Exploring the Legal Requirements for Cross Border Judicial Cooperation: The Case of the Service of Documents

Amato, Rosanna

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

European Quarterly of Political Attitudes and Mentalities EQPAM
Volume 8, No.2, April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

Exploring the Legal Requirements for Cross Border Judicial Cooperation: The Case of the Service of Documents

Rosanna Amato
Research Institute on Judicial Systems
National Research Council
Italy

Date of submission: April 19th, 2019 *Date of acceptance: April 23rd, 2019*

Abstract

In legal terms, the free movement of citizens, goods, services and capital leads to the creation of cross-border legal relationships involving more than one legal system. Therefore, cooperation between the judicial authorities of the Member States of the European Union is a keystone for a common area of freedom, security and justice.

Keywords: judicial system

1. Introduction

In legal terms, the free movement of citizens, goods, services and capital leads to the creation of cross-border legal relationships involving more than one legal system. Therefore, cooperation between the judicial authorities of the Member States of the European Union is a keystone for a common area of freedom, security and justice as referred to in the Treaty on the European Union.[1] Within such an Area, individuals should not be discouraged or prevented from exercising their rights; consequently, differences in the national systems, whether administrative or legal, cannot form a barrier. For this reason, over years, common measures and procedures have been adopted to seek ensuring a high degree of legal certainty

[1] Article 3(2) of TUE

Corresponding Author: Rosanna Amato, Researcher
Affiliation: Research Institute for Judicial Systems, National Research Council, Italy
Address: Via Zamboni 26, Bologna – 40126, Italy
e-mail: rosanna.amato@irsig.cnr.it

European Quarterly of Political Attitudes and Mentalities - EQPAM, Volume 8, No.2, April 2019, pp.36-53.

ISSN 2285 – 4916
ISSN–L 2285 – 4916

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

for citizens in cross-border relations, to guarantee an easy and effective access to civil justice and simplify transnational mechanisms of cooperation between civil courts. Nowadays, thanks to developments of primary law,[2] the European action in the field of judicial cooperation in civil matters is vast and varied, also covering crucial matters, such as family law or rules for non-contractual obligations. Overall, specific legal instruments have been adopted to ease the determination of jurisdiction and the recognition of decisions in extra-judicial cases,[3] to harmonise conflict of law rules,[4] as well as to facilitate access to justice[5] and smooth cross border cooperation between civil courts.[6] This includes specific provisions aimed at ensuring the efficient cross-border transmission of judicial and extrajudicial documents for purpose of service between the Member States. Service of documents is indeed part of every single judicial case and it directly impacts in the daily life of individuals and businesses. Both the good administration of justice and the protection of the rights of parties are highly dependent from the swift and safe running of this transmission procedure.[7] For this reason, its main goal basically is ensuring that the recipients are informed with undue delay that a proceeding is pending against them, so as to allow the full exercise of their right of defence as enshrined by the EU Charter of the Fundamental Rights[8] and in the national constitutional charts. At the same time, this must protect the legitimate expectations of the claimant, thus avoiding paralysing the judicial system.

In spite of the above achievements, the result is a complex regulatory framework that make it difficult for both practitioners and authorities get familiar with this supranational legal environment and develop an expertise in cross-border litigation.[9] The situation is all the more problematic, since a number of these

[2] Treaty of Functioning of the European Union, art. 81.

[3] Among the main legislation adopted see: 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; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000; 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; Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[4] In the field of the harmonisation of conflict-of-law rules, the Regulation (EC) No 593/2008 (Rome I) and the Regulation (EC) No 864/2007 (Rome II) seek to improve the legal certainty and predictability of the outcome of litigations concerning non-contractual obligations. Along with this, the Regulation (EU) N. 1259/2012 establishes a comprehensive legal framework for divorce and legal separation.

[5] See the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; Regulation (EC) No 1896/2006 of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

[6] See for instance the Regulation 1206/2001 adopted to simplify and expedite judicial cooperation in taking of evidence in civil matters.

[7] See the Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and the Regulation 1206/2001 adopted to simplify and expedite judicial cooperation in taking of evidence in civil matters.

[8] Charter of the Fundamental Rights of the European Union, art. 47.

[9] See Velicogna M., Ontanu E. A. (2018), Improving access to justice in cross-border litigation: Lesson from EU experiences, Paper prepared for the Public Sciences & Policies on Justice Administration and Policies Journal.

ISSN 2285 – 4916
ISSN-L 2285 - 4916

measures establish "optional common procedures",[10] which rely to a large extent upon background rules of national procedural law, thus creating a parallel and optional EU-wide legal regime for a given legal issue.[11] The majority of legal instruments established to simplify judicial cooperation in civil matters have been adopted by means of Regulations, a specific typology of EU legal act that is directly applicable in all the Member States as soon as it enters into force and that, as a matter of principle, does not require any other internal act to make it into law. Nonetheless, the situation is in practice a lot more nuanced than that. The regulations at stake make explicit reference to domestic procedural rules or, in some cases lack specific indications, thus requiring close coordination between the two legal dimensions.

Recent analysis aimed at exploring the practitioners' experience with certain judicial cooperation instruments have revealed that, although the intention of the EU legislator is smoothing and speeding up the handling of these cases, the judicial cooperation procedures adopted so far have been recognised to be too much complex to deal with, even for professional users. The extensive reliance on domestic rules, differences in national practices and in linguistic regimes are just a few examples of the many obstacles that even today affect the proper application of cross-border cooperation procedures.[12]

The EU legal framework regulating the cross-border service of judicial and extrajudicial documents can well represent this issue, since according to the evaluation exercise carried out in 2014 upon request of the EU Commission, major malfunctioning of the relevant legislation into force emerge where remission to national legal traditions is made, due to the application of the very different preconditions provided for in the EU Member States.[13] More specifically, as far as the service of documents is concerned, the root causes of the problem lie in the limited competence the European Union has in this field that does not allow to define a common European concept of service of documents. The supranational body of legislation aimed at ensuring the cross-border service of judicial and extrajudicial documents is indeed founded on the principle of the procedural autonomy of Member States.[14] Accordingly, the Union can only provide rules covering the transmission and service of documents in transnational relations, but it cannot interfere with the domestic procedural laws, thus creating a disconnect between the European sphere that can be harmonised, and the national one, where a standardisation process is politically difficult to accept and to realize.[15]

2. Service of Documents in the European Space of Justice

Regulation governing the service of judicial and extra-judicial documents in civil and commercial matter is deeply rooted in the legal tradition of each national legal order. This represents a crucial aspect in the transnational litigation field and, above all, an essential requirement for the genuine exercise of the rights of defence. Notwithstanding, this matter has been traditionally regarded as pertaining to the public law sphere.

