

Legal Consequence of Irregular Request for Evidence as Procedural Action in Civil Litigation in Bulgaria

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Abstract

Request for evidence in its essence is an expression of will containing statement for type of evidence mean or circumstance to be established with it. Means of evidence are stated by the parties through request for evidence. As an expression of will the request for evidence contains a statement about knowledge of the type of evidence mean and the circumstances to be established with it. The request for individualization of the request for evidence as procedural action is with review of a clear outline of the request's scope – the one the procedural action is directed towards– the type of evidence and circumstances to be established with the requested evidence. In case of irregular procedural action the court directs the party what the irregularity of the procedural action is and how it can be remedied as determines a term for the remedy. In case of non-execution of the court's direction within set term the legal consequence for this omission is it is considered not performed. The drawn conclusion is that the court shall not rule on the permissibility and reasonableness of the request for evidence as incurs preclusion for the party to collect evidence.

Keywords: procedural action, evidence, request, legal consequences, civil litigation

The issues related to the request for evidence as procedural action as per Civil – Procedure Code are not few and are various in character. They are researched in our legal doctrine²and various decisions in court practice have been ruled. But regardless of this there are still various interpretations in the practice regarding what will be the legal consequences for failure to remedy an irregularity in a request for evidence and regarding whether the obligation of the court stands to give directions to the parties in cases of evidence omissions. Those matters are a subject of this research without any pretentions for comprehensiveness.

1. According to the competitive start parties state the facts and means of their proving. The court does not state any facts but may use official means of evidence for clarifying the veracity of the facts claimed by the parties. **The request for evidence is a procedural action of the party made to the court, using which the party aims to be allowed and collected means of evidence stated by it.** According to the provisions of art. 156, par. 1 of Civil-Procedure Code in the request for evidence the party states the facts and means through which they will be proven. Therefore the request for evidence in its essence is an expression of will containing in it an expression of knowledge for the type of mean of evidence and circumstances that are to be established with it. On the grounds of those data the court estimates the permissibility of the means of evidence as well as their relevance. The request for evidence may be made in writing when it is in out-of-court session as well as verbal when it is made during a court session. The request is reviewed in court session as the court rules on it.

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²Kornezov, L. Civil litigation. Volume one. Process of claim. S: Sofi-R, 2009; Stalev, Zh., Mingova, A., Stamboliev, O., Popova, V. and Ivanova, R. Bulgarian Civil-Procedure Law. Ninth revised and completed issue. First according to the effective Civil-Procedure Code. S: 2012; Vlahov, K. Up-to-date problems of the new Civil-Procedure Code. Second edition. S: Sibi, 2012; Stamboliev, D. Proving in civil litigation. Second revised and completed issue. S: Siela 2012; Radulov, P. Evidentiary value of a document in a civil litigation. S: University Publishing House "St. Kliment Ohridski", 1993.

1.1. Irregularity of the Request for Evidence as Procedural Action

In order evidence to be collected necessary is performing transition activity of the parties and the court. Necessary is the parties to have requested evidence means with the exception of the cases when the court can officially assign evidence and has allowed them. Means of evidence are stated by the parties through request for evidence. Before collecting the stated and presented means of evidence the court assesses the reasonableness of the request for evidence. This inspection ends with permitting or prohibiting the requested means of evidence. Prior to ruling on the reasonableness of the request for evidence the court shall rule on the regularity of the request for evidence as a procedural action after which will rule on the permissibility of the request. The provisions of art. 156, par. 1 of Civil-Procedure Code require the party to state the facts and means through which they will be proven in the request for evidence. As an expression of will the request for evidence contains in itself a statement of knowledge for the type of request for evidence and the circumstances to be proven with it which data is necessary for the court to make an assessment of permissibility of the mean of evidence as well as for relevance. This is the common and minimal content of the request for evidence as a procedural action which it should contain in order to be regular as the provision is expressed semantically and pithily and within the provision of art. 127, par. 2 of Civil-Procedure Code - in the statement of claim the claimant shall state the evidence and specific circumstances to be proven with it and present all written evidence as in the provisions of art. 131, par. 3 of Civil Procedure Code – in the reply of statement of claim the defendant shall state the evidence and specific circumstances to be proven with them and present all written evince he has. Therefore according to the law the necessary content of the request for evidence is to be stated the type of mean of evidence, the circumstances that are to be established by the mean of evidence as well as to give data where the mean of evidence is – for example the witness' address if requested by summoning, a third party a certain document is requested from, the place where the evidence is located etc. This request results of the provisions of art. 156, par. 2, 3 and 4 of Civil-Procedure Code in relation to art. 186 of Civil-Procedure Code, art. 190 of Civil-Procedure Code and 192 of Civil-Procedure Code.

