# A comparative law perspective on modalities of serving documents

## Summary

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# Summary

This research focuses on the statutory provisions in several European countries regarding the modalities and statutory regulations of serving documents. The main focus is the serving of the summons and verdict, together with the possible introduction of other new modalities in the Netherlands, regarding to the improvement of the execution of verdicts in criminal cases. The central research question is: 'What statutory regulations and modalities exist in the surveyed countries concerning serving of documents in criminal cases which can be used to improve the execution of criminal judgments in the Netherlands?[1] To what extent are these statutory regulations and modalities feasible and – bearing the EHRC an ECHR in mind – are they acceptable?'

The following subquestions are to be distinguished:

- Which forms of serving documents serve as an official notification to the accused, in person or to another person than the accused?;
- Are alternative forms of notifications, in person or to another person than the accused, in use?;
- More specifically: are modern means of communication, such as electronic serving of documents, a part of the existing modalities of serving documents?;
- Which official bodies are responsible for the serving of documents?;
- Which authorities execute the serving of documents and are these authorities bound by any specific rules?;
- Who is in charge of the serving of documents and if applicable, how is this modeled?;
- What are the consequences of the ECHR-law concerning the statutory regulations and practical aspects of serving documents in criminal cases?

It should be kept in mind that on the one hand, serving documents concerns statutory regulations which would foster the practice of large number of cases in which adequate serving of documents does not appear to be problematic, because the (actual) address of the suspect is known, or is easily traceable and the suspect can be reached on that address. On the other hand there is a group of people for whom the serving of documents seems to be more difficult. A proper statutory regulation of serving documents is in that case demanded to support the continuation of the criminal proceedings.

In the first chapter this research has been narrowed down. This study concerns a QuickScan on the law of several countries in regard to the service of documents. Additionally this research encompasses a review of the relevant law of Belgium, Germany, England and Wales, Norway and Switzerland. Not only the different forms of serving documents have been reviewed, but also the place and functioning of the service of documents in these countries was analyzed in this study. In addition to

[1] This concerns the decisions of the judge and the Public Prosecutor, including the so called 'strafbeschikking'.

research of the law in the books, interviews with professionals in the field were conducted.

This summary does not contain a detailed report of the measures in the five countries. Nonetheless an overview, following on paragraph 8.12, has been added containing the most important findings of the mutual comparison. For a (relatively) brief overview of this comparison, we refer to this overview. However, the general conclusions can be summarized as follows.

To ensure legal protection and the instrumentality of the criminal law system, all surveyed countries aim for an effective and feasible service of documents in criminal law cases.

The basic principle in Germany, England, Norway and Switzerland is presence of the defendant during trial. The advantage of this required attendance is that the execution of court decisions is thus simplified; reading out the verdict equals the serving of documents. More important is that these countries consider it an obligation for a decent preparation of the criminal proceedings to notify the accused in person or, if necessary, notify another person than the accused. If this obligation is not fulfilled, this could result in deferment of trial. Preventing such an outcome resulted in a greater effort to notify the accused in person and check his place of residence in these countries. These efforts can be recommended for the Netherlands to consider the service of documents as a part of the preliminary inquiry. The improvement of the execution of a judgment is to a large degree dependent on the adequate serving of documents. This dependency on the service of documents has further been increased with introduction of the so called ZSM-approach, including the legal possibilities to immediately enforce verdicts, without awaiting a possible appeal; this approach however offers possibilities as well, because it results in a more intense contact between the administration of justice and the suspect.

In the context of an effective proceeding of serving documents several countries chose to notify other persons than the accused, whilst this notification serves as notification in person, including the legal consequences. This does not exclude the possibility to go to court and undo the legal consequences. This requires a separate legal procedure in which the onus of proof rests on the defendant. In relation to the right of access to the judge the standard of proof is relatively low. Against the background of direct access to the court, this proof is accepted quite easily and the defense will be offered reparation of legal consequences. This does not seem to benefit the expediency; however, bearing the legal and practical difficulties in mind, notification to other persons than the accused is an acceptable and feasible modality.

In some countries the serving of documents via the address of the lawyer of the defendant is allowed. Especially in Germany this form of serving documents is a matter of course. The German criminal law procedure from the Dutch approach on this point differs.

