NATIONAL REPORT FOR AUSTRIA ON CROSS-BORDER SERVICE OF DOCUMENTS

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Questionnaire for National Reports

On the Cross-border Service of Documents

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This questionnaire addresses practical and theoretical aspects regarding the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. Each partner should provide substantive answers for their respective Member State (or additional Member State, if specifically stipulated by the coordinator). Where the term "Regulation" is used below, it refers to Regulation (EU) 2020/1784 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.

For useful information please refer (among other sources) to:

- 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) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1784)
- Impact assessment of the 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) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2018:287:FIN)
- Opinion of the European Economic and Social Committee on a) Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (COM[2018] 378 final — 2018/203 [COD]) and on b) 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) (COM[2018] 379 final — 2018/204 [COD]) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2019.062.01.0056.01.ENG&toc=OJ%3AC%3A2019%3A062%3ATOC)
- The provided information in the European Judicial Atlas in civil matters on the service of documents (https://e-justice.europa.eu/38580/EN/serving_documents_recast)
- Briefing of the European Parliamentary Research Service (EPRS) on the reform of the service of documents regulation (2019)

(https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642240/EPRS_BRI(2019)642240_EN.pdf)

- Other *travaux preparatoires* of the Recast Taking of Evidence Regulation (see e.g. https://www.europeansources.info/record/proposal-for-a-regulation-amending-regulation-ec-no-1393-2007-on-the-service-in-the-member-states-of-judicial-and-extrajudicial-documents-in-civil-or-commercial-matters-service-of-documents/)

The structure of each individual report should follow, to the utmost extent possible, the list of questions enumerated below and the given structure. If authors choose to address certain issues elsewhere within the questionnaire, they are urgently requested to make cross-references and specify where they have provided an answer for the respective question (e.g. "the/an answer to this question is already provided in 1.6."). Following the structure of the questionnaire will enable and ease comparisons between the various jurisdictions.

The list of questions is not to be regarded conclusive. It might be that important issues in certain jurisdictions are not mentioned. Please address such issues on your own initiative where appropriate. On the other hand, questions that are of no relevance for your legal system can be left aside; in this case, you are requested to add a reference to the lack of relevance.

Please provide representative references to court decisions and literature. You are also asked to illustrate important issues by providing examples from court practice. If possible, please include empirical and statistical data. **Where the answer would be "no" or "not applicable", because something is not regulated in your national legal order, if possible please specify how you think it should be regulated**.

Please do not repeat the full questions in your text. There is no limitation as to the length of the reports.

Language of national reports: English.

Deadline: 31 March 2023.

In case of any questions, remarks or suggestions please contact the project coordinators, prof. dr. Vesna Rijavec: vesna.rijavec@um.si and prof. dr. Tjaša Ivanc: tjasa.ivanc@um.si.

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NATIONAL SERVICE OF DOCUMENTS

1. **What is the legal basis for service of documents in your Member State? Is there a special act regulating the service of documents within your national legal system?**

   The transmission of documents by courts and administrative authorities is largely regulated by the Austrian Service of Documents Act (hereinafter: ZustG). In addition, the Austrian Civil Procedure Code (hereinafter: ZPO) contains special provisions for civil proceedings in §§ 87 *et seq.* ZPO and the Austrian Court Organisation Act (hereinafter: GOG) regulates electronic legal transactions in §§ 89a *et seq.* GOG.[1] The Austrian Rules of Procedure for the Courts of First and Second Instance (hereinafter: Geo) also contain provisions on service in §§ 123 *et seq.* Geo.

2. **Explain the term "service" as used in your national legal system. If there is a legal definition, please quote it.**

   In Austria, there is no legal definition of the term "service", although a general definition can be derived from the relevant provisions of the ZustG. Service is - within the scope of application of the ZustG - the transmission of documents by courts and administrative authorities to the addressee in execution of the law.[2] The Austrian Supreme Court ("Oberster Gerichtshof – OGH") has defined service as follows: Service is the legal process of notification by which the person designated as the addressee of the document (addressee) is given the opportunity to take notice of a document addressed to him or her by order of the court.[3]

3. **How do you define "civil and commercial matters" in your national legal system? Does this definition differ from the term of the Regulation, and if so, in what way?**

   In Austria, this term is not defined in national laws, but it is used in various laws, e.g. in § 79 Verwertungsgesellschaftsgesetz (hereinafter: VerwGesG). There is no general definition in case law and literature either. However, it is pointed out that the term "civil and commercial matters" is to be interpreted autonomously under EU law (e.g. Brussels I*bis* Regulation *et al*).[4]

   § 1 Austrian Court Jurisdiction Act (Jurisdiktionsnorm – hereinafter: JN) only uses the term "civil matters" ("bürgerliche Rechtssachen") as this term (as well as the JN as a whole) includes commercial matters in national civil (procedural) law.

4. **For what purpose does your legal system define the concept "civil and commercial matters"?**

   § 79 VerwGesG regulates the composition of the Judicial Penal in copyright cases established at the Federal Ministry of Justice. The chairman has to be judge at the Supreme Court, the other two judges have to be members of other courts concerned with civil and commercial matters. Furthermore, the wording is used in national law when referring to European law (e.g. § 422 of the Austrian

[1] *P.G. Mayr* in *G. E. Kodek* and *P. G. Mayr*, Zivilprozessrecht[5] (facultas 2021) Rz 385; *W. H. Rechberger* in *W. H. Rechberger* and *D-A. Simotta*, Grundriss des Zivilprozessrechts[9] (MANZ 2017) Rz 513.
[2] *L. Bumberger* and *Chr. Schmid*, Praxiskommentar zum Zustellgesetz (NWV 2018) § 1 ZustG Rz 3.
[3] RIS-Justiz RS0106442, for the first time OGH 21.12.1995, 3 Ob 116/95 with reference to *H. W. Fasching*, Lehrbuch des österreichischen Zivilprozeßrechts: Lehr- und Handbuch für Studium und Praxis[2] (Manz 1990) Rz 522; see also *E. Gitschthaler* in *W. H. Rechberger* and *T. Klicka* (eds.), Kommentar zur ZPO[5] (Verlag Österreich 2019) § 87 Rz 3; *Rechberger*, supra n. 1, Rz 514.
[4] *A. Klauser* and *G. E. Kodek*, JN – ZPO[18] (MANZ 2018) Art 1 EuZVO 2007 Anm 2; *G. Kodek* in *H. W. Fasching* and *A. Konecny*, Kommentar zu den Zivilprozessgesetzen V/1[3] (MANZ 2022) Art 1 EuGVVO 2012 Rz 51 *et seq*.

Enforcement Act in civil matters [Exekutionsordnung – EO] which refers to the Regulation No 2014/655 on European Account Preservation Orders).

Since the term is not defined in Austrian national laws , this definition is only used with regard to the application of European law or international treaties and agreements.

5. **How are the concepts "judicial and extrajudicial documents" defined in your legal system? Does your national legal system distinguish between judicial and extrajudicial documents in the context of (official) service? If yes, please define these categories and give examples.**

The terms "judicial and extrajudicial documents" are not defined in Austrian law. In accordance with the case law of the ECJ, judicial documents are understood to be those that are related to judicial proceedings, whereas extrajudicial documents – in Austrian literature concerning European civil procedure law – are independent of such proceedings.[5] For the Austrian legal system, the following documents can be considered extrajudicial: enforceable deeds of record rights, letters of termination, reminders or call letters, declarations of assignment, arbitral awards and protest of bills of exchange.[6]

6. **What is the purpose of service of documents? Are there overarching principles of procedures that are intertwined with the service of documents in your Member State?**
The purpose of service is to enable the addressee to take cognisance of the document.[7] This is closely linked to the right to be heard by both parties, which is enshrined in Art 6 ECHR.[8] The far-reaching importance of this procedural principle is also shown by the fact that its violation is sanctioned with double nullity.[9] Furthermore, service of documents ensures the continuance of proceedings and is thus also part of the procedural principle of official conduct.[10] Another procedural principle for which lawful service is of great importance is the weakened principle of enquiry, which enables the court to take evidence *ex officio* without delay.[11] If the (required) service is unlawfully refused by the court, it is also a violation of the constitutionally guaranteed right to a lawful judge under Art 83 (2) of the Austrian Constitution ("Bundesverfassungsgesetz" – hereinafter: B-VG).[12]

7. **Who is responsible for the service of documents?**

§ 87 (1) ZPO clarifies that the court is primarily responsible for service: "Unless this Act provides otherwise, service shall be effected *ex officio* in accordance with § 89a of the Court Organisation Act, RGBl. No. 217/1896, as amended, otherwise in accordance with the Service of Documents Act, Federal Law Gazette No. 200/1982, as amended". Therefore, it is argued that § 87 (1) ZPO stipulates a primacy of application of the service provisions contained in the ZPO (arg: "unless") whereas the §§ 89 *et seq*. GOG and those of the ZustG are only secondary. What is more, the court also has to

[5] EuGH C-14/08, *Roda Golf & Beach Resort SL*, ECLI:EU:C:2009:395.
[6] Introductory Decree to the EC-Regulation 2000/1348 ("Einführungserlass zur EuZVO"), JMZ 30.043 A/6-I.11/2001; see also *F. Horn* in *R. Fucik* et al (eds.), ZPO[12] (MANZ 2015) Art 16 EuZVO 2007.
[7] See OGH 3 Ob 116/95; *Rechberger*, supra n. 1, Rz 514.
[8] *Mayr*, supra n. 1, Rz 89.
[9] See § 477 (1) No. 4 and 5 ZPO; *Rechberger*, supra n. 1, Rz 483.
[10] *Rechberger*, supra n. 1, Rz 462; *Mayr*, supra n. 1, Rz 71.
[11] *Mayr*, supra n. 1, Rz 74; see §§ 183 and 371 (1) ZPO.
[12] *M. Zußner* in *A. Kahl* and *L. Khakzadeh* and *S. Schmid* (eds.), Kommentar zum Bundesverfassungsrecht B-VG und Grundrechte (Jan Sramek Verlag 2021) Art 83 B-VG Rz 22 with reference to VfGH, VfSlG 19.297/2011.

monitor the service process.[13] The obligation to receive (duty to collaborate) by the recipient is directly related to service *ex officio*; if the document is not accepted, it is either deposited or left behind with the effect of service.[14]

7.1. If the court is responsible for service: What can be done if the court has failed to act? Can one sue the state and claim damage? Or can one sue the court to initiate the service?

If service is not executed properly, the proceedings conducted or the decision rendered nevertheless shall be null and void [§ 477 (1) and (4) ZPO] and no time limits shall be triggered.[15] However, there is no action to initiate the service process.

Pursuant to § 4 ZustG, the person entrusted with service (the service agent) acts as an organ of the authority/court whose document is to be served with regard to ensuring the lawfulness of service. Therefore, deliverers are functionally organs of the authority or court and consequently act in a sovereign capacity within the scope of service. § 4 ZustG clarifies that their conduct is to be attributed to the authority (the court), so that its legal entity is also liable for damages resulting from a misconduct of the deliverer pursuant to the Public Liability Act (Amtshaftungsgesetz – hereinafter: AHG).[16] The expression "lawfulness" ("Gesetzmäßigkeit") implies that liability does not only apply to violations under the ZustG, but also to violations of other regulations.[17]

For damages caused by the universal service operator or the delivery agent through violation of the Postal Market Act (Postmarktgesetz – hereinafter: PMG) or the ZustG, the Federal Government is liable in any case under the AHG according to the special provision of § 17 (2) PMG; the universal service operator or the delivery agent are thus not liable to the injured party in this regard.[18]

7.2. If the parties are responsible for service: Within what time frame must service be affected?

The only case of service by the party itself is direct service pursuant to § 112 ZPO: If both parties are represented by lawyers, each lawyer who submits a pleading must send a copy directly to the lawyer of the opposing party in accordance with § 112 sentence 1 ZPO. According to the wording of the provision, this has to be done by a carrier, the post or by fax or electronic mail, but nowadays the direct transmission via the platform for electronic service of documents ("Elektronischer Rechtsverkehr" hereinafter: ERV) will be the rule,[19] as lawyers are obligated to participate in the ERV. Pursuant to § 112 sentence 2 ZPO, service is not bound to a time limit because direct service is excluded in any case that

[13] See *S. Albiez* in *J. Höllwerth* and *H. Ziehensack* (eds.), Taschenkommentar zur ZPO (LexisNexis 2019) § 87 ZPO Rz 1-3; *H. Stumvoll* in *H. W. Fasching* and *A. Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen II/2[3] (MANZ 2016) § 87 ZPO Rz 2 *et seq*.; *Rechberger*, supra n. 1, Rz 514.
[14] In detail: *Stumvoll*, supra n. 13, § 87 ZPO Rz 8.
[15] *Albiez*, supra n. 13, § 87 ZPO Rz 7; *Mayr*, supra n. 1, Rz 405.
[16] *Schulev-Steindl*, Verwaltungsverfahrensrecht[6] (Verlag Österreich 2019) Rz 402.
[17] *Stumvoll*, supra n. 13, § 4 ZustG Rz 7 with further references.
[18] *Schulev-Steindl*, supra n. 16, Rz 402.
[19] In detail: *D. Zoubek*, '§ 112 – Übermittlungen mittels webERV', 38 Österreichisches Anwaltsblatt (2008) p. 344.

would lead to triggering an emergency deadline [see § 128 (1) half-sentence 1 ZPO]. However, the court may give a rectification order if direct service on the opposite party can not be proved.[20]

7.3. If the responsibility of service is shared between the court and the parties: Under your Member State's law, how is it determined who is responsible for the service of documents?

The ZPO clearly allocates the responsibility: Normally the service is executed by the court *ex officio* (typically through the national postal service). The only exception is when both parties are represented by a lawyer (see before q. 7.2).

