Chapter 5

Service of process

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ASTRID STADLER. — Our working group consisted of six members. Eva and I, from Sweden and Germany respectively, acted as co-reporters. Members from the UK, France, Italy, and Greece completed the team. This diversity of legal backgrounds compensated for the relatively small size of the group.

We held five meetings between 2014 and 2017, plus the annual meetings with all the working groups and the steering committee, in which the co-reporters presented their respective drafts.

ENRIQUE VALLINES. — What would you say were the main challenges you faced?

ASTRID STADLER. — Terminology was one of them for sure. It is always a sensitive issue in international projects like this. We worked in English but also tried to prepare a French translation as promptly as possible. This turned out to be a productive idea: sometimes the first translations revealed shortcomings in the English version, so we would go back and try something like a simultaneous wording in English and French.

[1] We thank Alessandro Spinillo and Jorge González Carvajal for their insightful comments.

It was a general policy of the project to avoid using terminology that might have diverging meanings in different jurisdictions. For example, 'personal service', 'substituted service', or 'fictitious service', each has a particular meaning — or a peculiar connotation — in different national jurisdictions. We wanted to avoid this. We preferred more neutral and explanatory terms such as, to return to the previous example, 'service guaranteeing reception' or 'alternative service' — sometimes sacrificing conciseness or even *elegance* in exchange for clarity and the absence of semantic adherence.

ENRIQUE VALLINES. — I can imagine how challenging it must have been for the steering committee to define the most appropriate level of detail and to achieve a uniform degree of completeness of the regulation in the different chapters: to try to achieve a comprehensive regulation or rather to exercise self-restraint and leave room for national legislators. It is not easy to draw this line. In your working group, did you have a clear idea about this from the beginning?

ASTRID STADLER. — The dichotomy between minimum or maximum rules was always present. We used the ALI-UNIDROIT Principles as a starting point, as most of the working groups did. Regarding service, however, the ALI-UNIDROIT Principles are rather circumspect.

Furthermore, they are principles, not rules; and our mission was to draft a set of actual rules. Nevertheless, we soon realised that some issues cannot be solved in detail and are probably best left to national legislators. These would be open-ended rules rather than *principles*, anyway. Take Rule 71:

> Rule 71. Responsibility for service
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> (1) Responsibility for service of documents lies with the court/parties.
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> (2) If responsibility lies with the court, upon application the court may entrust a party with service of documents if appropriate.
>
> (3) Where responsibility lies with the parties the court retains supervisory control which may include the power to set aside service.

Responsibility for service — who should be responsible for initiating and organising service — was obviously one of the key issues to tackle. The diversity of answers across Europe is remarkable. In some countries, responsibility lies with the court. However, in France, and countries which have adopted the French system, there is a well-established

bailiff system, in which claimants first go to the bailiff, the bailiff takes care of service, and only after that is the statement of claim filed with the court.[2] We thought it'd be better to leave it for legislators to choose: 'responsibility for service of documents lies with the court/parties'. We emphasised in the commentary that this is a deliberate option.

ENRIQUE VALLINES. — But you did set a hierarchy of preferred methods of service:

> Rule 73. Priority of methods guaranteeing receipt
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> Documents shall be served using a method that guarantees receipt (Rules 74-76). If such service is not possible, alternative service methods apply, as specified in Rule 78. Where the address for service is unknown or other methods of service have failed, methods of last resort, specified in Rule 80, may be used to effect service.

ASTRID STADLER. — We discussed whether it was appropriate to list several options and leave it to the 'judge/parties' to choose between them or whether to adopt a hierarchy of service models. As you pointed out, we opted for a hierarchy, partly because most European countries favour a certain method — e.g., personal service or service with acknowledgement of receipt — over others.

Another reason in favour of a hierarchy of methods of service is that methods that guarantee reception offer greater protection of the defendant's right to be heard, particularly regarding service of the statement of claim. Only when this is not possible, the 'judge/parties' may resort to alternative service rules.