[10] For a comprehensive overview see B. Fauvarque-Cosson, M. Behar-Touchais, Implementation of optional instruments within European civil law, PE 462.425 (European Parliament, 2012).
[11] See Mańko R. (2015), Europeanisation of civil procedure. Toward common minimum standards?, European Parliamentary Research Service (EPRS), PE 559.499.
[12] See Velicogna M., Ontanu E. A. (2018), Improving access to justice in cross-border litigation: Lesson from EU experiences, Paper prepared for the Public Sciences & Policies on Justice Administration and Policies Journal. The basic features of the traditional system of service of documents, based on international agreements, and the main changes occurred with the entry into force of the relevant EU regulations are specified in paragraph 2 of the present study.
[13] MainStrat, Study on the application of Council Regulation (EC) No 1393/2007 on the service of judicial and extra judicial documents in civil or commercial matters, report realized upon request of the EU Commission, 2014, ISBN: 978-92-79-34791-7
[14] In accordance with the principle of subsidiarity and with the provisions laid down in Article 81 of the Treaty of Lisbon.
[15] See Working Party on e-Law (e-Justice), Draft report of the expert group on the e-Service of Documents, Brussels, 19 July 2018, 11275/18.

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

In particular, countries belonging to the civil law tradition use to see the service of documents as an exercise of their judicial power; hence, they tend to be unenthusiastic about allowing an expression of the sovereignty of another State within their own borders.[16]

At international level, this matter has typically been governed by international treaties and arrangements, whether bilateral and multilateral, thus giving rise to a hugely fragmented legal landscape as to the applicable legal basis, which was characterised by three main factors: *a)* a cumbersome and slow transmission procedure, mostly based on diplomatic or consular channels that included a number of intermediary steps until the document reached the actual addressee in the State of destination;[17] *b)* high costs for the cross-border service, mainly due to the need to translate the documents to be served in the language of the State addressed; *c)* the protection of national sovereignty as a major concern and a general lack of emphasis on individual rights.[18]

This paradigm has however started to shift with the development of the EU legal framework for judicial cooperation in civil matter since, starting from the late '90s, the Union has progressively established an ever-comprehensive body of legislation on private-law relationships, increasingly focusing on both efficiency criteria and the protection of the procedural guarantees for parties to the procedure. Overall, the entry into force of the Lisbon Treaty has further moved to strengthen the right of the EU citizens to an effective legal protection and access to justice.[19] The Area of justice in civil matter has been indeed designed to be a common space, in which individuals are not prevented or discouraged from exercising their rights and fully enjoying their fundamental freedoms.[20] The main goal is reducing problems arising from possible incompatibilities between different legal systems and ensuring legal certainty and equal access to justice for both natural persons and business operators throughout the EU. To that purpose, a variety of supranational provisions are in place to ease the identification of the competent jurisdiction and the definition of the applicable law as well as to speed-up cross-border proceedings, while ensuring their fairness.[21]

Within this context, an effective framework for judicial cooperation in the field of the service of documents has become decisive.[22] An efficient service process is not only vital as a mean for favouring the

---

[16] See D. Mc Clean, *International Cooperation in civil and criminal matters* (3th Edition), Oxford University Press, 2012.

[17] The time limit for the document to be served ranged between 6 and 9 months. Please see Commission Staff working documents evaluation, accompanying the document proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) n. 1373/2007 of the European Parliament and of the Council of the 13 November 2007 on the service in the Member States of judicial and extra-judicial documents in civil and commercial matters (service of documents), 2018, p. 11.

[18] B. Barel, *Le notificazioni nello Spazio giudiziario europeo*, CEDAM, 2008, p. 11. See also A. Galic, *Service abroad in civil and commercial matters – from The Hague Conventions to the EU 1393/2007 Regulation*, in Collection of Papers, Faculty of Law, Nis 65 (2013): p. 59-78.

[19] See X. Kramer, *Judicial Cooperation in Civil Matters,* in P.J. Kuijper, F. Amtenbrink, D. Curtin, B. De Witte, A. McDonnell & S. Van den Bogaert (Eds.), *The Law of the European Union*, Alphen aan den Rijn: Kluwer Law International 2018, p. 721-740.

[20] Please, see Treaty of Functioning of the European Union (TFEU), art. 81.

[21] See X. Kramer, *Cross-border enforcement in the EU: mutual trust versus fair trial? Towards principles of European civil procedure*, in International Journal of Procedural Law, Vol. 2, pp. 202-230, 2011; M. Zlinsky, *Mutual trust and cross-border enforcement of judgments in civil matters in the EU: does the step-by-step approach work?* in Netherland International Law Review (2017) 64:115-139; M. Font i Mas, *La libera circolazione degli atti pubblici in materia civile. Un passo avanti nello spazio giudiziario europeo*, in Freedom, Security and Justice: European Legal Studies, 2017, n. 1, pp. 104-125.

[22] See D. Mc Clean, *International Cooperation in civil and criminal matters* (3th Edition), Oxford University Press, 2012, pp. 25-26; Dominelli S. (2018), Current and future perspectives on cross-border service of documents, Scritti di Diritto Internazionale Europeo, p. 34. This is all the more true, if one considers that a wide use of the Regulation is estimated. Data about the total number of service procedures carried out on a yearly basis are not available, however based on the fieldwork interviews carried

ISSN 2285 – 4916
ISSN-L 2285 - 4916

proper functioning of the internal market, but is also necessary to ensure access to justice and fair trial. Suffice it to say that failing to properly serve the document initiating proceedings results in a two-sided negative outcome at least, since it impacts negatively on the rights of the defendant as well as on the legitimate expectation of the claimant to have a reliable, speed and low-cost transmission procedure.[23] For that reason, the Union has replaced the earlier and more cumbersome system of cross-border service of judicial documents based on international conventions[24] with fast-track channels for transmitting documents from one Member State to another and common minimum standards relating to the protection of the rights of defence.

Such a matter was firstly introduced in the EU legal order with the *Council Regulation 1348/2000/EC*[25] and then (mainly) governed by the *Regulation 1393/2007/EC* (hereinafter the Service Regulation).[26] The latter is far from being intended to harmonise the national methods of service; its main goal is rather improving and expediting the cooperation scheme between the Member States applicable to the cross-border service of judicial or extrajudicial documents in civil and commercial matters,[27] including

out for the European Commission, it is estimated that as concerns the type of cases covered by the Regulation, in the timeframe 2000-2017, the number of legal proceedings in which the Regulation was applied increased from 2.8 million in 2000 to around 3.2 million in 2017 (+16%). Furthermore, it is estimated that in 2018, nearly 3.4 million civil and commercial court and out-of-court proceedings having cross-border implications required the application of the Regulation. Cft. 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 document) Brussels, 31.5.2018, COM(2018) 379 final, 2018/0204(COD). Please note that, as indicated in the proposal, the figures mentioned above have been estimated. See also Commission Staff working documents evaluation, accompanying the document proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) n. 1373/2007, 2018, p. 12.