In relation to improving the efficiency and effectiveness of the response to offences in the field of criminal law, electronic serving of documents plays an increasing important role. In Germany this manner of serving documents in criminal cases has not been used, in Switzerland and England it has been used sparsely. The general effort in Belgium to digitalize the administration of justice turned out to be too ambitious and therefore resulted in the failure of setting up this system. If and when there is a need for the use of this modality in the Netherlands, codification electronic serving of documents seems like a first small, however sufficient, step.

The acknowledgement and regulation of serving documents via (e.g.) e-mail should not be limited to criminal law. A general provision, which also covers civil and administrative law, is recommended. Research of the studied countries showed that the serving of documents is not an exclusive domain of criminal law. A more general statutory provision for different fields of law seems to have an advantage over separate statutory provisions. Thus the benefits from serving documents in one field of law can be executed in other fields of law. Under article 6 ECHR the related fields of law of criminal and criminal administrative law, inconsequent differences can be prevented.

Separately this research focused on the question to what extent the provisions of the ECHR permit certain modalities of service of documents. No concerns have been raised in relation to the serving of documents. Additionally this research focused on the requirements set by the ECHR, mainly in relation to the right of the defendant to be present at the trial.

One of the conclusions of this report could be that on the one hand the practical realization of serving documents is of main importance. On the other hand the serving of documents is interwoven with the foundations of the criminal procedure in each country and each legal system as such. This connection to the principles of the criminal procedure implies that changing these foundations should be done with extreme care. Changing the law on serving of documents just for the sole purpose of improving the execution in statutory regulations or practice should be prevented. However if changing the foundation of the criminal procedure is to be considered, the consequences and possibilities of (improving) serving of documents, including improvement of the execution of a verdict, should be taken into account. These alterations also involve other aspects which are not covered in this study. With these important limitations in mind the following answers, conclusions and recommendations were formulated

1. A (further) strengthening and focus on the responsibility for the serving of documents, preferably if applicable in person, as a more explicit component of the preliminary inquiry is required.
2. More often the Dutch criminal proceedings should presume the attendance in trial as a basic principle. It can be considered a possible task of the legislator to point out in which cases trial in attendance should be considered an obligation. However, the attendance of the defendant should not be set as a basic principle

for the sole purpose of the improvement of the serving of documents and the execution, because over stipulating the 'trial in attendance' also impacts the expediency of the criminal proceedings as a whole.

3. Different modalities of serving documents on another person than the defendant, whereas this notification serves as notification in person, including the legal consequence, exist and function in other legal systems and are as such compatible with the ECHR. This also applies to modalities of serving documents on the address of the suspect, without actually serving the documents in person. Such modalities, in which legal consequences are connected to the assumption of notification of the suspect, are already in use in the researched countries, despite the fact that they easily result in jurisprudence on the application of certain already detailed rules and the fact that back-up facilities for the suspect are always needed and necessary. Due to the fact that these modalities have practical significance in other countries, the Netherlands should reflect these modalities, bearing in mind the efficiency and effectiveness of the response to offences in the field of criminal law.
4. Serving of documents to (the office of) the lawyer, which is to be considered as handing the document to the defendant, can be found in several countries. Bearing in mind that documents in our country can also be served to another person than the defendant, several practical and judicial grievances apply. As additional grievance, it should be mentioned that a lawyer is not always aware of the whereabouts of his client. Potential introduction of this variety in the Dutch criminal proceedings also depends on the (appreciation of) principles towards the role and function of a lawyer and the relation with his client; shifting from support to representation at law. The significance of such aspects was not in the ambit of this research.
5. A – as a basic principle – consistent, uniform regulation of the execution serving documents in civil law, criminal law and administrative law deserves recommendation. Thus the different fields of law can enjoy more easily the advantages of developments and modalities in the field of the service of documents.

The first step in recognizing the possibilities of electronic serving of documents should be taken by the legislator; it is not recommended to impose this modality on the field. Moreover, electronic service of documents in criminal cases due to the relevance of the judicial consequences of a legal valid serving, can be considered a complicated variety of reciprocal 'two-way communication', which should comply with the demands of safe communication. Therefore electronic serving of documents should be considered to be the final piece of a smooth, inevitable, and already visible development, rather than a trendsetter of a precautious development of the electronic communication between government and its citizens in many countries.