7.4. What are the national requirements for a valid service of documents in your Member State?

If service with proof of service is ordered, it shall be effected by completing and signing the certificate of service.[21] § 22 (2) ZustG stipulates that the addressee of the document must confirm the service by signing and stating the date. If the transferee is not the addressee, he/she must also confirm his/her close relationship to the addressee. The delivery agent/carrier must also sign the certificate of service and return it to the court.[22] For the service to be legally effective, the certificate of service must contain the formally correct and complete information of the serviced document.[23]

If service is made without proof of delivery, the document is deposited in a delivery facility or left at the place of service, see § 26 (1) ZustellG. The service is then deemed to have been effected on the third day after the handover to the delivery agent, see § 26 (2) ZustG. For civil proceedings, § 126 (2) Geo stipulates under which circumstances service is to be effected without proof of service; e.g. for an attempt on a court settlement according to § 433 ZPO or for personal appearance at the court hearing according to § 182 (1) No. 1 ZPO. Pursuant to § 106 (1) ZPO, actions must always be served with proof of service.

8. What documents must be sent to the respondent? Who prepares the documents?

The opponent is served with pleadings submitted by the other party,[24] decisions of the court and other statements[25] as well as documents of the court.[26] In principle, pleadings must be sent to the court in so many identical copies that each opponent can be served with one.[27] However, if both parties are represented by lawyers, the pleadings submitted must be sent directly by the submitting lawyer to the representative of the opposing party pursuant to § 112 ZPO. This does not apply to pleadings that must be served only to the addressee or the service of which triggers an emergency deadline (see before q. 7.2.).

[20] *Stumvoll*, supra n. 13, § 112 ZPO Rz 8.
[21] *Stumvoll*, supra n. 13, § 22 ZustG Rz 4.
[22] *Mayr*, supra n. 1, Rz 393.
[23] RIS-Justiz RS0036449; OGH 5 Ob 592/77; 6 Ob 93/09h; *Stumvoll*, supra n. 13, § 87 ZPO Rz 9.
[24] *Mayr*, supra n. 1, Rz 368.
[25] *Rechberger*, supra n. 1, Rz 514.
[26] *Mayr*, supra n. 1, Rz 385.
[27] *Mayr*, supra n. 1, Rz 368.

9. What information or other aspects must be included in the documents?

§ 75 ZPO determines the necessary content of pleadings. According to No. 1 *leg cit* (as amended by Federal Law Gazette I 2022/61), this includes the designation of the court, the first name and surname, the date of birth and the place of residence of the parties (if known), the company register number (if available), the party status, the indication of the representatives acting for the parties as well as the designation of the subject matter of the dispute. No. 2 *leg cit* also requires the designation of the enclosures and their number as well as the indication whether the enclosures are attached in original or copy. Furthermore, according to No. 3 *leg cit*, the signature of the party itself and that of its legal representative, agent or lawyer must be included.

In addition to these requirements regarding the form of the pleading, there are also requirements regarding its content, which are described in § 76 ZPO. For example, the pleading must describe the factual circumstances on the basis of which the claim made in the pleading is justified and, if necessary, contain evidence.

9.1. Please provide the definition of the term "address for service" under your national legal system.

The term "address for service" is defined in § 2 No. 3 ZustG as follows: "a place for service (delivery point)" (No. 4) or "electronic service address" (No. 5).

According to § 2 No. 4 ZustG, a place for service is "the recipient's home or other accommodation, place of business, registered office, office or also the recipient's place of work; in the case of service on the occasion of an official act also its place, or a place indicated by the recipient to the authority for service in an ongoing procedure". The electronic address for service is defined in § 2 No. 5 ZustG as "an electronic address specified by the recipient to the authority for service in a pending or simultaneously pending proceeding".

9.2. Provide definitions of other (mandatory) aspects mentioned in Question 9.

§ 75 (1) ZPO requires the court to be designated. This refers to the court to which the pleading is submitted.[28] According to No. 1 *leg cit*, the first name and surname of the parties must also be stated, whereby not all first names have to be stated.[29] But it is necessary that the name is written out in full.[30] When designating the place of residence, the flat is to be precisely described by stating the district, the street, the house number as well as the staircase and door number (if available).[31] Furthermore, § 75 No. 1 ZPO requires the indication of the party status. In the first instance proceedings, it must therefore be stated whether the person is a plaintiff or a defendant. In higher instances, it must be recognisable which person is the appellant.[32]

[28] *A. Konecny* and *B. Schneider* in *H. W. Fasching* and *A. Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen II/2[3] (MANZ 2016) § 75 ZPO Rz 2.
[29] OGH 4 Ob 43/92, 8 Recht der Wirtschaft (1993), p. 39.
[30] *Konecny* and *Schneider*, supra n. 28, § 75 ZPO Rz 6.
[31] OGH 2 Ob 650/84; *Gitschthaler*, supra n. 3, § 75 Rz 5.
[32] *Konecny* and *Schneider*, supra n. 28, § 75 ZPO Rz 10.

If the party subject is a limited liability company or cooperative society, the exact wording of the company name[33] and the company register number must be indicated.[34] The company name is the name of an entrepreneur entered in the commercial register under which he conducts his business and gives his signature according to § 17 (1) UGB (Austrian Commercial Code). The company register number is a unique identification feature of legal entities and remains unchanged for the duration of their existence.[35] Every legal entity referred to in § 2 UGB,[36] has to be listed in the database of the commercial register under such a number (§ 30 UGB). In the case of such legal entities, it is not the place of residence but the registered statutory seat that is to be designated,[37] i.e. the place where the company has a business, where the management is located or where the administration is done.[38] The information must be sufficiently complete to enable the pleading to be served on the correct address without difficulty.[39]

Furthermore, § 75 No. 1 ZPO requires that the legal representatives are indicated. This is necessary if the party is incapable of taking legal action,[40] and thus cannot take legal action himself/herself.[41] This includes legal representatives and proxies such as parents, health care proxies and legal guardianship (of adults).[42] These representatives, like the parties, ought to be clearly individualised.[43] § 75 No. 1 ZPO also requires the designation of the matter in dispute, "the subject of the civil proceedings".[44] As a general rule, the amount in dispute is stated on the first page of the pleading in the case of proceedings for pecuniary claims. In all other cases, the matter in dispute is described with keywords.[45]

§ 75 No. 2 ZPO stipulates that the enclosures be designated by type and number and that it be stated whether they are attached in original or copy form. "Original" means the original form of the enclosure, copy means a (another) transcribed version or copy of the original.

According to § 75 No. 3 ZPO the pleading must also be signed: either by the party or his or her legal representative or, in proceedings in which a lawyer is compulsory, by the lawyer. The limit of the amount in dispute for the obligation to be represented by a lawyer is 5.000 € for the district court; in all higher courts, the parties must always be represented by a lawyer pursuant to § 27 (1) ZPO.

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[33] *Konecny* and *Schneider*, supra n. 28, § 75 ZPO Rz 13.
[34] *Albiez*, supra n. 13; § 75 ZPO Rz 7; *Gitschthaler*, supra n. 3, § 75 Rz 4.
[35] *W. Szöky* in *M. Straube* et al. (eds.), UGB I[4] (MANZ 2020) § 30 FBG Rz 3.
[36] „Public limited companies, limited liability companies, commercial cooperatives, mutual insurance companies, savings banks, European Economic Interest Groupings (EEIGs), European Companies (SEs) and European Cooperative Societies (SCEs) are entrepreneurs by virtue of their legal form."
[37] *Albiez*, supra n. 13; § 75 ZPO Rz 8; *Konecny* and *Schneider*, supra n. 28, § 75 ZPO Rz 15.
[38] § 5 (2) GmbHG.
[39] RIS-Justiz RS0036329; OGH 4 Ob 650/84; OLG Wien 3 R 128/88, 57 Evidenzblatt der Rechtsmittelentscheidungen [44 Österreichische Juristenzeitung] (1989) p. 566.
[40] *Gitschthaler*, supra n. 3, § 75 Rz 2/2.
[41] *Kodek*, supra n. 1, Rz 310.
[42] *Gitschthaler*, supra n. 3, § 75 Rz 2/2.
[43] *Albiez*, supra n. 13; § 75 ZPO Rz 10; *Konecny* and *Schneider*, supra n. 28, § 75 ZPO Rz 21.
[44] *Albiez*, supra n. 13; § 75 ZPO Rz 11; *Kodek*, supra n. 1, Rz 569.
[45] *Konecny* and *Schneider*, supra n. 28, § 75 ZPO Rz 23.

10. How are documents <u>without a cross-border element</u> served in your national jurisdiction? What is the usual method of service? Please explain the different methods of service in detail.

The types of service under national law are primarily regulated in the ZustG, but also in part in the ZPO. Basically, a distinction is made between physical service and electronic service.

Physical service can be effected by the postal service (which is Österreichische Post AG according to § 2 No. 6 ZustG), by court or municipal employees, by means of deposit, by publication in an edict or by a curator. Furthermore, a distinction is made as to whether service is effected with or without proof of service (see before q. 7.4).

Pursuant to § 88 (1) ZPO, domestic service primarily has to be effected by post. In certain cases ordered in § 88 (1) No. 1-6 ZPO, service may also be ordered by employees of the court or the municipality.[46] This is the case

- *"if no postal delivery service is established for the place where service is to be made"* (No. 1),
- *"if service by post would be too late or proof of delivery would not be available in time"* (No. 2),
- "*if the person to be served or his or her address is not precisely known and is only to be determined by the deliverer"* (No. 3),
  - i.e. if the court only knows the work place of the addressee in detail but not his full name or
  - if the exact designation of the place for delivery is unknown (door number in a great multi-apartment building)
- *"if the document must be served at a time when postal deliveries are not made"* (No. 4),
- *"if the document is to be served on the occasion of another official act or to an arrested person (prisoner)"* (No. 5) or
- *"if the document is to be served in the vicinity of the court building or in communication with nearby official offices or notary's offices, and if the administrative burden involved is less than in the case of service by post"* (No. 6).

If the court orders a "Zustellung zu eigenen Handen" (service at your own hand), the document must be served only to the addressee.[47] This is rarely the case any more (e.g. for a court order appointing an adult guardian according to § 116a Außerstreitgesetz [herein after: AußerstrG]). If the addressee is not at the place of service at the time of the service attempt, the document has to be deposited according to § 17 ZustG (on this immediately, see also q. 14.1.).

If servicing to a substitute recipient is also admissible (e.g. § 106 ZPO service of an action) and the addressee is not present at the place for service, but a substitute recipient is present, then the document may also be served to the substitute recipient if "*the deliverer has reason to believe that the addressee or a representative as defined in § 13 (3) ZustG is regularly present at the delivery point*", see § 16 (1) ZustG.

[46] See *S. Albiez*, supra n. 13, § 88 ZPO Rz 2 with further references; *Stumvoll*, supra n. 13, § 3 ZustG Rz 2.
[47] § 21 ZustG; *S. Albiez*, supra n. 13, § 87 ZPO Rz 14; *Mayr*, supra n. 1, Rz 395.

According to § 16 (2) ZustG a "substitute recipient" can be "*any adult person who resides at the same delivery point as the addressee or is an employee or employer of the addressee and who – unless living in the same household as the addressee – is willing to accept*".

If neither service to the addressee nor to the substitute recipient is possible, service shall be made by deposit. The prerequisite for this is that there is reason to believe that the addressee is regularly at the place of service. The deposit is usually made at the competent office (normally the nearest by post office), if there is no such office, at the municipal office.[48] The addressee must be notified of the deposit in written form pursuant to § 17 (2) ZustG. The document is deemed to have been served on the first day of the time limit, see § 17 (3) ZustG (see also q. 14.1).

If no address for service is known or if documents are to be served to several persons, documents can be delivered by including a message in the edict database.[49] § 116 ZPO allows the appointment of a curator if the whereabouts of persons are unknown and procedural acts must be taken to protect their rights. This appointment is to be recorded in the edict database according to § 117 (2) ZPO. If a curator is appointed, the document shall be deemed to have been served pursuant to § 118 (1) ZPO upon service to the curator.

Furthermore, it is possible to serve documents electronically in Austria. In this case, the rules on platform for the electronic service of documents ("Elektronischer Rechtsverkehr" – ERV) primarily apply. However, service by electronic delivery is only possible if the recipient participates voluntarily or is obliged to do so. Lawyers, notaries and banks, among others, are obliged to participate according to § 89c (5) GOG. For the content of the submissions, the rules for pleadings (see before q. 9 and 9.2.) must be observed, but a signature is not required.[50] Pursuant to § 89d (2) GOG the time of service of electronically transmitted court decisions and submissions [§89a (2) GOG] shall be the working day following their receipt by the recipient. Saturdays are not considered as working days.

If service in the ERV is not possible, the provisions of the third section of the ZustG may also be relevant. Under § 1b (1) of the E-GovG, companies must participate in electronic service. This means that the action must be served electronically in accordance with the provisions of the third section of the ZustG, unless the company is represented by a lawyer,[51] or participates in the ERV voluntarily.

10.1. Does the method of service differ from the cross-border service of documents within the scope of the Regulation?

Yes it does, becausethe Regulation provides for other means of service. In derogation from the Regulation, Austrian law does not provide for transmission by consular or diplomatic channels or for service of documents by the diplomatic or consular representations.

On the other hand, the Regulation does not contain any provisions on service to a curator or on service by publication in the edict database. The Regulation also does not provide for deposition of documents.

[48] § 17 ZustG.
[49] § 25 ZustG; § 115 ZPO; *Mayr*, supra n. 1, Rz 402.
[50] *Rechberger*, supra n. 1, Rz 512.
[51] *Mayr*, supra n. 1, Rz 404.

10.2. Are there several alternative methods of service in your Member State?

In Austria there are different forms of service (see q. 10). In Austria, service is primarily ("in der Regel")[52] effected by the national postal service (that is the "Austrian Post AG" according to § 2 No. 6 ZustG); alternatively, service by court or municipal employees is also possible. In certain cases, publication in the edict database or the appointment of a curator is necessary.

