence produced by the applicant yields the result that the claim is well-founded. By contrast, according to the "no-evidence" school a decision in favour of the plaintiff does not depend on any prior examination of the justification of the claim in question[71]. The choice of one of those options is inextricably linked to the predilection for one of the two systems and their determining features at large. As already pointed out with regard to the requirement of a proof of the claim or the necessity of the involvement of a proper judge the philosophy of full responsibility of the defendant for avoiding a decision against him and triggering adversary proceedings competes with the principle of a minimum protection of the defendant.

---

69 It is obvious, for example, that a computerized procedure resembling the German model as described in the main text is only conceivable if the court does not engage in an examination of the merits of the case which can only be performed by a human being.

70 Pursuant to Article 26 (1) of Council Regulation (EC) No 44/2001, the court has to declare of its own motion that it has no jurisdiction unless jurisdiction is derived from the provisions of that Regulation where a defendant domiciled in one Member State is sued in another Member State and does not enter an appearance there.

71 In Austria, under § 448 (2) ZPO an order for payment must not be issued if the claim is obviously not actionable (e.g. gambling debts) or not yet due. Apart from that, in the absence of express provisions dealing with this matter it was disputed in legal literature if and to what extent the well-founded nature of the claim at issue is to be examined. The court practice used to be very generous in that respect. By new legislation effective as from 1 January 2003 it has been explicitly clarified, though, that the court has to conduct a summary examination of the justification of the claim along the same lines as before delivering a judgment by default, i.e. based on the factual information by the plaintiff that has not been contested.

In order to prepare the choice it may be instructive to take into consideration the following aspects concerning the practical implementation of either of those principles.

It is important to bear in mind that even those Member States that refrain from an institutionalized examination of the merits of the case know a certain "safety valve" in that following either explicit provisions to that effect or an established practice applications that are obviously unfounded are rejected[72]. In other words, the need for a certain protection of defendants who remain passive against frivolous claims is recognized even within the "no-evidence" model. A European instrument inspired by this model should possibly contain an express rule defining the duties of the courts in that respect as clearly as possible.

In fact, the practical differences between the minimum protection offered by the elimination of obviously unfounded claims and the examination of the claim as necessary according to the "evidence" order for payment procedure could be properly assessed only if sufficient information was available on the extent of that examination. It appears to be an inevitable consequence of the unilateral nature of the proceedings preceding the decision that the test applied by the courts is a test of plausibility or credibility rather than an in-depth assessment of the justification of the claim. It depends largely on the requirements regarding the documentary proof and the nature of the plaintiff's account if the court is enabled to conduct more than a very superficial control concerning the merits of the case[73]. The mere fact that in all the Member States that have opted for the "evidence" model the judges issue an *injonction de payer* only if they consider the claim to be well-founded does not exclude significant variations in the practical implementation of that principle or guarantee a high level of protection of the defendant in itself. To ensure equal standards throughout Europe, some general guidelines on the thoroughness of the examination of the merits of the case may turn out to be necessary.

Question 15:

Should an examination of the justification of the claim be carried out before the delivery of a European order for payment? If so what should be the criteria of that examination?

---

72 According to section 23 of the Swedish Act on Summary Proceedings, "if it can be assumed that the claim by the applicant … is unfounded or unjustified, the application should be treated as if it had been contested by the defendant". The following examples are given in legal literature:
- a claim for damages for non-pecuniary losses clearly not recognized under Swedish law
- a claim arising from an illegal gambling debt not protected by the Swedish legal system
- a claim for damages that is reasonable as such but absurd regarding the claimed amount of money.

In Germany, almost identical examples are referred to in order to illustrate obviously unfounded claims that lead to the refusal of an order for payment. Pursuant to § 691 (1) ZPO the plaintiff has to be given the opportunity to rectify (formal as well as material) defects before the application can be rejected. In Finland, a claim is regarded clearly unfounded if it is illegal or generally known to be unjustified.

In Austria, whenever the court entertains a suspicion of fraudulent behaviour it can ask the plaintiff to provide additional information or evidence and reject the application if no sufficient statement by the plaintiff ensues. In practice, this possibility is made use of mainly to combat excessive demands regarding the interest rate or the reimbursement of costs.

73 The fact that in Italy and Greece the court can invite the applicant to submit additional documents or elaborate further on some aspects or details if it considers the original application to be insufficient could be taken as being indicative of a somewhat stricter scrutiny of the justification of the claim. Ultimately, additional information of the usual application of these rules in all the Member States adhering to the "evidence" school would be necessary to thoroughly deal with these questions.

3.3.6. The decision of the court on the payment order

3.3.6.1. Should a partial payment order be possible?

If the application fulfils the formal or substantive conditions only for a portion of the claim at issue but not for all of it the question arises if an order for payment should be issued for the part that meets the requirements[74]. Several Member States (Germany, Luxembourg) answer that question in the negative for their national systems and take a straightforward "all or nothing" approach. If the order for payment cannot be granted in full including the claimed interest rate and costs it has to be refused altogether[75].

The French and Belgian systems take a different approach. If the competent judge considers the claim at stake to be only partially justified he gives an injonction de payer for the valid fraction of the demand. No appeal lies against that decision but the plaintiff has two options to react to the partial refusal. If he is determined to pursue the entire claim including the portion rejected by the court he has to refrain from serving the order for payment on the defendant and has to initiate ordinary proceedings. If, on the other hand, he proceeds to the service and enforcement of the partial injonction de payer he forfeits the right to engage in further court proceedings concerning the remainder of the claim[76].

Note should be taken of the fact, however, that the differences between those two systems may be greatly diminished in the course of day-to-day implementation. If, for example, the

---

74 This situation has to be distinguished from that of an order for payment on a claim that is then only partially contested by the defendant.

75 § 691 (1) of the German ZPO. In Austria, the same rule applies only if the claim is partially unfounded. If, however, the application is partially inadmissible an order for payment can be delivered for the remainder of the claim.

76 Art. 1409 NCPC: "*Si, au vu des documents produits, la demande lui paraît fondée en tout ou partie, le juge rend une ordonnance portant injonction de payer pour la somme qu'il retient. …Si le juge ne retient la requête que pour partie, sa décision est également sans recours pour le créancier, sauf a celui-ci à ne pas signifier l'ordonnance et à procéder selon les voies de droit commun*".
In Belgium, Art. 1343 (4) subsection 2 is the comparable provision. It has to be pointed out, however, that the practicability of this particular system depends on the ability of the plaintiff to actually decide himself whether or not the order is served on the defendant. In other words, it is operational only in those Member States in which the plaintiff is responsible for the service (such as in France in Belgium where the plaintiff has to effect service through a *huissier de justice* mandated and paid by him). It appears to be somewhat difficult to transfer this system to those Member States where service is taken care of by the courts themselves.

courts, in following an established practice or even an obligation to that effect, give the plaintiff an opportunity to rectify the defects of the application or to reduce it to an amount or interest rate that allows the issuance of an order for payment[77] before dismissing the request, this practically amounts to leaving him with the decision to either content himself with the amount considered justified by the court or to resort to ordinary proceedings for the recovery of the whole of the claim.

At any rate, both methods just described share the same rationale of avoiding a split of one uniform case into two separate proceedings, a partial order for payment procedure and a partial ordinary civil procedure and the resulting complexity which would contradict the principal objective of an order for payment procedure to simplify the recovery of claims that are presumed to remain uncontested.

[77] Such an obligation exists in Germany pursuant to § 691 (1) ZPO.

Question 16:

Should it be possible to grant a European order for payment only for a part of the claim at issue?

3.3.6.2. A standardized format of the decision

As already mentioned above the use of standard forms for the application and for the decision on the application are closely linked. Both offer similar advantages, albeit obviously at different stages of the procedure. Whilst a standard claim form facilitates access to justice a standardized decision would attenuate the burden implied in proceeding to enforcement in a Member State other than the one in which the order for payment was delivered.

If the European order for payment were to be directly enforceable in other Member States all the information necessary for enforcement would have to be clearly and unambiguously indicated in the order for payment. To cite but one example of practical difficulties, in some Member States a certain interest rate is added to the claim ex officio and is not mentioned or merely referred to as the statutory interest rate in the decision. This may be self-explanatory for the enforcement authorities in the Member State in which the decision was delivered but it is incomprehensible and thus not enforceable abroad. Hence, any standard format of a European order for payment would have to explicitly state the applicable interest rate in numerical terms even if that was not ordinarily necessary under the law of the Member State in which it is issued. To be able to develop a form that responds to these needs as comprehensively as possible it would be a valuable contribution by the Member State and other experienced circles to inform the Commission about typical problems of the nature just mentioned that frequently occur in the context of enforcing decisions that were issued in other Member States.

Question 17:

Should the European order for payment be issued in a standardized fashion? If so what should be the content of a standardized decision?

3.3.6.3. Possibility for the plaintiff to appeal against a (partial) refusal to issue an order? Possibility to apply for a payment order repeatedly?

It appears to be common practice among the Member States with an order for payment procedure to exclude an appeal against a decision rejecting the application for a payment order. The simple and convincing explanation for this lack of a legal remedy lies in the fact that the plaintiff is not prevented from initiating ordinary civil proceedings regarding the very same claim. Several Member States even permit the submission of a new application for an order for payment after the rectification of the formal or material defects that led to the refusal of a favourable decision in the first place[78]. It could be worthwhile to consider the possibility of including an express provision to that effect in a European instrument[79].

[78] This appears to be the case at least in Italy, Luxembourg and Germany. As regards other Member States the text of the pertinent provisions does not explicitly provide for that possibility.

[79] The *Storme proposal* clarifies in its Article 11.4 that "*if the court refuses the application in whole or in part, such refusal shall not have the effect of res iudicata. No appeal shall lie against such a refusal*".

Question 18:

Should an appeal against the (partial) refusal of a European order for payment be inadmissible? Should it be possible to submit an application for a European order for payment for the same claim again after such refusal?

3.3.7. Information of the defendant on his procedural rights and obligations along with the decision

In order to secure a fair trial the defendant has to be properly put in the picture about his procedural rights and obligations along with the order for payment. It cannot be taken for granted by any means that the defendant is familiar with the specific features of an order for payment procedure. Therefore, concise yet comprehensive information is a prerequisite for short deadlines and for the assumption that within these time limits the defendant can take a decision on whether or not to contest the claim in full knowledge of the consequences without having to obtain legal advice. Although the exact content of that notification varies slightly from Member State to Member State, the following core elements appear to be uncontroversial:

- The possibility of opposition and the time-limit as well as the formal requirements for lodging such opposition including the address of the court or authority to send the statement of opposition to

- The enforceability of the order for payment if the claim is not contested within the time-limit

If the claim was not examined by the court as to its substance before issuing a European order for payment it could be deemed necessary to make that clear to the defendant to avoid any impression of being able to rely on the assessment of the claim as being unfounded without any active intervention on his part[80]. Moreover, in the case of a one-step procedure without any further possibility of an ordinary appeal against the decision in the absence of opposition, a pertinent warning of the defendant could appear to be appropriate[81].

Setting up a duty to properly inform the defendant raises, of course, the follow-up question of the legal consequences of a failure to comply with this obligation. In that respect it has to be noted that the nullity of the order for payment is the consequence of non-observance of the pertinent rules in some[82] but not all of the Member States. In Austria and Italy, for example, the failure to correctly make the defendant aware of the deadline for contesting the claim has no consequence whatsoever as the defendant is considered responsible for gathering the information necessary for the preparation of a defence and the statutory time-limit applies irrespective of its notification along with the order for payment. Given this significant difference it would be inevitable to create a uniform standard in the context of a European instrument in order to guarantee an equal protection of the rights of the defence throughout the Community.

---

80 § 692 (1) No. 2 of the German ZPO prescribes such an information. Similarly, in Austria the defendant is notified that the order for payment is based on the information provided by the plaintiff without any control of its correctness.

81 Article 1413 of the French NCPC contains an obligation to that effect.

82 In France Article 1413 NCPC and in Luxembourg Article 134 NCPC are very clear in that respect ("*a peine de nullité*").

Question 19:

What elements should the information of the defendant about his procedural rights and obligations accompanying a European order for payment comprise? What should be the consequences of a failure to comply with this obligation?

3.3.8. Service of the order for payment on the defendant

If it was necessary to identify the single most important and most intricate potential component of a European order for payment the rules governing the service of the order for payment on the defendant would rank as one of the most promising candidates.

The particular significance of the rules on service in the context of an order for payment procedure is easily explained. The service does not only, as in many other areas of procedural law, set in motion the running of time and thus serves as the point of reference for the determination if the defendant has met the deadline for contesting the claim. A characteristic feature of an order for payment is the fact that it is delivered and becomes enforceable only in default of participation of the defendant in the court proceedings. It is assumed that this passivity follows from a conscious decision in the light of his assessment of the justification of the claim at stake or from a deliberate disregard for the court action. The lack of an explicit reaction by the defendant leaves the correct service in due time of the documents informing about the claim at stake, his procedural rights and obligations and the consequence of non-participation as the only proof that the defendant has been put in a position enabling him to make the conscious choice to abstain from lodging opposition.

