

Bundesrat

Document 766/13 (Resolution)

14 March 2014

Resolution of the Bundesrat

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure

COM(2013) 794 final; Council document 16749/13

At its 920th session on 14 March 2014, the Bundesrat adopted the following opinion pursuant to sections 3 and 5 of the Act on Cooperation between the Federation and the *Länder* in European Union Affairs (EUZBLG).

1. The Bundesrat supports the Commission's ambition to facilitate the access to justice for consumers and small and medium-sized enterprises (SMEs) in cross-border small claims cases by means of a simple, quick and affordable procedure, thereby improving the enforcement competence of consumers and SMEs.

2. However, the Bundesrat notes that the Commission's plan to expand the scope of the Small Claims Regulation is excessive. The ceiling of EUR 10 000 mentioned in Article 1(1) of the proposal amounts to a fivefold increase in comparison with the current legal situation (cf. Article 2(1) of Regulation (EC) No 861/2007). Posing small claims in these terms can be difficult to explain, especially to consumers and SMEs for whom the Commission wants to make the Regulation more attractive. Even the decision to set the ceiling at EUR 2 000 in the current Regulation caused concern in its time, as it is significantly higher than the EUR 600 limit set by the German legislature in Section 459a of the Code of Civil Procedure (*Zivilprozessordnung* - ZPO) for discretionary procedures. In addition, according to data provided by the Federal Statistical Office for the year 2012, around 67 % of civil cases disposed of before local courts involved a claim of less than EUR 2 000, bearing in mind that most civil disputes are decided in local courts. As a result, the majority of all civil cases (at least in terms of the amount claimed) would fall within the scope of the European Small Claims Procedure, even though claims of up to EUR 10 000 do not seem minor in comparison. In effect, this would be a step towards a European Code of Civil Procedure.

Furthermore, the planned raising of the claim ceiling would affect a large number of proceedings falling within the competence of regional courts, where legal representation is a mandatory requirement. Section 78(1) of the Code of Civil Procedure focuses on eliminating unmeritorious claims and appeals, making for a more factual and objective procedure through filtering and processing by lawyers. Mandatory representation by a lawyer also creates a level playing field from a procedural point of view. The proposed fast-track, generally only written procedure without a hearing (see Article 1(4) of the proposal; Article 5(1) of Regulation (EC) No 861/2007) and with a simplified taking of evidence, as described in Article 1(6) of the

proposal (Article 9(2) and (3) of Regulation (EC) No 861/2007), is incompatible with the aforementioned German rules.

3. The Bundesrat shares the Commission's view that the Small Claims Regulation could help to simplify specific issues related to actions in a different Member State (for example, language barrier, distance, foreign legal system). We are, however, deeply concerned about the planned substantial extension of the cross-border scope to include cases with a foreign element, but where the parties are nevertheless habitually resident or domiciled in the same Member State (Article 1(1) of the proposal, Article 2(2) of Regulation (EC) No 861/2007). This applies first and foremost to the connection with the place where the facts on which the claim is based arose, as per Article 2(2), first sentence, point (c) of Regulation (EC) No 861/2007 (Article 1(1) of the proposal). The wording suggests that it would be enough if two German residents taking a holiday reach an agreement for the sale of a vehicle located in Germany while on a beach in Majorca. There is no discernible necessity to carry out a special procedure departing from German civil procedure in such cases, especially since the court fees connected with such a procedure are capped.

The complicated list of exclusions in Article 2(2) of Regulation (EC) No 861/2007 (Article 1(1) of the proposal) poses significant investigation and evaluation problems for judges. To honour the scope of the Regulation, they must already at the start of the proceedings determine the place of performance and the place where the facts on which the claim is based arose. The connecting factors set out in the Regulation are therefore not defined precisely enough to allow for a factually and legally unambiguous assessment. The same applies to the term 'the place of enforcement of the judgment' mentioned in Article 1(1) of the proposal (Article 2(2), first sentence, point (d) of Regulation (EC) No 861/2007). Since the enforcement of monetary claims is essentially possible wherever the losing party's assets are located and long after the conclusion of the investigation, a broad interpretation of this Regulation would allow for cases being identified as cross-border based simply on an impossible-to-disprove claim that the enforcement could potentially take place abroad. The resulting extension of the scope is unacceptable.