In addition, there is also service by means of electronic legal communication via the ERV, which is obligatory for lawyers, notaries, banks, etc [§ 89c (5) GOG]. Others may participate in the ERV voluntarily. For companies, § 1b (1) E-GovG provides that actions are to be served electronically according to the third section of the Service-Act if the company is not represented by a lawyer.[53]

10.3. Does your national legal system provide for special means for the service of documents for professionals (e.g., lawyers, notaries etc.) or state authorities? How do the methods of service relate to each other?

Yes, lawyers, notaries, banks, etc must participate in the ERV pursuant to § 89c (5) GOG - this obliges them to serve the court electronically and as a consequence they cannot serve it physically. Service from the court to the aforementioned persons is also effected via the ERV.

10.4. What considerations must the deciding court take into account when choosing the method of service?

When selecting the method of service, the court shall take into account the order of service under § 88 (1) ZPO as well as the requirements of § 89c (5) GOG on electronic service.

In assessing whether service must be effected only to the addressee ("zu eigenen Handen") or whether service to a substitute recipient should be possible, the court must follow the individual procedural rules.[54] In the area of civil procedure law, personal service is generally only effected in the case of a decision on the appointment of an adult guardian.[55] Other than that – especially considering actions and payment orders (see § 106 ZPO) – the service to a substitute recipient is possible.

10.5. Have the methods of service laid down in your national legal system been extended <u>for domestic service</u> after the entry into force of the Regulation?

No, the forms of service for domestic service have not changed in principle even after the Regulation came into force.

11. How is service in third-party countries regulated?

§ 11 ZustG and § 121 ZPO provide special rules for service abroad. § 11 (1) ZustG states in general terms that service abroad shall be effected in accordance with international agreements, in

[52] RIS-Justiz RS0036246, OGH 6 Ob 845/81.
[53] *Mayr*, supra n. 1, Rz 404.
[54] OGH 1 Ob 317/98v, 121 Juristischen Blätter (1999), p. 333.
[55] § 116a (2) AußStrG; *A. Geroldinger*, 'Eckpfeiler des neuen Erwachsenenschutzverfahrens', 64 Österreichische Richterzeitung (2018) p. 69 at p. 77.

accordance with the requirements of the laws or other legal provisions of the state in which service is to be effected, or in accordance with the manner permitted by international practice. § 11 (2) ZustG concerns service on foreigners or International Organisations entitled to privileges or immunities under international law. Such services must be effected by the Federal Ministry for Europe, Integration and Foreign Affairs. § 11 (3) ZustG applies to service on persons who have been sent abroad in accordance with the provisions of the "Federal Constitutional Act on Cooperation and Solidarity in the Deployment of Units and Individuals". If service is effected on such persons, it shall be effected through the competent Federal Minister or, if these persons have been grouped into one or more units, through the superior of the unit.

§ 121 ZPO stipulates that in cases not covered by § 11 (2) and (3) ZustG and for which service pursuant to § 11 (1) ZPO is not possible or would be difficult, the Federal Minister of Justice may, in agreement with the Federal Chancellor, permit service by post using the return coupons customary in international postal services via a special Regulation. Such a Regulation was issued (ZustellVO).[56] § 121 Abs 2 ZPO provides for the case that the confirmation of service to a person abroad is not received within a reasonable time. The party seeking service may then apply for service by public notice or for the appointment of a curator under § 116 ZPO. This also applies if service abroad has been attempted in vain or the request is not promising due to obvious refusal by the foreign authority. § 121 (3) ZPO clarifies that the provisions of the EuZVO 2022 remain unaffected.

12. Are there special methods of service for certain types of documents – regardless of whether they qualify as judicial or extrajudicial? Please provide examples.

Yes, there are special methods of service that are obligatory for certain documents. For example, § 116a (2) AußStrG explicitly stipulates that decisions on the appointment of an adult guardian must be served in person (and only to the addressee ["zu eigenen Handen"]), therefore the service to a substitute would be unlawful.

13. What is the usual time frame of the service of documents in your Member State?

Service via the Austrian Postal Service takes around 1-2 days,[57] service within the platform for the electronic service of documents is more or less instantaneous.

14. At what moment is a document considered to be served according to the national law of your Member State?

The service is basically bound to the cognisance of the addressee.[58] If served **with proof of service**, the document shall be deemed to have been served when the certificate of service is completed and signed.[59]

If service is effected **without proof of service**, service shall be deemed to have been effected on the third day after handing over the document to the service agent (so-called "fiction on service"), unless it becomes evident that the addressee was unable to take notice of the service process. In this case

[56] Regulation of the Federal Ministry of Justice of December 23, 1960 on the service of documents on persons abroad by post in court proceedings in civil disputes, Federal Law Gazette 1961/10.
[57] *Österreichische Post AG*, 'FAQ Paket & Post Express', <www.post.at/p/c/faq-privat#FAQ713901142> (visited 29 September 2022).
[58] *Rechberger*, supra n. 1, Rz 512.
[59] *Stumvoll*, supra n. 13, § 22 ZustG Rz 4.

service becomes legally effective on the day that follows the return of the addressee to the place of service, see § 26 (2) ZustG (so-called "cure of deficiency in serice").

If service cannot be effected and the document is deposited, the document shall be deemed to have been served on the first day of the collection period pursuant to § 17 (2) ZustG (fiction on service). In the case of publication in the edict, service shall be deemed effected upon inclusion in the edict database (§ 115 ZPO). If a curator is appointed, service shall be deemed to have been effected upon publication and service of the document to the curator, § 118 (1) ZPO. The time of service of electronically transmitted court decisions and submissions (via ERV) shall be deemed to have been the working day following the day of receipt in the addressee's electronic disposal area.[60] Saturdays are not counted as working days, see § 89d (2) GOG.

14.1. If and if so, under what circumstances is a document considered to be served according to the national law of your Member State when the recipient is served at an address they either do not use or do not know of?

Pursuant to §17 (1) ZustG, effective service by deposit requires that there is at least a presumption that the addressee is regularly present at the place of service. This fiction of service is a rebuttable presumption of proper service. However, there is no effect of service if the addressee, due to absence (within the collection period), could not have become aware of the service process in time to be able to pick up the document at the time when this would have been possible for the majority of the population due to their professional activities (intolerable reduction of the deadline, see q. 30 with example).[61] If, on the other hand, the addressee returns to the place of service after this time - but before the expiry of the time limit for collection - the service, which in itself would have no effect, becomes effective on the day following the return and the time frames (e.g. to file a statement of opposition against a payment order) start to run according to § 17 (3) ZustG. A return made only after the expiry of the collection period always results in the invalidity of the deposit (and thus the nullity of the subsequent proceedings).[62]

The situation is different in case of a change of the place of service by the party: The authority/court has to be informed immediately pursuant to § 8 (1) ZustG, otherwise, pursuant to § 8 (2) ZustG, service is effected by deposit (even without a previous attempt at service), unless another place of service can be established without difficulty.

Example: After the action has been served properly to the defendant's address, the defendant changes his address without informing the court. Therefore, the court serves the summons to the court hearing to the same address. The carrier has reason to believe that the addressee still lives there (because there is still his name on the letter box) but is just not at home at the moment. So, the carrier deposits the document at the nearest by post office. The defendant does not know about this serving process and thus, does not appear at the court hearing, which results in a default judgement against him.

[60] RIS-Justiz RS0129672.
[61] VwGH 26.6.2014, 2013/03/0055; *Mayr*, supra n. 1, Rz 399.
[62] *Mayr*, supra n. 1, Rz 399.

Since the defendant violated § 8 (1) ZustG, the service by deposit is effective according to the Supreme Court.[63] Therefore, the default judgment can not be nullified by an appeal to the appellate court stating that the process of service was deficient.

A change of the place of service shall only be deemed to have occurred if the party moves its previous place of service (e.g. by changing its place of residence) or permanently abandons it (without establishing a new one).[64] If the party is only temporarily absent from the place of service (e.g. during a holiday), the place of service is not considered to be changed.[65] § 8 ZustG is only applicable to physical service (2nd section of the ZustG).[66] It shall apply *mutatis mutandis* to any service agent appointed for accepting documents on behalf of the addressee according to § 9 (6) ZustG, so that he/she is also obliged to notify the change of his/her place of service, if applicable.[67]

14.2. Please elaborate in this regard, how the national law of your Member State treats the following scenario: The claim contains the official, duly registered address of the respondent. However, when the postman (or responsible person of service) wishes to serve the document at that address, it is clear that the recipient does not live there any longer (i.e., the post-box has a different name, neighbours confirm that the person has moved or a new tenant opens the door and confirms that the recipient has moved there some months ago and he neither has any relation with the former tenant nor does he know where they live now).

If, as in this case, the deliverer has justified doubts that the addressee is regularly at the place of service, the deposit must be omitted [§ 17 (1) ZustG *e contrario*].

The following options are possible:

- Pursuant to § 18 (1) ZustG a forwarding to another domestic address for service is possible if the service is to be effected by organs of a delivery service and the forwarding is provided for according to the regulations applicable to the transport of postal items (No. 1), or if the service is effected by the organs of the authority or a municipality and the new address for service can be determined without difficulty and lies within the local sphere of action of the authority or the municipality (No. 2).
- If neither service nor forwarding is possible, the document shall be returned to the sender, sent to an office notified by the sender for that purpose, or verifiably destroyed on the sender's instructions according to § 19 (1) ZustG. In this case, the certificate of service must state the reason for the return, forwarding or destruction (concretely: doubts that the addressee is regularly at the place of service) pursuant to § 19 (2) ZustG.

[63] RIS-Justiz RS0115726; RS0115725; OGH 1 Ob 167/20w; **affirmativ**: *Stumvoll*, supra n. 13, § 8 ZustG Rz 13; see also: *Haas*, 'Änderung der Abgabestelle: OGH bleibt streng', 11 Zivilrecht aktuell (2016) p. 367; **critical** *Schulev-Steindl*, supra n. 16, Rz 410.
[64] e.g. VwGH 21.11.2002, 2000/20/0359.
[65] e.g. OGH 9 ObA 172/92; VwGH 23.11.2006, 2005/20/0480.
[66] *L. Bumberger* and *Chr. Schmid*, supra n. 2, § 8 ZustG K 19.
[67] *Schulev-Steindl*, supra n. 16, Rz 410.

15. With what electronic methods can a claim be filed in court?

It is possible and meanwhile the rule to file a lawsuit via the Platform for the electronic service of documents (ERV). The relevance of ERV results in particular from the far-reaching obligation to participate pursuant to § 89c (5) GOG (*inter alia* for lawyers, notaries, banks and social insurance institutions), whereby a violation of the obligation to participate is to be treated as a formal defect. Submission by fax is also possible in principle, but is no longer of any significance in practice.[68] According to recent Supreme Court case law, pleadings submitted to the court by email are inadmissible and irrelevant.[69] For plaintiffs who are not represented by a lawyer (only in disputes before district courts if the claim does not surpass EUR 5.000,00) and do not participate in the ERV, they can either file a claim at court via postal service, by fax or they may put the action on record on the official day of the court pursuant to § 439 ZPO (so-called "Amtstag", see § 54 Geo).

16. What is the procedure under the national law of your Member State if the exact whereabouts of the recipient are unknown?

Pursuant to § 25 (1) ZustG, service can be effected on persons whose place of service is unknown by announcing on the official notice board (so-called "Amtstafel") that a document to be served is with the authority. In this regard, special provisions apply to court proceedings: Pursuant to § 115 ZPO, the official notice board is replaced by the edict database,[70] in which a notice needs to be included that a document to be served is located at the court. Pursuant to sentence 2 *leg cit*, the notification must contain further information (e.g. regarding the content of the document, the designation of the trial court and the matter in dispute as well as the possibility to pick up the document). The notification shall also refer to the legal consequences of the inclusion in the edict database. Upon inclusion in the edict database, service is deemed to have been effected.

16.1. Is a substitute method of service available under the national law of your Member State? If so, what factors does the deciding court have to take into account when assessing the admissibility of such service?

Service within the meaning of § 25 ZustG shall not be effected if a person authorised to accept service (service agent) has been appointed or the party changes the place of service without informing the authority. In this case, service shall be effected on the person authorised to receive service according to § 9 (3) ZustG or may be effected in accordance with § 8(2) ZustG. (deposition of the document even without an attempt of service, see q. 14.1). § 116 ZPO also provides for the possibility of service on a curator: This is possible upon request or *ex officio* if the party would have to perform a procedural act as a result of the service to be effected to him or her and in particular if the document contains a summons. The appointment of a curator must be announced in the edict database pursuant to § 117 (1) ZPO. According to § 118 ZPO service is deemed to have been effected after inclusion in the edict and successful service on the curator.[71]

[68] *B. Schneider* in *O. J. Ballon* and *B. Nunner-Krautgasser* and *B. Schneider*, Zivilprozessrecht[13] (MANZ 2018) Rz 224.
[69] RIS-Justiz RS0127859, OGH 5 Ob 2/18g, 60 Österreichische Notariatszeitung (2018) p. 300.
[70] *Stumvoll*, supra n. 13, § 25 ZustG Rz 9; *Rechberger*, supra n. 1, Rz 524.
[71] *Rechberger*, supra n. 1, Rz 525.

16.2. Is there a possibility of using fictitious methods of service in your Member State? Please elaborate.

The law makes use of a fiction several times by considering the service to be completed although the addressee does not have to have received the document. This is linked to events that make the receipt of the document by the addressee appear probable.[72] In this context, the possibility of substitute service (§ 16 ZustG), service by deposit (§17 ZustG) or service by public notice (§ 25 ZustG) and the fictitious service regarding the ERV according to § 89d (2) GOG are to be mentioned (see q. 10).

16.3. If yes: When does a fictitious method of service unfold its effects? Are these equivalent to the effects of service where the document is served directly to the recipient?