At the same time, when proceedings are already pending, Rule 79 (1) allows service from lawyer to lawyer, which is the most widespread and surely the most efficient method:

> Rule 79. Service of documents during proceedings
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> (1) During proceedings, if a party is represented by lawyer, service of documents may normally be effected on the lawyer or from lawyer-to-lawyer without Court intervention. Lawyers must provide an electronic address that can be used for service of documents.

[2] For a comparative overview cf Alessandro Simoni and Giacomo Pailli, *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* (European Commission 2016); Dimitrios Tsikrikas in Gascon Inchaustí/Vincent Smith/Astrid Stadler, *European Rules of Civil Procedure: A Commentary on the ELI/UNIDROIT Model Rules*, Edward Elgar (2023), at 71.01 (forthcoming).

ENRIQUE VALLINES. — What about the EU Service Regulation[3] and generally the EU acquis? Was it an important point of reference in your work?

ASTRID STADLER. — That was one of the first questions we had to answer: what to do with the Service Regulation. The question was, in turn, closely connected to the question whether we wanted to draft rules solely for domestic or also for cross-border disputes.

Regarding the first question, we were all aware that the Service Regulation 2007 was not working very well in practice. Moreover, when we started work, a reform was underway. As a result, we decided not to take the Service Regulation, or the EU acquis in this area in general, as set in stone.

Regarding the second question, we would start drafting model rules including both domestic and cross-border cases, because often the issues are the same in both settings. Only in limited situations is there a need for specific rules for cross-border cases, such as issues of language and translation or slightly more generous deadlines (Rules 82 to 85). Rule 86 clarifies the relationship of the Rules with the Hague Service Convention, which applies 'where there is occasion to transmit a judicial or extra-judicial document for service outside the European Union'. Also worth highlighting is Rule 82, which sets a different standard of language requirements from the Service Regulation.

ENRIQUE VALLINES. — We therefore have a set of rules — not mere principles — that establish a hierarchy of notification methods, applicable to both domestic and cross-border cases. Now, how do the different methods work in practice?

ASTRID STADLER. — Take the example of a company that is being sued. If it is a domestic case, we would start with Rule 74(1)(b):

> Rule 74. Service guaranteeing receipt
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> (1) Service guaranteeing receipt includes
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> …
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> (b) service via a designated electronic information system using appropriately high technical standards attested to by an acknowledgement of receipt that the system generates automatically where the addressee has a legal obligation to register with that system. Such

[3] Council Regulation (EC) № 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

> an obligation shall be imposed on legal persons and on natural persons engaging in independent professional activities for disputes relating to their trade or profession;

This article about electronic service mirrors one of the most important decisions we made: to suggest that companies and legal persons should be bound to register and to provide an email address that can be used by courts.[4]

Therefore, the first option, which is also the quickest and most effective way to perform the service, is electronic service.[5] This method should be effective in most cases. Only in the event that a company has not registered, or the email address is not operational will we need another way to effect service. This second option is physical delivery to a representative of the company at the business premises. This is provided for in Rules 74(1)(a) and 75.[6]

If the representative or employee refuses to accept the documents, Article 77 applies. This is a general rule on refusal of acceptance and states that refusal is, under certain conditions, equivalent to service.

> Rule 77. Refusal to accept service
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> Service according to Rule 74(1)(a) also includes service attested to by a document signed by the competent person who effected the service and stating that the addressee refused to receive the document. The document must be deposited at a specified place for a certain period of time for the purpose of collection by the addressee who has been informed where and when to collect the document.

If no representative of the defendant company is met, physical delivery can also be done to an employee, if there is one, and will also often lead to successful service. Rule 78 provides a couple of methods of so-called alternative service methods. According to Rule 78 (1) (c), the documents can also be deposited at the post office or at any other public authority. In this case it is necessary to notify the addressee that the documents are ready for collection

[4] This is already a mandatory rule in Italy: Art. 149bis CPC, Art. 3bis Legge No. 53/1994, Decreto-Legge No. 179/2012.