The Member States have developed rules on the service of documents that are based on manifestly divergent philosophies. As a starting point it can safely be assumed to be common ground that it is desirable to deliver a document personally to the addressee himself but that in practice this is often difficult to accomplish and that certain substitute methods of service have to be admitted to render the system operational. Yet, different Member States have come up with solutions that could hardly be imagined to be further apart. Suffice it to illustrate this diversity by briefly referring to the English and the French procedural rules. In England, ordinary first class mail without an acknowledgement of receipt constitutes the principal method of service. This system is based on the presumption that the document in question has actually reached the defendant in the absence of any proof to that effect and presupposes a high level of trust in the reliability of the postal service. For those exceptional cases in which service has not been properly effected the victim of such malfunctioning is equipped with the procedural remedy of applying for a court decision taken in the wake of improper service to be set aside. In stark contrast to this pragmatic and inexpensive approach the French legislation entrusts the service of an *injonction de payer* only to specialized liberal professionals (*huissiers de justice*) with extensive legal training who not only have to deliver it to the defendant but are obliged to explain to the recipient the legal significance of the document on top of the written instructions in the court decision itself. If the addressee is not found and a substitute method of service has to be employed French procedural law demonstrates its distrust of these methods by depriving the service of most of its legal consequences. Even the personal service of an order for payment, for example, on the spouse of the defendant does not trigger the time-limit for contesting the claim which starts to run only from the first act of enforcement against his property, this being the latest conceivable moment in which he becomes aware of the proceedings. There is no doubt that the French system provides a strong safeguard for the rights of the defence but it also goes without saying that the use of fully educated lawyers for the service of documents has its price tag attached to it.

It would theoretically be possible to draw up a legislative instrument on a European order for payment without any rules on the service of documents and to leave the pertinent issues to national law or in cross-border cases to national law in conjunction with Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extra-judicial documents in civil and commercial matters[83].

Nevertheless, it could appear somewhat difficult to imagine a genuinely European order for payment procedure without approximation of the rules on service to a certain extent. The automatic enforceability of the decision throughout the Member States which should be an integral element of a European order for payment is hardly conceivable without common rules on service. This is the unequivocal lesson to be learned from the preparatory works for the recently adopted proposal for a Regulation on a European Enforcement Order for uncontested claims where, in the light of the practical significance of Article 27 (2) of the 1968 Brussels Convention[84] as the major obstacle to recognition and enforcement, it was unanimously considered indispensable to guarantee certain minimum standards on service as a prerequisite for the abolition of exequatur. The proposal itself contains relatively detailed minimum requirements in that respect without a legal obligation for the Member States to adapt their legislation to them. Rather, the observance of these rules constitutes a condition for the certification of a court decision as a European Enforcement Order which in turn enables the free circulation of the judgment for the purposes of enforcement.

It appears to be inevitable that in the absence of binding common provisions on service a European order for payment would have to be subjected to the same process of certification or even to an exequatur procedure. In order to avoid this regrettable consequence which would divest the procedure of a large part of its appeal, a legislative initiative should, in principle, go a significant step further and embark on a true approximation of the rules governing the service of documents[85].

The multiplicity of questions arising in that context is open for discussion. To name but a few: Should the approximation be restricted to the order for payment procedure thus creating a separate set of rules for one specific type of proceedings or should it be extended to the service of documents in general, possibly in a separate legislative instrument? Should a minimum standards approach be chosen or should one aim at farther-reaching harmonization? What methods of service, of substitute service in particular, should be admitted? Could the relevant provisions of the proposal for a Council Regulation on a European Enforcement Order serve as an inspiration in that respect?

This Green Paper is intended to launch a wide-ranging debate on all these issues, primarily focussing on the service of a specific document, the order for payment, in a specific context but with potential ramifications beyond that realm.

---

83 OJ L 160, 30.06.2000, p. 37.

84 Now, with a slight modification, Article 34 (2) of Council Regulation (EC) No 44/2001 which entered into force on 1 March 2002.

85 Note should also be taken of the fact that the programme of mutual recognition spells out in section II B 1 that "*in order to increase the certainty, efficiency and rapidity of service of legal documents, which is clearly one of the foundations of mutual trust between legal systems, consideration will be given to harmonizing the applicable rules or setting minimum standards*". An order for payment procedure appears to be the area where progress in that respect is most indispensable.

Questions 20:

Should a legislative instrument on a European order for payment include provisions on the service of documents for this specific procedure or should it be accompanied by the harmonization of the rules on service in general? If so what should be the content of such rules?

3.3.9. Opposition by the defendant

3.3.9.1. Time-limits for opposition

The time-limit for contesting the claim under national legislation ranges from one week[86] to sixty days[87] running from the service of the order for payment on the defendant with the bulk of the Member States allowing more or less two weeks[88]. Some of the Member States (Italy, Sweden) do not set a fixed time-limit but add a measure of flexibility by leaving it to the court or competent authority to adapt it to the particular circumstances of each individual case within certain limits. France and Portugal create a direct link between the method of service of the order for payment and the length or the calculation of the time-limit in order to be more generous towards a defendant who has not received the payment order personally and directly from the person who effected service[89]. In Germany, the time limit is more than doubled to one month if the defendant is domiciled abroad in another Member State or a signatory of the Lugano Convention.

This brief overview illustrates the wide variety of options with regard to the time limit that goes far beyond the mere determination of a certain number of days and weeks. Ultimately, the choice of a time limit is rather a technical matter which is unlikely to present major problems. It has to be borne in mind, however, that the time necessary to prepare a defence increases the more demanding the formal and substantial requirements for a statement of defence are. Moreover, the significance of the time limit for opposition largely depends on the one-step or two-step nature of the procedure as a whole. If the defendant was awarded a second opportunity to contest the claim by challenging a second decision delivered after the expiry of the time-limit a belated opposition against the first decision would simply have to be construed as an objection to the second decision[90]. In a one-step procedure, by contrast, once

---

86 In Germany, the time-limit of one week applies to proceedings before the labour courts only. In Sweden, the time limit is determined individually for each case but commonly ten days are considered sufficient for ordinary cases.

87 In Italy, the normal statutory time-limit is fixed at 40 days but it can be adapted to the requirements of the case at issue and be reduced to at least 10 days or be extended to 60 days at the most.

88 Belgium (15 days), Finland (usually 14 days), Germany (14 days for proceedings before ordinary courts), Greece (15 days), Luxembourg (15 days), Portugal (15 days), Spain (20 days). In Sweden, the time-limit may not exceed two weeks without distinct reasons. In Austria, the current time-limit of 14 days will be extended to 4 weeks as from 1 January 2003 concurrently with the increase of the maximum amount that can be claimed in an order for payment proceeding to EUR 30.000. In France the defendant has one month to oppose the claim.

89 In Portugal, the time-limit is extended by 5 days (i.e. to 20 days) in that case. In France, the consequence of service other than personal service on the defendant himself is much more drastic in that the time-limit remains unchanged but starts running only from the moment of the first measure of enforcement taken against the property of the defendant (Article 1416 NCPC).

90 In Germany where the payment order does not become enforceable itself after the expiration of the time-limit but is followed by an enforcement order to be delivered upon the plaintiff's application, § 694 ZPO spells out that a belated statement of opposition against the payment order has to be admitted as long as no enforcement order has been given (i.e. such an objection bars the delivery of the enforcement order no matter how late it is lodged) and that it has to be considered an objection to the enforcement order if the latter has already come into existence. The situation appears to be similar in Luxembourg.

the deadline for opposition has passed the order for payment not only becomes enforceable but also acquires the status of *res iudicata* at the same time.

Question 21:

What should be the time limit for contesting the claim? Should the length of the period of time to lodge opposition be influenced by certain features of the individual case and if so by which?

3.3.9.2. Requirements for a statement of opposition

In many Member States (France, Germany, Sweden), the formal as well as the substantive requirements for contesting the claim are kept to an absolute minimum. It is sufficient for the defendant to submit a written declaration stating that he objects to the claim without the need for any further explanation. Often, the order for payment itself is accompanied by a very simple standard form for opposition which has to be completed, signed and returned to the court[91].

In other Member States (Italy, Luxembourg, Portugal, Spain), however, the statement of opposition has to contain at least a summary of reasons for contesting the claim. In Italy, the defendant even has to put forth a complete list of the grounds for his opposition and is punished for not doing so by being precluded from invoking new arguments at a later stage in the proceedings. In Austria, after the most recent reform of the order for payment procedure an unreasoned statement of opposition is admissible only in proceedings before the district court that is competent for claims up to € 10.000 (*Bezirksgericht*). In cases involving a claim of a higher value (i.e. before the *Gerichtshof*) the defendant's reply has to comply with the ordinary procedural rules on the statement of defence[92].

Such a requirement could possibly open a can of worms of complicated legal problems if a certain minimum standard concerning the content of the statement of objection on the substance of the claim was to be understood as a condition for the admissibility of the opposition itself[93]. It might be a delicate matter and would not necessarily add to the transparency and comprehensibility of an order for payment procedure if the court could reject an objection as inadmissible because of being insufficiently substantiated. After all, even an obvious lack of justification of an opposition does not change the fact that the claim was contested and cannot be considered to be uncontested unless the statement by the defendant is so utterly absurd that it does not even constitute an objection. The decision on the well-founded nature of the reasons for contesting the claim relates to the merits of the case and should be taken in ordinary civil proceedings.

---

91 In Germany, for example, the defendant only has to indicate if he contests the claim in full or in part by ticking boxes and, in the latter case, to specify which part of the claim is contested.

92 Given the case law of the Austrian courts in ordinary proceedings it is to be expected, however, that a statement of opposition will be considered admissible even if it does not comply with the requirements concerning its content. The consequences of such non-compliance are limited to the defendant being precluded from challenging the jurisdiction of the court at a later stage and to some cost aspects.

93 This appears to be the case in the Finnish order for payment proceedings where the defendant who wants to contest is requested to present the grounds for his opposition and to indicate the evidence he intends to submit and where the case is transferred to ordinary proceedings only if the defendant has given reasonable reasons for contesting the claim. Somewhat similarly, in Sweden the defendant's objections can be dismissed if they are obviously unfounded. The degree of difference between these two positions depends on their day-to-day interpretation and application in practice.

It would be more understandable to impose the obligation to give the reasons for contesting at the earliest possible stage, i.e. in the statement of opposition, not as a prerequisite for the admissibility of the opposition but in order to allow the careful preparation and to streamline the ensuing ordinary proceedings[94]. Nevertheless, strict requirements in that respect cannot remain without repercussions on the time the defendant has to be allowed to present his objections. The possible losses in efficiency and speed of the order for payment procedure itself have to be weighed against the beneficial effect of a duty to submit a reasoned declaration of opposition on the following proceedings.

If the order for payment procedure was perceived as a speedy and efficient method of finding out if a claim is contested by the defendant and to deliver an enforceable decision if that is not the case it would appear to be in line with that logic not to demand more than a simple "No" to form opposition.

Question 22:

Should any formal or substantive requirements be attached to the statement of opposition? If so what should these requirements be?

3.3.10. Effects of opposition

If the defendant contests the claim within the time limit the order for payment does not acquire enforceability. If the plaintiff wants to obtain an enforceable decision he has to continue his efforts in ordinary civil proceedings. These features are shared by all order for payment systems[95] but they still leave room for some diversity, especially with regard to the two following issues that warrant brief remarks.

Firstly, Member States have chosen different strategies concerning the fate of the order for payment itself in the wake of opposition. In several of them (France, Greece, Italy, Luxembourg) the payment order turns into the subject matter of the following ordinary proceedings. In other words, the order for payment is either upheld or overruled by the judgment. In others, however (Austria, Germany, Sweden[96]), the statement of objection itself virtually invalidates the order for payment and the ensuing ordinary proceedings are conducted just as if it had never existed. Since this choice does not directly touch upon the order for payment procedure but rather upon the ordinary proceedings that follow a statement of opposition it is not free of doubt if this issue needs to be addressed in a European instrument. If this was considered necessary a choice would have to be made.

---

94 This appears to be the underlying rationale of the new Austrian solution as regards proceedings before the *Gerichtshof erster Instanz*.

95 It is worth mentioning in that respect that in Luxembourg a contested order for payment is only continued following the rules of ordinary civil procedure before the *juge de paix*. In cases that fall within the competence of the *tribunal d'arrondissement* the rules of the *référé* (provisional measures) procedure apply.

96 For Germany and Sweden it has to be borne in mind that a two-step system applies. The *ex parte* first phase of the proceedings leads to a court decision which orders the defendant to honour the claim or to contest but which never becomes enforceable. If the defendant neither pays nor objects the court has to render a second decision which is enforceable (in Germany called *Vollstreckungsbescheid* or enforcement order) and is equivalent in status to a judgment by default. The description of the effects of opposition in the main text is valid only if the defendant already challenges the first decision. If he lets the first deadline slip by and only lodges opposition against the enforcement order this second court decision is the subject matter of the ensuing ordinary proceedings.

The second subject to be mentioned concerns the transfer to ordinary proceedings if the defendant contests the claim at stake. In some Member States (Austria, Italy, Portugal, Spain) this transfer is the automatic consequence of opposition whilst in others (Germany, Luxembourg, Sweden, Spain[97]) it hinges upon a request by one of the parties[98] to that effect[99]. The automatic continuation certainly being the speeder and less cumbersome solution the requirement for an additional demand would be in need of a convincing justification. It could be possibly argued that in some instances the plaintiff does not want to engage in ordinary proceedings because of their length and cost, e.g. in the case of a small claim, and thus wants to limit his attempt at recovery to the order for payment procedure.

A viable solution could possibly be found in the condition of a request which could be submitted already at the stage of the original application by simply ticking a box of the standard form.

Question 23:

Should an instrument on a European order for payment contain rules determining whether a statement invalidates the order for payment or the order for payment becomes the subject matter of the following ordinary proceedings? If so what should those rules be?

Question 24:

In the event of the claim being contested, should the case be transferred to ordinary proceedings automatically or only upon application by one of the parties?

3.3.11. Effects of the absence of timely opposition

3.3.11.1. The need for an additional decision – a one-step or two-step procedure

A crucial difference between the different types of order for payment procedures relates to their nature as one-step or two-step procedures.

The one-step model (Austria, France, Italy, Portugal, Greece[100]) is characterized by the fact that the court only issues one decision on the substance of the claim, the order for payment which is delivered after the ex parte phase of the procedure. If the time limit for opposition has passed without the defendant having contested the claim this one and only decision

97 It is not by accident that Spain is listed in both categories as according to Art. 818 NLEC below the threshold of 3000 EUR the parties are automatically summoned to a hearing whereas in the case of a claim for a higher amount the plaintiff has to submit a pertinent request. In Sweden and Spain the right of initiative appears to be restricted to the plaintiff.