In principle, the service to a substitute recipient is deemed to have been effected upon service to the recipient who accepts the document in place of the addressee. However, this only applies if the carrier has reason to assume that the addressee is regularly at the place of service and this assumption proves to be correct. The subjective impression of the deliverer is not sufficient; the addressee must actually be at the place of service regularly.[73]

If the addressee could not become aware of the service process in time due to absence from the place of service, the service to the substitute shall be deemed not to have been effected. However, service shall take effect on the day following the day of return to the place of service by the addressee according to § 16 (5) ZustG.[74] In the opinion of the Supreme Court, a substitute service is effective in case of doubt; § 16 (5) ZustG can only be applicable if there was an absence ("of longer duration") which precludes "regular presence" pursuant to § 16 (1) ZustG.[75] The risk (which can be remedied by restitutio in integrum) that the substitute recipient does not hand over the served document or does not hand it over in time is borne by the addressee returning to the place of service.[76] In the opinion of the Supreme Administrative Court, the cure of deficient service pursuant to § 16 (5) ZustG depends exclusively on the return to the place of service; it therefore also occurs if the addressee has not become aware of the service process.[77]

In the case of service by deposit, the document shall be deposited at the office of the service provider (post office or other universal service provider), at the municipality or at the (district) authority and kept ready for collection for a fortnight in accordance with § 17 (1) in conjunction with (3) sentence 1 ZustG. The addressee must be notified of the deposit; this notification shall be posted in the delivery facilities designated for at the place of service (e.g. letterbox, house mailbox),[78] left at the place of service or posted on the entrance door.[79] Service is deemed to have been effected on the first day on which the document was made available

[72] *D. Kolonovits* and *G. Muzak* and *K. Stöger*, Verwaltungsverfahrensrecht[11] (MANZ 2019) Rz 197.
[73] OGH 3 Ob 92/87 SZ 60/74.
[74] *Rechberger*, supra n. 1, Rz 521; see also VwGH 17.8.2017, Ra 2017/11/0211.
[75] RIS-Justiz RS0083895; OGH 1 Ob 630/84 (1 Ob 631/84), 1 Recht der Wirtschaft (1985), p. 181; see also *Schulev-Steindl*, supra n. 16, Rz 420.
[76] OGH 1 Ob 630/84 (1 Ob 631/84), 1 Recht der Wirtschaft (1985), p. 181.
[77] VwGH 24.10.1989, 88/08/0264.
[78] If the notice is deposited in another person's home mailbox, the service through deposit is ineffective: VwGH 8.9.2005, 2005/18/0047, see also *Schulev-Steindl*, supra n. 16, Rz 421.
[79] VwGH 20.04.2006, 2005/01/0558.

for collection according to § 17 (3) sentence 3 ZustG. The deposited document shall be kept ready for collection for at least two weeks. But there is no effective service if the addressee could not become aware of the service process due to absence from the place of service. However, service becomes effective on the day following the return of the addressee to the place of service on which the deposited document could have been remedied, if this day is within the collection period [see § 17 (3) sentence 4 ZustG].[80] Moreover, according to the Supreme Administrative Court, there is also no effective service if the carrier "places" the notice in front of the recipient's entrance door, because in this way it was neither attached to the entrance door (in the sense of "fastened"), nor left behind (since it did not reach the addressee's custody).[81] If, on the other hand, the proper notification is later damaged or removed, this no longer changes the effectiveness of the service through deposit according to § 17 (4) ZustG.[82]

Service by public notice is deemed to have been effected if two weeks have elapsed since the announcement on the official notice board of the authority, see § 25 (1) ZustG; in judicial proceedings, service is deemed to have been effected as soon as it is entered in the edict database (§ 115 sentence 4 ZPO).[83]

The **effects of service are the same regardless of how service is effected**, the **different forms** of service **are equivalent** in this respect.

Since the entry into force of § 89d (2) GOG, however, a **distinction** has to be made with regard to the time of service of judicial documents – and thus the beginning of the time limit – **between physical service on the one hand** and **electronic service via the ERV on the other hand**. Whereas in the case of physical delivery the document is usually deemed to have been served on the day on which the addressee actually took possession of it or (in the case of deposit) had the (first) opportunity to pick it up, § 89d (2) GOG provides for a "**fiction of delivery**" for participants in the ERV, **which becomes effective on the working day following the receipt** of the document in the recipient's electronic area of disposal.[84] The Constitutional Court did not see any lack of objectivity in this different arrangement of physical service and electronic service, but stated that this distinction fell within the discretionary power of the legislature and considered it therefore constitutional.[85]

16.4. Service of publication frequently do not assure that the document was actually made known to the recipient. Does your system try to ensure that the document was actually made known?

§ 25 (2) ZustG allows the court to supplement the public notice in an appropriate manner, for example by placing notices in newspapers, radio or television.[86]

[80] *Rechberger*, supra n. 1, Rz 523.
[81] VwGH 18.2.2020, Ra 2019/03/0156.
[82] *Schulev-Steindl*, supra n. 16, Rz 421.
[83] *Stumvoll*, supra n. 13, § 25 ZustG Rz 10; *Rechberger*, supra n. 1, Rz 524.
[84] *W. Fellner* and *G. Nogratnig*, RStDG, GOG und StAG II[5.01] (MANZ 2022) § 89d GOG Rz 11.
[85] VfGH 9. 12. 2015, G 325/2015.
[86] *Stumvoll*, supra n. 13, § 25 ZustG Rz 12.

16.5. Does the system include special remedies if actual knowledge was not obtained by the defendant?

Under certain circumstances, an application for restitutio in integrum is possible: § 146 (1) sentence 1 ZPO explicitly mentions the case that a party, through no culpability of his or her own, did not become aware of a service as an unforeseen or unavoidable event. If the party was prevented from participating in a court hearing or from taking a procedural step and is thus prevented from taking the procedural step, the application for restitutio in integrum must be granted. Fault is irrelevant as long as it is only a minor degree of negligence ("*culpa levissima*") according to § 146 (1) sentence 2 ZPO. Pursuant to § 148 (2) ZPO, the application must be filed within fourteen days after the obstacle has ceased to exist (in this case: after knowledge of the notification).

In case of ignorance due to deficiency in service, on the other hand, an appeal due to nullity is possible, see § 477 (1) No. 4 ZPO, because in this case the faulty service process is an error of the court.[87]

16.6. Please explain whether fictitious methods of service may in certain circumstances be in conflict with national procedural principles (e.g. right to a fair trial, right to be heard). If so, how is this issue dealt with?

The fiction of service is always problematic if the addressee does not actually become aware of the document (e.g. because he or she is not regularly present at the place of service), as in this case he or she has no opportunity to comment on the content of the document, which contradicts the principle of mutual legal hearing.[88] The most extreme case is the default judgment, where the arguments of the opposing party are to be considered true in principle. The ZPO addresses this problem in different ways: On the one hand, the fiction of service generally presupposes that there is at least reason to assume that the addressee has obtained or at least could have obtained knowledge of the content of the document (for example, the assumption [underlying a service by deposit] that the addressee is regularly at the place of service and can thus pick up the deposited document in the near future if he or she wishes). In the pathological cases where this assumption proves to be wrong, the possibility of taking legal remedies (restitutio in integrum) and appeals (q. 16.5) is intended to compensate for the lack of legal hearing.

16.7. Are different actions taken if the person's whereabouts are presumed to be within the country or abroad?

A service by fictitious service is naturally ruled out in the case of presumed residence abroad, because the prerequisite for the fictitious service is the possibility to take note of it (see q. 16.2), which is lacking (at least in the case of a longer stay abroad). For parties presumed to be abroad, there is therefore the possibility of service by sending the documents pursuant to § 10 ZustG: If a party does not have a domestic place of service,[89] he/she may be ordered by

[87] *Schneider*, supra n. 68, Rz 474.
[88] *Rechberger*, supra n. 1, Rz 482.
[89] This new wording of § 10 (1) ZustG, introduced by Federal Law Gazette I 2008/5, is intended to ensure that companies as legal persons with their seat abroad are also covered. See *Schulev-Steindl*, supra n. 16, Rz 405 with footnote 46.

the authority to name a person authorised to accept service within two weeks. Otherwise, service may be effected by sending the document without proof of service to an address for service known to the authority. A document sent in this way is deemed to have been served two weeks after it has been handed over to the delivery service, which must be indicated in the order appointing an agent for acceptance of service.[90] Service by sending the document to any address known by the authority (as described in the sentence before) is inadmissible from the moment the party has either named an authorised representative for service or has a domestic place of service and informs the authority thereof, see § 10 (2) No. 1 and 2 ZustG. § 98 Abs 1 ZPO contains a similar provision for civil proceedings; therefore, reference can be made to the previous remarks.

Whether the court issues such an order is within its discretion (arg: "may"). Instead of such an order, it could also effect service pursuant to § 11 ZustG (see in detail q. 11). This can be considered to be (more) purposeful if service abroad is guaranteed by international agreements.

17. What is the procedure in your national jurisdiction if the recipient is responsible for a failure to serve?

If the addressee or a substitute recipient living with him/her in the same household refuses to accept the document without a legal reason, the document must either be left at the place of service or, if this is not possible, they have to be deposited without written notification, see § 20 (1) ZustG; documents left behind are deemed to have been served according to § 20 (2) ZustG. Refusal of acceptance is deemed to have been the same if the carrier is denied access to the place of address or if the addressee denies his presence or causes his presence to be denied, see § 20 (3) ZustG. Upon effective service, the time limit for all applications begins to run (under civil procedure law: *inter alias* statement of opposition against the payment order, statement of defense, appeals). If the time limit in the first-instance proceedings lapses without being used (by fault of that party), the opponent can obtain a default judgment, whereby his or her arguments are to be considered true (see in full detail q. 22 and 23).

18. What language is to be used for domestic service?

According to § 53 Geo the language of the courts is German. In principle, documents must therefore also be served in German. An exception to this rule are the administrative and judicial districts of Carinthia, Burgenland or Styria with Slovenian, Croatian or mixed populations, in which the Slovenian or Croatian language is permitted as an official language in addition to German pursuant to Art 7 No. 3 Austrian Independence Treaty.[91]

19. Are there specific claim forms to be used for domestic service in your Member State? If so, explain their content and the information required.

In payment order proceedings, the plaintiff must use a form introduced by the Regulation of the Federal Minister of Justice (ADV-Form Regulation Federal Law Gazette II 2002/510), see § 250 (2) ZPO. Alternatively, the pleading may also be formatted accordingly. With regard to the necessary content, the application for payment orders does not differ from a full-text action; the ulterior motive of the form is

[90] In the opinion of the Supreme Court (7 Ob 135/04k), this provision does not violate Union law because foreigners and nationals residing abroad are equally affected.
[91] *K-H. Danzl*, Geo[9] (MANZ 2021) § 53 Anm 2.

rather to enable a more convenient and efficient processing of the submissions by means of automation-supported data processing.[92] Forms are also provided for the European enforcement orders, i.e. for the European order for payment procedure [Art 7 (1) EU Order for Payment Regulation] and the European Small Claims Procedure [Art 4 (1) EU Small Claims Regulation].

20. How are the costs of service regulated in your Member State?

The costs of service by the court (such as service of the defense) are part of the court fees to be reimbursed as a lump-sum for the entire proceedings before a given instance.[93] The court's service of documents therefore does not cause separate costs; with the introduction of the ERV and the largely obligatory participation of professional party representatives, service costs have lost much of their relevance as a cost factor anyway.

LEGAL IMPLICATIONS OF SERVICE

21. What are the legal (minimum) requirements of an effective service? Please list them.

General minimum requirements for effective service cannot be derived from the law; the individual forms of service each set out the relevant conditions themselves with regard to the place of service and the circle of addressees / (substitute) recipients. Minimum requirements are rather stipulated for the content of the documents (actions, defenses, pleadings, judgements etc) which shall be served. Another constant is the service order, which, according to § 5 ZustG, must be issued by the authority whose document is to be served. With regard to its minimum requirements, § 5 ZustG is vague: According to the provision, the addressee has to be designated as clearly as possible and the other relevant information for service must also be included in the order. The following can be mentioned as examples of "other information required for service":[94]

- Personal service with allowance to be served to a substitute recipient (in Austrian German also: "blue letter"), personal service only to the addressee ("white letter")
- With return receipt (certificate of service), without return receipt (in Austrian German also: "Fensterkuvert");
- Deposition without attempt of service according to § 23 Abs 1 ZustG;
- Do not serve to spouses[95] (or other persons living in the household as substitute recipients) pursuant to § 103 ZPO und § 16 (4) ZustG;
- Service on the legal representative (§ 13 ZustG);
- in the case of summonses to court hearings, the date on which the summons is issued according to § 139 (1) Geo.

[92] *Simotta*, supra n. 1, Rz 750.
[93] *Schneider*, supra n. 68, Rz 652.
[94] In detail: *Stumvoll*, supra n. 13, § 5 ZustG Rz 8.
[95] The additional indication "do not serve on spouse" is automatically made on the RSb envelope in divorce cases if service is effected by automated means, see *Stumvoll*, supra n. 13, § 5 ZustG Rz 8.

22. What are the legal consequences (procedurally and, if applicable, materially) of the proper service of documents?

Effective service is relevant in civil proceedings in particular because it triggers various time limits, such as the time frames for:

- Statement of defense – within four weeks beginning with the date of service according to § 230 (1) ZPO;
- Statement of opposition against the payment – within four weeks beginning with the date of service according to § 248 (2) ZPO;
- Statement of opposition against the default judgement – within 14 days beginning with the date of service according to § 397a (2) ZPO;
- Performance according to a court decision – within 14 days, either beginning to run with the date of service of the decision pursuant to §§ 409 (3) in conjunction with 416 (1) ZPO or after the decision entered into legal force (validity);
- appeal to the appellate court – four weeks according to§ 464 (1) and (2) ZPO;
- filing an appeal (to the Supreme Court) against a judgment on appeal [within four weeks pursuant to § 505 (2) ZPO];
- filing a remedy against a judicial order [within two weeks according to § 521 (1) and (2) ZPO].

Thus, effective service is also a requirement for *res judicata*, because formal *res judicata* does not occur until the expiry of the period to file an appeal,[96] the commencement of which in turn depends on effective service.

