OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 5 March 2009 [1]

I — Introduction

1. The Juzgado de Primera Instancia e Instrucción (Court of First Instance and Preliminary Investigations) No 5 de San Javier (Spain) has referred two questions to the Court of Justice for a preliminary ruling on the interpretation of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. [2] The referring court is uncertain about the Community definition of 'extrajudicial documents' for the purposes of the regulation. That uncertainty has arisen in connection with a number of private letters which were sent to the San Javier courts, via a notary, for subsequent service in the United Kingdom.

2. The Court is thus required to resolve a number of different important legal issues. First, there is the matter of admissibility, since the referring court asserts that it is a court of last instance in accordance with Article 68 EC. The Commission does not share that view and therefore, for the first time, the Court must rule on the application of the *Lyckeskog* [3] case-law to the article. Second, if the referring court is found to be acting as a court of last instance, it will be necessary to establish whether it is appropriate to submit a reference for a preliminary ruling. Since the case concerns the service of extrajudicial documents where no court proceedings have been commenced, it is not clear that there is a genuine dispute. Accordingly, it will be necessary to examine the *Job Centre* [4] case-law and to transpose it to the circumstances of the present case. Third, the substantive issue is particularly important for the purpose of determining one of the most ambiguous aspects of Regulation No 1348/2000, which is the definition of 'extrajudicial documents'.

II — Facts

3. On 23 October 2007, Roda Golf & Beach Resort SL ('Roda Golf'), a company with its registered office in San Javier, Murcia, executed before a notary an instrument of notification and request, seeking the service, through the office of the clerk of the Juzgados de Primera Instancia e Instrucción de San Javier, of 16 letters on a number of addressees

1 — Original language: Spanish.
2 — OJ 2000 L 160, p. 37.
3 — Case C-99/00 [2002] ECR I-4839.
4 — Case C-111/94 [1995] ECR I-3361.

residing in the United Kingdom, in accordance with Regulation No 1348/2000.

4. The letters gave notice of the termination of a contract for the sale of immovable property which Roda Golf had concluded with each recipient.

5. On 2 November 2007, the notary appeared before the clerk of the abovementioned court and formally served the notarial instrument together with the original copies of the 16 letters.

6. On 29 November 2007, the clerk of the referring court issued a measure of organisation refusing to effect service of the letters. The clerk asserted that Regulation No 1348/2000 provides for the service of 'extrajudicial documents' only where legal proceedings are under way, which was not so in the present case. The clerk took the view that the request did not fall within the scope of the regulation and therefore refused to grant the request of Roda Golf.

7. On 13 December 2007, Roda Golf lodged an application for review before the Juzgado de Primera Instancia e Instrucción No 5 de 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 No 1348/2000, which is an essential point for the purposes of resolving the application of Roda Golf, and therefore the court stayed the proceedings and made a reference to the Court of Justice for a preliminary ruling under Article 68 EC, in conjunction with Article 234 EC.

III — Legal framework

A — *The Community legal framework*

8. Title IV of the EC Treaty confers on the institutions the power to implement policies relating to the free movement of persons. For the purposes of the present preliminary ruling proceedings, it is appropriate to cite the following articles:

'Article 65

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper

functioning of the internal market, shall include:

(a) improving and simplifying:

— the system for cross-border service of judicial and extrajudicial documents,

…

Article 68

1. Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

…'

9. Regulation No 1348/2000 governs the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. [5] As concerns the present case, recitals 2 and 6 in the preamble to the regulation provide guidance on interpretation by pointing out that '[t]he proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States'. That requirement means that the transmission of such documents must be made 'direct and by rapid means between local bodies designated by the Member States'.

10. Although Regulation No 1348/2000 concerns extrajudicial documents, it is silent when it comes to defining that term and to laying down specific rules governing service. The regulation includes only one provision on extrajudicial documents, which is Article 16:

'Extrajudicial documents may be transmitted for service in another Member State in

5 — Regulation No 1348/2000 was repealed and replaced by Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2007 L 324, p. 79). However, the new legislation does not include any changes that are material to this reference for a preliminary ruling.

accordance with the provisions of this Regulation.'

11. In accordance with Article 17(b) of Regulation No 1348/2000, on 25 September 2001 the Commission enacted a decision adopting a manual of receiving agencies and a glossary of documents that may be served. [6] That glossary of documents appears in Annex II, although it is merely indicative rather than exhaustive in nature. The section relating to Spain states: 'As regards the extrajudicial documents that may be served, these are non-judicial documents issued by public authorities that are competent to effect service under Spanish law.'

B — *The national legal framework*

12. Articles 223 and 224 of Law 1/2000 of 7 January on Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil; 'LEC') [7] lay down the rules governing decisions issued by court clerks in civil matters.

6 — Commission Decision 2001/781/EC of 25 September 2001 adopting a manual of receiving agencies and a glossary of documents that may be served under Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2001 L 298, p. 1). That instrument has been amended twice, by Commission Decision 2002/350/EC of 3 April 2002 (OJ 2002 L 125, p. 1) and by Commission Decision 2007/500/EC of 16 July 2007 (OJ 2007 L 185, p. 24), neither of which have a bearing on this case.

7 — BOE No 7 of 8 January 2000.

'Article 223. Measures of organisation

1. Court clerks are responsible for adopting measures of organisation by means of which orders shall be executed in accordance with the law.

2. Measures of organisation shall be restricted to a statement of the decision issued together with the name of the clerk adopting the measure, the date and the signature of the clerk.

Article 224. Revision of measures of organisation

1. Measures of organisation determining matters which, by law, must be resolved by an interim decision, an order or a judgment, are automatically void.

2. Other than in the cases referred to in the previous paragraph, a measure of organisation

may also be set aside, at the request of the party to whom it is detrimental, where it infringes any legal provisions or resolves matters which, under this Law, must be determined by an interim decision.

3. The challenge referred to in the previous paragraph shall be heard and resolved in accordance with the provisions applicable to actions for review.'

13. By express provision of Article 224(3) LEC, the method of contesting a measure of organisation is an action for review under civil procedural law. That remedy is generally envisaged for the review of interim decisions and orders, and the applicable rules are set out in Articles 451 to 454 LEC:

'*Article 451. Reviewable decisions. Lack of suspensory effect*

In respect of all interim decisions and non-final orders made by any civil court, an action for review may be brought before the court which adopted the contested decision, which shall be executed without prejudice to that action

Article 452. Time-limit, form and inadmissibility

An application for review must be lodged within five days and must state, in the opinion of the applicant, the infringement resulting from the decision.

If those two requirements are not satisfied the application for review will be ruled inadmissible by interim decision and no further action may be brought.

Article 453. The right of the defendants to be heard and the decision

1. After the action for review has been ruled admissible, the other parties who have entered an appearance shall be granted a general time-limit of five days to contest the action should they deem it appropriate.

2. On the expiry of that time-limit for contesting the action, regardless of whether or not pleadings have been lodged, the court shall give its ruling by order, without any further formalities, within five days.

Article 454. The order resolving the action for review is not subject to appeal

Except for cases where there is a right to appeal against a refusal of leave to appeal, no action may be brought against an order resolving an action for review, without prejudice to the right to raise again the subject-matter of the review where, if appropriate, an appeal is brought against the final decision.'

14. According to Article 455 LEC, an appeal may be brought against an order of a court of first instance provided that the order has become 'final' or 'the law expressly provides [for it]'.

15. Finally, Article 207 LEC provides that 'decisions which conclude first-instance proceedings and decisions which resolve appeals brought against those decisions are final decisions'.

16. Notarial acts are governed by the Reglamento Notarial (Notarial Regulations) of 1944, [8] which have been amended on a number of occasions. Articles 202 to 206 of the Reglamento Notarial lay down the provisions governing instruments of notification and request, in the following terms:

'*Article 202*

The purpose of an instrument of notification is to communicate to an individual a piece of information or a decision from the individual who has requested notarial involvement, while instruments of request additionally call on the addressee to take certain action.

Provided that no legal provision stipulates to the contrary, the notary may choose to effect notifications and requests by sending to the addressee the official notice, copy or letter by registered post with a form for acknowledgement of receipt.

Where the procedure referred to in the previous paragraph is not used, the notary shall attend the address or place where the notification or request is to be effected, as designated by the petitioner, indicating that he is a notary and the purpose of his visit. If the addressee is not present, any individual who is at the designated place and provides proof of identity may accept service of the notice. If no one accepts service, that fact must be recorded. If the building has a concierge, service may be effected on that person.

