OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 28 June 2005 [1]

I — Introduction

1. In this first case pertaining to the interpretation of Council Regulation (EC) No 1348/2000 [2] ('the Regulation'), the Court is essentially asked to clarify the legal consequences of the language rule laid down by the Regulation, in particular where the addressee of a document to be served avails himself of his right under Article 8 of the Regulation to refuse to accept service due to the absence of a translation of the document to be served into the official language of the Member State addressed. I would first point out that this is a reference for a preliminary ruling in relation to an act under Title IV of the EC Treaty, which is consequently made pursuant to Article 68 EC in conjunction with Article 234 EC.

2. In order to simplify and speed up the transmission and service of judicial and extrajudicial documents, [3] the Regulation introduced in particular a direct procedure between 'transmitting agencies' and 'receiving agencies', and in so doing established a language rule that is intended to take account of the differing interests of the claimant and the defendant. According to this rule, service is also to be possible without translation of the document to be served, specifically in order to simplify and speed up the procedure; conversely, the addressee acquires the right in certain circumstances [4] to refuse to accept a document because a translation is missing. This is the subject-matter of the language rule in question set out in Article 8 of the Regulation, although the wording of this provision

1 — Original language: German.

2 — Regulation of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37).

3 — See for example the sixth recital in the preamble to the Regulation: 'Efficiency and speed in judicial procedures in civil matters means that the transmission of judicial and extrajudicial documents is to be made direct and by rapid means between local bodies designated by the Member States.' See also the eighth recital: 'To secure the effectiveness of this Regulation, the possibility of refusing to accept documents is confined to exceptional situations.'

4 — For example if the document is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands. This language rule offers the addressee no comprehensive protection inasmuch as it is not concerned with the possibility of his lacking knowledge of one of these two languages, as the Commission rightly emphasises when it points out that the protection of the addressee intended by the Regulation is based in linguistic terms on an abstract approach, with the result that circumstances are conceivable in which the addressee is entitled to refuse to accept a document although he understands the content of the document to be served, and in which conversely he is not entitled to refuse to accept a document although he does not understand the content. For an example, see inter alia Vanheukelen, 'Le règlement n° 1348/2000 — Analyse et évaluation par un praticien du droit' in *Le droit processuel et judiciaire européen — Het Europees gerechtelijk recht en procesrecht*, 2003, p. 208 and footnote 56 therein.

leaves undecided the question of what legal consequences are entailed by the (legitimate) exercise of the right to refuse to accept a document. The questions referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) concern these legal consequences.

3. The question arises in particular as to whether the first transmission and service operation can have legal effects despite exercise of the right to refuse to accept a document, and if an affirmative answer is given, in conformity with what rules the subsequent sending of the missing translation must take place. Regulation No 1348/2005 clearly contains a regulatory gap. [5] These questions, which are also connected with the more general problem of the rectification of defects in cross-border service, would appear to be of significant practical importance. [6]

5 — It is uncontested that the question of the legal consequences of a legitimate refusal to accept a document has deliberately been left open. See for example the explanatory report on the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (OJ 1997 C 261, p. 26): 'The Convention contains no provision regarding the possible legal consequences of refusing to accept a document on account of the language used; it will be for the competent courts to decide on this matter.'

6 — The literature sometimes refers to the 'vexatious problem of the rectification of defects in cross-border service'; see for example Stadler, 'Förmlichkeit vor prozessualer Billigkeit bei Mängeln der internationalen Zustellung?', comment in relation to Oberlandesgericht (Higher Regional Court) Jena, 2.5.2001 — 6 W 184/01, IPRax 2002, p. 282. See also Mignolet, 'Le contenu des règles de procédure issues des règlements communautaires et leur sanction' in *Le droit processuel et judiciaire européen — Het Europees gerechtelijk recht en procesrecht*, 2003, p. 329 with references.

II — Legal background

4. Article 5 of Regulation No 1348/2000 provides:

'1. The applicant shall be advised by the transmitting agency to which he or she forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8.

2. The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs.'

5. Article 8 of Regulation No 1348/2000 provides as follows under the heading 'Refusal to accept a document':

'1. The receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than either of the following languages:

(a) the official language of the Member State addressed or, if there are several

official languages in that Member State, the official language or one of the official languages of the place where service is to be effected; or

(b) a language of the Member State of transmission which the addressee understands.

