AUSTRIAN LAW JOURNAL

ISSN: 2409-6911

www.austrian-law-journal.at
DOI: 10.25364/01.10:2023.1.3.

Navigating the Future: Evolving Methods and Standards in Austrian Service Legislation

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Abstract: In the area of civil proceedings, which is characterized by rapid digital transformation, the world of postal services and delivery of judicial documents is experiencing a dynamic evolution. From pioneering technologies to legislative advancements, this article unveils the transformative measures adopted in Austria's service sector of civil proceedings in accordance to European harmonisation efforts. This article explores the evolution of Austrian service law since 2008 and shares perspectives on the future of serving judicial documents in the heart of Europe.

Keywords: service of documents; methods of service; substitute service; service by deposit; Web-ERV (platform for the electronic service of documents); service process; service time; deficiencies in service; restitutio in integrum.

1. Introduction

In Austria, the service of documents is essentially regulated in the **Austrian Service of Documents Act** (hereinafter: **SDA –** ["ZustG"]) which was created in 1982. Before that, the service of documents had been regulated in the **Austrian Civil Procedure Code** (hereinafter: **CPC** – ["ZPO"]), the **General Administrative Procedure Act** (AVG) and the **Federal Tax Code** (BAO).[1] With the creation of the SDA in 1982, the legislator intended to realize a standardisation and a simpler and clearer design of the system on serving judicial documents.[2]

However, even the introduction of the Service of Documents Act has **not** led to a complete standardisation of service in the area of civil proceedings: Certain provisions can still be found in other laws. Important are above all **§§ 87-121 CPC** and **§§ 89 *et seq* Court Organisation Act** (hereinafter: **COA** – ["GOG"]) regulating the electronic service of documents via **the platform on electronic service of documents** (hereinafter: **Web-ERV** – "Elektronischer Rechtsverkehr"). Before March 11th 2015, electronic service in court proceedings could only be effected via the Web-ERV according to § 28 (2) SDA.[3] Ever since 11 March 2015, however, electronic service (so called "e-service") in accordance with chapter 3 SDA (§§ 29 *et seq*) can also be effected in court proceedings if service via the Web-ERV is not possible (see § 89a [3] COA).[4] Therefore, the rules concerning service of documents in Austrian civil proceedings are **unfortunately still fragmented**.[5]

What is uniform, however, is that the court must supervise the service procedure.[6] The **obligation to receive** (duty to collaborate) by the addressee is directly related to service *ex officio*;[7] if the document is not accepted, it is either deposited or left behind

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[1] ErläutRV 162 BglNR 15. GP 8; *Stumvoll* in *Fasching/Konecny* (Eds), Kommentar zu den Zivilprozessgesetzen[2] – Ergänzungsband zum Zustellrecht (MANZ 2008) Vor § 1 ZustG Rz 7.

[2] ErläutRV 162 BglNR 15. GP 8; *Fasching*, Lehrbuch des österreichischen Zivilprozessrechts[2] (1990) Rz 520; *Stumvoll* in *Fasching/ Konecny* (Eds), Kommentar zu den Zivilprozessgesetzen II/2[3] (MANZ 2016) Vor § 1 ZustG Rz 7.

[3] *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] Vor § 1 ZustG Rz 31 and § 35 ZustG Rz 3 with further references; *Stumvoll*, Gelöste und ungelöste Fragen im inländischen Zustellrecht (Teil II), RZ 2018, 193 (194 f); affirmative LG Feldkirch 2 R 247/18s; **dissenting opinion** *Gitschthaler* in *Rechberger/Klicka* (Eds), ZPO: Kommentar[5] (2019) §§ 28-37b Rz 1: since BudBG 2011.

[4] See above FN 3.

[5] *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] Vor § 1 ZustG Rz 8 et seq; in Austrian jurisprudence, there has been a call for complete unification for a very long time: *Barfuß*, Gesetzestechnische Bemerkungen zum Entwurf eines Postzustellgesetzes, ÖJZ 1965, 340 et seq; *Mayer*, Das neue Zustellgesetz, ÖJZ 1984, 421 et seq.

[6] *S. Albiez* in *Höllwerth/Ziehensack* (Eds), Taschenkommentar zur ZPO (2019) § 87 ZPO Rz 1-3; *Gitschthaler* in *Rechberger/Klicka*, ZPO[5] § 87 ZPO Rz 6; *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 87 ZPO Rz 2 ff; *Rechberger/Simotta*, Grundriss des Zivilprozessrechts[9] (2017) Rz 514; RIS-Justiz RS0036440; RS0111270; OGH 3 Ob 76/00y; 4 Ob 90/21w.

[7] *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 87 ZPO Rz 8.

with the effect of service.[8] The actual service by handing over the document to the addressee is thus contrasted with the possibility of service fiction. It is argued that otherwise an orderly system of servicing judicial and extra judicial documents would be inconceivable.[9]

With this background in mind, the following chapter will provide a fundamental overview of the development of Austrian service law regarding the physical service of judicial documents.

2. Evolution of physical service since 2008

2.1. Mandatory hand delivery

2.1.1 Applicable law for writ of summons or equivalent documents before Federal Law Gazette I 2009/52

§ 106 CPC (Federal Law Gazette I 2005/120):

*(1) **Actions** and **documents to be served like actions** may only be served **directly on the addressee** or his **representative authorised to accept actions** or other documents to be served like actions or, in cases relating to the operation of a business, for the attention of an **authorised officer** ("Gesamtprokurist") of the addressee.*

(2) If service is effected abroad by authorities of the State in which service is effected, it shall be sufficient to comply with those rules which the law of that State provides for the service of the corresponding documents. This does not apply if the application of these rules would be incompatible with Article 5 ECHR.

