NATIONAL REPORT FOR GERMANY ON CROSS-BORDER SERVICE OF DOCUMENTS

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Project DIGI-GUARD 2023

Questionnaire for National Reports

GERMANY

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On the Cross-border Service of Documents

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.

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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 Zivilprozessordnung (Code of Civil Procedure, hereafter: ZPO) offers a legal basis for the service of documents. Section 2 of the third chapter gives a general overview of the procedure for the service of records or documents. The ZPO differentiates between service ex officio (sub-section 1, §§ 166 – 190 ZPO) and service of records or documents at the instigation of the parties (sub-section 2, §§ 191 – 213a ZPO). The latter is rarely used in practice.

The relevant section concerning service ex officio is structured as follows:

- Definition and retroactive effect of service (sections 166, 167 ZPO)
- Responsibilities of the court registry (§§ 168, 169 ZPO)
- Recipients of service (§§ 170 – 172 ZPO)
- Methods of service and substitute service (§§ 173 – 182 ZPO)
- Service abroad (§§ 183, 184 ZPO)
- Service by publication (§§ 185 – 188 ZPO)
- Remedy of defects in service of records or documents (§ 189 ZPO)

Before a legal reform in 2001, the provisions of the ZPO have remained largely unchanged since 1877.[1] Following the broadest reform concerning the service of documents,[2] service ex officio is considered the rule, § 166(2) ZPO. This means a service at the instigation of the parties is only possible if expressly allowed or mandatory, § 191 ZPO.[3]

A special act regulating solely the service of documents is the Verwaltungszustellungsgesetz (Administrative Service Act, hereafter: VwZG), which is applicable for the service procedure of the federal authorities, the federal corporations, institutions, and foundations under public law and the state fiscal authorities, § 1 VwZG. The VwZG is not applicable in civil and commercial matters. It is only regulating the service of documents through a public agent regarding administrative law.

For civil matters, generally, **§§ 166-190 ZPO** are applicable. If the documents are to be served on a person with limited legal capacity (*beschränkt geschäftsfähig*) or legal incapacity (*geschäftsunfähig*), service must be made on the legal guardian (*gesetzlicher Vertreter*), following § 170(1) ZPO.

[1] *M. Häublein/M. Müller*, in Rauscher/Krüger Münchener Kommentar zur Zivilprozessordnung Band 1 (C.H. Beck 2020), § 166 ZPO para. 1.

[2] Zustellungsreformgesetz, 25.06.2001, BGBl. I 1206, in force since 01.07.2002.

[3] *J. Dörndorfer*, in Vorwerk/Wolf Beck'scher Online-Kommentar Zivilprozessordnung (C.H. Beck 2022), § 166 ZPO para. 1.

A **service abroad** is stipulated in § 183 ZPO. In principle, postal delivery is also permissible to foreign countries if this is authorised by international law, § 183(2) ZPO. It should be noted, however, that the documents have to be served by registered mail with advice of receipt (Einschreiben mit Rückschein), § 183(2) cl. 2 ZPO. If there are no agreements on service abroad under international law, service is regularly done by the authorities of the foreign state at the request of the presiding judge of the court, subject to § 183(4) ZPO.

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

According to the legal definition in § 166(1) ZPO, "The term "service" designates the issuance of a document to a person in the form stipulated in the present Title." The definition of service applies to service which is carried out ex officio, § 166(2) ZPO.

Service is a means to enable a person to be informed about a document. Although for the service itself and its legal validity, documentation of the service is not necessary, a certificate of the date of service is possible. However, it only has an evidentiary function, § 169(1) ZPO. While the effectiveness of service requires intent,[4] a notarisation of delivery is no longer a constitutive part of service.[5] The documentation is regulated in a separate provision, § 182 ZPO.

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?

Germany does not use this term in pure domestic cases because civil law generally includes commercial matters as a legal sub-section (*Teilrechtsgebiet*). The ZPO applies the term in civil cases only as defined in § 13 Gerichtsverfassungsgesetz (German Courts Constitution Act, hereafter: GVG). According to this provision, such cases include issues between private individuals, family matters, as well as non-contentious matters of voluntary jurisdiction.

Other than that, all of these regulations are part of civil law. The division of the Bürgerliches Gesetzbuch (German Civil Code, hereafter: BGB) supports this. It is divided into five books, the last two stipulate family law and the law of succession.

Commercial matters, however, are regulated by a separate act, the Handelsgesetzbuch (German Commercial Code, hereafter: HGB). According to § 95 GVG, commercial matters are civil disputes in which an action is brought to assert a claim:

[4] BGH, 16.10.1956 - VI ZR 174/55, NJW 1956, 1878; *Häublein/Müller*, supra n. 1, § 166 ZPO para. 3.
[5] *Häublein/Müller*, supra n. 1, § 166 ZPO para. 3.

"1. against a merchant within the meaning of the Commercial Code, insofar as he is registered in the commercial register or the cooperatives register or need not be registered therein pursuant to a special statutory arrangement governing corporate entities established under public law, arising out of transactions that are commercial transactions for both parties;

2. arising out of a bill of exchange within the meaning of the Bills of Exchange Act or arising out of one of the documents designated in section 363 of the Commercial Code;

3. on the basis of the Check Act;

4. arising out of one of the legal relationships designated hereinafter:

   a) out of the legal relationship between the members of a commercial partnership or cooperative or between the partnership or cooperative and its members or between the silent partner and the owner of the commercial business, both during the existence of and after the dissolution of the partnership relationship, and out of the legal relationship between the managers or liquidators of a commercial partnership or cooperative and the partnership or cooperative or its members;

   b) out of the legal relationship concerning the right to use the commercial firm name;

   c) out of the legal relationships concerning the protection of trademarks, other identifying marks and registered designs;

   d) out of the legal relationship originating in the acquisition of an existing commercial business "inter vivos" between the previous owner and the acquirer;

   e) out of the legal relationship between a third party and the party liable on grounds of lack of proof of statutory authority or commercial authorisation of lawyer;

   f) out of the legal relationships under maritime law, especially those concerning the shipping business, those concerning the rights and obligations of the manager or owner of a ship, the ship's husband and the crew of the ship, and those concerning average, compensation for damages in the event of collisions between ships, salvage operations and claims of maritime lien holders;

5. on the basis of the Act against Unfair Competition, with the exception of claims of the ultimate consumer arising out of section 13a of the Act against Unfair Competition, provided that no mutual commercial transaction pursuant to subsection (1), number 1, exists;

6. arising out of sections 9, 10, 11, 14 and 15 of the Securities Prospectus Act or sections 20 to 22 of the Capital Investment Act."

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

German law does not use the term in its national legal system, they only use the definition for the application of European Law. The German legal system itself distinguishes between various legal fields as explained in question no. 3.

The distinction between commercial cases and others is only relevant for civil matters that are assigned to specialised courts (e.g., family, labour, or social). Family matters are assigned to Family Courts which are established at the local courts (*Amtsgerichte*), §§ 23a(1) No. 1, 23b(1) GVG. Labour matters are assigned to labour courts, state labour courts, and the Federal Labour Court, § 1 Arbeitsgerichtsesetz (Labour Courts Act, hereafter: ArbGG). Social matters are assigned to social courts, state social courts and the Federal Social Court, § 2 Sozialgerichtsgesetz (Social Courts Act, hereafter: SGG).

5. How is the concept "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.

"Judicial documents" are defined as documents originating from a judicial body whereas "extrajudicial documents" are defined as documents drawn up or certified by officials and authorities, as well as private documents whose formal transmission is required for evidence, to safeguard or assert claims.[6] Therefore, extrajudicial service is understood as the service of a document outside of a court proceeding and not only the service of documents related to a court proceeding.

Furthermore, § 371a(3) ZPO defines official electronic documents (*öffentliche elektronische Dokumente*) as electronic documents that have been created following the form requirements by a public authority within the limitations of its official competencies, or by a person or entity vested with public trust within the business circle assigned to them.

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 allow the recipient (§ 182(2) No. 1 ZPO) to take notice of the document and to prepare their legal defence thereon.[7] Following the same provision, the recipient is the person on which the document is to be served.

[6] *A. Stadler*, in Musielak/Voit Zivilprozessordnung (Vahlen 2022), Art. 1 EuZustVO para. 5.
[7] BVerfG, 11.7.1984 - 1 BvR 1269/83, NJW 1984, 2567, 2568.

This purpose is a consequence of the **right to be heard**, which is considered a fundamental constitutional right, Article 103(1) of the Grundgesetz (German Constitution, hereafter: GG).[8] Hence, the purpose of service establishes the **rule of law** in the area of judicial proceedings. Furthermore, the right to service promotes the course of proceedings and thus simplifies the procedure, which serves the principle of **effective access to justice** (Article 19(4) GG).[9] In addition, **legal certainty** can be established through the service of documents and according to provisions.

By serving the written pleading, the action is filed, § 253(1) ZPO. At this point, the dispute is considered **pendent** (anhängig), § 261(1) ZPO meaning that various procedural consequences are being constituted, e.g. a general prohibition of modifications of the action according to § 263 ZPO,[10] and none of the parties may bring the dispute before another court or trial according to § 261(3) No. 1 ZPO. **Lis pendens** (*Rechtshängigkeit*) ends with the process being closed, e.g. by an unappealable judgment according to § 705 ZPO or the withdrawal of legal action in line with § 269 ZPO.[11]

Lis pendens needs to be distinguished from the pendency (*Anhängigkeit*). The latter is the preliminary stage of lis pendens, as it designates the court's being concerned with a matter and therefore does not require the service of the written pleading.[12] The most relevant application of pendency is § 167 ZPO, in which it is deemed to be the starting point of the commencement of a time limit or limitation period.[13] The reason for this distinction between pendency and lis pendens is that service delays are not attributable to a party if the cause for the delay lies with the court.[14] According to the law, further procedural consequences can occur with lis pendens, e.g. following § 261(3) ZPO:

"1. For as long as the dispute is pending, none of the parties may bring the dispute before another court or tribunal;

2. The jurisdiction of the court hearing the case will not be affected by any change to the circumstances giving rise to its competence."

[8] Ibid.; *Häublein/Müller*, supra n. 1, § 166 ZPO para. 5.
[9] Cf. VGH München NJW 2012, 950, 951.
[10] *Becker-Eberhardt*, supra n. 1, § 261 ZPO para. 2.
[11] *Foerste*, supra n. 6, § 261 ZPO para. 8.
[12] *Becker-Eberhardt*, supra n. 1, § 261 ZPO para. 3.
[13] Lecturio, 'Anhängigkeit und Rechtshängigkeit der Klage', <www.lecturio.de/magazin/anhaengigkeit-rechtshaengigkeit-klage/>, visited 12 March 2023.
[14] Ibid.

7. Who is responsible for the service of documents?

The court registry shall perform service of documents ex officio under §§ 173 – 175, 168(1) ZPO. Hence, the court is responsible for sending the documents. However, the claimant is responsible for enabling the court to do so by providing enough/sufficient information.

Another method is the service at the instigation of the parties themselves, §§ 191 – 213a ZPO, to which the provisions of service ex officio apply if there are no lex specialis, § 191 ZPO. Inapplicable provisions are § 174 ZPO, concerning delivery at the governmental office, and § 176(1) ZPO, service through registered mail.[15] The bailiff is the competent service body for service at the instigation of the parties, § 192 ZPO. The bailiff may effect service themselves, § 193 ZPO, or have it effected by the post office, following §§ 194, 176 ZPO. Service by registered letter with confirmation of receipt in accordance with § 175 ZPO is not possible for service at the instigation of the parties.

Generally, as with service ex officio under sections 166 et seq. ZPO, the procedure of service by the parties also serves the possibility of obtaining actual knowledge.[16] It thus serves the right to be heard as a fundamental procedural right.[17] Hence, service at the instigation of the parties also serves legal certainty.[18] Although the objective of the service is similar, both ways are used in different scenarios. Service at the instigation of the parties may be relevant particularly in the case of service of declarations of intent according to § 132 BGB, of debt instruments which are to be served exclusively in party proceedings (e.g. enforceable deeds, deeds for the initiation of compulsory enforcement pursuant to §§ 750(2), 751(2), 756, 765, 795 ZPO), of arrests and interim injunctions if these are ordered (§§ 922(2), 936 ZPO), attachment and transfer orders (*Pfändungs- und Überweisungsbeschlüsse*) (§§ 829(2), 835(3), 846, 857(1), 858(3) ZPO), notifications (§ 845 ZPO), waivers by creditors of rights arising from attachment and transfer (§ 843 ZPO) and enforcement orders handed over by the district court to the claimant for service at the instigation of the parties (§ 699(4) cl. 2 and 3 ZPO).[19]

A subtype of the service among the parties constitutes the service from lawyer to lawyer, § 195(1) ZPO. If necessary, proof of service must be provided to the court, § 195(2) ZPO.

[15] *Dörndorfer*, supra n. 3, § 191 ZPO para. 5.
[16] *C. Vogt-Beheim*, in Anders/Gehle Zivilprozessordnung (C.H. Beck, 2023), § 191 ZPO para. 2.
[17] *Vogt-Beheim*, supra n. 16, § 191 ZPO para. 2.
[18] *Vogt-Beheim*, supra n. 16, § 191 ZPO para. 2.
[19] *Wittschier*, supra n. 6, § 191 ZPO para. 2; *Dörndorfer*, supra n. 3, § 191 ZPO para. 1.

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 the court is responsible for service, it can reject the service of documents only in exceptional cases.[20] If the requirements of such a case are not fulfilled and the court does not execute the service (correctly) it is considered a breach of an official duty (*Amtspflichtverletzung*), which results in a violation of the right to justice.[21] Hence, it is possible to claim damage, regularly based on § 839 BGB in connection with Art. 34 GG (*Amtshaftung*).[22]

The German Federal Court (*Bundesgerichtshof*, hereafter: BGH) granted a party compensation for damages in a case in which a service agent effected a service of an enforcement title incorrectly.[23] The agent served a temporary restraining order formally wrong, the copy was incorrect (generally speaking, in the case of enforcement orders, the bailiff does not need the original judgement or the enforceable document, but a copy is sufficient). Because the document itself contained neither the competent clerk of the court's signature nor the court seal, the wrong form led to a breach of official duty.[24] § 189 ZPO provides for a possible fiction to remedy defects (*Heilung*) if it cannot be proven that a document was served in due form or if the document was received in violation of mandatory service regulations. It is deemed to have been served at the time when the document was actually received by the person to whom the service was or could have been directed per the law. However, in this particular case, this was considered to not affect the breach of official duty (*Amtspflichtverletzung*) in any way, as the defect cannot be remedied according to § 189 ZPO.[25] The reasoning for this judgment was the irrelevance of the incorrect service for the existence of a breach of official duty. The incorrect service only effected the occurrence and extent of compensable damage. The damage would be based on § 839 BGB in connection with Art. 34 GG (*Amtshaftung*). However, even if a breach of official duty occurs, the existence of possible damage needs to be verified and cannot be established only by the breach itself. The state is only liable if the citizen actually suffers damage as a result of the breach of official duty.[26]

Generally, the time limits have to be abided by the court. The expiration date of the time limit has to be calculated based on §§ 187(1), 188(2), (3) BGB.[27] If a period commences on the occurrence of an event or at a point of time falling in the course of the day, then the day on which the event or

[20] BeckRS 2013, 7883.
[21] Ibid.
[22] BGH NJW 2019, 1374.
[23] Ibid.
[24] BGH NJW 2019, 1374.
[25] Ibid.
[26] BGH NJW 2019, 1374 (1377).
[27] *I. Drescher*, in Rauscher/Krüger Münchener Kommentar zur Zivilprozessordnung Band 2 (C.H. Beck 2020), § 929 ZPO para. 9.

the point of time occurs is not included in the calculation of the period, § 187(1) BGB. Although an extension of the period is not possible,[28] according to § 224 ZPO, it can be shortened through a private agreement by the parties. Since the enforcement period (*Vollziehungsfrist*) is not an emergency period, restitutio in integrum (*Wiedereinsetzung in den vorigen Stand*, § 233 ZPO) is not possible.[29]

The court has been granted a discretion in certain scenarios as to whether it serves the document on the recipient themselves or on a legal representative or whether it orders a foreign recipient to appoint an agent for the service within the country.[30] The discretionary choice cannot be challenged by either party to the dispute.[31]

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

In Germany, parties are not responsible for the service of actions brought in front of the civil courts; service is executed ex officio only, §§ 166(2), 270(1) ZPO.[32] Hence, direct service to the respondent does not result in lis pendens of the action.[33] Only during ongoing proceedings, documents may be effectively served from lawyer to lawyer, § 195 ZPO.[34]

There is one **exception**, where the parties are responsible for timely service of documents: Service must be performed before one month has elapsed since the day on which the arrest order (*Arrestbefehl*) was pronounced or served on the party at whose request it was made, § 929(2) ZPO. It has to be noted, however, that § 929(2) ZPO concerns the enforcement of a claim, not the (contentious) civil court proceedings or their procedural requirements. Service by a party is still considered an exception since the usual concept follows a service ex officio which is conducted at once (*alsbaldige Zustellung*). Service following § 929(2) ZPO in comparison does not rely on service at once – with the relevant point of time being the act of sending – but requires the arrest order to be delivered within the specified time period.

