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SERVICE ABROAD IN CIVIL AND COMMERCIAL MATTERS – FROM THE HAGUE CONVENTIONS TO THE EU 1393/2007 REGULATION

Abstract*: Protection of national sovereignty is no more the major concern in the system of cross-border service of documents. What is gaining on importance is the protection of fundamental rights and legitimate expectations of litigants, whereby proper balance must be struck between the competing values. The EU 1393/2007 Regulation strengthens the guarantees concerning language. On the other hand, by introducing the standard of the "language, which the addressee understands" the Regulation lowers the requirements applied in traditional regimes of cross-border service of judicial documents to a certain extent. On the principled level, the new approach can be favoured, it however causes numerous difficulties in practice, which does not contribute to legal certainty and predictability. The same applies to the CJEU's departure from the traditional view that states are free to implement various methods, which make service abroad unnecessary.*

Key words: *Service of process, civil procedure, EU law, fair trial, language of judicial documents, judicial co-operation*

1. Introduction

Cross-border service of judicial documents has long been one of the main fields of mutual judicial assistance in civil and commercial matters. Service through diplomatic channels proved to be extremely time-consuming, costly and unreliable, often bringing the parties to international litigation to the edge of denial of justice. Different methods were thus agreed upon in different international treaties, allowing for service abroad without recourse to consular and diplomatic channels. Besides numerous bilateral treaties, multilateral treaties were also

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adopted, beginning already with the Hague Convention of 1 March 1954 on civil procedure. It was followed by the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In the framework of judicial cooperation in civil matters in the European Union the European adopted the Regulation No. 1348/2000.[2] The system was later elaborated and improved with the adoption of the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

The most striking feature in this development is a clear paradigm shift as to what is the main concern in the regulation of cross-border service. Once it was the protection of national sovereignty but this is gradually losing importance. What prevails in focus today, is the striving for protection of individual procedural guarantees for parties to the procedure. From the viewpoint of the defendant, this concerns guarantees of due process and especially the right to be heard (related to language requirements), whereas from the viewpoint of the claimant the speed, reliability and low-cost in transmission in order to facilitate effective access to justice is essential. This paradigm shift is evident in the new system of cross-border service of documents in the EU 1393/2007 Regulation**,** especially if one compares it to the Hague 1965 Convention. Under the latter, the emphasis is solely on the issue of national sovereignty which is very clearly expressed in two aspects. In principle, the Hague convention requires a judicial document which is to be served through a central authority to be translated into the official language of the state addressed. It is the state of destination (its central authority) which has the right to reject acceptance of the service if the conditions concerning language are not fulfilled. However, if the central authority accepts to implement the service of documents without proper translation, there exists no individual right of the addressee to reject acceptance. On the other hand, the 1393/2007 provides for an individual right of the addressee to reject acceptance if requirements concerning language are not met. The second point, where the aforementioned paradigm shift is evident, relates to provisions on direct postal service in the Regulation on one hand and those in the 1965 Hague convention on the other. A contracting party to the Hague convention may namely object to direct service through postal channels (Art. 10), however if such an objection (or declaration as to the language requirements at least) is not declared[3], the

2 Council regulation (EC) No of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters

3 Direct service through postal channels (as a secondary method of transmition – the primary method under the Convention is service through designated central authorities) is only possible for states, which »do not object« to it (Art. 10). An overview of the status table of notifications, declarations and reservations on the web page of the Convention (http://

Convention itself does not provide for any procedural guarantees as to the language of documents, transmitted through postal channels[4] (guarantees are only provided for in regard to service through central authorities pursuant to Art. 5). Exactly the opposite approach was adopted by the 1393/2007 Regulation. Member states may no longer object against direct postal service. However, the Regulation imposes effective requirements, which enable the addressee to refuse service if documents are not written in or translated into a language, which he or she understands and thus do not enable to sufficiently exercise the right to be heard in procedure (*see infra*).

Evidently the service of process is no longer viewed predominantly as an »act of exercising powers of a sovereign state«. It is rather considered as an »act of providing information« with the goal of guaranteeing adversarial procedure and effective exercise of rights of defense (Hess, 2010: 448.). It is therefore also not surprising that the public policy exception, characteristic still for both Hague Conventions does not apply under the EU Regulation.