23. What are the consequences of the respondent's failure to appear in the proceedings under the national law of your Member State?

If the defendant fails to appear at the (preparatory) hearing, a judgment by default shall be given at the request of the plaintiff both in regional court proceedings [§ 396 (2) ZPO] and in district court proceedings [§§ 442 in conjunction with 396 (2) ZPO]. In this regard, the claims made by the plaintiff are to be considered true according to § 396 (1) ZPO which (except in cases of inconclusiveness of the claims) leads to a loss of the case for the defendant.[97]

23.1. What are the possibilities of legal remedy if the respondent claims incorrect service?

In case of non-appearance at the court hearing due to a deficiency in service, an appeal due to nullity of the proceedings is possible [see § 477 (1) No. 4 ZPO], which has to be filed within four weeks after service of the judgment [§ 464 (1) and (2) ZPO]. In addition, only the defendant has the possibility to file a statement of opposition against the default judgement within 14 days from the date of service, but only if the statement of defence was not filed in time [see § 397a (1) and (2) ZPO] and the default judgment was granted for that reason.[98] Also in district court proceedings the defendant may file an statement of opposition against the default judgement, but only if no statement of opposition against the payment order was filed [see § 442a (1) in conjunction with 397a ZPO].

[96] *Schneider*, supra n. 68, Rz 513.
[97] *Schneider*, supra n. 68, Rz 499.
[98] *Kodek*, supra n. 1, Rz 658.

24. What are the consequences of the claimant's failure to appear in the proceedings under the national law of your Member State? (e.g. due to the absence of a summons to the preparatory hearing)

If the claimant does not appear at the court hearing, a default judgment may be issued at the defendant's request, both in regional court proceedings [§ 396 (2) ZPO] and in district court proceedings [§§ 442 in conjunction with 396 (2) ZPO). In this case, the facts and claims presented by the defendant are to be considered true [§ 396 (1) ZPO], the action is then dismissed.[99]

24.1. What are the possible legal remedies if the claimant claims incorrect service?

In case of non-appearance at the court hearing due to a deficiency in service, an appeal due to nullity of the proceedings is possible [see § 477 (1) No. 4 ZPO], which has to be filed within four weeks after service of the judgment [§ 464 (1) and (2) ZPO]. However, the plaintiff cannot file a statement of opposition against the default judgment, neither in regional court proceedings nor in district court proceedings [contrary to the wording "parties" in § 442a (1) ZPO].[100]

25. What are the consequences of improper service in your national jurisdiction?

A deficiency in service does not have any legal effects,[101] e.g. the time periods (to file remedies etc) depending on the service do not start to run. A judgment becomes null and void due to a service defect if a party was deprived of the opportunity to be heard in court, § 477 (1) No. 4 ZPO.

25.1. What is the procedure if the recipient nevertheless had the opportunity to prepare and therefore the principle of equality of arms was not affected?

If the party obtains knowledge independently of the service (of a summons), is able to prepare and subsequently does participate in the hearing, there is no nullity within the meaning of § 477 (1) No. 4 ZPO.[102] The unlawful process of service can then at most constitute another procedural defect; this, however, only if a procedural law was violated and this violation was causal for the fact that the matter in dispute could not be discussed conclusively ["exhaustively", see § 496 (1) No. 2 ZPO] and could in this respect (adversely) affect the correctness of the decision on the merits.[103] This hardly seems conceivable in practice.

25.2. Can a deficiency in service be cured in your national jurisdiction? If so, how?

Deficiencies in service are on the one hand deficiencies of the **service order** (see q. 21) and on the other hand deficiencies of the **service process** (e.g. to the wrong address, posting in the wrong letterbox, the addressee was not regularly present at the delivery address because he was absent due to a stay abroad for 6 months contrary to the assumption of the carrier, etc.).[104]

With the exception of special rules on cure in the case of service without proof of delivery [see q. 14, § 26 (2) ZustG], substitute service despite absence from the place of service and deposit after an unsuccessful attempt at service (see q. 16.3.), deficiencies in service are cured according to the

[99] *Schneider*, supra n. 68, Rz 499.
[100] OGH 2 Ob 134/05b, 128 Juristische Blätter (2006), p. 323.
[101] *Kolonovits* et al., supra n. 72, Rz 203/1.
[102] *H. Pimmer* in *H. W. Fasching* and *A. Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen IV/1[3] (MANZ 2019) § 477 Rz 44.
[103] *Kodek*, supra n. 1, Rz 1048 and 1049.
[104] *Mayr*, supra n. 1, Rz 405.

general rule – pursuant to § 7 ZustG – at the time when the document actually reaches the addressee (indicated in the service order). This must be the document to be served.[105] The actual service must take place in the sense of "physical delivery", mere knowledge of the document content is not sufficient in the opinion of the Supreme Administrative Court.[106]

Example: If the judgement was mistakenly not served on the authorised lawyer but directly on the party, the time limit for appeal does not start to run until the day on which the judgement is actually received by the lawyer.[107]

In the case of electronic service, in the opinion of the Supreme Administrative Court, it is important that the addressee has actually accessed the inbox of his or her electronic account and opened the message/document.[108]

The following service defects are **incurable**:[109]

- Indication of an incorrect addressee in the service order[110]
- Indication in the service order of a recipient who is incapable of taking legal action
- Infringement of service regulations of international conventions in the case of service abroad[111]

25.3. Please explain whether such a cure may in certain circumstances be in conflict with national procedural principles (e.g. right to a fair trial, right to be heard). If so, how is this issue dealt with?

The legal cure of deficiencies in service pursuant to § 7 ZustG is unproblematic in view of procedural principles, because the right to be heard is safeguarded by the actual cognisance of the addressee (without cogniscance there is no cure); in this respect, relying on a new, defect-free service would be more of a formalism than actually necessary to safeguard the right to be heard. The equality of arms of the parties is also ensured by the mere ex nunc effect of the cure, i.e. there is no shortening of any time limits (to file remedies, etc).[112]

25.4. Do the consequences of improper service differ within the scope of the Regulation due to the provisions in Art. 22 of the Regulation? If so, how?

In general, according to Art 22 (1) of the Regulation, a judgment must only be served if the timely service or delivery is ensured so that the defendant has sufficient time to defend himself. In addition, the document must have been served in a manner consistent with the law of the receiving state (lit a leg cit) or either served personally to the defendant or served at his home in a manner provided for in the Regulation (lit b leg cit). Therefore, the objective of Art 22 of the Regulation and the national ZustG is the same: to ensure the right to be heard and a "fair trial" (see Art 6

[105] VwGH 19.10.2017, Ra 2017/20/0290.
[106] VwGH 24.3.2015,
[107] *Mayr*, supra n. 1, Rz 406.
[108] VwGH 5.9.2018, Ro 2017/12/0010.
[109] See *C. Grabenwarter* and *M. Fister*, Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit[6] (Verlag Österreich 2019) p. 83.
[110] VwGH 25.2.2019, Ra 2017/19/0316.
[111] VwGH 20.1.2015, Ro 2014/09/0059.
[112] *Stumvoll*, supra n. 13, § 7 ZustG Rz 2.

ECHR), which is made clear by the comparable possibility of restitutio in integrum [see Art 22 (4) of the Regulation and § 146 ZPO].

However, Art 22 (1) of the Regulation also intends to prevent potential adverse consequences based on a fictitious domestic service of national rules. The primary consequence of Art 22 (1) of the Regulation is the **stay of proceedings** (= to wait with the proceedings) **for the purpose of verifying whether** the defendant was **duly served** with the writ of summons or an equivalent document **in due time**. The default decision may thus only be issued after an appropriate examination has been conducted.

This is **in accordance with Austrian domestic law**, because pursuant to § 402 (1) No. 1 ZPO, a judgment by default must not be granted if the service of the summons or the order to file a statement of defence is not proven or if the court (despite proof of service) has doubts as to the correctness or timeliness of the service.[113] If a corresponding application is nevertheless made for a default judgement to be granted, it must either be rejected (better: dismissed)[114] or the court reserves the right to issue the default judgment until a date determined by the court at the request of the party ("reserved default judgment").[115] If proof of service is received by that date, the court has to grant the default judgment within eight days, see § 402 (1) No. 1 ZPO.

25.5. Has your Member State made use of the option in Art. 22 No. 2 of the Regulation?

Yes, Austria has made use of the option under Art 22 (2) of the Regulation, so that courts may decide the case even without a certificate of service or delivery of the writ of summons or an equivalent document,[116] if the requirements of Art 22(2) lit a-c are met.

However, if the requirements of Art 22 (2) of the Regulation are fulfilled, the courts may not issue a default judgment without any proof of service. Rather, the issuing of a default judgment must (also) be permissible under the national law of the court state. Art 22 (2) only establishes the legal situation that would exist without Art 22 (1) of the Regulation.[117]

According to Austrian law, therefore, a judgment by default may only be issued after the defendant has been effectively served (with the action together with the summons to the preparatory hearing or the order to file a statement of defence, see § 402 (1) No. 1 ZPO. From an Austrian point of view, proof of service of the writ of summons or an equivalent document **not dispensable**, even if the requirements of Art 22 (2) of the Regulation are met; However, proof of service on a curator pursuant to § 121 (2) in conjunction with § 116 ZPO would be sufficient.[118]

[113] OGH 3 Ob 906/36 SZ 18/174.
[114] *H. W. Fasching*, supra n. 3, Rz 1402; *D-A. Simotta*, supra n. 1, Rz 932.
[115] *Kodek* and *Mayr*, supra n. 1, Rz 879.
[116] *E-M. Bajons* in *H. W. Fasching* and *A. Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen V/2[2] (MANZ 2010) Art 19 EuZVO 2007 Rz 13; Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung) <e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (abgerufen am 23.11.2022).
[117] *Peer* in *M. Neumayr* and *A. Geroldinger* (eds.), Internationales Zivilverfahrensrecht (LexisNexis 2010) Art 19 EuZVO 2007 Rz 7.
[118] *A. Klauser* and *G. E. Kodek*, supra n. 4, Art 19 EuZVO 2007 Anm 10.

25.6. How is the possibility of reinstatement in Art. 22 No. 4 of the Regulation regulated in your Member State? What is the deadline for filing an application for *restitutio in integrum*?

In Austria there is a 14-day period to file the application after the obstacle has ceased to exist, § 148 (2) ZPO. Pursuant to § 146 ZPO, the requirement for *restitutio in integrum* is an obstacle due to an unforeseen or unavoidable event. If the party was prevented from participating in a hearing or from performing a procedural act due to such an obstacle and is thus excluded from performing a procedural act, the application for *restitutio in integrum* must be granted. Fault is irrelevant as long as it is only a minor degree of negligence, see § 146 (1) sentence 2 ZPO.

26. Can a decision be revoked due to incorrect service in your Member State even after it has become *res judicata*?

The question whether the **action for annulment** (of a party that could not participate in the proceedings due to a defect in service) should be admissible is not answered unanimously in the case law of the Supreme Court.[119] If this is affirmed, there would indeed be a possibility to declare a decision null and void by means of an action for annulment pursuant to § 529 (1) No. 2 ZPO. This view was taken by the 6th Senate in a case in which service was ineffective because it was effected on a person who lacked capacity to sue,[120] on the grounds that it could make no difference whether the invalidity of service resulted from the incapacity to sue or from a violation of formal requirements of the ZustG. This is in contrast to the opinion of the 5th and 7th Senate,[121] which is correct in my opinion, according to which the action for annulment is not admissible if the service (e.g. of the action and of a default judgment) was not effected in accordance with the provisions of the ZustG (e.g. service by deposit, although the addressee had been absent for a longer period of time), because the service in these cases is defective, therefore does not trigger any legal effects and, as a result, the decision cannot enter into formal legal force. The ineffective service therefore does not need to be declared null and void, it is simply to be repeated.

If - despite the existence of a deficiency in service - the decision's legal force and enforceability were confirmed by the decision-making court vis-à-vis the execution court, the person concerned may defend himself by means of an **application to nullify the confirmation of enforceability** on the grounds of the ineffectiveness of service pursuant to § 7 (3) EO.

27. How is the service of documents proven or documented? How is the date of service determined in the national law of your Member State?

According to § 22 (1) ZustG, the service has to be certified by the deliverer on the certificate of service. Pursuant to § 22 (2) sentence 1 ZustG, the transferee must sign the certificate of service and, if he or she is not the addressee, confirm his or her close relationship (i.e. why he or she is a possible substitute recipient). If the transferee/addressee refuses to confirm, this fact must be noted on the certificate of service together with the date and, if applicable, the close relationship [§ 22 (2) sentence 2 ZustG]. The certificate of service must be sent to the sender without delay, § 22 (2) and (3) ZustG, but an electronic copy may be sent instead if the authority did not exclude this by noting it on the certificate of service,

[119] *D-A. Simotta*, supra n. 1, Rz 1165 and 1166.
[120] OGH 6 Ob 127/03z.
[121] OGH 5 Ob 261/05a; 7 Ob 5/06w.

§ 22(3) ZustG. The certification itself can now also be made by signature on a technical device, § 22 (4) ZustG).

Alternatively, the court/authority may order service without proof of service pursuant to § 26 ZustG, namely if no such service with proof of service is required (by the law). The form of service without proof of service is, however, of secondary importance for the service of documents in civil proceedings.

28. Except for the mentioned respondent, are there other authorised recipients, i.e. (temporary) representatives or persons authorised? Please provide the corresponding regulations within your national legal system.

Pursuant to § 9 (1) ZustG, the parties are free to authorise a natural person, legal entity or registered partnership to receive documents from the court (so-called "power of attorney for service"). In this case, the authority / the court must designate the person authorised ("agent for service") to receive the document as the addressee, otherwise service is only deemed to have been effected at the time when the document actually reaches the person authorised to accept service.

A natural person is only eligible as an agent for service if he or she has his or her main residence in Austria; in the case of a legal person, this must apply to at least one representative authorised to receive documents. EEA nationals are exempt from this principle as long as service is guaranteed by international treaties or otherwise, § 9 (2) ZustG.