[5] The Commission Staff Working Document, *Impact Assessment* SWD(2018) 287 final, p. 16 concludes based on several studies that service by post is a preferred method. In general the use of transmitting and receiving agencies was used only exceptionally. The strong tendency to direct methods of service is thus also emphasized by the Model Rules. It is also encouraged by Simoni/Pailli (fn. 2), p. 94 et seq; Burckhard Hess (et al), *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*: *JUST/2014/RCON/PR/CIVI/0082* (European Union 2017) p. 57.

[6] Physical delivery is a method widely accepted accross Europe, for detailled reference cf. Wendy Kennett in Gascon Inchaustí/Vincent Smith/Astrid Stadler, (fn.2) at 74.09.

and to tell him when and where to collect them. If the addressee picks them up within that period, we will also have been successful in this case.

If none of the alternative methods leads to a successful notification — in particular, if the documents deposited for collection are not collected —, the method of last resort is service by publication, as provided for in Article 80.

> Rule 80. Service methods of last resort
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> (1) If service by methods that guarantee receipt (Rules 74-77) or alternative service (Rule 78) is not possible because the addressee's address is unknown or service has otherwise failed, service of documents may be effected as follows:
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> (a) by publication of a notice to the addressee in a form provided for by law of the forum state, including publication in electronic registers accessible to the public, and
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> (b) by sending a notice to the addressee's last known address or e-mail address, if applicable.

There are several means to carry out service by publication, including electronic social networks, if provided for by the law of the forum. We drafted a very flexible rule in this respect; whatever provides a chance that the information gets to the addressee is welcome under Rule 80.

ENRIQUE VALLINES. — Regarding electronic service, it is perhaps worth noting that you were one of the first working groups that were formed in 2014, so you were there from the very beginning of the project. In 2020, the Covid-19 pandemic was declared, and many things changed.[7] In this regard, has the world moved beyond the Rules? Do they stand in the post-pandemic context? If you were to undertake this project now, would you introduce changes in the text of the Rules?

EVA STORSKRUBB. — This is an excellent question, which could be applied to all sections of the Rules. As far as our side is concerned, I think we answered it quite well. The digitisation of civil justice was already present before the pandemic, and we were aware of it. Therefore, I'd like to believe that the recent developments, although far-reaching in many respects, would not have substantially altered our approach to service.

[7] *Cfr.* Krans, B., Nylund, A. (eds.), *Civil Courts Coping with Covid-19*, Chicago: IPG, 2021.

As Astrid said, the Rules impose an obligation on legal entities to be available for electronic service. When we proposed it, this felt quite avant-garde. Electronic service would be very efficient both nationally and cross-border compared to sending letters by post, which might work not-so-well in all countries. We still wanted acknowledgement of receipt. This was also included in the rules on electronic service for legal persons, which generate a formal acknowledgement of receipt in the system. But we also included an electronic means of service for natural persons:

> Rule 74. Service guaranteeing receipt
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> (1) Service guaranteeing receipt includes
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> …
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> (c) service by other electronic means if the addressee has previously and explicitly agreed to use this service method or is under a legal obligation to register an email address for the purpose of service. Such service must be attested to by the addressee's acknowledgement of receipt, which must include the date of receipt, and which is returned by the addressee;

We wouldn't go as far as imposing an obligation on natural persons to accept service by electronic means, hence the need for explicit consent. However, if there is consent for service — for example, by email or on a kind of digital platform[8] —, then there must be an acknowledgment of receipt. We must make sure that the natural person has received the documents electronically.

Electronic means are present also in last resort service, as Astrid pointed out, in Rule 80: 'by publication of a notice to the addressee in a form provided for by law of the forum state, including publication in electronic registers accessible to the public', and 'by sending a notice to the addressee's last known address or e-mail address, if applicable'. This means that not only email but also WhatsApp or any kind of electronic means, including Facebook Messenger or the like, can be used.[9] The idea is that the right of defence may and needs to be protected also in a digital context. This has not been and is not without controversy, legal and cultural, in various parts of Europe.

ALAN UZELAC. — Let's imagine that we have a young defendant, a German digital nomad that moves to a beautiful island in Croatia. His change of address has been stuck in the

[8] For details on currently used ways of electronic service and the aspects of safety and authenticity cf. Wendy Kennett (fn. 5), at 74.12 – 74.14.

