



*Tieslietu ministrija* 

**Project No JUST/2010/JCIV/AG/0010-30-CE-0421163/00-50 „Enhancing quality of judicial cooperation in civil matters: the European Union civil proceedings and tools provided by regulations on taking evidence and service of documents”**

**Training course „Cross-border judicial cooperation in civil matters: tools provided by regulations on taking evidence and service of documents”**

**May 24 - 25, 2012**



# *Introduction*

- Article 24 of the original Service Regulation No. 1348/2000 contained an obligation for the European Commission to present, no later than 1 June 2004, a report on the application of the Regulation. If need be, the report was supposed to be accompanied by proposal for adaptations of the Regulation.
- The Commission has presented its report in October 2004 (COM(2004)603 final). The report concluded that the application of the Regulation has generally improved and expedited the transmission and the service of documents between Member States.
- Main reasons were
  - the introduction of direct contacts between responsible (transmitting and receiving) authorities,
  - the possibility of postal service and direct service, and
  - the introduction of standard forms.
- The report identified also certain deficiencies:
  - lack of specific knowledge about the Regulation by practitioners, and
  - difficulties with application of certain provisions, in particular Article 11.The report suggested adaptations of Articles 8, 11, 14, 15, 17, 19 and 23.

# *Legislative Procedure*

- The Commission presented its proposal on 11 July 2005.
- Council reached a general agreement on the text of the Regulation at its meeting on 1 June 2006 and suggested to submit a coordinated version of the text.
- At the plenary session on 4 July 2006, the European Parliament adopted its opinion approving the Commission proposal subject to a number of amendments, and called on the Commission to submit a coordinated and comprehensive version of the Regulation incorporating the amendments by way of its revised proposal.
- The Commission followed suit and presented an amended proposal on 2 December 2006.
- The new proposal, with minor changes, was adopted by the Council and the European Parliament in June and July 2007 respectively.

# I. Scope of the Regulation

- (Article 1) The Regulation applies in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there.
- It shall not extend in particular to
  - revenue,
  - customs or administrative matters,
  - the liability of the State for actions or omissions in the exercise of state authority (*acta iure imperii*).

# *Civil and commercial matters*

- The Regulation does not define the term *civil and commercial matters* and, so far, the European Court of Justice (“ECJ”) was not seized of interpretation of this term in the context of the service of documents.
- It is reasonable to assume that the ECJ would give this term the same *autonomous* interpretation as it gave to the term in the context of the Brussels Convention/Regulation.
- Jurisprudence originates ECJ judgement of 14 October 1976 in the case C-29/76 LTU v Eurocontrol

# *Acta iure imperii*

- The new Regulation extended the original list of exemption by adding *acta iure imperii*.
- *Due to the more pragmatic interpretation of the term “civil and commercial” under the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, it could be argued that due to the wording of Article 20(1) of the Regulation, the Hague Convention might still find application in certain matters which are excluded from the scope of the Regulation.*

# *Territorial application*

- The Regulation applies to all Member States of the EU with the exception of Denmark (Article 1(3)).
- Denmark is bound by the Regulation by way of an Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters (OJ L 300, 17.11.2005, p. 55) .
- Notification by the Commission on the application of Regulation No. 1393/2007 to Denmark (OJ L 331, 10.12.2008, p. 21).

# *Conditions of Application*

- Regulation applies :
  - **when the law of the requesting Member State requires service of a documents abroad;**

Service on authorised representatives in the Member State of proceedings of the party residing abroad is not covered (recital 8).

# Conditions of Application (II)

- Regulation applies :
  - **only to service on persons whose *address* is known** (Article 1(2));

The address under the Regulation is equivalent neither to the (habitual) residence nor the *domicile* of the person.

This requirement creates a lot of problems in practice for many (requesting) Member States due to the lack of any viable mechanism of cooperation in ascertaining the address of an addressee.

Interpretation given to this rule by the authorities of the individual Member States differs in cases where the address given in the request is no longer valid (some Member States try to establish the new address as a natural part of the process, others simply return the request as unsuccessful).