8 — Decree of 2 June definitively adopting the Reglamento de la Organización y Régimen del Notariado (Regulations governing the Organisation of and the Legal Provisions applicable to the Profession of Notary) (BOE No 189 of 7 July 1944).

The formality shall be carried out by handing over the official notice which must be signed by the notary using at least his last name, must include verbatim the wording of the notification or request, and must state that the addressee has the right to respond and give the time-limit for that purpose, in accordance with Article 204.

...

Article 203

Where the addressee [or] his representative... refuses to accept the official notice or actively or passively resists receipt thereof, that fact shall be recorded and service shall be deemed to have been effected. Any matter which makes it impossible for the notary to deliver the official notice shall also be recorded, and in that case the procedure set out in the sixth paragraph of Article 202 shall be followed.

Article 204

The addressee has the right to respond before the notary at the time of service but he may not include in his response other requests or notifications, which must be the subject of a separate instrument.

...

Article 206

Notifications and requests provided for in Laws or Regulations which do not specify the relevant conditions or formalities shall be effected in the manner laid down in the foregoing articles. However, where those provisions lay down specific rules or set out different conditions or formalities with regard to the address, place, individuals on whom service may be effected, or any other matters, the special requirements of those provisions shall apply and the requirements of Article 202 and other corresponding articles of these Regulations shall not be applicable.'

IV — The questions referred for a preliminary ruling

17. By order of 3 January 2008, the Juzgado de Primera Instancia e Instrucción No 5 de San Javier made a reference for a preliminary ruling on interpretation of Regulation No 1348/2000, in accordance with

Article 68 EC, in conjunction with Article 234 EC. After briefly explaining that it fulfils the requirements of that provision (particularly that no appeals may be brought against the decision of the referring court), the Juzgado de Primera Instancia e Instrucción No 5 de San Javier refers the following two questions to the Court of Justice:

'(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 [in] the preamble to Regulation (EC) No 1348/2000)?'

18. The order for reference was received at the Court Registry on 14 January 2008. Observations were lodged, within the time-limit laid down in Article 23 of the Statute of the Court of Justice, by Roda Golf, the Latvian, Hungarian, Polish, Slovakian, Czech, Spanish, Greek, German and Italian Governments, and the Commission.

19. Despite the potential practical effects of this case on the organisation of national courts, none of the aforementioned Member States, nor the Commission nor the applicant in the main proceedings requested a hearing in the time-limit granted for that purpose, and therefore the case was ready for the preparation of this Opinion on 13 November 2008.

V — Admissibility

20. The Commission argues that the Juzgado de Primera Instancia e Instrucción No 5 de San Javier is not competent to make a reference for a preliminary ruling under Article 68 EC on the grounds that it is not a court of last instance and there are no *inter partes* proceedings. All the governments which have lodged observations remain silent on that point, while Roda Golf puts forward a number of reasons why the proceedings should be ruled admissible. Since this is a delicate question concerning Article 68 EC, I shall analyse both complaints in detail and individually.

A — *First objection to admissibility: Article 68 EC and the definition of 'court or tribunal' against whose decisions there is no judicial remedy*

21. In this case, the Court is required to examine the restriction imposed by Article 68 EC, to the effect that only courts

or tribunals of last instance may refer for a preliminary ruling questions concerning Title IV of the EC Treaty and acts based thereon. Before I apply that article to the present case, I feel it would be appropriate to set out the history and the reasons which led the Member States to adopt such a measure, drawing attention to the limitations and the disadvantages of that restriction on the dialogue between courts.

1. History of and reasons for Article 68 EC

22. The creation of an area of freedom, security and justice, with all the advantages which that entails, required considerable alteration of the traditional legal tools. The free movement of individuals within the territory of the European Union has posed a challenge to the project of integration, since it is not only individuals themselves who move but also their centre of vital interests. By way of example, the provisions of the Schengen *acquis* have gradually established mutual recognition in criminal matters; [9] the provisions relating to conditions of residence have been required to resolve the difficulties experienced by nationals of non-member countries who have legal relationships with Community citizens; [10] likewise, judicial and police cooperation in criminal cases has led to an increase in joint operations between the authorities of different States which is unprecedented in the history of Europe. [11]

23. In those circumstances, the Member States reacted cautiously to the impact of that process on the judicial architecture of the Union. In the preparatory documents for the Treaty of Amsterdam, the Presidency of the Council expressed concern about the possibility that a large number of preliminary rulings would be sought from the Court, which would overload and impede its operational capacity while also delaying the operational capacity of national courts submitting references. In the light of that situation, the Presidency proposed that a number of changes to the role of the Court of Justice be examined. [12]

24. The views raised in the Council were duly reflected in the current version of Article 68 EC, which was inserted following the reforms implemented by the Treaty of Amsterdam. Under the article, the courts of the Member States may rely on Article 234 EC in conjunction with Title IV of the EC Treaty and with measures of secondary law based thereon, albeit with a number of differences,

9 — Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19) sets out the *ne bis in idem* principle, the case-law on which has helped to strengthen the mutual recognition of judicial decisions in criminal matters.

10 — The serious problems which have arisen in that field have led to a reversal of judicial precedent. See, for example, Case C-127/08 *Metock and Others* [2008] ECR I-6241.

11 — The most emblematic symbol of that profound change is Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), which has led to extremely far-reaching decisions, such as the judgment in Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 28.

12 — ['General framework for a proposed reform of the Treaties, commentary on Article G']. The text may be found in *Revue Trimestrielle de Droit Européen*, No 1, 33, 1997, p. 187. On the origins of the provision, see Albors-Llorens, A., 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam, *Common Market Law Review*, No 35, 1998, pp. 1273 to 1276; Langrish, S., 'The Treaty of Amsterdam: Selected Highlights', *European Law Review*, No 23, 1998, p. 8, and Labayle, H.,'Le Traité d'Amsterdam. Un espace de liberté, de sécurité et de justice', *Revue Trimestrielle de Droit Européen*, No 33, 1997, pp. 873 and 874.

including, in particular, the restriction of competence to submit a reference for a preliminary ruling to national courts against whose decisions there is no judicial remedy.

25. Article 68 EC provided for so-called different-speed references for a preliminary ruling and enshrined a distinction which contrasted with the traditional solidity and uniformity of the Community system of remedies; it also challenged the view of the Court of Justice which, in its report of 1995 on certain aspects on the application of the Treaty on European Union, [13] rejected any restriction of the power of national courts to seek preliminary rulings. In the opinion of the Court, such a restriction would jeopardise the uniformity and consistency of Community law. [14]

26. The insistence of the Member States led to the alteration of the preliminary ruling procedure, even though it is difficult to imagine the feared flood of references, since Article 35 EU, which, with the exception of Spain, may be relied on by all national courts of the States which have had recourse to Article 15(2), [15] has not had a devastating impact. On the contrary, the recent adoption of the urgent preliminary ruling procedure is a clear sign that the Court is willing to expedite the resolution of cases relating to the area of freedom, security and justice, while there is no sign of any particular concern about an avalanche of references. [16]

27. Article 68 EC must be interpreted in accordance with the fundamental right to effective legal protection. The rules limiting the right to seek a preliminary ruling must be interpreted restrictively. The weaknesses of the limitations which Article 68 EC imposes on national courts give rise to a number of practical consequences which it is appropriate to set out and apply to the case referred by the Juzgado de Primera Instancia e Instrucción No 5 de San Javier.

13 — Report of the Court of Justice of May 1995.

14 — The Court expresses that concern clearly in paragraph 11: 'To limit access to the Court would have the effect of jeopardising the uniform application and interpretation of Community law throughout the Union, and could deprive individuals of effective judicial protection and undermine the unity of the case-law... The preliminary ruling system is the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the Treaties retains its Community character with a view to guaranteeing that that law has the same effect in all circumstances in all the Member States of the European Union … One of the Court's essential tasks is to ensure just such a uniform interpretation, and it discharges that duty by answering the questions put to it by the national courts and tribunals.'

15 — Those Member States apart from Spain have provided that any of their courts may make a reference for a preliminary ruling under Article 35 EU. Although there are no updates regarding declarations, a useful document, drawn up by the Research and Documentation Service of the Court of Justice, may be viewed at http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/art35.pdf.