[9] Rule 80, comment 3.

bureaucratic process. Meanwhile, an attempt is made to notify the German address of the trial, but the letter is misplaced and lost. Finally, we have the service of last resort according to Article 80. The defendant has accounts on LinkedIn, Facebook, and Instagram. Furthermore, his friends and relatives should be able to find a way to contact him. Would Article 80 be appropriate as a mechanism of last resort? Or would this be a case where the Rules would insist on surfing the web to find out what is happening to this person, especially knowing that he belongs to the younger generation?

ENRIQUE VALLINES. — Your question seems to be, in essence, whether the court or the party responsible for service can be deemed to have made 'every reasonable effort to discover the addressee's present address' should they have failed to search on the internet. This is an interesting question about the scope and meaning of Article 80(2).

EVA STORSKRUBB. — This would be another example of the Rules not going into such detail. Rule 80(2) would allow such a search but would not make it mandatory. We have not imposed an obligation or offered any kind of explanation as to the specific scope of the court's duty to act. Moreover, where responsibility for service lies not with the court but with the parties, we have not specified how active or diligent the parties must be.

ENRIQUE VALLINES. — From this point of view, making 'every reasonable effort' to discover the defendant's address functions as an open standard of care, which only national law or jurisprudence can fully integrate.

ASTRID STADLER. — Exactly. Decisions on what constitutes reasonable effort can be made on a case-by-case basis. Sometimes there is no way to find out where the defendant is: there are always cases where the defendant escapes or simply vanishes.[10] This is the exact situation where we need Rule 80.[11] As a closing clause, Rule 80(3) sets forth that service shall be ultimately deemed to be made within two weeks of the last publication of the notice, subject to certain conditions. We must strike a balance between the defendant's

[10] This is a situation that particularly occurs in a cross-border setting, for details see Wendy Kennett (fn. 5) at 80.02 et seq. Today Art. 7(1) ESR 2020 requires Member States to provide assistance in seeking the addressee's address.

[11] Rule 80 (2) imposes an obligation on the parties and the court to make reasonable efforts to discover the addressee's present address. Efforts to find the present address must be documented in the files. The Model Rules thus follow the example of France, Art. 659 CPC; Italy, Art. 148 CPC; Luxembourg, Art. 157 NCP; Spain, Arts. 156, 161(4) and 163 LEC.

right to be heard and the claimant's right to present his case. The *fictio juris* of a period of silence after publication is often the only way to achieve that balance.

ENRIQUE VALLINES. — Rule 80 is not the only rule regarding service methods of last resort; I see much room for flexibility in Rule 81, which allows parties to carry out service in whatever manner they think is best if there is acknowledgement of receipt by the defendant:

> Rule 81. Cure for defective service
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> If service of documents does not meet the requirements of Rules 74-79, such non-compliance will be cured if the addressee's conduct proves that they received the document to be served personally and in sufficient time for them to arrange their defence or in any other way respond as required by the nature of the document.

I've witnessed this situation in Spain,[12] with courts circumventing the legal rules of service by sending emails or leaving individual letters in the defendant's briefcase. Later, the service was 'cured' by way of an acknowledgement of receipt. However, this is an illegal procedure.

ASTRID STADLER. — I'm glad you mentioned Article 81. It is an important article. We modelled it to follow the example of many European countries that already have a similar rule in place.[13] It is a reasonable standard.[14] What is the purpose of service? To make sure that the defendant knows what is going on: that a lawsuit has been filed and the relevant documents of the case. After all, the way a person has been served is often secondary to whether he has actually received the documents.[15] This is what Article 81 emphasises.

ENRIQUE VALLINES. — Let me return to electronic service. Eva, you said that the working group wouldn't go so far as to advocate a legal obligation for individuals to accept the

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[12] Under Article 166 of the Spanish Code of Civil Procedure, 'Service that has not been carried out in accordance with [the relevant provisions of the Code on service] and that may hamper the right of defence will be null and void. However, when the addressee has acted as if he had been served and has not invoked the nullity of the service in her first appearance before the court, service will then be fully effective, as if it had been conducted in accordance with the relevant legal provisions'.