2. Where the receiving agency is informed that the addressee refuses to accept the document in accordance with paragraph 1, it shall immediately inform the transmitting agency by means of the certificate provided for in Article 10 and return the request and the documents of which a translation is requested.'

6. Article 9 of Regulation No 1348/2000 provides as follows in relation to the date of service:

'1. Without prejudice to Article 8, the date of service of a document pursuant to Article 7 shall be the date on which it is served in accordance with the law of the Member State addressed.

2. However, where a document shall be served within a particular period in the context of proceedings to be brought or pending in the Member State of origin, the date to be taken into account with respect to the applicant shall be that fixed by the law of that Member State.

3. A Member State shall be authorised to derogate from the provisions of paragraphs 1 and 2 for a transitional period of five years, for appropriate reasons.

This transitional period may be renewed by a Member State at five-yearly intervals due to reasons related to its legal system. That Member State shall inform the Commission of the content of such a derogation and the circumstances of the case.'

7. Article 19 of Regulation No 1348/2000 deals with the defendant not entering an appearance and provides:

'1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the

Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.'

III — Facts and procedure

8. These proceedings originate from a case before the Netherlands courts between the German claimant living in the Netherlands, Götz Leffler ('Mr Leffler'), and Berlin Chemie AG ('Berlin Chemie'), a company established in Germany and governed by German law.

9. On 21 June 2001, Mr Leffler applied in proceedings before the Rechtbank te Arnhem (Arnhem Local Court) for interim relief, seeking a ruling that a number of orders allowing seizure effected against him be set aside or alternatively lifted.

10. On 13 July 2001, this application was dismissed. Mr Leffler appealed against that decision to the Gerechtshof te Arnhem (Arnhem Regional Court of Appeal). Thereupon, Berlin Chemie was summoned to appear at the sitting of the Gerechtshof of 7 August 2001.

11. As a result of a procedural error, Berlin Chemie had to be summoned on 9 August 2001 to appear once again. Berlin Chemie failed to enter an appearance at the sitting arranged for 23 August 2001.

12. The Gerechtshof deferred a decision on Mr Leffler's application for judgment in default, because the summons did not satisfy the requirements of the Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure) and of the Regulation.

13. By a further writ of 7 September 2001, Berlin Chemie was summoned to appear at the sitting of the Gerechtshof of 9 October 2001. Berlin Chemie again failed to enter an appearance at the sitting.

14. A decision on Mr Leffler's request for judgment in default was once again deferred, pending the submission of information establishing compliance with the requirements of Article 19 of the Regulation with regard to service. Information was submitted at the sitting of the Gerechtshof on 4 December 2001.

15. By a judgment of 18 December 2001, the application was dismissed; in particular the Gerechtshof refused to grant judgment in default against Berlin Chemie, on the ground that the requirements of Article 8 of the Regulation had not been satisfied.

16. Mr Leffler lodged an appeal in cassation with the Hoge Raad against the judgment of the Gerechtshof, in which he pleaded that the Gerechtshof ought directly to have granted judgment in default and, in the alternative, that the Gerechtshof ought to have set a new hearing date and ordered that Berlin Chemie be summoned to appear on that day after rectification of any errors featuring in the previous writ.

17. The Hoge Raad held that neither Article 8 nor any other provision of the Regulation indicates what are to be the legal consequences of a refusal, within the meaning of Article 8(1), by the addressee to accept a document. It infers from this that there are fundamentally two possible interpretations, firstly that the defective service may be rectified and secondly that the defective service should be declared inoperative.

18. By judgment of 17 October 2003, received at the Registry of the Court of Justice on 20 October 2003, the Hoge Raad der Nederlanden therefore referred the following questions to the Court for a preliminary ruling, in accordance with Article 234 EC:

'1. Must Article 8(1) of the Regulation be construed as meaning that, in the event of refusal by an addressee to accept a document on the ground of failure to comply with the language requirement laid down in Article 8(1), it is possible for the sender to rectify that failure?

2. If the answer to Question 1 is in the negative: must refusal to accept the document be deemed to have the effect in law of rendering the service inoperative in its entirety?

3. If the answer to Question 1 is in the affirmative:

(a) Within what period of time and in what manner must the translation be brought to the attention of the addressee? Must notification of the translation satisfy the conditions which the Regulation imposes on the service of documents or can the manner of dispatch be freely determined?

