

CROSS-BORDER SERVICE OF DOCUMENTS IN EU GOING ONLINE: IMPLEMENTATION AND IMPLICATIONS*

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ABSTRACT

The service of documents is crucial for the smooth initiation and operation of cross-border civil and commercial proceedings. Cross-border service of documents raises the issues on effectiveness and efficiency of proceedings together with the effective right to access a (foreign) court in terms of the language used and the effective possibility of appearing before a court. In response, international judicial cooperation in the service of documents was established and operated for decades, starting with the Hague 1965 Service Convention. The importance of proper service of documents also comes from the fact that it is a condition to recognise and enforce the final foreign judgment in different domestic, European, and international legislations. The abolition of the exequatur procedure in the context of the EU legislation in civil matters points toward an even greater need for harmonisation, which seeks to be achieved through the Service of Documents Regulation. The changes in individual lives and business operations affected by digitalisation have also led to the need for the modernisation of judicial cooperation. The Service of Document Regulation underwent the recast procedure and entered into force on 1 July 2022. It has brought novelties, given the introduction of mandatory electronic communication between the agencies and facilitating electronic and direct service. The significant changes concern the e-Codex as the mean of communication; electronic service; electronic signature of deeds, documents and forms; and assistance in address enquiries. The paper assesses the implication of using ICT in the service of documents and, at the same time, addresses whether the changes are fully up with the fast-growing general technological advancement since it seems that the implementation level still depends on the Member States.

Keywords: *Service of Documents Regulation, ICT, access to justice, e-Codex, eIDAS, e-service, address enquiries*

* This paper is co-funded by the Erasmus+ Programme of the European Union. The paper reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

1. INTRODUCTION

The accelerated development of technology strongly affects judicial proceedings over the world. The COVID-19 pandemic has additionally encouraged the usage of electronic handling of claims, hearings, evidence taking, and delivery of justice.¹ The digitalisation-related measures evoked by the COVID-19 pandemic to overcome the limits of existing practice were expected to be temporary. Still, they had brought an increased openness towards the electronic environment and its use in court proceedings.² Consequently, such novelties mostly persisted even after the crisis.³

The usage of new technologies⁴ in the field of justice comes under the title of ‘electronic justice’ or ‘e-Justice’. Implementing e-Justice is one of the most significant challenges of the EU’s national justice systems. E-Justice means the use of electronic systems to carry out activities that had been carried out so far in some other way or in a way that was much less reliant on the said systems than is envisaged for the future.⁵ The use of electronic systems in judiciary affects *how* an activity or institution functions, but not what it *does*. E-Justice is ordinary justice, but making use of the tools that ICT provides in the organisation and performance of the tasks of judicial bodies.⁶ The changes that e-Justice entails should, therefore, only be external and should only affect the form of the procedural acts. The use of

¹ Onțanu, E. A., *Normalising the use of electronic evidence: Bringing technology use into a familiar normative path in civil procedure*, Oñati Socio-Legal Series, Vol. 12, No. 3, 2022, p. 585.

² Velicogna, M., *Cross-border Civil Litigation in the EU: What Can We Learn From COVID-19 Emergency National e-Justice Experiences?*, European Quarterly of Political Attitudes and Mentalities, Vol. 10, No. 2, 2021, p. 2., Certainly, COVID-19 pandemic has only accelerated the usage of ICT in the judiciary, while it has been developing in the last decades. See, e.g.: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Towards a European e-Justice Strategy*, 30 May 2008, COM(2008) 329 final; HCCH, The HCCH Service Convention in the Era of Electronic and Information Technology, 11 December 2019 The Hague (Netherlands), [<https://assets.hcch.net/docs/24788478-fa78-426e-a004-0bbd8fe63607.pdf>]; Contini, F.; Fabri, M. (eds.), *Judicial Electronic Data Interchange in Europe: Applications, Policies and Trends*, Lo Scarabeo, Bologna, 2003; Velicogna, M., *Justice systems and ICT-What can be learned from Europe*, Utrecht Law Review, Vol. 3, No. 1, 2007, pp. 29-147; Cerrillo, A.; Fabra, P. (eds.), *E-Justice: Using Information Communication Technologies in the Court System*, Information Science Reference-Imprint of: IGI Publishing, 2008.