16 — In addition to the undoubted risks to the consistency and uniformity of case-law (not to mention the undermining of basic procedural safeguards, such as the ones relating to transparency), the new urgent preliminary ruling procedure, adopted on 15 January 2008 (OJ 2008 L 24, p. 39) and governed by Article 104b of the Rules of Procedure of the Court of Justice, is also capable of compromising the operational capacity of the Court in the event of a (quite possible) deluge of references in the future. Despite those risks, nothing has deterred the supporters of the new procedure.

2. The restrictive interpretation of the limitations on the dialogue between courts laid down by Article 68 EC

28. Any exception to a rule must be interpreted restrictively. The special rules on preliminary rulings in Article 68 EC differ from the general rule in Article 234 EC, and therefore they must be construed narrowly. Nevertheless, that outcome is not reached solely by using criteria for interpretation.

29. Access to justice is a fundamental pillar of western legal culture. 'To no one will we sell, to no one will we deny or delay right or justice' proclaimed the Magna Carta in 1215, [17] expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention on Human Rights, [18] the Charter of Fundamental Rights of the European Union [19] and the case-law of the Court. [20] Therefore, the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised. In a number of Member States, such as Germany and Spain, that fundamental right is framed in such a way that it also includes the preliminary ruling procedure under Article 234 EC. [21] The present reference is doubly crucial with regard to safeguarding the procedural rights of individuals at both Community and national level. [22] Access to justice entails not only the commencement of legal proceedings but also the requirement that the competent court must be seised of those proceedings. Furthermore, from a procedural point of view, references for a preliminary ruling are subject to the principles of the uniformity and consistency of Community law, from which it follows that any national court must have competence to seek assistance from the Court of Justice. [23] Any barrier preventing a national court from making a reference undermines that fundamental right. On that premiss, it is appropriate to conclude that the restrictions under Article 68 EC may be relaxed when they are interpreted in the light of the principle of effective legal protection. [24]

30. There are also institutional reasons which militate in favour of a restrictive interpretation of Article 68 EC. The most important

17 — *Magna Carta Libertatum*, clause 40. On the evolution of the principle underlying the right of access to justice, see Zuckerman, A., *Zuckerman on Civil Procedure. Rules and Procedures*, Sweet & Maxwell, London, 2006, pp. 59 to 64.

18 — Article 6 of the convention.

19 — Article 47 of the charter.

20 — Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case 222/86 *Heyens and Others* [1987] ECR 4097, paragraph 14; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; and Case C-467/01 *Eribrand* [2003] ECR I-6471, paragraph 61.

21 — Judgment of the German Bundesverfassungsgericht of 9 January 2001 and judgment of the Spanish Tribunal Constitucional 58/2004 of 19 April 2004. The following commentaries on those judgments are interesting: Arndt, F., 'The German Federal Constitutional Court at the Intersection of National and European Law: Two Recent Decisions', *German Law Journal*, No 11, 2001, and Alonso García, R., 'Comentario a la sentencia 58/2004', *Common Market Law Review*, No 42, 2005.

22 — Martín Rodríguez, P., 'La cuestión prejudicial como garantía constitucional: a vueltas con la relevancia constitucional de derecho comunitario', *Revista Española de Derecho Constitucional*, No 72, 2004, and Azpitarte Sánchez, M., *El Tribunal Constitucional ante el control del derecho comunitario derivado*, Civitas, Madrid, 2002.

23 — Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraphs 96 and 97.

24 — Some commentators advocate the application of this criterion to Article 68 EC, Baquero Cruz, J. *'El Auto Dem'Yanenko: expulsión de ciudadanos de terceros Estados y TJCE'*, *Revista Española de Derecho Comunitario Europeo*, No 19, 2004, p. 944 et seq.

concerns the fact that the Court of Justice has exclusive jurisdiction to rule on validity. By restricting the right to seek a preliminary ruling to courts of last instance, lower courts are deprived of declarations that Community acts are invalid, a matter which the Treaty reserves to the Court of Justice. [25] That situation forces courts whose decisions are subject to appeal to apply a provision which they consider to be invalid, or, worse still, to carry out a review of validity, a task which only the Court of Justice has jurisdiction to perform. Accordingly, if the concept of last instance were defined too strictly, it would increase the risk of scrutiny of the lawfulness of Community provisions becoming fragmented.

31. Accordingly, it is unsurprising that initiatives have emerged to repeal Article 68 EC, such as the one put forward by the Commission in 2006, aimed at abolishing the special requirements of that provision in the interests of uniformity, effective legal protection and the efficient operation of the Community judicial system. [26] Although the proposal was not adopted, the arguments put forward by the Commission, to the effect that Article 68 EC 'breaks the rule of procedural economy', [27] 'unnecessarily waste[s] the resources of the national courts', [28] and 'is also inconsistent with the rest of the Treaty', [29] are sufficiently revealing. Nor did the Member States have any qualms about removing the special rules on preliminary rulings in Article 68 EC when they drew up the Draft Treaty establishing a Constitution for Europe and the Treaty of Lisbon, which do not provide for different systems of references for a preliminary ruling.

32. To recapitulate, the limitation of jurisdiction to seek preliminary rulings to courts of last instance must be interpreted restrictively. The entry into force of Article 68 EC set a precedent of doubtful compatibility with the spirit underlying Article 234 EC, because of the anomalies it introduces into both the dynamics of that article and the Community judicial architecture. As Pierre Pescatore wrote in a recent paper, the mechanism under Article 234 EC is '[a sacrosanct part of the Community *acquis*]'. [30] Any alteration to that cornerstone of the operation of the internal market [31] must be examined with great care, since the fundamental elements of the European judicial model are, to a great extent, based on a successful preliminary ruling system. It is therefore unsurprising that the supporters of alternative models have

25 — Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20.

26 — Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities - Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection of 28 June 2006 (COM(2006) 346 final). That document, which is extremely critical of Article 68 EC, contrasts with the position of the Commission in the present proceedings. If the Commission is of the opinion that the article impedes access to justice, I am at a loss to understand how it can argue so vehemently that the question submitted by the referring court is inadmissible, particularly in view of the fact that, as is clear from an analysis of the substance of the proceedings, the Commission proposes a maximalist interpretation of Regulation No 1348/2000, which demonstrates the clear importance of this case for the parties to the dispute and also for the law of the developing area of freedom, security and justice.

27 — Ibid., p. 6.

28 — Ibid.

29 — Ibid., p. 7.

30 — Pescatore, P., 'Preliminary Rulings — Evolution of the System', *50th Anniversary of the Court of Justice of the European Communities. Conference on Cooperation between the Court of Justice and the National Courts*, Publications Office, Luxembourg, 2003, p. 29.

31 — I have borrowed that expression from Robert Lecourt, former President of the Court, who used it in his work 'Le rôle unificateur du juge dans la Communauté', *Études de droit des Communautés Européennes, Mélanges offerts à Pierre-Henri Teitgen*, Pedone, Paris, 1984, p. 227.

distanced themselves from the Community tradition, invoking Article 68 EC. [32] If it is time to modify the relationship of cooperation between the Court of Justice and national courts, perhaps an amendment such as that of Article 68 EC is not the right approach.

33. Having regard to the fact that the Juzgado de Primera Instancia e Instrucción No 5 de San Javier operates on the first rung of the Spanish civil judicial ladder, it is necessary to establish whether a court of last instance, within the meaning of Article 68 EC, is a court which sits at the apex of the national court structure or the final court which may give a decision in accordance with the domestic system of remedies. In other words, it is necessary to determine, as the Court did in *Lyckeskog* [33] with regard to Article 234 EC, whether it is necessary to take the organic approach or the specific-case approach. In *Lyckeskog*, the Court adopted the second approach, confirming the detailed Opinion of Advocate General Tizzano which drew attention to the progressive trend in the case-law on that field. [34] At paragraph 15 of the judgment, the Court observed that consistency and uniformity are secured 'when... supreme courts are bound by this obligation to refer... *as is any other national court or tribunal against whose decisions there is no judicial remedy under national law...*'.

34. I find the solution to that problem in the arguments set out above and also in the case-law of the Court. Since the interpretation of Article 68 EC must conform to the principle of effective legal protection, it is necessary to attempt to ensure that it satisfies the requirements of that principle. [35] Logically, that view was expressed in *Lyckeskog*, since it permits an increase in the number of courts competent to make a reference for a preliminary ruling, regardless of whether they are at the hierarchical apex of their judicial system. That approach is also correct where a preliminary ruling is sought under Article 68 EC.