The legislature has set the requirement for individualization of the request for evidence as procedural action which request is set for individualization of the contested law with review of clear outline of the scope of the case, respectively the scope of request – what procedural action is directed towards – the type of mean of evidence and the circumstances which will be established with the requested evidence. In case of irregular statement of claim – when missing is an individualization of contested law through the grounds and petitem of the claim – art. 127, par. 1, point 4 and point 45 of Civil-Procedure Code the court lays still the statement of claim and gives directions and term for remedy of the irregularity – an argument of art. 129, par. 2 of Civil-Procedure Code as with review of the actions or omissions of the claimant, undertake the following procedural action – art. 129, par. 3 and following of Civil-Procedure Code. In the case irregular request for evidence the legislator has not foreseen a specific provision according to which the court shall proceed. The principal of official start settled in the provisions of art. 7 of Civil-Procedure Code requires the court to officially perform the necessary procedural actions on the movement and conclusion of the case and supervises the permissibility and dully execution of procedural actions of the parties. Therefore the court monitors for the dully performance of procedural actions. In case of irregular procedural action – art. 101 of Civil-Procedure Code he directs the party what is the irregularity of the procedural action performed by it and how can it be remedied as defines a term for the remedy. The request for evidence is a procedural action by the parties directed towards the court to allow evidence. Here is why it is subordinate to the common validity regime. In order a request for evidence to be valid it shall result of procedurally competent party and when carried out by a representative he shall hold representative power. Next the request shall be carried out in the form prescribed by law as well as within time set for the request – argument of art. 146, par. 3 in relation to art. 147 of Civil-Procedure Code as well as shall be directed towards the court – action's addressee.

2. In case of performing official inspection of the regularity under art. 101, par. 1 of Civil-Procedure Code of the request for evidence for allowing the evidence the court shall establish that contained in is data for the party as well as for the type of evidence mean and circumstances to be established by the requested mean of evidence – requirement under art. 156, par. 1 of Civil-Procedure Code. If missing is any of this data present is irregularity in case of which the court cannot assess whether present are the requirements of law allowing fulfilling of the request – permitting the evidence. For the regularity of the made request for evidence the court monitors officially because it is a procedural action. The irregularity of the request for evidence for allowing the evidence is removed under art. 101, par. 1 of Civil-Procedure Code. According to the quoted provision the court officially monitors for the dully execution of procedural actions.

It directs the party what the irregularity is of the procedural action it performs and how it can be corrected as defines a term for the correction. The provision of art. 101, par. 1 of Civil-Procedure Code is in chapter one of Civil-Procedure Code –general rules due to which is applicable in the proceeding for proving. This irregularity of the request for evidence shall be corrected in order the procedural action of court to be permitted according to which the court will rule on the claim. In order this act to be permissible – definition pursuant to art. 140 of Civil-Procedure Code, in relation to art. 252 of Civil-Procedure Code it shall be announced on the grounds of regular request for evidence – i.e. the one complying with statutory requirements.

If the request for allowing evidence is irregular the court, ruling on it by respecting it or rejecting it will rule an impermissible decision. This is why ruling on the request for evidence shall be preceded by a regularity inspection as in case of establishment of irregularity the procedure under art. 101 of Civil-Procedure Code shall be performed. Furthermore if the court has directed the party what the irregularity is and how it can be remedied, as has defined a term for the remedy, if the party doesn't act – does not make the correction within set term, the legal consequence of this omission is it is considered not performed – argument of par. 3 of art. 101 of Civil-Procedure Code. The conclusion that shall be drawn is that the court is not liable to rule on the permissibility and reasonableness of the request for evidence if irregularities of the request for evidence are not corrected. The legislator in some cases of means of evidence – witnesses, explanations by the parties and conclusions of experts places additional requirements which upgrade the general regularity requirements of the request for evidence – art. 156, par. 2, par. 3 and par. 4 of Civil-Procedure Code. Upon request for allowing interrogation of a witness the party shall state which facts the witness will be interrogated for, full name of the witness which requirements regard to interrogation of a witness in bringing regime and when it is a summoning regime – besides the set requirements stated shall be the witness' address with review of his summoning - argument under art. 156, par. 2 of Civil-Procedure Code.

Upon request for allowing explanations by the other party formulated are the questions which shall be answered – art. 156, par. 3 of Civil-Procedure Code and when a request for allowing expertise is made stated shall be in which field necessary is special knowledge, what is the scope and task of the expertise – par. 4 of 156 of Civil – Procedure Code. Through request for evidence stated and presented are means of evidence in order to be collected. The court, however, is not liable to collect each evidence stated or pointed out by the parties. It is court's obligation only with regards to permissible, relevant and necessary means of evidence. This is why prior to collecting stated and presented means of evidence the court assesses their reasonableness, which evidence is regular. This inspection ends with allowing or not allowing requested means of evidence. In conclusion, legal consequences of irregular evidence in civil legal proceeding matter theoretically as well as in court practice as this article will be useful to the legislator. Discussed matters cause differences and various interpretations in theory and practice. The developed theoretical analysis of the existing legal provisions significant for clarifying the essence of legal consequences of irregular request for evidence puts in discussion the disputable moments of the question. I remain hopeful that the discussion will unfold and the practice will rule on new problems and settle the ones that have occurred. On the other hand the article may be accepted as an attempt for provoking adequate legislative changes in Civil-Procedure Code.