The ECJ on the binding use of standard forms under the Service Regulation

In a judgment of 16 September 2015, in the case of *Alpha Bank Cyprus Ltd* v. *Dau Si Senh* and others (Case C?519/13), the ECJ clarified the interpretation of Regulation No 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters (the Service Regulation).

The judgment originated from a request for a preliminary ruling submitted by the Supreme Court of Cyprus in the framework of proceedings initiated by a Cypriot bank against, *inter alia*, individuals permanently resident in the UK.

The latter claimed that the documents instituting the proceedings had not been duly served. They complained, in particular, that some of the documents they had received (namely the order authorising service abroad) were not accompanied by a translation into English and that the standard form referred to in Article 8(1) of Regulation No 1393/2007 was never served on them.

Pursuant to Article 8 of the Service Regulation, the "receiving agency", *ie* the agency competent for the receipt of judicial or extrajudicial documents from another Member State under the Regulation, must inform the addressee, "using the standard form set out in Annex II", that he has the right to refuse to accept a document if this "is not written in, or accompanied by a translation into, either of the following languages: (a) a language which the addressee understands; or (b) the official language of the Member State addressed".

In its judgment, the ECJ held that the receiving agency "is required, in all circumstances and without it having a margin of discretion in that regard, to inform the addressee of a document of his right to refuse to accept that document", and that this requirements must be fulfilled "by using systematically … the standard form set out in Annex II". The Court also held, however, that, where the receiving agency fails to enclose the standard form in question, this "does not constitute a ground for the procedure to be declared invalid, but an omission which must be rectified in accordance with the provisions set out in that regulation".

The ECJ based this conclusion on the following remarks.

Regarding the binding nature of the standard form, the Court noticed that the wording of Article 8 of the Regulation is not decisive, and that the objectives of the Regulation and the context of Article 8 should rather be considered.

As regards the objectives of the Regulation, the Court stated that the uniform EU rules on the service of documents aim to improve the efficiency and speed of judicial procedures, but stressed that those objectives cannot be attained by undermining in any way the rights of the defence of the addressees, which derive from the right to a fair hearing, enshrined in Article 47 of the Charter of Fundamental Rights of the EU and Article 6(1) of the ECHR.

The Court added, in this regard, that "it is important not only to ensure that the addressee of a document actually receives the document in question, but also that he is able to know and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able effectively to assert his rights in the Member State of transmission". It is thus necessary to strike a balance between the interests of the applicant and those of the defendant by reconciling the objectives of efficiency and speed of the service of the procedural documents with the need to ensure that the rights of the defence of the addressee of those documents are adequately protected.

As concerns the system established by the Service Regulation, the ECJ began by noting that the service of documents is, in principle, to be effected between the "transmitting agencies" and the "receiving agencies" designated by the Member States, and that, in accordance with Article 5(1) of the Regulation, it is for the transmitting agency to inform the applicant that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8, whereas it is for the applicant to decide whether the document at issue must be translated.

For its part, the receiving agency is required to effectively serve the document on the addressee, as provided for by Article 7 of Regulation No 1393/2007. In that context, the receiving agency must, among other things, inform the addressee that it may refuse to accept the document if it is not translated into one of the languages referred to in Article 8(1).

By contrast, the said agencies "are not required to rule on questions of substance, such as those concerning which language(s) the addressee of the document

understands and whether the document must be accompanied by a translation into one of the languages" specified in Article 8(1). Any other interpretation, the ECJ added, "would raise legal problems likely to create legal disputes which would delay or make more difficult the procedure for transmitting documents from one Member State to another".

In the main proceedings, the UK receiving agency considered that the order authorising service of the document abroad should not be translated and deduced from that that it was not required to enclose with the document at issue the relevant standard form.

In reality, according to the ECJ, the Service Regulation "does not confer on the receiving agency any competence to assess whether the conditions, set out in Article 8(1), according to which the addressee of a document may refuse to accept it, are satisfied". Actually, "it is exclusively for the national court before which proceedings are brought in the Member State of origin to rule on questions of that nature, since they oppose the applicant and the defendant".

The latter court "will be required, in each individual case, to ensure that the respective rights of the parties concerned are upheld in a balanced manner, by weighing the objective of efficiency and of rapidity of the service in the interest of the applicant against that of the effective protection of the rights of the defence on the part of the addressee".

Specifically, as regards the use of the standard forms, the ECJ observed, based on the Preamble of the Regulation, that the forms "contribute to simplifying and making more transparent the transmission of documents, thereby guaranteeing both the legibility thereof and the security of their transmission", and are regarded by the Regulation as "instruments by means of which addressees are informed of their ability to refuse to accept the document to be served".

The wording of the Regulation and of the forms themselves makes clear that the ability to refuse to accept a document in accordance with Article 8(1) is "a 'right' of the addressee of that document". In order for that right to usefully produce its effects, the addressee of the document must be informed in writing thereof.

As a matter of fact, Article 8(1) of the Regulation contains two distinct statements. On the one hand, the substantive right of the addressee of the document to refuse to accept it, on the sole ground that it is not drafted in or

accompanied by a translation in a language he is expected to understand. On the other hand, the formal information about the existence of that right brought to his knowledge by the receiving agency. In other words, in the Court's view, "the condition relating to the languages used for the document relates not to the information given to the addressee by the receiving agency, but exclusively to the right to refuse reserved to that addressee".

The ECJ went on to stress that the refusal of service is conditional, in so far as the addressee of the document may validly make use of the right only where the document at issue is not drafted in or accompanied by a translation either in a language he understands or in the official language of the receiving Member State. It is ultimately for the court seised to decide whether that condition is satisfied, by checking whether the refusal by the addressee of the document was justified. The fact remains, however, that the exercise of that right to refuse "presupposes that the addressee of the document has been duly informed, in advance and in writing, of the existence of his right".

This explains why the receiving agency, where it serves or has served a document on its addressee, "is required, in all circumstances, to enclose with the document at issue the standard form set out in Annex II to Regulation No 1393/2007 informing that addressee of his right to refuse to accept that document". This obligation, the Court stressed, should not create particular difficulties for the receiving agency, since "it suffices that that agency enclose with the document to be served the preprinted text as provided for by that regulation in each of the official languages of the European Union".

Moving on to the consequences of a failure to provide information using the standard form, the ECJ noted, at the outset, that it is not apparent from any provision of that regulation that such a failure leads to the invalidity of the procedure for service.

Rather, the Court reminded that, in *Leffler* — a case relating to the interpretation of Regulation No 1348/2000, the predecessor of Regulation No 1393/2007 — it held that the non-observance of the linguistic requirements of service does not imply that the procedure must necessarily be declared invalid, but rather involves the necessity to allow the sender to remedy the lack of the required document by sending the requested translation. The principle is now laid down in Article 8(3) of Regulation No 1393/2007.

According to the ECJ, a similar solution must be followed where the receiving agency has failed to transmit the standard form set out in Annex II to that regulation to the addressee of a document.

In practice, it is for the receiving agency to inform “without delay” the addressees of the document of their right to refuse to accept that document, by sending them, in accordance with Article 8(1), the relevant standard form. In the event that, as a result of that information, the addressees concerned make use of their right to refuse to accept the document at issue, it is for the national court in the Member State of origin to decide whether such a refusal is justified in the light of all the circumstances of the case.