[13] For the approaches taken in the EU Member States see Wendy Kennett (fn. 2) at 80.05 with further references.

[14] Rule 81 is based on Article 18(1) of the European Enforcement Order Regulation, for details see Dimitrios Tsikrikas in: Fernando Gascon Inchausti/Vincent Smith/Astrid Stadler, (fn. 2), at 81.01.

[15] In essence this is based on the principle "pas de nullité sans grief". Numerous Member States therefore have similar provisions on the cure of defective service: e.g. Art 114(2) French CPC; s. Cass. Civ. 24 mai 1984, Gaz. Pal. 1984, Cass. civ. 18 janv. 1989, JCP 1989, III 21286; Sec. 189 German CPC; Art 159 (3) Greek CPC.

service electronically. What kind of considerations did the group make to arrive at this conclusion?

EVA STORSKRUBB. — At the time, Denmark was the only country in Europe — perhaps things have changed since then — that obliged natural persons to be available for electronic service, even for the document instituting proceedings. Citizens in Denmark *must* have this kind of electronic mailbox for authorities of all kinds, even courts. Only people who are homeless, or who aren't accountable for themselves, can have an alternative system.

The same happens, after all, with a physical post-box. A natural person might be on holiday, but is assumed to be available 24/7, as in the digital sphere. This relates to the legal culture but also to the general trend towards digitisation and culture. Swedish media are reporting that many companies now have a function to close off company email, so that an employee cannot be reached outside working hours.

The question is, therefore, if courts are allowed to serve people electronically, when, or how quickly, will people access service? How do we socially perceive this kind of responsibility? This is a profound cultural aspect that is constantly evolving.

We see similar thinking behind the Recast Service Regulation[16] rules on electronic service. Even in a cross-border setting, direct electronic service — not via the designated transmitting and receiving agencies — is not possible in principle without prior consent. If I understand correctly, if there is this kind of platform, consent to join the platform does not suffice and there still needs to be specific consent. The same idea lies behind the need for express acknowledgment of receipt of an email, even though the system *knows* when the addressee has received and read the message.

MARÍA LUISA VILLAMARÍN. — I see many of your ideas — carefully opening up to more electronic service, but without forcing everyone to be available for that purpose — incorporated in the Recast Service Regulation.

[16] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast).

Another issue in this regard is the interoperability of these platforms across Europe. In a cross-border context, digital platforms must be interoperable.

EVA STORSKRUBB. — They should. The reality is, however, that only Danish courts or authorities can serve people on the Danish platform; a Finnish authority cannot.

ENRIQUE VALLINES. — This in turn poses a legal question: should the EU compel member states to make their systems available to each other?

EVA STORSKRUBB. — In the first drafts of our accompanying commentary, we tried to encourage this, but it is easier to envision it than to put it into practice. In the EU context, the interoperability of platforms and digital tools in general is now being discussed more, but there is still a long way to go.

ENRIQUE VALLINES. — When electronic service or any other method of direct service to the addressee is unsuccessful, we must then turn, as Astrid explained, to the 'alternative methods' of service listed in Rule 78. What is the general approach of the Rules to these 'alternative methods'?

MARÍA LUISA VILLAMARÍN. — We can start by asking whether we need a standard for these cases. A first point of reference is the Henderson case at the European Court of Justice.[17] Mr Henderson was sued by Novo Bank because of his repeated non-payments. After receiving an unanswered notice, he was condemned by the Portuguese courts. When he found out, he appealed the decision claiming that the notice was null and void, on the following grounds. First, because the 'acknowledgment of receipt of the registered letter was not included in the file, which constituted a breach of a formal requirement laid down by Portuguese legislation'. Second, because he did not personally accept service of the document instituting proceedings before the Court and ignored 'who had accepted the letter of service in question, so that he was not aware of the proceedings brought against him'. Third, Annex II to Regulation 1393/2007 was not transmitted to him and he was 'not informed of his right to refuse to receive service of a judicial document drawn up solely in the Portuguese language, whereas, in the present case, a translation into English or Irish would have been required'. Based on these questions, the Court of Justice analysed the