(b) Does national procedural law apply in respect of the possibility of rectifying the failure?'

IV — Legal analysis

A — *General remarks in relation to Regulation No 1348/2000*

1. The objective of the Regulation

19. The primary objective of the Regulation is to improve and expedite the transmission between the Member States of judicial and extrajudicial documents in civil or commercial matters for service in another Member State. [7] This improved and expedited transmission of documents is intended to serve directly the 'proper functioning of the internal market'. [8]

20. It must be borne in mind that the transmission and service of documents lie within a triangle of conflicting priorities concerning the right to administration of justice, [9] the protection of defendants [10] and procedural economy. [11] Realisation of the abovementioned objectives therefore appears problematic in that prejudicial effects on the protection of defendants may be inherent in the expedition of the transmission of documents, for example if it is no longer guaranteed that the defendant will be able to prepare his defence effectively, whether for linguistic, temporal or other reasons. Protection of the defendant cannot, in turn, cause the claimant to be deprived of his right to a lawful judge, for example because the defendant is able to frustrate service.

21. There are additionally considerations related to sovereignty, which, inter alia, necessitate a decision in relation to the extent to which a State is prepared to renounce 'formal' methods of service, for example in favour of more modern forms of service such as service by post, [12] or the

7 — See in particular the second recital in the preamble to Regulation No 1348/2000 (cited in footnote 2).

8 — Second recital in the preamble to Regulation No 1348/2000.

9 — Also, and specifically, in the sense of the right to a lawful judge in accordance with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

10 — In the sense of safeguarding rights of defence. It is not by chance that Article 6(3)(a) of the ECHR states that 'everyone charged with a criminal offence has the ... minimum [right] to be informed promptly, *in a language which he understands* and in detail, of the nature and cause of the accusation against him' (emphasis added).

11 — These are the introductory words used by Heß in 'Die Zustellung von Schriftstücken im europäischen Justizraum', NJW 2001, p. 15.

12 — The assertion of State sovereignty, for example through transmission via authorities, can of course affect other aspects; service by post within international legal relations not only represents a renunciation of official methods of transmission and service, but unquestionably also reduces protection of the defendant if it is not ensured that operative service in linguistic terms requires the opportunity to be given to take effective note of the content of the document to be served.

extent to which a State is prepared to act as the 'vicarious agent' of another State in the service of documents.

22. These conflicting interests must therefore be balanced against each other in order to produce workable service rules for international legal relations.

23. Such balancing of interests appears all the more necessary because the legal rights involved are protected by general principles of Community law. At this point, it should only be recalled that, in accordance with settled case-law, where it is necessary to interpret a provision of secondary Community law and consequently its objectives, preference should be given as far as possible to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law. [13]

24. The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. [14] In this connection it takes account of the constitutional traditions common to the Member States and the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or which they have ratified. These treaties include the Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), [15] as is also apparent from Article 6(2) EU.

25. Inspired by this field of protection, which it is required to safeguard, the Court has developed the principle of fair legal process. [16] Although this principle also requires that proceedings be expeditious, it emphasises in particular equality of arms between the parties to the proceedings. However, it equally includes the protection afforded under the ECHR and consequently the general principles of law, the right to a lawful judge (Article 6(1)) and the right to a fair hearing (Article 6(3)). The provisions of the Regulation must be interpreted in the light of these principles, especially as the Regulation relates to procedural law, whose very objective is balancing the interests of the parties. The Regulation must thus primarily be considered in relation to this balancing of interests, as confirmed by the history of its origin.

2. The origin of the Regulation

26. International procedural law was concerned in particular to spare domestic claimants the complications of service abroad, especially through the mechanism

13 — See Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 21, Case C-314/89 *Rauh* [1991] ECR I-1647, paragraph 17, and Case C-181/96 *Wilkens* [1999] ECR I-399, paragraph 19.

14 — As an example, see Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 25.

15 — See Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18. See also the earlier judgment in Case 36/75 *Rutili* [1975] ECR 1219, paragraph 32.

16 — *Krombach* (cited in footnote 14), paragraph 26.

of fiction of service.[17] The State sovereignty esteemed under international law meant that, until such time as special instruments had been elaborated, service in international legal relations was possible only, if at all, through diplomatic channels.

