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Service of judicial documents to party domiciled in the territory of another Member State in light of The Court's case C - 325/11

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1. Representative for service in previous national regulation

Until 2013's amendment Polish Code of Civil Procedure required an appointment of a representative for service in Poland for parties who do not have a place of stay or residence, or registered address in the Republic of Poland. In the case of not appointing the representative judicial documents addressed to party without any address in Poland were left in the case files and considered duly served as so called fictions service. Polish courts were obligated to inform foreign party about the necessity of designating the representative in Poland as also as who can be designated as an agent upon the first service. The obligation to inform party indicates that leaving document in case files applies only to subsequent documents, not to lawsuits and motions instituting proceedings.

The above regulation was not uncommon among other European national legislations. For example similar institution was stipulated in article 683 of French Code De Procédure Civile called *remise au parquet* or in § 183 of German Zivilprozessordnung - fiktive Inlandzustellungen.

The majority of European jurisprudence had widely agreed that interpretation of article 1 of The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters indicates the use of national legislation in cases of service of the document in another country. That interpretation allows not excluding the institution of fictitious service in relations between the Member States.

Other lawyers marked out that fictitious service is against the Article 6 of the European Convention on Human Rights and Article 47 of Charter of Fundamental Rights of the European Union stipulating the right to fair trial as also as with the Article 18 of The Treaty on the Functioning of the European Union, which prohibits

any discrimination on grounds of nationality.

2. European Union's regulation for service judicial documents

This topic of the service of judicial and extrajudicial documents in civil or commercial matters in Member States was introduced in European Union law in the Council Regulation (EC) No 1348/2000 of 29 May 2000, which was later improved by Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007.

The Article 1(1) of latter Regulation directly states that this legal act is to apply in civil and commercial matters 'where a judicial … document has to be transmitted from one Member State to another for service there', with an exception in the Article 1(2) when the address of the recipient of the document is unknown.

The matter of fictitious service's legality was a subject of deliberations of The Court in a case C - 325/11. District Court in Koszalin asked a preliminary ruling whether Article 1(1) of Regulation No 1393/2007 and, if necessary, Article 18 of the Treaty on the Functioning of the European Union must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that judicial documents addressed to a party whose place of residence or habitual abode is in another Member State are placed in the case file, and deemed to have been effectively served, if that party has failed to designate a representative who is authorized to accept service and is resident in the first Member State in which the court proceedings are taking place.

The advocate general Y. Bot underlined in his opinion that although Article 1 is ambiguous because it does not state in which cases a judicial or extrajudicial

document is obligated to be transmitted from one Member State to another for service there, this must be read in conjunction with Article 1(2), which adds that 'this Regulation shall not apply where the address of the person to be served with the document is not known'. As the case where the address of the addressee is not known is the only case where the application of Regulation No 1393/2007 is expressly excluded, it may be inferred by contrary reasoning that the regulation applies in all cases where the addressee has a known address situated in another Member State. The court agreed with advocate general's opinion.

The Court pointed that Regulation 1393/2007 in articles 4-15 enumerates means of transmission and service of judicial documents. According to judgement this enumeration with no doubt is exclusive. Among these methods Court have not found fictitious service.

The Court observed that the aim of Regulation 1393/2007 is to improve and expedite the transmission of judicial documents between Member States, but that can not be achieved at the expense of a breach in any way the rights of the defence, which is entitled to service recipients and is a component of the right to a fair process. Provisions of Regulation No 1393/2007 seek to reconcile effectiveness and efficiency of the service of documents with the requirement to ensure adequate protection of the rights of defence of the addressees by the guarantee of effective and efficient receipt of these documents.

In the aftermath of the Court's ruling Polish courts ceased the use of the article 1135^5 of Polish Civil Procedure Code. For example, in the case VI ACa 1299/12 The Warsaw Court of Appeal found the proceedings invalid due to the use of this regulation. Eventually in the result of the Court's sentence in case C‑325/11 Polish Civil Procedure Code was amended by excluding an obligation to establish a

representative for service in Poland for parties which have a place of stay or residence, or registered address in any Member State of the European Union.

However, it seems that this change of regulation cannot be found entirely appropriate.