³ Krans, B.; Nylund, A., *Civil Courts Coping with Covid-19*, in: Krans, B.; Nylund, A. (eds.), *Civil Courts Coping with Covid-19*, Eleven International Publishing, The Hague, 2021, p. 3.

⁴ Gascón Inchausti, F., *Electronic Service of Documents. National and International Aspects*, in: Kengyel, M.; Nemessányi, Z. (eds), *Electronic Technology and Civil Procedure: New Paths to Justice from Around the World*, Springer, Dordrecht, Heidelberg, New York, London, 2012, pp. 137-180.

⁵ See: Velicogna, M., *In Search of Smartness: The EU e-Justice Challenge*, Informatics, Vol. 4, No. 1, 2017, pp. 1-17.

⁶ Gascón Inchausti, *op. cit.*, note 4, p. 3.

electronic systems should under no circumstances jeopardise any of the safeguards applicable to judicial activities.⁷

The focal point of the EU's e-justice in civil matters is enhancing access to justice in cross-border cases. The civil procedure differs in the Member States, regardless of the specific level of harmonisation. Due to that, the litigants in Member States can face legal and practical obstacles when endeavouring to enforce their cross-border claims. Those obstacles can derive from the necessity to establish international jurisdiction properly, the need for cross-border service of documents, the taking of evidence, enforcement, diverging domestic procedures, and having to incur additional costs for local legal representation, the translation of documents, and travel expenses.⁸

All aforementioned indicates that the EU's legal framework for international judicial cooperation in civil matters needs to address the usage of technological means to improve access to justice, uphold procedural guarantees in the use of such means, secure data protection, and provide the necessary resilience of communication flows in judicial cooperation, both during usual times and in the case of lasting disruptive events.⁹ As part of these efforts, the EU legislator adopted new provisions on the cross-border service of judicial and extrajudicial documents in civil and commercial matters.

Although the language of the 2007 Service of Documents Regulation¹⁰ was drafted in a 'technology-neutral' way, modern channels of communication were not used in practice. The same can also be stated concerning the 1965 Hague Service Convention.¹¹ Following the recast procedure¹² the new Service of Documents

⁷ *Ibid.*, p. 3.

⁸ Kramer, X. E., *Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU*, in: Benyekhlef, K.; Bailey, J.; Burkell, J.; Gélinas, F. (eds.), *eAccess to Justice*, University of Ottawa Press, Ottawa, 2016, p. 354.

⁹ Onçanu, *op. cit.*, note 1.

¹⁰ 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 (service of documents), and repealing Council Regulation (EC) No 1348/2000 [2007] OJ L 324, pp. 79–120 (hereinafter: 2007 Service of Documents Regulation).

¹¹ HCCH, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, [<https://www.hcch.net/en/instruments/conventions/full-text/?cid=17>].

¹² Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) COM/2018/379 final (hereinafter: 2018 Service of Documents Regulation Proposal).

Regulation¹³ has been applicable since 1 July 2022, with the exceptions of certain rules that will apply from 2025. The novelties introducing the usage of modern technologies in the service of documents will be presented below.

2. SERVICE OF DOCUMENTS AND MODERN TECHNOLOGIES

COVID-19 was not the sole factor that demanded the implementation of digitalisation in court proceedings. In the past few years, there has been an increased number of social and commercial interactions in the European Union, closely related to the greater mobility of the new generation of workers and the rise of international e-commerce. This led to an increased number of cross-border disputes, seeking a framework to remedy the challenges of an increasingly integrated mobile and digital society.¹⁴

The procedural system of every state opts for the rules on the service of documents which regulate how the written communication between the court and the parties is to be conducted.¹⁵ The national legislations on the service of documents are designed for domestic cases, not the ones with the cross-border element. For that reason, cooperation between the states is necessary.

The international law of service of documents needs to reconcile the interest between the right to effective access to justice of the party interested in proper service, and the right to be heard of the recipient. The party interested in proper service, usually the plaintiff, desires speedy transmission. While the recipient, usually the defendant, has the interest in a right to a reasonable opportunity to take note of the documents as well as comprehensibility.¹⁶ The interests of both confronting parties need to be in line with the principle of economic procedure which implies simple, cost-effective and expeditious service. Finally, this all requires the avoid-

¹³ Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) [2020] OJ L 405, pp. 40–78 (hereinafter: 2020 Service of Documents Regulation).