27. This system was supplemented by international Conventions, which is hardly surprising given the proximity of the topic to State sovereignty. Such Conventions established procedures for the international transmission and service of documents, but they paid little attention to aspects of efficiency, not least because of the need to respect State sovereignty.

28. The 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ('the Hague Convention') served as a model, including in particular in connection with the Europeanisation of the law relating to service. Firstly, the Hague Convention improved the traditional system of service through diplomatic channels, by making it possible to effect service through the agency of central authorities. Secondly, the Hague Convention espoused the protection of defendants, and provides in particular, in Articles 15 and 16, that judgment is not to be given in default until it is established that the document to be served has actually reached the defendant and that service or delivery was effected in sufficient time to allow the defendant to defend.

29. Although the 1968 Brussels Convention[18] had the task within the European judicial area of coordinating concurrent proceedings in the Member States and guaranteeing the freedom of movement of judgments, so far as concerns the transmission of procedural documents it merely made reference, in Article IV of its Protocol, to the Hague Convention, which had been concluded a short time earlier.

30. The finding that the free movement of judgments in the internal market was being frustrated at the stage of service[19] was required in order to enable a new political initiative to be launched. In this context it must be borne in mind that even in intra-Community legal relations, service of a document is subject to dual judicial scrutiny: first during the initial trial, with regard to the possibility of giving judgment in default where appropriate, if for example a (foreign) defendant fails to appear at the time set for the hearing, but also subsequently in the recognition proceedings, where a judgment

17 — See the observations of Heß on comparative law, op. cit., pp. 16 and 17.

18 — Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (consolidated version in OJ 1998 C 27, p. 1, 'the Brussels Convention')

19 — See Heß, op. cit., pp. 17 and 18 and the citations therein

in default delivered in another State is required to be recognised. [20] In both proceedings any deficiencies in service may be the subject of debate, bringing associated delays and the inherent uncertainties and/or inconsistencies.

31. The Council, by an act of 26 May 1997, [21] drew up a Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters and recommended it for adoption by the Member States in accordance with their respective constitutional requirements.

32. The Regulation is substantially based on this Convention, which did not enter into force because the Treaty of Amsterdam created new provisions conferring competence in Articles 61 EC and 65 EC, by bringing within the Community framework those elements of the 'third pillar' relating to judicial cooperation in civil matters. This made the Convention obsolete. However, the provisions were taken over almost verbatim, [22] so that the Regulation must be interpreted with due regard to the Convention and the explanatory report. [23]

33. The language rule in Article 8(1) of the European Convention on Service corresponds to the language rule in Article 8(1) of the Regulation. Having regard to the aim pursued of speeding up the transmission of documents, service in a language other than the official language of the State addressed, namely in the language of the State of transmission, is allowed, not least in order to save translation costs, [24] provided that the addressee understands the language in question. The scope of this language rule was manifestly at issue during the negotiations: France and others demanded that the provisions relating to service should be harmonised as far as possible, whereas other States,

20 — Article 27(2) of the Brussels Convention.

21 — OJ 1997 C 261, p. 1 ('the European Convention on Service'). On the date of completion of the Convention, the Council took note of the explanatory report on the Convention (already cited in footnote 5). This explanatory report appears at p. 26 of the aforementioned Official Journal.

22 — See for example the fifth recital in the preamble to Regulation No 1348/2000: 'Continuity in the results of the negotiations for conclusion of the Convention should be ensured. The main content of this Regulation is substantially taken over from it.'

23 — The response to the Convention, and accordingly to the Regulation, in legal literature was generally critical, in particular on the ground that the Convention kept to the model of mutual judicial assistance between States, that is to say to the formal channel of service laid down in the Hague Convention, and consequently focused on this formal channel of service, as provided for in Article 2 to Article 11 of the Regulation. See for example Heß (cited in footnote 11), 15 (21 et seq.); Gsell, 'Direkte Postzustellung an Adressaten im EU-Ausland nach neuem Zustellungsrecht', EWS 2002, 115 (116); Cordopatri, 'Note sul regolamento CE N. 1348/2000', in *Giurisprudenza di merito*, Vol. XXXVI (2004), 10, 2141 (2153); Frigo, 'La disciplina comunitaria della notificazione degli atti in materia civile e commerciale: il regolamento (CE) n. 1348/2000', *Diritto processuale civile e commerciale communitario* 2004, 117 (p. 157).