2. An outline of methods of service pursuant to the Regulation No. 1393/2007

The Regulation provides for different ways of transmitting and serving documents. The first one is transmission through designated transmitting and receiving agencies. These are decentralized in most member states, whereas others have a single centralised agency. In addition, Article 14 of the Regulation provides for service on addressees directly by mail (registered letter with acknowledgement of receipt or equivalent), whereas Article 15 of the regulation allows for direct service through competent judicial officials or other competent persons of the member state addressed (e.g. *huissiers de justice*), although member states may oppose the latter option to be applicable in their territory. In addition the Regulation also provides for the possibility of transmission by consular or diplomatic channels, but this has remained without any practical practical significance though. Thereby the Regulation establishes neither a hierarchy nor an order of precedence as between the different methods of service allowed under the regulation.[5] In Slovenia at least, the most important methods of service under the

www.hcch.net/index_en.php?act=conventions.text&cid=17) enables a conclusion that only a formal reservation (declaration) is effective; it is not sufficient that a contracting state opposes postal service in practice. A requirement for an appropriate notification, unlike in the context of the 1954 Hague convention, explicitely follows from articles 21 and 31 of the Convention as well.

4 See the Practical Handbook… (referring to case law of the courts in USA, France and Germany), p. 80.

5 Plumex v. Young Sports NV, C-473/04, 9.2.2006.

Regulation are service via designated transmitting and receiving agencies (Arts. 4-11) and direct service by post (Art. 14). The regulation relies heavily on the use of simplified standard forms, contained in the annexes to the Regulation (thus abolishing the requirement of once burdensome letters-rogatory. An important practical instrument for facilitating judicial co-operation under the Regulation is the European Judicial Atlas in civil matters.[6] It enables users to quickly and easily find the appropriate receiving and transmitting agency in any member state, relevant standard forms and relevant member states' notifications concerning the Regulation. In general the Regulation considerably improved and speeded up transmission of judicial documents among member states.[7] Nevertheless in certain states delays are still common although the Regulation stipulates that the receiving agency shall take all necessary steps to effect the service of the document as soon as possible, and in any event within one month of receipt.

3. Languate guarantees in the Regulation No. 1393/2007

3.1 General remarks

With regard to all methods of service, the Regulation provides for important requirements concerning language. The approach is different than in the Hague 1965 Convention: pursuant to Art. 8, it is sufficient that the document to be served is in a language (or accompanied by a translation) which the addressee understands (or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected). Otherwise, the addressee may refuse to accept the document, whether at the time of the service or returning the document within one week.. Thus an attempt of service may not be refused if the proper translation is not included (compare Art. 146.a of the Slovenian Civil Procedure Act[8]). The court may not require the applicant to provide or pay for a translation. If the applicant insists, service must be attempted even if it is entirely clear that the document is neither in a language that the

6 http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_information_en.htm (2 May 2013).

7 Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Regulation (EC) 1348/2000 on the service in the Member States of Judicial and Extrajudicial documents in civil or commercial matters {SEC(2004)1145}; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0603:EN:NOT (2 May 2013).

8 Zakon o pravdnem postopku, Official gazette, No. 26/1999.

addressee understands nor in an official language of the receiving Member State.[9] But as a danger that the addressee will refuse acceptance exists, in accord with Art. 5 of the Regulation the transmitting agency must advise the applicant who forwarded the document to it, that the addressee may refuse the service of the document if it is not in one of the languages of Art. 8 (the official language of the Member State of destination or a language the addressee understands; Art. 5/1).

Prior to coming into force of the Regulation it was questionable, how the right to refuse service of non-translated documents due to inappropriate language could be exercised in the case of substitute postal service. For example, under national procedural law, relatives living in the same household, are obliged to accept the document for the addressee. The same logic though cannot apply to the possibility of waiving the right to refuse service of documents that are not in the appropriate language. The will of the person (the relative for example) that accepts the service of the document for the addressee although requirements concerning language are not met, cannot substitute the will of the addressee to accept or refuse to accept the service due to lack of language requirements. The issue is now properly settled, giving the addressee 7 days to decide whether she will accept or refuse service (whereby she will be duly informed about this right in all official languages of EU member states; this information must be attached to the document). Thus, this right can be exercised in the case when another person accepted the service on behalf of the addressee as well. This is applicable in all methods of service – substitute service, postal service and personal service "in the hands" of the addressee (Art. 8 of the Regulation). This way she can inform herself of the document and then still decide to refuse the service. It must be taken into account that there will probably be an increase of cases where the addressee will accept the service of documents which are beneficial to him and refuse the acceptance of documents unfavourable to him. Nonetheless, such a regulation is appropriate. In the moment of acceptance, even the addressee himself accepting the document usually does not know of the right to refuse service. Just like he does not know whether the document is understandable to him or not.