¹⁴ See: Amato, R.; Velicogna, M., *Cross-Border Documents Service Procedures in the EU from the Perspective of Italian Practitioners – The Lesson Learnt and the Process of Digitalisation of the procedure through e-Codex*, *Laws*, Vol. 11, No. 6, 2022, pp. 1-2.

¹⁵ The notion of “service of document”, need to be distinct from the notion of “service of process”. Service of process regulates how to give notice of the initiation of proceedings to the defendant. McClean, D., *Service of Process*, Beaumont, P.; Holliday, J. (eds), *A Guide to Global Private International Law*, Hart, Oxford, London, New York, New Delhi, Sydney, 2022, pp. 161-175.

¹⁶ Kieninger, E.-M.; Hau, W., *Service of documents*, in: Basedow, J.; Rühl, G.; Ferrari, F.; de Miguel Asensi, P. (eds.), *Encyclopaedia of Private International Law*, Edward Elgar Publishing, Cheltenham, UK, Northampton MA, USA, 2017, p. 1628.

ance of mistakes which could compromise the success of subsequent proceedings, namely the recognition and enforcement of the expected decision abroad.¹⁷

The 1965 Hague Service Convention is technology-neutral in its current form and its usefulness and applicability in the future depends on the embrace of modern technology.¹⁸ The Conclusions and Recommendations of the Special Commission on the Practical Operation of The Hague Apostille, Evidence and Service Conventions reaching far in 2003 emphasized the need to embrace technical developments and acknowledged that modern technologies are an integral part of life today.¹⁹ Specifically, the Special Commission recommended that States explore ways to use modern technology to further the operation of the Service Convention, especially in regard to the electronic transmission of requests.²⁰ The trend in advocating the digitalisation within the 1965 Hague Service Convention is continuous, this was confirmed by further discussion within the Special Commissions²¹ and the 4th edition of Practical Handbook on the Operation of the Service Convention, giving the special focus to modern technologies.²²

The 2007 Service of Documents Regulation was also drafted as a technology-neutral tool. The Commission had argued that the traditional channels of transmission of a document were underperforming and modern channels of communication are in practice not used due to old habits, legal obstacles, and lack of interoperability of the national IT systems.²³ The research on the functioning of the EU instruments regulating the cooperation in civil matters had identified the

¹⁷ *Ibid.*

¹⁸ Ossenova, K. V., *Use of an Electronic Platform for Communication and Transmission Between Central Authorities in the Operation of the HCCh Service Convention*, HCCH a[Bridged Edition, The HCCH Service Convention in the Era of Electronic and Information Technology, The Hague, 2019, [<https://assets.hcch.net/docs/24788478-fa78-426e-a004-0bbd8fe63607.pdf>], p. 14.; Richard, V.; Hess, B., *The 1965 Service and 1970 Evidence Conventions as crucial bridges between legal traditions?*, in: John, T.; Gulati, R.; Köhler, B. (eds.), *The Elgar Companion to the Hague Conference on Private International Law*, Elgar, Cheltenham and Northampton, 2020, pp. 288-298.

¹⁹ HCCH, *Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Apostille, Evidence and Service Conventions*, 2003, [<https://assets.hcch.net/docs/0edb-c4f7-675b-4b7b-8e1c-2c1998655a3e.pdf>].

²⁰ *Ibid.*

²¹ HCCH, *Conclusions and Recommendations of the Special Commission on the practical operation of The Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions*, 2009, [https://assets.hcch.net/upload/wop/jac_concl_e.pdf]; *Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice*, 2014, [<https://assets.hcch.net/docs/eb709b9a-5692-4cc8-a660-e406bc6075c2.pdf>].

²² HCCH, *Practical Handbook on the Operation of the Service Convention*, 4th ed., The Hague, 2016, [<https://www.hcch.net/en/publications-andstudies/details4/?pid=2728&ctid=3>].