[17] Judgment of the Court (10th Chamber) of 2 March 2017, case C-354/15, Andrew Marcus Henderson v. Novo Banco S.A. The quoted excerpts are from paras. 97 and 99 of the judgment.

minimum standards to be met in alternative methods. In this respect, two fundamental ideas can be highlighted: firstly, these alternative methods must 'offer sufficient guarantees that the addressee is properly informed within the required time limits'; secondly, the option of a third party validly accepting court documents on behalf of the addressee must be 'reserved for clearly defined situations' to guarantee the defendant's rights. Moreover, for this to be possible, the addressees must in any case be adult persons 'who are within the person's habitual residence and who are members of his family or employees in his service'.

ENRIQUE VALLINES. — Going to Rule 78, how are these cases of alternative service defined?

MARÍA LUISA VILLAMARÍN. — Firstly, age or, more generally, capacity must be considered. National legislations vary considerably in this regard. For example, in France, recipients need to be older than 12; older than 14 in Spain, Italy, and Hungary; older than 15 in Luxembourg and Finland; older than 16 in Belgium.[18] The Recast Service Regulation is limited to adults. Rule 78 opted for a more open-ended, flexible rule, which avoids defining a threshold and which should include, for instance, minors close to legal age. The recipient should simply be 'able', which refers to a case-by-case assessment.

Secondly, it is also necessary to define the relationship of these potential addressees to the defendants. Rule 78 limits the addressees to cohabitants and persons working for the defendant, in line with the recast service regulations. Furthermore, to avoid conflicts of interest, Rule 78(3) excludes those who are opposing parties to the defendant, as is the case in most European countries. Paragraphs (1) and (2) of Rule 78 require the will of the person served.

Thirdly, the place where alternative service is to be effected must also be taken into account. Rule 78(1) limits the place to the defendant's residence or premises. Places *close* to the defendant's residence or premises are not acceptable.

Fourthly, the will of the person who receive the service is also required by Rule 78 (1) and (2).

[18] For details on national provisions in the Member States see also Wendy Kennett (fn. 2) at 78.02-78.03.

ENRIQUE VALLINES. — If alternative service also fails, we have no choice but to resort to the 'methods of last resort' provided for in Rule 80. Such cases are far from rare.

MARÍA LUISA VILLAMARÍN. — Of course, effective rules for such cases are essential. The dilemma is the conflicting rights and interests at stake. On the one hand, we have the claimant's right to legal protection, which could be totally impeded if the defendant could not be searched by all the legal available means, since this would leave this right devoid of content. In this sense, the Court of Justice of the EU states that a 'objective of general interest' in the EU is 'the aim of avoiding the situation of denial of justice in which the plaintiff would find himself if it were impossible to locate the defendant'.[19] On the other hand, there is the defendant's right of defence, that obliged to be especially cautious when serving judicial documents. For this reason, when it comes to the methods of last resort, a certain degree of diligence is required from both the court and the parties, particularly the claimant. Rule 80 does not refer to the standard of care required from the parties.[20]

The court's duty is clearly defined in Rule 80: it must make 'every reasonable effort', using similar terms as those of the Recast Service Regulation,[21] which in turn mirrors case law from the European Court of Human Rights requiring that national authorities take the action that could legitimately and reasonably be expected from them.[22] However, it is not enough for the court to try to serve. The court must exhaust all means of service at its disposal. This means that, in some cases, it may be necessary to search for an alternative address or to carry out further investigations.

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[19] Judgment of the Court (1st Chamber), 15 March 2012, G v. Cornelius de Visser, Case C-292/10. Judgment of the Court (1st Chamber) of 17 November 2011, Hypoteční banka a.s. v. Udo Mike Lindner, Case C-327/10.

[20] An example of this standard of care required to the defendant can be found in ECHR Case Inmoterra International Denia v. Spain, 20 May 2020, where the unsuccessful service of document was attributed to the inaction and lack of diligence of the defendant (para. 30).