[23] See "An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law", Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission JUST/2014/RCON/PR/CIVI/0082 - Strand 1 Mutual Trust and Free Circulation of Judgments, pp.60-61. The Report is available at https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en

[24] See the Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters and the Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters.

[25] The Regulation has entered into force in the 2001. Since its adoption, this has generally improved and speeded up the transmission procedure. Notwithstanding, during the adaptation stage the application of a variety of provisions turned out to be not fully satisfactory. Against this background, just three years after its inception, an evaluation process has been initiated with a view to assess legal and practical drawbacks arising in practice and develop concrete proposals for possible modifications. See the *Commission Report on the application of Regulation (EC) No 1348/2000 (COM (2004) 603 final).*

[26] In the EU, the legislative competence in relation to judicial cooperation in civil matters was introduced in 1999 when the Treaty of Amsterdam entered into force. It is a part of the Area of Freedom, Security and Justice (AFSC) currently laid down in Section V of Part III of the TFEU.

[27] Regulation 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. Please, note that specific provisions regulating the service of documents are also foreseen in other EU legal instruments concerning judicial cooperation in civil matter, such as the European Enforcement Order, the European Order for Payment Procedure and the European Small Claims Procedure. Cft. Velicogna M., Lupo G., Ontanu E. A., Simplifying Access to Justice in Cross-Border Litigation, the National Practices and the Limits of the EU Procedures. The Example of the Service of Documents in the Order for Payment Claims (August 24, 2015). Paper presented at 2015 EGPA Annual Conference, PSG XVIII: Justice and Court Administration (24 -29 August 2015, Toulouse, France). Available at SSRN: https://ssrn.com/abstract=3224271 or http://dx.doi.org/10.2139/ssrn.3224271

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

certain acts issued in the absence of legal proceedings.[28] Overall, in cases in which one of the parties (at least) reside in a Member State other than the one where the proceeding takes place, the Regulation must be applied whenever a document has to be formally served in the course of the procedure. Its application is not restricted to proceedings pending before civil tribunals, but also covers extra-judicial documents, the service of which may arise in various out-of-court proceedings, or even in the absence of any underlying judicial proceeding.[29]

This piece of legislation certainly represents a step forward in the objective of enhancing the common area of justice. Its ultimate purpose is defining a faster and reliable regime preventing to the extent possible problems hindering the recognition of judgments abroad and, at the same time, allowing any resident in the Union (including legal persons) to be aware that a proceeding is pending against him/her in any other Member State, so as to enjoy - with adequate advance and with knowledge of cause – a proper defence. For this reason, the Service Regulation adopts two lines of approach; the one aimed at setting expeditious procedures for cross-border transmission and the one directed to define minimum standards relating to the right of defence.

The Service Regulation provides for a variety of methods to be used to favour the rapid and successful execution of the transmission procedure. The main channel for forwarding is based on the direct dialogue between transmitting and receiving agencies, which act as intermediaries between the claimant and the addressee.[30] Such a mode of collaboration is further supplemented by other alternative systems. Postal service is undoubtedly one of the main innovations introduced by the Regulation compared to the traditional service regime.[31] This is considered one of the fastest methods for transmission, since it allows Member States to serve judicial documents directly by post.[32] Along with this, service can be also performed directly through the competent authorities of the requested State; accordingly, *any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State*.[33] Finally, the Service Regulation includes two traditional means of interstate communication, based on the employment of diplomatic and consular channels. The first one relies to transmission by consular or diplomatic channels. This is an indirect forwarding mechanism, under which the service is carried out by the Consul of the requesting State on the

[28] In the case C-14/08 *Roda Golf,* the European Court of Justice clarified that the concept of "extrajudicial document" within the meaning of Article 16 of the Service Regulation, is a Union concept and, which should not be interpreted autonomously. Therefore, it is not for the national law to determine which kind of document fall within the meaning of the above provision. This must be determined taking into account the goals pursued by both the TFEU and the Service Regulation, that is to say establishing a system for intra-Union service contributing to the smooth functioning of the internal market. As a result, in the view of the Court, judicial cooperation also applies in the absence of legal proceedings. See also the *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of 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(2013) 858 final.

[29] Case C-473/04 Plumex, 9 February 2006, ECLI:EU:C:2006:96.

[30] Regulation 1393/2007/EC, arts. 2, 3, 4, 6 and 7.

[31] Regulation 1393/2007/EC, art. 14.

[32] Survey-based researches have showed that this system is frequently used, in certain States it is used even more often than through a receiving agency. Cft. MainStrat, Study on the application of Council Regulation (EC) No 1393/2007 on the service of judicial and extra judicial documents in civil or commercial matters, report realized upon request of the EU Commission, 2014, ISBN: 978-92-79-34791-7, pp. 52-53.

[33] Regulation 1393/2007/EC, art. 15.

ISSN 2285 – 4916
ISSN-L 2285 - 4916

addressee.[34] Service can also be performed by diplomatic or consular agents directly, in the case that service is effectuated by the Consul of the requesting State on the addressee.[35]

The EU legislation does not prioritise these different arrangements and so does the European Court of Justice, according to which no hierarchy exists between them, making it impossible distinguishing between primary and secondary/subordinate methods of service.[36] Nevertheless, at present, collaboration between transmitting and receiving agencies still remains the cornerstone of the solution provided by the Regulation.

Traditional diplomatic channels are actually hardly ever used, and recourse to them seems to be limited to exceptional circumstances. After all, indirect diplomatic service relies on a highly complex system, involving the ministries of Justice and Foreign Affairs of the Member States concerned. Thus, its workflow is extremely slow and even detrimental to the interested parties. Likewise, the direct consular transmission is almost unknown and underutilized. Although, it has marked – at least in paper - a qualitative improvement in comparison with the mechanism provided for in international agreements, it lacks development, uniform acceptance within the EU, and is also perceived as being obsolete. With regard to both the direct service and postal service, although the usefulness of these two alternatives is undeniable, shortcomings have been stressed in their practical application. As an example, direct service provided for by art. 15 is a highly appreciated scheme (especially in those national systems where service is carried out by professionals, such as *huissiers*), since this has been conceived to serve a foreign document as if it were a domestic one. Nevertheless, this method is poorly applied due to a variety of reasons. Overall, it lacks uniform application at EU level, because the possibility to employ it strongly depends by the domestic legislation of both the requesting and requested States. On the one hand, this option can be relied to only in the case this is allowed by the Country of the addressee. On the other hand, due to the lack of a common understanding of what “direct service” is, national rules of both the Countries involved govern the definition of the person allowed to forward the document in the State where the proceeding takes place as well as of the one authorized to effect the service in the State of destination. Finally, also postal service still poses difficulties, even if it is a widely used and apparently very simple method. The latter mainly arise because of two factors at work. The first one lies in the different levels of quality of postal services in the Member States and the risk – significant in certain cases – to not deliver the document in time or to the right person.[37] The second one is driven by the Regulation itself, which does not harmonize the conditions relating to the eligible substituting recipients nor the consequences of an unclaimed delivery.[38]

[34] Regulation 1393/2007/EC, art. 12. Basically, under this system, the request is forwarded to the Ministry of Justice of the forwarding State, who in turn sends it to the Ministry of Foreign Affairs. The latter is then in charge for the transmission of the request to the embassy located in the requested State. Once in the addresseed State, the request is forwarded to the Ministry of Foreign Affairs and then forwarded to the Ministry of Justice, who definitely gives it the appropriate course by the respective authority. Please see MainStrat, Study on the application of Council Regulation (EC) No 1393/2007 on the service of judicial and extra judicial documents in civil or commercial matters, report realized upon request of the EU Commission, 2014, ISBN: 978-92-79-34791-7, p. 64.