§ 21 SDA (Federal Law Gazette I 2008/5):

*Documents to be served into the addressee's hands **must not be served to a substitute recipient**.*

2.1.2 Policy of the applicable law

According to the above-mentioned former legal situation, service into the hands of the addressee ("hand delivery") had to be effected wherever it was expressly ordered; a special application by the parties was not required (§ 87 [1] CPC). This affected

[8] *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 87 ZPO Rz 8.
[9] *Fasching*, LB[2] Rz 520; *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 87 ZPO Rz 8.

pleadings initiating proceedings as well as notifications by which parties were included in the proceedings for the first time.[10]

In terms of legal policy, hand delivery was considered necessary whenever a party had to be made aware of the initiation of proceedings or of a required participation). Such notifications are usually associated with preclusion or default consequences or have direct legal effects for parties and participants. The reasoning behind this was the belief that only service directly into the addressee's hands could be considered sufficient to safeguard the right to be heard.[11]

2.1.3 Affected documents

Regarding civil proceedings, the following documents had to be served by hand delivery:[12]

- actions
- payment orders
- summonses to legal successors of a deceased party
- judicial termination of tenancies
- court orders to hand over or take over the subject matter of the tenancy
- court orders appointing an adult guardian according to § 246 Non-Contentious Proceedings Act ("Außerstreitgesetz"; this is one of the very few cases in which a service into the hands of the addressee is still mandatory to this day, see § 116a Non-Contentious Proceedings Act)[13]

2.1.4 Admissible addressees

§ 106 CPC, which was applicable in all the above-mentioned constellations, declared in the case of mandatory hand delivery not only the addressee personally to be entitled to receive the document, but also the following groups of persons:

[10] *Stumvoll* in *Fasching/Konecny*, ZPG² ErgBd § 106 ZPO Rz 2; *P. Mayr*, Zivilverfahrensrechtliche Neuerungen des Budgetbegleitgesetzes 2009, ecolex 2009, 562 (565); *Stopfer* in *Raschauer/Sander/Wessely* (Eds), Österreichisches Zustellrecht (2007) § 106 Rz 2; **dissenting opinion** *Frauenberger-Pfeiler*, Neuerungen im Zustellrecht, ecolex 2009, 569 (569 f).

[11] *Fasching*, LB² Rz 520; *Stumvoll* in *Fasching/Konecny*, ZPG² ErgBd § 106 ZPO Rz 2.

[12] See for the following examples: *Fasching*, LB² Rz 535; *Stumvoll* in *Fasching/Konecny*, ZPG² ErgBd § 106 ZPO Rz 2; *Stopfer* in *Raschauer/Sander/Wessely,* Zustellrecht § 106 ZPO Rz 3.

[13] *Geroldinger*, Eckpfeiler des neuen Erwachsenenschutzverfahrens, RZ 2018, 69 (77); *Kodek/Mayr*, Zivilprozessrecht⁵ (2021) Rz 395.

- representatives who are authorised to take delivery of actions or comparable documents (e.g. lawyers pursuant to their power of attorney according to § 31 [1] No 1 CPC)[14], and
- authorised signatories in legal matters relating to the operation of the addressee's commercial business.

The selection of the persons to whom personal service could be effected for the addressee was exclusively **within the sphere of influence of the addressee** due to the special power of attorney or procuration (authorised signatory), so that **their privileged position was considered to be justified.**[15] Because of their qualified functions that could be influenced by the addressee, such persons were dogmatically not classified as substitute recipients.[16]

a) Qualified authorised representatives

For non-lawyers a general (simple) postal power was not sufficient;[17] neither was a verbal authorisation by the addressee to the postman to deliver mail items intended for him to a specific person.[18] Rather, the **explicit inclusion of actions**[19] or RSa letters (return receipt blue)[20] or **judicial documents** which can only be served into the hands of the addressee was necessary.[21]

b) Authorised signatory

The category "authorised signatory" is determined by company law pursuant to the Austrian Commercial Code ("UGB"). If the authorised signatory has joint signatory power ("*Gesamtvertretungsbefugnis*"), service on one authorised signatory with joint

[14] *Feil*, Zustellwesen[5] (2006) § 106 ZPO Rz 2 (120); *Stumvoll* in *Fasching/Konecny*, ZPG ErgBd[2] § 106 ZPO Rz 6; *Walter/Mayer*, Zustellrecht (1983) 187.
[15] *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 106 ZPO Rz 5.
[16] *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 106 ZPO Rz 5.
[17] Compare § 150 Post Ordinance („Postordnung"; cancelled on Dec 31st 1996); RIS-Justiz RS0036433; LGZ Wien MietSlg 30.704 (1918); OGH GlUNF 3239 (1905); OGH 2 Ob 211/51 EvBl 1951/245; 2 Ob 295/71 (not published); *Feil*, Zustellwesen[5] § 106 ZPO Rz 2 (120); *Stopfer* in *Raschauer/Sander/Wessely,* Zustellrecht § 106 ZPO Rz 2.
[18] RIS-Justiz RS0036567; OGH 6 Ob11/79; 1 Ob 793/82; *Gitschthaler* in *Rechberger* (Ed), ZPO: Kommentar[3] (2006) § 87 ZPO (§ 21 ZustG) Rz 2.
[19] So-called „Spezial(post)vollmacht"; see *Feil*, Zustellwesen[5] § 106 ZPO Rz 2 (120); *Gitschthaler* in *Rechberger*, ZPO[3] § 87 ZPO (§ 21 ZustG) Rz 1; *Klauser/Kodek*, ZPO[16] (2006) § 106 ZPO E 3 (589); *Stopfer* in *Raschauer/Sander/Wessely,* Zustellrecht § 106 ZPO Rz 2; *Stumvoll* in *Fasching/Konecny*, ZPG ErgBd[2] § 106 ZPO Rz 6; *Walter/Mayer*, Zustellrecht 186 f; RIS-Justiz RS0036433; LGZ Wien MietSlg 30.704 (1918); OGH GlUNF 3239 (1905); 2 Ob 211/51 EvBl 1951/245; 2 Ob 295/71 (not published).
[20] Compare § 150 Post Ordinance („Postordnung"; cancelled on Dec 31st 1996).
[21] OGH GlUNF 7518 (1915); *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 106 ZPO Rz 6.

signatory power was sufficient.[22] Mere agreements in the internal relationship, however, were irrelevant.[23]

2.1.5 Service Process for actions and equivalent documents until 2009

As already mentioned, hand delivery of actions or payment orders was regarded as a form of service with **specific addressee protection:** The underlying objective was to provide the addressee with direct knowledge of the document without any intervention of less qualified persons (i.e. substitute recipients), at least to ensure a **specific possibility of knowledge**.[24] Thus, the addressee should preferably receive the document personally; a failure of receipt (in due time) should be attributable to the addressee's own conduct.[25] This purpose was considered to be best achieved with the addressee present at the time of service, therefore **servicing to a substitute recipient was prohibited**.[26] A disregard of this rule resulted in the service being **ineffective**. However, even such an ineffective service could still be cured by actual receipt (pursuant to § 7 SDA).[27] If the addressee was not present at the service attempt, the document was deposited (see point 3.).