9 Requirements with respect to language according to the 1965 Hague convention are stricter, though it is not the addressee who is entitled to refuse to accept the untraslated documents but only the central authority (see Art. 5 of the Convention). Still, even here an immediate translation is not necessary in every case (if an informal service through a central authority in the state of destination is required and the addressee is willing to accept the document, service in language of the foreign court is also allowed; if the state of destination does not reject service through direct postal channels and does not impose conditions concerning language, translation is not required in that case either).

3.2 The standard of »understanding the language« concerning natural persons and legal entities

The standard of "a language which the addressee understands" must clearly be understood in a subjective sense. What matters is whether the particular addressee understands the language. Implementation of more objective criteria (such as that the addressee understands the language of the state, which he or she is a national of) might be desirable from the viewpoint of legal certainty and predictability (Lindacher, 2001: 187), however the Regulation gives no ground for such an approach (Heiderhoff in Rauscher, 2010: 626). The word »understands« points to a factual, objective situation and not to a mere assumption, even if that assumption might be based on certain circumstantial evidence.[10] Objective circumstances (such as citizenship of the addressee or the fact that for a longer time she lived in a state, in which a certain language is spoken) may only be regarded as an indication thereto or as one of the applicable circumstances in determining whether the addressee actually understands the language. The ECJ has already taken the standpoint that the parties' contractual agreement concluded in the course of business that correspondence is to be conducted in the language of the Member State of transmission does not give rise to a presumption of knowledge of that language (which is the criterion concerning the validity of the service). Such an agreement is only evidence which the court may take into account in determining whether the addressee actually understands the language.[11] Particularly in consumer contracts the language of the contract or the language in standard contract terms which the contract is referring to, certainly cannot be (at least a strong) evidence of the consumer's knowledge of that language (Heiderhoff in Rauscher, 2010: 626).

How then to determine whether the addressee truly understands the documents when the addressee is a legal entity? Which one of these should understand the language: the legal representative, (one of) in-house lawyers or senior managers, anyone, maybe the person that was actually handling the case for the entity? Or should it suffice that the language is the official language of State where a branch, agency or other establishment of the legal entity is situated? Would that apply only if the dispute is arising out of an operation of this branch, agency or establishment or maybe even if this is not the case? (Schlosser, 2003: Par. 2, Art. 8 EuZVO, Mankowski, 2009: 182, Lindacher, 2001: 187) A certain amount of objectivization is necessary since a legal entity as such does not speak or understand any specific language. The standpoint that it be decisive whether the

10 See the view of the Commission in the case C-14/07 (Weiss), referred to in the Opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 35).

11 Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07, 8.5.2008.

legal representative of the entity understands the language or not is impractical. It is sensible to ascertain whether the people who were actually working on the subject matter understand the language (Heiderhoff in Rauscher, 2010: 629). It should also be assumed that the legal entity understands the language, spoken in the state of its seat (statutory seat or the seat of administration or of its principal place of business[12]). Also in view of the Attorney General *Trstenjak* the only practicable solution by which it is possible to answer this question would seem to be by reference to the registered office of the legal person as the relevant connecting factor for the linguistic knowledge.[13]. Surely taking the view that in cross-border business relations the legal entity must understand English since it is the *lingua franca* of international trade goes too far.[14] According to the ECJ the agreed language of business correspondence on its own is not a decisive factor (see above), although it certainly is such a circumstance that makes it hard to object that the entity understands the language.

Difficulties might again arise concerning the question, what degree of knowledge of the language is needed in order to rightfully refuse the service of the document. Rudimentary or general knowledge of the language is probably not enough. The level of understanding of legal and expert terminology needed depends on the content of the documents as well; with the summons to a hearing or serving simple court orders the situation is not the same as with service of lengthy and complex statements of claims (Lindacher, 2001: 179- 187). In general however, the linguistic knowledge must be good enough for legal documents to be essentially understood from a linguistic point of view.[15] On the other hand, it must be borne in mind that the primary objective of the Regulation is to lower the costs regarding translations and that the aim of requirements concerning language according to the ECJ is to enable effectively to assert the rights of the defence.[16] From this point of view, lower standards regarding the extent of the translation (with respect to annexes see below), its quality as well as the necessary degree of the addressee's linguistic knowledge are sufficient.

12 Either of these criteria determines the „domicile" of the legal entity pursuant to Art. 60 of the Brussels I Regulation.

13 Opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 72) in case C-14/07 (Weiss).

14 Such a view: Schlosser, Rn. 2 to art. 8 EuZVO. See also opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 58) in the case C-14/07 (Weiss).

15 See also opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 74) in the case C-14/07 (Weiss).

16 Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07, 8.5.2008.