24 — Meyer, 'Europäisches Übereinkommen über die Zustellung', IPRax 1997, 401 (p. 403).

such as the Federal Republic of Germany, favoured a national solution. A compromise was ultimately struck. [25]

B — *Consideration of the questions referred*

1. Introductory remarks in relation to the course of the examination

34. In most cases, linguistic problems are inherent in the transmission of judicial documents between Member States. An effective defence, and therefore in the final analysis protection of rights of defence and of the right to a fair hearing, presuppose the opportunity to take note of the document in question, which in turn may necessitate a translation.

35. The transmission and service of judicial or extrajudicial documents in intra-Community legal relations pursuant to the procedure laid down in Article 4 et seq. of the Regulation raises practical questions, not only due to the need for cooperation between authorities of different Member States, but also with respect to language barriers to be overcome. Added to this are legal questions which may arise not least from the lack of harmonisation of procedural law.

36. Article 8(1) of Regulation No 1348/2000, which the Court is asked to interpret, lays down a language rule that represents a simplification inasmuch as it does not automatically require documents for transmission to be translated. This advantage to the sender is offset by the addressee's right of refusal, in order to reestablish equality of arms. However, in so far as an addressee legitimately [26] avails himself of this right to refuse acceptance of a document, the Regulation unquestionably fails to set out the legal consequences of exercise of the right. [27]

37. In so far as the referring court essentially asks in the first question about the possibility of rectification, evidently understood as the subsequent submission of the initially absent translation of the document to be served, it must first be considered whether such a possibility of rectification is to be governed by Community law or national law.

25 — See point 2 of the introduction to the Explanatory Report on the 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 (cited in footnote 5).

26 — It can be left undecided at this point whether the legitimate exercise of the right to refuse to accept a document under Article 8(1) of the Regulation covers only those cases in which a translation of the document to be served in a language referred to in this provision is absent, or whether it also presupposes an evaluation by the national court having jurisdiction as to whether the exercise of the right must be considered to be improper. The order for reference contains no indications in this respect. It has also failed to address the criterion to be applied in respect of linguistic knowledge if the defendant, as in the main proceedings, is a legal person. On this and other questions, see Malan, 'La langue de la signification des actes judiciaries ou les incertitudes du règlement sur la signification et la notification des actes judiciaires et extrajudiciaires', *Petites affiches*, 17 April 2003, p. 6.

27 — See above, point 2.

38. If national law were to apply and were to stand in the way of rectification, it would also be necessary to examine whether the Community principle of effectiveness would in this case have to restrict the procedural autonomy of the Member State in question.

39. If, on the other hand, there is a possibility of rectification in the above sense, either under national law or under Community law, it would then be necessary to decide under what procedural rules the absence of service is to be rectified. The consequences inherent in such a remedy for any procedural time-limits to be adhered to are in particular open to question.

2. The legal consequences to which a legitimate refusal to accept a document may give rise

(a) Arguments of the parties

40. *Mr Leffler* submits that the Hague Convention[28] in particular cannot be used to interpret Article 8(1) of the Regulation, but that the European Convention on Service[29] together with its explanatory report must rather be used. Mr Leffler recalls that the addressee has the right to refuse to accept a document under the European Convention on Service too, but that the legal consequences inherent in the exercise of this right cannot be inferred from the wording of that Convention. It may be inferred from the explanatory report on the European Convention on Service that these legal consequences are to be defined in accordance with national law. Therefore, inasmuch as national law offers a possibility of rectification, Article 8(1) of the Regulation does not stand in the way of such a possibility, having regard where necessary to temporal restrictions arising out of Article 19 of the Regulation.

41. In case the Court were to prefer an autonomous interpretation of Article 8(1) of the Regulation, Mr Leffler argues that the Regulation should only protect the addressee from service of a document which he is not able to understand that produces detrimental legal effects for him. It should not, on the other hand, be possible to paralyse the entire proceedings. It would exceed the necessary protection of the defendant if the initial service that has failed for linguistic reasons were to be entirely inoperative.

42. Mr Leffler contends that errors on the part of, for example, translators or the court rather than the claimant himself cannot cause the claimant to forfeit his legal claim. Inoperative service would in particular cause the sender to fail to observe time-limits, which is especially unjustifiable if he was not responsible for the error. In this context, the protection granted to defendants in Article 19 of the Regulation is adequate.