²³ 2018 Service of Documents Regulation Proposal, p. 3.

service of documents as a universal problem.²⁴ Kramer those difficulties in cross-border service of documents associates with differences between national rules on service, the plurality of authorities involved and their different work methods, language requirements and other formalities, which result in delays in the actual service to the addressee and obtaining proof thereof.²⁵

The evaluations that had proceeded the Proposal for the amendment of the 2007 Service of Documents Regulation identified the shortcomings in the protection of procedural rights and overall legal complexity and uncertainty and concluded that benefits would result from using electronic communication for digitalisation of the judiciary, by simplifying and speeding up cross-border judicial procedures and judicial cooperation.²⁶ The intention of the legislator was to make the substantial improvement with little investment by relying on the EU outputs and legal standards that already exist.²⁷ The proposal was published in 2018 and offered a new set of rules aimed at improving the effectiveness and speed of judicial procedures, primarily by digitalising them. The Commission's idea was as well to rely on EU outputs and legal standard that already existed, such as e-Codex,²⁸ a European digital infrastructure for secure cross-border communication in the field of justice developed and managed by a consortium of Member States with EU co-funding and applied in voluntary pilot projects by a number of Member States.²⁹ Nevertheless, the Regulation was drafted before the COVID-19 pandemic and before the EU took a systematic approach to regulating the digitalisation of justice. Regardless, the Proposal and final text are aligned with the latest EU policies, including the EU's digitalisation of the judicial cooperation package.³⁰ The new 2020

²⁴ Gascón Inchausti, F.; Requejo Isidro, M., *A Classic Cross-border Case: the Usual Situation in First Instance*, in: Hess, B.; Ortolani, P. (eds.), *Impediments of National Procedural Law to the Free Movement of Judgments*, Vol. I, Beck/Hart/Nomos, Oxford/Baden-Baden, 2019, pp. 5–85.

²⁵ Kramer, X., *Are you Being Served? Digitising Judicial Cooperation and the HCCH Service Convention*, HCCH a[Bridged Edition, The HCCH Service Convention in the Era of Electronic and Information Technology, The Hague, 2019, [https://assets.hcch.net/docs/24788478-fa78-426e-a004-0bbd-8fe63607.pdf], p. 44.

²⁶ 2018 Service of Documents Regulation Proposal, p. 7.

²⁷ *Ibid.*, p. 3.

²⁸ Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726, PE/87/2021/REV/1 [2022] OJ L 150, p. 1–19.

²⁹ See: Francesconi, E.; Peruginelli, G.; Steigenga, E.; Tiscornia, D., *Conceptual Modeling of Judicial Procedures in the e-Codex Project*, in: Casanovas, P.; Pagallo, U.; Palmirani, M.; Sartor, G. (eds.), *AI Approaches to the Complexity of Legal Systems*, Vol 8929, 2014, Springer, Berlin, Heidelberg, pp. 202-216.

³⁰ Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and

Service of Documents Regulation pursues two objectives. The first is to modernise the system of both exchanges between authorities and agencies and direct service to the recipient through the introduction of digital communication on a mandatory basis (between authorities) or in the case of the recipient's consent (for direct service). And second, to address the shortcomings in the previous Regulation clarity or its operation in practice.³¹

3. DIGITALISATION RELATED NOVELTIES IN 2020 SERVICE OF DOCUMENT REGULATION

3.1. Communication between Transmitting and Receiving Agencies and Central Bodies

The introduction of modern communication technologies opened the issue of communication between the authorities seated in the different states and its transformation from traditional paper communication to electronic communication. Electronic communication is not only necessary to keep up with modern society's demands but also contributes to equally efficient and secure service.³²

The EU legislator intended to establish a system grounded on principles of speediness and efficiency,³³ which strongly relies on direct transmission of documents between the authorities, without recourse to diplomatic channels, which are foreseen only in exceptional circumstances.³⁴ For that reason the Service Regulation obliges the Member States to designate the transmitting agencies and receiving agencies.³⁵

The 2007 Service of Documents Regulation provided that the transmission of documents between the transmitting and receiving agencies could be carried out by any appropriate means provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible. This technology-neutral formulation permitted electronic exchanges, but they were not used in practice.³⁶ Regulation did not set any particular

amending certain acts in the field of judicial cooperation, SEC(2021) 580 final, S WD(2021) 392 final, SWD(2021) 393 final.

³¹ Stein, A., *The European Service Regulation: Introduction*, in: Anthimos, A.; Requejo Isidro, M. (eds.), *The European Service Regulation. A Commentary*, Edward Elgar Publishing, Cheltenham/Northampton, 2023, pp. 1-25.

³² Kramer, *op. cit.*, note 25, p. 45.

³³ Dominelli, S., *Current and Future Perspectives on Cross-Border Service of Documents*, *Scritti di diritto privato europeo e internazionale*, Aracne, 2018, p. 78.