[28] BGH NJW 1993, 1076; *Drescher*, supra n. 27, § 929 ZPO para. 9.
[29] Ibid.
[30] *Bacher*, supra n. 3, § 253 ZPO para. 42.1.
[31] BGH GRUR 2014, 705; *Bacher*, supra n. 3, § 253 ZPO para. 42.1.
[32] *Becker-Eberhardt*, supra n. 1, § 253 ZPO para. 37; *Bacher*, supra n. 3, § 253 ZPO para. 42.
[33] *Becker-Eberhardt*, supra n. 1, § 253 ZPO para. 40; *Bacher*, supra n. 3, § 253 ZPO para. 42.
[34] *Becker-Eberhardt*, supra n. 1, § 253 ZPO para. 40; *Bacher*, supra n. 3, § 253 ZPO para. 42.

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 German Civil Procedure is divided into two phases: the contentious proceedings (*Erkenntnisverfahren*) and the enforcement proceedings (*Vollstreckungsverfahren*). Generally speaking, service ex officio is the norm during the contentious proceedings, whereas service at the instigation of the parties is usually used during the enforcement proceedings.[35] During the latter, service ex officio is to be assumed if the service is not subject to the disposition of the creditor or is not in his interest of enforcement.[36] Furthermore, service ex officio is mandatory if the service is an official duty of the bailiff and the service by parties is neither required nor permitted, § 191 ZPO. Cases where the service at the instigation of the parties is required and codified can be found in question No. 7.

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

According to § 166(1) ZPO, the term "service" designates the issuance of a document to a person in the form stipulated in the present title.

If a document is served **ex officio**, the requirements are the following. First, it takes an order or instruction of the person effecting the service (e.g. the clerk's office (*Geschäftsstelle*) or the court) to effect the service of a particular document.[37] Second, the execution in the form determined by the law, and third, the performance of service towards the recipient. Last, the requirements of the respective form of service must be met.[38]

For the execution in the form determined by the law in the case of a service ex officio, the clerk's office is the service agent.[39] According to § 168(1) cl. 1 ZPO, there are three alternative methods, besides "regular" service by mail, how a document can be served on the recipient. Service by physical delivery at the governmental office (§ 174 ZPO), service against return confirmation of receipt (§ 175 ZPO), and service by registered mail, return receipt requested (§ 176 ZPO).[40]

[35] J. Herrfurth, „Zustellung von Amts wegen oder Zustellung auf Betreiben der Partei - Verfahrensrecht und kostenrechtliche Auswirkungen", DGVZ (2018) p. 245 at p. 246.
[36] Ibid p. 245.
[37] *H. Roth*, in Stein/Jonas Zivilprozessordnung Band 3 (Siebeck, 2016), § 166 ZPO para. 6.
[38] Ibid.
[39] *Roth*, supra n. 37, § 166 ZPO preface para. 10.
[40] Ibid.

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

In principle, "documents" include all certificates (§§ 415 et seq. ZPO) as well as all written or electronic texts.[41] Following the right to be heard, all relevant documents (procedurally and on the merits) have to be served onto the parties. Exemplary this applies to the following types of documents.

The written statement of claim (prepared by the claimant) must be sent as a service of action to the respondent in pursuance with § 253 ZPO as well as an information form (prepared by the court) to notify the respondent about their procedural rights, § 499 ZPO.

Other included documents that require service are:[42]

- the third-party notice (*Streitverkündung*), prepared by the party (§ 73 ZPO),
- the ruling for the assessment of costs, given by the court of first instance (§ 104 ZPO),
- the withdrawal of legal action, initiated by the claimant (§ 269 ZPO),
- the judgement, given by the court (§ 317 ZPO),
- the orders and rulings, given by the court (§ 329 ZPO),
- the notice on appeal on points law, done by the court (§ 550 ZPO),
- as well as its reasoning, given by the court (§ 551 ZPO),
- the notice of appeal and its particulars, prepared by the counterparty (§ 521 ZPO),
- the payment order, prepared by the claimant and given by the court (§ 693 ZPO),
- and the enforcement order, given by the court (§ 699 ZPO)

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

The information that must be submitted to the respondent must enable them to know the subject of the case (materially) and to evaluate their procedural rights and possibilities. Thus, the information included serves the purpose of safeguarding the right to be heard of the respondent and to create a fair hearing regarding the knowledge of the facts and procedural instruments.

The exact necessary information depends on the type of document. Generally, documents produced by the court and those with the possibility to limit the recipient's rights if (no) action is taken, need to be accompanied by an instruction of the legal remedies (*Rechtsbehelfsbelehrung*). Materially, the

[41] *Roth*, supra n. 37, § 166 ZPO para. 5.
[42] *Häublein/Müller*, supra n. 1, § 166 ZPO para. 8.

following applies for the different types of documents, including some special aspects concerning their service conditions.

The information contained in the **statement of claim** is set out in § 253 ZPO:

> "(2) The statement of claim must include:
>
> 1. The designation of the parties and the court;
> 2. Exact information on the subject matter and the grounds for filing the claim, as well as a precisely specified petition."

Thereby, formally, the claimant has to provide the name, address, and other information necessary to identify the respondent, § 253(2) No. 1 ZPO. Materially, the claimant has to provide the facts that are necessary to establish the legal claim, § 253(2) No. 2 ZPO. Although not legally required, it is recommended in § 253(3) ZPO to include some additional aspects into the statement of claim.

A **third-party notice (§ 73 ZPO)** must include the reasons for the notice and the status of the legal dispute (§ 73 cl. 1 ZPO) as well as a declaration that the dispute is announced.[43] To meet these requirements, it is sufficient to provide explicit information, namely about the claim to be expected or effected within the meaning of § 72 ZPO but also about the main proceedings in its essential points.[44]

The court of first instance decides on the petition regarding the **assessment of costs (§ 104 ZPO)**. The request must be filed in written form or declared on the record at the office of the competent court. Moreover, the exact designation of the dispute and the declaration that an assessment is requested are required.[45] According to § 104(2) ZPO, for a cost item to be considered, it shall suffice for it to have been substantiated. A prima facie evidence (*Glaubhaftmachung*) is only required if the related factual statements are in dispute.[46] Also, a lawyer's expenditures for postage and telecommunications service are sufficiently substantiated by his assurance that such expenditures have been occurred (§ 104(2) ZPO).

The **withdrawal of legal action (§ 269 ZPO)** does not need to be stated explicitly, implied conduct is sufficient.[47] Nevertheless, the actual will to withdraw must result from it, pure idleness (*Nichtstun*) equals omission according to § 333 ZPO,[48] which then could lead to a default judgement as stated in § 330 ZPO. Such a withdrawal is only possible until the start of the oral proceedings unless the

[43] *Schultes*, supra n. 1, § 73 ZPO para. 2.
[44] Ibid.
[45] *Schulz*, supra n. 1, § 103 ZPO para. 38.
[46] *Schulz*, supra n. 1, § 104 ZPO para. 14.
[47] *Becker-Eberhardt*, supra n. 1, § 269 ZPO para. 19.
[48] Ibid.

respondent agrees, § 269(1) ZPO. Unless declared at the hearing, the action shall be withdrawn by submitting a written pleading to the court, § 269(2) cl. 2 ZPO.

The **service of judgment (§ 317 ZPO)** shall be served as a copy (*Abschift*) on the parties, § 317(1) cl. 1 ZPO. Execution copies (*Ausfertigungen*) of the judgement will be issued only upon the corresponding applications being made, and solely in paper format, § 317(2) cl. 1 ZPO. A copy is a duplicate or, put more simply, a photocopy. It has no significance in legal transactions and is used solely for information or as an object of inspection (*Augenscheinsobjekt*) in legal disputes.[49] The execution copy, on the other hand, represents the original in legal transactions, § 47 Beurkundungsgesetz (German Notarisation Act, hereafter: BeurkG).

§ 317(2) cl. 3 ZPO stipulates:

> „Any execution copy of the judgment that a party may request shall be issued without the section addressing the facts and the merits of the case and the reasons on which a ruling is based; this shall not apply if the party requests to have a complete execution issued to it."

The judgement shall in principle be served on both parties.[50] An exception are default judgments that have been pronounced, these shall be served only on the party that has not prevailed in the dispute, § 317 (1) cl. 1 ZPO.

According to § 313 ZPO:

> "(1) The judgment shall set out:
>
> 1. The designation of the parties, their legal representatives, and the representatives of the case;
> 2. The designation of the court and the names of the judges contributing to the decision;
> 3. The date on which the court proceedings were declared terminated;
> 4. The operative provisions of a judgment;
> 5. The merits of the case;
> 6. The reasons on which a ruling is based.
>
> (2) The section addressing the facts and the merits of the case is to summarise, in brief, and based on the essential content, the claims asserted and the means of challenge or defence brought before the court, highlighting the petitions filed. The details of the circumstances and facts as

[49] Pietsch & Meisner Rechtsanwälte und Notar, 'Urkunden, Urschrift, Ausfertigungen, Beglaubigte Abschriften, Unterschriftsbeglaubigung und Abschriften, was ist eigentlich was?', <www.ra-pietsch.de/urkunden-urschrift-ausfertigungen-beglaubigte-abschriften-unterschriftsbeglaubigung-und-abschriften-was-ist-eigentlich-was/> visited 12 March 2023.
[50] *Musielak*, supra n. 1, § 317 ZPO para. 6.

well as the status of the dispute thus far are to be included by reference being made to the written pleadings, the records of the hearings, and other documents.

(3) The reasoning for the judgment shall contain a brief summary of the considerations of the facts and circumstances of the case and the legal aspects on which the decision is based."

Furthermore, the form in which a document is to be served (original, copy, transcript) is not governed by the law on service but by the substantive law (e.g., § 132(1) BGB in conjunction with § 2296(2) cl. 2 BGB) or other procedural law (§§ 377, 402 ZPO). Without special provisions, the delivery of a certified copy is sufficient.[51]

Orders and rulings (§ 329 ZPO) should, for reasons of clarity, be based on the structure of judgements under § 313 ZPO, meaning that a distinction between the statement of facts and legal evaluation is recommended.[52] Orders subject to appeal on points of law (*Rechtsbeschwerde*) must reflect the legally relevant facts of the case. The court of appeal on points of law must in principle proceed based on these facts, including the party submissions.[53] The information contained in the heading (*Rubrum*) of a judgement must essentially be cited in orders, e.g. which judge has recorded the order[54] and in which type of procedure it was issued.[55]

In principle, orders must be substantiated with reasoning.[56] It is therefore necessary to state the facts of the case, the subject matter of the dispute, and the requests of the parties.[57] Even if the court deviates from the interpretation of a norm of ordinary law that the Supreme Court (*Bundesverfassungsgericht*) decision has given it so far, a justification for this must be inferred either from the reasons for the decision or from other circumstances of the case.[58]

The **notice on appeal of points of law (§ 550 ZPO)** as well as its **reasoning (§ 551 ZPO)** must be substantiated in written form, § 551(2) cl. 1 ZPO.

According to § 551(3) ZPO, the reasoning for the appeal on points of law must include:

"1. The declaration to which extent the judgement is being contested and a petition is being made for its repeal (petitions made in the appeal on points of law);

2. The grounds for the appeal on points of law, these being:

[51] *Häublein/Müller*, supra n. 1, § 166 ZPO para. 9.
[52] *Musielak*, supra n. 1, § 329 ZPO para. 2.
[53] BGH NJW 2002, 2648; *Musielak*, supra n. 1, § 329 ZPO para. 2.
[54] BGH NJW-RR 1994, 1406.
[55] *Musielak*, supra n. 1, § 329 ZPO para. 2.
[56] *Musielak*, supra n. 1, § 329 ZPO para. 4.
[57] Ibid.
[58] BVerfG NJW 1994, 574; *Musielak*, supra n. 1, § 329 ZPO para. 4.

a) The specific designation of the circumstances from which the violation of the law is apparent;

b) Insofar as the appeal on points of law is based on the allegation that the law has been violated with regard to the proceedings: the designation of the facts that reflect this irregularity."

If the appeal on points of law has been admitted based on a complaint against denial of leave to appeal, reference may be made, in providing the reasoning for the appeal on points of law, to the reasons cited in the complaint against denial of leave to appeal.

On the other hand, a reference to other earlier pleadings or the grounds of the appeal judgement for the admission of the appeal is not sufficient.[59]

The statement of reasons must cover all parts of the contested judgement that the appellant seeks to have set aside in accordance with the announced claims for revision; insofar as this is lacking, the revision is inadmissible.[60] It is necessary to state the reasons that, from the perspective of the appellant, constitute the substantive or procedural error of law. A statement of paragraphs is not required.[61]

In the event of a complaint of procedural irregularities (§ 551(3) cl. 1 No. 2 b) ZPO), the appellant must at least show that he has made an effort to clarify the matter if he is unable to state specific individual facts due to his lack of knowledge of internal court proceedings.[62]

For the **notice of appeal and its particulars (§ 521 ZPO)** a written statement of defence in appeal proceedings by the opponent is possible, § 521(2) cl. 1 ZPO. According to § 521(2) cl. 2 ZPO, the content is determined per § 277 ZPO. Therefore, the respondent is to state the means by which he defends his case in the statement of defence, provided that based on the circumstances of the proceedings, this corresponds to a diligent pursuit of the court proceedings and serves to promote them. Thereafter, he may primarily limit himself to defending the decision rendered in his favour and to countering new means of challenge by the appellant.[63] Furthermore, any new means of challenge and defence must be introduced;[64] otherwise, there is a risk of preclusion according to § 530 ZPO.[65] According to § 530 ZPO, if there are delays in submitting means of challenge or defence, § 296(1), (4) ZPO shall apply, meaning that the submissions can be rejected in certain cases.

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[59] *Ball*, supra n. 6, § 551 ZPO para. 8.
[60] BGH NJW 1998, 2470; *Ball*, supra n. 6, § 551 ZPO para. 8.
[61] BGH NJW-RR, 1990 480 (481); *Ball*, supra n. 6, § 551 ZPO para. 9.
[62] BGH NJW 1986, 2115; *Ball*, supra n. 6, § 551 ZPO para. 11.
[63] BVerfG NJW 2015, 1746; *Rimmelspacher*, supra n. 27, § 521 ZPO para. 11.
[64] OLG Stuttgart NJW 1981, 2581 (2582); *Rimmelspacher*, supra n. 27, § 521 ZPO para. 11.
[65] *Rimmelspacher*, supra n. 27, § 521 ZPO para. 11.

The **payment order**, which is served as per § 693 ZPO, contains the following aspects according to § 692 ZPO:

"(1) The payment order shall set out:

1. The requirements of the petition as designated in section 690 (1) No. 1 to 5;
2. The notice as to the court not having reviewed whether or not the claimant is entitled to the claim being enforced;
3. The demand to settle the account for the debt claimed, along with the interest demanded thereon and the amount of the costs designated, and to do so within two (2) weeks of the payment order having been served, insofar as the claim being asserted is deemed justified, or to communicate to the court whether the claim being asserted is opposed and in which scope this is being done;
4. The notice that a writ of execution may be issued that corresponds to the payment order, based on which the claimant may pursue compulsory enforcement of his claim should the respondent under the claim not have lodged an opposition before the time limit has lapsed;
5. If forms have been introduced: the notice that any opposition shall be lodged using a form of the type enclosed, which is available from any local court [*Amtsgericht*] and can be completed there;
6. In the event of an opposition being lodged: advance notice specifying the court that is assigned to the matter, with the note that this court reserves the right to review whether or not it has jurisdiction.

