Position paper

The service of documents, cornerstone of a fair trial

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The International Union of Judicial Officers (UIHJ) is an international association, created in 1952 which today brings together 91 countries. Its purpose is to represent the interests of its members in international organizations and to ensure collaboration with national professional bodies. It is committed to the improvement of national procedural rights and international treaties. It strives to promote ideas, projects and initiatives aimed at developing and raising the independent status of the judicial officer.

The service of a document initiating proceedings constitutes the founding process of any legal procedure. As such, it contains all the details of the claim against the defender on which the court will be obliged to rule, to prevent any miscarriage of justice. It describes the grounds of the dispute and contributes to the establishment of adversarial proceedings, including the rights of the defense. This document thus represents the centrepiece of any legal action as a conduit of information, both for the parties and sometimes for the judge, depending on the circumstances of its delivery. It enables the defendant to be effectively informed of the legal and factual elements on which the claimant intends to base his/her action.

However, today the document initiating proceedings is no longer a mere stage in the judicial process. It has become a genuine "cornerstone" of a set of Community secondary law instruments which cover the judicial process through to enforcement.

In fact, since the judgment of the European Court of Human Rights (ECHR) of 19 March 1997[1], Hornsby v Greece, the execution of a judgment is considered to be an integral part of the fair trial within the meaning of Article 6§1 of the European Convention on Human Rights.

Therefore, the notion of fair trial covers not only access to a judge and the conduct of the proceedings, but also the enforcement of a final and binding judicial decisions. The European judge thus intends, in the name of the rule of law, to provide full effectiveness to the “right to a court”.

Indeed, the European Convention on Human Rights aims to protect rights that are not theoretical or illusory, but concrete and effective[2]. Based on this principle, the right to a court would be illusory if it did not extend to the enforcement of court decisions. Under the effect of this jurisprudential impulse, the scope of this right has become such that the member states and public authorities necessarily had,

[1] ECHR, *Hornsby v. Greece*, 19 March 1997, echoing the Golder v. The United Kingdom (ECHR, 21 February 1975) case, in that the right to a fair trial would be illusory if the legal order of a Contracting State allowed a final and binding decision to remain ineffective to the detriment of one part.
[2] ECHR, *Airey v. Ireland*, 9 October 1979, §24.

by virtue of their positive obligations, to organise their judicial system in such a way as to avoid any obstacle to the enforcement of final judgments[3] and provide for an effective remedy to obtain enforcement of a decision[4].

Regarding the initiation of proceedings, the ECHR recognises that the right to a public hearing would be meaningless if one party to the trial was not informed of the hearing, so that they may be able to appear in court[5].

On the basis of Article 6§1 of the European Convention on Human Rights, the ECHR requires States to implement effective notification procedures, to ensure that the parties are notified of the date of the hearings on time[6]. This is a consequence of the more general obligation placed on States to organise their judicial system in such a way, that their courts can guarantee everyone the right to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time[7].

The ECHR also considers that the principle of equality requires a fair balance between the parties, so that they can present one's case in a way which is not too disadvantageous, in relation to the opponent and that, as these principles are pertinent to the whole of the procedural law of the Contracting States, they also apply to the specific field of service of judicial documents on the parties[8].

In this regard, for the ECHR, the mere formal sending of a summons without any certainty of its delivery to the addressee, cannot be considered as proper communication, according to legal channels and it is for the Government to demonstrate that the addressee was properly summoned[9].

This is why, in many countries, judicial officers are charged with the service of procedural documents, in particular documents initiating proceedings. This method of service provides unparalleled legal certainty.

The other methods of notification (postal notification by simple letter or registered letter with acknowledgment of receipt, electronic notification or other modes such as fax, SMS, or social networks) do not make it possible to reliably ensure the date of service, or to provide proof that the defendant was correctly informed. These methods prevent the claimant from obtaining compensation in case of a fault, resulting from failure of the service and associated loss (prescription, annulment of the court decision, damages, lost opportunity etc). Moreover, these modes of service do not provide any opportunity for a verbal explanation to the addressee.

Three reports were produced at the request of the European Commission, in 2004 and 2014, by the Lex Fori and Mainstrat companies, on the application of regulations No 1348/2000 and 1397/2007 on service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

[3] ECHR, *Pibernik v. Croatia*, 4 March 2004.
[4] ECHR, *Zazanis v. Greece*, 18 November 2004, §49.
[5] ECHR, *Yakovlev v. Russia*, 15 March 2005, No 72701/01, § 21.
[6] ECHR, *Gospodinov v. Bulgaria*, 10 May 2007, No 62722/00.
[7] ECHR, *Frydlender v. France*, 27 June 2000, No 30979/96, § 43.
[8] ECHR, *Miholapa v. Latvia*, 31 May 2007, No 61655/00. Natalie Fricero *in Droit et procédures internationales*, Cahier semestriel of *Dr. et procéd.*, September – October 2007, pp. 27 and 26, and *Le droit à l'exécution et le droit de la notification et de la signification dans la jurisprudence européenne, 1980-2014*, UIHJ Publishing, 2014, p. 111.
[9] ECHR, *Trudov v. Russia*, Section 1, 13 December 2001, No 43330/09.

These three reports highlight the superiority - in terms of legal certainty - of service by a judicial officer over the use of registered letters with acknowledgment of receipt. The conclusions of these reports are in line with the various studies carried out by the UIHJ.

Lex Fori report (2004)

Two extracts from the Lex Fori report on the methods of service and notification of legal documents can be usefully cited. The first relates to proof of service. The second relates to the date of service.