## *II. Service of Judicial Documents*

- The Regulation distinguishes principally 4 methods for service of judicial documents. These are not identical with the means of transmission of documents for service:
  - a) the use of transmitting and receiving agencies (Section 1 of Chapter II);
  - b) service by diplomatic or consular agents (Article 13);
  - c) service by postal services (Article 14), and
  - d) direct service (Article 15).

# *Equality of Methods (law)*

- Under jurisprudence of the ECJ (judgment of 9 February 2006 in case C-473/04 Plumex) all these methods are *equal*.
- The new Regulation reflects this (see Article 8(4), Article 9(3)).

# *Equality of Methods (reality)*

- An important practical distinction exists between the methods.

Service under Section 1 of Chapter II and under Article 15 – application of rules of service of (domestic) judicial documents (usually rules of Civil Procedure).

For postal service (Article 14) - domestic rules of postal service (rules of the Universal Postal Union or rules of specialised postal services such as DLH, UPS etc).

Article 13 – either postal service in the Member State or personal service (not the usual practice).

Rules of civil procedure and rules of postal service do not coincide - no guarantee of same “quality” of service (i.e. under the rules of Universal Postal Union it is possible to serve on another adult person found at the address given).

## a) *Use of Transmitting and Receiving Agencies*

- Traditional method („formal service“): transmission of the document to be served between the transmitting and receiving agencies designated for this purpose by Member States.  
*List of agencies can be found at the website of the European Judicial Atlas in Civil Matters under the heading „Serving Documents“*  
*[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/ds\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_information_en.htm)*
- Mechanism: direct transmission of request for service by the transmitting agency of one Member State to the receiving agency of another Member State.
- The formal and language requirements of the communication between the transmitting and receiving agencies are described in Articles 4 to 6 and 10 to 11 of the Regulation.

# Procedure

- Article 7 regulates the conditions of the actual service of documents.
- The receiving agency (or other competent person or body) serves the document
  - either in accordance with the law of its Member State, or
  - by a *particular method* requested by the transmitting agency, unless that method is incompatible with the law of the requested Member State.

The dominant method is the service in accordance with the law of the requested Member State.

Request for service by a particular method brings with it a possible need to reimburse the costs occasioned by such a method (Article 11(2)(b)).

# Deadlines

- Service has to be effected as soon as possible, in any event within one month of receipt of the request.
- The failure to meet this deadline has no legal consequences on the service of the document, but it brings with it two elements:
  - an information obligation by the receiving agency (Article 7(2)(a)) and
  - the obligation to continue attempts to serve the document, unless otherwise indicated by the transmitting agency, where service seems to be possible within a reasonable period of time (Article 7(2)(b)).

# *Right to Refuse*

- Important changes of Article 8 regarding the refusal to accept a document by the addressee inspired by the jurisprudence of the ECJ (Case C- 443/03 Leffler, judgement of 8 November 2005) .
- The main elements are:
  - the obligation to inform the addressee of the right to refuse to accept a document for language reasons by means of a form (Annex II),
  - the right to refuse if the document is not in a language which the addressee understands (or the language of the place of service) and
  - the possibility to remedy the refusal by the subsequent submission of the necessary translation.

# Right to Refuse (II)

- Annex II
  - provides information, in the languages of all Member States, to the addressee about his/her right to refuse to accept the document,
  - contains the declaration of refusal to be made by the addressee ,
  - contains invitation to notify the transmitting authority of languages he/she understands.
- Under the new wording of Article 8, the addressee may refuse to accept a document if it is in a language he or she does not understand, unless it is in the language of the State addressed (or in case of several official languages, in the official language of the place of service).
- *For the right to refuse service of a document where the annexes attached are not in the relevant language see judgment of the ECJ of 8 May 2008 in case C-14/07 Weiss.*

# *Rectification of Service*

- Paragraph 3 of Article 8 provides a solution in cases where the addressee validly refused to accept the document for language reasons: if the document, with the necessary translation, is subsequently served on the addressee, this (later) service constitutes valid service.