35. In addition, I notice a certain harmony between my suggestion and the case-law on judicial cooperation in civil and commercial

32 — Komárek, J., 'In the court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure', *European Law Review*, No 32, 2007, p. 486 et seq., proposes an alternative model of the Community judicial system, which combines hierarchy with differentiation, using as a foundation the restrictions laid down in Article 68 EC.

33 — Cited above.

34 — Opinion of Advocate General Tizzano, points 32 to 38. The Court took that approach in the early judgment in Case 6/64 *Costa* [1964] ECR 585, and also in Case 107/76 *Hoffmann-La Roche* [1977] ECR 957. Although it is only for the sake of interest, I feel I must point out that, while in *Lyckeskog* the Court sought to base its findings on *Costa*, it cited the case incorrectly and founded the specific-case approach on Joined Cases 28/62 to 30/62 *Da Costa and Others* [1963] ECR 31. The similarity between the names of the parties in both cases is clear but, unless I am mistaken, the *Da Costa* judgment, which first laid down the *acte clair* doctrine, contributes little to the dispute resolved in *Lyckeskog*.

35 — The overwhelming majority of academic legal writers also take that view. Particularly emphatic is Alonso García, R., *El juez español y el Derecho comunitario*, Tirant lo Blanch, Valencia, 2003, p. 228: 'if national courts against whose decisions there is no judicial remedy are excluded from seeking a preliminary ruling on interpretation or on validity from the Court of Justice, an interpretation of that system in accordance with the abstract or organic approach would be liable to lead to serious errors not only of interpretation but also in the application of Title IV of the Treaty, since it would leave the way open for national courts to declare Community acts invalid, and such decisions would be irreversible if they were made, at sole or last instance, by lower courts'. See also Cheneviere, C., 'L'article 68 CE — Rapide survol d'un renvoi préjudiciel mal compris', *Cahiers de Droit Européen*, No 40, 2004, pp. 569 to 572; Girerd, P., 'L'article 68 CE: un renvoi préjudicial d'interpretation et d'application incertaines', *Revue Trimestrielle de Droit Européen*, No 35 (2), 1999, p. 243, and Valle Gálvez, A., 'Las nuevas competencias del Tribunal de Justicia de las CCEE tras el Tratado de Ámsterdam', *Noticias de la Unión Europea*, 2000, No 186, p. 29.

matters. In *Danmarks Rederiforening*, [36] the Court declared admissible a reference for a preliminary ruling based on the Protocol on the Interpretation by the Court of Justice of the Brussels Convention, [37] which restricted the right to seek preliminary rulings in Denmark to the Højesteret (Supreme Court), even though, in that particular case, the reference had been made by the Arbejdsret (Labour Court), acting as a court of last instance. In paragraph 16 of the judgment, the Court observed that a literal interpretation of the protocol 'would have the result that in Denmark questions concerning the interpretation of the Brussels Convention, arising in actions such as the present, could never be the subject of a reference for a preliminary ruling'. On those grounds, the reference for a preliminary ruling was ruled admissible and the specific-case approach was applied in a similar, although not identical, sphere to that of Article 68 EC. [38]

36. In the light of those considerations, I am inclined to postulate that, since Article 68 EC refers to courts against whose decisions there is no judicial remedy, it applies to supreme courts and to any other national courts against whose decisions there is no right of appeal.

37. Accordingly, despite the fact that the Juzgado de Primera Instancia e Instrucción No 5 de San Javier does not sit at the apex of the national judicial pyramid, it is competent to make a reference for a preliminary ruling under Article 68 EC if no appeal lies against its decisions. All that remains to be established is whether, under Spanish procedural rules, individuals have the right to challenge the rulings of that court.

3. The system of remedies under Spanish civil law

38. In its order, the Juzgado de Primera Instancia e Instrucción No 5 de San Javier states that it is competent to hear and determine an action against a measure of organisation of the clerk of the same court; such measures may be scrutinised by means of an action for review (Article 224 LEC) which, although intended for contesting interim decisions and orders (Article 451 LEC), may be extended *ex lege* to measures of organisation.

39. In accordance with Article 455 LEC, there is a right of appeal against final orders. That method of challenge also covers orders which determine an action for review.

36 — Case C-18/02 *DFDS Torline* [2004] ECR I-1417.

37 — Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

38 — Strictly speaking, the case did not fall within the scope of Article 68 EC because, although **Council** Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) was already in force when the reference was made, it was not applicable in Danish territory where it was only possible to rely on the Brussels Convention which, in the other Member States, had become a Community instrument thanks to the regulation.

40. The ordinary action for review, provided for in the LEC as a general appeal against interim decisions and orders, [39] is framed as a non-devolutive appeal in which the court which delivered the decision scrutinises itself, reviewing and, if it considers it appropriate, setting aside the decision. [40] However, where an action for review is brought against a measure of organisation, it has a rather different character, since an act of a lower body is contested before another, higher, body: thus, a measure adopted by a court clerk is reviewed by the court itself. Since there is a hierarchy between the two bodies, Article 451 LEC provides individuals with a remedy, albeit one which has certain special features vis-à-vis an ordinary action for review. [41]

41. That distinction explains the diversity of the solutions in national case-law. The Commission has cited a number of orders of lower courts giving leave to appeal against orders determining an action for review against a measure of organisation. [42] However, that point is not clear because there is conflicting case-law [43] and a certain amount of academic disagreement, [44] leading to the conclusion that no appeal lies against such orders in actions contesting measures of organisation. The fact that the LEC is a recent legislative text whose provisions have yet to undergo the scrutiny for which the Spanish Tribunal Supremo (Supreme Court) has competence may contribute to that procedural debate. However, it is beyond question that, as matters currently stand, it has not been specifically established under national procedural law whether an appeal may be brought against a decision such as the one pending before the Juzgado de Primera Instancia e Instrucción No 5 de San Javier.

42. In those circumstances, two matters must be taken into consideration.

43. First, it is important to draw attention to the referring court's view that it has the status of a court of last instance. The third section in the order for reference states that, in the opinion of the court, Article 454 LEC is applicable, and '[c]onsequently... it must be considered that there is no appeal against the decision on the admission or non-admission of the application for judicial cooperation'. The dispute between Spanish courts on the subject of the LEC must be resolved by the highest court of that Member State and never by the Court of Justice which, were it to interpret Article 454 LEC, would be

39 — Articles 451 to 454 LEC.

40 — Armenta Deu, T., *Lecciones de Derecho Procesal Civil*, 3rd edition, Marcial Pons, Madrid, 2007, pp. 239 to 241, and Díez-Picazo, I. and de la Oliva Santos, A., *Derecho Procesal Civil. El proceso de declaración*, 3rd edition, Ramón Areces, Madrid, 2004, pp. 251 and 252.

41 — In fact, prior to the 2000 version of the LEC, the method for challenging decisions of court clerks was the 'action for revision'. The current version of Article 224 LEC retains a trace of the old nomenclature, referring, in the heading, to the '*revision* of measures of organisation' (emphasis added). It may be concluded, therefore, that the use of the action for review to contest measures of organisation is an exceptional remedy which is not at all in keeping with the structure of non-devolutive actions.

42 — Orders of the Audiencia Provincial (Provincial Court), Castellón, of 26 June 2006 and the Audiencia Provincial, Cáceres, of 24 January 2006.

43 — Order of the Audiencia Provincial, Madrid, of 25 January 2005.

44 — Aguilera Morales, M., 'Resoluciones judiciales y diligencias de ordenación', *Tribunales de justicia: Revista española de derecho procesal*, No 3, 2000, p. 277, and Bonet Navarro, A., *Los recursos en el proceso civil*, La Ley, Madrid, 2000, p. 88.

conducting itself like a Spanish civil court and taking part in a disagreement which it is for the courts of Spain to settle. [45] If the referring court is certain that its decisions are not subject to appeal, the Court of Justice must put its trust in that court, which has come to it seeking criteria for the interpretation of Community law.

44. Second, referring to points 28 to 37 of this Opinion, where uncertainties arise, it is appropriate to choose the approach which is most favourable to the reference for a preliminary ruling. Accordingly, the confusion inherent in Spanish procedural law may have only one outcome in respect of the present dispute, that is, recognition of the competence of the referring court.