It is important to note, however, that **before the amendment to the SDA**[28] in 2008, § 21 (2) SDA[29] had stipulated a **mandatory second service attempt**. So, if service at the addressee was **not possible at the first attempt**, the service agent had to leave a **written notice** requesting the addressee to be present at the place of service at a precisely specified time.[30] The service agent also had to inform the addressee that an unsuccessful second service attempt would result in service being effected by deposit (pursuant to § 17 SDA).[31] Should the document have been **deposited already after the first attempt**, the **service was ineffective**, which could only be cured by actual

[22] OGH 7 Ob 117/70 EvBl 1971/7; *Feil*, Zustellwesen[5] § 106 ZPO Rz 3 (120); *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 106 ZPO Rz 7; *Stopfer* in *Raschauer/Sander/Wessely,* Zustellrecht § 106 ZPO Rz 4.

[23] LGZ Wien RPflSlgE 2003/8; *Gitschthaler* in *Rechberger/Klicka*, ZPO[5] § 93 ZPO Rz 9; *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 106 ZPO Rz 7; *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 93 ZPO Rz 24/1.

[24] *Feil*, Zustellwesen[5] § 21 ZustG Rz 1 (76); *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 21 ZPO Rz 2.

[25] *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 21 ZPO Rz 2.

[26] *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 21 ZustG Rz 2; *Wessely* in *Raschauer/Sander/Wessely,* Zustellrecht § 21 ZustG Rz 1; OGH 9 Ob A 91/91 (9 ObA 92/91).

[27] § 7 SDA contains the fundamental rule that deficiencies in service cure with the factual receipt of the document by the addressee. The provision applies to all service methods (see OGH 8 Ob 579/93 JBl 1994, 481; 5 Ob 123/05g MietSlg 57.780 = RIS-Justiz RS0083714 [T2]).

[28] § 21 (2) SDA was eliminated with Federal Law Gazette I 2008/5.

[29] In the original version of Federal Law Gazette 1982/200.

[30] *Fasching*, LB[2] Rz 536; *Gitschthaler* in *Rechberger*, ZPO[3] § 87 ZPO (§ 21 ZustG) Rz 2; *Wessely* in *Raschauer/Sander/Wessely,* Zustellrecht § 21 ZustG Rz 3.

[31] *Fasching*, LB[2] Rz 536; *Wessely* in *Raschauer/Sander/Wessely,* Zustellrecht § 21 ZustG Rz 3.

receipt (pursuant to § 7 SDA), but not pursuant to § 17 (3) SDA (see later on).[32] Moreover, the notice had to indicate which authority intended to deliver a document to which addressee, otherwise it had no legal effect.[33]

The written notice of the (new) second service attempt had to be placed in the letterbox intended for the place of service, left at the place of service or, if this was not possible, affixed to the entrance door (flat, house or garden door).[34] The rules concerning the written notice of the second service attempt were consistent with the written notice of deposition (see point 3.).

The second service attempt had to be made at the specified time at the place of service for the first attempt. The day of the second service attempt was decisive, the exact time was not required on the notification.[35] Only if the second attempt was also unsuccessful, the service could (and had to) be effected by deposit (see point 3.).[36]

2.2 Admissibility of service on a substitute recipient

2.2.1 Applicable law for writ of summons or equivalent documents after Federal Law Gazette I 2009/52

§ 106 (1) CPC has been stating ever since 2009:

*Actions shall be served with certificate of service. Service on a **substitute recipient is admissible.***

2.2.2 Policy behind the amendments

In accordance with European harmonisation efforts, the amendment of the Civil Procedure Code and the Service on Documents Act (Federal Law Gazette I 2008/5 and Federal Law Gazette I 2009/52) introduced the admissibility of substitute service for writ of summons or an equivalent document into § 106 (1) CPC.[37] Thus, the previously prevailing Austrian standard of compulsory hand delivery for actions and

[32] VwGH 24.11.1982, 82/01/0046; 03.04.1990, 89/11/0152 ZfVB 1991/2/603; *Feil*, Zustellwesen[5] § 21 ZustG Rz 8 (77); *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 21 ZustG Rz 10; *Wessely* in *Raschauer/Sander/Wessely,* Zustellrecht § 21 ZustG Rz 3.

[33] VwGH 24.01.1990, 89/02/0140 ZfVB 1991/1/230; *Gitschthaler* in *Rechberger*, ZPO[3] § 87 ZPO (§ 21 ZustG) Rz 2; *Klauser/Kodek*, ZPO[16] § 21 ZustG E 4 (2158); *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 21 ZustG Rz 10.

[34] *Fasching*, LB[2] Rz 536; *Feil*, Zustellwesen[5] § 21 ZustG Rz 9 (78); *Wessely* in *Raschauer/Sander/Wessely,* Zustellrecht § 21 ZustG Rz 3; *Walter/Mayer*, Zustellrecht 116 f.

[35] VwGH 27.02.1997, 95/16/0134 ARD 4905/20/98 = ÖStZB 1997, 637; *Gitschthaler* in *Rechberger*, ZPO[3] § 87 ZPO (§ 21 ZustG) Rz 2; *Klauser/Kodek*, ZPO[16] § 21 ZustG E 6 (2158); *Wessely* in *Raschauer/Sander/Wessely,* Zustellrecht § 21 ZustG Rz 3.

[36] *Fasching*, LB[2] Rz 536; *Gitschthaler* in *Rechberger*, ZPO[3] § 87 ZPO (§ 21 ZustG) Rz 5.

[37] ErläutRV Budgetbegleitgesetz 2009, 113 BlgNR XXIV. GP 32; *Bajons* in *Fasching/Konecny*, ZPG V/2[2] Art 7 EuZVO 2007 Rz 2.

comparable documents was **eliminated**,[38] because this form of delivery is – according to the legislator[39] – by no means compulsory in an international comparison[40] and, moreover, does not offer any substantial increase in recipient protection.