4. We also have considerable misgivings about the provisions contained in Article 1(4-6) of the proposal (Articles 5(1), 8 and 9 of Regulation (EC) No 861/2007) on the exceptional nature of oral hearings and the fact that the taking of evidence is essentially limited to documents and written witness statements, whose scale is at the discretion of the court. Daily court practice demonstrates the importance of forming a personal, direct visual impression during hearings, questioning and negotiations. The use of modern electronic communication technology only allows a similar impression to form in straightforward cases. The current provisions already tend to make it difficult to establish the facts in cases where language barriers need to be overcome. In this context, we have to reject the designation of oral hearings as an exception, only to be conducted at the request of the parties. We would also point out that only allowing expert evidence and oral testimonies in cases where it is impossible to pass judgment based on the provided written evidence could infringe the right to a fair hearing. We cannot help but get the impression that the Commission assumes that every lawsuit is justified and that the enforcement of the claim may not be delayed by a lengthy procedure. We find that more attention needs to be paid to the right of defendants to defend themselves against an unjustified (in their view) claim, especially since there is no mandatory legal representation even in cases involving comparatively high amounts.

5. The introduction of compulsory video and telephone conferences in Article 1(5-6) of the proposal (Articles 8 and 9 of Regulation (EC) No 861/2007) is open to criticism, including from the point of view of practicality. The use of modern communication technology in Small Claims Procedures is currently subject to availability. The Bundesrat acknowledges that the compulsory design of the Regulation could help save both time and money and therefore make Small Claims Procedures more attractive for legal applicants, however we are afraid that the implementation of these requirements would cause significant timing, organisational and funding problems for the *Länder*. The additional burdens imposed on the *Länder* would be inconsistent with the goals pursued.

6. We are afraid that the assistance with completing forms that the state currently offers to parties will be overextended by the proposed new consultation duties - cf. Article 1(7) of the proposal (Article 11 of Regulation (EC) No 861/2007). Questions as to whether the procedure is available to the applicant and which court has jurisdiction could necessitate complex legal analysis. Moreover, calculating the due interest and establishing which documents are to be attached to the claim requires legal consultations regarding the basis of claim and the burden of proof. Offering legal consultation to one party would however violate the state's duty of neutrality and possibly also the Legal Advice Act (*Rechtsberatungsgesetz*).

7. We reject the introduction of an upper limit for court fees amounting to 10 % of the value of the claim and the minimum court fee being capped at EUR 35, as provided in Article 1(9) of the proposal (Article 15a of Regulation (EC) No 861/2007). These changes contradict in particular the goal of the second Modernisation of Costs Law (*zweites Kostenrechtsmodernisierungsgesetz*) - which was to increase the cost coverage in court proceedings - and discriminate against parties in a domestic proceeding, which cannot be conducted according to the Small Claims Regulation. Moreover, it is precisely the procedures described in this Regulation that can be costly, as implementing foreign law often requires seeking the opinion of experts.

8. The Bundesrat acknowledges that, since the Small Claims Regulation entered into force in 2007, the option to conduct a simplified procedure in cross-border cases with claims under EUR 2 000 has been used only extremely sparingly in practice. The Commission's own findings also suggest that the reason for the limited importance of the procedure laid down is not so much its scope as its low visibility, as identified in point 2 of the explanatory memorandum to the proposal. According to the Eurobarometer 2012 survey, only 12 % of respondents were aware of the existence of the ESCP and only 1 % had already used the procedure. However, this does not necessarily mean that legislative action is needed. Specifically, the proposed extension of the Regulation's scope seems neither appropriate nor well-suited to make the procedure more attractive. In our opinion, a consolidation and implementation of the existing rules is instead necessary to raise consumers' and SMEs' awareness of them, so that legal applicants can choose the option of the Small Claims Procedure more frequently in future.

9. The Bundesrat is transmitting this opinion directly to the Commission.