[21] Article 22 (2) (c).

[22] For example, in the recent Case *Karesvaara and Njie vs Spain*, of 15 December 2020 (Appl. 60750/15), the European Court of Human Rights ordered Spain to pay the plaintiffs some 11,000 euros, finding that, having the Spanish Courts have served the judicial document by means of public announcement, by attaching the summons to the bulletin board of the Court house, without any other attempt to serve them personally, and, therefore, considered that the national authorities had not taken all the measures that had legitimately and reasonably been expected of them, especially since, in the subsequent enforcement proceedings, the plaintiffs' property, as well as alternative addresses, were quickly located (para. 55).

The claimant's burden in this regard is not expressly laid down in either Rule 80 or the Regulation, but we can find guidance in comparative case law. For example, in Spain, the applicant bears the procedural burden of verifying that such an act has been attempted in the number of places where there is a sufficient rational basis for estimating that the person lives, and must employ the ordinary diligence — not a heightened standard of care — to acquire the corresponding knowledge.[23] Therefore, it must provide the court with all information in its possession about the defendant, resulting in nullity of service if bad faith can be assumed, as usually happens when the claimant unlawfully conceals the defendant's address.

ENRIQUE VALLINES. — In fact, an unscrupulous claimant might even think of playing with the rules of service to favour a method of last resort and thus curtail the defendant's right of defence.

MARÍA LUISA VILLAMARÍN. — Fictitious methods of last resort are indeed problematic and must be used carefully and exceptionally. Rule 80 addresses this problem with three proposals. First, it calls for the implementation of the most efficient channels for publication, recommending the generalisation of electronic registers or noticeboards (paragraph 1.b). Second, it calls to serve always to the last known address or email address, if applicable (paragraph c). Third, it establishes a further safeguard, because it also suggests accompanying the publication, where possible, with effective channels, such as warnings or alerts.

Today, almost 85% of the world's population owns a smartphone. So why not use SMS, WhatsApp, social media, at least for alerts or to let people know there is a publication waiting to be read? And why not use these methods directly for publication? This happens already in several countries, such as the USA, the UK, Bulgaria, or Estonia. Rule 80 is open to this new option, as explained in the commentary.

ALAN UZELAC. — In the wake of this technology note and the previous reflection on the changes brought about by the pandemic, perhaps some areas of the project are in danger of rapidly becoming obsolete. The chapter on process notification could be one of these areas.

[23] *Ley de Enjuiciamiento Civil*, Article 155. See also Supreme Court Judgments 287/2017, of 12 May 2017; 2147/2016, of 18 May 2016; 2630/2016, of 9 June 2016.

Croatian law is usually rather conservative, yet I see that it exceeds some of the service standards of the Regulation, which should be cutting-edge and future oriented. In 2019, we started with a broad obligation — not only for legal persons but also for lawyers and other legal professionals such as experts — to open safe electronic mailboxes in the national system. We have been recently stretching this duty even further. This is to say that, if the rules are to be resistant to time, they must be drafted with electronic communication at the forefront. However, if I look at the current service rules, I find that most of them concern old-fashioned paper communication, while very few focus on electronic communication. This situation should probably be reversed, which leads me to believe that, after the pandemic, these rules could and probably should be revised.

The same happens with the 'reasonable effort' standard. According to Rule 80 (2), 'reasonable effort' needs to be made only 'to discover the addressee's present address'. Nowadays, the best proof of communication is communication itself. As María Luisa said, people use their mobile phones for all kinds of communication. Therefore, it is not the case to strive to find an email address — which is already a slightly outdated method of communication. Instead, one should try to reach the recipient by the best means available. The decisions of the Court of Justice cited by María Luisa were also a bit broader.

Considering the pandemic and recent developments in civil procedure, we need to change our objectives, tools, and means. Yes, the Rules of Procedure could and should be revised, and better sooner than later.

EVA STORSKRUBB. — Not necessarily. Professionals are already mentioned in our rules for legal persons. As I said, we were quite avantgarde in 2014, where we said that legal persons and professionals are obliged to have a platform. We did not specify the type of electronic platform but said that they must be available for electronic service.