The reason for this inadequacy lies in the ambiguous judgement of the European Court of Justice. The main ruling of the Court focused on the exclusive enumeration of means of service stipulated in the Regulation No 1393/2007. The Court stated that the fictitious service, such as the one stated in Polish Civil Procedure Code - is not included in that list. Hence it cannot be used in the procedure of transmission of the judicial documents from one Member State to another.

According to Regulation No 1393/2007 the service of judicial document can be done by direct service, establishing for this purpose the transmitting and receiving agencies, by consular or diplomatic mail and by registered letter with acknowledgement of receipt. The major purpose of stipulating this exclusive list of means of service was to expedite the transmission of documents between the court and the party who has a place of stay or residence not in the forum country but in another Member State.

In light of the above the reason why the Member States are not allowed to introduce the procedure in which in some cases there is no necessity of serving the document to a party who failed in performing their duties is unclear. Such a regulation would not be a form of service of the document, but a negative effect of failure in performing a party's duties. With no doubt the fictitious delivery, which in this case serves as some sort of penalty to a negligent party, is not in fact a form of a service of the document. This penalty comes down to a possibility of continuing the proceeding

regardless of the fact that the party would not have been presented with the content of document.

For similar reasons the Court's reference to the article 1(2) of the Regulation 1393/2007 and the point 8 of its preamble appears to be inappropriate. This stems from the fact that these regulations deal with the situation in which there is a necessity of the document's service. According to the article 1(2) the Regulation shall not apply where the address of the person to be served with the document is not know. The missing address of the party does not result in the lack of necessity of delivery, but creates an obstacle that has to be dealt with. As far as it concerns the point 8 of the preamble it states that the Regulation should not apply to service of a document on the party’s authorised representative in the Member State where the proceedings are taking place regardless of the place of residence of that party. In this case the service is also obligatory, however due to the party's decision the documents must be sent not no the party themselves but to a person authorised by the party.

Taking the above into consideration the Court's statement that the fictitious delivery stipulated in national regulation should be treated as a form of service excluded from the Regulation 1393/2007 - therefore unacceptable - appears to be invalid.

Furthermore, the obligation to appoint a representative, dwelt in the country of trial, to whom the service would be addressed cannot be treated as a form of delivery excluded from the Regulation. It stems from point 8 of the preamble, which content has already been mentioned. As the Regulation does not apply where a party appoints an attorney for service, such an authorisation shall not be found prohibited.

However, the fictitious service, as a result of breaching the obligation to appoint a

representative for service appears to be contrary to the purpose of the Regulation 1393/2007.

3. Polish Code of Civil Procedure amendment

An ambiguous judgement delivered by the Court led the Polish legislator to make an arguable law amendment. According to current Polish regulation a party who has a place of residence or stay in any Member State is not obliged to authorise a representative dwelt in the Republic of Poland during the proceeding in Polish court. It is also not possible that the service of documents to such party is done by leaving it in the case files. In any case it has to be delivered to a foreign party in compliance with terms stipulated in the Regulation 1393/2007.

A Polish legislator missed the fact that it was only a fictitious service as a result of not appointing an agent, which was contrary to the Regulation. In fact it would be possible to oblige a party dwelt in another Member State to seek help of a representative in order to receive a service of judicial documents. Such obligation corresponds with a pursuit of quick and efficient trial. Presumably it would also be possible to retain fictitious service providing that it would be modified. For instance it could be patterned on the German regulation which states that the delivery is duly served in 2 weeks after its posting, regardless of the fact if it actually reaches an addressee.

It is worth mentioning that the regulation of an attorney to service appears in EU legislation. Examples of it are included in the Council Regulation no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters and in the Regulation no 2201/2003 on jurisdiction, recognition and enforcement of matrimonial and parental judgements. According to

these regulations an applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative *ad litem*.

An attorney for service is also known in national regulations. § 184(1) of German Zivilprozessordnung states that the court is able to oblige a party who has neither a place of residence nor a registered office in Germany to appoint a representative to whom the judicial documents shall be delivered. If a party fails to perform that duty, the court sent subsequent documents to the party and they are found duly served in two weeks after its posting regardless of the fact if it actually reaches an addressee.