(2) A corresponding stamp placed on the document or an electronic signature shall be deemed compliant with this rule instead of a signature by hand."

Since this only replaces a stamp impression and not a mandatory signature, a simple signature is sufficient (deviating from § 130b ZPO, which requires a qualified signature).[66]

Due to its basis of the payment order, the **enforcement order (§ 699 ZPO)** must pursue the claim specified in the order of payment according to § 692(1) No. 1 ZPO, § 690(1) No. 3 ZPO.[67] The claimant must limit their application insofar as the respondent has made payments in response to the order for payment. According to § 699(1) cl. 2 ZPO, they must state this truthfully in the application.[68] The payments which the respondent had already made before the service of the order

[66] *Voit*, supra n. 6, § 692 ZPO para. 3a.
[67] *Schüler*, supra n. 27, § 699 ZPO para. 12.
[68] *Schüler*, supra n. 27, § 699 ZPO para. 13.

for payment but which could no longer be taken into account in the order for payment must also be indicated.[69]

Since an enforcement order cannot be issued if the respondent has lodged an opposition (*Widerspruch*) in due time, the claimant must also limit the application for issuance of the enforcement order insofar as only a partial objection to the order for payment has been filed, § 694(1) ZPO.[70]

In the case of non-machine processing of the order for payment procedure, the applicant shall calculate in the application the procedural costs incurred to date, which shall be included in the enforcement order, § 699(3) cl. 1 ZPO.

According to § 699(4) ZPO, the enforcement order shall be served ex officio on the respondent under the action unless the claimant has applied that it be transmitted to them for service on the respondent in keeping with the principle under which the parties delimit the scope of the case (*Dispositionsgrundsatz*) in proceedings.

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

In principle, the formal recipient of the document to be served is the person who is to receive the document according to the order (§ 182(2) No. 1 ZPO).[71] However, a suitable recipient can also be someone other than the previously mentioned person, namely their legal representative (§ 170(1) ZPO) or a lawyer of record (§ 172 ZPO).[72] "Address for service" is regularly the residence of the recipient, cf. § 130 No. 1 ZPO. "Residence" means the complete address of the residence consisting of the street, house number, and municipality.[73] The specification of a post office box[74] or a c/o address[75] is insufficient.[76] For companies, the indication of the business address applies accordingly, § 130 No. 1 ZPO. If the information of the recipient's address is refused to be given per se or without sufficient cause, the action is inadmissible, unless this defect is remedied.[77]

[69] Crevecoeur: ‚Das Mahnverfahren nach der Vereinfachungsnovelle', NJW 1977, 1320 (1323); *Schüler*, supra n. 27, § 699 ZPO para. 14.
[70] *Schüler*, supra n. 27, § 699 ZPO para. 15.
[71] *Häublein/Müller*, supra n. 1, § 166 ZPO para. 4.
[72] Ibid.
[73] BGH, Judgment of December 9, 1987 – Case No.: IVb ZR 4/87, juris.
[74] BVerwG NJW 1999, 2608.
[75] OLG Frankfurt BeckRS 2014, 11223, para. 15.
[76] *Becker-Eberhardt*, supra n. 1, § 253 ZPO para. 57.
[77] BGH NJW 1988, 2114.

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

According to § 253(2) No. 1 ZPO, one mandatory aspect contained in the statement of action is the designation of the court and parties. In principle, the name of the party concerned must be mentioned. Other designations are sufficient only if the identity of the parties can be established beyond doubt for any third party.[78] For the designation of the court, an address is not necessary, the same holds true for the exact description of the judicial body. This rule does not apply to commercial matters (for the definition of commercial matters, see question No. 3). In commercial cases, the statement of claim has to subject the action to the Commercial Chamber. This requirement is stipulated in § 96(1) GVG, according to which the hearing of the dispute before the Commercial Chamber must be requested in the statement of claim. For this reason, a statement of claim addressed to a regional court is, in case of doubt, deemed to be intended for a ordinary civil chamber.[79]

Materially, according to § 253(2) No. 2 ZPO, the subject matter and reason for each claim must be stated. The subject matter of the dispute refers to the procedural claim that a party asserts in court proceedings based on a specific fact of life. It should be noted, however, that it is generally inadmissible for the court's examination to limit the merits to specific claims.[80]

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

National service of documents is done following §§ 168 – 176 ZPO, in practice mainly via postal services, § 168(1) ZPO. Following § 177 ZPO, "the document may be physically submitted to the recipient at any location at which the person is found". § 175(1) ZPO states that "a document may be served on the persons referred to in § 173(2) against receipt (e.g. lawyers, notaries, bailiffs as well as public authorities, corporations or institutions under public law)." As stated before, the court has a discretion to choose the appropriate means of service for the individual case.[81]

It has to be noted that service of electronic documents (§ 173(1) ZPO) has only been recently allowed through safe communication methods such as the special electronic lawyers' mailbox (beA: *besonderes elektronisches Anwaltspostfach*; see questions No. 48 et seq.).[82] This is a platform enabling secure communication between lawyers and other participants in electronic legal transactions.[83] Since the change of the ZPO, lawyers, notaries, and bailiffs as well as public institutions have to establish such a safe communication method, § 173(2) ZPO, which is essentially

[78] *Becker-Eberhardt*, supra n. 1, § 253 ZPO para. 50.
[79] Ibid.
[80] *Foerste*, supra n. 6, § 253 ZPO para. 24.
[81] *Bacher*, supra n. 3, § 253 ZPO para. 42.1.
[82] A. Siegmund, ‚Das beA von A bis Z', NJW (2017), p. 3134.
[83] BRAK, 'beA & ERV', <www.brak.de/anwaltschaft/bea-erv>, visited 12 March 2023.

a specialised e-mail system, while other persons have to explicitly agree to the use of electronic communication methods, § 173(4) ZPO.

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

It depends. As stated above, the service of documents is done in Germany regularly via post (cf. Art. 18 of the Regulation) and not electronically through a unified IT system (cf. Art. 19 of the Regulation). Transmission or service by diplomatic or consular channels, agents, or offices (cf. Art. 16, 17 of the Regulation) is generally not used in national service of documents.

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

Yes, there are different methods of service, depending on the scenario. Generally, they have to be distinguished by their objective. §§ 170 – 172 ZPO concern service on other persons than the recipient, whereas §§ 173 – 181 ZPO provide alternative methods of service directed at the recipient. Substituted and fictitious methods of service are stipulated in §§ 174, 184, 185 ZPO.

Alternative methods are **service on representatives (§ 170 ZPO)** if the recipient does not have the legal capacity to conduct proceedings. If the recipient is not a natural person, service on the entity's director shall suffice, § 170(2) ZPO. If an entity has more than one legal representative or director, it shall suffice to serve the documents on one of them, § 170(3) ZPO.

If documents are to be **served on a person for whom a legal guardian is appointed**, a copy of the document must be provided to the legal guardian, **§ 170a(1) ZPO**. The same procedure must be applied vice-versa if the document is served on the legal guardian; then, a copy of the document needs to be sent to the person for whom a legal guardian is appointed, § 170a(2) ZPO.

It is possible to **serve authorised representatives (§ 171 ZPO)** with the same effect as on the represented recipient as long as the representative can present a written authorisation. In pending proceedings, service shall be effected on the **legal representative appointed for the proceedings (§ 172 ZPO)**. If the legal representative is a person under § 130d cl. 1 ZPO, e.g., a lawyer, service of the specified documents is conducted in accordance to §§ 130a, 130d ZPO solely electronically.

Electronic documents have to be **served (§ 173 ZPO) securely**. For further details, see Questions 48 et seq.

For **service by physical delivery at the governmental office (§ 174 ZPO)**, written documents can be handed over opened or closed at the governmental office.[84] The governmental office is any room

[84] *Dörndorfer*, supra n. 3, § 174 ZPO para. 1.

of the court (e.g. courtroom, judge's or judicial officer's office), but also any other place where the activity of the court is carried out.[85] By way of proving such service, it is to be noted on the document and in the files that the document was physically delivered, while also adding the date of such service, § 174 cl. 2 ZPO. A missing note can be made up for, e.g., through remedy, it does not lead to invalidity.[86]

Service against return confirmation of receipt (§ 175 ZPO) is, according to § 175(1) ZPO, permissible only on the recipients named in § 173(2) ZPO. These are lawyers, notaries, bailiffs, tax advisors, other persons involved in the process in a professional capacity, or associations and organizations that can be assumed to be more reliable, as well as authorities, corporations, or institutions under public law. The document may also be served by telefax, § 175(2) cl. 1 ZPO. In its heading, the transmission is to bear the note "Service against return confirmation of receipt" and is to set out to the sender, the name and address of the recipient party, as well as the name of the employee of the judiciary effecting the transmission of the document, § 175(2) cl. 2 ZPO. Afterwards, the confirmation of receipt must be sent to the court in written form, by telecopy, or as an electronic document according to § 130a ZPO. This confirmation proves the date of delivery, which, even after an unusually long time period has elapsed, does not rebut the accuracy of the confirmation of receipt.[87]

Service by registered mail, return receipt requested (§ 176 ZPO) is another alternative service method, which can be chosen as an alternative to §§ 174, 175 ZPO.[88] The service is executed by handing over the registered document,[89] whereby the return receipt is sufficient proof of delivery, § 176(1) cl. 2 ZPO.

If service is not executed according to §§ 174, 175 or 176(1) ZPO, a service order needs to be issued.[90] The office serves the document in question in a sealed envelope and with a prepared form of a certificate of service, § 176(2) cl. 1 ZPO.

The following are methods of substituted or fictitious service.

Substituted service at the residence, at business premises, and at institutions (§ 178 ZPO) is used if the recipient cannot be located at their residence, business premises, or an institution in which they are a resident (see question 17.1). The provision of § 178 ZPO is used correspondingly with §

[85] *Dörndorfer*, supra n. 3, § 174 ZPO para. 2.
[86] *Dörndorfer*, supra n. 3, § 174 ZPO para. 4.
[87] BGH NJW-RR 2012, 1584; *Dörndorfer*, supra n. 3, § 175 ZPO para. 4.
[88] *Dörndorfer*, supra n. 3, § 176 ZPO para. 2.
[89] Ibid.
[90] *Dörndorfer*, supra n. 3, § 176 ZPO para. 4.

180 ZPO, concerning substituted service by placement in the letterbox), and § 181 ZPO, providing for substituted service by deposit of the records or documents.

The **service by mailing the records or documents (§ 184 ZPO)** was originally intended solely for service on recipients who live abroad according to § 183(2) to (5) ZPO. However, according to general opinion, the provision is also applicable as a fictitious service in Germany.[91] According to § 184(1) ZPO the court may order the party to name, within a reasonable period of time, an authorised recipient who is a resident of Germany or who has business premises in Germany, unless the party has appointed a legal representative for the case. Should no authorised recipient be named and until such a recipient is named retroactively, documents may be served subsequently by being mailed to the address of the party. Two weeks after handing the document over to the post, it is considered served, according to § 184(2) cl. 1 ZPO.

The fictitious method of **service by publication (§ 185 ZPO)** can be executed everywhere, if:

"1. The abode of a person is unknown and it is not possible to serve the documents upon a representative or authorised recipient,

2. It is not possible to serve documents upon legal persons obligated to register a domestic business address with the Commercial Register, neither at the address entered therein nor at the address entered in the Commercial Register of a person authorised to receive service of documents, or at any other domestic address obtained without any investigations,

3. It is not possible to serve documents abroad, or if such services do not hold out any prospect of success, or

4. The document cannot be served because the place of service is the residence of a person who, pursuant to §§ 18 – 20 GVG, is not subject to jurisdiction."

Due to the right to be heard (Art. 103(1) GG), this method can only be justified if other methods of service are unsuccessful, impossible or difficult to implement for factual reasons, either because the recipient's abode is unknown or because the number of persons effected is large or unmanageable (ultima ratio).[92]

11.3. 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, there are special methods of service for professionals. Lawyers and notaries have a digital mailbox (beA for lawyers resp. beN for notaries) where they can send and receive documents. The

[91] BGH NJW 1999, 1187; OLG Stuttgart NJW-RR 2011, 1631 (1632); *Wittschier*, supra n. 6, § 184 ZPO para. 1.
[92] BVerfG NJW 1988, 2361; *Häublein/Müller*, supra n. 1, § 185 ZPO para. 1.

use of those mailboxes is mandatory between corresponding users, e.g., court and lawyers, § 130d ZPO. As stated before, lawyers can serve a document among colleagues effectively when an action is considered to be lis pendens, although the means of service remain the same except for the digital mailbox.

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

Service ex officio is the standard method of service, while service at the instigation of the parties is the exception and requires that it is authorised or required by law.[93] The court has been granted a discretion in certain scenarios to decide on the method of service and the discretionary choice cannot be challenged by either party to the dispute.[94]

Service ex officio is usually executed by postal service. There are three postal service methods to choose from, which are considered equal alternatives: service by physical delivery at the governmental office (§ 174 ZPO), service against return confirmation of receipt (§ 175 ZPO), or service by registered mail, return receipt requested (§ 176 ZPO).[95] However, it should be noted that § 175 ZPO can only be used if the recipient is one of the persons named in § 173(2) ZPO.

Moreover, there is an option for fictitious service by publication, which can only be used if one of the four requirements of § 185 ZPO is met due to its conflict between the sender's rights (the person in whose interest service is effected) to have justice administered and the recipient's right to be heard.[96]

Substituted methods of service are substituted service at the residence, at business premises, and at institutions (§ 178 ZPO), substituted service by placement in the letterbox (§ 180 ZPO), and substituted service by deposit of the records or documents (§ 181 ZPO). § 178 ZPO takes precedence in the relationship between the three substitute methods, meaning that § 180 ZPO is only applicable if service according to § 178(1) No. 1, 2 ZPO is not possible, and § 181 ZPO is only applicable if service according to § 178(1) No. 3 or service according to § 180 ZPO is not possible.

11.5. Have the methods of service laid down in your national legal system been extended for domestic service after the entry into force of the Regulation?

There have been amendments concerning cross-border service and some national changes, especially regarding the service of documents from lawyers. Other amendments and additions have

[93] *Dörndorfer*, supra n. 3, § 166 ZPO para. 3.
[94] BGH GRUR 2014, 705; *Bacher*, supra n. 3, § 253 ZPO para. 42.1.
[95] *Dörndorfer*, supra n. 3, § 176 ZPO para. 2.
[96] *Häublein/Müller*, supra n. 1, § 185 ZPO para. 1.

been implemented through the "Gesetz zum Ausbau des elektronischen Rechtsverkehrs mit den Gerichten und zur Änderung weiterer Vorschriften" (Act on the Expansion of Electronic Legal Transactions with the Courts and on the Amendment of Further Provisions), which transposed Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services. However, no amendments have been made specifically regarding to Regulation 2020/1784.

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

§ 183(1) cl. 1 ZPO regulates the service in EU countries, whereas § 183(1) cl. 2 ZPO states:

> "Insofar as the aforementioned provisions do not apply to service abroad, paragraphs 2 to 6 shall apply to service abroad."

§ 183(2) ZPO regards delivery via post or through authorities of the other country. When there are no international agreements, § 182(4) ZPO applies in pursuance to § 183(3) ZPO. § 183(6) ZPO recognises the jurisdiction of the local court of the respondent's domicile or habitual residence concerning the service of documents abroad.

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

German law does not provide special methods of service for certain types of documents. All judicial documents are served either ex officio or by the parties, depending on the respective requirements. The only special method is substituted service by deposit of the records or documents (*Ersatzzustellung durch Niederlegung*), § 181 ZPO. This form is used if the service specified in § 178(1) No. 3 or § 180 ZPO are impossible.