However, according to the legislative materials[41], it seems that an expected **major cost reduction** was also part of the reasoning behind the let-go of the compulsive hand delivery of actions or equivalent documents.[42] After listing the costs for postage fees for envelopes for the entire year of 2007[43], the materials state: "*The draft therefore proposes that actions (and thus all documents instituting proceedings) should only be served by ordinary return receipt letter (RSb). This leads to a reduction of the expenditure of the Confederation.*"[44]

2.2.3 Service Process for actions and equivalent documents since 2009

As a result, most documents initiating proceedings – e.g. actions and payment orders – are now served by means of **normal physical service with certificate of service** with so-called "**substitute service**"[45] **explicitly permitted**.[46] One of the **last exceptions** to that rule is the **court order appointing an adult guardian** (see above point 2.1.3).

"**Substitute service**" is only **admissible** if the following **requirements** are met (§ 16 [1] and [2] SDA):[47]

- Firstly, the service cannot be effected to the addressee directly.
- Secondly, the service agent must have reason to believe that the addressee is "regularly present" at the place of service, which is the case if the addressee –

[38] ErläutRV Budgetbegleitgesetz 2009, 113 BlgNR XXIV. GP 32; *Bajons* in *Fasching/Konecny*, ZPG V/2[2] Art 7 EuZVO 2007 Rz 2.
[39] According to ErläutRV Budgetbegleitgesetz 2009, 113 BlgNR XXIV. GP 32; also see: *Büchler*, Die Reform des österreichischen Zustellrechts, in FS Simotta (2012) 85 (90).
[40] Compare as well: *Nimmerrichter*, Die Zustellung von Klagen seit dem BudgetbegleitG 2009, Zak 2010, 347 (348 [FN 2]).
[41] ErläutRV Budgetbegleitgesetz 2009, 113 BlgNR XXIV. GP 33.
[42] *Büchler*, FS Simotta 90; *Frauenberger-Pfeiler*, ecolex 2009, 569; *Mayr*, ecolex 2009, 565.
[43] In 2007, about 7.8 million deliveries were handled via the postal route of the Federal Computing Centre ("Bundesrechenzentrum-GmbH"). Approximately € 12.6 million in postage fees for individual envelopes were incurred. Of this amount, € 5.6 million was for 1,186,874 RSa documents, € 5.5 million for 2.099.201 RSb documents and € 1.55 million for 2,958,997 window items ("*Fensterkuverts*"). In addition, there are the deliveries carried out directly by the courts, for which postage costs of approximately € 16.7 million were incurred in the same period (translated by the authors). See ErläutRV Budgetbegleitgesetz 2009, 113 BlgNR XXIV. GP 33.
[44] Translated by the authors.
[45] This wording is not ideal as it indicates a change in the service method which is not the case. It would be better to speak of "service to a substitute recipient".
[46] *Rechberger/Simotta*, ZPR[9] Rz 521.
[47] *Kodek/Mayr*, Zivilprozessrecht[5] Rz 396 et seq.; *Rechberger/Simotta*, ZPR[9] Rz 521; *Schulev-Steindl*, Verwaltungsverfahrensrecht[6] (2018) Rz 418 with further references.

apart from periodic short-term absences (due to work, etc) – returns to the place of service in a regular manner.

- Thirdly, a substitute recipient must be present at the place of service at the time of the service attempt.

In general, substitute recipient can be **any natural adult person** who **lives at the same place of service** as the addressee or is **employer** or **employee** of the addressee and who – unless living in the same household as the addressee – is willing to accept. **Adulthood** does **not mean being of legal age**, but that the substitute recipient **seems to be able to understand the point of the service process**.[48]

If all the above-mentioned requirements are met, the "substitute service" **is deemed to have been effected upon service to the recipient** who accepts the document in place of the addressee (so called **service fiction**). Only if the addressee **is not able to become aware of the service process in due time because of a (longer) absence** from the place of service, the service to the substitute shall not be deemed to have been effected. However, in cases of (longer) absences service shall take effect on the **day following the day of return** to the place of service by the addressee.[49] If the document can neither be served to the addressee nor a substitute recipient, it can be deposited pursuant to § 17 SDA (see point 3.).

2.2.4 Critique

This change on the one hand lowered the until this point prevailing **higher** Austrian legal protection standard,[50] but on the other hand significantly increased the probability that the document to be delivered **would not reach the correct addressee**. As a result, the **litigation risk of misdirected documents** was largely **shifted from the plaintiff** (or applicant) **to the defendant** (or respondent).[51] Even if legal practice in Austria may encounter this problem rarely, it is therefore the responsibility of the addressee to defend himself against a **procedural disadvantage caused to him as a result of faulty** "**substitute service**" by filing an application for *restitutio in integrum*, for which the applicant is not only faced with the burden of proof but (pursuant to §

[48] *Feil*, Zustellwesen[5] § 16 ZustG Rz 7 (60); *Schulev-Steindl*, Verwaltungsverfahrensrecht[6] Rz 418; VwGH 99/05/0197; OGH 2 Ob 279/98p.

[49] *Rechberger/Simotta*, ZPR[9] Rz 521; see also VwGH 17.8.2017, Ra 2017/11/0211.

[50] *P. Mayr*, ecolex 2009, 565; *Rechberger/Simotta*, ZPR[9] Rz 521.

[51] *Bajons* in *Fasching/Konecny*, ZPG V/2[2] Art 7 EuZVO 2007 Rz 2.

154 CPC) must always pay the costs.[52] What is more, case law places very strict requirements on such an application in cases of potential service deficiencies:

For instance, actions or equivalent documents **concerning a company** can now be served **not only to managing directors** but **also to any employees**, even to the **cleaning personnel who were not officially registered, but paid by the managing director**:[53] In one case, all managing directors of a company were on a team-building business trip at the time the carrier attempted to serve a payment order. However, a cleaning person, who was not officially registered as worker with the authorities, but got paid by the directors, was in fact present at the service time. The carrier handed over the payment order to the cleaning person, who left it behind on the bureau desk of one managing director. The manging directors later filed an application for reinstatement (pursuant to § 146 CPC) in which they stated that they only gained cognisance of the payment order with the service of the enforcement order and that the "substitute service" was ineffective, as the cleaning person did not hand over the document (personally). The Supreme Court ruled that the cleaning person was an employee and thus a lawful substitute recipient. A **substitute service is effective in case of doubt**; the risk that the substitute recipient does **not hand over** the served document or **does not hand it over in time is borne by the addressee** returning to the place of service.[54] Thus, the Supreme Court rejected the application for reinstatement in this particular case.