³⁴ 2020 Service of Documents Regulation, Article 16.

³⁵ *Ibid.*, Article 3.

³⁶ Stein, *op. cit.*, note 30, p. 4.

time limit for the agency to transmit the documents to the foreign agency following the request of the interested party.

The new rules of the 2020 Service of Documents Regulation do not change the core of the provision on the transmission of documents between the agencies, it only changes the medium through which transmission must be performed.³⁷ The central rule establishes an obligation for all communication and exchanges of documents between the agencies and bodies designated by the Member States to be carried out by a secure and reliable decentralised IT system.³⁸ The Regulations mentions the e-Codex as an example of a decentralised IT system. That's because it was not the intention of the legislator to tie the Regulation to e-Codex firmly, but to leave space for more advanced technical solutions in the future.³⁹

No later than 1 May 2025,⁴⁰ when the provision enters into force, all the technical measures have to be taken to make this ICT system operational, and the transmitting agencies should be able to use their usual national application interface or software provided by the European Commission to send the documents to be notified to the receiving agencies via the e-CODEX system.⁴¹ The specific standard form of the request will be completed in electronic format in one of the official languages of the requested State or in a language accepted by that State.⁴² The receiving agency, for its part, will send an automatic acknowledgement of receipt to the transmitting agency via the same system, using the electronic version of the forms.⁴³

The 2020 Service of Documents Regulation also refers to the eIDAS Regulation.⁴⁴ This Regulation is generally applicable to the electronic transmission of documents and clarifies that qualified electronic seals or signatures, as defined in it, may be

³⁷ Amato, Velicogna, *op. cit.*, note 14, p. 21.

³⁸ 2020 Service of Documents Regulation, Article 5.

³⁹ Stein, *op. cit.*, note 30, p. 4.

⁴⁰ 2020 Service of Documents Regulation, Article 37; The provision on means of communication between Transmitting and Receiving Agencies and Central Bodies will come into force on 1 May 2025, three years after the entry into force of the Implementing Act establishing the decentralised IT system, which was adopted on 14 March 2022.; Commission Implementing Regulation (EU) 2022/423 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1784 of the European Parliament and of the Council, C/2022/1417 [2022] *OJ L* 87, p. 9–13.

⁴¹ Amato, Velicogna, *op. cit.*, note 14., p. 21.

⁴² 2020 Service of Documents Regulation, Article 8(2).

⁴³ *Ibid.*, Article 10(1).

⁴⁴ *Ibid.*, Article 5(3); Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] *OJ L* 257, p. 73–114.

used where documents transmitted require or feature a seal or a handwritten signature. Following that, all documents passing between transmitting and receiving agencies will be able to be signed electronically and will not be deprived of legal effect or considered inadmissible simply because they are in electronic format.⁴⁵

The transmission can be carried out by other means only if there is a disruption of the decentralised IT system or due to exceptional circumstances.⁴⁶ Examples of exceptional circumstances can be found in the Recitals. They are related to situations in which the voluminous documentation in electronic form will be a large administrative burden for transmitting agency or whereby the original document is needed in paper format to assess its authenticity.⁴⁷ The question is to what extent the States will use this exception since many cases and documentation are voluminous, and there are still many decisions and documentation without electronic signature. Will those exceptions also lead to the abuse of this new provision on communication just because national authorities will still rather communicate old-fashioned way? Anyhow, these exceptions have to be interpreted narrowly due to the explicit aim of the Regulation to make the transmission via a decentralised IT system mandatory.

3.2. Cooperation in Address Enquiries

Indirectly, the digitalisation of the administrative cooperation also loosens up the scope of application of the 2020 Service of Documents Regulation. The old rules of the 2007 Service of Documents Regulation strictly excluded the application of the Regulation where the address of the person to be served with the document was not known.⁴⁸ The difficulties in application in this regard were identified.⁴⁹ There were situation in which the parties expected Central Authorities to locate the recipient or have made use of the Evidence Regulation to locate the address (even this Regulation as well preconditions the knowledge of the address for its application).⁵⁰

⁴⁵ 2020 Service of Documents Regulation, Article 6.

⁴⁶ *Ibid.*, Article 5(4).

⁴⁷ *Ibid.*, Recital 15.

⁴⁸ 2007 Service of Document Regulation, Article 1(2); same as the 1965 Hague Service Convention, Article 1(2).