98 In Germany and Luxembourg both parties have the possibility of transferring the case to ordinary proceedings as under certain circumstances the defendant may have an interest in obtaining a decision with the force of *res iudicata* pronouncing the non-existence of the alleged claim.

99 In Spain, Sweden and Luxembourg the request has to be filed within a time-limit after the opposition of one month, four weeks and six months, respectively. In Germany (§ 696 (1) ZPO) and Luxembourg, the plaintiff can make the request in the case of opposition already in the original application for the order for payment.

100 The contribution by *G. Nikolopoulos, Order for Payment in Greece* to *Walter Rechberger/Georg Kodek (eds.), Orders for payment in the European Union, Kluwer Law International 2001*, p. 165, 167 is not entirely clear in that respect as it is pointed out that the plaintiff *can* serve the order for payment on the defendant again with the consequence of an additional ten-day period to contest the claim. If this second service is optional as suggested by the language used by the author it is unclear why the plaintiff who has already obtained a final and enforceable decision should choose to open up another possibility of opposition. If the second service was in fact mandatory the Greek order for payment would have to be categorized as a two-step procedure.

becomes enforceable. Generally the expiration of the time limit and the resulting enforceability is simply certified by a court clerk who appends an enforcement clause (*formule exécutoire*) to the order for payment[101].

In the rest of the Member States that know an order for payment procedure (Belgium, Finland, Germany, Luxembourg, Sweden) the original order for payment cannot itself acquire enforceability but has to be followed by a second enforceable decision hereinafter referred to as "enforcement order"[102]. The additional burden imposed on the plaintiff and especially on the court by the mere fact that a second decision is issued varies from one Member State to another and depends on the procedural details of national legislation. If, as in Luxembourg, both the payment order and the enforcement order have to be delivered by a proper judge this means that the same case has to be considered by a judge twice in the course of an order for payment procedure. Thus, judges would not appear to be overly relieved from having to deal with simple and uncontested matters this being one of the main objectives of the order for payment in some Member States. If, however, the enforcement order is delivered by a court clerk as in Germany or by the enforcement agency as in Sweden, the practical difference between the issuance of an enforcement order and the appendage of a *formule exécutoire* in a one-step procedure may be minuscule.

Since generally speaking the one-step model appears to offer a bigger potential of efficiency it needs to be analyzed whether or not there are convincing or even compelling reasons for the introduction of a second step. If the main purpose was to oblige the plaintiff to indicate if a full or partial payment has been made within the time limit[103] other ways not involving a second court decision could be thought of. Another potential reasoning, an enforcement order setting in motion the time limit for an appeal is predicated on the necessity of the existence of such an appeal which will be discussed immediately below.

Question 25:

Should a European order for payment procedure be a one-step or two-step procedure, i.e. should the original decision become enforceable or should a second decision (an "enforcement order") be necessary after the expiry of the time limit for contesting the claim?

---

101 In France, according to Art. 1422 NCPC the appendage of the enforcement clause is not automatically carried out by the court but depends on a separate application by the plaintiff. In Austria, the *res iudicata* effect and the enforceability is certified not by the administrative staff of the court but by a judge or a *Rechtspfleger*. This certification itself can ordinarily be challenged without any time-limit (§ 7 (3) EO).

102 In Sweden and Finland the first step consists not of an order to pay but an order to respond and state whether the claim in question is accepted or contested. Therefore, strictly speaking the first step does not constitute a payment order. Nevertheless, the defining common feature of all two-step procedures is that the court (or in Sweden the enforcement agency) has to consider the matter twice and that only the second step yields an enforceable decision. Thus, for the purposes of simplification in the following the terminology of a "payment order" and an "enforcement order" to refer to the first and second step is applied is used for all two-step procedures although it s not technically correct for those two Member States.

103 In Germany and Luxembourg the enforcement order is issued only upon application by the plaintiff which has to be submitted to the court until six months after the expiry of the time-limit for payment or opposition at the latest. In Germany, pursuant to § 699 (1) ZPO the application cannot be presented before the expiry of that time-limit and must indicate if and to what extent the defendant has made a payment with regard to the claim at issue.

3.3.11.2. Appeal against the order for payment

There is a clear correlation between the choice of a one-step or two-step procedure and the existence of a second possibility to contest the claim by means of an ordinary appeal after the expiration of the time limit for opposition[104]. Whereas in the Member States that have opted for a one-step model the order for payment becomes enforceable and final at the same time if no objections are raised by the defendant, the examples of a two-step procedure in the European Union invariably provide the defendant with a second opportunity to contest the claim and transfer the case to ordinary proceedings by challenging the enforcement order[105]. Those two issues, therefore, have to be considered together.

As already set out earlier the availability of an additional possibility to appeal could be conceived to a certain extent as a compensation for the lack of the requirement of documentary evidence and of any examination of the merits of the case by a judge before the delivery of the payment order. But in some of the Member States that apply a one-step model and do not allow any further appeal (Austria[106], Portugal) there is no legal assessment whatsoever of the claim at issue by the court. Vice versa, in Belgium and Luxembourg the enforcement order given in a two-step procedure can be appealed against although the order has been issued by a proper judge after a legal appraisal based on written proof. It should also be taken into account that the availability of an appeal against an enforcement order in a two-step procedure does not automatically imply a better protection of the rights of the defence, particularly those safeguarded by the rules on the service of documents. If such an order was to trigger the time limit for an appeal it would have to be formally served on the defendant just as the payment order[107]. The likelihood of problems arising in the course of the service of a document does not appear to diminish because of the mere fact that another document has been served on the same person before. So in spite of a successful communication of the payment order to the defendant the court may well have to face an application for relief from the effects of the expiration of time to appeal because the enforcement order has not reached the defendant. If the defendant has properly received an order for payment and has been duly informed about the ongoing proceedings including the lack of a possibility to appeal after the time limit for opposition has passed it may well be called into question why he deserves

---

104 This, of course, does not exclude the possibility of an extraordinary appeal such as an application for relief from the expiration of time to contest the claim if, for example, the defendant has never actually received the order for payment without any fault on his part and has thus not had an opportunity to lodge opposition.

105 In these Member States the decision generally has the same status as a judgment by default and is subject to the same means of ordinary appeal as a judgment by default In Germany the enforcement order (*Vollstreckungsbescheid*) can be appealed against until two weeks after service (one week in cases before the labour courts). In Luxembourg an *opposition* can be lodged until 15 days after service. In Sweden the defendant can apply for what is called a re-opening of the case until one month after the order has been issued. Under Art.1343 (3) of the Belgian Code Judiciaire he has the choice between two different methods of challenging the decision, either appeal (judicial review by a higher court, a court of appeal) or opposition (leading to adversarial proceedings before the same court that has delivered the decision). In Finland, the decision is actually called a judgment by default whose service on the defendant is usually effected in connection with the enforcement itself. After service the defendant has 30 days to appeal.

106 As regards Austria, this information is valid only until 31 December 2002 since after that date the courts will have to conduct a summary examination of the well-founded nature of the claim; on this in some more detail *supra 3.3.5.*

107 Note should be taken of the fact that in Finland the service of the second decision falls on the plaintiff and is not a prerequisite for enforcement but usually takes place at the time of the beginning of enforcement. This could possibly reduce the likelihood of problems as the point in time at which the defendant has indubitably gained knowledge of the existence of an enforceable decision might be easier to establish than the mere service of a document itself.

another shot at contesting the claim in the form of an ordinary appeal. On the other hand, the scenario of a one-step procedure without appeal and without examination of the claim by the court undoubtedly places a very high responsibility, arguably too much responsibility, on defendants like consumers who are not familiar with the rules governing court proceedings.

Question 26:

Should there be an ordinary appeal against a European order for payment (or, in a two-step procedure, against an enforcement order) after the time limit for opposition has expired?

3.3.11.3.Res iudicata effect of the decision

In the vast majority of Member States (Austria, Finland, France, Germany, Greece, Italy, Spain, Sweden and partly Luxembourg[108]) irrespective of the one-step or two-step nature of the procedure the enforceable decision by the court carries the effect of *res iudicata* if the defendant did not oppose to the claim and did not appeal against the order for payment within the pertinent time limit in those Member States where such an appeal is possible. Without trying to engage in an in-depth discussion of legal philosophy for the purposes of this Green Paper the effect of *res iudicata* should be understood as the definitive settlement of the cause of action in question between the parties reflected not only by the lack of an appeal against the decision but also by the impossibility to re-examine that decision in subsequent court proceedings.

Belgium and Portugal present an exception in that in those Member States the defendant can still raise objections regarding the existence or justification of the claim at issue after the order for payment has become unappealable, either in later ordinary proceedings[109] or in challenging the enforcement of the decision[110].

In order to guarantee legal certainty and to provide a procedure which is not provisional but generates a conclusive decision on the matter it would appear to be preferable to exclude the option of calling into question the order for payment even after the time limits for opposition and/or appeal have expired unless compelling reasons supported or necessitated such a possibility[111]. It has to be taken into account, however, that eight out of the ten Member States with an order for payment procedure are happily attributing *res iudicata* effect to this type of decision. If the rights of the defence are properly protected by the applicable procedural rules it should not be a major obstacle to accord the status of a truly final decision to an order for payment.

---

108 In Luxembourg the procedure before the *tribunal d'arrondissement* is a procedure on provisional measures and thus only capable of yielding a provisional decision. Only the orders for payment issued by the *juge de paix* can become *res iudicata*.

109 This possibility exists in Belgium.

110 As regards Portugal, since only judgments can acquire the status of *res iuidicata* and since the order for payment issued by a court clerk without an examination of the claim is not equivalent to a judgment in the absence of any express provision dealing with *res iudicata* it must be concluded that the defendant can base his opposition to the enforcement of the order for payment on the non-existence of the debt.

111 This would not exclude, of course, the possibility of an extraordinary appeal such as an application for relief from the expiration of time for objection or appeal (*relèvement de forclusion, Wiedereinsetzung in den vorigen Stand*), for example if turns out that the defendant has not been properly served with the order for payment and has therefore not become aware of it without any fault on his part.

Question 27:

Should a European order for payment acquire the status of res iudicata after the time limits for opposition and/or appeal have expired?

3.3.12. Rules on representation by a lawyer?

The question if and to what extent the representation by a lawyer is mandatory in order for payment proceedings is dealt with very differently in the Member States and closely intertwined with their general systems regarding the necessity of representation in court proceedings at large. In Italy, Belgium and Greece the duty to be represented by a lawyer is all-encompassing and applies both to the application for an order for payment and to the statement of opposition. In Finland, France, Germany, Luxembourg, Portugal and Sweden representation is obligatory neither for the plaintiff nor for the defendant. In Spain, the application for an order for payment can be filed without a lawyer's assistance but the statement of opposition must be signed by an attorney if necessary under the general rules of mandatory representation in ordinary proceedings[112]. In Austria, finally, the plaintiff has to be represented by a lawyer if the claim at stake passes the threshold that triggers mandatory representation in ordinary proceedings whereas the defendant can always lodge opposition himself and needs a lawyer only for the ensuing ordinary proceedings[113].

Whilst it is not self-evident that a European instrument on a specific procedure should comprise provisions on the (lack of) mandatory representation by lawyers and thus inevitably collide with the general rules in that respect in one or the other Member State, it could be considered advantageous to keep the requirements for lodging opposition as low as possible and exempt the defendant from an obligation to be represented by the lawyer for the simple act of replying "No" to the allegation of the uncontested nature of the claim at issue.

Question 28:

Should an instrument on a European order for payment include rules on the lack of mandatory representation by a lawyer in the order for payment procedure? If so what should those rules be?

3.3.13. Rules on costs (court fees, other expenses) and their compensation

In order to enable the full enforcement of an order for payment in other Member States whose enforcement authorities are not familiar with the pertinent legislation in the Member State of origin let alone the calculation of the costs that have to be compensated the European order for payment would need to expressly include those costs in an unambiguous manner. Due to the vast diversity in the Member States' legislation in that respect[114] it is doubtful whether it

---

112 Articles 814 (2) and 818 (1) NLEC.

113 The threshold is currently established at 4000 €. As from 1 January 2003 the scope of application of the order for payment procedure will be extended to claims between 10.000 € and 30.000 €. For these newly covered claims representation by a lawyer is obligatory for both parties including the statement of opposition itself. In order for payment proceedings before first instance labour tribunals, however, representation is non-mandatory for both parties irrespective of the value of the claim.

114 To illustrate this diversity, suffice it here to give the example of Sweden where pursuant to sections 46 and 48 of the Act on Summary Proceedings and a government ordinance the plaintiff's possibility of having his expenses compensated is curtailed as the defendant cannot be obliged to reimburse him for his own work and counsel exceeding a certain moderate amount (at present 315 Swedish Kroner).

would be wise to suggest substantive rules on the compensation of legal costs in an instrument on a European order for payment which might give rise to contradictions between these provisions and the law applicable in ordinary proceedings.

Rather, it could appear to be preferable to try to identify some individual questions of particular significance for the order for payment procedure that are instrumental in determining its cost-effectiveness and attractiveness for the parties. It could be considered worthwhile, for instance, to make sure that in the case of an objection to the claim by the defendant the order for payment proceedings do not cause additional costs for the parties but that court fees as well as lawyers' charges are covered by those calculated for the ensuing ordinary proceedings as otherwise plaintiffs could be deterred from opting for order for payment proceedings because of purely cost-related motives.

Question 29:

Should an instrument on a European order for payment comprise provisions relating to the costs of the procedure and their compensation? If so what should those rules be?

3.3.14. Enforcement

Whilst the rules governing the enforcement by and large appear to be in no need of approximation for the purposes of this subject matter the following two aspects could deserve some reflection.