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

A fax and an electronic service of documents via secure digital communication methods are considered immediate. Filing the action via electronic communication methods, such as the beA, has the effect of immediately suspending the statute of limitations and leads to the lis pendens of the action. Postal service takes 1-3 days with the exception that there is no postal service on Sundays and bank holidays.

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

A document is in general served once it is handed over to the recipient; actual knowledge is not important and, in some cases, service may even be fictitious, §§ 180 cl. 2, 181(1) cl. 4; 184(2) cl. 1, 188 ZPO (see question 17.2). Generally, the provisions on service commonly consider the document served when it has come into the sphere of influence of the recipient in a way that they can keep it.[97] Service is effected irrespective of the identity and method how the intermediary has come into possession of the document, as long as the recipient may "get a hand on" the document.[98]

15.1. 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?

(This question refers to the service to an official or known address of the recipient, but one which is not (anymore) used by the recipient. Please elaborate on national treatment of negligent behaviour (of the recipient who might have forgotten to de-register the address or to make arrangements to be informed about service of documents to this address), multiple places of residence, service to a "wrong" address (either unknowingly by the competent institution or maliciously of the opponent by providing/using the wrong address), and differences of the relevant address regarding the determination of jurisdiction (domicile) and the address used for the service of documents.)

An action has to be served to the recipient.[99] If the recipient cannot be found at the legally registered address of residence, substituted service, §§ 178 – 181 ZPO, may be used. Substituted service is not ineffective simply because the concerned person does not actually live at the address (anymore).[100] Actual use of the residence at the address is not a prerequisite for the effectiveness of a substituted service, especially if the recipient negligently conceals his true residential address, has intentionally registered this address, or presents himself as living there.[101] In such cases, substituted service by placement in the letterbox (§ 180 ZPO) may be used regardless. However, the general use of the residence has to be checked ex officio.[102]

If the use of the residence cannot be established or the recipient has negligently or involuntarily forgotten to de-register the address, other substituted services may be used depending on the scenario.

[97] *Roth*, supra n. 37, § 189 ZPO para. 7.
[98] Ibid.
[99] BGH NJW 2017, 2472 para. 25.
[100] OLG Jena, NStZ-RR 2006, 238.
[101] Ibid.
[102] *Dörndorfer*, supra n. 3, § 180 ZPO para. 1.

If all methods of substituted service are impossible, fictitious service applies. Due to the right to be heard, which as a precondition necessarily requires the knowledge of an action brought against oneself, service of the action is generally necessary. If all other methods fail, fictitious service through official publication will be used, § 185 No. 1 ZPO (see question 17).

15.2. 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 the recipient cannot be found at the registered address, other methods of service than direct delivery according to § 166 ZPO will be taken. It is possible to, depending on the situation, use substitute service and instead serve the (legal) representative, §§ 170 or 171 ZPO, to serve the recipient at the governmental office, § 174 ZPO, or everywhere where the recipient can actually be found, § 177 ZPO. If the abode of the recipient is unknown and direct and substitute service are impossible, service will be fictitious through official publication, § 185 No. 1 ZPO (see question 17).

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

Lawyers and other professions specified in § 173(2) ZPO can electronically file an action through a specialised electronic communication system (see questions No. 48 et seq.). For the specified professionals, the use of electronic services is mandatory. The usual method of filing an action at court for private persons is via postal service or through personally handing the document in at court. It is, however, possible to register at the public electronic mailbox and file a claim in court as a private citizen individually (see question No. 49).

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

According to § 185 ZPO, the documents may be served by publishing a notice (service by publication) wherever:

> "1. The abode of a person is unknown and it is not possible to serve the documents upon a representative or authorised recipient."

However, the knowledge of a third party who does not disclose his knowledge does not prevent this;[103] neither does the existence of a post office box[104] or a "postal warehouse address".[105] Unknown residence may consequently only be assumed if detailed investigations have been unsuccessful.[106] Inquiries at the last responsible post office and residents' registration office are not sufficient.[107] In addition, inquiries must be made with the last known landlord, housemates, neighbours, and employer.[108]

§ 186 ZPO describes the approval of and implementation of service by publication. According to § 186(2) ZPO, service by publication shall be implemented by hanging a notification on the court's bulletin board or by publishing the notification in an electronic information system that is publicly accessible in the court. Additionally, the notification may be published in an electronic information and communications system established by the court for such notifications. The notification must set out:

1. The person on whose behalf the documents are to be served.
2. The name of the party to whom documents are to be served and the address last known.
3. The date, the reference number of the document, and the designation of the subject matter of the proceedings, as well as
4. The office at which the document may be inspected

The notification must include the note that a document is being served by publication, that this service may trigger periods, and that once they have lapsed, the party to whom the documents are being served in this way may have forfeited rights. In serving summonses in this way the notification must indicate that the document sets out a summons to a hearing and that should the party fail to comply with it, such failure may act to the party's detriment in legal terms.

In an addition to the bulletin board, the court can order that the notice of service by publication must be published in the Official Gazette (*Bundesanzeiger*), § 187 ZPO.

According to § 188 ZPO, the document shall be deemed served should one month have lapsed since the notification has been displayed on the bulletin board.

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[103] Zöller/*Schultzky*, § 185 ZPO para. 4; *Wittschier*, supra n. 6, § 185 ZPO para. 2.
[104] OLG Hamburg, NJW 1970, 104; *Wittschier*, supra n. 6, § 185 ZPO para. 2.
[105] *Wittschier*, supra n. 6, § 185 ZPO para. 2.
[106] BGH NJW 2012, 3582; *Wittschier*, supra n. 6, § 185 ZPO para. 2.
[107] Ibid.
[108] Ibid.

17.1. 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?

A substitute method of service is available as stated in § 178 ZPO. Regarding the substitution, the means of service itself does not change, but the recipient of the document does. This option is used if the recipient could not be encountered at their residence, business premises or an institution in which they are a resident. In this case, the documents can be **served on an adult or a person employed by the family at their residence, § 178(1) No. 1 ZPO**. In the business premises, the documents may be **served on a person employed there (§ 178 (1) No. 2 ZPO)** or in an institution, on the **head of the facility or an authorised representative, § 178(1) No. 3 ZPO**.

If the options according to § 178(1) No. 1 or 2 ZPO cannot be executed, the documents can be placed in a letterbox appurtenant to the residence or the business premises, or into a similar receptacle that the recipient has put up to receive mail, and which according to general practice is suited to securely store mail, § 180 ZPO. The person serving shall note the date of service on the document's envelope which at the same time signifies that the document shall be deemed served, § 180 ZPO.

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

Possible fictitious methods of service are §§ 189 and 184 ZPO. § 189 ZPO stipulates the remedy of defects in the service of records or documents saying that if it is impossible to prove that a document has been served in due form, or should the document have been received in violation of mandatory regulations governing service of documents, it shall be deemed served at that point in time at which the document was factually received by the person to whom service of the document was addressed, or could be addressed.

§ 184 ZPO regulates authorised recipients and service by mailing the records or documents stating that for service according to §183 ZPO, the court may order the party to name, within a reasonable period of time, an authorised recipient who is a resident of Germany or who has business premises in Germany, unless the party has appointed a lawyer of record. Should no authorised recipient be named and until such a recipient is named retroactively, documents may be served subsequently by being mailed to the address of the party (§ 184(1) ZPO).

§ 184(2) ZPO stipulates that two weeks after it has been mailed, the document shall be deemed served. The court may set a longer period. An instruction of the legal remedies is to be enclosed in the order following § 184(1) ZPO, attention is to be drawn to these legal consequences. By way of

recording proof of the documents having been served, it is to be noted in the files at which time and to which address the document was mailed.

17.3. 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?

One fictitious method of delivery is § 189 ZPO. It stipulates that if it is not possible to prove that a document has been served in due form, or should the document have been received in violation of mandatory regulations, it shall be deemed served at that point in time at which the document was factually received by the recipient. This fiction of service unfolds its effects at the time it was actually received by the recipient and thus can be seen as equivalent to the effects where the document is served directly to the recipient. § 189 ZPO only remedies the defects in the service of records or documents, the (formally defective) service itself has the same effects.

Another fictitious method is § 184 ZPO which refers to service abroad, § 183 ZPO. For such a delivery, the court may order the party to name an authorized recipient who is a resident of Germany or who has business premises in Germany, unless the party has appointed a lawyer as a legal representative, § 184 ZPO. If the party has appointed neither of the two possible recipients above, the documents may be served by being mailed to the address of the party, § 184 ZPO. According to § 184(2) ZPO, two weeks after it has been mailed, the document shall be deemed served which is the time it unfolds its effects.

17.4. 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?

Due to the existence of fictitious methods of service, the German system does not consider it a mandatory requirement that knowledge of the document has actually been obtained. However, such methods are bound to strict preconditions to safeguard the recipient's rights. They may only be used if other methods of service are impossible as they were implemented to serve as a balance between the rights of the claimant and respondent.

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

If service was executed following the law, there are no remedies for the recipient if they have de facto not obtained actual knowledge. This is why fictitious service is to be used as an ultima ratio to enable the recipient to obtain knowledge in most cases. Regularly, the methods of fictitious

service are only used in scenarios in which the recipient deliberately conceals their whereabouts and refuses to take notice of the service and the documents served.

17.6. 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?

Fictitious methods are used if the respondent cannot be located. The **claimant's right** to justice results from the principle of the rule of law (*Rechtsstaatsprinzip*) and includes legal protection by independent courts.[109] The **respondent's rights** are the right to be heard and the right to a fair trial, both derived from the principle of the rule of law enshrined in Art. 19(4) GG and Art. 103(1) GG.[110]

Generally, fictitious methods of service cannot be categorically denied on account of the claimant's right to justice. On the other hand, it must be ensured that fictitious methods of service are only used as an ultima ratio and are not frivolously used if any (reasonable) problems with service occur. Otherwise, these methods would unduly violate the legal rights of the respondent.[111] Hence, impossible service resulting in obtaining knowledge by the respondent always concerns a conflict between procedural rights between the claimant and respondent. This conflict is aimed to be resolved through the existence of the provisions concerning fictitious service.

Therefore, if the recipient never actually receives the document and the time limit expires, an essential task of service is to provide the recipient with the right to justice and thus ensure a fair trial.[112] According to the BGH, it is incompatible with the principle of the rule of law to irrevocably deny a legal remedy due to a loss of the document in the mail.[113] Therefore, reinstatement or restitution in integrum may be possible.[114]

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

Service abroad is codified in § 183 ZPO which refers to additional provisions. Generally, cross-border service is done under international law.[115] Regulation 1393/2007 is considered lex specialis.[116] Fictitious service may be possible when cross-border service is impossible or does not promise success, § 185 No. 3 ZPO.

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[109] Dürig/Herzog/Scholz/*Grzeszick*, Art. 20 GG para. 135.
[110] *Vogt-Beheim*, supra n. 16, § 185 ZPO para. 2.
[111] EuGH NJW 2005, 3627; *Bach*, supra n. 3, § 328 ZPO para. 25.
[112] BVerfG NJW 1988, 2361; BGH NJW 2000, 3284 (3285).
[113] BGH NJW 2000, 3284 (3285).
[114] *Vogt-Beheim*, supra n. 16, § 185 ZPO para. 3.
[115] *Häublein/Müller*, supra n. 1, § 166 ZPO para. 28.
[116] Ibid.

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

The ZPO contains rules for cases in which acceptance of the document to be served is refused without cause (§ 179 ZPO). If such a refusal to accept exists, the document must be left in the recipient's home or business premises and is deemed to have been served upon refusal to accept (§ 179 cl. 2 ZPO). In cases where there are no residential or business premises, the document shall be returned and shall be deemed served notwithstanding the refusal of acceptance.[117]

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

Documents must be written in German, as this is the official language of the court, § 184 GVG. If a document is submitted in a foreign language, then it is considered to be irrelevant and not in compliance with the deadline.[118] It is disputed how a court should react to such a document. While some argue that there is nothing to be done, most people say that the court must at least point out that the document is to be submitted in the German language.[119]

The principle that the language of the court is German applies to all procedural acts, court decisions and protocols, however, it does not apply to submitted evidence.[120] According to § 142(3) cl. 1 ZPO states that the court <u>may</u> order that foreign-language documents need to be translated meaning that a general submission in a foreign language is permitted and the court has discretion regarding the translation.[121]

The blanket disregard of foreign-language documents constitutes a violation of the fundamental right to be heard under Art. 103(1) GG.[122]

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

There are regularly no claim forms to be used except for German or European orders for payments or other European forms such as in Small Claims Procedures.

The German order for payments (§§ 688 – 703d ZPO) is a form-based procedure which is an exception to the general freedom of form that governs the civil procedures with some minor exceptions, such as the necessity to have a written statement of claim, § 253 ZPO. It serves the same

[117] *Häublein/Müller*, supra n. 1, § 179 ZPO para. 5-7.
[118] Armbrüster: ‚Fremdsprachen in Gerichtsverfahren', NJW 2011, 812 (813).
[119] Ibid.
[120] Armbrüster. ‚Fremdsprachen in Gerichtsverfahren', NJW 2011, 812 (818).
[121] Ibid. at (813).
[122] Ibid.

objectives as the European order for payments, to provide an accessible, fast, and simple way to obtain an enforceable title.

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

In order for a court to serve the statement of claim to the recipient, the claimant has to have paid the court fee, §§ 6(1), 12(1) cl. 1 Gerichtskostengesetz (Judicial Costs Acts, hereafter: GKG). If they refuse to do so without justification the claim is dismissed. Special costs concerning the service do not have to be paid in advance since 1994.[123] The court fees are calculated based on the GKG, especially § 12 GKG and the annexes to the GKG.

In principle, the unsuccessful party bears the costs of the proceedings, including costs incurred from service. Exemplary, there is a flat rate for service against return confirmation of receipt (§ 175 ZPO), service by registered mail, return receipt requested (§ 176 ZPO), or service by bailiffs which amounts to 3,50€, KV No. 9002 GKG. For service of documents by bailiffs, the Gesetz über Kosten der Gerichtsvollzieher (Law on Costs of Bailiffs, hereafter: GVKostG) may additionally govern the costs (Annex to § 9 GVKostG).

If the action is transmitted to court via electronic means and the court has to serve the respondent in paper format because they are not represented by a lawyer, the court will print the electronic statement of claim and the additional documents free of charge.[124]

[123] *Becker-Eberhardt*, supra n. 1, § 253 ZPO para. 192.
[124] *Bacher*, supra n. 3, § 253 ZPO para. 41.

LEGAL IMPLICATIONS OF SERVICE

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

- Address for service of the respondent[125]
- Signature of the claimant[126]
- Before regional courts (*Landgerichte*, LG) or higher regional courts (*Oberlandesgerichte*, OLG): Signature of a lawyer
- German language, § 184 GVG[127]

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

One legal consequence of the proper service of documents is the lis pendens according to § 261 ZPO. It states that as long as the dispute is pending, none of the parties may bring the dispute before another court or tribunal and the jurisdiction of the court hearing the case will not be affected by any change to the circumstances giving rise to its competence.

Further, immediate **procedural consequences** of the lis pendens are:

- a general prohibition of changes to the complaint (§ 263 ZPO),
- consequences of the sale of the disputed object (§§ 265, 266 ZPO),
- the necessity of a decision by final judgement (§ 269 ZPO),
- the admissibility of the counterclaim (§ 33 ZPO)
- and the action of acknowledgement (§ 256(2) ZPO),
- admissibility of main (§ 64 ZPO) and subsidiary (§ 66 ZPO) intervention,
- admissibility of third-party notice (§ 72 ZPO).[128]

§ 263 ZPO stipulates that upon the dispute having become pending, the complaint may be modified if the respondent consents to this being done, or if the court believes such a modification to be expedient.

According to **§ 266 ZPO**, should a legal dispute be pending between the possessor and a third party as to whether a right being claimed for a property exists or does not exist, or as to whether an obligation encumbering a property exists or does not exist, then the successor in title to any property so disposed of shall be entitled and, upon a corresponding application having been filed by the opponent, shall be obligated to assume the legal dispute as the primary party, regardless of his

[125] *Bacher*, supra n. 3, § 271 ZPO para. 4.1.
[126] Ibid. para. 4.2.
[127] Ibid. para. 4.4.
[128] *Becker-Eberhardt*, supra n. 1, § 261 ZPO para. 2.

circumstances. This shall apply mutatis mutandis to any legal dispute as to whether an obligation encumbering a registered ship or ship under construction exists or does not exist.