[35] Regulation 1393/2007/EC, art. 13. In this case, service is performed by the consular agent abroad.

[36] Case C-473/04 Plumex, 9 February 2006, ECLI:EU:C:2006:96.

[37] Commission Staff working documents evaluation, accompanying the document proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) n. 1373/2007, 2018, pag. 31.

[38] Commission Staff working documents evaluation, accompanying the document proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) n. 1373/2007, 2018, pag. 32.

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

3. Goals and Methods of the Study

The entire body of laws described above is currently under revision. In 2018, a Proposal amending the Service Regulation has been issued by the European Commission, with the aim to generally improve the existing channels of transmission and service in parallel with the strengthening of the protection of the rights of defence of the addressee. Notably, the Proposal is intended to develop further the framework of judicial cooperation based on the dialogue between transmitting and receiving agencies, so that this can take full advantage of the potential of cutting-edge technological solutions.

As a matter of fact, the Service Regulation already provides - although implicitly - option for the secure electronic transmission of documents.[39] This is why, in 2013 an initiative has been launched by France, Belgium and Luxembourg to create the so-called *European Judicial Officers' Service of Documents platform* (*EJS platform)* for the secure transmission of judicial and extrajudicial documents.[40] Notwithstanding, most of the competent authorities in the Member States do not use ICT to perform service, because the latter has not been notified as an eligible method for the purpose of service. Furthermore, it seems that national actors feel more comfortable in using paper-based channels.[41]

The new version of the Regulation should therefore help improving the speed and efficiency of cross-border proceedings, making it possible the safe electronic exchange of documents between the users. This path, of course, is not without obstacles, both technical and legal. In this respect, it is interesting to observe that technical issues seem to be a minor problem. Steps have been already taken at EU level to make the electronic communication of documents between transmitting and receiving agencies possible. Starting from 2010, the e-CODEX[42] consortium is developing a tool that supports the electronic communication between citizens and courts and between Member State administrations in civil cross-border proceedings. This solution would ensure a safe electronic communication and exchange of documents between the users of the system, it would provide for automatic recording of all steps of the workflow and also ensure the genuine identity of the participants. The conditions for the use of such type of direct electronic service should indeed ensure that electronic user accounts are used for the purpose of service of documents only if there are appropriate safeguards for the protection of the interests of the parties by way of high technical standards. Beyond this, digitalisation would largely improve the efficiency of the service process also in terms of coordination with the national rules. E-CODEX has been designed in line with the principle of procedural autonomy and respecting the principle of independence of the judiciary; therefore, its functioning

---

[39] Art. 4 (2) states that 'The transmission of documents (...) between transmitting agencies and receiving agencies may 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 information in it is easily legible".

[40] EJS is a case management system, connected to the Directory of Bailiffs, which facilitates the management of cross-border cases by providing an update of the case at every stage of proceedings. This platform, created in accordance with the Regulation on service of documents, requires an electronic identification for authentication. Documents are electronically signed through it before sending. EJS is fully interoperable with e-CODEX system since it has been developed according to the e-CODEX standards. The Me-CODEX project is currently seeking to enlarge the scope of the EJS platform.

[41] Working party on e-Law (e-justice) – expert group on e-Service of documents and e-Communications Delegations, Brussels, 19 July 2018, 11275/18, p. 17.

[42] E-CODEX is a major project co-funded by the European Union since 2010 that has shown its efficiency in pilots on civil commercial matters. On the e-CODEX project see: Velicogna, M. (2014), Coming to Terms with Complexity Overload in Transborder e-Justice: The e-CODEX Platform. In The circulation of agency in E-Justice (pp. 309-330). Springer, Dordrecht;
Carboni N., Velicogna M., (2011), Electronic data exchange within European Justice: e-CODEX challenges, threats and opportunities, in IJCA, vol. 4, p. 104; Velicogna, M., Lupo, G. (2017), From drafting common rules to implementing electronic European civil procedures: The rise of e-CODEX. In From common rules to best practices in European Civil Procedure (pp. 181-212). Nomos Verlagsgesellschaft mbH & Co. KG; Velicogna M. (2015), e-CODEX and the Italian Piloting Experience,
IRSIG-CNR Working Paper.

ISSN 2285 – 4916
ISSN-L 2285 - 4916

basically exploits the existing legal, technological and organizational installed base,[43] and relies to the interoperability of national e-justice systems.[44] The sole condition is setting up mutually connected gateways and connectors, to communicate with other national jurisdictions.[45]

Challenges are thus well behind the availability and the limits of technology.[46] The hardest knot to unpick is actually legal and organisational complexity. The establishment of a secure system for electronic transmissions is mainly hindered by legal and practical problems resulting from the existence of different regulative layers (e.g. European, national, local). Thus, the main challenges for electronic platforms for collaboration to be operational shall be complying with all those legal layers and supporting the exchange of legally valid communications. Together with these, practical problems seem to be also relevant in the context of the procedure analysed. Investigations aimed at exploring the digital service of documents as rooted in the current legal, organizational and technical context in specific Member States, have revealed that the limited digitization of service of documents is also largely due to the complexity of ensuring the protection of certain procedural rights in practice, when shifting from the analogue procedure to the IT communication.[47]

On this basis, in the following paragraphs the service process based on the structure of transmitting and receiving agencies will be investigated, with the aim to provide an overview of the main features characterizing this system of collaboration and how it is meant to function in practice. In particular, along with the analysis of the relevant provisions, the workflow of this method of transmission will be outlined, so

[43] Installed base here refers to the "set of existing technological, legal and organizational components and their "capabilities […] their users, operations and design communities". Cft. Hanseth O., Lyytinen K. (2010), Design theory for dynamic complexity in information infrastructures: the case of building internet", in Journal of Information Technology, 25(1), p.4; Lanzara G.F., The Circulation of Agency, in Judicial Proceedings: Designing for Interoperability and Complexity", in Contini F., Lanzara G.F. (Eds), The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings, 2014, 14. Quoted in Velicogna M., Lupo G. (2016), From drafting common rules to implementing electronic European Civil Procedures: the rise of eCODEX, available at https://www.e-codex.eu/sites/default/files/2018-09/Velicogna_Lupo-2016-from_drafting_common_rules_to_implementing_elect.pdf

[44] Cft. Borsari G. et al. (2012), D7.3 High Level Architecture Definition, e-CODEX deliverable, p.8. Velicogna M., Lupo G. (2016), From drafting common rules to implementing electronic European Civil Procedures: the rise of eCODEX, available at https://www.e-codex.eu/sites/default/files/2018-09/Velicogna_Lupo-2016-from_drafting_common_rules_to_implementing_elect.pdf

[45] See Working party on e-Law (e-justice) – expert group on e-Service of documents and e-Communications Delegations, Brussels, 19 July 2018, 11275/18. Cft also Commission Staff Working Document Impact Assessment Accompanying the document 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), SWD/2018/287 final.