3.3.14.1. Provisional enforceability

The types of questions arising with regard to the provisional enforceability of an order for payment heavily depend on the one-step or two-step nature of the procedure and the related issue of the possibility of an appeal against the order. If in a one-step procedure the order immediately acquires the effect of *res iudicata* once the time limit to contest the claim has elapsed and no further appeal is possible there is room for provisional enforcement only before the expiration of that time limit or after an opposition has been lodged. As a general rule, with the notable exception of Greece[115], the Member States that have adopted a one-step procedure (Austria, France, Italy, Portugal, Spain) do not attribute provisional enforceability to the order itself but require the expiry of the time limit before an enforcement clause can be appended to it. Exceptions are partly made for claims that are based on very strong documentary evidence such as a cheque or a bill of exchange that has been supplied to the court[116]. If a statement of opposition is submitted on time, provided that it does not invalidate the order for payment anyway[117], the order is not provisionally enforceable[118].

In German case-law it is fiercely disputed if and to what extent the plaintiff is entitled to compensation for the costs of involving a debt collection (incasso) agency before turning to the courts.

115 There, the defendant who lodges an opposition can apply for the suspension of enforcement until the final decision on the case.

116 Art. 642 of the Italian C.P.C. that in its Art. 649 also foresees the possibility of suspending such provisional enforceability upon application by the defendant if compelling reasons for such suspension exist. In Austria aspecial order for payment procedure for those types of claims (*Mandats- und Wechselmandatsverfahren*) exists and allows provisional enforcement even after opposition has been lodged without the plaintiff having to demonstrate any particular danger to the claim.

The possibility of taking protective measures in the case of the danger of irreparable harm (for example if the plaintiff can demonstrate a certain likelihood that the defendant tries to evade payment or to embezzle assets) is integrated into the system of provisional enforcement in some Member States (e.g. Art. 642 of the Italian C.P.C.). This issue which appears to rather fall within the sphere of provisional measures in general is not dealt with in this Green paper.

117 On this aspect, supra *3.3.10.*

Most Member States that apply a two-step procedure (Finland, Germany, Luxembourg, Sweden) have in common that the first decision of the court ("payment order") is not enforceable at all whereas the second decision that is taken after the expiration of the time limit for objections ("enforcement order") is "only" provisionally enforceable until the appeal against this ruling has passed. The further conditions of provisional enforcement (such as the requirement of a security to be provided by the plaintiff) differ considerably[119].

Question 30:

Should a European order for payment be provisionally enforceable? If so what should be the requirements for provisional enforceability and for the suspension of provisional enforcement?

3.3.14.2. Cross-border enforcement – the order for payment as a European enforcement order without exequatur

Based on the assumption that the Council will in due course adopt a regulation based on the Commission proposal for a Regulation creating a European Enforcement Order for uncontested claims[120] which aims at abolishing exequatur for all court decisions on uncontested pecuniary claims under certain conditions it is clear that a European order for payment would also fall within the scope of application of that regulation. Ideally, however, the establishment of a European order for payment proceeding should go one step further and relieve the plaintiff of the requirement of having the decision certified as a European Enforcement Order by the court of origin. Such a potential status of a European order for payment as a natural-born European Enforcement Order would presuppose that the adequate protection of the rights of the defence guaranteed by the check of compliance with certain

---

118 Italy constitutes an exception in that regard as Art. 648 C.P.C. allows the declaration of the order as provisionally enforceable after being contested under certain conditions, e.g. if the statement of opposition is not based on documentary proof.

119 In Germany, for example, enforcement orders are basically provisionally enforceable without security (§§ 700 (1) and 708 (2) ZPO). The defendant can apply for suspension of enforceability which can be granted only if the defendant provides a security save in exceptional cases (§ 719 and § 707 ZPO). In Luxembourg an enforcement order issued by a *tribunal d'arrondissement* is a provisional measure by nature; provisional enforceability can be granted with or without security.
It is also interesting to note that the Swedish system is based on the presumption that an application for an order for payment is simultaneously an application for the enforcement of that order once it is issued. As a consequence other than in most other Member States where the plaintiff has to take an additional initiative to launch enforcement the Swedish enforcement agency proceeds to enforcement ex officio unless the plaintiff explicitly refrains from such automatic enforcement on the application form.

120 COM (2002) 159 final, 18.04.2002.

minimum standards primarily concerning the service of the document which instituted the proceedings in the course of the certification procedure is unnecessary. This, in turn, appears to be conceivable only if an instrument on the European *o*rder for payment itself includes binding rules or minimum standards on the service of documents which brings us back to the issues already discussed above[121].

Question 31:

Should a European order for payment be directly enforceable in other Member States without exequatur and also without a certification in the Member State of origin as currently envisaged for the European Enforcement Order for uncontested claims? If so, which conditions should be attached to such direct enforceability?

[121] Supra *3.3.8.*

4. PART III: MEASURES TO SIMPLIFY AND SPEED UP SMALL CLAIMS LITIGATION

There seems to be a growing concern of citizens and small and medium-seized enterprises in the Member States that their judicial systems do not fully meet their demands. For many the judicial systems are too expensive, too slow and too difficult to deal with. The smaller the claim is, the more the weight of these obstacles increases, since costs, delay and vexation (the "three-headed hydra"[122]) do not necessarily decrease proportionally with the amount of the claim. These problems have led to the creation of simplified civil procedures for *Small Claims* in many Member States.

At the same time, the potential number of cross-border disputes is rising as a consequence of the increasing use of the EC Treaty rights of free movement of persons, goods and services. The obstacles to obtaining a fast and inexpensive judgment are clearly intensified in a cross-border context: It will for example often be necessary to hire two lawyers, there are additional translation and interpretation costs and miscellaneous other factors such as extra travel costs of litigants, witnesses, lawyers etc. There is a wide range of possible issues: Individuals may be involved in an accident while on holiday or while making a shopping trip abroad, or they may buy goods, which later turn out to be faulty or dangerous. A consumer may order, over the Internet, goods from abroad which are never dispatched or which turn out to be faulty. Obviously, potential problems are not limited to disputes between individuals. Also the owners of small businesses may face difficulties when they want to pursue their claims in another Member State. A hotel owner left with an unpaid bill should be able to pursue his legitimate claims. But as a consequence of the lack of a procedure which is "proportional" to the value of the litigation, the obstacles that the creditor is likely to encounter might make it questionable whether judicial recourse is economically sensible. At present, the expense of obtaining a judgment against a defendant in another Member State is often disproportionate to the amount of money involved. Many people, faced with the expense of the proceedings, and daunted by the practical difficulties that are likely to ensue, abandon any hope of obtaining what they believe is rightfully theirs.

With the entry into force of the Amsterdam Treaty, and following the conclusions of the Tampere European Council, the European Union faces the challenge of ensuring that in a genuine European Area of Justice individuals and businesses are not prevented or discouraged from exercising their rights by the incompatibility or complexity of the legal and judicial systems in the Member States. Since this problem is particularly virulent in the case of *Small Claims*, action has been considered most urgent in this specific field of civil procedure.

4.1. EXISTING EC LAW - EARLIER COMMUNITY INITIATIVES

The impact of EC law on national law of civil procedure is still rather limited. There is, however, one exception: The European Court of Justice has interpreted Art. 12 [ex-6] EC Treaty (Prohibition of Discrimination on Grounds of Nationality) as setting limits to the application of domestic law of civil procedure in cases where this would lead to a discrimination on grounds of nationality.

---

122 Jacob, J., *Justice between man and man*, in: Current legal problems, 1985, 211

It has ruled in various cases[123] that *"a rule of civil procedure of one Member State, such as one requiring nationals and legal persons of another Member State to provide security for costs when they wish to sue a resident of the former State or a company established there, falls within the scope of the Treaty within the meaning of the first paragraph of Article 6 and is subject to the general principle of non-discrimination laid down by that article"*.

It had, however, been recognised earlier on that such a limited impact on national law would not be sufficient since only the worst consequences of the national laws would be eliminated, and that a functioning internal market required more. An approximation of national laws would be necessary in order to provide citizens and enterprises with better access to justice.

For this reason, the Commission in 1990 requested a group of experts, called "Commission European Judiciary Code", to draw up a study on the approximation of the laws and rules of the Member States concerning certain aspects of the procedure for civil litigation. The resulting report (the so-called "Storme Report"[124]) was published in 1994. It contained a series of proposals to approximate the various aspects of civil procedure which have, however, not been enacted.

The issue of Small Claims has been addressed from two sides at the Community level in the past:

On the one hand, the topic was approached with the objective of improving the access to justice of consumers:[125] Based on the *Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*[126] of 1993, the Commission in 1996 adopted an *Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market*.[127] In the Action Plan, the Commission proposed the introduction of a simplified European form in order to improve the access to court procedures.

On the other hand, the Commission in 1998 proposed the introduction of Small Claims procedures in all Member States in its Proposal for a Directive combating late payment in commercial transactions.[128]

4.2. BACKGROUND

The background of the current effort is the entry into force of the Amsterdam Treaty and the Tampere European Council Conclusions, which have set the goal of progressively establishing an "area of freedom, security and justice". Compared with the Storme Report, this approach is rather limited in its scope since it seeks to establish common procedural rules not for all civil procedures, but only for a particular type of litigation, namely *Small Claims.*

---

123 See: C-323/95, *Hayes v Kronenberger*, ECR 1997, p. I-1711; Case C-43/95, *Data Delecta Aktiebolag*, ECR 1996, p. I-4661; Case C-122/96, *Saldanha*, ECR 1997, p. I-5325.

124 Storme, M., *Study on the approximation of the laws and rules of the Member States concerning certain aspects of the procedure for civil litigation*, Final Report, Dordrecht, 1994.

125 See in this context also COM(1984) 692 final and COM (1987) 210 final.

126 COM(1993) 576 final.

127 COM(1996) 13 final.

128 *Commission Proposal for a European Parliament and Council Directive combating late payment in commercial transactions* (OJ C 168, 3.6.1998, p. 13). Article 6 provided for "simplified legal procedures for small debts". *Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions* (OJ L 200, 8.8.2000, p. 35) does, however, not include a corresponding provision.

The need to take action in this field has been expressed repeatedly:

– The **Vienna Action Plan**[129] considered it necessary to identify "the rules on civil procedure having cross-border implications which are urgent to approximate for the purpose of facilitating access to justice for the citizens of Europe and examine the elaboration of additional measures accordingly to improve compatibility of civil procedures".

– The Conclusions of the **Tampere European Council** (October 1999) called for a simplification and acceleration of cross-border litigation on small consumer and commercial claims:

"V. Better access to justice in Europe

30. The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for **simplified and accelerated cross-border litigation on small consumer and commercial claims**, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should also be created by Member States.

31. Common minimum standards should be set for **multilingual forms** or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union".

– **Commission expert meetings** held on 29 November 1999 and 28 May 2002 identified *Small Claims* procedures as a priority issue.

– The **Council Programme for Mutual Recognition**[130] calls for "simplifying and speeding up the settlement of cross-border litigation on Small Claims".

– The need for simplified and accelerated cross-border litigation on small consumer and commercial claims has also been expressed by the **European Parliament**[131]**.**

4.3. EXISTING SMALL CLAIMS PROCEDURES IN THE MEMBER STATES

As a follow up to the Tampere conclusions, the Commission distributed to all Member States a questionnaire in order to obtain a description of national procedures with respect to *Small Claims*. The answers of the Member States[132] have been summed up in a study.[133]

---

129 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C 19, 23.1.1999, p.1, point 41 d).

130 OJ C 12, 15.1.2001, p. 1.

131 OJ C 146, 17.5.2001, p. 4

132 There was no answer to the questionnaire from Greece. According to the *Green Paper on Consumer Access to justice, COM(1993)576 final*, there is a Small Claims Procedure in Greece (Articles 466 – 472 of the Code of Civil Procedure).
In Italy there is a specific procedure ("Giudice di Pace", Articles 316 ff. of the Code of Civil Procedure) which is, however, not simplified procedurally. Instead, the judge decides on claims below € 1000 not on the basis of the law, but of equity.

133 Des Procedures de traitement judiciaire des demandes de faible importance ou non contestees dans les droits des Etats-membres de l'Union Européenne, Exploitation de l'enquête de la Commission européenne "Les procédures judiciaires applicables aux demandes de faible importance", Rapport final: Evelyne Serverin, Directeur de recherche au CNRS IDHE-ENS CACHAN, Cachan, 2001.

Simplified procedures for Small Claims exist in Germany, Spain, France, Ireland, Sweden and the United Kingdom. Their most important characteristics are:

– In Spain, Ireland, Sweden and the United Kingdom (England/Wales, Scotland and Northern Ireland) there are specific Small Claims Procedures which provide for various simplifications with respect to the ordinary procedure: In many cases, the introduction of the claim is facilitated, often through a specific form. Certain rules concerning the taking of evidence are relaxed, and the possibility of a purely written procedure exists. Also the possibility to appeal is excluded or restricted.

– In Germany there is no specific procedure for Small Claims, but courts may determine their procedures as they see fit in Small Claims cases[134].

– In France there is no specific procedure for Small Claims, but for Small Claims there is a simplified way of introducing the procedure at the Tribunal d'instance by a simple "déclaration au greffe".

There are no specific procedures for Small Claims in Austria, Belgium, Denmark, Finland, Luxembourg, the Netherlands and Portugal.[135]

In Finland, the Code of Civil Procedure contains, however, many different simplified alternatives to the ordinary procedure. E.g. forms can be used to introduce a claim or oppose it, judges and other officials of the court may be obliged to give advice to the parties, no legal references are needed, parties are not obliged to be represented by a lawyer, rules concerning the taking of evidence are relaxed, expert evidence is not used and a purely written procedure is available. The choice between the ordinary procedure and the simplified forms of procedure is, however, not made on the basis of the amount of money claimed (i.e. on a quantitative basis), but rather on the basis of qualitative criteria. Simplified forms of procedure are used in simpler, less complex cases regardless of the amount of money claimed.