3.3 Party autonomy concerning the language of service of documents?

It is disputed whether autonomy of the parties concerning the determination of the acceptable language of the documents to be served, is allowed. May the parties validly conclude a procedural contract stipulating that in potential future court proceedings they shall accept service of documents, written in certain language even if (one of) the parties do not understand it? (In favour: Heiderhoff in Rauscher, 2010: 624, Schlosser, 2007: 621) Such an agreement, if admissible, could be framed in different ways, even in an indirect manner e.g. by stipulating that the parties "agree not to exercise their right from the Art. 8 of the Regulation" (the right to refuse to accept the document for reasons of language) or that "the parties agree that they understand a certain language for the purposes of service of documents." It should be clearly distinguished that the aforementioned dilemma relates only to the parties' autonomy concerning language in cross border service of process, not the language of court proceedings. The Regulation does not relate to the language of court proceedings at all. The question whether the parties may contractually agree upon cross-border service of documents in a certain language (presumably in the language of the proceedings) is not answered in the ECJ judgment in the *Weiss* case either.[17] In that case the parties' agreement concerned only the language of correspondence relevant to the performance of the contract and not the correspondence in connection with judicial proceedings brought in that regard.

There exists no explicit legal basis for giving binding effect to such a procedural contract and thus to the parties' agreement on the language of the documents to be served pursuant to the Regulation on service. The issue concerns the general dilemma, to what extent (if at all) the procedural order allows for so called »procedural contracts«. In certain states, e.g. Slovenia and Austria, the general approach towards procedural contracts is negative (Ude, 2002: 107, Fasching, 1990: 395),[18] whereas in certain other states, e.g. Germany, the doctrine and the case law seems to be more generous in recognizing party autonomy concerning powers contractually to depart from the statutory procedural regime (Rosenberg, Schwab, Gottwald, 2004: 421). In Slovenia at least, it is certain that parties are not authorized contractually to depart e.g. from the legal regime of service of process unless expressly authorized so by the law. Nevertheless, in the context of European civil procedure, in order to assure uniform application, a euroautonomous interpretation of notions and concepts, adopted by the Regulations must be favoured. Thus the question concerning the parties' powers

17 Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07, 8.5.2008.

18 See e.g. the decision of the Austrian Supreme Court (OGH) of 7 October 2003, 4 Ob 188/03, published in Recht der Wirtschaft 2004, 223.

to waive in advance their right under article 8 of the Regulation is »ripe« for a referral for a preliminary ruling to the Court of Justice of the European Union.

Personally I would advocate a restrictive approach. The right to refuse to accept a document aims to guarantee effective exercise of the right to be heard. The fundamental precondition of this right is that the party understands the subject matter of the dispute. This however is not the case if the party does not understand and is not obliged to understand the language of the document.[19] At least the core elements of the right to be heard, which is protected by constitutions of numerous states (e.g. Art. 22 of the Slovenian Constitution) and by the Art. 6 of the European Human Rights Convention are not waivable in advance. This restriction applies even to legal orders, which are otherwise not unfavourable to recognizing legal effect to procedural contracts and even to fields of law, which are generally favourable to party autonomy in determining rules of procedure (such as arbitration[20]). True, it is open to debate whether the guarantees concerning language of documents to be served should be regarded as a "core element" of the right to be heard, but such a view can at least be reasonably argued. Furthermore, the reasoning that »the provision concerning the refusal of documents (Art. 8 of the Regulation) is only giving a right to the party, is only in the party's interest and that it is thus logically subject to a party disposition« (Schlosser, 2007: 621) is not convincing either. It is an entirely different matter to determine that the party can waive a right or decide not to exercise it (e.g. file an appeal, file a defense plea, decide not to request a disqualification of a judge, decide not to cross-examine a witness…) if this right can already be effected and the decision not to effect it can be based on circumstances of the pending case. But from this it can not at all be logically concluded that such a waiver of rights may as well and in the same manner be exercised in advance, even before court proceedings are pending. The nature of certain fundamental rights (e.g. the right to a fair hearing) excludes the possibility to waive their enforcement in advance (Landrove, 2006: 89). It is only admissible to waive them during the proceedings. This differentiation must be maintained because before the proceedings parties are not aware of all the consequences of a waiver. In contrast, such safeguards are no more necessary once the facts are known during the proceedings (Landrove, 2006: 89).