We distinguished between all legal persons, professionals, and individuals. Apart from Denmark, I know of no other European country that obliges every single citizen to set up an electronic mailbox to receive official communications from all authorities, including the courts.

Furthermore, I don't think all natural persons in Europe are able or should be required to effectively use these electronic services. Some people cannot, others simply do not want to.

Can we really force everyone to be available? The question is broader. When and how should citizens be bound to be electronically available? Will I be obliged to check my digital mailbox? If I go to a meditation retreat for one week, will some procedural timetable collapse? Do we really want to relax on social media and suddenly find a court or a tax notice on the screen? This is a sensitive political or constitutional issue that concerns the relationship between citizens and the state and that we cannot ignore.

ASTRID STADLER. — I agree with Eva: the pandemic has not made this set of rules obsolete. We have already placed a strong emphasis on electronic service as the standard mode of service. We are not talking about email, but about a designated electronic information system, as stipulated in Rule 74. We have deliberately avoided going into technical details because this must be open to technical developments.

For companies, this is the ordinary way of service. For individuals and consumers, it can become the normal mode if they explicitly consent. I believe the consent of natural persons is necessary. Otherwise, the courts will probably use email addresses that are no longer valid or not regularly checked by the recipient. This would create a lot of uncertainty.

The postal service still has residual importance in the Rules and in practice. The only place where post offices are mentioned in the Rules is when it is not possible to meet the addressee or to leave documents behind. The addressee must be informed of the most appropriate place to collect the documents. According to Article 78(1)(c), this may be 'at a post office or at the competent public authority', such as a town hall or police station; the important thing is that the addressee knows where to collect them.[24]

In general, the Rules were designed to remain open to further development, a necessary feature of a good model regulation. After all, model rules are not immediately applicable laws. National legislators that want to reform their service rules are free to make modifications and adapt to new developments. Therefore, I do not think they are obsolete or outdated.

MARÍA LUISA VILLAMARÍN. — I'd make a distinction between the present and the future. Today, electronic service of documents can only be imposed on legal persons; natural

[24] For details see Wendy Kennett (fn. 5) at 78.06.

persons must have given their consent beforehand — and with due safeguards. Tomorrow, electronic service will probably be made mandatory. But we must focus on the present. And today, whether we are using electronic, postal, or other personal services, flexibility is what matters most. We must avoid the temptation to impose an inflexible protocol that could end up being, *hic et nunc*, inefficient.

ENRIQUE VALLINES. — Moreover, because this would freeze the law at some point, planting the seeds of legal obsolescence as soon as further technical developments appear, which we cannot foresee now.

ALAN UZELAC. — I believe that the future is already here. As I said, in a country as antiquated as Croatia, an electronic signature chip with a simple reading device has been integrated into the judicial environment over the past five years. Whenever there is new documentation or a new movement in a case, I automatically receive a notification via my mobile phone. It also reaches my client's inbox faster (an interesting glitch of the system).

We no longer have only one channel of communication. Our world is based on communication redundancy. I wouldn't consider social media platforms like Facebook or Instagram as exclusive channels. Also, I don't think the obligation to notify the process is respected when sending something via Instagram. However, it might be the best way to inform the other party of the receipt of important court documents. This could trigger communication and is the only way to safeguard the right to be heard in the current times.

All this could perhaps have been emphasised more openly in the Rules — in any case, this is not a serious criticism.

EVA STORSKRUBB. — We discussed the issues you raised intensively. Whichever medium is used, be it postal or electronic platforms, it is necessary for people or companies to follow the Rules or go to the specified address for the system to work. However, when people are not registered, have multiple addresses, or run fictitious companies, these are the most difficult cases in terms of service. This makes it easier for them to hide as defendants. We must have more levels. I agree that, in the future, the formal rules of electronic service may make it more difficult for people to hide. Competing means of service will help us facilitate access to justice. It just needs to be coordinated, organised, and formalised if everyone is to be available electronically.