

AG opinion on Roda Golf (Regulation N° 1348/00)

On October 2007, a company named Roda Golf & Beach Resort S.L. ('Roda Golf'), executed before a notary an instrument of notification and request, seeking the service of 16 letters giving notice of the termination of a contract on addressees residing in the United Kingdom. On November 2007, the notary appeared before the clerk of the Juzgados de Primera Instancia e Instrucción, San Javier, and formally served the notarial instrument together with the original copies of the 16 letters. The clerk of the referring court issued a measure refusing to effect service of the letters. Roda Golf lodged an application for review before the Juzgado de Primera Instancia e Instrucción No 5, San Javier, in accordance with Article 224 of the Ley de Enjuiciamiento Civil (Law on Civil Procedure). When examining the action contesting the measure of organisation issued by the clerk, the court was uncertain about the interpretation of Regulation (EC) No 1348/2000; therefore, on January 2008 it referred the following two questions to the Court of Justice for preliminary ruling:

- '1. Does the scope of Regulation (EC) No 1348/2000 extend to the service of extrajudicial documents exclusively by and on private persons using the physical and personal resources of the courts and tribunals of the European Union and the regulatory framework of European law even when no court proceedings have been commenced? Or,
2. Does Regulation (EC) No 1348/2000 on the contrary apply exclusively in the context of judicial cooperation between Member States and court proceedings in progress (Articles 61(c), 67(1) and 65 EC and recital 6 of the preamble to Regulation (EC) No 1348/2000)?'

AG Ruiz-Jarabo Colomer's long opinion has been delivered on March, the 5th. He starts analysing the matter of admissibility of the question, which is a twofold objection raised by the Commission.

A) According with Article 68 EC, only courts or tribunals of last instance may refer a preliminary ruling question concerning Title IV of the EC Treaty and acts based thereon; the Spanish court asserts it is a court of last instance in

accordance with the aforementioned article; the Commission denies it. AG sets out the history and the reasons which led the Member States to adopt Article 68 EC; he concludes that the rule has to be interpreted in accordance with the fundamental right to effective legal protection, therefore restrictively. He then turns to consider what is a “court of last instance” within the meaning of Article 68 EC: only a court sitting at the apex of the national court structure (if so, the Spanish question would not be admissible), or the final court which may give a decision in accordance with the domestic system of remedies?. Judging from previous cases before the ECJ -although concerning Article 234 EC- he rejects the organic approach in favour of the specific-case approach: Article 68 EC refers to courts against whose decisions there is no judicial remedy, applying to supreme courts and also to any other national courts against whose decisions there is no right of appeal.

Unfortunately, under Spanish procedural law it is unclear whether an appeal may be brought against a decision such as the one pending before the Juzgado de Primera Instancia e Instrucción No 5, San Javier. Under this circumstances, AG draws attention to the referring court’s view that it has the status of a court of last instance; he also points out that where uncertainties arise, it is appropriate to choose the approach which is most favourable to the reference for a preliminary ruling. He therefore concludes that the first plea of inadmissibility must be dismissed.

B) The second plea of inadmissibility concerns another essential condition that a court has to meet in order to seek a preliminary ruling: the question must arise in the context of proceedings; ‘a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature’. This means two requirements: the reference must be made by a court or tribunal (first requirement), in relation to a case in which (second condition) it exercises a judicial function. In the instant case, although the referring court is part of the Spanish judicial structure, there are uncertainties regarding whether the action concerned is an *inter partes* dispute, and whether the decision of the court is judicial in nature.

AG Ruiz-Jarabo Colomer studies EC case law on Article 234 EC, stating that it also applies to preliminary rulings sought under Article 68 EC. He then recalls the conditions set by the ECJ for a proceeding to be considered *inter partes*: first, it

will suffice if an individual is claiming a right and seeks a ruling from a court; second, the claim must be clearly defined in terms of both the facts and the law; third, the national court must ensure the observance of all procedural safeguards when it exercises jurisdiction. Applying such criteria to the present case, AG concludes that the main proceedings are *inter partes*.

As for the requirement of judicial nature of the function, the AG brings up a special exception set by the EJ in the *Job Centre* affair (case C- 11/94), where the applicant asked for an order to register a company: the Court ruled that there was no judicial activity, but only the exercise of administrative authority; it nevertheless went on to state that ‘Only if the person empowered under national law to apply for such confirmation seeks judicial review of a decision rejecting that application – and thus of the application for registration – may the court seised be regarded as exercising a judicial function, for the purposes of Article [234]’. Applying the exception to the present case, AG concludes that the function performed by the referring court is judicial in nature.

The issue of admissibility being solved, AG tackles the questions referred for preliminary ruling. The Juzgado de Primera Instancia e Instrucción No 5, San Javier, seeks a precise definition of *extrajudicial documents* in the context of Regulation (EC) No 1348/20. For some Member States, extrajudicial documents may be served under this Regulation only where court proceedings have been commenced; since ordinary declaratory proceedings have not yet been commenced in the matter referred by the Juzgado de Primera Instancia e Instrucción No 5, San Javier, those Member States propose that the Court should restrict the service of extrajudicial documents to situations where proceedings are underway. However, this opinion is not shared by the AG: leaning on the purpose of Regulation (EC) N° 1348/2000 and its legal basis (art. 65 EC), he defends a broad interpretation of the scope of the Regulation; *extrajudicial documents* are not only documents which are included in a case-file; the term also covers documents which are required to be served, regardless of whether or not proceedings have been commenced.

To end, AG suggest a definition of *extrajudicial document* mid way between an autonomous interpretation and interpretation by reference to the law of the State of origin: in his view extrajudicial documents are documents which, first, require the involvement of an authority or a public act; second, give rise to specific and different legal effects as a result of that involvement; and, third, are used to

support a claim in possible court proceedings.

(Regulation (EC) N° 1348/2000 has been replaced by Regulation (EC) N° 1393/2007, which is already in force)