# *Date of Service*

- Article 9 : the date of service of a document shall be the date on which it is served in accordance with the law of the Member State addressed.
- *Unclear how this rule operates in cases where service is requested by a particular method under Article 7(1) and such method is not known in the State addressed, yet it is not incompatible with its law.*

# “Double date”

- Article 9(2) - new wording clarifies that the provision finds application only in those State whose law contains deadlines for the applicant linked to the date of service of the document on the other party in proceedings.
- Since service abroad takes the document out of the sphere of influence of the applicant (and the authorities of his or her Member State), the need to wait for the actual service to the addressee abroad might have detrimental effects to the procedural rights of the applicant.
- For such cases the provision refers back to the law of the applicant’s Member State and the date to be taken into account shall be the one determined in that law, instead of the law of the State addressed.

# Costs of Service

- Article 11 is based on free provision of service.
- Paragraph 2 contains two important exemptions. The applicant is expected to pay (reimburse) the costs occasioned :
  - by recourse to judicial officers (or other competent persons) in the State addressed, or
  - by the use of a particular method of service.

*The Commission proposed a solution in the form of a fixed fee which such a Member State must lay down in advance. This solution, although criticised by those Member State who provide service free of charge, was adopted in the revised text of Article 11.*

*For information on the fixed fees laid down by Member States see the Judicial Atlas*

## ***b) Service by diplomatic or consular agents***

- The Regulation does not exclude service by the diplomatic or consular agents of the requesting Member State (Article 13).
- Service on nationals of the State where the document originates is always possible, service to other persons can be opposed by the Member State on whose territory such service is to take place.
- Limited practical use.
- Rules of Articles 8 and 9 apply (see Article 8(4) and Article 9(3)).
- The obligation to provide information on the right to refuse to accept a document for language reasons in this case lies with the respective diplomatic or consular agent.

# ***Difference between „service“ and „transmission“***

- Service by diplomatic or consular agents under Article 13 must be distinguished from the transmission of requests under Article 12 of the Regulation.
- Article 13 - obligation to serve lies with the agents themselves, without any involvement of the authorities of the State addressed.
- Article 12 - the agents transmit the request for service emanating from their authorities to the receiving agencies or central bodies of the State addressed for further steps to be taken.

## c) *Service by postal services (I)*

- Article 14 allows Member States to effect service directly to persons on the territory of another Member State by the use of postal services.
- Service may be effected not only by the “official” post, but any relevant postal service (such as FedEx, DHL, UPS).
- The new text harmonises the requirements imposed on such service: A registered letter with acknowledgment of receipt or equivalent is required.
- The Regulation does not require that the letter be delivered to the addressee *in person* which undermines the effectiveness of this method.

# *Service by postal services (II)*

- Rules of Articles 8 and 9 apply as well (see Article 8(4) and Article 9(3)).
- The obligation to provide information on the right to refuse to accept a document for language reasons in this case lies with the authority or person sending the document (Article 5(3)).
- The Regulation does not provide answer for situations where the authority or person sending the document fails to provide information on the right to refuse (fails to attach Annex II).  
The assessment of the effects of such service (i.e. its validity) is left to the national law of the Member State where the documents originated and where the civil procedure is conducted.

## d) *Direct service*

- The new text of Article 15 changed the approach to direct service: It does not require anymore a *formal opposition* from a Member State to such a method, but links the possibility to apply this provision to the permissibility under the law of the Member State addressed.
- Unlike in the case of Articles 13 and 14, this provision has a more limited scope, since it allows only a “person interested in a judicial proceedings” to have recourse to this option.
- *A contrario*, authorities are excluded. In Member States where the service of documents is the obligation of the courts, not the parties to the proceeding, this provision is not available.

## ***Direct service (II)***

- The person requesting service may approach directly the judicial officers, officials or other competent person in the Member State addressed.
- The Regulation does not restrict this list to authorities which under Chapter II are the receiving agencies. *The working presumption is that the law of the Member State which permits this form of service also specifies who the bodies (persons) competent to affect such service are.*
- Rules of Articles 8 and 9 apply as well (see Article 8(4) and Article 9(3)).
- It follows from the lack of special reference to Article 15 in Article 8(5) that it is expected that the information on the right of refusal shall be given to the addressee by the competent body of the State addressed effecting direct service.