[46] Velicogna M., Lupo G. (2016), From drafting common rules to implementing electronic European Civil Procedures: the rise of eCODEX, available at https://www.e-codex.eu/sites/default/files/2018-09/Velicogna_Lupo-2016-from_drafting_common_rules_to_implementing_elect.pdf

[47] Cft. Steigenga E., Taal S., Medici A., Velicogna M., Pro-CODEX Report Exploring the potential for a Service of Documents e-CODEX use case in The Netherlands, Finalized 12 June2018. This Report, focused on the Duch system, shows how the possibile digitalisation of the procedure could affect certain procedural rights of the addressee, notably the personal verification of the acknowledgment of receipt. In paper-based procedure, this step is carried out by bailiffs, who deliver the documents in person to litigants. However, the digital personal acknowledgement is currently not possible. This results in a lack of assurance that the addressee has received and is aware that the document has been served on him/her. The Report also stresses that, at present, certified e-mail service or infrastructure are not available in the Country. Please note that this Report has been realized within the framework of "Pro-CODEX: Connecting legal practitioners national applications with e- CODEX infrastructure", project co-funded by the European Commission Directorate-General Justice within the Justice Programme (2014-2020), Action Grant to support judicial cooperation in civil matters Application: JUST/2014/JCOO/AG/CIVI 4000007757.

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

as make clear the steps to be taken to perform the service. The results of recent survey-based researches and qualitative studies carried out over the last years will be further taken into consideration, in order to provide an overview of the main problems hindering the smooth functioning of this procedure, often arising from differences in domestic legal tradition as well as from the interpretation of the legal requirements set by the Regulation by the actors involved, even within the same legal system.

4. Service of Documents through Transmitting and Receiving Agencies: Looking for a Reliable, Speed and Low-Cost Transmission Procedure

The main trait of the Service Regulation consists of establishing a decentralised method of service of documents, which makes of the direct interaction between national authorities or bodies designated by each Member State the key cornerstone of the European system of documents' transmission. Such an exchange of documents is performed by competent transmitting and receiving agencies with territorial responsibility, thus departing from the slow cooperation path via central government bodies, provided for in the relevant international agreements.[48] Within this new system, a national body, which according to its internal procedural law is competent for the service abroad, may directly send a request to the foreign receiving agency. Central bodies are still called upon to play a role, but according to art. 3, they only have a supporting function, particularly in cases of ambiguity regarding the competent agency in the receiving State. They are basically in charge of supplying information and providing solutions to difficulties that may possibly arise during transmission of documents for service; the forwarding of requests for service to the competent receiving agency is allowed only in exceptional cases and at the request of a transmitting agency.

Within this framework for cooperation, a few conditions must be complied with when performing the service. On the one hand, the transmitting agency can send the document using "any appropriate mean", in so far as certain requirements for legibility and reliability are met. The content of the document received must be true and faithful to that of the document forwarded and all information in it must be easily readable.[49] On the other hand, the receiving agency has to serve the document at issue - or have the latter served - according to legal arrangements permitted by the legislation of the requested Member State. As an alternative, the document can be served following a specific procedure asked for by the requesting agency, provided that this is not incompatible with the law of the requested Member State.

The rationale underpinning this simplified scheme lies in the need to carry out the service easily and in the shortest period of time. For this reason, the Regulation has introduced a number of significant improvements, compared to the previous legal regime, contributing to speed up the whole process. First and foremost, specific deadlines must be complied with when performing the transmission of documents.[50] Along with this, the use of standard forms marks almost every single step of the transmission procedure, so as to overcome the barriers usually hindering the cross-border dialogue between the national actors involved and ensuring speed, certainty and efficiency of the transmission process.

[48] The Hague Convention, article 2.
[49] Regulation 1393/2007/EC, art. 4 (2).
[50] In the case that the service of documents is effected through transmitting and receiving agencies, the period of time considered as reasonable is one month. The service of a document should be completed in any event within one month of receipt by the receiving agency

European Quarterly of Political Attitudes and Mentalities EQPAM
Volume 8, No.2, April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