§ 93 (1) ZPO provides that, in the case of a power of attorney, all service of documents is to be effected on the authorized lawyer until the power of attorney is revoked, therefore the power of attorney carries the authorisation to accept service within itself.[122]

Special provisions apply to cases relating to the operation of a person's business: In the case of these, service may also be effected on the authorised signatory ("Prokuristen") for the recipient. There is also a special form of power of attorney for service in the case of joint litigants: If a procedural act is to be performed by or against several persons who do not have a common representative or agent for service, they may be ordered by the court (either *ex officio* or at the request of the opponent) to nominate one of them or a third person as agent for service, § 97 (1) ZPO. If this order is not complied with, the court shall appoint a joint agent for service at their risk and expense, again either *ex officio* or at the request of the opposing party, § 97 (2) ZPO. Such an order shall be made if it can be expected to simplify or accelerate the proceedings. It must not be made if there is a legal interest in not being jointly represented, which must either be recognisable or must be expressed credibly by the persons concerned, § 97 (3) ZustG.

29. What are the legal consequences of an improper service of documents?

A deficiency in service does not have any legal effect, in particular procedural time limits do not start to run. In addition, the consequence may be a deficiency of the entire proceedings up to nullity pursuant to § 477 (1) No. 4 ZPO. However, a deficiency in service can be cured according to § 7 ZustG, namely at the time when the document actually reaches the addressee. However, mere knowledge of the content of a document is not sufficient for this purpose.[123]

[122] *Stumvoll*, supra n. 13, § 93 ZPO Rz 5.
[123] *Stumvoll*, supra n. 13, § 7 ZustG Rz 12.

30. What is considered a timely service of documents?

"Timely service" is not defined in the law. Rather, it refers to "**timely knowledge of the service**", which is assumed if the addressee was able to react to the item at the same time as a recipient – who could normally have been served by substitute service – would have reacted.[124] If, therefore, the addressee did not gain the opportunity to come into possession of the document through the service process later than would have been the case for a large part of the population as a result of their professional activity, the service by deposit must also be considered as proper and thus effective.[125] Relevant for the assessment of whether the addressee could have gained cognisance the service in due time is therefore the service process itself,[126] which is of particular importance in the case of service by deposit:

Example: The court, which had been called upon by means of an action, issued an order of rejection ("Zurückweisungsbeschluss") because it considered itself to lack jurisdiction and served it on the plaintiff. The order of the court of first instance could not be delivered to the plaintiff's address on Monday 31 October, which is why it was deposited at the post office with the note "Start of collection period 31 October". According to the plaintiff's own remedy statements, the document was collected on Wednesday 2 November. The Remedy Court rejected the plaintiff's remedy, which was posted on 16 November, as being late ("not in time").

"Not in time", the "classic" case of § 17 (3) ZustG, means **intolerable shortening of the deadline** (according to the Supreme Administrative Court, in any case when half of the deadline has already passed, but usually already from 3-4 days of shortening[127]). Only in this case the possibility of knowledge or collection and thus the time of return of the addressee within the collection period is relevant. If, on the other hand, the shortening of the time limit is tolerable, the fiction of service comes into effect on the first day of deposit. The legal consequence is the start of the time limit period.

In the decision underlying the example, the rejection of the remedy court was justified in the opinion of the Supreme Court, because a large part of the population - due to their professional activity - could also have only picked up the order of the court of first instance on 2 November (due to the public holiday), so that the fiction of service existed and therefore the start of the remedy period (of 14 days) began on 31 October.[128] The plaintiff's remedy should therefore have been posted by 14 November at the latest. A no longer tolerable shortening of the deadline in the sense of the more recent case law of the Supreme Administrative Court can also be denied for the abovementioned example.

31. Who bears the risk of an untimely service of documents?

Since the ZustG does not provide for delayed service, this question cannot really be answered in the national context. In any case, the time limit only starts to run with the service or with the fiction of service, so that a delay in the service process itself (e.g. if the document remains in the distribution center of the post office for a longer period of time due to a COVID-19-related staff shortage before it is taken away by a delivery agent) cannot trigger any disadvantages for the recipient.

In this respect, the litigant has to bear the risk that the time limit has not yet expired due to late service (contrary to one's own expectations), for whom the expiry of the time limit is favourable (e.g. for obtaining a default judgment or the formal *res judicata* effect of a court decision in one's own favour).

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[124] *Stumvoll*, supra n. 13, § 16 ZustG Rz 33; RIS-Justiz RS0083923.
[125] RIS-Justiz RS0083923.
[126] *Stumvoll*, supra n. 13, § 17 ZustG Rz 21 *et seq*.
[127] VwGH 25.6.2015, Ro 2014/07/0107.
[128] OGH 7 Ob 511/84.

CROSS-BORDER SERVICE WITHIN THE SCOPE OF THE REGULATION

32. Which bodies are considered to be "transmitting agencies" according to Art. 3 No. 1 of the Regulation in your Member State? If there are several transmitting agencies in your Member State, please describe their local jurisdiction.

In Austria, the following are designated as transmitting agencies within the meaning of Art 3 (1) of the Regulation on the Service of Documents: the district courts; the regional and higher regional courts; the Labour and Social Court of Vienna; the Commercial Court of Vienna; the Supreme Court.[129] Its jurisdiction extends to the entire spectrum of ordinary jurisdiction, the individual areas of jurisdiction are delineated in the JN.

33. Which bodies are considered to be "receiving agencies" according to Art. 3 No. 2 of the Regulation in your Member State? If there are several receiving agencies in your Member State, please describe their local jurisdiction.

In Austria, only the district courts are designated as receiving agencies within the meaning of Article 3 (2) of the Regulation on the Service of Documents.[130]

34. What means of communication is accepted by the receiving agencies when receiving documents?

As a general rule, the transmission of documents that have been drawn up using one of the forms in Annex I of the Regulation is now carried out via a decentralised IT system based on e-Codex pursuant to Article 5 (1) of the Regulation. Other forms of transmission remain possible pursuant to Article 5 (4) of the Regulation under exceptional circumstances or in the event of a malfunction of the decentralised IT system, whereby the requirements of reliability and security must be taken into account. In Austria, transmission by post, by private delivery services or by fax or e-mail is possible in this case.[131]

35. Which public institution is the "central body" according to Art. 4 of the Regulation in your Member State?

In Austria, the central agency within the meaning of Art. 4 of the Regulation on the Service of Documents is the Federal Ministry of Justice.[132]

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[129] *Bajons*, supra n. 116, Art 2 EuZVO 2007 Rz 2; Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23 November 2022).

[130] Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23 November 2022).

[131] Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23 November 2022).

[132] *Bajons*, supra n. 116, Art 3 EuZVO 2007 Rz 2; Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23 November 2022).

36. How is it decided which method of service will be used by the authorities in your Member State?

Pursuant to Article 11 (1) of the Regulation, service is effected by the receiving agency, in principle in accordance with the law of the Member State addressed,[133] alternatively in accordance with a special procedure requested by the transmitting agency, but only if this procedure is in conformity with the law of the Member State addressed.[134]

If the receiving agency concludes that the particular method requested by the transmitting agency is incompatible with its own legislation, it must serve the document in accordance with its national law on service, provided that this has been requested by the transmitting agency (Annex I, Form A, point 5.2.1.). In the absence of such a request, the document must be returned (together with the request for service) using the appropriate form F in Annex I ("Notification of return of request and document", point 1.3.).

The district court as receiving agency (q. 33) will be guided in particular by the requirement of Art 11 (2) of the Regulation, according to which service must be effected as soon as possible, but in any case within one month. Domestically, § 89 (1) ZPO provides that the determination of the method of service is within the discretionary power of the court whose judgment, order or summons is to be served or at which the pleading to be served (e.g. the action) was filed or the record was taken.

In accordance with European harmonisation efforts, the amendment of the ZPO and the ZustG (Federal Law Gazette I 2008/5 and Federal Law Gazette I 2009/52) introduced the **admissibility of substitute service** for writ of summons or an equivalent document into § 106 of the ZPO and thus **eliminated** the previously prevailing Austrian standard of **compulsory personal service (only to the addressee)** for actions and comparable documents.[135]

As a result, most documents initiating proceedings will probably be served by means of **normal service with proof of service** [**RSb - recommanded letter b**; see § 13 (1) in conjunction with 22 (1) and (2) ZustG, with substitute service permitted according to § 16 ZustG].

37. What are the costs of service under the Regulation if your Member State is the receiving State?

In Austria, no fee is charged due to a delivery in accordance with the Regulation.[136]

38. How are incomplete or insufficient requests for service to be dealt with?

Within the scope of application of the Regulation, the procedure of the receiving agency is exclusively governed by the Regulation due to the primacy of its application: Consequently, the district court as receiving agency (q. 33) has to contact the transmitting agency without undue delay in case of a request for service which it cannot execute on the basis of the information and documents transmitted and has to request the missing information or documents from the transmitting agency, using **form E in Annex I** of the Regulation. In principle, there are no domestic requests for service, but in the case of defective pleadings, an order for improvement within the meaning of § 84 ZPO must generally be issued.

[133] *Peer*, supra n. 117, Art 7 EuZVO 2007 Rz 1.
[134] *Peer*, supra n. 117, Art 7 EuZVO 2007 Rz 2.
[135] *Bajons*, supra n. 116, Art 7 EuZVO 2007 Rz 2.
[136] Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23 November 2022).

39. In which languages can the standardised forms be completed (according to Art. 3 No. 4 lit. d of the Regulation) in your Member State?

The forms can be completed in both German and English.[137]

40. To what extent does your Member State support address tracing according to Art. 7 of the Regulation? Please describe the process in detail.

The main residence and possibly the secondary residence of every person registered in Austria can be retrieved from the Central Register of Residents (ZMR). Authorities can access this register online, as can lawyers, banks, insurance companies, etc. In principle, any person can even request information on their registration for a s mall administrative fee.[138]

41. Has your Member State lodged a national reservation concerning the service by consular or diplomatic agents provided for in Art. 17 of the Regulation?

Austria has no reservations concerning service by diplomatic representatives and consular staff within the meaning of Art 17 of the Regulation.[139]

42. Is the direct service method provided for in Art. 20 of the Regulation compatible with the national law of your Member State?

Direct service of judicial documents by public officials or civil servants is unknown in the Austrian legal system, i.e. direct service is not permissible within the meaning of Article 20 (1) of the Regulation. Austria has declared a corresponding reservation to Art 15 of the (inaugural) EC Regulation 2000/1348 (on Service of Documents) and has subsequently maintained this reservation.[140]

43. Is there a bilateral or multilateral agreement within the meaning of Art. 29 of the Regulation between your Member State and one or more other Member States? If yes, please give reference to the agreement and elaborate. Please leave out the generally applicable agreement between the EU and the Kingdom of Denmark of 19 October 2005 on the service of judicial and extrajudicial documents in civil or commercial matters.

In the relationship between the Republic of Austria and the Federal Republic of Germany, the Agreement on the Further Simplification of Legal Transactions under the Hague Convention of March 1, 1954 (HZÜ - Federal Law Gazette 1960/27) shall continue to be applied, which concerns mutual legal transactions and the possibility of service of documents.[141]

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[137] Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <https://e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23.11.2022).
[138] Zentrales Melderegister (ZMR): <www.oesterreich.gv.at/lexicon/Z/Seite.991731.html#:~:text=Das%20Zentrale%20Melderegister%20%28ZMR%29%20ist%20ein%20%C3%B6ffentliches%20Register%2C,%E2%80%93%20mit%20ihrem%20Nebenwohnsitz%20%2Fihren%20Nebenwohnsitzen%20erfasst%20sind> (visited 07 December 2022).
[139] Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23 November 2022).
[140] *Bajons*, supra n. 116, Art 15 EuZVO 2007 Rz 4.
[141] Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <https://e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23 November 2022).

44. Has your Member State exercised the option for early use of the decentralised IT system as defined in Art. 33 No. 2 of the Regulation?

Austria has currently not made use of the option pursuant to Art 33 (2) of the Regulation to start the operation of the decentralised IT system at an early stage.[142]

RIGHT OF REFUSAL

45. Is there a possibility under your national law to refuse to accept a document?

In Austria, refusal of acceptance of service is only possible in exceptional cases regulated by law (e.g. according to § 12 (2) ZustG: Acceptance of a foreign-language, untranslated document; see q. 45.1.), so in principle there is a compulsory obligation to accept the service of "official" documents, see § 20 ZustG. If acceptance is refused without a legal basis, the document must be left at the place of service or, if this is not possible, can be deposited in accordance with § 17 ZustG, but without having to provide the written notification of the deposit. Upon leaving the document, it is deemed to have been delivered, see § 20 (2) ZustG. Refusal to accept the document thus does not prevent effective service in principle.

45.1. On what grounds can the acceptance of a document be refused?

Acceptance can be refused in the following cases:

- according to § 12 (2) ZustG in case of service of a foreign language, non-translated document;
- according to §§ 16 (2), 20 (1) ZustG (*e contrario*), if a substitute recipient does not live in the same household as the addressee;
- according to § 24a No. 1 ZustG in case of service at the place of encounter.

Therefore, if effective service requires acceptance, it may also be refused.[143] Moreover, the reference to the existence of a legal reason in § 20 (1) ZustG is rather vague; this includes those cases in which service may not be effected, such as in the case of refusal of acceptance by the substitute recipient in the case of personal service (only to the addressee) or in the case of service on the "original" addressee despite the appointment of an authorised representative for service.[144]

45.2. How can the acceptance of documents served electronically be refused?

With regard to the refusal of acceptance of electronically served documents, the law does not make any explicit provision; the general grounds for refusal of acceptance do not fit electronic service. Therefore, it must be assumed that a right to refuse acceptance does not exist in principle or that the refusal of acceptance is factually impossible because the recipient cannot prevent the deposit of a document on an electronic medium (the provider server).