According to **§ 269(3) cl. 1 ZPO**, should the action be withdrawn, the legal dispute is to be considered as not having become pending; any judgment which was already given and has not yet become final and binding shall become ineffective without this requiring its express repeal.

From a **material** point of view, the lis pendens has an impact on the interest during legal proceedings (§ 291 BGB). It states in cl. 1:

> "the debtor must pay interest on a money debt from the date when litigation is pending onwards, even if he is not in default; if the debt only falls due later, interest must be paid from its due date onwards."

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

According to § 331(1) ZPO, should the claimant petition that a default judgement be delivered against the respondent because the latter has failed to appear at the hearing, it is to be presumed that the facts as submitted to the court by the claimant in the oral argument have been acknowledged.

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

In case of a default judgment (*Versäumnisurteil*), the respondent could claim they have not been properly served. Generally, in case of default, the party concerned risks losing their rights (materially and procedurally).[129] However, the law implemented a balance of interests in these cases: The procedural loss upon issuance of a first default judgment is not final.[130] A first default judgment can be appealed against under § 338 ZPO, and a final loss of rights is only imminent in the case of a second default judgment following § 345 ZPO.[131] In case of appeal following § 338 ZPO, the legal consequence is restitution in integrum per § 342 ZPO.[132]

Additionally, if there is no fault concerning the default, §§ 335, 337 ZPO, the court is obliged to adjourn ex officio until the impediment has been removed.[133] In the case of improper service, § 335(1) No. 2 ZPO, this would be until the respondent has been properly served and made aware of the action brought against them.

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[129] *Anders*, supra n. 16, § 330 ZPO preface para. 2.
[130] Ibid.
[131] Ibid.
[132] *Anders*, supra n. 16, § 330 ZPO preface para. 24.
[133] Ibid. para. 2.

25. 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)

Should the claimant fail to appear at the hearing a default judgment is issued according to § 330 ZPO to the effect that the claimant's complaint is dismissed. The prerequisite is a corresponding petition being filed.

In the context of a default judgment, the action is then dismissed.

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

Considering the objectives of service, incorrect service regularly impairs the respondent's rights. If the claimant cannot assert a violation of their own rights, an argument of formally ineffective service is inadmissible.

Regarding the service of summons to a court hearing, the claimant may risk a default judgment in accordance with § 330 ZPO. In these scenarios, they may claim unduly summons, § 335(1) No. 2 ZPO.

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

A formal defect does not necessarily lead to its ineffectiveness when the service is carried out.[134] In fact, § 189 ZPO states the possibility of remedy of defects in the service. In principle, incorrect service only leads to invalidity if the purpose of the infringed procedural provision requires it.[135] In the following, some of the most discussed scenarios will be briefly mentioned an their legal consequence will be given.

If the action is served on a person other than the recipient or their representatives according to the law, no one shall become a party.[136]

If the action has been served, e.g. because the service was based on a court order, but the service was defective, a remedy under § 189 ZPO is possible if the respondent actually received the application.[137]

[134] *Häublein/Müller*, supra n. 1, § 166 ZPO para. 6.
[135] *Bacher*, supra n. 3, § 253 ZPO para. 88.
[136] Ibid. para. 89; *Weth*, supra n. 6, § 50 ZPO para. 1.
[137] *Roth*, supra n. 37, § 253 ZPO para. 66.

Even the absence of service may be remedied ex nunc pursuant to § 295 ZPO by an unopposed plea (*rügelose Einlassung*).[138] If the lack of service is due to an error of the court, § 167 ZPO applies in favour of the claimant.[139]

If an error in service leading to invalidity is not remedied by the end of the legal dispute, a judgment rendered despite the absence of a lis pendens has no effect.[140] Although it can formally only be appealed within the generally applicable time limits, the judgment does not have any substantive legal effect even after the expiry of these time limits.[141]

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

Generally, the regulations of the service of documents have a formal character. The formal requirements have a formal character. They do not serve an end in themselves but are standards of expediency with the help of which the substantive law is to be realised.[142] They lose their purpose when their function is achieved by other means.[143] Therefore, a formal error in the execution of service does not necessarily lead to its invalidity.[144]

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

The service is ineffective if mandatory service provisions have been violated [for example if the recipient of service is not a part of the group of persons defined in § 178 ZPO]. Ineffective service can be remedied by retroactive approval under § 189 ZPO and by waiver of the objection, § 295 ZPO. The ineffectiveness of the earlier service can also be overcome by reperformance. However, the new service has no retroactive effect.[145]

26.3. 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 form of service is not only important for the realisation of the right to be heard (Art. 103(1) GG) but is equally important for the right to effective legal protection within a reasonable time (Art. 19(4) GG) and for legal certainty as an essential element of the principle of the rule of law (Art. 20(3) GG).

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[138] *Bacher*, supra n. 3, § 253 ZPO para. 87; *Roth*, supra n. 37, § 253 ZPO para. 65.
[139] *Bacher*, supra n. 3, § 253 ZPO para. 87.
[140] Ibid. para. 89a.
[141] Ibid. para. 89a.
[142] *Häublein/Müller*, supra n. 1, § 166 ZPO para. 6.
[143] Ibid.
[144] Ibid.
[145] *Dörndorfer*, supra n. 3, § 166 ZPO para. 5.

This clarifies the constitutional framework to be observed in the interpretation of § 189 ZPO. A weighting of the legislature that one of the aforementioned fundamental procedural rights and principles is entitled to priority in the law of service cannot be inferred from the explanatory memorandum to the Act, neither in general nor concerning the provision of § 189 ZPO at issue here. According to the legislator's intention, the aforementioned fundamental procedural rights and guarantees must therefore be appropriately balanced.[146] This means that there needs to be a case-by-case consideration to decide whether a remedy according to § 189 is compatible with the principles or not.

In the present case, the scope of § 189 ZPO was at issue. The actual respondent had initially not been correctly named in the rubric. Thus, the court's intention to serve the application referred to the bogus respondent named in the heading. Later, the rubric was corrected without the application being served on the real respondent now named there. As a result, the BGH denied the possibility of a remedy according to § 189 ZPO. In justification, it relies on legal certainty as an essential element of the principle of the rule of law (Art. 20(3) GG) and the right to be heard in court (Art. 103(1) GG). The scope of § 189 ZPO is defined by the telos of purpose. The purpose of service is, inter alia, to give the recipient a reasonable opportunity to take cognisance of a document. The recipient must be able to see with sufficient clarity and distinctness whether the document he has received concerns him. Only in this way and only then can the respondent's rights of defence be sufficiently safeguarded in the case of a served application.[147]

26.4. 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 Germany, it is generally assumed that service has been proper due to service ex officio being applicable in most cases. Hence, unless the respondent lodges a statement of defence, service is assumed to have been effected and that the respondent is not raising arguments against the claim.

Documents served via post are considered to be served after two weeks of handing the document in at the post, § 184(2) cl. 1 ZPO (see question No. 11.2.). Following § 276(1) cl. 1 ZPO, the respondent has to lodge a statement of defence regularly after additional two weeks. Therefore, Article 22 of the Regulation is particularly relevant in Germany for the possibility of issuing a default judgment in written preliminary proceedings in the absence of a statement of defence by the respondent, § 331(3) cl. 1 ZPO in conjunction with § 276(1) cl. 1, (2) ZPO.

Other methods of safeguarding the recipient's interests than the service provisions contained in the ZPO do not apply in national cases. Especially, the serving authority does not have an obligation to

[146] BGH, NJW 2017, 2472 (2476).

[147] Dr. Würdinger, Herberger: ‚Grenzen der Heilung von Zustellungsmängeln‘, NJW 2017, 2472 (2477 f.).

take additional, reasonable measures to inform the recipient about a court action against them; this includes approaching to recipient via telephone or social media.[148]

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

The Bundestag does not deem the provision necessary to implement into national law.[149] They state that German courts may still render a judgment if the respondent has not lodged a statement of defence without taking the advanced measures as long as there has been a service by publication, § 185 No. 3 ZPO.[150]

26.6. 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*?

Again, the Bundestag does not see the need to transpose the Regulation into additional, national law. It states that it remains the case that, in German civil proceedings, restitution in integrum is inadmissible pursuant to § 234(3) ZPO and Article 22(4) of the Regulation after the expiration of one year from the end of the missed time limit.[151]

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

If a service error leading to ineffectiveness is not remedied by the end of the legal dispute, a judgement rendered despite the lack of lis pendens has no effect. Although it can only be challenged within the generally applicable time limits, it does not have any substantive legal effect even after the expiry of these time limits.[152]

28. 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 § 182 ZPO, the proof of service is done through a separate certificate. The minimum requirements of that certificate are set out in § 182(2) ZPO. Following this, the record of service shall include inter alia:

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[148] *Hiss/Lahme*, supra n. 3, Art. 22 EUVZO 202 para. 17.
[149] BT-Drs. 20/1110, p. 28.
[150] Ibid.
[151] Ibid.
[152] BGH NJW-RR, 2006, 565; *Bacher*, supra n. 3, § 253 ZPO para. 89a.

"1. The designation of the person on whom service is to be made,

2. The designation of the person to whom the letter or the document was physically submitted,

3. In the case provided for by § 171 ZPO, the statement that the authorisation of lawyer was produced, […]

6. The note that the day of service was noted on the envelope containing the document to be served,

7. The place, the date and, should the court registry so have instructed, also the time of service,

8. The surname, given name, and signature of the person serving the documents as well as the name of the enterprise contracted for service, or the public authority charged with this task."

If the date of service is missing from the envelope or differs from the date shown on the certificate of service, the service is still effective. However, the court will have to take this circumstance into account when considering whether and when the document is deemed to have been served.[153]

29. 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.

"§ 170 ZPO [service on legal representatives]

(1) In the event a person does not have the capacity to conduct proceedings, service is to be made on his legal representative. Any service made on the person incapable of conducting proceedings shall not be valid.

(2) Should the party on whom documents are to be served not be an natural person, service on the entity's head shall suffice.

(3) In the event of an entity having more than one legal representative or head, it shall suffice to serve the documents on one of them.

§ 170a ZPO [service in the case of legal guardianship]

(1) If service is made on a person in respect of whom a legal guardian has been appointed, a copy of the document served shall be communicated to that person, in so far as he or she is known and his or her area of responsibility is affected.

(2) If service is made on the guardian pursuant to § 170(1) ZPO, a copy of the document served shall be communicated to the person under guardianship.

[153] *Wittschier*, supra n. 6, § 182 ZPO para. 3.

§ 171 ZPO [service on authorised recipients]

Service on the representative appointed by legal transaction shall have the same effect as service on the party so represented. The representative is to produce a written authorisation.

§ 172 ZPO [service on legal representatives of the case]

(1) Wherever proceedings are pending, service is to be made on the legal representative of the case appointed for the respective level of jurisdiction. This shall apply also to procedural actions affecting the proceedings before the court of that level of jurisdiction as a result of: a protest having been entered, the judgment handed down by that court having been reversed, the proceedings having been reopened, an objection having been filed pursuant to section 321a, or new statements having been submitted to the court in compulsory enforcement proceedings. Proceedings before the court responsible for enforcement are proceedings at the first level of jurisdiction.

(2) A written pleading by which an appeal is filed is to be served on the legal representative of the case admitted to that level of jurisdiction the decision of which is being contested. If a legal representative of the case has already been appointed for the higher level of jurisdiction, the written pleading is to be served on that legal representative. Service shall be made on the party itself if the party has not appointed a legal representative of the case."

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

If there is no proof of receipt in accordance with § 182 ZPO, a cure for defects in the service is the actual perusal, § 189 ZPO. According to § 189 ZPO, should it not be possible to prove that a document has been served in due form, or should the document have been received in violation of mandatory regulations governing the service of documents, it shall be deemed served at that point in time at which the document was factually received by the person to whom service of the document was addressed, or could be addressed.

31. What is considered a timely service of documents?

The service of the pleading on the opponent is decisive for the observance of the time limit. The party must therefore submit the pleading to the court in such good time that in the normal course of business it may be expected that it will be served on the opponent within the time limit. If this happens, unforeseeable delays, whether in the course of court business or by post, are not to be

attributed to the party.[154] It is advisable to file a pleading according to § 132(1) cl. 1 ZPO with the court no later than eleven days before the oral proceedings.[155]

> "**§ 132 ZPO [deadlines for written pleadings]**
>
> (1) Any preparatory written pleading setting out new facts or new, other submissions is to be filed in such due time that it may be served at least one (1) week prior to the hearing scheduled for oral argument. This shall apply to any written pleading that concerns interlocutory proceedings.
>
> (2) Any preparatory written pleading submitted in response to new submissions is to be filed in such due time that it may be served at least three (3) days prior to the hearing scheduled for oral argument. This shall not apply to any written response made in interlocutory proceedings."

The requirement of timeliness of service is intended to ensure that the respondent has sufficient time after service to instruct a lawyer to represent them and to prepare their defence. The decisive factor for timeliness is whether the respondent actually had sufficient time in the individual case to prepare a proper defence.[156] The document shall be deemed to have been served at the time it is actually received by the addressee of service.[157]

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

The actual existence of the authority to act ad litem (*Prozessvollmacht*) is irrelevant insofar as the claimant bears the risk that the respondent's representative appointed by him does not have an authorised lawyer and that the service affected on him is therefore ineffective.[158]

[154] *Anders*, supra n. 16, § 132 ZPO para. 11; *von Selle*, supra n. 3, § 132 ZPO para. 8.
[155] *Kern*, supra n. 37, § 132 ZPO para. 9; *von Selle*, supra n. 3, § 132 ZPO para. 8.
[156] *Stadler*, supra n. 6, Art. 45 EuGVVO para. 10.
[157] *Häublein/Müller*, supra n. 1, § 189 ZPO para. 19.
[158] Hupka/Kämper: ‚Die Zustellung im Zivilverfahren', JA 2012, 448 (451).

Cross-Border Service Within the Scope of the Regulation

33. 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.

§ 183 ZPO regulates the service abroad. To implement the Regulation, §§ 1067(1), 1069(1), 1070 and 1071 ZPO shall apply according to § 183(1) ZPO. § 1069(1) No. 1 ZPO provides the German court, which is in charge of the service, competence for the service of judicial documents and No. 2 declares that, generally, **the court at the domicile or habitual residence** is competent for the service of extrajudicial documents.[159] By typing in the postcode (and address), the e-justice portal links the competent court for the corresponding address of domicile.[160]

Judicial documents are documents directly related to judicial proceedings. They may be served to initiate proceedings, may have been created in the course of the proceedings or may terminate pro-ceedings.[161] Extrajudicial documents differ from judicial ones in that they are not directly related to judicial proceedings. They differ from purely private documents and communications as their trans-mission requires the involvement of an authority or judicial official. These include notaries and bailiffs.[162]

34. 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.

§ 1069(2) ZPO regulates which bodies are considered to be "receiving agencies", within the meaning of Art. 3(2) of the Regulation. The governmental office of the local court in whose district the document is to be served shall be the receiving agency, § 1069(2) cl. 1 ZPO.[163] The state governments may assign the duties of receiving agency to a district court for the districts of several district courts by statutory order, § 1069(2) cl. 2 ZPO.

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

The following means of communication are available for receiving and sending: mail and private delivery services, fax; and for informal communications: telephone and e-mail.[164]

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[159] *Thode*, supra n. 3, § 183 ZPO para. 4; *Hiss/Ruster*, supra n. 3, Art. 3 EuZVO 2022 para. 9.
[160] E-Justice, ‚Zustellung von Schriftstücken (Neufassung)', <https://e-justice.europa.eu/38580/DE/serving_documents_recast>, visited 12 March 2023.
[161] *Thode*, supra n. 3, § 1069 ZPO para. 5.
[162] Ibid. para. 9.
[163] *Hiss/Ruster*, supra n. 3, Art. 3 EuZVO 2022 para. 13.
[164] E-Justice, 'Zustellung von Schriftstücken (Neufassung)', <https://e-justice.europa.eu/38580/DE/serving_documents_recast>, visited 12 March 2023.