Regarding proof of service, the report concludes that although the scope of the proof will vary, in all situations the presence of properly established proof, will demonstrate that service has been carried out. It is relevant to identify the various methods of service. When challenging the validity of the service, the court will consider with greater caution the certificate of sending a simple letter rather than the confirmation of the service, signed by the recipient himself. This does not mean that a personal delivery service certificate is unassailable. **Thus, a dispute may relate to the authenticity of the recipient's signature**. Indeed, some third parties can usurp the identity of the recipient or a complacent server may ignore the fact that only a third party is present and ask them to sign for the recipient.

In France, Belgium, Luxembourg, and the Netherlands, the signature of the recipient of personal service is covered by the authentic force of the document. It is only after a procedure for the registration of forgery that the annulment of the service can be obtained. In addition, page 32 of the report reads that **person-to-person service is the only way to be sure with complete certainty that the recipient has been informed. No other method can achieve this result**.

Regarding the date of service, the report concludes that the study of the certain, presumed or fictitious nature of the date shows that some methods offer complete safety while others are particularly dangerous. A hierarchy emerges between the methods which depends on the nature of the date of service. When comparing this hierarchy with that of proof, it appears that the safest methods of fixing the date are also the methods which offer the most reliable evidence.

In this regard, personal service appears to be the ideal mode because it provides evidence in terms of proof of service, including certainty of the date.

Mainstrat study (2004)

The conclusions of the Mainstrat study concerning postal notification are unequivocal (p. 64):
« Our main proposals at this stage, and taking account of the input from the survey, are:

- *Service by post is inadvisable because acknowledgments of receipt are usually not sent back*
- *Service by post creates uncertainty because there is no assurance that delivery has been effected to the right person*
- *Service by post creates uncertainty about the date to be taken into consideration as evidence that service has been effected (date of issue by the applicant or date of reception by the addressee)*
- ***Service by post should be replaced by physical service to the addressee by legal professional**."*

Mainstrat study (2014)

In its second study, the Mainstrat company, drawing on the experience of the two Community regulations on service, concludes in the same direction as that of its first report (p. 63): *"The opposition of different Member States (11 Member States do not admit this mode of service and 3 of them admit it under conditions), and the remission to the internal legal conditions required in those States where this method is allowed, weaken the scope of direct service, and* ***make this method of service of document not recommendable on grounds or legal certainty****."*

Work carried out by the UIHJ

All the surveys carried out by the UIHJ[10] demonstrate that there is little credibility associated with the method of notification by letter: this method of service offers involves serious disadvantages when it comes to a court to decide on the basis of a notification by letter, where the acknowledgment of receipt, does not clearly show whether the defendant was actually informed of the proceedings.

Moreover, a study carried out on the service of documents in the European Union in 2003 by the UIHJ[11] shows that, on the one hand, service, either primarily or subsidiarily exists in all the countries of the European Union[12] and that, on the other hand, the questions that could arise from the financial impact, linked to the generalisation of such a mode of communication, are unjustified and particularly ill-founded, especially in proportion to the significant costs involved in a trial within the European Union[13].

To mitigate the risks associated with the methods of notification by letter, even registered letter, States have to set up a system allowing the defaulting litigant to challenge the court decision, with all the consequences attached to this (costs, delays, prejudice to the parties, congestion of the courts, inefficiency of the judicial system, abuse, legal insecurity, etc.).
Any notification made under these conditions, therefore does not provide the required certainty of Article 6§1 of the European Convention on Human Rights.

The UIHJ considers that a registered letter, even with acknowledgment of receipt, is generally insufficient as a method of evidence that the addressee was properly served.

As regards the document initiating proceedings, the UIHJ considers that only an effective proof of a service guarantees the conditions of a fair trial, in particular in a European context, given the various non-aligned legal systems coexisting currently within the European Union.

When served by a judicial officer, the document initiating proceedings allows the judge to fully assess the conditions under which the defendant was intimated to appear, as well as the information provided to the defendant. Within the community framework, this is a real advantage for a judge, responsible for settling a cross-border dispute.

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[10] In particular the UIHJ study entitled "*Report: Research mission on the service of documents in the European Union*", January 2003 as well as the UIHJ survey carried out from October 2002 to June 2003 and communicated to the European Commission and to Mainstrat.
[11] UIHJ, "*Report: Research mission on the service of documents in the European Union*", January 2003
[12] Report, p. 7.
[13] Report, p. 15.

In fact, when a document is served by a judicial officer, three key elements allow compliance with the requirements of a fair trial, including when the document is served electronically:

- The judicial officer, as an impartial legal professional with a special status, guarantees the date of service, the content of the served document, as well as the conditions of service to the addressee.
- In the event of failure, the civil and criminal liability of the judicial officer remains accountable. The judicial officer is personally liable in the event of damage to the parties, without any financial limitation (the judicial officer is insured to cover any wrongdoing).
- When serving a document, the judicial officer travels to the home of the addressee, thereby providing a certain solemnity to the service process, and can provide the defendant on this occasion with impartial information on the trial, methods of representation, the consequences of failing to appear, etc.

The UIHJ considers that for service of documents, that only a service carried out by a judicial officer, a legal professional which the European Court of Human Rights has recognised as an agent, working in the interest of the proper administration of justice, makes them an essential element of the rule of law[14], thereby fully safeguarding a fair trial.

The UIHJ invites states to establish and promote the initiation of proceedings, using the services of judicial officers.

[14] ECHR, *Pini and others v. Romania,* 22 June 2004, No 78028/01, No 78030/01.

Contact:

UIHJ
6 place du Colonel Fabien
75019 Paris – France
Tel : +33 (0)1 42 40 89 48
Fax : +33 (0)1 42 40 96 15
http://www.uihj.com
uihj@uihj.com