Here it should be mention that the German Federal Court in case IX ZB 183/09 stated that the Polish regulation, which compliance with EU law has been questioned in front of the Court, cannot be found manifestly contrary to German public policy. German Federal Court ruled that leaving a document in the case files as a result of not designating an attorney for service does not infringe the right of the party. According to German Federal Court the Polish court's obligation to deliver an initiating document directly to a party, with an advice on a negative effect of not appointing a representative serves as a sufficient guarantee to the rights of the party.

With no doubt a German regulation corresponds with the rules of a quick and efficient trial enacted in the Regulation 1393/2007. A cross-boarder delivery turns out to be expensive and time-consuming. Furthermore some difficulties may occur with the confirmation of the receipt (Polish Supreme Court III CRN 69/87). It seems reasonable to oblige a court to deliver initial documents directly to the foreign addressee, and enable it to address the subsequent documents to the representative appointed in the country of trial. It is worth mentioning that the documents would be

duly served upon the delivery to the attorney.

4. An attempt to assess the amendment

Unfortunately, due to the ambiguity of the Court ruling Polish regulations are still being adjusted and the duty of appointing an attorney for the purpose of delivery is being withdrawn from specific regulations. Until recently in some specific cases this obligation applied to all parties domiciled or registered outside Poland. As of September 2015 in the land registration proceedings only parties domiciled or who has a registered office outside the Member States are obliged to designate a representative in the Republic of Poland (article 626^{12} § 1 and 2 of Polish Civil Procedure Code). Identical amendment was made in regulation referring to forfeiture of things on the basis of customs law (article 610^{3} of Polish Civil Procedure Code). Also according to article 380(2) of Bankruptcy and Rehabilitation Law the creditors domiciled or registered within the European Union are not obliged to appoint an attorney for service. In our opinion these adjustments cannot be found desirable. Undoubtedly they render the proceedings longer and for this reason cannot be found compliant with the major aims of the Regulation 1393/2007.

On the other hand a pursuit of quick and effective trial – which characterise German regulation – cannot do harm to the rights of defence of the addressees. This right can only be guaranteed by the effective and efficient service of the judicial documents. It has to be stated that these guarantees stem from the party's right to fair process which is enacted in article 47 Charter of Fundamental Rights of the European Union and in article 6(1) of European Convention of Human Rights. These cast a doubt on the compliance of German legislation on cross-boarder delivery of judicial documents with the Regulation 1393/2007.

It should be stated that if the Court had underlined the necessity of enacting the means of service corresponding with the aims of the Regulation, such as creating an effective and fair trial, rather than stressing the exclusive character of the list of forms of delivery, the ruling would have been more clear. If so, it could have prevented Polish legislator from proceeding a questionable law amendment. A proper ruling could also have influenced other Member States to reconsider their regulations on this matter. It occurs to us that although German law corresponds with the exclusive enumeration of means of service stipulated in the Regulation, it should be found incoherent with one of the purposes enacted it in which is a guarantee of effective and efficient service of documents.

Another problem that occurred in the matter of the Regulation 1393/2007 refers to its application. The case initiated by prejudicial question presented by District Court of Koszalin gave the Court an opportunity to underline that the Regulation 1393/2007 refers to all situations in which a party is dwelt or registered in a Member State other than a forum country. If the Court had ruled that thing out expressly that would have compensated for ambiguity of the Regulation in that matter. In fact the 1393/2007 law leaves the Member States a possibility to decide in which situations the Regulation shall be used. This stems from the fact that the article 1(1) states that is shall apply where a document has to be transmitted from one Member State to another for service there. Due to the equivocal content of the article 1(1), and in the absence of a statement of the Court, who missed an opportunity to explain it, those are the Member States who can decide when it is compulsory to deliver a document to another country. Therefore the Member States are granted a possibility to decide if the Regulation shall be applied.

The problem mentioned above can result in the situation in which the Regulation is not applied in a uniform manner by the Member States. The Court could have

brought that issue to an end by interpreting an article 1(1) by putting an emphasis on the factual state of living outside the forum country as an element which decide whether there is or there is not a necessity of serving a document to a party dwelt in another Member State.