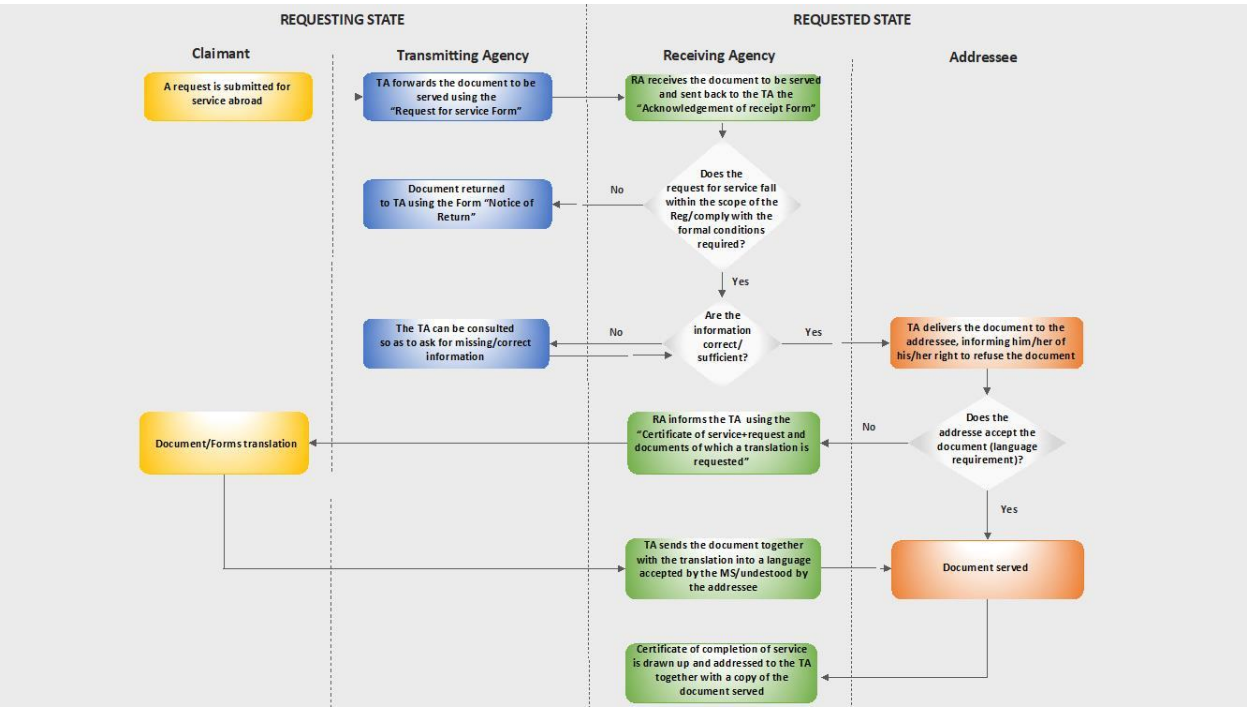

Table 1
Service procedure via transmitting and receiving agencies

As outlined in the above flowchart, the service of documents under the EU regime is performed through a quite streamlined procedure, marked by three main stages: *a)* the start-up phase initiated by the claimant and carried out in the requesting State; *b)* the transmission stage connecting the two different legal orders, which is governed by the EU Regulation; *c)* the delivery stage, which is carried out in the requested State and is thus regulated by the relevant national legislation.[51]

Any person interested in a judicial proceeding may ask the Transmitting Agency with territorial jurisdiction to send - usually by registered mail - a judicial or extra-judicial document to the Receiving Agency, which is located in the Member State where the document is to be served. The document to be transmitted must be complemented with a standard form, filled out in one of the languages that the Country of destination has previously decided to accept.[52] The form actually contains the official request for cooperation, which includes details of both the applicant and the person to whom the document has to be served, as well as information about the specific method of service to be used. The standard form also contains indications concerning the type of act to be forwarded, the language in which this has been drawn up and of its possible optional translation. For this reason, the Transmitting Agency has the duty to advise the applicant that the translation of documents to be forwarded may be needed and that the addressee has

[51] Salvadori M., L'assistenza giudiziaria tra Stati e le notificazioni internazionali nel regolamento (CE) n. 1393/2007, in Vinciguerra S., Dassano F., Scritti in memoria di Giuliano Marini, 2010, p. 772.
[52] Regulation 1393/2007/EC, art. 4 (4). The documents and all papers that are transmitted shall be exempted from legalisation or any equivalent formality.

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

in principle the right to refuse them in the case that this requirement is not met or if the document is drawn up in a language that s/he is not able to understand.[53]

Once the document has been delivered, the Receiving Agency is called upon to send back an acknowledgement of receipt to the Transmitting Agency within seven days[54] or to return the document in case of improper service (as an example, if the case is not covered by the Regulation or if compulsory formalities are not complied with). In this respect, it is worth stressing that within this cooperation pattern, dialogue between national agencies is allowed for consultation purposes. Therefore, in the case the lack of important information may hamper the proper delivery of the document forwarded, the Receiving Agency is encouraged to seek contact with its foreign counterpart, so as to obtain the missing elements and finalise the service process.[55] Only in the event that service could not been made within one month (e.g. because the addressee could not be located), the document can be returned together with a certificate of non-service.

The general objective of the Regulation is indeed first and foremost removing obstacles resulting from the differences between judicial and administrative systems of the EU Member States and more specifically guaranteeing individuals the same speed of service as they would have if the procedure had developed into a single system, through more efficient procedures and the reduction of the burden for citizens and businesses involved in cross-border proceedings. For this reason, this entire system is grounded on principles of speediness and efficiency. To that end, even legalisation (or equivalent forms) have been abolished. [56]

Nonetheless, over and above these performance requirements this new piece of legislation is intended to guarantee a better access to justice as well as the procedural rights of the parties. As an example, together with the above provisions aimed at overcoming linguistic barriers and ensuring the understandability of the document served by the actors involved, a special rule on determining the date of service has been provided for with the aim to protect the interests of both the applicant and the addressee of the service. Overall, service of documents in civil proceedings is characterised by a tension between the claimant 's right to administration of justice and the need to protect the defendant's right to a fair hearing by timely and effective information. This conflict of interest is further aggravated when the service must be performed on a cross-border level. For this reason, the Regulation provides for a double date-system, which is meant to strike a balance between these conflicting interests. According to article 9, generally the *lex loci actum* applies. Thus, the date of service is the date on which the document is served in accordance with the law of the requested Member State. This allows the addressee to rely on the domestic law of the Country where s/he lives to calculate the time period in which s/he can answer the claim. However, as an exception to this rule, if the law of the requesting Member State requires to serve a document within a particular period of time, the date to be taken into account with respect to the applicant shall be that determined by the *lex processus*. This will also make possible to protect the claimant, in the case that s/he

[53] Regulation 1393/2007/EC, art. 8.
[54] Regulation 1393/2007/EC, art. 6.
[55] Regulation 1393/2007/EC, art. 6 (2).
[56] Please note that according to the Regulation 1393/2007/EC, art. 4 (4) "*the documents and all papers that are transmitted shall be exempted from legalisation or any equivalent formality*". This rule was already provided by the Regulation 1348/2002 (art. 4 (4)). With the entry into force of the Regulation 2016/119111/EU, suppression of legalisation is the general rule. Under the Regulation 2016/119111/EU suppression of legalisation is intended as "*formality for certifying the authenticity of a public office holder's signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears*". On this topic, see Dominelli S. (2018), Current and future perspectives on cross-border service of documents, Scritti di Diritto Internazionale Europeo, p. 78-79.

ISSN 2285 – 4916
ISSN-L 2285 - 4916

has an interest in acting within a given period or a specific date, avoiding that events which fall outside his/her own control could affect the positive outcome of the service procedure.

5. The critical issues of a common, efficient and speed service process

The Service Regulation has surely represented a significant breakthrough compared to the legal regime provided for by the relevant international agreements as well as by the Regulation 1348. It has introduced expeditious channels for transmission and clearer rules (on paper at least), including measures covering certain minimum standards pertaining to the protection of defence rights. Survey-based evaluations recently carried out have shown that this is perceived as having had a positive impact on the functioning of the Area of freedom, security and justice. Stakeholders generally feel that its entry into force has improved the cross-border service process, while contributing to ensure the right to access to justice and the protection of the rights of the parties.[57] Notwithstanding this, loopholes in the current legislation and shortcomings in its practical application still causes concrete problems for citizens, business and public administrations of the Member States and ultimately hinder specific EU policy objectives regarding the effectiveness of the service process and the genuine protection of the procedural rights of the parties.