3. Service by deposit

3.1 Requirements for a deposit - § 17 (1) and (2) SDA

3.1.1 In general

§ 17 (1) and 2 SDA stipulate **three requirements for a deposition to be admissible**:

Firstly, a deposition is only admissible if **neither the addressee nor a substitute recipient** was present at the service place at the time of the service attempt.[55] Secondly, a **deposition** is only admissible if the service agent may presume that the addressee is **regularly present** at the place of service. According to the case law of the

[52] *Nimmerrichter*, Zak 2010, 348.
[53] OGH 2 Ob 118/10g Zak 2010/769.
[54] OGH 2 Ob 118/10g Zak 2010/769; also see OGH 1 Ob 630/84 (1 Ob 631/84) RdW 1985, 181; RIS-Justiz RS0083880 (T1).
[55] If this is not the case the deposit is unlawful and therefore not effective. See RIS-Justiz RS0111049, OGH 4 Ob 186/98g, 1 Ob 41/18p; *Gitschthaler* in *Rechberger/Klicka*, ZPO[5] § 87 ZPO (§ 17 ZustG) Rz 1; *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 17 ZustG Rz 3.

Austrian Supreme Court, the **perspective of the service agent is decisive** for the assessment of whether there was reason to believe or not, as long as the absence of the addressee was not conspicuous.[56] Thirdly, the addressee must be **notified (in written form)** of the deposit. If these requirements are met, the document shall be deposited at the office of the service provider (normally the **nearest by and thus competent post office** or other universal service provider), at the **municipality** or at the **(district) authority**.[57]

3.1.2 Special focus on the written notification

The notification shall be **posted in the delivery facilities** designated for at the place of service (e.g. **letterbox,** house mailbox), **left at the place of service** or **posted on the entrance door**.[58]

However, according to the Supreme Administrative Court, there is **no effective service** if the carrier **"places" the notice in front of the recipient's entrance door**, because in this way it was neither attached to the entrance door (in the sense of "fastened" [with duct tape])[59] nor left behind at the place of service (since it did not reach the addressee's custody).[60] The same applies if the deliverer **wedges the notice between the door and the door frame**[61] (because then it would not be fastened) or **pushes it under the entrance door**.[62] In one case, however, the Supreme Administrative Court ruled that the leaving of the notification by throwing it through a half-way opened window was lawful because it could be subsumed under the wording of the provision ("left behind at the place of service").[63]

If, on the other hand, a proper notification is **later damaged or removed**, the effectiveness of service through deposit is not revoked.[64] The risk of damage or removal therefore must be borne by the recipient. Thus, it is irrelevant whether the

[56] OGH 3 Ob 1005/86; *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 17 ZustG Rz 6.
[57] See in detail *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 17 ZustG Rz 7.
[58] VwGH 20.04.2006, 2005/01/0558; *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 17 ZustG Rz 9. In principle, the deliverer has a right of choice, as long as the notification can be presumed to actually reach the addressee: OGH 9 ObA 64/93 EvBl 1993/196 = RZ 1994/46; *Gitschthaler* in *Rechberger/Klicka*, ZPO⁵ § 87 ZPO (§ 17 ZustG) Rz 4. If the notice is deposited in another person's home mailbox, the service through deposit is ineffective: VwGH 8.9.2005, 2005/18/0047, see also *Schulev-Steindl*, Verwaltungsverfahrensrecht⁶ Rz 421.
[59] *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 17 ZustG Rz 9.
[60] VwGH 18.2.2020, Ra 2019/03/0156.
[61] OGH 7 Ob 286/63 EvBl 1964/131; *Gitschthaler* in *Rechberger/Klicka*, ZPO⁵ § 87 ZPO (§ 17 ZustG) Rz 3.
[62] VwGH 28.8.1997, 97/04/0064; RIS-Justiz RS0036540; OGH 7 Ob 286/63 EvBl 1964/131.
[63] VwGH 16.10.1990, 87/05/0063; **dissenting opinion** *Gitschthaler* in *Rechberger/Klicka*, ZPO⁵ § 87 ZPO (§ 17 ZustG) Rz 3; *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 17 ZustG Rz 9/1 (because this would not be foreseeable for addressees in general).
[64] *Gitschthaler* in *Rechberger/Klicka*, ZPO⁵ § 87 ZPO (§ 17 ZustG) Rz 5; *Schulev-Steindl*, Verwaltungsverfahrensrecht⁶ Rz 421.

notification is still present when the recipient returns. The *bona fide* addressee is only protected by the application of the *restitutio in integrum* (in cases of effective service).[65]

3.2 Consequences of an admissible deposit - § 17 (3) and (4) SDA

The deposited document **shall be kept ready for collection for at least two weeks** (collection period). So, if the deposition (process) was lawful, service **is deemed to have been effected on the first day** on which the document was made **available for collection**.[66] The first day of the collection period is therefore considered as if the document had been handed over to the addressee on that day (so-called **service fiction**).[67]

However, this **service fiction** is a **rebuttable presumption** of proper service depending on the "**timely knowledge of the service (process)**", which is only assumed if the addressee was able to gain knowledge of the deposition at the same time as an addressee would have been able to who had been absent from the place of service due to work-related responsibilities.[68] The **Supreme Court** ruled in consistent case law[69] that **"absence from the service place" is not (yet) present** if the addressee **either returns on the day of the service attempt** or **on the next working day** in time so that a **removal of** the deposited **document is still possible**. In these cases, the service will **already take effect on the day of the beginning of the collection period**. If the addressee returns **later**, he/she could **no longer become aware of the service in time** (to trigger the service fiction).

So, there is **no effect of service** if the addressee, due to absence from the place of service (within the collection period), **could not have become aware of the service process in time** to be able to pick up the document at the time when this would have been possible for the majority of the population due to their professional activities.[70]

[65] VwGH 29.05.2008, 2005/07/0166; *Schulev-Steindl*, Verwaltungsverfahrensrecht[6] Rz 421 with further references in FN 122.
[66] RIS-Justiz RS0083986; OGH 2 Ob 504/90; *Gitschthaler* in *Rechberger/Klicka*, ZPO[5] § 87 ZPO (§ 17 ZustG) Rz 7; *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 17 ZustG Rz 15.
[67] *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 17 ZustG Rz 15; OLG Wien 28 R 369/13k.
[68] *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 16 ZustG Rz 33; RIS-Justiz RS0083923; OGH 7 Ob 511/84; 8 ObA 61/03h.
[69] E.g. OGH 5 Ob 513/93 RdW 1993, 334; 7 Ob 519/92 RZ 1994/5; 3 Ob 22/87 SZ 60/131 = MR 1988, 26 (*Rechberger*); also see *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 17 ZustG Rz 23 and 8 Ob 12/12s in which the Supreme Court explicitly acknowledged the time interval presented by *Stumvoll* in *Fasching/Konecny*, ZPG[2] ErgBd § 17 ZustG Rz 23.
[70] VwGH 26.6.2014, 2013/03/0055; *Kodek/Mayr*, ZPR[5] Rz 399.

