

European Union, CJEU, Alder, judgement of 19 December 2012

Deciding bodies and decisions

CJEU, Alder, Case C-325/11, judgement of 19 December 2012, EU:C:2012:824

Area of law

Effective judicial protection

Subject matter

Judicial cooperation in civil and commercial matters - Service of documents to party domiciled in the territory of another Member State

CJEU was asked to clarify whether, in light of Article 47(2) CFR, Article 1(1) of Regulation (EC) No. 1393/2007 must be interpreted as precluding Member States' legislation providing for methods of fictitious service of judicial documents.

Summary Facts Of The Case

In 2008, Mr. and Mrs. Adler, who resided in Germany, started civil proceedings against Mr. and Mrs. Orłowski, two Polish residents, before the District Court of Koszalin (*Sąd Rejonowy w Koszalinie*). The District Court requested the applicants to communicate to it, within one month, the name of a representative in Poland authorized to accept the service of judicial documents and inform them that, according to the Polish Code of Civil Procedure (Article 1135), in case they failed to do so, any documents addressed to them would have been added to the file case and deemed to be effectively served.

The applicants did not comply with the District Court's request and, as a consequence, the court's notice about the date of the hearing and the counterparts' briefs were placed in the case file and deemed to have been effectively served to them. The applicants did not appear to the hearing scheduled on 5 June 2008 and the claim was eventually dismissed. Lacking any challenge, the judgment became final.

In October 2009, the claimants lodged a new application with the District Court requesting the resumption of proceedings. The applicants argued that they have not been allowed to participate effectively to the trial, due to the fact that judicial documents had not been served to them, in breach of the principle of non-discrimination on grounds of nationality guaranteed by EU law.

On 23 June 2010, the District Court declined to resume proceedings as it found that the Polish Code of Civil Procedure was fully consistent with EU law. However, the Regional Court of Koszalin (*Sąd Okręgowy w Koszalinie*), to which Mr. and Mrs. Alder appealed, overturned the judgment of

the District Court by finding that the fictitious service provided for by the Polish Code of Civil Procedure was not in compliance with Regulation (EC) 1393/2007. The case was referred back to the District Court.

The District Court disagreed with the Regional Court's conclusions. Accordingly, it decided to stay the national proceedings and to raise a question for preliminary reference before the CJEU, asking, in essence:

“Are Article 1(1) of Regulation... No 1393/2007... and Article 18 TFEU to be interpreted as meaning that it is permissible to place in the case file, deeming them to have been effectively served, judicial documents which are addressed to a party whose place of residence or habitual abode is in another Member State, if that party has failed to appoint a representative who is authorized to accept service and is resident in the Member State in which the court proceedings are being conducted?”.

At the outset, the CJEU engaged in defining the scope of application of Regulation (EC) 1393/2007 in order to assess whether such Regulation also covered cases in which, according to the concerned Member State's national legislation, there should not be any cross-border service of judicial documents in another Member State. According to the Court, then absence of any precise indications as to the cases in which the service “has to be” made in another Member State according to Article 1(1) of Regulation (EC) 1393/2007 does not mean that such cases have to be determined based on the Member State's national provisions. To the contrary, the Court applied a systematic interpretation of the Regulation and concluded that there are only two circumstances in which the service of judicial documents falls outside the Regulation's scope of application: (i) when the permanent or habitual residence of the addressee is unknown; and (ii) when the addressee has appointed a representative authorized to accept the service of judicial documents in the State where proceedings are taking place. In all other cases, when the addressee of the service of judicial documents resides abroad, Regulation (EC) 1393/2007 applies and, therefore, the service must be undertaken according solely to its provisions. It follows that, according to the Court, the cases in which judicial documents have to be serviced abroad cannot be determined by reference to the national provisions of the Member State where proceedings are taking place. This interpretation of Article 1(1) of Regulation (EC) 1393/2007 would indeed undermine the uniform application of EU law.