4. Corollary

45. For all of the reasons set out, since Article 68 EC does not provide that courts must sit at the top of a Member State's judicial structure and since, after assessing the circumstances of the case, the Juzgado de Primera Instancia e Instrucción No 5 de San Javier gives a decision which is not subject to appeal, the first plea of inadmissibility raised by the Commission must be dismissed.

B — *Second objection to admissibility: the existence of a dispute in the main proceedings*

46. It remains to be established whether the Spanish referring court satisfies another essential condition in order to seek a preliminary ruling. This time, in contrast to the previous point, the contested condition has its origins in case-law, which requires that the question must arise in the context of proceedings. In the words of the Court, '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'. [46] The Commission contends that the Juzgado de Primera Instancia e Instrucción No 5 de San Javier is seised of a dispute which is not *inter partes* and, moreover, in which it does not exercise judicial authority. Accordingly, the Commission asks that the reference for a preliminary ruling be declared inadmissible.

47. It is clear that the grounds of inadmissibility developed by the Court in relation to Article 234 EC apply equally to preliminary rulings sought under Article 68 EC. The wording of the latter article, which provides that Article 234 EC 'shall apply to this title

45 — The Court of Justice is competent to interpret Community law and the national court is competent to identify and interpret the applicable national law. That delimitation, based on respect for the procedural autonomy of the national courts, is deeply rooted in the case-law of the Court (Case C-155/73 *Sacchi* [1974] ECR 409; Case 111/75 *Mazzalai* [1976] ECR 657; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003; and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747).

46 — Orders in Case 138/80 *Broker* [1980] ECR 1975, and Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4; judgment in *Job Centre*, paragraph 9.

[IV]', demonstrates that the preliminary ruling system and the relevant case-law are fully applicable, subject only to the exceptions which are subsequently laid down in Article 68 EC. [47] Therefore, in accordance with the case-law of the Court on the grounds of admissibility under Title IV of the EC Treaty, it is appropriate to analyse a number of judgments.

1. The requirement that there must be a dispute

48. The success of the preliminary ruling procedure lies mainly in the broad terms chosen by the founding States when they drafted Article 234 EC, which, however, also enabled certain restrictions to be set on the submission of questions. The following are among the most notable conditions: the reference must be made by a court or tribunal; [48] the order for reference must explain the factual and legislative context of the questions asked; [49] hypothetical or fictitious questions are not permitted; [50] and, in connection with the present point, there must be a dispute. [51]

49. There is a special relationship between the first and last conditions referred to. The definition of 'court or tribunal' sets a boundary with regard to the participants in the Community judicial dialogue; not all bodies may take part in that dialogue and instead it is restricted to bodies invested with jurisdiction. In *Vaassen-Göbbels*, [52] the Court appeared to evaluate rigorously the criteria which a body must satisfy in order to participate in the dialogue. In my Opinion in *De Coster*, [53] I proposed a reframing of that case-law, which had been developed subsequently in such a way that considerable legal uncertainty had ensued. I note that recently the Court is more inclined to restrict the dialogue to bodies which are truly judicial in nature. It may be deduced from the most recent judgments that a stricter review is being established, in line with the original spirit of the *Vaassen-Göbbels* judgment, and that approach is only relaxed in certain cases in the interests of effective legal protection. [54]

50. The definition of 'court or tribunal' is closely linked to the definition of 'dispute' because, in order to ascertain whether a body dispenses justice in accordance with the *Vaassen-Göbbels* criteria, there must be *inter partes* proceedings. Despite that supposed link, the two criteria are different and the Court has rightly examined them separately.

51. Even where a body is part of the judicial structure of a State, it does not always act in

47 — The Court applied that case-law to references for a preliminary ruling under Article 35 EU, stating that, '[l]ike Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court "considers that a decision on the question is necessary in order to enable it to give judgment", so that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU' (Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 29). I do not rule out the possibility that the Court may modify that criterion in the future, since I venture to stress that, in that judgment, the Court held that the traditional criteria of admissibility were applicable '*in principle*'.

48 — Case 61/65 *Vaassen-Göbbels* [1966] ECR 261.

49 — Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6.

50 — Case 244/80 *Foglia* [1981] ECR 3045, paragraphs 18 and 20.

51 — *Job Centre*.

52 — Cited above.

53 — Opinion in Case C-17/00 [2001] ECR I-9445.

54 — Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 34, and Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraphs 31 to 35.

the exercise of judicial powers. The first condition concerns the *subjects* of the preliminary ruling dialogue. The last condition concerns the *functions* carried out by both participants. Therefore, the Court has devised one ground of admissibility which is connected to the nature of the body concerned and another for the tasks it performs. In other words, even if it has the attributes of a court, a body does not always exercise judicial authority. They are separate aspects which, correctly in my opinion, are treated differently.

52. The conduct of the Court is logical. The preliminary ruling procedure is framed as cooperation between courts with a view to reaching a uniform solution which is appropriate to the case concerned and is compatible with the principle of the consistency of Community law. It is, therefore, a constructive relationship *between courts* and not *between proceedings*, which explains the subtlety employed by the Court when defining the concept of court or tribunal; however, once the participants in that cooperation have been established, it has tended to be much more flexible. Otherwise, it would lead to rather strange results: for example, classifying non-judicial bodies as courts or tribunals would result in the importance of the requirement that there must be a dispute being reduced to such an extent that it disappears altogether; however, if the alternative approach were taken, the outcome would be equally worrying, since a quasi-judicial body is unlikely to perform a judicial function and, therefore, would never be competent to make a reference for a preliminary ruling.

53. There are also reasons of judicial policy which must be considered, since the Court enters into a dialogue with national courts so that those courts may subsequently exercise the traditional powers of a court, such as the adoption of interim measures, the enforcement of judgments, and the protection of procedural safeguards. Those powers are also available to courts where they are seised of proceedings which are not fully *inter partes* or where their task has more administrative overtones. To enable a national court, as a court of Community law, to give and enforce its decision in the light of Community provisions, the determination of whether or not a dispute exists must be undertaken with care.

2. *Inter partes* proceedings and the nature of the judicial function: two elements of the same requirement

54. In the instant case, although the referring court is part of the Spanish judicial system, there are uncertainties regarding whether the action concerned is *inter partes* and whether the decision of the court is judicial in nature. Despite the fact that the two elements have become intertwined so that together they form the requirement that there must be a dispute, they are different aspects which have been considered separately in case-law.

55. Thus, the Court of Justice has not regarded as crucial the requirement that proceedings must be *inter partes* in order for a national court to seek a preliminary ruling. [55] Once the cooperation *between courts* has been confirmed, the national court has a considerable measure of discretion when it comes to making a reference. The Court has reiterated that view on many occasions, stating that 'the requirement that the procedure be *inter partes* is not an absolute criterion'. [56]

56. In *De Coster*, I drew attention to the lack of clarity surrounding the requirement that proceedings be *inter partes*. [57] The Court of Justice has not stipulated as a general rule that all references for a preliminary ruling where there is only one party to the national proceedings are admissible. However, it has laid down three criteria which must be satisfied for proceedings to be *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. The reference to that third criterion is found in Article 6 of the European Convention on Human Rights and in the case-law of the European Court of Human Rights. Given that the existence of those criteria has been established, all of which have been proved in a tactical and rather disorganised manner before the Court, the requirement that proceedings must be *inter partes* is deemed to be satisfied for the purposes of Article 234 EC.

57. A similar dynamic governs consideration of the nature of the judicial function. In *Job Centre*, [58] the Court tentatively stated that the national court must carry out judicial functions in the strict sense. That case-law was subsequently upheld but its true meaning is clear on closer inspection of the procedural context of each dispute. Thus, in *Job Centre*, the Tribunale civile e penale di Milano (Civil and Criminal District Court, Milan) was seised of an application for confirmation of the memorandum of association of a company in a non-contentious procedure. Since the decision sought from the Tribunale was an order to register the company, the Court ruled that there was no judicial activity. The Court also found that that criterion was not fulfilled in *Salzmann*, [59] in which an Austrian Bezirksgericht (district court) referred a question for a preliminary ruling in its capacity as the court responsible for maintaining the land register. The same finding was reached in *HSB-Wohnbau*, [60] where a preliminary ruling was sought by the Amtsgericht Heidelberg (Local Court, Heidelberg) in its capacity as the court responsible for maintaining the commercial register.