Also in Austria, the Code of Civil Procedure contains provisions simplifying procedural rules for procedures at the District Courts *("Bezirksgerichte")* which are competent for claims up to 10.000 €. The simplifications refer to the (not mandatory) representation by a lawyer, the duty of the judge to give assistance to a party not represented by a lawyer, the introduction of the procedure, the relaxation of certain rules concerning the taking of evidence and to restrictions of the possibility to appeal. Despite the fact that one not may consider this as a specific Small Claims Procedure in a strict sense, these simplifications are indicated in detail below.

The most important features of the existing Small Claims procedures can be summarised as follows:

This Green Paper is based on the answers of the Member States and their evaluation in the study.

134 § 495a ZPO (Code of Civil Procedure).

135 This results from the answers of the Member States to the questionnaire.
In two of these Member States, there are, however, Small Claims procedures according to the *Green Paper on Consumer Access to justice, COM(1993)576*: In the Netherlands, a new procedure before the "Kantongerecht" was introduced by a law of 30 December 1991. In Portugal, there is the "processo sumarissimo" (Articles 793 ff. of the Code of Civil Procedure). The Commission would appreciate any correction of incorrect or incomplete information in the answers to the questionnaire.

4.3.1. Threshold

All Member States with Small Claims procedures have thresholds for these procedures which vary, however, considerably:[136]

600 € (Germany), 1.235 and 2.470 € (Scotland[137]), 1.270 € (Ireland), 2.038 € (Sweden), 3.005 € (Spain), 3.294 € (Northern Ireland), 3.811 € (France), and 8.234 € (England/Wales)[138].

4.3.2. Types of litigation

In most Member States with Small Claims procedures, these procedures are available not only for monetary claims.

In Scotland[139], Ireland[140] and England/Wales[141], the simplified procedures are reserved to certain types of disputes.

In England/Wales[142], Ireland[143] and Sweden[144] the use of a simplified procedure is prohibited for certain types of disputes.

In Germany[145], the simplified procedure is not restricted to any classes of action.

4.3.3. Small Claims Procedure as an option or an obligation

In Germany[146], England/Wales[147], Scotland[148], Spain[149] and Sweden[150] the use of the simplified procedure is obligatory (for claims below the threshold), but in most of those

---

136 Thresholds in national currencies (before 1 January 2002), calculated into €.

137 In Scotland, there are two simplified procedures: The *Small Claims Procedure* (up to and including £750) which is intended for use by the lay person, and the *Summary Cause Procedure* (over £ 750 up to and including £1500) which covers broadly speaking consumer claims, actions by corporate bodies for recovery of debt and claims by landlords to recover possession of heritable property.

138 Interests on the main claim and expenses are not included.
Please note that the threshold proposed in Article 6 of the *Commission Proposal for a European Parliament and Council Directive combating late payment in commercial transactions* (OJ C 168, 3.6.1998, p. 13) had been significantly higher (not less than € 20.000).

139 In Scotland, the Small Claims Procedure is reserved to actions for payment of money not exceeding £ 750 in amount (exclusive of interest and expenses) other than actions in respect of aliment and interim aliment and actions of defamation, and for actions ad factum praestatum (to enforce an act other than payment of money) or for the recovery **of possession of moveable property where in any such action** there is included, as an alternative to the claim, a claim for payment of a sum not exceeding £ 750 (exclusive of interest and expenses).

140 In Ireland, the *Small claims procedure* applies for faulty goods or bad workmanship, minor damage to property and non-return of rent deposits.

141 In England, the *Small Claims Procedure* applies for claims for personal injury where the damages sought are less than £ 1000, claims for housing disrepair where the claim for repair is less than £ 1000 and for all other claims with a value of less than £ 5000.

142 In England/Wales, claims for harassment or unlawful eviction relating to residential premises are excluded from the *Small Claims Procedure*.

143 In Ireland, claims relating to contracts, hire purchase/credit sales agreements, tort and family law are excluded from the *Small Claims Procedure*.

144 In Sweden, the *Small Claims Procedure* is excluded for family law matters.

145 The Small Claims Procedure can be used in any dispute which falls into the competence of the Registry Courts which is competent . The Registry Court has no competence for labour law, claims against the tax authorities under civil service law and claims against the courts and civil servants for exceeding their powers or failing to undertake official acts.

Member States a litigation can be transferred to the ordinary or a more formal procedure by the judge or on application of a party. In France and Ireland the Small Claims Procedure is optional. In Northern Ireland claims for less than £ 2000 are subject to the small claims procedure, unless the proceedings are for a debt or liquidated amount and the claimant opts to proceed by ordinary civil bill. However, even then the defendant may serve a notice of intention to defend that is endorsed with a request that the matter be dealt with as a small claim and the court is obliged to accede to that request.

4.3.4. Introduction of the Procedure

At present, forms for filing the claim can be used in England/Wales[151], Scotland[152], Northern Ireland[153], Sweden[154], Ireland[155], Spain[156] and France.

In France, for Small Claims there is a simplified way of introducing the procedure at the Tribunal d'instance by a simple "déclaration au greffe". There a is form the use of which is not obligatory. The "déclaration au greffe" can also be made orally. In the "déclaration au greffe" procedure, the parties are informed by the greffier (court clerk) of the hearing by letter (or also orally).

In Germany, there is no form, but all applications and declarations can also be made orally.

In Austria, the claim can be entered in the record of the District Court at the place of residence of the claimant which will establish the competent court and transfer the case to it.

There is no obligation to make legal references in the application in any Member State, i.e. only factual references are required. Accordingly, claimants do not necessarily have to employ a lawyer.

4.3.5. Representation and assistance

In most Member States there is support by a court clerk or help desk for the introduction of a procedure (Germany, England/Wales, Scotland, Northern Ireland, Sweden, Ireland, Austria). Moreover, the judge gives assistance during the hearing to a party that is not represented by a lawyer (particularly on procedural issues), whilst observing the principle of impartiality

---

146 In Germany, the parties cannot demand to revert to normal proceedings. It is within the discretion of the courts to revert to normal proceedings at any time, but this is the exception in practice.

147 In England/Wales, the court can, however, refer a small claim to a different procedure (for example the fast track).

148 In Scotland, the court may, however, remit the claim to a more formal procedure when satisfied that a difficult question of law or a question of fact of exceptional complexity is involved, either on its own merit or on motion of any party. The court must remit the claim if the parties make a joint motion.

149 In Spain, the oral procedure (for claims below 500 000 pesetas) is obligatory.

150 In Sweden, a party can demand the application of the ordinary procedure if the claim is of a specific importance for the legal relationships between the parties which goes beyond the matter of the claim.

151 A standard form is available for all claims, including small claims.

152 The use of a standard form is compulsory. There are guidance leaflets to fill in the form and oral assistance is available from court officials.

153 A form is prescribed in the court rules which must be used.

154 A standard form is available for all claims, including small claims.

155 In Ireland, there are special forms for filing the claim and for the response of the defendant which can be obtained from the Registrar who will assist on their completion.

156 The introduction of a form is currently prepared (in application of Articles 437 et 812 of the Code of Civil Procedure).

(Ireland, Sweden, France, Germany, Sweden[157], England/Wales, Northern Ireland[158] and Austria).

At present, no Member States requires mandatory representation by a lawyer in Small Claims procedures.[159] In France, the parties in practice often defend themselves without assistance by a lawyer and come to the hearing with a more or less complete file.

Nevertheless, in all existing small claims procedures, representation by a lawyer is possible.

In Sweden, Germany, England/Wales, Scotland and Northern Ireland a person who is not qualified as a lawyer may also represent a party.

4.3.6. ADR (Alternative Dispute Settlement)

In several Member States, ADR (Alternative Dispute Settlement) methods have been introduced in the context of court proceedings.

In Ireland, ADR efforts are directly connected with the Small Claims procedure. The Small Claims Registrar facilitates conciliation, mediation and informal discussions in an effort to reach a settlement without a judgment being delivered.

In Scotland, the present rules do not provide specifically for the Sheriff brokering a settlement of the claim through conciliation or mediation. It is nevertheless intended that the Sheriff should seek if possible to determine the issues between the parties at the first hearing without needing to hear evidence. This policy is reinforced under new rules being prepared under the current review which will, if approved, expressly provide for the Sheriff attempting to resolve the dispute through seeking to negotiate a settlement. A state-sponsored in-court advice scheme which is presently being piloted in one of the Sheriff Courts includes a mediation facility to which cases may be referred. Referrals may be made either by the adviser or the court. The success of this service is presently being evaluated.

Also other Member States have provisions to facilitate ADR in the context of court proceedings, independently of existing (or not existing) Small Claims procedures. These provisions range from granting the possibility of recourse to ADR (for example in Belgium[160] and France[161]) to its encouragement (in Spain,[162] Italy,[163] Sweden[164] and England/Wales[165])

---

157 En s'adressant à un tribunal de première instance ou à un service public de recouvrement forcé, il est possible de recevoir une assistance pour l'engagement d'une procédure. La base juridique de cette assistance est l'obligation générale faite à l'administration publique de servir les citoyens. Cette obligation de service implique que les citoyens peuvent téléphoner ou se rendre dans un tribunal de première instance pour recevoir des conseils d'ordre général sur la procédure et les règles y afférentes. Par ailleurs, le président du tribunal est tenu au cours de la phase préparatoire d'une instance de veiller à ce que toutes les questions relatives au litige soient clarifiées et à ce que les parties fassent connaître tous les éléments dont elles peuvent se prévaloir.

158 The District Judge will guide the parties through the hearing and give assistance to any party that requires it. He will help in the formulation of questions to be put to witnesses and will of his own volition ask witnesses after each party has examined and cross-examined them.

159 In Spain, there is, however, mandatory representation if the value of the claim is above 150 000 pesetas. In Autria, there is no mandatory representation for claims up to 4.000 €.

160 Article 665 of the Judicial Code, introduced by the law on family mediation of 21 January 2001, allows the judge, at the joint request of the parties or at his own initiative but with the agreement of the parties, to appoint a mediator.

161 See articles 131-1 to 131-15 of the new Code of Civil Procedure on judicial mediation.

and even the prior obligation to have recourse to ADR under the law or by decision of the judge (for example in Germany,[166] Belgium[167] and Greece[168]).

4.3.7. Relaxation of certain rules concerning the taking of evidence

The relaxation of rules concerning the taking of evidence is one of the issues crucial in the small claims procedures in most Member States. In many cases, the judge has a certain amount of discretion in this respect:

In Small Claims procedures in England/Wales and Northern Ireland the strict rules of evidence do not apply. In England/Wales no expert may give evidence, whether written or oral, at a hearing without the permission of the court. The court does not need to take evidence on oath and may limit cross-examination. Witnesses may submit written statements, but - as a general practice - the attendance of witnesses is encouraged at the trial or final hearing. The court may adopt any method of proceeding that it considers to be fair, and limit cross-examination. The judge may ask questions to any witness directly before allowing other persons to do so.

Also in Scotland and Sweden the normal rules of evidence are relaxed. In Scotland there is a hearing with a further hearing for evidence when necessary." The Judge should seek if possible to determine the issues between the parties at the first hearing without the need to hear evidence. Detailed written pleadings to support the claim are not required. The normal rules of evidence are relaxed without any restrictions of evidence. Written statements of witnesses are regarded as documentary evidence.

---

162 Articles 414 and 415 of Act No 1/2000, which came into force on 9 January 2001, stipulates that the judge must intervene to invite the parties, at the start of the "ordinary" procedure, to a conciliation or transaction once their respective claims have been expressed.

163 Articles 183, 185 and 350 of the Code of Civil Procedure stipulates that the judge must take all measures to assess in practice whether the necessary conditions are present to extinguish the judgment in hand by a document establishing the effective reconciliation of the parties.

164 Pursuant to chapter 42, section 17, of the Code of Procedure, the court must take all measures to allow the dispute to be resolved amicably.

165 Pursuant to Rules 26.4 and 44.5 of the Civil Procedure Rules for England and Wales, which came into force on 26 April 1999, the court may suspend a case to allow the parties to have recourse to mediation. The courts can order the parties to make financial penalty payments if they refuse mediation.

166 Pursuant to a Federal Law of 15 December 1999, under § 15a, para. 1 of the law implementing the civil procedural regulations (EGZPO), Federal states may legislate to the effect that no statement of claim may be brought before a registry court where the amount at issue is € 750 or less, or in certain nuisance and disciplinary cases until a recognised arbitration body has attempted to resolve matters: any statement of claim made without such an attempt at reconciliation would then be dismissed as inadmissible. So far, four *Länder* have used this mandatory out of court settlement attempt option. Once an action has been brought, § 279 ZPO requires the courts to give consideration to settling the dispute or individual bones of contention amicably in any case; they may thus present the parties with proposals for settlement at any stage of the proceedings, during the oral or written hearings or order the parties to attempt to settle matters amicably. In proceedings under § 495a ZPO (Small Claims procedures), it is also within the courts' discretion to suspend proceedings to allow attempts to be made to settle matters out of court.

167 The recourse to extrajudicial procedures is compulsory, under the Judicial Code, for example, in matters of litigation involving employment contracts and agricultural leases. A bill currently being discussed envisages an overall reform within the framework of the Judicial Code and introducing the possibility whereby any judge can order a mediation procedure.

168 Article 214 of the Code of Civil Procedure stipulates that disputes which fall within the jurisdiction of the court of first instance cannot be heard unless there has first been an attempt at conciliation.

In Germany, the courts are free to obtain evidence as they see fit and are not bound by statutory rules of evidence or evidence procedures. The discretion of the court is, however, limited by the principle of a fair hearing, the right to a hearing in law, the prohibition of arbitrariness and the principle of reasonability and of impartiality.

In Austria, the courts can reject the taking of evidence proposed by the parties in certain cases-[169]

In England and Wales, Northern Ireland, Sweden[170] and Germany telephone conferences are possible.