If the addressee returns at such a later point in time, **service becomes effective on the day following the return of the addressee** to the place of service on which the deposited document **could have been remedied**, if this day is **still within the collection period** [see § 17 (3) sentence 4 SDA].[71] This means that collection must still be factually possible within the collection period,[72] so the return must take place at the latest at the penultimate day of the collection period.[73] The **legal consequence** is that **time limits** (e.g. to file a statement of opposition against a payment order) **start to run only from that day forward**.[74]

Last but not least it shall be mentioned that a return made only **after the expiry of the collection period** always results in the **invalidity of the deposit** (and thus the nullity of the subsequent proceedings), because the addressee in this case is no longer able to collect the document.[75]

4. Service via the Web-ERV

4.1 Introduction

In Austria it is possible (for civil proceedings since 2000)[76] and **meanwhile the rule to file a lawsuit** via the **platform for the electronic service of documents** (hereinafter: "*Web-ERV*"). In this context Austria plays a pioneer role among the EU member states,[77] as already in 2009, more than 93 % of **actions for payment orders** and more than 67 % of applications for enforcement procedures were filed electronically via the Web-ERV.[78] In 2021, already 94 % of **all civil actions** and 76 % of all applications for enforcement procedures were filed electronically via the Web-ERV.[79] The relevance of the Web-ERV results in particular from the **far-reaching obligation to participate** pursuant to § 89c (5) COA (*inter alia* for lawyers,[80] notaries, banks and social insurance

[71] RIS-Justiz RS0083966 (T4); *Rechberger/Simotta*, ZPR[9] Rz 523.
[72] OLG Wien 10 Ra 111/99p ARD 5076/35/99; OGH 5 Ob 226/14p; *Schulev-Steindl*, Verwaltungsverfahrensrecht[6] Rz 421.
[73] 3 Ob 22/87 MR 1988, 26 (*Rechberger*); *Ballon/Nunner-Krautgasser/Schneider*, Einführung in das Zivilprozessrecht[13] (2018) Rz 232.
[74] OGH 14 Os 92/93; *Gitschthaler* in *Rechberger/Klicka*, ZPO[5] § 87 ZPO (§ 17 ZustG) Rz 9/1.
[75] *Kodek/Mayr*, ZPR[5] Rz 399; *Gitschthaler* in *Rechberger/Klicka*, ZPO[5] § 87 ZPO (§ 17 ZustG) Rz 9/1.
[76] *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 1 ZustG Rz 28.
[77] *M. Schneider*, Wir verZetteln uns nicht! RZ 2010, 63 (65); the WebERV was presented as showcase project by the EU-Commission (eGovernment-conference in Brussels in 2001), see <https://www.derstandard.at/story/789523/elektronischer-rechtsverkehr-oesterreichs-erhaelt-eu-auszeichnung> (visited June 7th, 2023).
[78] *M. Schneider*, RZ 2010, 63 (64).
[79] See: <https://www.justiz.gv.at/service/digitale-justiz/elektronischer-rechtsverkehr-(erv).967.de.html> (visited June 1st, 2023).
[80] Since July 2007, see § 89c (5) COA in the version of Federal Law Gazette I 2005/164; *M. Schneider*, RZ 2010, 63 (64); *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 1 ZustG Rz 26.

institutions), whereby a violation of the obligation to participate is to be treated as a formal defect.[81] Private persons can participate voluntarily:[82] To participate, a one-time - free of charge - registration with a mobile phone signature or citizen card at an electronic service provider[83] is required.[84] Service within the platform for the electronic service of documents is more or less instantaneous. For the content of the submissions, the rules for pleadings must be observed, but a signature is not required.[85] Furthermore, the transmission of file attachments in PDF format (similar to e-mail) is possible.[86] Two significant exceptions to this are actions for payment orders and applications for enforcement procedures, because their data are stored in structured form for the automatic creation of payment orders and enforcement authorisations.[87]

4.2 Service process and service time

The transmission of electronic data from the party to the court and vice versa takes place in several steps:[88]

party → transmitting agency → Federal Computing Centre[89] → court

party ← transmitting agency ← Federal Computing Centre ← court

Electronic submissions of a party to a court are submitted when they are received in their entirety by the Federal Computing Centre. If the submission is provided for by a transmitting agency and the data have subsequently been received in their entirety by the Federal Computing Centre, they shall be deemed to have been submitted as soon as the transmitting agency has notified the submitting party that it has received the data for forwarding pursuant to § 89d (1) COA.[90]

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[81] § 89c (6) COA; see *Kodek/Mayr*, ZPR[5] Rz 383; *Rechberger/Simotta*, ZPR[9] Rz 512; RIS-Justiz RS0128266. This is also applicable on European lawyers (see OGH 1 Ob 116/21x AnwBl 2022/58, 122 [Schumacher] = RIS-Justiz RS0128266 [T28]) but not for emeritus attorneys at law (see OGH 7 Ob 66/21p AnwBl 2021/198, 410 [*Dittenberger*]).

[82] *Kodek/Mayr*, ZPR[5] Rz 383; *Spornberger* in *Zankl* (ed), Rechtshandbuch der Digitalisierung (2021) Rz 17.175.

[83] For a list of those see: *Gitschthaler* in *Rechberger/Klicka*, ZPO[5] § 87 ZPO (§§ 28-37b ZustG) Rz 2; <https://www.bmf.gv.at/services/Elektronische-Zustellung/Technische-Informationen.html> (visited May 31st 2023), as the government is obligated to publish such a list according to § 30 (3) SDA.

[84] FAQs zum ERV, AnwBl 2009, 419 (419); *Schumacher/Klingler*, Zustellungen im österreichischen Zivilverfahren, in FS Danzl (2017) 559 (574).