45.3. What factors does the deciding court have to take into account when assessing the admissibility of the refusal to accept?

[142] Europäischer Gerichtsatlas für Zivilsachen – Zustellung von Schriftstücken (Neufassung), <e-justice.europa.eu/38580/DE/serving_documents_recast?AUSTRIA&member=1#a_148> (visited 23 November 2022).
[143] *Stumvoll*, supra n. 13, § 20 ZustG Rz 4.
[144] *Stumvoll*, supra n. 13, § 20 ZustG Rz 11 *et seq*.

The court must proceed on the basis of the grounds for refusal of acceptance provided for in the ZustG (q. 45.1) and determine by way of subsumption whether such a ground is relevant in the specific case.

45.4. What are the consequences of such a refusal? Please distinguish between justified and unjustified refusals when responding.

In the case of justified refusal of acceptance, service is deemed not to have been effected and consequently cannot trigger any legal effects. In the case of unjustified refusal of acceptance, the obligation to accept is not effected by physical enforcement but by a fiction of service.[145] In this case, § 20 (1) ZustG provides that the document is to be left at the place of service and that service is deemed to have been effected [§ 20 (2) ZustG]. If this is not possible, the document must be deposited without the written notification, in which case service is deemed to have been effected on the first day on which the document is held ready for collection, § 17 (2) sentences 2 and 3 ZustG.

46. How do the courts in your Member State review the admissibility of the refusal to accept a document under Art. 12 of the Regulation?

Pursuant to Art 12 of the Regulation 2022 (formerly Art 8 of the Regulation on Service of Documents 2007), the addressee may refuse to accept service if the document is neither in a language the addressee understands (para 1 lit a leg cit) nor in an official language of the Member State addressed (para 1 lit b leg cit). According to Article 12 (3) of the Regulation, acceptance may be refused either directly at the time of service itself or by means of a written statement within two weeks of service. In the European Judicial Area, this provision now leaves no scope for the national provision of § 12 (2) ZustG, according to which the acceptance of service of a foreign-language document which is not accompanied by a German translation (in court proceedings, a certified translation is also required) may be refused by the addressee to the service authority within three days.[146]

ELECTRONIC METHODS OF SERVICE

47. Does your Member State's national law allow documents to be served electronically? If so, how?

Electronic service is not only possible, but also clearly the form of service preferred by the legislator (because it saves costs).[147] In the judicial area, §§ 89a *et seq.* GOG and the Regulation of the Federal Minister of Justice on Electronic Legal Transactions (ERV-VO 2021) are particularly relevant. Due to the now extensive obligation to use the platform on electronic service of documents pursuant to § 89c (5) GOG, it is primarily this platform that serves the electronic service of judicial decisions [§§ 89a (2) GOG]; electronic service within the meaning of the third section of the ZustG (§§ 28 et seq.) is only possible pursuant to § 89a (3) GOG if service via the platform on electronic service of documents is not possible. Within the framework of the ERV, pursuant to § 1 ERV-VO 2021, service can be effected via a transmitting agency (No. 1), by direct transmission via the

[145] *Stumvoll*, supra n. 13, § 20 ZustG Rz 2.
[146] *U. Frauenberger-Pfeiler*, supra n. 13, § 12 ZustG Rz 5.
[147] ErläutRV 381 BlgNR 26. GP 1.

Bundesrechenzentrum (No. 2) or via upload portals (finanzonline.bmf.gv.at and justizonline.gv.at, No. 3 and 4). Pursuant to § 6 of the ERV-VO 2021, transmission via email is only permissible if expressly ordered by the law. In civil proceedings, communication by email between the party and the court is not permissible according to recent case law of the Supreme Court.[148]

47.1. If dedicated internet portals are used for this purpose: Please describe the platform. Do users have to register beforehand?

The following electronic communication systems exist according to the current legal situation:

- **FinanzOnline** (electronic data transmission procedure of the Austrian fiscal administration) pursuant to the Federal Tax Code (Bundesabgabenordnung – hereinafter: BAO):

  Access to FinanzOnline requires a one-time registration. This can be done online (i.e. as electronic registration) or via the registration form FON1,[149] which can be filled out and handed in personally at any tax office or sent to the tax office by post. Transmission via FinanzOnline (permissible e.g. in the company register procedure pursuant to section 4 ERV-VO 2021) must be carried out in accordance with the interface description[150] published by the Federal Minister of Justice on the website <kundmachungen.justiz.gv.at>, § 7 (1) ERV-VO 2021. This description regulates the requirements for the form and contents of documents submitted into the ERV via FinanzOnline or Transmitting Agencies as well as direct communication via the Federal Computing Center (§§ 7 in conjunction with 2-4 ERV-VO 2021).

- **ERV** (Elektronischer Rechtsverkehr [= platform for the electronic service of documents]) for the communication with public prosecutors and courts, plus **JustizOnline**:

  Since November 2020, the internet platform JustizOnline has made it possible to contact the justice system unbureaucratically and without time constraints. JustizOnline offers a wide range of services - from electronic file inspection (eAE) and land register queries to submissions and information via a chatbot system. The platform guarantees the highest accessibility and security standards and can be used with a smartphone as well as with a computer.[151] In this context, JustizOnline serves to realise the digitisation project concerning the Austrian justice system under the name "Justice 3.0" and will be continuously expanded.

[148] RIS-Justiz RS0127859, OGH 5 Ob 2/18g, 60 Österreichische Notariatszeitung (2018) p. 300.
[149] See: <formulare.bmf.gv.at/Service/Formulare/Inter-Steuern/pdfs/9999/fon1.pdf> (visited 24 January 2023).
[150] See: <kundmachungen.justiz.gv.at/edikte/km/kmhlp05.nsf/attachments/gog/$file/gogarchive_schnittstellenspezifikation_v1_1.pdf> (visited 24 January 2023).
[151] JustizOnline: <www.justiz.gv.at/home/service/digitale-justiz/justizonline.9b8.de.html> (visited 12 January 2023).

Via JustizOnline, the transmission has to take place according to the technical possibilities either by using the citizen card function (via mobile phone signature or chip card [e.g. on one's e-card]) or via Electronic-ID according to §§ 4 *et seq.* E-GovG. Registration must also take place before transmitting via these upload services, the objective of which is to open up the ERV to everybody.[152]

Everyone has been able to participate in the ERV since 2001,[153] however JustizOnline is now intended to further promote and advance accessibility to electronic communication with courts.

47.2. How is the e-identification (and possibly e-signature) of electronically served documents executed in the national legal system of your Member State?

In accordance with the technical possibilities, signatures may be executed electronically, in particular under original documents of court decisions and protocols. In matters of jurisdiction in civil court proceedings, a signature shall be executed by means of a handwritten signature or by means of a qualified electronic signature (Art 3 No. 12 eIDAS Regulation). If a signature is made by means of a qualified electronic signature, this shall be made visible on the signed document in a manner that makes it possible to recognise and verify who the signature is from, § 89c (2) GOG.

Pursuant to § 89c (3) GOG, the electronic copy of court decisions must contain the name of the decision-making body; in addition, the decision must be provided with the e-signature of the justice administration (in accordance with the ERV-VO 2021) (so-called "justice signature"). This justice signature is an advanced signature within the meaning of § 2 No. 3 SigG (Austrian Signatures Act). The Federal Minister of Justice shall ensure the necessary certification services for the electronic judicial signature as well as the qualified electronic signatures of the organs entitled to over-authentication. Each use of the e-signature of the justice administration shall also be recorded in a protocol, which shall also show the name of the user, § 89c (4) GOG. This record must be kept for at least three years. In accordance with § 19 (3) of the E-GovG, the judicial signature (as an official signature) is to be represented in the document by a figurative mark which the person responsible for the public sector has published on the Internet[154] as his or her own, as well as by a note in the document stating that it has been officially signed. The validity of the judicial signature affixed to a document can be checked on the internet at <www.signaturpruefung.gv.at/>.

Concerning documents submitted by parties, the description published by the Federal Minister of Justice on the website kundmachungen.justiz.gv.at, § 7 (1) ERV-VO 2021 (see q. 47.1.), regulates the requirements for the form, contents and signature of documents submitted into the ERV via FinanzOnline or Transmitting Agencies as well as direct

[152] Elektronischer Rechtsverkehr (ERV) <www.oesterreich.gv.at/themen/dokumente_und_recht/elektronischer_rechtsverkehr_erv.html> (visited 30 November 2022).
[153] Federal Law Gazette I 2000/26; see also *W. H. Rechberger*, 'Zur Wandlung des Erscheinungsbildes des österreichischen Zivilprozesses', in *T. Gottwald* (ed.), Festschrift M. Schneider (Edition Weblaws Bern 2013) p. 361 at p. 371.
[154] See: <kundmachungen.justiz.gv.at/edikte/km/kmhlp05.nsf/all/jusign_bild2!OpenDocument> (visited 24 January 2023).

communication via the Federal Computing Center (§§ 7 in conjunction with 2-4 ERV-VO 2021). Pursuant to this description the signature must always correspond to a detached signature according to the form XML DSIG (also see [W3C-2002]).[155] For this purpose, the participant must have an officially certified public key, the correctness of which must be verified by the respective justice application upon receipt of the input.[156]

SOAP (Simple Object Access Protocol) over HTTP is in itself an unreliable protocol. Without further measures, one is not protected against the loss of messages. There are numerous attempts to remedy this disadvantage through additional protocols.[157] Therefore the integrity of a transmission, i.e. proof that it has not been altered, and also the encryption, are guaranteed in the present version of the ERV exclusively via TLS connections between the participant, the service provider and the ERV. At least TLS version 1.2 is used as the Transport Layer Security (TLS) protocol.[158]

47.3. How is it ensured that the right person receives the documents? How is the identity of the user verified?

In the ERV, the "address code" serves to designate the receiving person in accordance with § 8 (1) sentence 2 ERV-VO 2021, whereby this is an alphanumeric sequence of numbers assigned to the participating person, § 8 (1) sentence 1 ERV-VO. This ID of the participant is made with a maximum length of 7 characters, starting with one or more capital letters and followed by numbers.[159] The address code data define the attributes of a registered ERV participant centrally managed in the ERV address code service. They are returned when the address code service is queried, provided the ERV participant can be identified by an address code.[160] Under the respective address code, further information on the participant is to be stored at Bundesrechenzentrum GmbH, such as name, title, date of birth, address and bank details for the collection of fees in the case of natural persons, § 8 (2) ERV-VO 2021. Changes to this data are to be communicated by the participating person without delay, § 8 (6) ERV-VO 2021. If a participating person has more than one address code, he or she shall designate one of them as the principal address code to which judicial documents are to be transmitted in principle, § 8 (7) ERV-VO 2021.

In the case of professional participants (e.g. lawyers, notaries and tax advisors), the address code is generated pursuant to § 8 (4) ERV-VO 2021 by the respective chamber, which generates the address code and transmits it to the Bundesrechenzentrum GmbH. Otherwise, the address code is generated by the Bundesrechenzentrum GmbH itself upon request (via a transmitting agency).

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[155] See *C. Adorjan*, 'Beschreibung der externen Schnittstelle des ERV', < https://kundmachungen.justiz.gv.at/edikte/km/kmhlp05.nsf/all/erv!OpenDocument>, visited 01 March 2023; *P. Webel*, 'webERV Schnittstellen Beschreibung', < https://kundmachungen.justiz.gv.at/edikte/km/kmhlp05.nsf/all/erv!OpenDocument>, visited 01 March 2023.

[156] *Webel*, supra n. 155.

[157] *Webel*, supra n. 155.

[158] *Webel*, supra n. 155.

[159] *C. Adorjan*, 'Beschreibung der externen Schnittstelle des ERV-Anschriftcodeservices', < https://kundmachungen.justiz.gv.at/edikte/km/kmhlp05.nsf/all/erv!OpenDocument>, visited 01 March 2023.

[160] *Adorjan*, supra n. 159.

47.4. How is the time of service determined?

The time of service shall be the working day following the receipt in the electronic disposal area of the recipient, whereas Saturdays do not count as working days [§ 89d (2) GOG].

48. Is electronic service dependent on the consent of the person concerned in your Member State?

Not every person is obliged to participate in the platform on electronic service of documents. Obligated persons, [§ 89a (1) in conjunction with 89c (5) GOG] may, however, be served by the court electronically pursuant to § 89a (2) GOG; a requirement for consent cannot be derived from the law.

48.1. If consent is required, can it be given universally or must consent be obtained for each individual case?

If a person – that is not obligated to participate in the ERV – voluntarily registers to participate in the ERV, one can argue that he/she thereby has given her "universal consent" to accept the service of documents in this manner. In this case – since it is the most economic form of service – will probably serve via the ERV.

48.2. If universal consent is permissible, can certain matters (e.g. family law disputes) be exempted from the consent?

In principle, there are no exceptions to the possibility of electronic service under § 89a (2) GOG, but the term "can" indicates that it is a discretionary decision of the court whether to serve physically or electronically. It is questionable, however, why the court should come to the conclusion that the written copy is preferable in the specific case.

49. Is every citizen obliged to accept electronic service of documents in your Member State?

No, there is no general obligation to accept electronically served documents because there is no general obligation to participate in the ERV: Only the natural persons and legal entities (in particular lawyers) mentioned in § 89c (5) GOG are obliged to participate in the ERV.

49.1. If yes: What provisions does your Member State's national law provide in case the recipient has no possibility to receive electronic deliveries? (e.g. for elderly people)

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50. Is there a central body responsible for electronic service in your Member State?

The central interface in electronic legal transactions is the Bundesrechenzentrum GmbH (Federal Computing Centre), which handles both transmission by transmitting agencies and direct transmission (§§ 2 and 3 ERV-VO 2021). The ERV participants directory is also set up at the Bundesrechenzentrum GmbH (§ 9 ERV-VO 2021).