⁴⁹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Regulation (EC) NO 1393/2007 on the European Parliament and the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, COM/2013/0858 final, point. 3.2.1.

⁵⁰ *Ibid.*; Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174, p. 1–24.

The purpose of such a rule in 2007 Service of Document Regulation was to avoid imposing excessive obligations on the Member States and to avoid the question to whom the duty to find the address might fall.⁵¹ However, the Brussels *Ibis* Regulation⁵² and Brussels *IIter* Regulation,⁵³ provided that where the defendant does not enter an appearance, the court has to stay the proceedings so long as it cannot be shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.⁵⁴ The CJEU further elaborated those “necessary steps” in the meaning that the court seized of the matter must be satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.⁵⁵

The new rules of 2020 Service of Document Regulation opt for the same solution as its predecessor, but with the exception of Article 7.⁵⁶ Whole new Article provides for assistance in address enquiries, to some extent relying on the means of modern technologies. The provided procedures represent some specific measure or pre-step before the service occurs or after the unsuccessful service occurs. A similar system is provided and well-functioned under the Maintenance Regulation, which governs the specific measure in finding the debtor’s address.⁵⁷

In situations where the address of the person to be served with the judicial or extrajudicial document in another Member State is unknown, Member State is obliged to provide the assistance. The provision provides for three types of assistance. Member State shall assist in determining the address in at least one of these ways. First, by providing for designated authorities to which transmitting agencies may address requests to determine the address of the person to be served. The examples of such designated authorities are the same ones designated as the receiving

⁵¹ Dominelli, *op. cit.*, note 33., p. 71.

⁵² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351, p. 1–32, Article 28(2).

⁵³ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), ST/8214/2019/INIT [2019] OJ L 178, p. 1–115, Article 19(1).

⁵⁴ Stein, *op. cit.*, note 30, p. 39.

⁵⁵ Case C-327/10 *Hypotečni banka a.s.* [2011] EU:C:2011:745, para. 52.; Case C-292/10 *Cornelius de Visser* [2012] EU:C:2012:142, para. 55.

⁵⁶ 2020 Service of Documents Regulation, Article 1(2).

⁵⁷ See: Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7, p. 1–79, Article 51(2)(b) in conjunction with Article 52.; Župan, M.; Drventić, M., *Sustav središnjih tijela kroz europski model naplate prekograničnog uzdržavanja*, Zbornik radova Dani porodičnog prava „Pravna sredstva za smanjenje siromaštva djece”, Mostar, 2015, pp. 151-161.

agencies (Czech Republic, Italy, Slovenia, Spain, Slovakia) or designated as central authorities (Cyprus, Hungary, Romania). Other designated authorities are bailiffs (Belgium, Latvia, Lithuania, and Luxembourg), the Ministry of Interior (Croatia), the civil registry (Estonia) or the national court registry (Poland).⁵⁸

The second type of assistance is allowing persons from other Member States to submit requests, including electronically, for information about addresses of persons to be served directly to domicile registries or other publicly accessible databases using a standard form available on the European e-Justice Portal. None of the Member States provided for such kind of assistance. The reason for that possibly lies in the fact that it is not fully clear who is the “person from the other Member State”, does this concern the official person or any interested party – physical person to use the assistance. In this regard, the Member States mostly remained in the framework of secure and official communication indicated by the transmitting agencies and thus had chosen the first mean of assistance.

The third mean of assistance relates to the detailed information provided by the Member States, through the European e-Justice Portal, on how to find the addresses of persons to be served. This model may concern as the “easiest way out” for Member States to comply with the imposed obligation.⁵⁹ It comes in the form of detailed information on national law and procedure for obtaining information from the population register (Germany, Austria), provided information on online phone registries or business registries, and other helpful information for individual research (Ireland, France), or a combined system where there is information provided on the separate registries for the natural persons, and information on the registries for companies (Latvia, Malta, Finland).⁶⁰ Overall, this model concerns the possibility to contact the particular registry online or to make an individual research on publicly available online databases.

By this provision, the legislator decided to add an option for the party interested in service to have a more significant probability for successful service when the address of the person to be served is unknown. In this case, the Regulation does not follow the well-functioned system of cooperation between the Member States from Maintenance Regulation. Although this might be a good solution,⁶¹ in this case, it is decided not to put an excessive burden on the requested Mem-

⁵⁸ E-Justice Portal, European Judicial Atlas in Civil Matters, *Serving Documents (Recast)*, [https://e-justice.europa.eu/38580/EN/serving_documents_recast], Accessed 25 June 2023.