A further argument which is invoked in that regard is that if the parties may enter a jurisdiction agreement and thus conclusively agree on the language of court proceedings itself, then they may even more so agree on the language

19 The decision of the Austrian Supreme court dated 16.6.1998.

20 See e.g. the judgment of the Canton de Vaud Tribunal Cantonal, case 172/I, 23 April 2008, cited in Müller, Swiss case law in International arbitration, 2. Ed., Schulthess/Bruylant, 2010, p. 168.

of documents to be served abroad.[21] I do not find that argument convincing either. The parties may depart from the statutory procedural regime and enter a jurisdiction agreement (which indeed conclusively means that they accept the language of court proceedings in the chosen court) because the law expressly authorizes them to do so (e.g. by Art. 23 of the Brussels I Regulation). But there is no such express authorization for a procedural contract concerning the language of the documents to be served abroad either in the Brussels I Regulation or in the Service of documents Regulation. I find it extremely far reaching to argue that already a jurisdiction agreement in favour of a court in a certain state (or even a choice of law agreement in favour of a law of a certain state) should be understood in the sense that the party either conclusively acknowledges to understand the language of proceedings in that court or that she waives the right to reject cross-border service of documents in the language of that court.

It is also not sufficient to make a reference to the parties' ability freely to agree on language issues in arbitration in order to justify that the same should be the case in regard to language of documents in cross-border service.[22] It is a well recognized fundamental principle in arbitration that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Compulsory procedural rules are clearly meant to be only an exception to that fundamental principle in arbitration.[23] In the court proceedings however, the starting point is the opposite: the law imposes the system of procedure, whereas the question may then be put as to what extent may the parties depart from such statutory determined procedural regime. The "arbitration argument" may be as well invoked to argue exactly the opposite: if the parties want more autonomy concerning rules of procedure and particularly to avoid the language requirements they are free to choose arbitration.

3.4. Translation of annexes to a document?

Neither the Regulation nor the Hague convention define the term "document" and therefore a commonly disputed issue concerning cross-border service is also the question of whether all annexes to the document must be translated as well or the translation of the application suffices. The ECJ already ruled on this, saying that the absolute obligation of translation concerns documents instituting proceedings or an equivalent document, regarding the annexes though,

21 This view is taken in the opinion of Advocate General Trstenjak delivered on 29 November 2008 (Par. 85-91) in the case C-14/07 (Weiss).

22 Such a reference was invoked by the Advocate General Trstenjak her opinion delivered on 29 November 2007 in the case C-14/07 (Weiss).

23 See e.g. Article 19 of the UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985.

an assessment must be made, determining whether a translation is actually needed in order for the defendant to properly understand the content (of the claim and cause of action) and enable him to arrange for his defence.[24] The role and importance of annexes to a document to be served may vary according to the nature of the document. If only documents which have a purely evidential purpose and which are not intrinsically linked to the application in so far as they are not necessary for understanding the subject matter of the claim and the cause of action do not form an integral part of that document. Thus, translation from the standpoint of the Regulation is not obligatory (Par. 69 of the Judgment). The ECJ rejected the view that the annexes must always be considered to form an integral part of the "document" and that only a full translation should be regarded as necessary precondition for guaranteeing the rights of the defence.

4. Service abroad – is it necessary at all?

4.1 Fictitious domestic service instead of service abroad

The Regulation 1393/2007 applies "where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there" (Art. 1). It is clear that the Regulation is applicable only to international service and not to internal service. But when does international service (transmission abroad »for service there«) need to occur at all? On the face of it the answer to this question is obvious: service abroad is necessary if the addressee resides abroad. However numerous legal systems have successfully invented ways of avoiding service abroad by providing for different – essentially fictitious – methods of service within their own jurisdiction. The best known example in comparative perspective (although not applicable in the context of EU already since the ECJ's *Scania Finance* judgment[25]). is perhaps the French method of *remise au parquet.* It enables the French authorities to serve a judicial document addressed to a person abroad be simply leaving it in the prosecutor's office in France (the prosecutor then informs the foreign addressee, however this is merely an information as to the service, which has already been effected in France). In USA a method of "piercing the veil" for the purpose of service to a legal entity abroad has developed (handing the document to a subsidiary – although an independent legal entity – with a place of business in the USA in order to effect service to a mother company situated abroad). [26] In Switzerland (Par. 138 of the ZPO) a party with

24 Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07, 8.5.2008.

25 Scania Finance France SA v Rockinger GmbH & Co, C-522/03, 13 October 2005.

26 E.g. Schlunk *v.* Volkswagenwerk Aktiengesellscaft, 486 U.S. 694 (1988), cited by Douglas B. Abrams, Service of Process Under The Hague Convention, Claims For Relief, and The Statute

a residence or place of business in a foreign country must designate an address for service in Switzerland, otherwise service is effected by public notice via publication in the official journal. In many countries (e.g. Germany, Slovenia[27], Poland) a party must appoint within its jurisdiction a representative, authorized to accept service. If the party complies with this obligation, service abroad is no longer necessary and if it doesn't, some method of – essentially – fictitious service within the jurisdiction shall (or may) be implemented.