58. However, the Court has accepted references for a preliminary ruling such as the one

55 — That diminishing importance of the *inter partes* requirement began in the judgment in Case 43/71 *Politi* [1971] ECR 1039. In Case 162/73 *Birra Dreher* [1974] ECR 201, the Court succinctly based on those less stringent criteria its finding that a reference for a preliminary ruling is not conditional on the requirement that the procedure which concludes with the reference for a preliminary ruling by the national court must be contested.

56 — Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 37, and *De Coster*, paragraph 14.

57 — Opinion, points 29 to 38.

58 — Cited above.

59 — Case C-300/01 [2003] ECR I-4899.

60 — Order in Case C-86/00 [2001] ECR I-5353.

from the president of the Tribunale di Torino (District Court, Turin) in a summary procedure which did not involve any discussion between the parties and which was resolved by decree. [61] The Italian Pretori (Magistrates) have also been held to perform a judicial function where they combine the functions of an examining magistrate and a prosecutor, as was the case in *Pretore di Cento* and *Pretore di Salò*. [62] The Court has also taken into consideration situations where a decision is nominally taken by a political body but the substantive decision is left to a court. That was the case in *Garofalo and Others*, [63] in which the Court was required to determine whether the Italian Council of State complied with the requirements of Article 234 EC when it issued an opinion in an extraordinary petition, the final decision on which would be referred to the President of the Italian Republic for a formal ruling. Furthermore, the advisory capacity of certain courts, which do not issue a binding act, has been regarded as sufficient for referring a preliminary ruling, in accordance with the judgments in *Österreichischer Gewerkschaftsbund* [64] and *Felix Swoboda*. [65] Recently, when giving its second preliminary ruling under the urgent procedure, the Court accepted, in *Santesteban Goicoechea*, [66] a reference from the indictment division of a French court of appeal. According to the French Council of State, such bodies have administrative jurisdiction when, as occurred in that case, they draw up an opinion on a request for extradition. The Court concentrated in its analysis on the binding nature of the decisions of those bodies and did not attach great importance to the non-judicial nature of their decisions. [67]

59. Further, where the requirements for establishing a judicial function are not satisfied, the Court laid down a special exception in *Job Centre* in which, having declared that the Tribunale civile e penale di Milano lacked jurisdiction on the grounds that it was exercising administrative authority, the Court went on to state: '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], in respect of an application for the annulment of a measure adversely affecting the petitioner.' [68] That alteration of case-law has a laudable purpose, since, where a reference for a preliminary ruling in a quasi-judicial procedure is ruled inadmissible, there is a risk that the system of remedies against the decisions of the court concerned is also unusual in nature. In those circumstances, the reference for a preliminary ruling would never reach the Court, regardless of its importance to the dispute and to the consistency of Community law.

60. The Court applied that exception in *Cartesio*, [69] a reference for a preliminary ruling from the Szegedi Ítélőtábla (Court of Appeal, Szeged) (Hungary), in an appeal against a decision to refuse registration adopted by a commercial court. Despite the fact that the procedure at first instance was not *inter partes* and the decision resolving that procedure was not judicial in nature, the Court found that, notwithstanding the particular features of the procedure, at the appeal stage there were sufficient grounds for

61 — *Politi*.
62 — Case 110/76 [1977] ECR 851, and Case 14/86 [1987] ECR 2545, paragraph 7, respectively.
63 — Joined Cases C-69/96 to C-79/96 [1997] ECR I-5603, paragraphs 19 to 26.
64 — Case C-195/98 [2000] ECR I-10497, paragraphs 24 to 30.
65 — Case C-411/00 [2002] ECR I-10567, paragraphs 25 to 27.
66 — Case C-296/08 PPU [2008] ECR I-6307.
67 — Ibid., paragraph 36.
68 — *Job Centre*, paragraph 11.
69 — Paragraphs 58 to 60.

applying the exception laid down in *Job Centre*. It is important to point out that the procedure at first instance and the appeal were heard by two different courts, that there were marked special procedural features, and that *Cartesio* was the only party to have entered an appearance. Even so, for the purposes of replying to the uncertainties raised in the proceedings, the Court recognised the jurisdiction of the appeal court to seek a preliminary ruling.

3. The case-law applied to the present case

61. It may be inferred from the order for reference and from the national law applicable to the main proceedings that the Juzgado de Primera Instancia e Instrucción No 5 de San Javier is seised of an application for review of a measure of organisation adopted by the clerk of that court, ruling inadmissible a request for the service of extrajudicial documents. It is necessary to establish whether the reference for a preliminary ruling is admissible in the light of two independent elements: the requirement that the proceedings must be *inter partes*, on the one hand, and the requirement that the decision of the referring court must be judicial in nature, on the other.

(a) The *inter partes* principle in the present case

62. Roda Golf lodged the action for review against a decision of a court clerk which precluded it from relying on Regulation No 1348/2000 and had a direct effect on its legal rights. The purpose of the action is to expedite the service of judicial and extrajudicial documents, specifically to protect the powers and rights of those who are competent or have a duty to notify certain acts. It is clear, therefore, that Roda Golf has a direct interest in bringing an action for review.

63. In addition, during the review the referring court considers only whether there has been an infringement of 'any legal provisions' (Article 224(2) LEC). The decision resolving the action upholds or dismisses a legal argument. Accordingly, the referring court is seised of a matter which was delimited beforehand in the application lodged by Roda Golf.

64. Finally, actions for review are governed by civil legislation on the review of orders, interim decisions and, exceptionally, measures of organisation. Such actions are subject to the general rules on appeals and to the principles underlying effective judicial protection.[70] The referring court must ensure observance of all the procedural safeguards to which Roda Golf is entitled in any challenge brought before the Spanish civil courts.

70 — Díez-Picazo, I. and De la Oliva Santos, A., *Derecho procesal civil* ..., op. cit.

65. Consequently, the main proceedings are *inter partes* for the purposes of the reference for a preliminary ruling.

b) The judicial nature of the function carried out by the referring court in the present case

66. When adopting the measure of organisation which is contested in the main proceedings, the clerk of the court was not acting as a judicial authority. The tasks which individuals charged with assisting judges must perform do not transform those individuals into courts. It is significant that their decisions are reviewable by their hierarchical superiors, in accordance with Article 224 LEC. Moreover, there would be an infringement of the *Job Centre* case-law were the reference to arise as a result of proceedings the sole purpose of which was the service of documents under Regulation No 1348/2000, since the measures laid down in that provision are used to monitor the correct operation of a civil procedure but not proceedings themselves.

67. However, in the instant case, it is appropriate to apply the exception laid down in the *Job Centre* judgment, in accordance with which the reference for a preliminary ruling is admissible if it arises in the context of a subsequent action, notwithstanding the fact that original competence for the matter was not judicial. As I have explained above, having regard to the official who first gave a decision on the request and to the subject-matter in issue, the Juzgado de Primera Instancia e Instrucción No 5 de San Javier is not acting in a judicial context in the case referred. However, by seeking a preliminary ruling in the context of an action for review, the referring court is 'exercising a judicial function... in respect of an application for the annulment of a measure adversely affecting the petitioner'. [71]

68. As I have argued, actions for review are a Spanish civil law remedy and are classified as non-devolutive appeals because they are heard by the court which gave the contested decision. Actions for review are governed by specific rules but also by the general provisions of the LEC. That argument is borne out by the fact that the action may be brought where there is evidence of a direct interest, where the subject-matter is clearly defined and where there is full compliance with all the procedural safeguards, as I explained in points 62 to 64 of this Opinion.

69. Therefore, the judicial nature of the function carried out is established for the purposes of the reference for a preliminary ruling.

71 — *Job Centre*, paragraph 11.

4. Corollary

70. In the light of all of the foregoing considerations, since it has been confirmed that the main proceedings are *inter partes* and that the function performed by the referring court is judicial in nature, I propose that the Court should dismiss the second plea of inadmissibility raised by the Commission.

VI — The questions referred for a preliminary ruling

71. The aim of Regulation No 1348/2000 was to improve the internal market, in view of the fact that efficiency and speed in the service of judicial and extrajudicial documents contributes to strengthening the objectives of the Treaties. It was not a new initiative since, as long ago as the 1960s, in the context of the Hague Conference, the 1965 convention on the subject was adopted and has since been ratified by the majority of the Member States of the European Union.[72] The Treaty of Amsterdam impeded the entry into force of another convention on the service of documents, drafted in accordance with the former Article K.3 EU,[73] but its subject-matter was revived in the regulation which the Court is now required to interpret.

