

EUROPEAN SMALL CLAIMS PROCEDURE AND EUROPEAN ORDER FOR PAYMENT PROCEDURE

Policy Proposal

1. The Council is invited to consider and approve draft rules as a consequence of a new EU Regulation (Regulation (EU) 2015/2421) ('the 2015 Regulation'), which amends the European Small Claims Procedure and European Order for Payment procedure.
2. Draft rules have been developed by the Access to Justice Committee ("the Committee") are provided for consideration at **Paper 9.1A**.

Timing

3. The 2015 Regulation is due to come into force on 14 July 2017. It is intended that the draft rules provided at **Paper 9.1A** will come into force on the same date.

Rationale

4. The European Small Claims Procedure was introduced by EC Regulation 861/2007 ('the 2007 Regulation') and applies between all Member States of the European Union except Denmark. The intention of the procedure is to allow a person to use internationally recognised court forms to recover money that they are owed by somebody in another EU country. The procedure can currently be used for claims up to the value of €2000 and is a written procedure, unless an oral hearing is considered necessary by the court.
5. EC Regulation (1896/2006) ('the 2006 Regulation') established a European Order for Payment Procedure. This is a procedure that makes it easier and quicker for creditors to recover uncontested monetary debts in cross border cases. The procedure operates on the basis of standard forms and a uniform process across all EU Member States. It can be used in both civil and commercial matters and does not require the use of lawyers. The procedure is optional and can be used instead of existing procedures under national law.
6. This matter was initially considered by the Committee at their meeting dated 12 December 2016 and it was agreed that changes to the Act of Sederunt (Sheriff Court European Small Claims Procedure Rules) 2008 (S.S.I. 2008/435) ('the ESCP Rules') and Act of Sederunt (Sheriff Court European Order for Payment Procedure Rules) 2008 (S.S.I. 2008/436) ('the EOPP Rules') would be required as a consequence of the 2015 Regulation..

7. In particular, the Committee instructed the following amendments:
 - to amend the ESCP Rules provide a form of application where the court wishes to take evidence in another Member State;
 - to amend Form 3 in the ESCP Rules to reflect the wording of Article 18.1 of the 2015 Regulation.;
 - to amend Form 1 in the EOPP Rules to include reference to European Small Claims Procedure; and
 - to amend paragraph 5 of the EOPP Rules to take account of the effect of the new Article 17 of the 2015 Regulation.
8. The Committee agreed that it did not wish to make references to the EU Regulations in the ESCP and EOPP Rules ambulatory.
9. The draft rules provided at **Paper 9.1A** were approved by the Committee at its meeting dated 18 April 2017. A drafting commentary was provided to the Committee at that meeting and is reproduced at **Annex A**.

Issues raised during policy development stages

10. The 2015 Regulation also makes amendments to Article 13 of the 2007 Regulation in relation to service. These amendments provide that the claim and counterclaim forms and judgments must be served by postal service or by electronic means. However, for electronic means to be used, they must be both (a) technically available and (b) admissible in accordance with the procedural rules of the Member State in which the ESCP is heard. This means that for this provision to apply, the same would need to be available in the domestic procedural equivalent of the member state. At present the domestic court rules do not appear to permit electronic service instead of by the usual methods of service, namely post and personal. LPPO notes that there is some provision in the Summary Cause and Small Claim Rules enabling email communication of certain court documents but it is LPPO's understanding from the Scottish Courts and Tribunals Service that electronic communication is not used or available in practice. LPPO advise that this would lead to the conclusion that it is not "technically available" as a mode of communication.
11. However, in the Simple Procedure Rules, Part 6 makes provision for the parties and court to send documents by a number of ways, including by email, but when it comes to the formal steps in the court process, documents are required to be served formally. In the Simple Procedure Rules, formal service means service by

post (which failing, personal service). LPPO notes that Article 13(1) only applies to documents which are the claim, counterclaim and judgment. Accordingly, the Council need only be concerned with the domestic position in relation to these documents. In the context of Simple Procedure, the only aspect left in this regard related to the 'Decision Notice'.

12. As the Simple Procedure Rules permit electronic service of the Decision Notice but it is not yet available in practice, LPPO has advised that a rule change will likely be required when Civil Online goes live (ie when the method of service becomes 'technically available'.) The Secretariat has undertaken to keep track of this matter and will bring it to the Council's attention in due course when a commencement date is finalised for Civil Online.