An essentially identical rule as in Art. 1 of the Regulation No. 1393/2007 is contained also in Art. 1 of the 1965 Hague Convention, which defines that the Convention shall apply "wh*ere there is occasion to transmit a judicial or extrajudicial document for service abroad*". Since the Convention does not define cases where the service has to be effected abroad, it is a generally accepted position that it is left to the national law of each contracting state to define when a document needs to be transmitted abroad for service. Thus, the above mentioned methods of avoiding service abroad are admissible under the 1965 Hague Convention, which is regarded as non-binding since it is applicable only if the national law of the State of the court before which the matter is brought decides that a document must be transmitted abroad for the purpose of service.[28]

4.2 The CJEU judgment in the *Alder* case

Since the wording of Art. 1 of the Regulation No. 1393/2007 is almost identical to Art. 1 of the Hague Convention the question is put whether the above stated findings apply to it as well. Is it left to each Member State to decide when a document has to be transmitted abroad for service or does the Convention apply (and override national rules) whenever the address of the addressee of the document to be served is in another Member State? Are rules of domestic law, which enable for avoiding service in another member state, compatible with Art. 1 of the Regulation? Moreover, does fictitious domestic service as a substitute for service abroad amount to an indirect discrimination based on grounds of nationality, since it imposes additional burdens (e.g. appointment of a representative in the country of proceedings) for parties residing abroad – and these will in a vast majority of cases be foreigners.[29] The CJEU has recently had an opportunity to

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of Repose, http://www.abramslawfirm.com/CM/Articles/Articles5.asp (3 May 2013).

27 Art. 146 of the Civil Procedure Act.

28 Opinion of Advocate General Bot delivered on 20 September 2012 in Case C-325/11 (Alder), Par. 31.

29 Article 18 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) provides: "Within the scope of application of the Treaties, and without prejudice to any

answer these questions in the *Alder* case.[30] The case concerned proceedings in a Polish court, which ordered the claimants (residing in Germany) to appoint a representative in Poland authorised to accept the service of documents pursuant to Article 1-135 of the Polish *Kodeks postepowania cywilnego*. The claimants failed to do so and the documents addressed to that party were placed in a case file and were, in accordance with the law, deemed to have been served.

The CJEU chose not to follow the patterns established in the framework of the 1965 Hague Convention, but rather relied on the opinion of the AG *Bot* who held that "far-reaching developments in the matter since it acquired a Community dimension entail a re-assessment of the relationship between the rules evolved from Regulation No 1393/2007 and national laws of civil procedure".[31] The Court while admitting that Art. 1 does not contain any express indication regarding the circumstances in which such a document 'has to be' transmitted from one Member State to another, nevertheless concluded that reading it together with other provisions of the Regulation provided useful clarifications in that regard. Specifically, in the first place, Article 1(2) of Regulation No 1393/2007 expressly provides that the regulation does not apply where the address of the person to be served with the document is not known.[32] The Court concluded that it follows from a systematic interpretation of the regulation in question that that regulation provides for only two circumstances in which the service of a judicial document between Member States falls outside its scope, namely (i) where the permanent or habitual residence of the addressee is unknown and (ii) where that person has appointed an authorised representative in the Member State where the judicial proceedings are taking place.[33] It therefore concluded that except in these situations, if the person to be served with the judicial document resides abroad, the service of that document necessarily comes within the scope of Regulation No 1393/2007 and must, therefore, be carried out by the means put in place by the regulation to that end, as provided for by Article 1(1) thereof. The regulation thus precludes a procedure for notional service such as that (*in casu*) of the Polish national law (leaving the document addressed to the party abroad simply in the court's file). Only in this manner a uniform application

special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

30 Krystyna Alder and Ewald Alder v. Sabina Orlowska and Czeslaw Orlowski, C-325/11, Adler, 19 December 2012.

31 Opinion of Advocate General Bot delivered on 20 September 2012 in Case C-325/11 (Alder), Par. 31.

32 Krystyna Alder and Ewald Alder v. Sabina Orlowska and Czeslaw Orlowski, C-325/11, Adler, 19 December 2012, Para. 22

33 Ibid, Para. 24.

of the Regulation is achieved.[34] The Court further stressed the importance of protection of fundamental procedural guarantees in the regulation of cross-border service. Objectives of effective service cannot be attained by undermining the rights of the defence in any way of the addressees, which derive from the right to a fair hearing, enshrined in Article 47 of the Charter of Fundamental Rights and Article 6(1) of the European Human Rights Convention.[35] For that reason as well the CJEU favours the broad application of the Regulation since it seeks to adequately reconcile the efficiency and speed of the transmission of judicial documents with the need to ensure that the rights of the defence of the addressees are adequately protected, through the guarantee of actual and effective receipt of those documents.[36] On the other hand, the national law providing for a fictitious domestic service does not guarantee for that addressee either knowledge of the judicial act in sufficient time to prepare a defence or a translation of that document.