The Court then proceeded to assess the compatibility of Article 1135 of the Polish Code of Civil Procedure with Regulation (EC) 1393/2007. The Court first noticed that the Regulation contains an exhaustive list of means of transmission of judicial documents, which does not include forms of national (fictitious) service such as the one provided for in Article 1135 of the Polish Code of Civil Procedure. The Court thus concluded that Regulation (EC) 1393/2007 “precludes a procedure of national service such as that in force in Poland” (para. 32).

According to the CJEU, this finding is further corroborated by a teleological reading of the Regulation at stake. The Court stressed that the main objective behind the adoption of this Regulation is to establish a system of intra-Community service for the purpose of the proper functioning of the internal market and to improve and expedite the transmission of documents among Member States. According to the Court, however, these objectives “cannot be attained by undermining in any way the rights of the defence of the addressees, which derive from the right to a fair hearing, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (...)

”(para. 35, where it recalled its settled case-law on the point). The Court noticed, in this respect, that several provisions contained in Regulation (EC) 1393/2007 are indeed characterized by the attempt to strike an appropriate balance between the need to increase the efficiency of the transmission procedure, on the one hand, and the full respect of the right of the defence, on the other hand. Taking this into account, the Court excluded that the system for national service provided for in Polish law – which deprives the addressee who resided outside Poland of the right to effectively receive judicial documents and defend himself – may be deemed compatible with the objective of protecting the right of the defence, which is enshrined in Regulation (EC) 1393/2007.

In light of the above, the Court concluded that “*Article 1(1) of Regulation No 1393/2007 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that judicial documents addressed to a party whose place of residence or habitual abode is in another Member State are placed in the case file, and deemed to have been effectively served, if that party has failed to appoint a representative who is authorized to accept service and is resident in the first Member State, in which the judicial proceedings are taking place*” (para. 42).

Relation to the scope of the Charter

Article 47(2) EU Charter - Right to an effective remedy and to a fair trial – Right to defence

The Court did not explain why the case fell under the scope of the EU law, hence within the scope of the Charter. The latter’s relevance stemmed, however, from the fact that the proceedings concerned the scope of application and interpretation of Regulation (EC) No. 1393/2007.

Relation between the Charter and EHCR

Article 47(2) CFR corresponds in meaning to Article 6(1) ECHR and, as a result, the level of protection accorded to the right of the defence under Article 47(2) cannot be lower than that guaranteed to the same right under Article 6(1) ECHR (see Article 52(3) CFR). However, the scope of application of Article 47(2) is broader than the one of Article 6(1) ECHR as it encompasses any proceedings involving rights or freedoms guaranteed by EU law (and, thus, is not subject to the limitations provided for in Article 6(1) ECHR).

Impact on Jurisprudence

Following the *Alder* judgement, Article 1135 of the Polish Code of Civil Procedure was amended. Even before the amendment, Polish Courts stopped applying Article 1135 of the Polish Code of Civil Procedure.

See, for instance, the *Sąd Apelacyjny w Białymstoku / Wydział I Cywilny*’s decision of 5 December 2013, where the court found that, in light of the *Alder* reasoning, Article 165(2) of the Polish Civil Code – enshrining the rule pursuant to which the delivery to a postal operator of a document equates its filing into court – must be extended to apply also to cross-border postal services. Article 165(2) of the Polish Civil Code was later amended to explicitly provide such equation with effects from 17 August 2013.

The *Alder* judgement is relevant also because other EU Member States' legislation includes provisions similar to the one contained in Article 1135 of the Polish Code of Civil Procedure (See, e.g., Article 635 of the French Code of Civil Procedure and Article 183 of the German Code of Civil Procedure). In this respect, it is also worth mentioning that, interestingly, before the CJEU issued its judgment in *Alder*, the German Federal Court had found that Polish legislation on the fictitious service of documents did not infringe the right of the defence of the party to proceedings and, therefore, could not be considered to violate German public policy (see case BGH, IX ZB 183/09, judgment of 14 June 2012).