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

The state governments determine by statutory order the body responsible in the respective state as the German central office pursuant to Art. 4 of the Regulation, § 1069(3) ZPO. Following § 1069(4) ZPO, the responsible body shall be the Federal Office of Justice.

The postal address is the home address, if available, first, otherwise – if necessary additionally – the post office box address.[165] For express shipments and parcel service (including small packages), only the home address is to be used.[166]

The task of the Central Office is performed in each German federal state by a body designated by the state government. These are usually the state judicial administrations or a higher regional court of the respective state.[167]

List of competent courts (or authorities):

- Baden-Württemberg: www.amtsgericht-freiburg.de
- Hamburg: www.amtsgericht.hamburg.de
- Bayern: www.justiz.bayern.de
- Mecklenburg-Vorpommern: www.jm.mv-regierung.de
- Bremen: www.landgericht.bremen.de
- Saarland: www.saarland.de/mdj/DE/home/home_node.html
- Brandenburg: www.mdj.brandenburg.de
- Rheinland-Pfalz: www.justiz.rlp.de
- Sachsen-Anhalt: www.mj.sachsen-anhalt.de
- Schleswig-Holstein: www.schleswig-holstein.de/mjev
- Niedersachsen: www.mj.niedersachsen.de
- Sachsen: www.justiz.sachsen.de/olg
- Nordrhein-Westfalen: www.olg-duesseldorf.nrw.de
- Hessen: www.olg-frankfurt-justiz.hessen.de
- Berlin: www.berlin.de/senjust
- Thüringen: www.thueringen.de/th4/tmmjv/

[165] Ibid.
[166] Ibid.
[167] Ibid.

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

Generally, the method of service will be similar to national scenarios. Therefore, service through the post is the most commonly used method, if possible and appropriate.

Service by diplomatic agents or consular officers (Art. 17 of the Regulation) shall only be permitted in exceptional cases if the service cannot be expected to be affected by the authorities of the foreign state or cannot be expected to be effected within a reasonable time or if there is another justified exceptional case or if it is a matter of service on a foreign state, or to employees of a German diplomatic mission abroad and the persons living in their private residence.[168] Service via a German diplomatic mission or consular post remains subsidiary and should only take place in the exceptional cases mentioned above.[169]

Service by postal services (Art. 18 of the Regulation) is implemented in Germany according to § 183(3) ZPO.

Electronic service (Art. 19 of the Regulation) is explicitly regulated in § 1068 ZPO. Therefore, court documents may only be served electronically on recipients in Germany under Art. 19(1)a of the Regulation.

For **direct service (Art. 20 of the Regulation)** in Germany, the provisions on service of process in §§ 191 et seq. ZPO apply to incoming requests.[170] Direct service of documents transmitted from abroad is therefore effected by the bailiff, § 192 ZPO. For outgoing requests, direct service is subject to two restrictions: First, it must be admissible under the law of the receiving state. This can be found on the European Justice Portal.[171] Secondly, it must be admissible in the specific case under the ZPO. If both conditions are met, the party to the proceedings can contact the foreign authorities directly without the involvement of the German bailiff being required.[172]

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

Expenses may be up to 20.50 EURO under ordinary circumstances. They are calculated according to the type of service requested in accordance with the Judicial Costs Acts, in Germany the GKG.[173]

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[168] *Hiss/Ruster*, supra n. 3, Art. 17 EuVZO 2022 para. 4.
[169] *Wittschier*, supra n. 6, § 183 ZPO para. 3; Ibid.
[170] *T. Rauscher*, in Rauscher/Krüger Münchener Kommentar zur Zivilprozessordnung Band 3 (C.H. Beck 2022), Art. 15 EG-ZustellVO para. 4. *Hiss/Ruster*, supra n. 3, Art. 20 EuZVO 2022 para. 5.
[171] E-Justice, ‚Zustellung von Schriftstücken (Neufassung)', <https://e-justice.europa.eu/38580/DE/serving_documents_recast>, visited 12 March 2023.
[172] *Hiss/Ruster*, supra n. 3, Art. 20 EuZVO 2022 para. 7.
[173] Ibid; E-Justice, ‚Zustellung von Schriftstücken (Neufassung)', <https://e-justice.europa.eu/38580/DE/serving_documents_recast>, visited 12 March 2023.

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

If mandatory information for service is missing, the document will not be served. Additionally, a statement of claim will not be served if the court fee is unjustifiedly not paid in advance, §§ 6(1), 12(1) cl. 1 GKG.

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

According to § 1070 ZPO, service requests, certificates of service and other notices according to the Regulation received from abroad must be in German or English or accompanied by a translation into German or English.

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

For Germany, a transfer to the federal office of justice, which performs the tasks of the central office according to Art. 4 of the Regulation, is recommended.[174] However, this does not mean that other institutions, especially when referred to in other international contexts or treaties, are not competent. The designation of the central office serves to simplify and accelerate cross-border civil cases.

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

Yes, § 1067 ZPO deals with the national reservation:

> **"§ 1067 ZPO [Service by diplomatic missions or consular posts]**
>
> (1) Service pursuant to Article 17 of Regulation (EU) 2020/1784 by the competent German diplomatic mission or consular post abroad shall only be effected in justified exceptional cases. Service pursuant to sentence 1 on a recipient who is not a German national shall only be admissible if the Member State in which service is to be affected has not excluded this by a declaration pursuant to the first sentence of Article 33(1) of Regulation (EU) 2020/1784.
>
> (2) Service pursuant to Article 17 of Regulation (EU) 2020/1784 to be effected in the Federal Republic of Germany shall only be admissible if the addressee of the document to 1068be served is a national of the transmitting State."

As stated in § 1067(1) ZPO, this method of service should be effected only "in justified exceptional cases". The provision applies partly not only to service with the help of German diplomatic or

[174] Schlosser/Hess, Art. 7 EuZVO 2022 para. 4.

consular representations in other Member States, but also (vice versa) to service from foreign Member States via their representations in Germany.[175]

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

Direct service has not been of great practical relevance so far, since in German civil procedure law, and in particular, in proceedings for the recognition of judgments, the principle of official service predominantly applies.[176]

As mentioned in question 37, in Germany, the provisions on service of process in §§ 191 et seq. ZPO apply to incoming requests.[177] Direct service of documents transmitted from abroad is therefore effected by the bailiff, § 192 ZPO. For outgoing requests, direct service is subject to two restrictions: First, it must be admissible under the law of the receiving state. This can be found on the European Justice Portal (https://e-justice.europa.eu/38580/DE/serving_documents_recast). Secondly, it must be admissible in the specific case under the Zivilprozessordnung. If both conditions are met, the party to the proceedings can contact the foreign authorities directly without the involvement of the German bailiff being required.[178]

44. 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.

Among the bilateral agreements concluded by Germany, the following contain provisions to further simplify cross-border service:

- The German-Belgian Supplementary Agreement to the The Hague Convention on Civil Procedure, according to Art. 3(4) of which the two states mutually waive the reimbursement of expenses incurred as a result of the fact that a court official was involved in the service or that a special form was observed;
- The German-Greek Convention on Legal Assistance, under Art. 25(1) of which costs of service shall be charged only if they were caused by the express request to proceed in a special form;

[175] Wagner: ‚Neuigkeiten zum internationalen Zivilverfahrensrecht‘, EuZW 2022, 733 (734).
[176] *Hiss/Ruster*, supra n. 3, Art. 20 EuZVO 2022 para. 4.
[177] *Rauscher*, supra n. 170, Art. 15 EG-ZustellVO para. 4.; *Hiss/Ruster*, supra n. 3, Art. 20 EuZVO 2022 para. 5.
[178] *Hiss/Ruster*, supra n. 3, Art. 20 EuZVO 2022 para. 7.

- The German-British Agreement on Legal Intercourse, which in Art. 5, 6 and 7 provides for further facilitations of service; in particular, according to Art. 7 of this agreement, direct service is permitted without the restriction provided for in Art. 15, so that documents other than those to be served in party service under the ZPO may also be transmitted by German bailiffs;
- The German-Dutch Supplementary Agreement to the The Hague Convention on Civil Procedure, according to Art. 3(5) of which the two states mutually waive the reimbursement of expenses incurred as a result of the fact that during service a court official has assisted or a special form has been observed;
- The German-Austrian supplementary agreement to the The Hague Convention on Civil Procedure, which allows the waiver of the use of the forms (for the request for service, for the instruction on the right to refuse acceptance and for the certificate of service) and excludes the obligation to reimburse the costs;
- The German-Swedish Supplementary Agreement to The Hague Convention on Civil Procedure, according to Art. 3(1) of which the two states mutually waive the reimbursement of expenses incurred as a result of the fact that an enforcement officer assisted in the service.[179]

45. 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?

There is no information on the early use of the decentralised IT system as defined in Art. 33 No. 2 of the Regulation.

[179] Geimer/Schütze/*Okonska*, Art. 20 VO (EG) 1393/2007 para. 9; *Ruster/Lahme*, supra n. 3, Art. 29 EuZVO 2022 para. 3.

RIGHT OF REFUSAL

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

In principle, there is no right to refuse acceptance of an item to be delivered.[180] However, refusal of service is possible under specified circumstances. Acceptance of the document to be served is refused under § 179 ZPO if its receipt would be possible but the recipient of service refuses it and behaves accordingly.

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

Acceptance of the document served may be refused in certain conditions under § 179 ZPO. The provision is applicable in the case of service according to §§ 176-178 ZPO on the recipient themselves, on their legal or legally appointed representative, or the substitute persons mentioned in § 178 ZPO.[181]

Refusal is justified if service is to be effected at an inappropriate time, e.g. at night time (§ 758a(4) ZPO), on Sundays and public holidays, on an inappropriate occasion (§ 177 ZPO) or if the substitute person (§ 178(1) no. 1 or no. 2 ZPO) does not belong to the family or is not employed (e.g. a visitor).[182] This also applies if there are reasonable doubts about the identity of the person encountered with the recipient indicated on the consignment.[183]

In the case of an **unjustified refusal** to accept the document, it must be left in the home or business premises. It may also be thrown into the letter box like an ordinary letter or tacked to the door.[184] However, it is not possible to use the letter box if the same letter box is also used by the opponent.[185] Delivery to a third party (e.g. a neighbour) is inadmissible.

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

As there is no electronic service of documents except to legal representatives, there is no special provision.

[180] *Wittschier*, supra n. 6, § 179 ZPO para. 2.
[181] *Wittschier*, supra n. 6, § 179 ZPO para. 1.
[182] *Dörndorfer*, supra n. 3, § 179 ZPO para. 1; *Wittschier*, supra n. 6, § 179 ZPO para. 2.
[183] *Dörndorfer*, supra n. 3, § 179 ZPO para. 1; *Wittschier*, supra n. 6, § 179 ZPO para. 2.
[184] *Dörndorfer*, supra n. 3, § 179 ZPO para. 2; *Wittschier*, supra n. 6, § 179 ZPO para. 2.
[185] LG Fulda MDR 1987, MDR 1987, 149; *Dörndorfer*, supra n. 3, § 179 ZPO para. 2; *Wittschier*, supra n. 6, § 179 ZPO para. 2.

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

All relevant facts have to be taken into account as long as the recipient brings them forward. These factors may be simple facts of the situation, personal reasons or other aspects that may lead to the decision of justified refusal. The fact and time of delivery to the correct recipient may be proven with all admissible evidence under the ZPO.[186] The court decides based on the free assessment of evidence (*freie Beweiswürdigung*) according to § 286 (1) ZPO.[187]

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

The consequences of the refusal of acceptance of service of a document are laid down in § 179 ZPO. As soon as acceptance is refused without due reasons, service is deemed to have been delivered, § 179 cl. 3 ZPO. If the recipient of service does not have a home or business premises (e.g. in the case of service at another place under § 177 ZPO), the document to be served must be returned to the sending office (§ 179 cl. 2 ZPO).[188]

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

As a refusal to accept a document is generally possible under national civil law, the courts are using similar methods to review the admissibility. They might be more lenient concerning the competent authority to whom the refusal is being submitted,[189] all other procedural aspects like the free assessment of evidence remain the same within civil procedures.

[186] *Roth*, supra n. 37, § 189 ZPO para. 10.Stein/Jonas/*Roth*, § 189 ZPO para. 10.
[187] Ibid.
[188] *Dörndorfer*, supra n. 3, § 179 ZPO para. 3.
[189] *Ruster/Lahme*, supra n. 3, Art. 12 EuZVO 2022, para. 42.

ELECTRONIC METHODS OF SERVICE

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

Court documents may only be served electronically on recipients in the Federal Republic of Germany per Article 19(1)(a) of the Regulation, § 1068 ZPO.

An electronic document has to be provided following the requirements in § 2 Elektronischer-Rechtsverkehr-Verordnung (Electronic Legal Communication Regulation, hereafter: ERVV):

> "**§ 2 Requirements for electronic documents**
>
> (1) [1]The electronic document must be transmitted in PDF file format. [2]If pictorial representations cannot be reproduced without loss in the PDF file format, the electronic document may additionally be transmitted in the TIFF file format. [3]The PDF and TIFF file formats must correspond to the versions published in accordance with § 5(1) No. 1.
>
> (2) The electronic document shall comply with the technical standards published in accordance with § 5(1) No. 1 and 6.
>
> (3) The electronic document shall be accompanied by a structured machine-readable record in XML file format, which shall conform to the definition or schema files published pursuant to § 5(1) No. 2 and shall contain at least:
>
> 1. the name of the court;
> 2. the file number of the proceedings, if known;
> 3. the designation of the parties or participants in the proceedings;
> 4. the indication of the subject matter of the proceedings;
> 5. if known, the file number of a proceeding concerning the same subject matter and the name of the office keeping the file."

The ERVV regulates technical frameworks (chapter 2), electronic governmental mailboxes (chapter 3), personal electronic mailboxes (chapter 4; see Question 49), and the electronic communication with law enforcement agencies and criminal courts (chapter 5).

§ 173 ZPO regulates the general service of electronic documents. According to § 173 (1) ZPO, an electronic document can only be delivered electronically via a secure transmission channel; even so, electronic documents may also be printed and served in written form following §§ 175, 176 ZPO.[190] Since the service of electronic documents in Germany always requires a secure means of transmission, the new provision § 1068 ZPO allows electronic service from Germany only under

[190] *Wittschier*, supra n. 6, § 173 ZPO para. 2.

the first alternative of the Regulation, i.e. in accordance with Article 19(1)(a) of the Regulation, but not in accordance with the modalities of Article 19(1)(b) of the Regulation.

Specified professionals, lawyers, notaries, bailiffs and tax consultants have an **obligation** to open a secure transmission channel and use it for the electronic service of documents (§§ 173(2) No. 1, 130d ZPO). Starting from 1.1.2024, other persons, associations, and organisations involved in the process in a professional capacity who can be assumed to have a higher level of reliability are subjected to the same obligation. Only if electronic service is temporarily not possible for technical reasons, the transmission shall remain permissible in accordance with the general provisions, § 130d cl. 2 ZPO. Therefore, the submission in conventional paper form with a signature, by fax (also with a signature) or computer fax, but not the simple transmission as an e-mail attachment, can be considered.[191]

Other than the specified persons in § 173(2) ZPO may only be served a document electronically if they have given consent to be served in such a way for the specified proceedings, § 173(4) cl. 1 ZPO.

Following § 173(4) cl. 4 ZPO, an electronic document is deemed served on the third day after electronic confirmation of receipt from the recipient's mailbox. This generous **service fiction** of three days is intended to create an incentive to choose electronic service, because unlike postal service, where (substitute) service is regularly deemed to have been effected as soon as the document is deposited in the letterbox, electronic service grants additional three days to become aware of the content of the document.[192] Proof of missing or later receipt remains possible, § 173(5) cl. 5 ZPO.