The channel of transmission based on receiving and transmitting agencies has turned out to be underperforming, working slowly and less efficiently than expected, even because ICT is in practice not used, partly due to legal barriers or the lack of interoperability between national systems, but also – quite simply – to old habits.[58]

As yet, the timescale set out to complete the service process has not noticeably improved compared to the previous legal framework. The procedure is still taking a long time and delays can be encountered at any stage of the process. Generally, the timing has remained almost unchanged and in a few isolated cases it seems that this has even gotten worse. It is estimated that the average days required for having the document served is about 3.3 months, significantly above the one-month deadline set out in the Regulation. This is highly worrying if taking into account that timing is crucial, especially for the proper carrying out of certain types of proceedings (e.g. in insolvency or enforcement cases).[59]

The rationale underpinning such delay largely relies to **differences**– sometimes huge – in the national internal procedures of the Countries involved. Service of documents is indeed deeply rooted in the domestic civil procedural law tradition and is strongly linked to a variety of internal factors, such as the role played by the structure of the proceeding. It follows that the way this topic has been addressed varies from one Member State to another, taking into account different legal cultures and reflecting the way each legal system has addressed the attempt to strike a balance between the need for a rapid and cost-efficient process and the safeguard of individual rights. As an example, points of view may significantly vary even in relation to the definition of the type of acts which institutes proceedings.[60]

[57] MainStrat, Study on the application of Council Regulation (EC) No 1393/2007 on the service of judicial and extra judicial documents in civil or commercial matters, report realized upon request of the EU Commission, 2014, ISBN: 978-92-79-34791-7.
[58] See 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), 2018/0204(COD).
[59] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of 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/2013/0858 final.
[60] DMI in Consortium with University of Florence and University of Uppsala, Study on the service of documents. Comparative legal analysis of the relevant laws and practices of the Member States. Final Report (No JUST/2014/JCOO/PR/CIVI/0049), 5th October 2016.

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

The existence of diverse domestic legal regimes, however, is only part of the issue, since differences also arise in the actual application of the relevant provisions within the domestic domain. Varying practices can be encountered indeed, as a result of varying levels of knowledge and experience of the Regulation between local authorities. Supranational provisions, after all, are not always clear and a number of ambiguities in their wording end up favouring misinterpretations or, in any case, non-uniform interpretations.[61]

In this respect, the **lack of familiarity** with the Service Regulation plays a major role. Recent studies have showed that the dialogue between receiving and transmitting agencies is often hampered by systematic deviations from the relevant supranational rules. As an example, in spite of the "retransmission duty" clearly foreseen by art. 6 (2) of the Regulation, findings revealed a certain reluctance towards cooperation, in the event that the document to be served has been forwarded to the wrong receiving agency. It seems that in such cases the document is usually returned to the sender, and no effort is made by the receiving agency to identify the territorial competent authority. Only in the (few) cases where the receiving agency is familiar with the procedure, action is taken to identifying the competent local authority or, more generally, to favour the smooth completion of the procedure assisting the transmitting agency in locating the addressee or clarifying the address on the document.[62] It is worth noticing that the poor knowledge of the relevant legal framework is also reflected in the incorrect use of forms, which are one of the mainstays of the mechanism under examination. These are not always filled in correctly, sometime missing the date of handing over the document. When completed in handwriting, sometimes they are hardly readable and when filled out online, the final result is not user-friendly.[63]

On a more general point, **communication** between transmitting and receiving agencies is often not smooth and effective. Language-related problems are, of course, a key issue in that respect, since both transmitting and receiving agencies are not always fluent in the language of the document forwarded. Interestingly, it seems that national authorities sometimes reply to the requests received using their local language, thus hindering mutual understanding, or even fail to answer because of the lack of knowledge of the language used. Furthermore, in certain cases, they also tend to ignore the wording of article 8 (1), rejecting documents that are not drawn up in the official language of the receiving Member State, irrespective of being one of the languages accepted (and possibly understood by the addressee).

Along with linguistic reasons, the cross-border dialogue between national actors is further hampered by the administrative formalities for transmitting and receiving agencies, which are felt to be "heavy and quite bureaucratic", especially with regard to the rigid use of the long and complex standard forms attached to the Regulation and the heavy reliance on paper-based means of communication.[64] On the basis of the

[61] See Commission Staff Working Document Impact Assessment Accompanying the document 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), SWD/2018/287 final.

[62] Commission Staff working documents evaluation, accompanying the document proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) n. 1373/2007 of the European Parliament and of the Council of the 13 November 2007 on the service in the Member States of judicial and extra-judicial documents in civil and commercial matters (service of documents), 2018, p. 31

[63] MainStrat, Study on the application of Council Regulation (EC) No 1393/2007 on the service of judicial and extra judicial documents in civil or commercial matters, report realized upon request of the EU Commission, 2014, ISBN: 978-92-79-34791-7.

[64] Commission Staff working documents evaluation, accompanying the document proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) n. 1373/2007 of the European Parliament and of the Council of the 13 November 2007 on the service in the Member States of judicial and extra-judicial documents in civil and commercial matters (service of documents), 2018, p. 43.

ISSN 2285 – 4916
ISSN-L 2285 - 4916

information displayed in the Court Database, postal service is the principal mean of transmission between bodies accepted by each Member States. This also include all communications between transmitting and receiving agencies, even when just clarifications are needed (e.g. further information on the address). Electronic transmission is not frequently used in practice, although it is accepted by certain States and national laws often foresee the possibility to use this channel under certain security and authentication conditions. [65]

5.1 Language Requirements and the Right to Understand: So Many Goals, But What Results?

Provisions governing the language requirements of documents to be served have turned out to be cause of significant complications for all the parties involved. These rules are actually unclear and no indications have been issued by the EU Institutions to provide guidance on this matter. The Service Regulation has surely contributed to strengthen the procedural rights of the addressees, allowing them to refuse the document served in the case the latter has been drawn up in a language that they cannot understand. A refusal opposed on this legal basis – especially if well-founded - does not render the service invalid, but this must be just considered as a mistake that can be remedied through the forwarding of the documentation in the correct language.[66] Such a solution, however, inevitably results in further delays and unwanted consequence in practice, because of the ambiguities in the wording of the relevant provisions.

First and foremost, the Service Regulation does not make sufficiently clear the requirement to provide information on the right to refusal. Case law shows that information on the right of refusal is not always provided properly or even not given, because there is a widespread misconception that the relevant annex form is not required when the document to be served is already drawn up or translated into either a language that the addressee understands or an official language of the State of destination.[67] The European Court of Justice has actually ruled on this point, stating that the receiving agency is always required - without a margin of discretion - to inform the addressees of their rights, by using systematically the specific form provided for by the Regulation,[68] but such a ruling, however, tends to be often misinterpreted.

Moreover, the Regulation does not provide indications on how to conduct this assessment and on which standard to rely on.[69] The evaluation of the actual ability of the recipient to understand the language of the document received is a complex task, which cannot be easily performed just on objective criteria, but requires the thorough assessment of several subjective factors. Objective circumstances, such as those relating to citizenship, residence or domicile etc., should only be regarded as an indication.