72. As the title suggests, Regulation No 1348/2000 concerns the service of judicial and extrajudicial documents but is limited to civil and commercial matters. The Juzgado de Primera Instancia e Instrucción No 5 de San Javier seeks a precise definition of 'extrajudicial documents' because it is uncertain whether a notarial instrument of notification and request, accompanying 16 letters giving notice of the termination of a contract of sale, is that type of document.

73. Two distinct but occasionally intertwined points of view are apparent from the written observations lodged in these preliminary ruling proceedings. On the one hand, two Member States maintain that extrajudicial documents may be served under Regulation No 1348/2000 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 de San Javier, those Member States have proposed that the Court should restrict the service of extrajudicial documents to situations where proceedings are under way, taking the view that that resolves the question referred by the Spanish court. On the other hand, the majority of the Member States, together with the Commission and the applicant in the main proceedings, contend that Regulation No 1348/2000 applies to the service of extrajudicial documents even where proceedings have not been commenced, basing their contention on Article 16 of the regulation, which governs such documents.

74. The referring court has referred two questions and that duality is reflected in the

72 — Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded on 15 November 1965. Today, the Hague Conference on Private International Law states in its database that, in the EU, only Austria and Malta have not ratified the convention.

73 — Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed on 26 May 1997 (OJ 1997 C 261, p. 2).

views put forward by those who have participated in these proceedings. There is a clear continuity between the two questions even though they are separate entities, and therefore I propose that the Court should act in the same way by first of all considering whether Regulation No 1348/2000 provides for the service of extrajudicial documents where court proceedings have not been commenced and, second, by supplying an authoritative interpretation of 'extrajudicial documents', a term which, unlike judicial documents, has not been defined in the regulation.

A — *The procedural context of extrajudicial documents and the requirement that there must be a dispute*

75. The Kingdom of Spain and the Slovak Republic argue vigorously that, even though they refer to contexts unconnected with the legal reality, extrajudicial documents are governed by Regulation No 1348/2000 if their service is essential during court proceedings. That may be deduced from the functions normally performed by courts in the legal traditions of the Member States and from a literal interpretation of the preamble to Regulation No 1348/2000.

76. Recital 6 in the preamble to the regulation refers to '[e]fficiency and speed in judicial procedures in civil matters' and states that 'the transmission of judicial and extrajudicial documents is to be made direct and by rapid means'. It follows from that statement that the regulation is aimed at the improvement of procedures with a cross-border element. Accordingly, those Member States argue, the scope of Regulation No 1348/2000 is restricted to the service of extrajudicial documents in proceedings brought before a national court.

77. The view of the Commission, to the effect that an extrajudicial document becomes a judicial document as soon as it is entered in a case-file, cannot be upheld. [74] During proceedings, it is occasionally necessary to have recourse to Regulation No 1348/2000 to serve documents such as notarial acts or company resolutions, but that fact does not transform those documents into judicial documents merely because they are in the record of the proceedings of which a court is seised. However, the Commission is more persuasive in its assertion that such an extensive limitation of the scope of Regulation No 1348/2000 would have been expressly mentioned in the provision. The broad interpretation of a recital is perhaps not the most convincing argument to bolster the position of the Kingdom of Spain and the Slovak Republic, particularly when there are other more persuasive arguments in support of the opposing view.

78. Article 65 EC is the legal basis for Regulation No 1348/2000. The acts of secondary law which may be adopted under the article are '[m]easures in the field of judicial cooperation in civil matters having cross-border implications', provided that they contribute to the 'proper functioning of the

74 — Paragraph 45 of the Commission's observations.

internal market'. The article refers to the service of judicial and extrajudicial documents but states nothing to support the view that proceedings must be under way. Rather, Regulation No 1348/2000 calls for flexibility, speed, efficiency and the smooth transmission of both judicial and extrajudicial documents without requiring at any point that those documents must be included in a record of court proceedings. Recital 6 might have been drafted as a reminder of the particular importance which the expeditious transmission of documents acquires during court proceedings, without being exclusive in nature vis-à-vis other situations. [75]

79. In addition, the glossary approved by the Commission, which is not intended to be exhaustive but provides a very good indication of the variety of documents in each Member State, favours a broad interpretation of the scope of Regulation No 1348/2000. For example, the glossary categorises as extrajudicial documents Belgian, German and Hungarian notarial acts. Portugal provides a detailed list of private legal instruments, such as instruments concerning the assignment of credit, the resignation of a company director and mergers and acquisitions. As far as the United Kingdom is concerned, '[l]egal documents which must be served in connection with any non-judicial civil or commercial matter' are extrajudicial documents. However, the most striking example is that of Austria, which classifies 'documents seeking to safeguard, pursue or counter a civil or commercial claim, *but without involving civil court proceedings*' as extrajudicial documents. [76]

80. It may be inferred from all of the foregoing that, for the purposes of Regulation No 1348/2000, 'extrajudicial documents' are not only documents which are included in a case-file and that instead the term also covers documents which are required to be served regardless of whether or not proceedings have been commenced. I acknowledge that a hasty interpretation might lead to abuses which would be liable to overload the operational capacities of national courts. However, that concern does not justify restricting the scope of Regulation No 1348/2000. Instead, it must be taken into account when considering the definition of 'extrajudicial documents', a point which it is appropriate to examine next.

B — *The definition of 'extrajudicial documents' for the purposes of Regulation No 1348/2000*

81. All the Member States which have participated in these preliminary ruling proceedings argue that it is for each national legislature to define 'extrajudicial documents' for the purposes of Article 16 of Regulation No 1348/2000. While a number of States,

75 — On the importance of Regulation No 1348/2000 for the purpose of safeguarding the aims pursued by the measures referred to in Article 65 EC, see Marchal Escalona, N., *El nuevo régimen de la notificación en el espacio judicial europeo*, Comares, Granada, 2002, pp. 7 to 9.

76 — Emphasis added.

such as Latvia and Germany, contend that the matter as a whole should be resolved by reference to national legislation, other States, such as the Czech Republic, Hungary, Poland, Spain, Greece and Italy, propose a more composite approach, suggesting a number of common criteria to give substance to a Community definition while reiterating that each Member State has a certain freedom to define the concept.

82. With a view to resolving that delicate situation, [77] I believe that it is appropriate to refer to the case-law of the Court, specifically to the developing case-law on Regulation No 1348/2000, which provides some important guidance. In *Leffler*, [78] the Court was seised of the first reference for a preliminary ruling on the interpretation of that provision and it explained the consequences arising from the refusal of an addressee to accept a document served under Regulation No 1348/2000. The Court dismissed outright the claim that the effects of that refusal should be governed by each national legal system, citing the risks of a fragmented interpretation of the regulation. Declaring that the Treaty of Amsterdam had given 'a new dimension' [79] to measures adopted under what is now Title IV of the EC Treaty, the Court held that such a situation testifies to 'the will of the Member States to establish such measures firmly in the Community legal order and thus *to lay down the principle that they are to be interpreted autonomously*'. [80] In addition, the Court observed in that judgment that 'the choice of the form of a regulation, rather than that of a directive initially proposed by the Commission, shows the importance which the Community legislature attaches to the direct applicability of the regulation's provisions *and their uniform application*'. [81] The Court reached the same finding in *Weiss und Partner*, [82] again insisting, in connection with the effects of a refusal to accept service, that Regulation No 1348/2000 must be applied uniformly. [83]

83. In those circumstances, I do not believe that Article 16 of Regulation No 1348/2000 refers unconditionally to national law for the purposes of defining the Community concept of 'extrajudicial documents'. Such an important reference would be expressed in the regulation itself but neither its articles nor its history indicate such an intention. It is

77 — It is a sensitive subject, although, surprisingly, some writers have described it as irrelevant. Sharma, D.H., *Zustellungen im Europäischen Binnenmarkt*, Dunker & Humblot, Berlin, 2003, p. 84, makes an erroneous analysis, asserting that the subject-matter of the dispute itself should not give rise to uncertainties detrimental to the effectiveness of Regulation No 1348/2000. However, the fact that nine Member States have participated in these proceedings, together with the divergent opinions advanced, shows that the proceedings have generated a significant reaction.