[85] *Rechberger/Simotta*, ZPR[9] Rz 512.

[86] FAQs zum ERV, AnwBl 2009, 419 (420); *Schumacher/Klingler,* FS Danzl 559 (575).

[87] FAQs zum ERV, AnwBl 2009, 419 (420); *Schumacher/Klingler,* FS Danzl 559 (575).

[88] *Kodek/Mayr*, ZPR[5] Rz 384.

[89] „Bundesrechenzentrum GmbH", see: <https://www.brz.gv.at/en/> (visited May 31st, 2023).

[90] *Kodek/Mayr*, ZPR[5] Rz 384; *Spornberger* in *Zankl,* Rechtshandbuch der Digitalisierung Rz 17.180.

Pursuant to § 89d (2) COA, the **time of service** of electronically transmitted court decisions and submissions shall be the **working day following their receipt** by the recipient **in their area of disposal**, but Saturdays are not considered as working days.[91] Compared to physical service, this may result in a significant extension of the time limit,[92] as the addressee can already hold the served document "in his hands" without the service having yet become effective.[93]

De facto, the service date may be postponed by several days:[94] For example, if the data arrived in the addressee's electronic disposal area on a Friday, time limits start on Monday. In cases of physical service, the time limit would either start to run with the day on which the document was served to the addressee/substitute recipient (2.2.3) or – in cases of deposit – on the first day of the collection period (3.2), which in both cases may be already on Friday. The Constitutional Court, however, did not see any lack of objectivity (in regard to the principle of equality) in this different arrangement of physical service and electronic service, but stated that this distinction fell within the discretionary power of the legislator and considered it therefore to be constitutional.[95]

4.3 Selected issues on service via Web-ERV

4.3.1 Technical malfunction

The Supreme Court ruled in one case[96] (in accordance with the law of physical service) that **technical defects** or **maintenance work** which make **service factually impossible** are **comparable to a "local absence"** of the addressee (they are more comparable to an unsuccessful service attempt[97]). Thus, attempted services during such a technical defect are to be considered **invalid**. If, on the other hand, the service is effective and the **obstacle to actual knowledge lies in the addressee's area** (e.g. due to a lack of functionality of the terminal device), only **reinstatement** (*restitutio in integrum*) is possible at best. **Doubts** as to whether an electronically transmitted document did

[91] RIS-Justiz RS0129672, OGH 11 Os 29/14w; *Fucik,* Neues im Zivilprozessrecht 2012, ÖJZ 2012/50, 485; *Kodek/Mayr*, ZPR[5] Rz 384; *Spornberger* in *Zankl,* Rechtshandbuch der Digitalisierung Rz 17.180.

[92] *Kodek/Mayr*, ZPR[5] Rz 384; see in detail: *Frauenberger-Pfeiler/Schmon*, Physische Zustellung, elektronische Zustellung und verhandlungsfreie Zeit: Einfluss auf den Lauf der Rechtsmittelfristen, JAP 2012/2013, 26 (27 f).

[93] *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 1 ZustG Rz 29/1.

[94] See with even more extreme examples: *Frauenberger-Pfeiler/Schmon*, JAP 2012/2013, 26 (27 f).

[95] VfGH 9. 12. 2015, G 325/2015 ecolex 2016/95; *Fellner/Nogratnig*, RStDG, GOG und StAG II[5.01] (2022) § 89d GOG Rz 11; *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 1 ZustG Rz 27.

[96] OGH 10 Ob S 113/12h EvBl 2013/54 (*Schwab*).

[97] OGH 10 Ob S 113/12h EvBl 2013/54 (*Schwab*); *Stumvoll* in *Fasching/Konecny*, ZPG II/2[3] § 1 ZustG Rz 29.

not reach the addressee's area of disposal on the designated day due to an error in the terminal device or due to a transmission interference that was determined to be possible, work to the advantage of the addressee.

In another case, an Web-ERV transmitting agency incorrectly transmitted two confirmations (with different dates of service) for the same service: to the court for day X, to the recipient for day X+1. The actual (earlier) day of service could later be proven in a technically flawless manner and was therefore decisive according to the Regional Court of Vienna.[98]

It is worth mentioning that – pursuant to § 89e COA – the Federal Government shall be liable for damage caused by the use of information and communication technology resulting from errors in the conduct of judicial business, including judicial administrative business. In the case of an electronic transmission of submissions, the Confederation shall be liable if the error has occurred

- in the case of data transmitted to the court, from the time of their receipt by the Federal Computing Centre;
- in the case of data to be transmitted by the court, until their receipt in the recipient's area of disposal.

This strict liability[99] is excluded if the damage is caused by an unavoidable event that did not occur due to a failure of the means of computer-aided data processing. Furthermore, the Public Liability Act ("Amtshaftungsgesetz") is applicable.

4.3.2 Absence of the service place in context of electronic service?

What is more, there is no legal order whether a physical component, e.g., absence from the service place (see above point 3.2) must be taken into account with regard to electronic service. According to *Stumvoll*,[100] the reverse conclusion that such absences do not call service into question and that recipient protection is therefore considerably weaker should not be drawn, because all previous recognizable ideas of the legislator were based on the initial case that the recipient has set up "his PC at home".

In the first decision issued on this topic, however, the Supreme Court denied the (analogous) application of physical service rules concerning absences because they

[98] LGZ Wien 44 R 306/14x (not published), quoted from *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 1 ZustG Rz 29.
[99] *Ch. Freudenthaler*, Haftung für „technische Hilfsmittel" wie für Erfüllungsgehilfen? ÖJZ 2011/85, 801 (803).
[100] *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 1 ZustG Rz 30/1.

are simply **not applicable** to electronic service methods **according to their wording**.[101] The Supreme Court did not see any unplanned loophole in the law. But according to *Stumvoll*[102] the **addressee's vacation time** – for example – **is worth protecting,** which **should** therefore **not be burdened with daily checks** of possible services. This **approach becomes even clearer in the case of hospital stays**, in which – according to the beforementioned case law – private individuals who participate in the Web-ERV **can no longer postpone the effects of e-service there**,[103] even if they have been in coma for a longer period of time and were therefore factually unable to react to the served document. In this case, only **reinstatement** is possible, for which the applicant is not only faced with the burden of proof, but also with the costs of an application for restitutio in integrum according to § 154 CPC (see above point 2.2.4).