Since the CJEU found that the Polish national law is already incompatible with Art. 1 of the 1393/2007 Regulation, it did not need to examine whether it was also incompatible with the prohibition of discrimination based on nationality (Art. 18 TFEU). This issue, however, was addressed in the opinion of AG *Bot,* who considered that the obligation to provide an address for service is inconsistent with the principle of non-discrimination under Article 18 TFEU.[37] He observed that whereas the rule in question does not show direct discrimination on grounds of nationality because it applies in all cases where the party, irrespective of nationality, resides in another Member State,[38] it however amounts to indirect (covert) discrimination on the ground of nationality. This is in so far as it generally affects nationals of other Member States who in many cases will not have a residence, habitual abode or registered office in Poland. This reasoning is in line with the CJEU's *Mund & Fester* case, where the court – although in a different context (regarding conditions for obtaining an interim order of protection) – applied a broad concept of indirect discrimination.[39]

34 Ibid, Para. 27.

35 Ibid, Para. 35.

36 Ibid, Para. 40.

37 Opinion of Advocate General Bot delivered on 20 September 2012 in Case C-325/11 (Alder), Par. 31.

38 Ibid, Para. 77.

39 Mund & Fester v. Firma Hatrex International Trasport, C-398/92, 10 February 1994.

4.3 Some critical remarks

Although based on concerns for an effective protection of fundamental rights, the CJEU Alder judgment is not immune to criticism. First, it is interesting to note that in the other area of traditional international judicial assistance (cross-border taking of evidence) the approach of the CJEU is exactly the opposite. In that context the CJEU (on two occasions[40]) confirmed that rules of the EU Regulation 1206/2001 do not derogate national rules on taking evidence, which also have cross-border implications and application of which make resort to the Regulation unnecessary.[41] However, it is difficult to see why the approach as to the relation between the EU Regulation and the national law concerning two related issues (cross-border service and cross-border taking of evidence) is exactly the opposite.

The CJEU is right in holding that methods of fictitious service jeopardize the fundamental right to be heard. Therefore they may only be implemented as the last resort, when absolutely necessary. Thereby competing values (right of effective access to court on the one hand and the right to be heard on the other hand) need to be carefully balanced. Such is in the case of persons with unknown address. There a fictitious service (e.g. by public notice) is admissible in order to safeguard legitimate expectations of the other party, but only after all investigations required by the principles of diligence and good faith have been undertaken to trace the addressee.[42] Thus before fictitious service is effected all reasonably expectable means to find the real (not merely officially registered) address must be implemented. [43] It is true that the situation is different in the context of a known address of a person residing abroad, where a fictitious domestic service is merely a substitute for applying methods of the Regulation No. 1393/2007. But what CJEU failed to sufficiently take into account is that the fictitious domestic service in Poland (placing the document in the court's file) was not implemented automatically (unlike the French system of *remise au parquet* or the US system of "piercing the veil" for the purpose of service to a foreign company – see supra). Rather, it was a sanction for the claimants' failure to follow the court's instruction to nominate in Poland a representative authorized to accept service. Had the parties complied with that court order, there would have been no fictitious service at all. In such procedural situation it is, in order to assess compatibility with fundamental rights, wrong to take into account just the consequence (the sanction); one should in the first place examine whether