Compatibility with SCJC guiding principles

Principle	Compatibility
<i>The civil justice system should be fair, accessible and efficient</i>	The draft rules contain amendments to existing rules of court arising from changes to EU legislation. The proposed amendments will ensure that the court rules accurately facilitate the implementation EU legislation.
<i>Rules relating to practice and procedure should be as clear and easy to understand as possible</i>	The draft rules follow the drafting style guide previously agreed by Council and is clear and easy to understand for users.
<i>Practice and procedure should, where appropriate, be similar in all civil courts</i>	The draft rules apply to sheriff court rules only and ensures that they are consistent with the relevant EU legislation.
<i>Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted</i>	There is no scope to consider alternative methods of resolving disputes in the context of these rules.

Links to other initiatives

13. There are no links to other initiatives.

Implementation

14. Implementation will lie with SCTS and the Secretariat will liaise with the Legislation Implementation Team and the Judicial Institute with regard to any staff or judicial training.

Consultation

15. There has been no consultation on the draft rules.

Legal advice

16. Comprehensive legal advice from LPPO is provided in the drafting commentary provided at **Annex A**.

Recommendation

17. The Council is invited to consider the draft rules at Paper 9.1A and to approve them for submission to the Court of Session for consideration, subject to any stylistic or typographical amendment.

**Scottish Civil Justice Council Secretariat/Lord President's Private Office
May 2017**

ANNEX A

DRAFTING COMMENTARY*Overview*

1. This instrument is drafted to cover the changes identified at the Access to Justice Committee ('the Committee') meeting dated 12 December 2016 as being necessary to facilitate the forthcoming amendments to the European Small Claims Procedure and the European Order for Payment Procedure. The coming into force date reflects the date when the amending EU Regulation comes into force. No European Communities Act 1972 powers are cited in the preamble as domestic powers are sufficient.

Paragraph 2(2) and (3)(a)

2. This is to address the first bullet point in paragraph 16 of the minutes of the Committee meeting of 12 December 2016 ("the minutes"). While it would have been possible to copy out an equivalent provision to that of paragraph 4(3) of SSI 2003/601, in my view this is not necessary. First, the EU Small Claims Rules already contain a number of ancillary applications so there is logic to adding this new application for remote evidence taking into those pre-existing rules. Second, it is clear from the terms of Article 8.1 (as amended) of Regulation (EC) 861/2007 that the procedures in Council Regulation (EC) 2106/2001 automatically apply. Therefore all that is necessary is to specify how the application is to be made in the process and the Form.

Paragraph 2(3)(b)

3. These changes are hopefully self-explanatory: they adjust the wording in Form 3 so as to mirror the amended wording in Article 18.1 of Regulation (EC) 861/2007. This is to deliver the second bullet point in the minutes.

Paragraph 3(2)

4. This inserts a definition of "European Small Claim" and an associated definition of "European Small Claims Procedure". These are necessary to pave the way for the use of those phrases in the amendment to Form 1 made by paragraph 3(4) and paragraph 3(3)(b) respectively. This is to deliver the third bullet point in the minutes and is required by virtue of the amendments made to Article 17 of Regulation (EC) 1896/2006 to create a fourth domestic court procedure for contested payment orders to be considered in.

Paragraph 3(3)

5. The adjustments made by Article 17 of Regulation (EC) 1896/2006 provide that if the claimant has not specified which domestic court procedure the contested claim is to apply, or has specified European Small Claims Procedure and the claim is outwith scope of that procedure, then the applicable court rules are the ordinary shrieval court rules (namely OCR, summary cause or simple procedure) unless the claimant has explicitly requested that the claim not follow ordinary court rules.

6. In order to do least violence to the existing drafting, I have approached this by inverting this so that the normal rule is that the proceedings are dealt with under ordinary shrieval court rules but where the claimant has specified European Small Claims Procedure *and* the claim is within the scope of that procedure then ESCP shall govern the contested claim. Testing the drafting against the results required by Article 17 of Regulation (EC) 1896/2006 yields the outcomes required by the EU Regulation.

7. The changes made by paragraph 3(3)(a) and (c) are consequential.

Andrew Campbell, Head of Legal Secretariat

20 March 2017