78 — Case C-443/03 [2005] ECR I-9611.

79 — Ibid., paragraph 45.

80 — Ibid., paragraph 45, emphasis added.

81 — Ibid., paragraph 46, emphasis added.

82 — Case C-14/07 [2008] ECR I-3367.

83 — In the Opinion in *Leffler*, Advocate General Stix-Hackl points out that the regulation seeks the approximation as far as possible of the legal consequences of the rights laid down in its provisions. Accordingly, 'it is hardly logical to "flee" to national law in order to fill any regulatory gaps' (point 63).

possible to dispute the level of harmonisation pursued by the regulation but the Member States may not manipulate the interpretation of Article 16 of Regulation No 1348/2000 to suit themselves.

84. The wording of the article is somewhat ambiguous. It merely provides that extrajudicial documents may be transmitted for service in another Member State in accordance with the provisions of the regulation. That paucity of words contrasts with the preceding 14 articles which provide in detail for the service of judicial documents.

85. In that connection, I agree with the Czech Republic which defines extrajudicial documents 'by reference to the law of the State of origin, interpreted in the light of the aim of the regulation and the general principles which flow from all the national legal systems'. [84] That is the best way of approaching this case, since, with regard to extrajudicial documents, it was the intention of Regulation No 1348/2000 to take advantage of the experience of each Member State. The glossary adopted by the Commission reflects that national plurality and lays down guidelines not only for the documents listed therein but also for those which are not included but which, in accordance with a systematic analysis, fall within the scope of Regulation No 1348/2000. Article 16 recognises that the term 'extrajudicial documents' has a Community dimension even though it gives the Member States an important role, which is to provide a model to ensure that the Community definition covers all documents which, in accordance with the traditions of the Member States, are capable of being extrajudicial in nature. [85]

86. Accordingly, I invite the Court to define 'extrajudicial documents' for the purposes of Regulation No 1348/2000 in a manner which respects and is consistent with the legal diversity of the Member States and the objectives of the regulation.

87. The first clue to the definition of 'extrajudicial documents' is found in the legislation preceding Regulation No 1348/2000. The most important precedent is the 1965 Hague Convention which was ratified by the vast majority of the Member States and on which the Court relied in *Weiss und Partner*. [86] Unlike the regulation in issue in these proceedings, Article 17 of the convention defines the term 'extrajudicial documents' as

84 — Observations of the Czech Government, paragraph 8.

85 — Scarano, L.A., 'Il Regolamento CE n. 1348/2000 sulle notifiche internazionali intracomunitarie', in Ambrosi, I. and Scarano, L.A., *Diritto Civile Comunitario e Cooperazione Giudiziaria Civile*, Giuffrè, Milan, 2005, pp. 105 and 106.

86 — Paragraph 52.

documents 'emanating from authorities and judicial officers of a Contracting State'. Accordingly, under the convention, only public documents are extrajudicial in nature. [87]

88. Another important precedent is the 1997 Convention on the Service of Judicial and Extrajudicial Documents, which was drawn up on the basis of the now repealed Article K.3 EU and never entered into force. As I pointed out above, Regulation No 1348/2000 inherited the provisions of the draft convention, including the current Article 16. However, the draft convention contained a highly important explanatory report on which the Court also relied in *Weiss und Partner*. [88] In the commentary on Article 1, the report acknowledged the difficulty of forming a precise definition of 'extrajudicial documents'. However, it went on to state that the term covers 'documents drawn up by a public officer, for example a notarial deed or a writ, documents drawn up by Member States' official authorities or documents of a type or importance which require them to be transmitted and brought to the addressee's attention by official procedure'. That is a wider definition than the one in the Hague Convention, since, in addition to extrajudicial documents adopted by public authorities, it also covers other forms of document which are strictly private but particularly important vis-à-vis legal relationships.

89. Also informative is the glossary drawn up by the Commission, which includes an extremely wide variety of documents with only a limited number of shared features. In the light of that diversity, I propose that the Court should analyse the definition of 'extrajudicial documents' for the purposes of Regulation No 1348/2000 in the light of three central features which are referred to in the examples supplied in the glossary.

90. First, there are extrajudicial documents which require the involvement of an authority or a public act, particularly an 'authority' other than the courts of the sending State, which is exercising public powers. The term 'involvement' indicates that the document must be issued by that authority or that its subject-matter must be ratified by a public declaration. [89] Similarly, involvement by 'public act' refers to extrajudicial documents whose official nature does not arise from an individual or collegiate authority but rather from a legislative act. Thus, there are documents whose effects, conferred directly by law, are so important under a national legal system that

87 — The practical guide to the 1965 convention, drafted by the Permanent Bureau of the Hague Conference on Private International Law, provides examples of extrajudicial documents consistent with Article 17 of the convention: 'extrajudicial documents include ... demands [f]or payment, notices to quit in connection with leaseholds or contracts of employment, protests with respect to bills of exchange and promissory notes, provided that they are issued by an authority of huissier. Objections to marriage, consents for adoption, and acceptances of paternity are also in this class in so far as they imply compliance with certain formalities'. *Practical Handbook on the Operation of The Hague Service Convention*, Permanent Bureau — Hague Conference, Wilson & Lafleur Ltée, Montreal, 2006, p. 30. There is a slight reduction in the importance of the requirement that such documents must be public in the final sentence, provided that there is a degree of involvement by an authority.

88 — Paragraphs 53 and 54. It is striking that the Court should categorically discount the usefulness of that report for the purposes of interpretation in the first case concerning Regulation No 1348/2000, *Leffler*. In paragraph 43 of the judgment in that case, the Court held: 'This interpretation cannot be successfully countered by the submission that the consequences of refusal of a document should be determined by national law. The comments in the explanatory report on the convention... cannot properly be relied upon in this connection.' That assertion is made to prevent fragmentation of the interpretation of the regulation at national level.

89 — Sharma, D.H., *Zustellungen* ..., op. cit., p. 84.

they warrant service in accordance with Regulation No 1348/2000. The explanatory report on the 1997 convention covers such acts when it refers to 'documents of a type or importance which require them to be transmitted and brought to the addressee's attention by official procedure'.

91. Second, such documents give rise to specific and different legal effects because they have undergone a formal procedure. The mere involvement of a public authority does not mean that all extrajudicial documents assume a character which differs from the one they would have had if they had not been submitted to that authority. Under national law, it is appropriate to require individuals to have recourse to the public authorities to strengthen the effectiveness of certain documents and, consequently, to bring stability and certainty to legal relationships. However, where the involvement of a public authority does not have a bearing on the effectiveness of a document, it is my view that it is not an 'extrajudicial document' within the meaning of Regulation No 1348/2000. Thus, in the present case, whether notice of termination of a contract of sale is given by private letter or by the involvement of a public authority formally recorded in a notarial instrument of notification and request is a matter which is capable of substantially altering the classification of the document concerned. [90]

90 — Sharma, D.H., *Zustellungen* ..., op, cit., p. 84, uses the termination of a private contract as an example of an extrajudicial document.

92. Third, to maintain consistency with the principal objective of the regulation, which is essentially to ensure efficient and rapid judicial cooperation in the territory of the Community, the extrajudicial document concerned must support a claim in possible court proceedings. There must be evidence of a connection, however slight, between the need for service, on the one hand, and the activation of the mechanisms of Regulation No 1348/2000, on the other. Otherwise, national courts would become courier services for litigants who have not even commenced proceedings. The Court must have regard to that situation by restricting the definition of 'extrajudicial documents' in accordance with this third requirement.

93. Consequently, it is my view that '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. It is for the national court to determine whether a notarial instrument of notification and request, used to give notice of the termination of a contract for the sale of immovable property, is an 'extrajudicial document' in the light of the three requirements set out.

VII — Conclusion

94. In the light of all of the foregoing considerations, I suggest that the Court should reply to the Juzgado de Primera Instancia e Instrucción No 5 de San Javier, declaring that:

(1) for the purposes of Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 'extrajudicial documents' are not only documents which are included in a case-file and instead the term also covers documents which are required to be served regardless of whether proceedings have been commenced;

(2) for the purposes of Regulation No 1348/2000, '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;

(3) it is for the national court to determine whether a notarial instrument of notification and request, used to give notice of the termination of a contract for the sale of immovable property, is an 'extrajudicial document' in the light of the three requirements set out.