40 Lippens, C-170/11, 6 September 2012, Pro Rail, C-332/11, 21 February 2013.

41 Ibidem.

42 De Visser, C-292/10, 15 March 2012.

43 Compare also Kramberger Škerl, 2010, p. 121 ff.

the initial court order was such that it put an unnecessary burden upon the parties and whether it was unreasonably difficult for the parties to comply with it. Had the CJEU applied such a test, it would have hardly come to a conclusion that fundamental rights of the parties were violated. The obligation to nominate a representative authorized to accept service in the country where court proceedings are pending, does not seem to be too burdensome and difficult to comply with. Especially when this concerns not the defendants but the claimants (like in the Alder case), it does not seem unreasonable to expect that they shall first consider and the comply with the law of the country, where they themselves chose to bring proceedings. For example, a party can – instead of appoint such a representative, simply appoint a local attorney (with full powers of representation). After all in numerous EU member states there exists an obligatory representation by lawyers in civil procedure meaning that the parties cannot represent themselves. This inevitably means that a party will in any case need to nominate a member of the local bar (more precisely: authorized to appear in the courts of the member state at hand) where proceedings are pending and this will – in consequence – also mean that all documents shall be served to the (local) attorney. This will be a domestic service, without any need of translations. It is difficult to see the logic how it can be incompatible with the fundamental rights if the party needs to nominate a representative, authorized to accept service, in the country of the court, however it is perfectly acceptable if the party needs to appoint a fully authorized representative in that country (which also results in a disappearance of the need for cross-border service). It seems unfair to conclude that legal systems of those member states which provide for an obligation for foreign resident parties to appoint representatives for service within jurisdiction *per se* violate fundamental rights of (foreign) parties, whereas legal systems of those member states, which provide for an obligation of full representation by qualified attorneys do not. True, the mandatory representation by attorneys does not apply only to parties residing abroad but also to domestic parties. On the other hand the obligation to appoint a representative, authorized to accept service, affects only parties residing abroad (who will be in most cases foreign citizens). However this differentiation is no more an issue from the viewpoint of fundamental rights (right to be heard) but merely from the viewpoint of indirect discrimination. This should be examined solely on the basis of Art. 18 TFEU. The test in this regard should be whether there exist any justified grounds for such an – what it undoubtedly is – indirect discrimination. In my opinion such grounds do exist. While it is true that the 1393/2007 Regulation has significantly contributed to speeding up a cross-border service of documents and also made it more efficient and reliable, it is a pure fiction to say that this amounts to a total disappearance of any differences between domestic service and service abroad – in regard to cost, reliability and time. Service abroad can sometimes be

very costly (not only because of translation involved!), it can (in certain member states) still take a lot of time and the result sometimes is still uncertain. This however can be avoided if a party appoints a representative (either an attorney with full power of representation or a person authorized merely for accepting of service) in the country where proceedings are pending.

5. Conclusion

Comparing to the traditional system of the Hague 1954 and 1965 Conventions, the EU Service of Documents Regulation strengthens the guarantees concerning language on one hand. Foremost, because it is beyond doubt that these guarantees must apply to cases of direct postal service as well, whereby it is assured that the addressee can effectively exercise the right to refuse acceptance of the document for the reasons concerning language. On the other hand, introducing the criteria of the »language, which the addressee understands«, the Regulation lowers the standards, which were applied in traditional regimes of cross-border service of judicial documents to a certain extent. On the principled level, the new approach may be favoured as it corresponds to what should be the overriding principle in cross-border service of documents from the viewpoint of the addressee – effective exercise of the right to be heard in proceedings. On the other hand, the new approach has positive effects concerning certain other equally important procedural guarantees – those which relate to the cost barriers for an effective access to court and those relating to the duration of proceedings. The problem however is that the new standard of »understanding the language« causes numerous difficulties when applied in practice. Another striking development, which demonstrates that the EU Regulation is slowly detaching itself from the Hague Convention, which it was originally based on, concerns the clear preference, given by the CJEU to the methods of service, set out in the Regulation, over the "inventions" of national laws which substituted the need to serve abroad. Whether this development is entirely justified, remains to be seen.

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Достављање аката у иностранству у грађанским и трговинским стварима: од Хашке конвенције до Уредбе ЕУ 1393/2007

Резиме

Заштита националног суверенитета није више главна брига у систему доставе судских и вансудских аката у иностанству. Све већи значај добија заштита фундаменталних права и легитимних очекивања процесних странака, при чему се мора постићи адекватна равнотежа између супротстављених вредности. У том контексту, Уредба ЕУ 1393/2007 јача гаранције које се односе на употребу језика. С друге стране, увођењем стандарда у погледу "језика који адресат разуме", ова Уредба донекле снижава захтеве који су примењени у традиционалним режимима доставе судских и вансудских аката у иностранству. У начелу, овај нови приступ може бити имати своје предности али у пракси проузрокује бројне тешкоће, што не доприноси правној сигурности и предвидивости. Исто важи и за одступање Суда правде Европске уније од традиционалног става да су државе слободне да имплементирају различите методе, што практично чини достављање у иностранству непотребним.

Кључне речи: *достава аката у иностранству, грађански поступак, право ЕУ, језик судских докумената, судска сарадња.*