Another arguable matter arose from the Court's abstention from referring to the query about the coherence of the article 1135^5 of Polish Civil Procedure Code and the article 18 of the Treaty on the Functioning of the European Union which prohibits any discrimination on grounds of nationality. That issue comes down to the question whether polish regulation is discriminatory on the basis of citizenship. It gave the Court an opportunity to underline the importance of the principle of non-discrimination to the EU legislation. Unfortunately the Court found it case unnecessary to settle.

The issue of discriminatory character of the article 1135^5 was dubious. The questioned Polish regulation was not only aimed at foreigners but also applied to Polish citizens who did not have the place of stay or residence in the Republic of Poland. According to Polish Government due to that regulation the article 1135^5 of Polish Code of Civil Procedure did not show direct discrimination on grounds of nationality, as the obligation included in it was irrespective of the citizenship. In response to this argument the advocate general Y. Bot claimed that Polish regulation breached the article 18 of The Treaty on the Functioning of the European Union as in the majority of cases the obligation was applied to citizens of other Member States who did not usually have their residence or place of habitual abode in Poland.

A ruling in that particular matter could have resulted in amendments of national regulations. As the Treaty on Functioning of the European Union refers not only to civil and commercial regulations, but also to matters that are not included in

the Regulation 1393/2007 the range of amendments could have been wider.

For example the article 138 states that a party, and also a person who is not a party, whose rights have been infringed, that resides abroad shall be obliged to designate an addressee for the service of documents in Poland. If they fail to do so, a document sent to their last known address in Poland, or if there is no such address, recorded in the case files, shall be deemed to have been served. As the criminal procedure is not included in the Regulation 1393/2007 the Court sentence, which did not refer to Polish law compliance with the article 18 of the Treaty on Functioning of the European Union, does not serve as a trigger to amend the article 138.

A firm statement of the Court that Polish law enacting a fictitious service breaches the Treaty non-discriminatory regulation would have resulted in the need of a change of mentioned criminal regulation – at least as far as it concerns EU citizens. Due to the absence of such statement the guarantees of a party's right of a fair trial in a polish civil procedure are stronger that those in criminal cases.

Furthermore, it should not be omitted that the amendment of the article 1135^5 of Polish Civil Procedure Code was beneficial only to people who has a place of stay, residence or registered office in one of the Member States. It does not refer to citizens of Member States who live outside the European Union. even in associated and neighbouring countries like the EEA's Iceland, Norway and Lichtenstein. Interesting case occurs in Greenland, although Greenland withdrew from European Community, the EU predecessor and still remains outside the European Union, every Greenland citizen holds citizenship of Denmark and because of this also holds EU citizenship. Despite this Greenlanders living outside any Member State of the European Union remains excluded from Polish regulations allowing not establishing a representative for service in Poland. Hence the question arises whether this new regulation is not

discriminatory towards them.

5. Summary

In light of the above it seems that the Court's sentence, although needed and resulting in positive changes, should have been more resolute. This would have contributed to unity of national regulations on the service of judicial documents. The ambiguity of the sentence cannot be found as beneficial from this point of view.

For example, the Court's ruling did not forbid a regulation in which a foreign party is obliged to designate a representative for service. It was only an effect of fictitious service as a result of not appointing such an attorney that was found contrary to EU law. Despite that, Polish legislator ceased that duty towards parties dwelt or registered in one of the Member States, even though such duty is known to other national regulations and contributes to effectiveness of delivery. What is more the Court's interpretation left room for such controversial delivery as enacted in German legislation. The Court could have prevented these disparities by underlining that national legislations must be coherent with all of the major aims of the Regulation 1393/2007.

What is more, a unification of national regulations could have been reinforced by firm statement that it is an actual state of living outside the forum country which makes it obligatory to deliver judicial documents according to the provisions of the Regulation 1393/2007.

Last but not least a reference to the article 18 of the Treaty on the Functioning of the European Union would have contributed to desirable law amendments in national legislations.

In the absence of the above mentioned a divergence in national regulations on cross-boarder service of judicial documents is still at issue.