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

Since 01.01.2018, lawyers are obligated to use the special electronic lawyer mailbox (beA).[193] The existence of a beA-account is strictly bound to the requirements of § 31a(1) cl. 1 Bundesrechtsanwaltsordnung (Federal Lawyers Act, hereafter: BRAO).[194] This means that the account is directly linked to the admission as a lawyer.[195] After the revocation of the admission or the lawyer's death, the mailbox is therefore initially deactivated and deleted after a reasonable period of time has elapsed, § 31a(4) BRAO.[196]

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[191] *Stadler*, supra n. 6, § 130d ZPO para. 3.
[192] *Vogt-Beheim*, supra n. 16, § 173 ZPO para. 11.
[193] Siegmund: ‚Das beA von A bis Z', NJW 2017 3134.
[194] Müller: ‚Noch unvollendet: Das beA der Rechtsanwaltsgesellschaft', NZA 2019 825.
[195] Ibid.
[196] Ibid.

For a first activation of the personalised beA-mailbox, users need a beA-card and a chip card reader, which can be purchased from the federal chamber of notaries (*Bundesnotarkammer*) since it is the official certification body (*Zertifizierungsstelle*). After that, the user can register on the beA-brak website.[197]

Since 1.1.2022 citizens and persons not specified in § 173(2) ZPO can open electronic mailboxes (*Bürger- und Organisationenpostfächer*, hereafter: eBO). If people are interested in the electronic service of documents, they may open such a mailbox by registering. eBOs are regulated by § 10 ERVV, which stipulates some requirements for such mailboxes.

Another secure transmission channel according to § 130a(4) No. 1 ZPO is the mailbox and dispatch service of a De-Mail account if the sender is securely logged in within the meaning of § 4(1) cl. 2 De-Mail Act when sending the message and they have the secure log-in confirmed in accordance with § 5(5) De-Mail Act. De-Mails are always encrypted in transit and are stored in encrypted form. The messages are not accessible to unauthorised persons at any time and can neither be read nor changed.[198]

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

The execution of e-identification depends on the purpose. Generally, the more sensitive a situation, the higher the standard. Different methods may be used depending on the standard of security and availability. Some of the e-identification methods may be used alternatively in some circumstances.

Exemplary, for opening an eBO, the mailbox owner has to prove their identity. § 11(2) cl. 2 ERVV stipulates different ways of doing so:

> "The proof can only be provided by one of the following means of identification:
>
> 1. electronic proof of identity in accordance with § 18 of the Personalausweisgesetze [Personal Identity Card Act], § 12 of the eID-Karte-Gesetz [eID Card Act] or § 78(5) of the Aufenthaltsgesetz [Residence Act],
> 2. a qualified electronic seal in accordance with Article 38 of Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification

[197] BRAK, 'Registrierung für Benutzer mit eigenem Postfach', <www.bea-brak.de/xwiki/bin/view/BRAK/%2300001>, visited 12 March 2023.

[198] CIO Bund, 'De-Mail — einfach, nachweisbar und vertraulich, <https://www.cio.bund.de/Webs/CIO/DE/digitale-loesungen/digitale-verwaltung/de-mail/de-mail-node.html>, visited 12 March 2023.

and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC,

3. in the case of publicly appointed or sworn persons providing interpretation or translation services, a confirmation of the body responsible for the public appointment and swearing-in of such persons pursuant to the Gerichtsdolmetschergesetz [Court Interpreters Act] or the respective state law, also with regard to the information on the professional title as well as the language for which the appointment is made,
4. in the case of bailiffs, a confirmation of the body responsible for their appointment, also with regard to the job title, or
5. a declaration in a publicly certified form of the name and address of the holder of the post office box as well as the clear designation of the post office box."

Serving a document via an eBO is only possible through authorisation by electronic proof of identity, an authentication certificate saved on a qualified electronic signature creation device Annex II of the Regulation on electronic identification and trust services for electronic transactions in the internal market (hereafter: eIDAS Regulation), or a non-qualified authentication certificate that can be validated via services that are accessible via the internet, § 11(3) ERVV.

The form of an electronic signature is stipulated in § 126a BGB. The definition of "qualified electronic signature" is provided by Art. 3 No. 12 eIDAS Regulation.[199] According to Art. 3 No. 12 of this Regulation, a "qualified electronic signature" is an advanced electronic signature that has been created by qualified electronic signature creation services and is based on a qualified electronic signature certificate.

The effect of a qualified electronic signature is equivalent to that of a written signature because of its high safety standard.[200] It requires two technical signature components: a qualified electronic signature generation unit and an electronic signature certificate.[201] The latter one needs to be issued by qualified trust service providers (*qualifizierter Vertrauensdiensteanbieter*) otherwise it is only considered an advanced electronic signature and cannot replace the written form requirement according to § 125 BGB.[202] An advanced electronic signature is usable, provided the signatory can be clearly associated with it, the signatory can be reliably identified, the creation data is under the

[199] *D. Einsele*, in Säcker et al. Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 1 (C.H. Beck 2021), § 126a BGB para. 7.
[200] Voigt/Herrmann/Danz: ‚Die elektronische Signatur und ihre Einsatzmöglichkeiten für digitale Vertragsschlüsse', NJW 2020, 2991 (2993).
[201] Ibid.
[202] Ibid.

sole control of the signatory, and the signature is linked to the signed data in such a way that subsequent changes can be detected, Art. 26 eIDAS Regulation.[203]

The largest sphere of application for the qualified electronic signature in Germany currently is beA.[204] Because of the obligation to use beA since 01.01.2022, electronic documents transmitted to a court must either be provided with a qualified electronic signature by the responsible person or be (simply) signed by the responsible person and submitted by a secure means of transmission where an electronic signature is dispensable.[205]

E-identification takes place via a so-called chamber ident procedure (*Kammerident-Verfahren*) at the respective local Bar.[206] The procedure takes place after the application for the qualified signature certificate has been prepared following the signature law.[207]

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

If a lawyer sends pleadings to the court via the beA that comply with the time limit, they have to instruct the responsible staff in their office that the confirmation of the automated acknowledgement of receipt must always be checked.[208] Since citizens do not use beA, lawyers and authorities do not send documents directly to them via electronic service.

To verify the identity of the user, e-identification is required as explained in question No. 47.2. For the identification appointment at the lawyer association, a valid identity document together with a certificate of registration, the printed application for obtaining the qualified signature certificate, and the identification form by chamber ident must be brought.[209] With all these documents a secure identification of the person can be ensured and therefore a successful transmission of the electronic document.

49.3. How is the time of service determined?

According to § 173(3) ZPO, electronic service is evidenced by an electronic acknowledgement of receipt to be transmitted to the court. The structured data set provided by the court with the service shall be used for the transmission. If the court does not provide a structured data set, the electronic acknowledgement of receipt shall be transmitted to the court as an electronic document (§ 130a

[203] Saenger ZPO/Kießling, § 130a ZPO para. 15.
[204] Voigt/Herrmann/Danz: ‚Die elektronische Signatur und ihre Einsatzmöglichkeiten für digitale Vertragsschlüsse', NJW 2020, 2991 (2992).
[205] BSG NJW 2022, 1334.
[206] BNotK, 'Kammerident-Verfahren', <www.bea.bnotk.de/kammerident/>, visited 12 March 2023
[207] Ibid.
[208] BAG NJW 2019, 2793; Günther: ‚Haftungsfallen rund ums beA', NJW 2020, 1785 (1786).
[209] Ibid.

ZPO). A fictitious delivery, for example, linked to the receipt in the beA of the lawyer concerned, does not exist.[210]

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

Since 1.1.2022 lawyers, and other specified professionals (§ 173(2) ZPO), are subject to the "active use obligation", according to which they must transmit all documents such as pleadings and their annexes as well as applications and declarations to be submitted in writing as an electronic document unless this is temporarily not possible for technical reasons.[211]

This obligation is codified in § 130d ZPO:

> **§ 130d ZPO [obligation to use for lawyers and authorities]**
>
> Preparatory pleadings and their annexes as well as applications and declarations to be submitted in writing that are filed by a lawyer, by an authority or by a legal person under public law including the associations formed by it for the performance of its public duties shall be transmitted as an electronic document. If this is temporarily impossible for technical reasons, transmission shall remain admissible in accordance with the general provisions. The temporary impossibility shall be substantiated at the time of the substitute submission or immediately thereafter; an electronic document shall be submitted on request."

For other than the in § 173(2) ZPO specified people, consent is a mandatory requirement for the use of electronic service, § 173(4) cl. 1 ZPO.

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

Consent is not required for lawyers, in fact, according to § 130d ZPO, lawyers and authorities have the obligation to use electronic service.

As for everyone else consent is a requirement, it has to be generally given for an individual course of proceedings, § 173(4) cl. 1 ZPO. The consent does not have to be expressly declared, but it is sufficient if it results from the concrete circumstances in the individual case.[212] A **fictitious consent** applies if the person in question has initiated electronic service towards the court, § 173(4) cl. 2

[210] Siegmund: ‚Das beA von A bis Z', NJW 2017, 3134 (3135); Hartung/Scharmer/*Jacklofsky*, § 14 BORA para. 10.
[211] Hartung/Scharmer/*Jacklofsky*, § 14 BORA para. 11.
[212] *Wittschier*, supra n. 6, § 173 ZPO para. 6.

ZPO.[213] If the person is not a natural person, they may give **general/universal consent** to the use of electronic service, not limited to individual proceedings, § 173(4) cl. 3 ZPO.

In the case of incoming requests for service from abroad that are settled by a German court, the recipient's consent to electronic service on him or her must be checked by the German mutual legal assistance court (*Rechtshilfegericht*).[214] Consent given in the foreign court state for electronic service by the trial court there alone is not sufficient for the assumption of an existing consent in German legal assistance proceedings, but may be used as an indication.[215] However, consent for electronic service by the mutual assistance court may also be given to the foreign court.[216]

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

As universal or general consent is solely possible for non-natural persons, such as legal entities, certain matters fall out of the scope of application anyway. Following the objective of the provision, there might be a possibility to exclude certain matters from the required consent despite a "general" consent. Thus far, there has not been a decision on this question.

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

No, only specified professionals, such as lawyers and authorities have the obligation to use and accept electronic service of documents. Natural persons have to give individual consent to receive documents electronically served, § 173(4) cl. 1 ZPO. There might be fictitious consent if the person has initiated the use of electronic service in the specific proceedings, § 173(4) cl. 2 ZPO.

51.1. 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)

§ 130d ZPO obliges only lawyers and corresponding authorities, with electronic service being effected through beA. Consequently, citizens do not need to receive electronic documents if they are unable to or do not wish to. The obligation for specified persons serves the purpose of expanding electronic communication between professionals and courts.

[213] *Vogt-Beheim*, supra n. 16, § 173 ZPO para. 10.
[214] *Wittschier*, supra n. 6, § 173 ZPO para. 6.
[215] Ibid.
[216] Ibid.

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

The German Federal Bar (*Bundesrechtsanwaltskammer*) is responsible to support the electronic services of lawyers in Germany via beA.[217] It is the umbrella organization of the lawyers' self-administration. It represents the interests of the 28 bar associations and thus of the entire legal profession in the Federal Republic of Germany with around 166,000 lawyers vis-à-vis authorities, courts and organizations – at a national, European, and international level.[218]

Because it launched the beA-platform, the German Federal Bar also provides instructions for registrations for the beA-platform and publishes a newsletter for periodical updates on beA.[219]

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

To ensure the security of electronic service via beA, a Hardware Security Module (HSM) is used, on which the messages are "transcoded" on a server of the German Federal Bar.[220] Furthermore, security is ensured through limited methods of serving electronic documents. Following §§ 130a(3) and (4), 130d ZPO in conjunction with § 4 ERVV, a high standard of unification and security is required.

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

In Germany, electronic service has been implemented for professionals to enable safe and fast transmission of documents. As questions regarding authentication and issues concerning effective access to justice have be overcome before shifting the system to electronic service for everyone, this step has to be carefully planned. In the meantime, the overall efficiency, occurring problems, and possible improvements will be monitored within the professional use of electronic service.

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

If electronic service is temporarily not possible for technical reasons, the transmission shall remain admissible in accordance with the general provisions. The temporary impossibility shall be substantiated at the time of the substitute submission or immediately thereafter; an electronic document shall be submitted upon request, § 130d ZPO. It does not matter whether the temporary

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[217] BNotK, 'Aufgaben und Tätigkeiten der Bundesnotarkammer', <www.bnotk.de/aufgaben-und-taetigkeiten>, visited 12 March 2023.

[218] BRAK, ‚Besonderes elektronisches Anwaltspostfach: Endlich geht's los!', <https://www.brak.de/presse/presseerklaerungen/presseerklaerungen-archiv/2016/presserklaerung-17-2016/>, visited 12 March 2023.

[219] BRAK, ‚beA-Newsletter', <www.brak.de/newsroom/newsletter/bea-newsletter/>, visited 12 March 2023.

[220] CH Beck, ‚Verschlüsselungsmethode des beA gebilligt', <https://rsw.beck.de/aktuell/daily/meldung/detail/bgh-verschluesselungsmethode-des-bea-gebilligt>, visited 12 March 2023.

technical impossibility lies in the sphere of the court or with the submitting party.[221] The duration of the disruption is irrelevant as long as it can and will be remedied.[222]

The prima facie evidence (*Glaubhaftmachung*) shall in principle already be attached to the substitute submission and shall only be submitted subsequently in exceptional cases if this is not possible in terms of time. It should describe the nature of the defect in a (layman's) way that makes operating errors unlikely.[223]

56. What are the costs of electronic service?

The costs depend on the service used. The mandatory software of beA for lawyers will be explained to give an overview over the cost structure of these systems.

The **beA** Card, which is required for secure login, can be purchased in two different versions: the beA Card Basic and the beA Card Signature.

The Card Basic option is required for the first registration on the platform and serves as a daily login on beA. Additionally, documents without a written form requirement may be send by using this option.

The beA Card Signature was initially designed as a "basic version" and can be used to create qualified electronic signatures as soon as it has been loaded and reloaded with a qualified certificate. The "top-up procedure" includes an individual identification required by the laws concerning signatures, which may trigger further costs.[224]

The beA Card costs 29,90€ plus VAT/year for the beA Card Basic and 49,90€ plus VAT/year for the beA Card Signature, each with a minimum contract period of 24 months.[225] If a beA Card Basic is subsequently extended by a qualified electronic certificate for the beA Card Signature, the additional costs are only 20€ plus VAT/year.[226] Individual transmissions do not cause any extra costs since the beA cards are already bound to a subscription.

Furthermore, a chip card reader is needed to use both beA Cards, which can vary in cost. Also, if the lawyer employs staff, there are optional beA Cards for employees. A beA Card for employees costs 12.90€ plus VAT/year and a beA software certificate costs 4,90€ plus VAT/year, each with a minimum contract period of 12 months.[227] With this Card and corresponding software, employees

[221] *Stadler*, supra n. 6, § 130d ZPO para. 3.
[222] *Stadler*, supra n. 6, § 130d ZPO para. 3.
[223] Ibid.
[224] BNotK, 'Allgemeine Fragen und Antworten zu Ihrer beA-Karte', <www.bea.bnotk.de/documents/FAQ_beA_180704.pdf>, visited 12 March 2023.
[225] Ibid.
[226] Ibid.
[227] Ibid.

can log into beA and read messages or send documents signed in a qualified manner by the lawyer or documents that are not subject to a written form requirement.[228]

Generally, the flat rate payment for the beA service enables free service of documents under the applicable provisions.