⁵⁹ Stein, *op. cit.*, note 31, p. 10.

⁶⁰ E-Justice Portal, *op. cit.*, note 58.

⁶¹ Dominelli, *op. cit.*, note 32, p. 73.

ber States.⁶² It is without question that these new rules will help in the search for unknown addresses. Still, this new measure is not uniform, meaning that the provided assistance models differ in effectiveness, mainly because there is a variety of authorities involved and methods of finding the address. It is questionable to what extent its purpose will be accomplished in practice.

3.3. Electronic Service

The electronic service of documents can be very useful in an international environment where borders are no barriers to electronic communication, which leads to the some advantages of procedural efficiency.⁶³ Necessary condition for the exercise of the right to be heard is that the party becomes aware of an act in respect of which he has a right to be heard, any caution in the regulation of the electronic service of documents in the cross-border environment is thus justified. The proper service of the documents to the defendant is the core basis for the defendant's right of defence. Unlike the traditional means of service, the electronic service does not always guarantee appropriate recognition by a defendant. For that reason, Member States usually do not accept electronic service as a primary service method without the defendant's consent. Overall, the solutions in the Member States differ, with the examples where the electronic service is already standard.⁶⁴

Until the 2020 Service of Document Regulation, there was no reference to electronic service in international and EU instruments regulating the cross-border service of documents.⁶⁵

⁶² It should bear in mind that the functions of Central Authorities in family matters are always more specific and justified. See: Župan, M.; Christian H.; Ulrike K., *Central Authority Cooperation Under The Brussels II ter Regulation*, in: Bonomi, A.; Romano, G. P. (eds.), *Yearbook of Private International Law*, Vol. XXII, 2020/2021, Verlag Dr. Otto Schmidt, Köln, 2021, pp. 183-200; Župan, M., *Cooperation between Central Authorities, Jurisdiction in Matrimonial Matters*, in: Honorati, C. (ed.), *Parental Responsibility and International Abduction: A Handbook on the Application of Brussels IIa Regulation in National Courts*, Peter Lang, Frankfurt am Main, 2018, pp. 265-292.

⁶³ Gascón Inchausti, *op. cit.*, note 4, p. 173.

⁶⁴ E.g. Austria, which introduced the system *Elektronischer Rechtsverkehr* (ERV) for digital service in 1990s.

⁶⁵ Although, EU legislator already introduced the electronic service within the uniform procedures regulation of the European Enforcement Order, European Order for Payment Procedure and European Small Claim Procedure. See: Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143, p. 15, Article 13(1)(d) and 14(1)(f); Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L 399, p. 1-32, Article 13(1)(d) and 14(1)(f); Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199, p. 1, Article 13(1)(b).

The 2020 Service of Regulation changes the current legal framework as it introduces electronic service of documents as an additional alternative method of service in cross-border cases.⁶⁶ The new provision on direct electronic service is less ambitious than the one proposed in 2018 but still represents a step forward to the use of electronic communication channels.⁶⁷ The provision should be interpreted as granting the choice to the court of proceedings to make use of other methods if, on a case by case approach, service by email might prejudice the right to defence, or be impossible for technical reasons.⁶⁸

Provision provides that direct service can be effected only by electronic means that are available for domestic service under the law of the Member States.⁶⁹ This solution pre-conditions the general use of electronic service to its development in Member States where the national solution greatly differ.⁷⁰ As to the current state, 11 Member States declared that they do not apply the Article 19 on electronic service (Spain, Croatia, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Finland, and Sweden), which calls into question true technological advances in terms of service of documents.⁷¹

The provision provides for two alternative models of direct electronic service. They are both conditioned by the prior consent of the addressee. The first method is electronic service by using qualified electronic registered delivery services within the meaning of eIDAS Regulation, where the addressee must give prior express consent to the use of electronic means for service of documents in the course of legal proceedings. It can be assumed that this will mean that qualified electronic registered delivery services which are already operating in the Member States would be extended to the cross-border service.⁷² Regarding the consent, prior express consent could be given for specific proceedings or as a general consent to the service of documents in the course of legal proceedings by those means of service. Where under the law of the forum Member State procedural documents can be served through an electronic system, it is sufficient to express prior consent to

⁶⁶ 2020 Service of Documents Regulation, Article 19.