What has happened in Hungary is a clear example of the impact that the *Alder* judgment can have even outside Poland. The Hungarian Code of Civil Procedure contains, in fact, a provision identical to the one enshrined in former Article 1135 of the Polish Code of Civil Procedure; however, in the aftermath of the CJEU's *Alder* decision, Hungarian judges have refrained from applying it.

Impact on Legislation / Policy

Impact at the EU level

The *Alder* judgment has a specific relevance with respect to the issue of the service of judicial documents. Its conclusions have indeed been subsequently reiterated in another judgment: Case C-519/13 *Alpha Bank Cyprus Ltd v. Dau Si Senh and Others*, judgment of 16 September 2015, EU:C:2015:603. The case concerned a request for a preliminary ruling from the *Anotato Dikastirio Kyprou* (Supreme Court of Cyprus) related to the interpretation of Article 8 of Regulation (EC) No. 1393/2007. The Court confirmed its finding in *Alder* by restating that the objectives underpinning the said Regulation (i.e., increase efficiency and speed of the service procedure among Member States) “cannot be attained by undermining in any way the right of the defence of the addressees, which derive from the right to a fair hearing enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the European Convention [on Human Rights] (...)” (para. 31). The Court also reiterated that, according to the above, Regulation (EC) No. 1393/2007 must be interpreted to guarantee a fair balance between the efficiency of the procedure and the fundamental rights of the addressee (para. 33). Interestingly, in the *Alpha Bank* judgment, the CJEU further elaborated on the content of the right of the defence in the context of cross-border service of judicial documents. The Court stressed, in fact, that: “it is important not only to ensure that the addressee of a document actually receives the document in question, but also that he is able to know and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able effectively to assert his rights in the Member State of transmission” (para. 32).

Impact at the national level

Following the judgment of the CJEU in the *Alder* case, the Polish Code of Civil Procedure was amended. According to Article 1135 of the Code, as amended with effects from 17 August 2013, the fictitious service of judicial documents apply now only to addressees who reside outside the EU (in non-EU Member States) and fail to appoint a representative authorized to accept service in Poland. Conversely, judicial documents are served according to the modalities provided for in Regulation (EC) 1393/2007 to the parties of proceedings who have their residence or habitual abode in another EU Member State.

Even before the amendment of the Code entered into effect, however, Polish courts stopped

applying the fictitious service rule enshrined in Article 1135 of the Polish Code of Civil Procedure (see Warsaw Court of Appeal, case No. VI ACa 1299/12, decision of 14 May 2013).

Sources - EU and national law

National Law

- Articles 401 and 1135 of the Polish Code of Civil Procedure

EU Law

- Article 18 Treaty on Functioning of the European Union (TFEU)
 - Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ 2007 L 324/79).
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Sources - CJEU Case Law

On the interpretation of the purpose and objectives of Regulation No 1393/2007

- C-14/08, *Roda Golf & Beach Resort*, EU:C:2009:395
 - C-473/04, *Plumex*, EU:C:2006:96
 - C-14/07, *Weiss und Partner*, EU:C:2008:264
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Comments

Impact on international private law

The judgment may be relevant also under a private international law perspective. Article 1 of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters states, in fact, that the Convention applies to all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. This provision has been generally interpreted in the sense that whether a document should be sent abroad is a matter to be determined pursuant to the law of the forum. This reading is clearly opposite to the CJEU's approach in *Alder*, where the Luxembourg judges found that "*in situations... where the person to be served with the judicial document resides abroad, the service of that document necessarily comes within the scope of Regulation No 1393/2007 and must, therefore, be carried out by the means put in place by the regulation to that end, as provided for by Article 1(1) thereof*" (para. 25 of the *Alder* decision). This, however, opens the question to some critical remarks, given the complexity of the criteria of residence or habitual residence and no definition is contained in Regulation (EC) No. 1393/2007.