For non-lawyers and especially private persons, using **De-Mail** services including standard emails is free of charge. However, there may be charges for the initial setup of the account. These costs depend on which service private customers choose (5,99€ for "De-Mail Basic"; 9,99€ for "De-Mail Private").[229] If the setup is done via eID on the new electronic identity card, the initial account setup is free of charge.[230] It is possible to book additional services (e.g. De-Mail registered mail) for additional costs.[231]

The costs for the licence of an **eBO** is based on the provider of the service. Generally, the requirements of use and its framework are officially set.[232] For offices, some providers calculate based on the number of supervisors in the contracting organisation form.[233] They charge offices containing only one supervisor, shared offices, and partnerships (e.g. law firms) 29€/month. Legal entities such as associations and other legal persons, as well as private persons must request a quote.[234] Other providors charge 18,95€/month for single users with optional add-ons for more than 100 messages per month.[235]

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

All messages stored in the beA system are encrypted at all times and therefore safe from unauthorised access. The computer systems of the beA are located exclusively in Germany and are therefore subject to the strict requirements of German data protection law. The beA places high

[228] Ibid.
[229] Web.de, ‚De-Mail Preisliste', <www.produkte.web.de/de-mail/preise/>, visited 12 March 2023.
[230] Ibid.
[231] Ibid.
[232] For guidance, see for example: Bund Länder Kommission, 'Sicherer Übermittlungsweg für Bürgerinnen und Bürger sowie Organisationen (juristische Personen und nichtrechtsfähige Personenvereinigungen)', <https://egvp.justiz.de/buerger_organisationen/2022_08_04_Sicherer_Uebermittlungsweg_Buerger_Organisationen_V1-4.pdf>, visited 12 March 2023.
[233] LOGO Datensysteme, ‚eBO.connect', <http://ebo.betreuung.de/bestellen/>, visited 12 March 2023.
[234] Ibid.
[235] Procilon, ‚eBO – elektronisches Bürger- & Organisationenpostfach mit proDESK Framework', <https://www.procilon.de/kommunizieren/elektronischer-rechtsverkehr/ebo-elektronisches-buerger-und-organisationenpostfach>, visited 12 March 2023; Protectr, ‚Elektronischer Rechtsverkehr mit eBO', <www.protectr.com/funktionen/business/elektronischer-rechtsverkehr>, visited 12 March 2023.

demands on the security mechanisms used to encrypt the transmitted data. Strong encryption algorithms are used to meet these requirements.[236]

58. 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 change from postal to electronic service in Germany still focused on the substitution of paper documents with electronic attachments. The next step ahead would be a cloud computing system in which lawyers, courts, and possibly parties can share, check, and access the common court files jointly. Advices of receipt, alterations of documents and the like should be made visible to other users to ensure authenticity and the adherence to procedural rights.

So far, since the partly mandatory implementation of electronic service, the effort of printing and scanning statements of claim at the courts is reduced while the standardisation of processes is ensured.[237] However, courts generally continue to work with paper files and have to print every (electronic) document they receive. For the future, electronic files and ideally using shared virtual, cloud-computing systems between lawyers and courts would improve legal certainty as knowledge of all files is guaranteed for every eligible person. Using a common file system would remove further barriers of service as all documents are stored centrally. This holds especially true for cross-border cases where postal service between Member States always faces the obstacle of different providers and requirements, adding to the costs.

59. 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.

Within the framework of the European order for payment procedure, E-CODEX is already opening electronic communication with the District Court for Commercial Matters in Vienna for the Wedding District Court, which is centrally responsible for Germany in this respect.[238]

Regarding the procedures in the case of European Small Claims, Germany intends to participate in the pilot operation as soon as the European Justice Portal makes this function available.[239] In North Rhine-Westphalia, use has been made of the possibility provided for in the law to concentrate

[236] beA, ‚Datenschutz im beA', <https://portal.beasupport.de/fragen-antworten/kategorie/allgemeine-fragen/datenschutz-im-bea>, visited 12 March 2023.
[237] *Stadler*m, supra n. 6, § 130d ZPO para. 1.
[238] Justiz NRW, ‚E-CODEX', <www.justiz.nrw/JM/doorpage_online_verfahren_projekte/projekte_d_justiz/ecodex/index.php>, visited 12 March 2023.
[239] Ibid.

jurisdiction for these proceedings; the Essen Local Court has been designated for this purpose by statutory order.[240]

The interconnection of the commercial registers of all EU Member States, based on Regulation 2012/17/EU, has been implemented using E-Delivery, which is part of the E-CODEX technology. This allows queries on all companies registered in the EU Member States or Iceland, Liechtenstein or Norway. It is also possible to exchange information on foreign branches and cross-border mergers between companies.[241]

[240] Ibid.
[241] Ibid.

PROBLEMS RESULTING OUT OF CROSS-BORDER SERVICE

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

Generally, the service of documents is not a major problem in Germany. The relevant provisions cater for multiple scenarios and strive to balance the rights of the claimant and the respondent adequately. However, it may be practically challenging to serve a document on someone who intentionally hides which as a result increases the costs of service. In some cases, this might lead to costs of service (especially personal), which is significantly higher than the amount in dispute.

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

Several topics can be brought up which could be issues arising out of cross-border service to Germany. The first is the issue of **knowledge of German procedural law** and its requirements. There are **different methods of service** and some are mandatory for certain professions, such as the use of the electronic service for lawyers. Further, compared to other Member States, the **scopes of official duties** might be different. Most of the time, the court is responsible for the service of documents ex officio. This way offers increased legal certainty although it requires trust in the correct performance and choice of method of service. As service is mainly conducted via post, **time limits** might pose a difficulty when other Member States assume service is fast through electronic means. Finally, there might be **language barriers**, especially when communicating with German courts as the only language they use is German.

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

As international laws and treaties are lex specialis in cases of cross-border service, international agreements setting out different scenarios of service might already improve legal certainty. Practical guidelines could be written and made public to incorporate international agreements into national practice. More broadly, German law, especially the ZPO, could be officially translated into English or other languages to enable a wider audience access to the relevant provisions. As there are some translations online, this would only improve legal certainty, as the terminology and topicality would be secured.

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

LG Bamberg, 8.1.2021 - 3 S 72/20, NJW-RR 2021, 383:

The effectiveness of service according to § 180 cl. 2 ZPO is not affected by any spelling mistakes or other inaccuracies in the first name and surname of the recipient of service, provided there is no doubt as to the identity of the recipient and there is no risk of confusion.

LSG Hamburg, 24.3.2021 – L 2 U 12/20, BeckRS 2021, 11272:

If a lawyer has several special lawyers' mailboxes (beA), service can be effectively performed to each active beA, irrespective of the assignment of the respective beA to certain fields of activity of the lawyer. The court decided that service is made on the person, not on "a P.O. box", cf. § 166(1) ZPO, and the holder of the electronic P.O. box, and thus the recipient of the service, was undisputedly the claimant's authorised legal representative. Moreover, the holder of an electronic mailbox is also obliged under § 31a(6) BRAO, inter alia, to take note of service and the receipt of service via beA.

LG Berlin, 18.6.2021 – 65 S 340/20, BeckRS 2021, 42392:

Defects in service are defects to be remedied under § 189 ZPO, provided that the copy served is identical to the original. Since the purpose of § 189 ZPO is to consider service as effected even if the purpose of service is achieved otherwise, this also applies to the service of an improperly certified copy because the intention of the service is not called into question. This objective lies in the provision of a reasonable opportunity to take note of the action and to document the time of notification. The respondents did not argue that the certified copies and the simple copies served on them did not reproduce the statement of claim completely and correctly.

OLG Brandenburg, 15.12.2021 – 4 U 13/21, BeckRS 2021, 43985:

Service was conducted by publication (§§ 186, 187 ZPO) because it was assumed an address was not used anymore but without trying it or investigating further. The court decided that before fictitious service by publication following § 185 No. 2 ZPO may be used, service must be attempted at the last known address. This also applies if, before a period of five months, the action could not be served there. It applies in any case if the court has no further findings other than the note that the document could not be served.

AG Lüneburg, 30.5.2022 - 24 M 1458/22, DGVZ 2022, 202:

Service was conducted electronically and the costs were calculated as if the service was done personally. The court decided that electronic service is not a personal service so the cost rate according to KV 100 GvKostG is excessive.

OLG München, 6.7.2022 - 7 U 3126/20, BeckRS 2022, 22631:

The court served a document through the fictitious official publication because the service via post was ineffective. The use of fictitious service, in this case, was deficient as the claimant knew of an address which was might have been used by the recipient and the court is subject to a duty to investigate. Fictitious service is only possible when all other methods of service are not promising.

BFH (Interlocutory judgment), 19.10.2022 – X R 14/21, NJW 2023, 470:

Effective substitute service by insertion in a letterbox (§ 180 ZPO) requires a prior unsuccessful attempt at substitute service has been made at the recipient's home or business premises (§ 178(1) No. 1, No. 2 ZPO). It cannot be deduced from the general contact restrictions in force during the Covid-19 pandemic alone that a substitute service by insertion in a letterbox without a prior attempt of service at the home or business premises could be considered effective during this period.

OLG Nürnberg, 20.2.2023 – 13 W 44/23, BeckRS 2023, 3203:

Service at a c/o address by placing it in a letterbox belonging to the home does not constitute effective substitute service within the meaning of § 178(1) No. 1 ZPO if it is not established that the respondent was actually resident at the c/o address (at that time).

INSTRUCTIONS FOR CONTRIBUTORS

1. References

As a rule, specific references should be avoided in the main text and, preferably, should be placed in the footnotes. Footnote numbers are placed after the final punctuation mark when referring to the sentence and directly after a word when referring to that word only. We humbly invite our authors to examine carefully our sample references which are preceded by [-]. These sample references put the theory of our authors' guidelines into practice and we believe that they may serve to further clarify the preferred style of reference.

1.1. Reference to judicial decisions

When citing national judicial authorities, the national style of reference should be respected. References to decisions of European courts should present the following form:

[Court] [Date], [Case number], [Party 1] [v] [Party 2], [ECLI] (NB: the "v" is not italicised)

- ECJ 9 April 1989, Case C-34/89, Smith v EC Commission, ECLI:EU:C:1990:353.
- ECtHR 4 May 2000, Case No. 51 891/9, Naletilic v Croatia.

1.2. Reference to legislation and treaties

When first referring to legislation or treaties, please include the article to which reference is made as well as the (unabbreviated) official name of the document containing that article. The name of a piece of legislation in a language other than English, French or German should be followed by an italicised English translation between brackets. In combination with an article number, the abbreviations TEU, TFEU, ECHR and UN Charter may always be used instead of the full title of the document to which the abbreviation refers. If the title of a piece of legislation constitutes a noun phrase, it may, after proper introduction, be abbreviated by omission of its complement. Thus:

- Art. 2 Protocol on Environmental Protection to the Antarctic Treaty (henceforth: the Protocol).
- Art. 267 TFEU.
- Art. 5 Uitleveringswet [Extradition Act].

1.3. Reference to literature

1.3.1 First reference

Any first reference to a book should present the following form: [Initial(s) and surname(s) of the author(s)], [Title] [(Publisher Year)] [Page(s) referred to]

- J.E.S. Fawcett, The Law of Nations (Penguin Press 1968) p. 11.

If a book is written by two co-authors, the surname and initials of both authors are given. If a book has been written by three or more co-authors, 'et al.' will follow the name of the first author and the other authors will be omitted. Book titles in a language other than English, French or German are to be followed by an italicised English translation between brackets. Thus:

- L. Erades and W.L. Gould, The Relation Between International Law and Municipal Law in the Netherlands and the United States (Sijthoff 1961) p. 10 – 13.

- D. Chalmers et al., European Union Law: cases and materials (Cambridge University Press 2010) p. 171.
- F.B. Verwayen, Recht en rechtvaardigheid in Japan [Law and Justice in Japan] (Amsterdam University Press 2004) p. 11.

1.3.2 Subsequent references

Any subsequent reference to a book should present the following form (NB: if more than one work by the same author is cited in the same footnote, the name of the author should be followed by the year in which each book was published):

[Surname of the author], [supra] [n.] [Footnote in which first reference is made], [Page(s) referred to] Fawcett, supra n. 16, p. 88.

- Fawcett 1968, supra n. 16, p. 127; Fawcett 1981, supra n. 24, p. 17 – 19.

1.4. Reference to contributions in edited collections

For references to contributions in edited collections please abide by the following form (NB: analogous to the style of reference for books, if a collection is edited by three or more co- editors only the name and initials of the first editor are given, followed by 'et al.'):

[Author's initial(s) and surname(s)], ['Title of contribution'], [in] [Editor's initial(s) and surname(s)] [(ed.) or (eds.)], [Title of the collection] [(Publisher Year)] [Starting page of the article] [at] [Page(s) referred to]

- M. Pollack, 'The Growth and Retreat of Federal Competence in the EU', in R. Howse and K. Nicolaidis (eds.), The Federal Vision (Oxford University Press 2001) p. 40 at p. 46.

<u>Subsequent references follow the rules of 1.3.2 supra.</u>

1.5. Reference to an article in a periodical

References to an article in a periodical should present the following form (NB: titles of well- known journals must be abbreviated according to each journal's preferred style of citation):

[Author's initial(s) and surname(s)], ['Title of article'], [Volume] [Title of periodical] [(Year)] [Starting page of the article] [at] [Page(s) referred to]

- R. Joseph, 'Re-Creating Legal Space for the First Law of Aotearoa-New Zealand', 17 Waikato Law Review (2009) p. 74 at p. 80 – 82.
- S. Hagemann and B. Høyland, 'Bicameral Politics in the European Union', 48 JCMS (2010) p. 811 at p. 822.

<u>Subsequent references follow the rules of 1.3.2 supra.</u>

1.6. Reference to an article in a newspaper

When referring to an article in a newspaper, please abide by the following form (NB: if the title of an article is not written in English, French or German, an italicised English translation should be provided between brackets):

- [Author's initial(s) and surname(s)], ['Title of article'], [Title of newspaper], [Date], [Page(s)]: T. Padoa-Schioppa, 'Il carattere dell' Europa' [The Character of Europe], Corriere della Serra, 22 June 2004, p. 1.

1.7. Reference to the internet

Reference to documents published on the internet should present the following form: [Author's initial(s) and surname(s)], ['Title of document'], [<www.example.com/[...]>], [Date of visit]

- M. Benlolo Carabot, 'Les Roms sont aussi des citoyens européens', <www.lemonde.fr/idees/article/2010/09/09/les-roms-sont-aussi-des-citoyens-europeens_1409065_3232.html>, visited 24 October 2010. (NB: 'http://' is always omitted when citing websites)

2. Spelling, style and quotation

In this section of the authors' guidelines sheet, we would like to set out some general principles of spelling, style and quotation. We would like to emphasise that all principles in this section are governed by another principle – the principle of consistency. Authors might, for instance, disagree as to whether a particular Latin abbreviation is to be considered as 'common' and, as a consequence, as to whether or not that abbreviation should be italicised. However, we do humbly ask our authors to apply the principle of consistency, so that the same expression is either always italicised or never italicised throughout the article.

2.1 General principles of spelling

- Aim for consistency in spelling and use of English throughout the article.
- Only the use of British English is allowed.
- If words such as member states, directives, regulations, etc., are used to refer to a concept in general, such words are to be spelled in lower case. If, however, the word is intended to designate a specific entity which is the manifestation of a general concept, the first letter of the word should be capitalised (NB: this rule does not apply to quotations). Thus:
- [...] the Court's case-law concerning direct effect of directives [...]
- The Court ruled on the applicability of Directive 2004/38. The Directive was to be implemented in the national law of the member states by 29 April 2006.
- There is no requirement that the spouse, in the words of the Court, 'has previously been lawfully resident in another Member State before arriving in the host Member State'.
- Avoid the use of contractions.
- Non-English words should be italicised, except for common Latin abbreviations.

2.2. General principles of style

- Subdivisions with headings are required, but these should not be numbered.
- Use abbreviations in footnotes, but avoid abbreviations in the main text as much as possible.
- If abbreviations in the main text improve its legibility, they may, nevertheless, be used. Acronyms are to be avoided as much as possible. Instead, noun phrases are to be reduced to the noun only (e.g., 'the Court' for 'the European Court of Human Rights'). If this should prove to be problematic, for instance because several courts are mentioned in the text (e.g., the Court of Justice and the European Court of Human Rights), we ask our authors to use adjectives to

complement the noun in order to render clear the distinction between the designated objects (e.g., the Luxembourg Court/the European Court and the Strasbourg Court/the Human Rights Court). As much will depend on context, we offer considerable liberty to our authors in their use of abbreviations, insofar as these are not confusing and ameliorate the legibility of the article.

- In English titles, use Title Case; in non-English titles, use the national style.

2.3. General principles of quotation

- Quotations are to be placed between single quotation marks, both in the main text and in the footnotes (thus: 'aaaaa').
- When a quotation forms part of another quotation, it is to be placed between double quotation marks (thus: 'aaaaa "bbbbb" aaaaa').
- Should a contributor wish to insert his own words into a quotation, such words are to be placed between square brackets.
- When a quotation includes italics supplied by the contributor, state: [emphasis added].