51. What measures are taken in your Member State to ensure the security of electronic service?

The security of electronic legal transactions is primarily ensured by the address code together with an advanced electronic signature as individual authentication of the participant [§ 10(2) ERV-VO 2021]. In addition, § 10 (3) ERV-VO 2021 provides that in order to protect against misuse, appropriate technical and organisational measures must be taken to ensure that electronic submissions are only made by the person designated in the submission as the submitting person.

52. What measures are taken in your Member State to ensure the efficiency of electronic service?

The efficiency of electronic legal transactions is enhanced on the one hand by the central processing via the Bundesrechenzentrum GmbH, and on the other hand by the wide range of transmission options provided by the ERV-VO. As a result, citizens can also use the ERV without the intermediary of transmission agencies (e.g. through the upload options via FinanzOnline and JustizOnline).[161]

53. What are the consequences if electronic service is not possible? (e.g. disrupted internet access)

If service is not possible via the ERV, it can alternatively be effected via electronic service in accordance with the provisions of the 3rd section of the ZustG [§ 89a (3) GOG]. In the present case (disruption of the internet connection), this will not be purposeful either; in this case, it must be pointed out that the possibility of serving a written copy of the decision is expressly retained [§89a (2) GOG], thus it seems mostly appropriate to serve the document physically via the Austrian postal service.

54. What are the costs of electronic service?

A distinction must be made here: If a transmission agency is used, a basic fee is charged for registration and a fee for each transmission made, whereas transmission via the upload services (FinanzOnline or JustizOnline) is free of charge.[162]

55. What measures does your Member State take with regard to data protection in connection with electronic service?

Pursuant to § 10 (1) ERV-VO 2021, the transmission in the ERV must be encrypted; in addition, participants are identified and authenticated by means of an advanced electronic signature [§ 10 (2) ERV-VO 2021]; the certificates used for this purpose must be issued by a trust service provider pursuant to Art 3 No. 19 eIDAS-VO 910/2014/EU.

56. How could the rules on service in your national law be improved in order to facilitate cross-border service and to avoid legal uncertainty?

The simplification of cross-border service goes hand in hand with the homogenisation of Member State service law. In particular, because the Regulation often refers to the law of the Member State addressed, there are probably considerable differences in the application of the Regulation, depending on the respective national law. An approximation would definitely contribute to legal certainty, but the existence of a consensus among the Member States for ONE uniform act regulating the *modus operandi* of cross-border services is questionable.

[161] Elektronischer Rechtsverkehr (ERV): <www.oesterreich.gv.at/themen/dokumente_und_recht/elektronischer_rechtsverkehr_erv.html> (visited 30 November 2022).
[162] Elektronischer Rechtsverkehr (ERV): <www.oesterreich.gv.at/themen/dokumente_und_recht/elektronischer_rechtsverkehr_erv.html> (visited 30 November 2022).

57. Please explain how the E-CODEX system operates if your Member State took part in the E-CODEX project concerning procedures in the case of European Small Claims and European Payment Order.

e-CODEX ensures interoperability between the IT systems used by judicial authorities of the member states. This allows different national e-justice systems to be interconnected in order to conduct cross-border proceedings in civil and criminal matters.[163]

The e-CODEX system is a tool specifically designed to facilitate the cross-border electronic exchange of any content transmissible in electronic form in the justice area, such as Documents, official forms, evidence or other information. In the context of increased digitalisation of judicial cooperation in civil and criminal matters, the aim of the e-CODEX system is to improve the efficiency of cross-border communication between the competent authorities and facilitate access to justice of citizens and businesses.[164]

For example, e-CODEX already supports the system for the digital exchange of electronic evidence as well as exchanges relating to European Investigation Warrants and mutual legal assistance in the area of judicial cooperation in criminal matters.[165] Within the framework of the Regulation on European Payment Orders, Germany and Austria have jointly developed this EU-supported IT application for the supportive electronic processing. It has the following functionalities:[166]

- Simple processing of applications by transferring the data from the claim form and creating further forms and procedural steps in the system.
- Important data of the proceedings are available at any time in the form of a table.
- All procedural steps are presented in an orderly manner in a register. All further steps are carried out from the register, such as letters and notes.
- Text modules can be freely created and saved for all purposes.

PROBLEMS RESULTING OUT OF CROSS-BORDER SERVICE

58. What national issues arise out of the service of documents in your member state?

Problems arise in particular from the fact that the effectiveness of service depends on numerous uncertainties (e.g. regular stay at the place of service), which is not necessarily beneficial to the freedom from defects of (the service of) judicial decisions and thus to legal certainty. The regulations of §§ 16 (5) [and 17 (3)] ZustG, which are not necessarily successful from a creational legislative point of view, lead to difficulties of interpretation and are also not answered uniformly by the case law of the Supreme Court and the Supreme Administrative Court. The problem lies in

[163] <www.consilium.europa.eu/de/press/press-releases/2021/06/07/digitalisation-of-justice-council-approves-its-mandate-for-negotiations-on-the-e-codex-system/#:~:text=Mit%20e-CODEX%20wird%20die,in%20Zivil-%20und%20Strafsachen%20durchzuführen.> (visited 12 January 2023).
[164] Proposal 2020/0345 (COD) for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726, see <data.consilium.europa.eu/doc/document/ST-9005-2021-INIT/en/pdf> (visited 12 January 2023).
[165] See supra n. 158.
[166] *Ministry of Justice*, IT-Anwendung in der österreichischen Justiz (2020) p. 35.

the fact that it is not clear from the wording how the phrase "regular presence" according to para 1 *leg cit* - which is a precondition for substitute service - relates to the phrase "absence from the place of service" according to para 5.[167]

It is disputed whether § 16 (5) ZustG only applies if the substitute service was admissible per se, i.e. the addressee is regularly at the place of service but does not become aware of the service in time due to his short-term absence, or whether para 5 *leg cit* also applies if the substitute service would not be admissible at all because the addressee is absent for a longer period of time, or whether para 5 *leg cit* applies to both cases.[168]

More recent case law tends to apply the provision to cases of prolonged absence:

In the opinion of the Supreme Court, a substitute service is effective in case of doubt; § 16 (5) ZustG only applies if there was an absence which precluded "regular presence" pursuant to § 16 (1) ZustG.[169]

In the opinion of the Supreme Administrative Court, a so-called "temporary absence" pursuant to § 16 (5) ZustG - which excludes substitute service - exists if the recipient is prevented by this absence from taking notice of the service processes in the area of the place of service, which can be affirmed e.g. for travel, holidays or a hospital stay, but not for professional absence during the day.[170]

59. What European issues arise out of the service in your member state?

As far as can be surveyed, the Regulation and national law on service of documents **appear to harmonise**, which becomes evident from Article 22 (1) of the Regulation and § 402 (1) No 1 ZPO (see q. 25.4. and 25.5.) providing for very similar provisions concerning default judgements.

It is interesting to note, however, that according to the case law of the Supreme Court, the question of the **effectiveness of service** is to be assessed **according to the law of the receiving state**, whereas the question of the **cure of defects in service** (i.e. if there is no effective service according to the law of the receiving state) is to be assessed **according to Austrian procedural** and service **law** (if the proceedings are pending in Austria).[171] See also q. 61.

One can argue, that it would be **more coherent** if the question whether **a deficiency in service is cured or not** is dependent of the **service law of the receiving state**, because that would be more favourable for the addressee since time limits for procedural acts also depend on the effectiveness of service and the addressee will have more cognisance on the service law of the member state in which he/she lives in than of any other.

[167] *Schulev-Steindl*, supra n. 16, Rz 420 with further references to literature and case law in footnote 108.
[168] *Schulev-Steindl*, supra n. 16, Rz 420.
[169] RIS-Justiz RS0083895; OGH 1 Ob 630/84 (1 Ob 631/84), 1 Recht der Wirtschaft (1985), p. 181; agreed by *Stumvoll*, supra n. 13, § 17 ZustG Rz 18.
[170] VwGH 25.2.2002, 2002/17/0021; **previous dissenting opinion**: VwGH 4.10.2001, 95/080131: In the case of a longer absence, the deposit is inadmissible; a cure could only be considered according to the basic rule of § 7 ZustG.
[171] OGH 4 Ob 60/05k, 20 Recht der Wirtschaft (2005) p. 549; see also *Gitschthaler*, supra n. 3, § 121 ZPO Rz 7.

60. How could the provisions on service in your national legislation be improved in order to facilitate cross-border service and prevent legal uncertainty?

In Austria, the ZPO was amended accordingly in 2009 due to the Service of Documents Regulation (2007) and the harmonisation efforts of the EU. See q. 36. For more far-reaching measures, an autonomous regulation is required under EU law, which provides for ONE mandatory service of documents act for all member states instead of a regulation that only refers to national laws (see q. 56).

61. Please list national cases in which problems occurred regarding the cross-border service of documents. If possible, please shortly summarise the respective issues[172] and decision.

OGH 4 Ob 60/05k = RdW 2005/629 concerning Art 7 EuZVO 2007:

The requirements and effects of service abroad have to be assessed according to the procedural law applicable in the country of service, unless a special transmission was requested by the transmitting agency. By contrast, the running of time limits triggered (for proceedings pending in Austria) by service abroad and the cure of deficiencies in service by actual receipt of the document are to be assessed according to Austrian procedural and service law. However, if a special transmission was not requested by the transmitting agency, the effective service according to the rules of the State of service also has legal effects for the Austrian proceedings.

OGH 3 Ob 91/09t:

Case: The court of first instance granted the execution as requested. Apparently, in the course of the appearance of the obligor at a court hearing before the court of first instance an attempt was made on 16 May 2008 to hand over the execution order to the obligor. According to the certification on the service receipt, the obligor refused to accept the document because it had not been translated.

Decision concerning Art 1 EuZVo 2007:

The Regulation does not apply to the personal direct service of judicial documents at court (on the addressee) pursuant to § 24 ZustG, which would be ready for transmission, even if the addressee is from another Member State; this is a **purely domestic service**.[173]

Decision concerning Art 8 EuZVO 2007:

An **enforcement order** by direct service at the court may be served on a person (resident in another EU country) even without a translation.

OGH 4 Ob 183/09d concerning Art 8 EuZVO 2007

The assessment of whether the addressee was entitled to refuse to accept documents drawn up in the language of the State of transmission because of insufficient knowledge of that language is a matter exclusively for the court conducting the proceedings in the State of transmission.

OGH 1 Ob 218/11g:

Case: The plaintiff filed an action on damages against a company that was seated in Jersey, Channel Islands. Since service in Jersey is almost impossible, service of the action is requested at the Dutch (residential) address of the Chairwoman of the Board of the Defendant. The court of first instance had the complaint and the order to file a

[172] The case is only presented, if considered necessary for understanding the ruling of the Supreme Court.
[173] OGH 3 Ob 91/09t (RIS-Justiz RS0124823).

response translated into Dutch and served the documents at the address. The Dutch courts indicated that the CoB refused to accept them because of the language used.

Decision concerning Art 8 EuZVO:

According to its clear wording, Art 8 No. 1 of the Regulation leaves no doubt that documents may always be served in their original or translated version in the official language of the Member State addressed (i.e. without any further condition). This result also does not contradict Art 6 ECHR, independent to the language skills of the CEO that accepted the document.

Therefore, the Supreme Court considered that the service process had been effective.

OGH 2 Ob 217/12v (2 Ob 218/12s):

Case (shortened to relevant parts):

According to the international return receipt, the father was duly served with the interim order for the payment of maintenance to his children (dated 5 September 2011) together with the instructions on the right of appeal at an address for service in Luxembourg indicated by the (plaintiff) children on 19 September 2011. The father's remedy was only filed with the First Instance Court by electronic means on 6 October 2011. The remedy contains the argument that service should have been effected in accordance with the Regulation, but in fact it was not.

Decision concerning Art 1 EuZVO 2007:

The Regulation only supersedes procedural law (*lex fori*) to the extent that it regulates the respective question itself. However, it does not affect the national rules on which documents have to be served at all, how the addressee or authorised recipient, the address for service and the place of service are to be determined. These questions, i.e. also at whose hands and at which place judicial documents are to be served, are to be assessed according to national law.[174]

Decision concerning Art 9 EuZVO 2007:

The date from which time limits relevant for the recipient begin to run is also governed by the law of the state in which the recipient is domiciled. According to Art 9 (3) of the Regulation, this also applies to postal service.[175]

In the case there were no indications that the service would have been ineffective under the service law of the receiving State of Luxembourg or that it would have become effective only at a later point in time than that of the receipt of the document as recorded on the proof of service, nor was this ever asserted by the father. Therefore, it had to be assumed that the service of the preliminary injunction on September 19, 2011 was legally effective, which means that the **(missed)** time limit for appeal had started to run and the **remedy had been filed too late**.

OGH 8 Ob 17/12a

Case: corresponding to the above-mentioned case 1 Ob 218/11g

Decision concerning Art 1 EuZVO 2007:

The effectiveness of service, including the question of how service is to be effected on a legal person, the cure of deficiencies in service and the entitlement and consequences of a refusal to

[174] OGH 1 Ob 218/11g, 2 Ob217/12v, 2 Ob218/12s; RIS-Justiz RS0127746.
[175] OGH 2 Ob 217/12v, 2 Ob 218/12s; RIS-Justiz RS0128711.

accept service, are to be assessed according to the law of the State of the proceedings and not directly according to the Regulation.[176]

Decision concerning Art 7 EuZVO 2007:

Art 7 of the Regulation clarifies that the receiving agency shall proceed according to its own service rules when effecting service (unless the transmitting agency requests otherwise). Pursuant to § 106 (2) ZPO, compliance with the local form is sufficient for the lawfulness of a foreign service under the Austrian lex fori.[177]

Decision concerning Art 8 EuZVO 2007:

The language regime of Art 8 of the Regulation is based on the internationally recognised concept that the addressee must accept service in the official language of the place of service.

Overall: The service on the living place of the CoB in the Netherlands was effective.

[176] OGH 8 Ob 17/12a (RIS-Justiz RS0127642).
[177] OGH 8 Ob 17/12a (RIS-Justiz RS0127642).