Yet, the extent to which **absences** (from the "computer" or "smartphone") should postpone the effects of service at all should also be **(re)considered in the age of digitalisation**. One can argue that technical possibilities have developed in such a way that worldwide access to the contents of the service is possible independently of the recipient's own fixed receiving device. With note-books, tablets and smartphones, there is **no longer the necessity for a fixed receiving device in form of a "PC at home"**.[104] Instead, one can check one's "inbox" regularly and immediately from everywhere around the world. Furthermore, the addressee shall not be able to "sabotage" the effectiveness of e-service by cleverly choosing his service place or his absence of it.[105]

A recent court decision also points in the direction that physical service places shall not matter in the scope of e-service: The Regional Court of Feldkirch[106] argued that the **physical component of a service place cannot be derived from the intent of the legislator for e-service methods** (any longer[107]). If this legal opinion prevails, **private persons who are participating** within any form of e-service, including the **Web-ERV**, would have the **unconditional (!) obligation to check their inbox regularly (daily or at**

[101] OGH 2 Ob 239/13f EvBl-LS 2014/78.
[102] *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 1 ZustG Rz 30/2.
[103] *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 1 ZustG Rz 30/3.
[104] Similar already *Wessely*, Die Tücken der Technik – Zum „maschinellen" Verkehr zwischen Bürger und Behörde, ÖJZ 2000, 701 (706); also mentioning this technical development *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 1 ZustG Rz 30/2.
[105] *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 1 ZustG Rz 30/2.
[106] LG Feldkirch 2 R 247/18s.
[107] The court ruled that with the amendment in Federal Law Gazette I 2017/40, which eliminated the obligation to notify the addressee by post (via physical service) at a service place he had made known pursuant to § 35 (2) SDA, it became apparent that the legislator did not want to connect the electronic service address to a physical place of service.

least every second day), unless they give notice of their absence in advance.[108] This would create yet again a differentiation between electronic and physical service, which can be questioned with regard to the principle of equality (Article 7 of the Austrian Constitution).

A final legal clarification of this "grey area" would be desirable, because with regard to e-service standards which primarily apply to administrative proceedings, it becomes apparent that this topic is resolved inconsistently:[109] According to § 35 (7) No 2 SDA, primarily applicable for administrative proceedings, e-service (within the third chapter of the SDA) is deemed not to have been effected if it transpires that the addressee was more than just temporarily absent from all service places during the collection period of two weeks. § 89d (2) COA – primarily applied in civil proceedings[110] – lacks a comparable provision, as there is no collection period and no regulation concerning absences whatsoever. This can be regarded as an unplanned loophole because there is no apparent reason to create such a difference within the scope of e-service. Therefore, it can be considered whether § 35 (7) No 2 SDA should be applied by analogy in the context of § 89d (2) COA, since § 35 (7) SDA contains a far more recipient-friendly variant.[111] In our opinion, the wording of this provision also disputes the view reasoned by the Regional Court of Feldkirch, as the legislator is still explicitly mentioning absences from service places in context of e-service with the provision of § 35 (7) No 2 SDA.

5. Conclusion and Prospects

Austrian service law is unfortunately still fragmented. On the one hand, the legislator eliminated mandatory hand delivery in 2008/09 (and therefore increased the risk for judicial documents not reaching their intended addressee in cases of physical service) in order to comply with EU harmonisation efforts and to reduce costs. But as far as can be seen (due to the lack of corresponding reports), the practical service system – contrary to criticism[112] – does not seem to have deteriorated as a result.

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[108] In this direction already *Larcher*, Zustellrecht (2010) Rz 473, 543; *Sander* in *Frauenberger-Pfeiler/Raschauer/Sander/Wessely* (eds), Österreichisches Zustellrecht² (2011) § 33 ZustG Rz 12, unless the addressee gives notice of absence for a specific period of time according to § 28b (2) SDA.

[109] Already pointing to this *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 1 ZustG Rz 30/2 and 30/3.

[110] The provision of § 89d (2) COA does not apply to service under § 35 SDA, see RIS-Justiz RW0001027; OLG Wien 33 R 118/22y.

[111] *Stumvoll* in *Fasching/Konecny*, ZPG II/2³ § 1 ZustG Rz 30/3.

[112] See *Frauenberger-Pfeiler*, ecolex 2009, 569; *Mayr*, ecolex 2009, 565; *Nimmerrichter*, Zak 2010, 348; compare *Büchler*, FS Simotta 91.

On the other hand, the Web-ERV as method of electronic service has been a huge success, so in the age of digitalisation, the question arises whether one should therefore oblige private individuals (of legal age) to participate in the Web-ERV.[113] However, this idea is confronted with objections as well:[114] Do we – as a society – actually want to be obliged to constantly check our "personal Web-ERV inbox" for judicial (and extrajudicial) documents to avoid default consequences due to irrefutable service fictions as with § 89d (2) COA? We think that in the face of such a duty, the utmost caution would be called for. For the time being, it remains to be seen how the case law on such issues will develop in the future and how European[115] as well as Austrian legislation will proceed with the matter of enhancing digital service methods.

[113] This question was raised and discussed during the first international conference held within the framework of the DIGI-GUARD project "Digital communication and safeguarding the parties' rights: challenges for European civil procedure" (Portorož, May 18-20, 2023) in which the authors participated and presented major aspects of the Austrian service law (in the frame of civil proceedings) to project partners and an international audience of legal practitioners, judges and scientists of the EU-member states. See: <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/how-to-participate/org-details/997837449/project/101046660/program/43252386/details> for project information (visited August 29, 2023); see <https://zivilverfahrensrecht.uni-graz.at/de/neuigkeiten/detail/article/return-to-sender-elektronische-zustellung-zwischen-graz-und-istrien/> for information regarding the conference (visited August 29, 2023).

[114] Whereas computer scientists (especially Prof. Dr. Boštjan Kežmah [Maribor]) and some legal practitioners were enthusiastic about this idea, because in this day and age "everybody owns a smartphone or similar electronic device", a lot of attending legal scientists reacted cautiously to it, as it would create a "compulsory state of constant availability" for users as a consequence.

[115] E.g. for the e-Codex project see: <https://www.e-codex.eu/about> (visited August 29, 2023); Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 (Text with EEA relevance), OJ L 150, 1.6.2022, p. 1–19.