In Spain[171], Sweden[172], Germany and Ireland witnesses can submit written statements instead of appearing before the court. In Northern Ireland, written statements of witnesses are possible but not widely used.

4.3.8. Introduction of the possibility of a purely written procedure

The possibility of a purely written procedure (instead of oral hearings) exists presently in Sweden[173], Northern Ireland[174], Scotland[175], Germany, England/Wales and Spain.

In Germany written procedures are the rule in practice. The parties can, however, demand an oral hearing.

In England, a judgment may be based on a written procedure alone if the judge thinks it appropriate and the parties agree, but such cases are rare.

4.3.9. Relaxation of rules concerning the content of the judgment and time frame

In Germany, the judgment in a Small Claims procedure does not necessarily have to contain the facts of the case. With respect to the legal reasoning, it is sufficient if the essentials are in the records.

A general time frame for resolving a case does not apply in any Member State.

---

169 Presently, this possibility exists with respect to claims which are minor (not more than 10 %) compared with the total claim. As of 1 January 2002, this possibility will exist for all claims below 1.000 €.

170 L'audience peut se tenir par téléphone s'il est jugé opportun de le faire compte tenu de l'objet de l'affaire, des frais de comparution en personne et des inconvénients que peut entraîner la comparution en personne des parties. Les vues des parties sont également prises en compte. Il arrive dans la pratique que les parties comparaissent par téléphone, surtout dans le cadre de demandes de faible importance.

171 In Spain written statements are allowed in specific cases (Article 381 of the Code of Civil Procedure).

172 Les déclarations écrites des témoins (dites attestations de témoignage) ne sont admises que si l'audition des témoins ne peut avoir lieu au cours ou en dehors de l'audience principale ou encore à l'intérieur du tribunal, ou s'il existe des raisons particulières quant aux frais ou aux inconvénients qu'est jugée engendrer une audience au cours ou en dehors de l'audience principale, à l'apport qu'est jugée constituer une telle audience, à l'importance de la déclaration ou à d'autres circonstances. Cette méthode est rare et les règles sont par conséquent appliquées de manière restrictive.

173 Cette possibilité est appliquée dans les cas où les débats oraux ne sont pas nécessaires compte tenu de l'instruction de l'affaire et où aucune des parties ne l'exige.

174 Although legislation allows a purely written procedure, in practice it is not widely applied although it does mean that applicants living outside the jurisdiction can and do support their applications with written statements rather than appear at court. However if the matter is disputed the applicant is at a disadvantage if they do not appear at the hearing and rely solely on their statements.

175 The written procedure in Scotland is for undefended claims only.

Currently, there is a time limit for the delivery of the judgment in Spain[176] (10 days), Sweden (14 days), Scotland (28 days) and Austria (4 weeks[177]).

4.3.10. Costs

The procedural rules with respect to the reimbursement of costs differ significantly. In many Member States all costs have to be paid by the defendant alone if he loses.

In England/Wales, Scotland, France[178], Ireland, Northern Ireland[179] and Sweden the reimbursement is, however, limited. It varies from no reimbursement (Ireland) to restrictions on court fees (Northern Ireland) and fixed maximum sums, in some cases depending on the value of the claim (England/Wales, Scotland, Sweden).

4.3.11. Exclusion/restriction of the possibility to appeal

The laws of the Member States concerning the possibility to appeal against decisions in Small Claims procedures differ considerably.

Judgments in Small Claims cases may be appealed without limitation in Ireland and Spain.[180]

In Scotland an appeal is possible only on points of law.

In Sweden an appeal is subject to permission which is granted if there are particular circumstances such as the importance of the case for the application of the law.

In England/Wales an appeal is subject to permission in all cases save for specific instances that effect the liberty of an individual.

In Northern Ireland there is currently a very restricted right of appeal in small claims proceedings[181]. However, legislative amendments have been proposed which will expand the right of appeal."

There are thresholds for appeals in France (25.000 FF = 3.811 €) and Germany (600 €) which effectively mean that in a Small Claims Procedure an appeal is not possible. In Germany, an appeal is nevertheless admitted if the case is of general significance.

In Austria, an appeal against judgments concerning claims below 2.000 € is possible only because of nullity (i.e. most severe procedural errors) or on points of law[182]

---

176 There are, however, no legal consequences, if the time limit is not respected.

177 There are, however, no legal consequences, if the time limit is not respected.

178 The reimbursement of costs is limited in accordance to Article 695 of the New Code of Civil Procedure.

179 Only the appropriate court fee will be awarded unless the District Judge is satisfied there has been unreasonable behaviour by one of the parties (in which case he may award costs and witness expenses against that party), or the proceedings were properly commenced by civil bill (in which case costs may be awarded).

180 In Spain, there are, however, restrictions with respect to the evidence allowed (Article 460 of the Code of Civil Procedure).

181 The District Judge may, and must if so ordered by the High Court, state for the determination of the High Court any question of law arising out of an award.

182 Appeals based on factual points and the evaluation of evidence are excluded (§ 501 of the Code of Civil Procedure).

4.4. THE NEED FOR ACTION AT COMMUNITY LEVEL

As mentioned above, costs, delays and vexation connected with judicial remedies do not necessarily decrease proportionally with the amount of the claim. On the contrary, the weight of these obstacles increases, the smaller the claim is. That is why many Member States have created simplified civil procedures for *Small Claims.*

The Study "Cost of Judicial Barriers for Consumers in the Single Market" of 1995[183] revealed the following data for Smalls Claims cases in the domain of consumers which are, however, also of a more general relevance:

- 24% of the citizens of the Member States buy sporadically (mostly while travelling abroad) goods or services for up to 2.000 € in other EU countries.[184] 10% of these consumers are unsatisfied and two thirds of them are unable or unwilling to pursue their claims. The survey also shows that a Single Market for durable goods hardly exists. They are rarely bought abroad due to the risks of not being able of claiming repair or return of money.
- The total costs of pursuing a cross-border consumer claim with a value of 2000 € varies, depending on the combination of Member States from 980 € to 6.600 € and amounts to 2.489 € for a proceeding at the defendant's residence on the average. The minimum, and average costs for a proceeding at the plaintiff's residence are about 3% lower, the maximum cost are even 11% lower than for a proceeding at defendant's residence. Since part of the costs have to be paid even by successful plaintiffs and the risk of having to cover the full costs in unsuccessful cases always exists, a reasonable consumer would not sue for 2.000 €.
- In addition, consumers take the duration of the legal action into account. Decisive elements in this respect are the proceedings (and within these the service of documents) and enforcement. Whereas some Member States offer proceedings which take a year or less, the courts with jurisdiction over small consumer claims in Ireland and in particular in Italy need several years for resolving the dispute. The average duration of a cross-border civil law suit in Europe is almost 2 years at the defendant's residence and six months more at the plaintiff's residence (where service of process and the procedure for recognition and enforcement add to the duration).
- The data indicate legal uncertainty for consumers in the Single Market. As a consequence, informed consumers will avoid anonymous markets and uninformed consumers suffer risks when buying abroad. The structures offered for cross-border civil litigation are far from being trustworthy, accessible and effective. Calculations of direct costs for consumers indicate that the aggregate costs of cross-border consumer legal uncertainty is significant. Adding up different cost categories led to costs in the range of 7.230 to 73.790 million €.

The fact that the obstacles to obtaining a fast and inexpensive judgement are thus clearly intensified in a cross-border context is also stressed in the Report of the Multidisciplinary Conference of Experts on *Resolving Small Claims Across European Borders,* hosted by the UK Presidency of the European Union in 1998.[185] The lack of knowledge of the legal systems

---

183 *Cost of Judicial Barriers for Consumers in the Single Market*, Hanno von Freyhold, Volkmar Gessner, Enzo L. Vial, Helmut Wagner (Eds.), A Report for the European Commission (Directorate General XXIV), Zentrum für Europäische Rechtspolitik an der Universität Bremen, October/November 1995, available at: http://www.freyvial.de/Publications/egi-2.pdf

184 EUROBAROMETER survey of 17 May 1995 (43.0)

185 Multidisciplinary Conference of Experts, *Resolving Small Claims Across European Borders,* 22 and 23 June 1998, Down Hall, Hatfield Heath, Hertfordshire.

of other Member States and the resulting need to consult a lawyer, the more time-consuming service of documents on a party in another Member State and additional translation costs are only some of the contributing factors. Therefore today the expense of obtaining a judgment against a defendant in another Member State is often disproportionate to the amount of money involved, in particular when the value of the claim is low. If in this case there is no procedure available which is "proportional" to the value of the litigation because the legal system of a Member State does not provide for such a procedure or excludes its application in cross-border cases, the obstacles that the creditor is likely to encounter can make judicial recourse economically questionable. Many creditors who are faced with the expense of the proceedings and daunted by the practical difficulties that are likely to ensue, may abandon any hope of obtaining what they believe is rightfully theirs.

In order to enable the Commission to better assess the extent of the need for action at Community level as well as the nature of the action needed, it is one of the purposes of this Green paper to gather more information on the functioning of the existing Small Claims procedures. A mere analysis of the existing procedural framework is not sufficient in order to draw the right conclusions as to the performance of a specific procedure in its daily use. The greater the divergence of acceptance and success of procedures intended to simplify and accelerate small claims litigation between the Member States, the bigger the disequilibrium outlined above and the more urgent the need for approximation throughout the Community becomes.

In this context, it should also be clarified that a possible future Community instrument on Small Claims would fit into the existing Community acquis in the field of Judicial Cooperation in Civil Matters and other possible future instruments in this area. In cross-border Small claims cases, documents would be served in accordance with Regulation (EC) N° 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.[186] The fact that a debtor has objected to a claim made in a possible future European order for payment procedure as outlined in Part II of this Green Paper, would not have an impact on whether after the order for payment procedure, the ordinary or the Small Claims procedure would follow (provided that the action concerns a "Small Claim"). And finally, an uncontested judgment rendered in a Small Claims procedure, would qualify for a European Enforcement Order (once a Council Regulation creating a European Enforcement Order for uncontested claims has been adopted,[187] and provided that the other conditions for issuing the Order are fulfilled).

Question 32:

Which problems, if any, have arisen in the application of Small Claims procedures in your Member State? Please indicate the level of acceptance and success of these procedures in practice. Are these procedures also available in cross-border cases where either the plaintiff or the defendant is domiciled in another Member State? Which problems are currently encountered when small claims are pursued across borders?

In the context of the acceptance and success of existing procedures, it should furthermore be stressed that after the adoption of a future Community instrument on Small Claims, one key aspect for citizens will be to inform them of the existence of the Small Claims procedure in

186 OJ L 160, 30.6.2000, p. 37.

187 See COM(2002) 159 final, Proposal for a Council Regulation creating a European Enforcement Order for uncontested claims.

order to guarantee effective access to justice in practice. One way to provide this information will be through cooperation of the competent national authorities in order to provide the general public and professional circles with information on the Small Claims procedure, in particular via the European Judicial Network in Civil and Commercial Matters established by Council Decision No 2001/470/EC.[188]

Question 33:

Which ways to inform citizens of a future Community instrument on Small Claims procedure best can be envisaged ?

[188] Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ L 174, 27.6.2001, p. 25.

5. SCOPE OF INSTRUMENT ON SMALL CLAIMS

Apart from the two issues mentioned in the Introduction (Part I: appropriate legal instrument, application to cross-border cases only or to purely internal cases as well), a possible future Community instrument on Small Claims raises other specific questions. Two different types of questions can be distinguished:

– One set of questions is linked to the scope of the instrument on *Small Claims*. The scope concerns i. a. the question what the threshold for *"Small Claims"* should be, for which types of disputes the *Small Claims* procedure should be available and whether it should be obligatory or optional. This question is addressed in this chapter.

– The second question concerns the concrete procedural rules that could distinguish the *Small Claims* procedure from ordinary procedures, i.e. the question which procedural rules can be envisaged and could be suitable in order to ensure that individuals and businesses are not prevented or discouraged from exercising their rights. The procedural rules possibly connected with these parameters are linked to all phases of a civil procedure, namely the introduction of the procedure, the procedure itself, the judgment and its costs, the enforceability of the judgment and the possibility to appeal. This question is addressed below (6.).

A possible future Community instrument on Small Claims raises specific questions with respect to its scope. These three issues, namely the threshold of the Small Claims procedure, the types of litigation for which the Small Claims procedure is available, and the question whether the Small Claims procedure should be optional or obligatory, are to a certain extent inter-linked.

5.1. Threshold

Since the notion of the term *Small Claims* is quantitative, it seems necessary to set a quantitative threshold (based on the value of the claim) below which a claim is be considered as "small". Admittedly, there are legal systems in which the choice between the ordinary procedure and the simplified forms of procedure is not made on the basis of the amount of money claimed (i.e. on a quantitative basis), but rather on the basis of qualitative criteria (see 4.3). Simplified forms of procedure are used in simpler, less complex cases regardless of the amount of money claimed. A quantitative definition of Small Claims seems nevertheless preferable since a Claim which involves no major legal questions and where also the factual situation is clear, but which nonetheless has a high value, can hardly be defined as a "small" claim.

In all Member States with Small Claims procedures there are thresholds for these procedures which vary considerably (between 600 € and 8.234 €). There seems to be a general tendency in the Member States of raising these thresholds (rather than lowering them).

The threshold should not be set too low in order to make sure that the Small Claims procedure has a scope of application with a sufficient practical significance and – in accordance with the Tampere conclusions – a direct impact on the lives of citizens. On the other hand, a threshold which would be set at a too high level could also be problematic. The simplification of procedural rules is only justified in cases where the costs of the judiciary are out of proportion with the value of the claim at stake. A too high threshold could be an obstacle for the introduction of significant procedural simplifications because of considerations concerning an

effective legal protection of the citizens. A threshold between 1000 € and 2000 € could be an acceptable compromise. The threshold could be set at a higher level in case of an optional procedure (see 5.3) since the application of the ordinary procedure remains open in any case.