### ***III. Service of extrajudicial documents***

- Regulation is applicable also to service of extrajudicial documents (Chapter III).
- All the methods of transmission (and all the methods of service) are equally applicable to extrajudicial documents.
- The Regulation does not give any definition to the term of extrajudicial documents.
- The ECJ in judgment C-14/08 (Roda Gold and Beach Resort) held that *Article 65 EC and Regulation No 1348/2000 intend to establish a system for intra-Community service the purpose of which is the proper functioning of the internal market.*
- This interpretation potentially stretches the concept, although the case in point dealt with the service of a notarial deed which should not have caused difficulties).

# *Extrajudicial Documents (II)*

- The Practical Handbook to the Hague Convention:

*“Extrajudicial documents differ from judicial documents in that they are not directly related to a trial, and from strictly private documents in that they require the involvement of an “authority or judicial officer”, in the words of the Convention.*

*There are many kinds of extrajudicial documents. Extrajudicial documents include...demands for payment, notices to quit in connection with promissory notes, provided that they are issued by an authority or huissier.*

*Objections to marriage, consents for adoption, and acceptances of paternity are also in this class insofar as they imply compliance with certain formalities.”*

# *Extrajudicial Documents (III)*

- The Explanatory report on the Commission's proposal for the future Regulation 1348/2000:  
*„The term 'extrajudicial documents', however, is not amenable to precise definition.  
It may be taken to cover documents drawn up by a public officer, for example a notarial deed or a writ, documents drawn up by Member States' official authorities or documents of a type or importance which require them to be transmitted and brought to the addressee's attention by official procedure.”.*
- The glossary of documents which may served under the original Regulation, drawn up by the Commission under Article 17(b) of that Regulation, did not bring much clarity into the concept either.

## ***IV. Defendant not entering an appearance***

- Article 19 contains special provision on the consequences of defendant not entering an appearance.
- This Article has not been amended in comparison with the original Regulation and is, in fact, the verbatim reproduction of Article 15 and 16 of the Hague Service Convention.
- The court may give judgment against a defendant who has not appeared and who was to be served abroad to situation where the document instituting the proceedings (or an equivalent document)
  - was actually served (or delivered) to the defendant
  - by one of the methods under the Regulation
  - in time sufficient for the defendant to enable his defence.

# ***Defendant not entering an appearance (II)***

- Paragraph 2 allows a Member State to make a declaration which enables the court to give judgment *even if service (or delivery) were not effected* :
  - if the document was transmitted abroad by one of the methods under the Regulation;
  - sufficient time has elapsed (not less than 6 months); and
  - no certificate was received and every reasonable effort was made to obtain it.
- Cumulative fulfilment of all three mentioned conditions is required.

*What should happen if the court receives the certificate, but the certificate has either deficiencies or does not confirm service?*

# Defendant not entering an appearance (III)

- Article 19(4) gives further protection: the judge has the possibility to *relieve* the defendant *from the effects* of the expiration of the *time for appeal* against the judgment given against him provided:
  - the defendant did not have knowledge, without any fault on his part, of the document in sufficient time to defend (or of judgment in sufficient time to appeal) and
  - provides *prima facie* defence to the action on the merits.
- Member States have a possibility to specify the time limit for such an application which may not be shorter than one year.
- This protection does not apply to judgments on status or capacity of persons (paragraph 5 of Article 19).

# *Future*

- Under Article 24 of the Regulation the Commission is expected to present, every five years, a report to the European Parliament, the Council and the European Economic and Social Committee on the application of this Regulation. The report shall be accompanied if need be by proposals for adaptations of this Regulation in line with the evolution of notification systems.
- The report has not been submitted yet, but is being prepared.
- Difficult to assess what the conclusions of the report shall be and if any proposals for adaptations shall be suggested.
- There are several provisions where further clarification of the text may be needed and areas which may allow for further development of the system of service of documents within the European Union.