The ECJ on the meaning of “extrajudicial document” and on the service of such a document according to Regulation No 1393/2007

On 11 November 2015, the ECJ rendered its judgment in the case of *Tecom Mican SL* (case C-223/14). The ruling clarifies the interpretation of Regulation No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the Service Regulation), and, more specifically, the interpretation of Article 16 (“Extrajudicial documents may be transmitted for service in another Member State in accordance with the provisions of this Regulation”).

The dispute in the main proceedings concerned an agency agreement between a German and a Spanish company. The Spanish agent asked a Spanish judicial officer to effect service of a letter of demand on the German principal, through the competent German authority, seeking payment of a goodwill indemnity and of unpaid commission, or, in the alternative, disclosure of the principal’s accounts. The letter stated that the same demand had already been addressed to the German company in a previous letter of demand certified for official purposes by a Spanish notary.

The judicial officer refused to grant the application on the basis that no legal proceedings had been brought requiring the judicial assistance sought to be granted. The Spanish company then brought proceedings in Spain for review of that refusal.

The seised court, however, decided to stay proceedings and to refer some questions to the ECJ for a preliminary ruling, regarding both the meaning of the expression “extrajudicial document” and the rules governing the service of such a document from one Member State to another.

In its judgment, the ECJ begins by noting that, for the purposes of the Service

Regulation, the expression "extrajudicial document", as already stated in *Roda Golf*, must be treated as an autonomous concept of EU law. It must be given a broad definition and cannot be limited to documents that are connected to legal proceedings alone. The Court reiterates that the concept, as suggested in the latter judgment, may include documents drawn up by notaries, but concedes that it cannot be inferred from those findings alone whether, in the absence of legal proceedings, the concept in question includes only documents drawn up or certified by a public authority or official, or whether it also encompasses private documents.

Relying, in particular, on the preparatory work leading to the adoption of the Regulation (including the explanatory report of the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, which never entered into force), the Court concludes that the concept of an "extrajudicial document", within the meaning of Article 16 of the Service Regulation, must be interpreted as encompassing "both documents drawn up or certified by a public authority or official and private documents of which the formal transmission to an addressee residing abroad is necessary for the purposes of exercising, proving or safeguarding a right or a claim in civil or commercial law".

The ECJ goes on to address the issue of whether, under the Service Regulation, service of an extrajudicial document can be effected pursuant to the detailed rules laid down by that Regulation even where an earlier service has already been effected through another means of transmission.

The Court examines, in the first place, the case in which the earlier service has been effected under rules not provided for in the Service Regulation. In that regard, the ECJ notes that the wording of Article 1(1) of the Regulation makes clear that that Regulation is applicable "where a[n] … extrajudicial document has to be transmitted from one Member State to another for service there". As the Court itself asserted in *Alder*, this means that the Regulation provides for only two situations in which the service of a document falls outside its scope: where the permanent or habitual residence of the addressee is unknown and where that person has appointed an authorised representative in the Member State of the forum.

Since it is common ground that the Regulation does not provide for any other

exception, the Court concludes that, in the case considered, the cross-border service of an extrajudicial document pursuant to the means of transmission of the Service Regulation remains possible.

Secondly, as regards the consequences related to the case in which an applicant effects an earlier service pursuant to the detailed rules laid down by Regulation No 1393/2007, the Court notes that the Regulation lays down various means of transmission applicable to the service of extrajudicial documents exhaustively.

The Regulation states in Article 2 that the service of judicial documents is, in principle, to be effected between the transmitting agencies and the receiving agencies designated by the Member States. However, it also provides, in Section 2, for other means of transmission, such as service by diplomatic or consular agents or service by postal services.

As the Court already observed in *Plumex*, the Service Regulation does not establish a hierarchy between the various means of transmission that it put in place. Besides, in order to ensure an expedient cross-border transmission of the relevant documents, the Regulation neither entrusts the transmitting or receiving agencies, nor the diplomatic or consular agents, the judicial officers, officials or other competent persons of the Member State addressed with the task of determining whether the reasons for which an applicant may wish to effect service of a document through the means of transmission laid down are appropriate or relevant.

Consequently, in the Court's view, service of an extrajudicial document pursuant to one of the means laid down by Regulation No 1393/2007 remains valid, even where an earlier transmission of that document has already been effected by a means other than those laid down therein.

The last question addressed by the ECJ is whether Article 16 of Regulation No 1393/2007 must be interpreted as meaning that it is necessary to ascertain, on a case-by-case basis, whether the service of an extrajudicial document has cross-border implications and is necessary for the proper functioning of the internal market.

The Court observes that the Service Regulation falls precisely within the area of judicial cooperation in civil matters that have cross-border implications, and that, pursuant to Article 1(1), it applies where a document has to be transmitted "from

one Member State to another" for service there.

As a result, since the cross-border implications of the transmission of a document constitute an objective condition for the applicability of the Regulation, "those implications must be considered, without exception, to be necessarily satisfied where the service of such a document falls within the scope of that Regulation", and must therefore be effected in accordance with the system established by the Regulation itself.

As regards the proper functioning of the internal market, it is common ground that that element constitutes the primary objective of the system of service laid down by the Regulation. Thus, in so far as all the means of transmission of judicial and extrajudicial documents envisaged therein have been put in place expressly in order to obtain that objective, it is reasonable to consider that, once the conditions for the application of those means of transmission are satisfied, the service of such documents necessarily contributes to the proper functioning of the internal market.

In the end, where the conditions of Article 16 are satisfied, it is not necessary to ascertain, on a case-by-case basis, whether the service of an extrajudicial document has cross-border implications and is necessary for the proper functioning of the internal market.