---

[65] It seems that the method of working with paper documents is in line with the regular working practice of the national authorities and, thus perceived as most practical for them. Cft. Commission Staff Working Document Impact Assessment Accompanying the document 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), SWD/2018/287 final, pag 15 and Attachment n. 8.

[66] Regulation 1393/2007/EC, art. 8 (3).

[67] Cft. Commission Staff working documents evaluation, accompanying the document proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) n. 1373/2007 of the European Parliament and of the Council of the 13 November 2007 on the service in the Member States of judicial and extra-judicial documents in civil and commercial matters (service of documents), 2018, p. 37.

[68] Case C-519/13, Alpha Bank Cyprus, ECLI:EU:C:2015:603.

[69] See Case C-14/07, Weiss, ECLI:EU:C:2008:264. Cft. Bohunova P., 'Regulation on Service of Documents: Translation of Documents Instituting Proceedings Served Abroad', sub 4, available at http://www.muni.cz/research/publications/818211; and A. Galic, *Service abroad in civil and commercial matters – from The Hague Conventions to the EU 1393/2007 Regulation*, in Collection of Papers, Faculty of Law, Nis 65 (2013): p. 64.

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916

Practical difficulties connected to the to the genuine protection of the person served have thus arisen as well as those regarding possible abuses that could affect the right of the claimant to an effective, speedy and low-cost procedure. Which subject/entity must be considered in charge to conduct such an evaluation? Which standards must be met? What degree of knowledge is needed in order to legally refuse the document served, also in the view of the fact that general knowledge of a language is probably not enough, when dealing with legal and expert terminology? All these questions, at present, remain unanswered.

On the other hand, it must be borne in mind that the responsibility to provide in court information giving proof of the actual language skills of the addressee is usually placed upon the claimant, and this is problematic in practice. For this reason, transmitting agencies in some Member States encourage – and sometimes even require - the claimants to send document together with a "precautionary" translation, thus causing an increase of the costs incurred by them. Therefore, this trend seems to move in the opposite direction from the primary goal of the Service Regulation, that is making the entire procedure faster, reducing burden for the parties involved, including costs incurred for translation.

6. Final Remarks

Legislation regulating the service of documents is a very technical matter, but its importance should not be disregarded as it directly impacts in the daily life of individuals and businesses. Basically, its main goal is ensuring that the addressee is timely informed that a proceeding is pending against him/her, so as to allow the full exercise of the right of defence as enshrined by art. 47 of the EU Charter of Fundamental Rights and in the national constitutional charts. At the same time, this must protect the legitimate expectations of the claimant, thus avoiding paralysing the judicial system.

Although the Service Regulation addresses this issue by providing for a variety of mechanisms for transmission that can be used by national actors to favour the rapid and successful execution of the transmission procedure, in this paper focus has been on the collaboration between transmitting and receiving agencies, which still remains the cornerstone of the European service regime. This analysis is indeed a first attempt to outline the workflow of this method of transmission, so as identify the steps to be taken to perform the cross-border service and providing and overview of the main problem affecting its practical application, also in the perspective of a possible future digitisation of the procedure. Both the EU Institutions and stakeholders have already made clear that the real challenge in this respect does not lie in the need to develop the appropriate technology, since cutting-edge ICT solutions are already in place to support electronic communication between citizens and courts and between Member State administrations in civil cross-border proceedings. Legal complexity is at the very heart of the problem, both in the classical paper-based procedure as well as within the framework of a possible digital environment for the exchange of the documents to be served.

Against this background, this study was meant to highlight the practical difficulties resulting from the different regulative layers (e.g. European, national, local) characterising the service regime in the EU, obviously without in any way claiming to be exhaustive. As mentioned above, although this whole matter is essentially based on the application of a regulation, which by definition should be directly applied at a domestic level without margins of discretion on the part of national authorities, reality is much more nuanced than that. Just like many other civil matter-topics covered by EU regulations, there are plenty of loopholes and references to domestic procedural rules, which require close coordination between the two legal dimensions. Furthermore, the results of recent survey-based researches and qualitative studies carried out over the last years have allowed to identify other factors at work, contributing to make the picture more complex. The ambiguity of certain provisions of the Regulation, combined with language

ISSN 2285 – 4916
ISSN-L 2285 - 4916

barriers and the extensive lack of familiarity with the EU legislation result in a variety of deviations from the "European procedure", affecting almost every single step of the service process. This, in turn, gives rise to a proliferation of different local practices, which sometimes make it very difficult the path of dialogue between transmitting and receiving agencies. The Regulation on service of documents establishes indeed a transmission mechanism relying on strong principle of cooperation and mutual acceptance between national service systems. How this principle should be framed in a digital world remains an open question at present.

In this perspective, this paper has attempted to identify some of the main critical points to address so as to smooth the service procedure in both a paper-based and digital environment. In particular, based on the picture of the situation provided above, the delay – sometimes significant – still affecting the service process is largely due to the existence of diverse domestic legal regimes and practices combined with the lack of clarity of certain key European provisions. This combination of causes results in a variety of local practices deviating from the letter and the spirit of the Regulation, thus hindering the proper completion of the procedure. Problems connected to misinterpretations or non-uniform interpretations are only mitigated when the national authority concerned is familiar with the supranational provisions at stake. The poor knowledge of the relevant legal framework is also at the heart of the misuse of key elements of the Regulation, such as the use of standard forms, which are often missing important information or are even not employed to perform certain steps of the service process, contrary to what the law foresees. Language-related problems together with the bureaucratic burden resulting from the heavy reliance on paper-based procedure complete the picture, playing a major role in making the communication between transmitting and receiving agencies complicated and ineffective.

Against this background, a viable solution could be to seek filling normative gaps with non-legislative arrangements, which may have a positive effect on the rapid and effective conduct of the service procedure. As an example, as far as the preparation stage is concerned, practical arrangements should be defined to assist the actors concerned in legal proceedings in clarifying an address in another Member State. Likewise, within the framework of the transmission phase, efforts should be made to ensure that details concerning the competent national agencies are complete and correct, in order to allow the transmitting agency to easily locate the receiving authority and avoid a retransmission scenario. The Central bodies should also play a pivotal role in this field, by assisting national actors in identifying the right agency as well as answering doubts posed to them. In this respect, the possible digitalisation of the procedure offers very interesting perspectives in terms of improving the efficiency of the system. By using secure electronic transmission system would allow to eliminate, or mitigate at least, those problems arising from the use of the analogue service process. Time-frame for service would be significantly reduced, by avoiding recourse to postal service, and providing the national agency of a fast and direct channel of communication to ask for consultation where needed.

Of course, these preliminary findings should be followed by a more in-depth study, focused on the empirical examination of practices developed by practitioners at the local level, so as to be able to have full awareness of the issues on which priority actions should be taken, also in view of the process of digitization of the procedure.

EQPAM Volume 8 No.2 April 2019
ISSN 2285 – 4916
ISSN-L 2285 - 4916