One could also imagine to foresee a common *minimum threshold* below which the small claims procedure would be applicable in all Member States, but which would leave Member States the choice to set the threshold at a higher level. It could also be considered to set an additional maximum threshold.

Question 34:

Should there be a quantitative threshold for Small Claims ?

If so, what should this threshold for Small Claims be ?

Should there be a common threshold for all Member States ?

Or would a Community minimum (and maximum) threshold be sufficient?

5.2. Types of litigation

In contrast to the order for payment procedure which aims at producing an enforceable title for *uncontested claims* within a reasonable period of time (possibly by using data procession), the Small Claims procedure applies for claims which are *contested* by the defendant. Therefore there are hardly any arguments for limiting the Small Claims procedure to monetary claims only. Since the case will be heard by a judge - in whatever simplified procedural form -, it is not necessary that the wording of the judgment fits with a form which is just filled in by crossing boxes (which may be difficult in the case of non-monetary claims). Therefore also in most Member States with Small Claims procedures, these procedures are available not only for monetary claims.

Furthermore, the question arises whether the procedure should be limited to certain types of claims, or whether certain claims should be excluded from the procedure. The laws of several Member States provide for such limitations.

The Tampere Conclusions speak of special common procedural rules for simplified and accelerated cross-border litigation on “small consumer and commercial claims, as well as maintenance claims”.

It is the purpose of the Small Claims procedure to avoid lengthy and expensive procedures for small claims. It would therefore a priori seem logical to apply the procedure for all types of claims in civil and commercial matters. This could, however, pose problems in cases where substantial and expensive taking of evidence (such as expert witnesses) is necessary. On the other hand, one could imagine flexible rules on the taking of evidence by granting the judge a significant room for discretion in this respect (see below 6.4). Furthermore, it may be difficult to determine certain types of litigation which are typically more complex and are thus not suitable for a Small Claims procedure. Even in cases of claims of damages for injuries – which might be typically more complex - a possibly necessary expertise could be made in writing, and a written procedure would thus be feasible. In this context, also the question of reimbursement of costs and the question whether the procedure is optional or obligatory are of relevance. If the reimbursement of expert witnesses (which can be necessary even in cases concerning simple contractual claims) should be limited in an obligatory Small Claims

procedure, it would render the pursuit of claims economically questionable where such prove is necessary.

In determining the suitable types of litigation, one will also have to take into account that in some Member States certain claims (such as e.g. certain family law matters) are not dealt with in an ordinary civil procedure. It could therefore be difficult to introduce a Small Claims procedure (a simplified ordinary procedure) for those types of claims.

In non-monetary claims, it is usually the claimant who determines the value of the claim. In the case of an obligatory Small Claims procedure, it would thus be up to him to determine whether or not the procedure applies for his claim. In order to prevent a possible misuse, in some Member States the judge controls the determination of the value of the claim.

Question 35:

Should Small Claims be restricted to monetary claims, or not?

Question 36:

For which types of disputes should the Small Claims procedure be available?

Should certain civil and commercial disputes be excluded?

Or should the procedure be available only for certain civil and commercial disputes specifically mentioned?

5.3. Small Claims Procedure as an option or an obligation

Optional procedure

An optional procedure (such as presently in France, Ireland and Northern Ireland) could be established as an additional European procedure which would not interfere with existing national procedures. This could, however, mean that the Small Claims procedure would hardly be used in practice, in particular if the Small Claims procedure would only apply to cases with cross-border elements,

It would also have to be considered who could opt for the Small Claims procedure. In order to guarantee equal procedural rights of the parties, it seems reasonable that the claimant could introduce the procedure as a Small Claims procedure, but the defendant could object to this and thus make the ordinary procedure applicable. As a result, a Small Claims procedure would apply only if both parties agree to it. Since they will, however, often have contradictory interests and thus will not always both be in favour of a speedy procedure, the practical scope of application of the procedure could be limited significantly.

Obligatory procedure

An obligatory procedure (such as in Germany, England/Wales, Scotland, Spain and Sweden) would ensure a wider scope of application of the small claims procedure, especially if not only cases with cross-border elements were covered. In certain cases it could, however, be more suitable to apply a normal procedure despite the fact that the value of the claim is below the threshold for Small Claims. In order to avoid that this decision is left to the parties, one could consider to leave it to the discretion of the judge to “transfer” a Small Claims procedure to an ordinary procedure. Such a decision would have implications for all other procedural

simplifications in a Small Claims Procedure (such as limitations to the possibility to appeal etc). In most cases the judge will consider the "transfer" to the ordinary procedure because he wants to apply the normal rules on the taking of evidence. Therefore one could consider – instead of a "transfer" of the procedure – only to enable the judge also to apply the normal rules on the taking of evidence. The application of the remaining procedural simplifications would not then be within the discretion of the judge (see below 6.4).

One should be aware of the link between this issue and the possibilities of simplifying procedural rules such as the necessity of an oral hearing or consequences of limitations to the reimbursement of costs.

Question 37:

Should the Small Claims Procedure be obligatory or optional ?

Should it be possible for the court to revert a small claim to an ordinary procedure ?

If so, under which conditions ?

Should it be possible for the parties to revert a small claim to an ordinary procedure ?

If so, under which conditions ?

6. SIMPLIFICATION OF PROCEDURAL RULES

The possible options for the simplification of procedural rules in a Small Claims procedure with respect to an ordinary procedure concern all stages of a procedure (the commencement of the proceedings, the proceedings themselves, the judgment and its costs and the possibility to appeal). The options mentioned here can be found in one way or another in existing Small Claims procedures (and to some extent also in the ordinary procedures of other Member States), but they stand for a broader range of possible options. It is the purpose of the following proposals of simplification of procedural rules to keep the procedural efforts low with respect to the small value of the claim and to make the procedure as user-friendly as possible, but nevertheless to guarantee effective legal protection to the citizen which observes a procedure based on the rule of law.

6.1. Common minimum standards for forms

A standard form, which could be filled in very easily and is limited to the absolutely necessary essentials would significantly facilitate the introduction of a procedure.

Those essentials could be:

- Name and address of the parties and the court

- The claim, including a short description of the facts

- Date and signature.

Also the Tampere Conclusions (point 31) mention the setting of common minimum standards for multilingual forms.

The aim should be to introduce a form which does not contain any information for which the plaintiffwould require the assistance of an attorney (such as legal observations or the legally correct wording of judgment requested). If necessary, the judge or a court clerk could give instructions to the parties concerning necessary amendments in the course of the further procedure (see below 6.2). In order to prevent problems, the form could include instructions to be followed for filling it in. The simplified European form proposed by the Commission in the 1996 *Action Plan on Consumer Access to Justice and the Settlement of Consumer Disputes in the Internal Market*[189] and the existing Commission *Consumer Complaint Forms*[190] could serve as points of reference.

In the Action Plan, the Commission proposed the introduction of a simplified European form in order to improve the access to court procedures.

It could also be envisaged to introduce forms for further stages of the procedure (such as for the reply of the defendant).

Such forms could be made available also in the internet. This would make things easier especially for parties residing in a Member States different from the court, in particular if

---

189 COM(1996) 13 final.

190 http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just03_en.html

despite all efforts of harmonisation between the Member States minor differences in the forms should prove to be necessary.

One could consider the possibility of allowing modern means of communication such as fax and email for the introduction of the procedure and further communication between the litigants and the court. Whereas communication by fax is increasingly being accepted by the courts, electronic communication is possible only in exceptional cases and only through special systems of data transfer. Also communication via email is problematic because of the difficult verification of the authenticity of the document. Taking into account the EC legislative framework concerning electronic signatures[191], the introduction of a procedure through email could, however, become more common in the future. One should also be aware that the technical ways of communication are a general issue of civil procedure rather than a matter specific to Small Claims.

Question 38:

Should common minimum standards for forms be introduced ?

If so, which standards could be envisaged ?

For which stages of the procedure should the forms be used ?

Should modern means of communication be introduced?

6.2. Representation and assistance

Since it is one of the objectives of small claims procedures to enable litigants to obtain a judgment easily and inexpensively, representation by a lawyer is *not mandatory* in any Member State. On the other hand, representation by a lawyer is *possible* in all Member States. This existing framework seems satisfactory since the Small Claims procedure should grant easy access to justice in particular for laymen, and since there are no objections against presentation through a lawyer.

The possibility of representation by non-lawyers which exists already in some Member States (Germany, England/Wales, Scotland and Northern Ireland) could be a further improvement. This might be of interest in particular for companies which particularly in easy cases could be represented by members of their staff.

In many cases the parties are in fact not represented by a lawyer. In order to give effective assistance to those persons, many Member States provide for assistance concerning the introduction of the procedure through court clerks, in particular concerning the filling in of a form. Such provision of assistance may help to avoid delays caused by incomplete applications and corrections necessary later on.

Non-lawyers may, however, often need help also in later stages of the procedure. The Small Claims procedures of most Member States do therefore provide that detailed pleadings are not required and that the judge has certain duties to give instructions to the parties. He should work towards a complete clarification of the factual situation and support the parties especially in procedural questions. In order to improve the user-friendliness of the Small

[191] See in particular Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19. 1. 2000, p. 12.

Claims procedure, one could envisage to introduce a duty for the judge to give instructions to the parties. Such a duty could possibly be far-reaching, but obviously would imply that the judge would have to remain neutral and may not conduct his own investigation ex officio.

The possibility of introducing claims directly at the court by entering them in the records orally could complete the assistance to laymen and reduce inhibitions of persons who are not experienced in dealing with the authorities.

Question 39:

Should there be assistance in procedural issues for litigants not represented by a lawyer?

If so, in to which extent?

Should lay representation be possible?

6.3. ADR (Alternative Dispute Settlement)

A further procedural option that could be considered is the introduction of ADR (such as conciliation, mediation and informal discussions) in the context of Small Claims procedures. This would have the advantage that the workload of courts would be reduced as well as costs. There could be substantial savings in legal fees and other litigation expenses and in the time and energy of the parties and judges. Also, a compromise is most likely to be reached faster than a judgment rendered and enforced. ADR measures could therefore significantly contribute to reaching the aim of cutting costs and saving time which is of relevance for all procedures in civil and commercial matters, but is for evident reasons of a predominant importance in the context of Small Claims.

One can consider different options with respect to the optional or compulsory nature of ADR. They range from the giving possibility of recourse to ADRs in the context of court procedures to their encouragement by the courts. One could even imagine the introduction of an obligation to have recourse to ADRs before a judgment can be rendered.

One should nevertheless be aware that ADR is a general issue of civil procedure rather than a matter specific to Small Claims. The Commission has therefore addressed the issue in a specific *Green paper on alternative dispute resolution in civil and commercial law*[192].

Question 40:

Should ADR be introduced for Small Claims procedures ?

If so, should recourse to ADR be optional or obligatory?

---

192 *Green Paper on alternative dispute resolution in civil and commercial law*, COM(2002) 196 final (http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf). In the context of Small Claims, especially the Chapter of the Green Paper dealing with *"ADRs in the context of court proceedings"* is of interest.

6.4. Relaxation of certain rules concerning the taking of evidence

A crucial issue in most existing Small Claims procedure is the simplification of the rules concerning the taking of evidence which aim at shortening the procedure and cutting costs.

In order to achieve this aim, one could imagine to restrict the means of evidence which are admitted. For example, means of evidence which are especially costly (such as expert witnesses) could be excluded. This could, however, in certain cases make the establishment of facts almost impossible.

Almost all Small Claims procedures provide therefore for simplifications of the rules concerning the taking of evidence instead of limitations to the means of evidence.

One could imagine the following options:

– Admission of written statements by witnesses and/or parties.

  This would save travel costs significantly, especially in cross-border cases.

– Telephone and video conferences

  Also this option would save travel costs, and it would have the additional advantage of creating a direct contact between the court and the parties or witnesses. It could facilitate the assessment of the evidence by the court, and would open up the possibility of cross-examination. Of course the technical conditions would have to be created.

– Submitting certain means of evidence to the admission by the judge

  In order to expand the scope of application of the Small Claims procedure as far as possible and make it applicable to very different types of claims, flexible rules on the taking of evidence seem an appropriate option. It could also be considered to leave the admission of specific means of evidence in a particular case to the discretion of the judge who would thus not be bound by the normal rules on the taking of evidence. The judge confronted with a specific case could then – based on his training and experience – determine the necessary means of evidence himself and conduct a procedure which would be more or less formal, depending on the circumstances of the individual case. This may seem a far-reaching option at first. It should nevertheless be considered whether such an easy and flexible solution could not be acceptable in order to accelerate and simplify the procedure, taking into account the small value of the claim. In Germany, this option has been applied successfully. Possibly, one could also expressly provide that in any case the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights and in Article 47 of the Charter of Fundamental Rights of the European Union has to be respected.

As is the case in some Member States (such as Scotland and Germany), this step could be combined with a limitation of the possibility to appeal (see 6.8). Also a limitation of the grounds of appeal to points of law and a violation of fundamental principles of a fair trial such as the right to be heard or the prohibition of arbitrariness could be considered. The assertion of procedural errors could also be made subject to permission by the court of appeals.

Question 41:

Should certain rules concerning the taking of evidence be relaxed ?

If so, which and to what extent?

6.5. Introduction of the possibility of a purely written procedure

A further-going procedural option is the possibility of introducing a purely written procedure (instead of oral hearings). This possibility can in "easy" cases significantly cut costs, particularly in cross-border cases, and reduce the time necessary for the judgment to be rendered.

In the context of the room for discretion mentioned above (6.4), it could be considered to leave it to the discretion of the judge whether an oral hearing is necessary in a specific case. This would again have the advantage of a flexible solution which could be adapted to the individual case. Particularly in case where the small procedure would be obligatory, it should be considered to provide for a mandatory oral hearing on application of a party, in order to avoid to come in conflict with the procedural guarantees of Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union. In the case of an optional procedure, the parties could in any case opt for an oral hearing through the choice of the ordinary procedure, possibly also after the introduction of the procedure.