⁶⁷ Stein, *op. cit.*, note 30, p. 6.; The final content of the Article 19 can be considered as the result of the consensus between the Member State.

⁶⁸ Dominelli, *op. cit.*, note 32, p. 154.

⁶⁹ The 2018 did not included this condition in the proposed provision, see: 2018 Service of Document Regulation Proposal, Article 15. Still, this condition is of the European Order for Payment Procedure and European Small Claims Procedure, Article 13(1)(b).

⁷⁰ Stein, *op. cit.*, note 30, p. 6.

⁷¹ E-Justice Portal, *op. cit.*, note 58.; It should be noted that the information provided on the e-Justice Portal are still incomplete and does not contain the data for all the Member States. Objections can also be made to the clarity and precision of the submitted answers.

⁷² *Ibid.*

the service of documents, where the explicit reference to court proceedings is not necessary.⁷³

The second method provides the electronic service via simple email. In this case, the addressee must express its prior consent with regard to specific court proceedings. The addressee also needs to confirm the receipt, including the date of receipt.⁷⁴ The addressee should confirm receipt of the document by signing and returning an acknowledgement of receipt or by returning an email from the email address furnished by the addressee for service. The acknowledgement of receipt could also be signed electronically.⁷⁵

The provision as well permits the Member States to predict additional requirements to guarantee the safety of the transmission.⁷⁶ Such conditions could address issues such as the identification of the sender and the recipient, the integrity of the documents sent and the protection of the transmission against outside interference.⁷⁷ Only four countries declared that they do not ask for the additional requirements (Slovenia, Austria, Hungary, and Ireland), while five of them declared on the need to meet additional condition in the application of the provision on electronic service (Belgium, Czech Republic, Estonia, France, Slovakia).

The cumulation of strict conditions for electronic service prescribed by the provision itself, the possibility of Member States to impose additional conditions themselves, together with the current data provided on the e-Justice Portal, indicate that the real benefits of electronic service at the EU level are hardly achievable at this time.

4. CONCLUSION

The development of electronic technology in our society started two decades ago. Nowadays, there are highly developed and sophisticated means of electronic communication. Due to their convenience and effectiveness, their application in civil justice procedures is inevitable and appropriate.

The 2020 Service of Documents Regulation replaces the paper-based transmission mechanism with the decentralised ICT system of national applications interconnected by a secure and reliable communication infrastructure – e-Codex. The

⁷³ 2020 Service of Documents Regulation, Recital 32.

⁷⁴ *Ibid.*, Article 19(1)(b).

⁷⁵ *Ibid.*, Recital 33.

⁷⁶ *Ibid.*, Article 19(2).

⁷⁷ 2020 Service of Documents Regulation, Recital 33.

new framework relies on the broader and better use of technological solutions. This framework offers promising opportunities to improve the system in terms of efficiency. It reduces notification time and security problems and offers direct and secure communication channels. The overall time left for implementing those provisions in national systems is reasonable. Still, there is a certain doubt about resorting to the traditional transmission channels due to the exceptions provided in the recital.

By providing assistance in address enquiries, the legislator decided to add an option for the party interested in service to have a more significant probability for successful service when the address of the person to be served is unknown. In this case, it is decided not to burden the requested Member States excessively. Instead, the Member States can choose one or more proposed assistance models, which include different authorities and work methods. It is without question that these new rules will help in the search for unknown addresses. Still, this new measure is not uniform, meaning that the provided assistance models significantly differ in effectiveness.

The new provision on electronic service grants to the court of proceedings the choice to decide whether it will use the electronic service, if the electronic mean of service is available under its national law. By providing strict conditions to use this service method and allowing Member States to add additional requirements, the Regulation leaves a small place for the procedural safeguards to be breached. Still, those strict conditions, together with the data on national laws provided on the e-Justice Portal, indicate that the full benefits of electronic service at the EU level are hardly reachable.

The recast procedure had two objectives - to introduce digital communication and to address the existing shortcomings in previous Regulation concerning its clarity and operation in practice. Unfortunately, everything indicates that the new provisions on digitalisation are introducing new shortcomings in the sense of their clarity and implementation. The new rules are not in line with the advancement of modern technology and thus not contribute to the expected enhancement of the individual's right to access to justice.

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