Question 42:

Should the possibility of a purely written procedure (instead of oral hearings) be introduced?

If so, under certain conditions?

6.6. Relaxation of rules concerning the content of the judgment and time frame

In addition to a simplified trial, another possibility to accelerate the delivery of a judgment could be to relax the rules concerning the content of the judgment.

One could think in particular of relaxing the rules concerning the reasons for the judgment. This option could be provided for in connection with possible restrictions of the possibility to appeal (see 6.8). In cases where no appeal is available, the judgment could be limited to the essential legal and factual points. In case that the possible grounds of appeals were restricted to points of law, at least the rules concerning the assessment of the evidence could be relaxed.

It could also be considered to introduce a duty to lodge a notice of appeal in cases where a judgment has been delivered orally. If no notice of appeal is lodged and the judgment becomes final, a possibly required written engrossment of the judgment could be limited to the essential facts or even to the findings.

A general time frame for resolving a case does not apply in any Member State and could be problematic with respect to the varying degree of complexity of different cases. Furthermore, there are certain circumstances influencing the duration of a procedure which are outside the sphere of the court (such as problems in connection with the service of documents or witnesses who cannot be reached).

In the context of the introduction of relaxed rules concerning the content of a judgment, a time limit for the delivery of a judgment after the conclusion of the proceedings could be considered. Currently, there are time limits for the delivery of the judgment between 10 days

(Spain) and 28 days (Scotland). Depending on the extent of relaxation of rules concerning the content of the judgment, a time limit from 14 days to 28 days could be appropriate.

Question 43:

Should the rules concerning the content of the judgment be relaxed ?

If so, to which extent ?

Should there be a time frame for the delivery of a judgment?

6.7. Costs

The question of reimbursement of costs and expenses such as court fees, expenses for witnesses, experts and lawyers is an important issue for a creditor in order to enable him to assess if litigation is economically sensible. The significance of the rules on the reimbursement of costs and expenses should not be underestimated. Some Member States (England/Wales, Scotland, Northern Ireland, France, Ireland, Sweden) diverge in their Small Claims procedures from the wide-spread general rule that the reimbursement of costs is based on the degree of success of the parties. These rules should also be seen in the context of the question whether the Small Claims procedure is obligatory or optional.

Obligatory procedure

In cases where the small claims procedure is obligatory (see 5.3) and the creditor can not choose the ordinary procedure instead, far-reaching restrictions on the reimbursement of costs could deter creditors from pursuing Small Claims (or at least prevent them from employing a lawyer) because the overall financial outcome could be negative even if they win the case. A rule which does not provide for any reimbursement of costs of the plaintiff for court fees (and possibly necessary fees for witnesses and expert witnesses), would make court procedures for very small claims economically very questionable. Such a rule might not contribute to achieving the aim of facilitating access to justice. Even when the value of the claim is higher than the costs, the plaintiff in the end would not receive the total amount owed. The faster delivery of the judgment would then – in a certain sense - have to be "bought". On the other hand, a defendant taken to court without justification could be forced to make possibly significant expenditures in order to defend himself. Similar considerations can be made if the reimbursement of costs is limited to a maximum amount.

It could be argued that with respect to fees for lawyers the concept of the Small Claims procedure itself makes the employment of a lawyer superfluous. A party which nevertheless decides to employ a lawyer should also pay his fees. Also, no one should be involved in an expensive court procedure only because the other party employs a lawyer. On the other hand, a significant limitation of the reimbursement of fees for lawyers could - in an obligatory Small Claims procedure - effectively result in a practical exclusion of representation by a lawyer. Most parties do not take legal recourse wilfully, but they would in fact be deprived of the possibility to hire a lawyer and would be forced to represent themselves at court. In contrast to the attorney who represents only the interests of his party and advises it extensively, even the best assistance by the court must remain neutral and remains therefore limited to procedural questions or information concerning the legal situation. It is certainly the aim to make sure that the Small Claims procedure can be conducted also without assistance through a lawyer. Nevertheless, such assistance can not be replaced.

In an obligatory Small Claims procedure one should therefore consider carefully whether or not to limit the reimbursement of costs.

Optional procedure

In case of a procedure which would be optional for both parties (see 5.3), these questions are of less significance. Nevertheless, they will play a role in determining to which extent the Small Claims procedure will be used in court practice. A party that does not want to represent itself at court, or expects significant expenditures (e.g. for witnesses or expert witnesses), will most likely opt for the ordinary procedure. Furthermore, bigger and medium-sized enterprises usually employ lawyers. Since small claims cases are often between enterprises or between enterprises and consumers, a limitation of the reimbursement of costs could have as a consequence that the Small Claims procedure would in practice only be applied in cases between individuals who both refrain from employing a lawyer.

Question 44:

Should the reimbursement of costs be restricted ?

If so, to which extent ?

6.8. Exclusion/restriction of the possibility to appeal

Restrictions on the possibility to appeal may be considered in the interest of reducing costs and producing legal certainty faster. Such restrictions are common in the ordinary procedure and in the existing Small Claims procedures in the Member States to a varying degree (Scotland, Sweden, England/Wales, Northern Ireland, France, Germany) as an important means to reduce the duration of a procedure.

One could consider a total exclusion of the right to appeal which would obviously bring about the most effective acceleration and cost-saving. On the other hand, such a solution may be problematic since the parties would be prevented from appealing even against the – from their point of view - most serious mistakes of the court of first instance. This could create the impression of arbitrariness of the judge.

It might also be considered not to exclude the right to appeal totally, but to restrict it. Since the judge is bound by substantive law and - despite all simplification of the taking of evidence – by the principle of a fair trail (see above 6.4 and 6.5), also a restriction of the grounds of appeal to points of law could be considered (thus excluding factual questions). Consequently, one could avoid the lengthy and costly annulment of a judgment and its referral back to the court of first instance for a new procedure due to errors in the establishment of the facts. Additionally, one could consider the violation of fundamental principles of a fair trial as an additional ground of appeal. This would have the advantage that the concrete shaping of the rather general principle of a fair trial through case law would not be left to the courts of first instance alone.

In order to avoid delays in the procedure caused by appeals with no prospect of success, it would also be possible to make the admission of an appeal subject to approval by the court of appeals or the court of first instance. This could be considered in particular as far as grave procedural mistakes are concerned. It would be preferable if this decision was taken by the court of appeals since a decision of the court of first instance concerning an appeal against a judgment released by that court could create the impression of arbitrariness.

With respect to the low value of the claim, one should abstain from opening up appeals to a third instance since this can cause particularly long delays.

Question 45:

Should the possibility to appeal be excluded or restricted ?

If so, to which extent?

6.9. Further options for simplification

There could be further options for a simplification of procedural rules in Small Claims in order to simplify and accelerate the litigation and make it cheap and user friendly.

Question 46:

Which other options to simplify procedural rules for Small Claims can be envisaged?

7. SUMMARY OF QUESTIONS

Question 1:
Should European instruments on order for payment proceedings and on small claims be applicable to cross-border cases only or to purely internal litigation as well?

Question 2:
What is the appropriate legislative instrument for order for payment proceedings and small claims, a regulation or a directive

Question 3:
Which problems, if any, have arisen in the application of the order for payment procedure or another procedure for the recovery of uncontested claims available in your Member State ? Please indicate the level of acceptance and success of these procedures in practice.
Are these procedures also available in cross-border cases where either the plaintiff or the defendant is domiciled in another Member State ?
If yes, which problems, if any, have occurred in the application ?
If no, how are uncontested claims in a cross-border situation to be adjudicated?

Question 4:
Should a European order for payment procedure be limited to pecuniary claims ?
If not, which types of non-pecuniary claims should be included?

Question 5:
Should a European order for payment procedure be available for claims relating to certain areas of civil and commercial law only or should certain types of claims be excluded ?
In either case please indicate the categories of claims that should be included or excluded?

Question 6:
Should a European order for payment procedure be available only for claims up to a certain value ?
If so what should be that ceiling value?

Question 7:
Should the use of a European order for payment procedure be obligatory or optional only if the creditor believes that the claim will remain uncontested?

Question 8:
Should the courts of the Member State in which the defendant is domiciled have exclusive international jurisdiction for a European order for payment procedure in cross-border?

Question 9:
Should a European instrument on an order for payment proceeding contain rules determining the competent courts within the Member States ? If so what should these rules be?

Question 10:
Should an instrument on a European order for payment contain provisions determining who exactly at a court (judges, court clerks) is in charge of the procedure and has the authority to deliver an order for payment?
If yes what should those rules be?

Question 11:
What should be the requirements relating to the content of the application for a European order for payment?
In particular, which conditions should apply to the description of the circumstances invoked as the basis of the claim?

Question 12:
Should the submission of documentary proof of the claim at issue be a requirement for the application for a European order for payment ?
If so what types of documents should be considered sufficient as a proof of the claim?

Question 13:
Should it be obligatory to use a standard form in order to present an application for a European order for payment?
If so what should be the content of the standard form?

Question 14:
What should be the role of computer technology and electronic data processing in the communication between the court and the parties and in the management of the European order for payment procedure by the court?

Question 15:
Should an examination of the justification of the claim be carried out before the delivery of a European order for payment ?
If so what should be the criteria of that examination?

Question 16:
Should it be possible to grant a European order for payment only for a part of the claim at issue?

Question 17:
Should the European order for payment be issued in a standardized fashion?
If so what should be the content of a standardized decision?

Question 18:
Should an appeal against the (partial) refusal of a European order for payment be inadmissible?
Should it be possible to submit an application for a European order for payment for the same claim again after such refusal?

Question 19:
What elements should the information of the defendant about his procedural rights and obligations accompanying a European order for payment comprise?
What should be the consequences of a failure to comply with this obligation?

Questions 20:
Should a legislative instrument on a European order for payment include provisions on the service of documents for this specific procedure or should it be accompanied by the harmonization of the rules on service in general?
If so what should be the content of such rules?

Question 21:
What should be the time limit for contesting the claim ?
Should the length of the period of time to lodge opposition be influenced by certain features of the individual case and if so by which?

Question 22:
Should any formal or substantive requirements be attached to the statement of opposition ?
If so what should these requirements be?

Question 23:
Should an instrument on a European order for payment contain rules determining whether a statement invalidates the order for payment or the order for payment becomes the subject matter of the following ordinary proceedings?
If so what should those rules be?

Question 24:
In the event of the claim being contested, should the case be transferred to ordinary proceedings automatically or only upon application by one of the parties?

Question 25:
Should a European order for payment procedure be a one-step or two-step procedure, i.e. should the original decision become enforceable or should a second decision (an "enforcement order") be necessary after the expiry of the time limit for contesting the claim?

Question 26:
Should there be an ordinary appeal against a European order for payment (or, in a two-step procedure, against an enforcement order) after the time limit for opposition has expired?

Question 27:
Should a European order for payment acquire the status of res iudicata after the time limits for opposition and/or appeal have expired?

Question 28:
Should an instrument on a European order for payment include rules on the lack of mandatory representation by a lawyer in the order for payment procedure ?
If so what should those rules be?

Question 29:
Should an instrument on a European order for payment comprise provisions relating to the costs of the procedure and their compensation ?
If so what should those rules be ?

Question 30:
Should a European order for payment be provisionally enforceable?
If so what should be the requirements for provisional enforceability and for the suspension of provisional enforcement?

Question 31:
Should a European order for payment be directly enforceable in other Member States without exequatur and also without a certification in the Member State of origin as currently envisaged for the European Enforcement Order for uncontested claims? If so, which conditions should be attached to such direct enforceability?

Question 32:
Which problems, if any, have arisen in the application of Small Claims procedures in your Member State ?
Please indicate the level of acceptance and success of these procedures in practice.
Are these procedures also available in cross-border cases where either the plaintiff or the defendant is domiciled in another Member State ?
Which problems are currently encountered when small claims are pursued across borders?

Question 33:
Which ways to inform citizens of a future Community instrument on Small Claims procedure best can be envisaged ?

Question 34:
Should there be a quantitative threshold for Small Claims ?
If so, what should this threshold for Small Claims be ?
Should there be a common threshold for all Member States ?
Or would a Community minimum (and maximum) threshold be sufficient?

Question 35:
Should Small Claims be restricted to monetary claims, or not?

Question 36:
For which types of disputes should the Small Claims procedure be available?
Should certain civil and commercial disputes be excluded?
Or should the procedure be available only for certain civil and commercial disputes specifically mentioned?

Question 37:
Should the Small Claims Procedure be obligatory or optional ?
Should it be possible for the court to revert a small claim to an ordinary procedure ?
If so, under which conditions ?
Should it be possible for the parties to revert a small claim to an ordinary procedure ?
If so, under which conditions?

Question 38:
Should common minimum standards for forms be introduced ?
If so, which standards could be envisaged ?
For which stages of the procedure should the forms be used ?
Should modern means of communication be introduced?

Question 39:
Should there be assistance in procedural issues for litigants not represented by a lawyer ?
If so, in to which extent ?
Should lay representation be possible?

Question 40:
Should ADR be introduced for Small Claims procedures ?
If so, should recourse to ADR be optional or obligatory ?

Question 41:
Should certain rules concerning the taking of evidence be relaxed ?
If so, which and to what extent?

Question 42:
Should the possibility of a purely written procedure (instead of oral hearings) be introduced ?
If so, under certain conditions?

Question 43:
Should the rules concerning the content of the judgment be relaxed ?
If so, to which extent ?
Should there be a time frame for the delivery of a judgment?

Question 44:
Should the reimbursement of costs be restricted ?
If so, to which extent?

Question 45:
Should the possibility to appeal be excluded or restricted ?
If so, to which extent?

Question 46:
Which other options to simplify procedural rules for Small Claims can be envisaged?