28 — Cited in point 28.
29 — Cited in footnote 21.

43. On the other hand, *Berlin Chemie* states that service that fails to be effected on linguistic grounds is inoperative by virtue of Articles 7, 8 and 9 of the Regulation, in which the words 'all steps required for service' and 'refusal to accept a document' point to service that fails to be effected on linguistic grounds being inoperative.

44. Berlin Chemie also relies on Article 6 of the ECHR, under which legal acts that the defendant does not understand cannot produce any legal effects. An act that produces no legal effects cannot be 'rectified', but is inoperative, so that renewed service is necessary in order to produce legal effects. In the alternative, Berlin Chemie asserts that the claimant should not at all events be given more than one opportunity to correct any omissions, in particular if he has acted without legal assistance.

45. The *Commission* asserts that the Regulation must be interpreted in the light of the European Convention on Service, [30] because the rationale of that Convention is reproduced in the Regulation. The institutional developments resulting from entry into force of the Treaty of Amsterdam and following the gradual establishment of an area of freedom, security and justice must also be considered.

46. It is evident from the recitals in the preamble to the Regulation that the legitimate interests of all parties must be taken into account and that the unimpeded operation of judicial procedures should simultaneously be sought. The Regulation lays particular emphasis on the efficiency and expedition of judicial procedures.

47. The Commission points out that the language rule in Article 8(1) of the Regulation is based on an abstract approach, [31] so that refusal to accept a document cannot always be justified by compelling reasons related to the protection of defendants.

48. The Commission also emphasises that there is no obligation to refuse to accept a document in the event of failure to observe the language rule. It cannot be inferred from the wording of the Regulation, in particular from Article 8(1), [32] that effective service depends on observance of the language requirement.

30 — Cited in footnote 21

31 — See above, footnote 4.

32 — The Commission explicitly emphasises that the 10th recital, according to which, 'for the protection of the addressee's interests, service should be effected in the official language or one of the official languages of the place where it is to be effected or in another language of the originating Member State which the addressee understands', contradicts the clear wording of Article 8 of the Regulation in this respect.

49. Therefore, no conclusions may immediately be drawn in relation to the validity of the service procedure from the existence of the right to refuse to accept a document laid down in Article 8(1) of the Regulation. However, in the view of the Commission, the absence of any rules in relation to the consequences of a refusal to accept a document does not necessarily cause national law to apply in this respect, although it must be admitted that there are certain indications to this effect in the Regulation's preparatory documents.

50. The Commission takes the view that the application of national provisions in this context would lead to inconsistent legal consequences within the Member States and consequently to legal uncertainty.

51. The Commission therefore proposes that the legal consequences of a refusal to accept a document be determined autonomously, bearing in mind the restricted scope of guidance in this regard within the text of the Regulation itself.

52. The Commission firstly considers the idea of not allowing the failed initial service to produce any legal effect, but believes that this would disproportionately favour the defendant, contrary to the balance sought by the Regulation itself. The absence of a corresponding unequivocal legal basis also indicates that such inoperativeness should not be accepted. Finally, the claimant would as a result be deprived in some circumstances of his fundamental right to a lawful judge.

53. In the view of the Commission, it therefore complies with the tenet of the Regulation of ensuring proper operation of judicial procedures if the claimant is given the opportunity to 'rectify' the initial failed service by subsequently sending the missing translation. This is also supported by the wording and 'effet utile' of Article 8(2), according to which 'the request and the documents of which a translation is requested [are to be returned]'.

54. The *German Government* bases its opinion on the view that it was intended that the Regulation should not lay down the legal consequences in relation to the language rule in Article 8(1). It infers this from the drafting history of the predecessor rule in the European Convention on Service. Therefore, also taking account of the judgment in *Lancray*,[33] any legal consequence, and thus also the ability to rectify, must be assessed under national law.

33 — Case C-305/88 [1990] ECR I-2725, paragraphs 29 and 30.

55. The *Finnish Government* essentially follows the arguments of the German Government. In its estimation, it is evident in particular from the preamble to the European Convention on Service that it is fundamentally necessary to have recourse to the law of the Member States with regard to the legal consequences.

56. The *Netherlands Government* relies on Article 8(2) of the Regulation, which provides that only the documents to be translated are to be returned, and concludes from this, with regard to the unreturned remainder, that the defect can be cured in the event of transmission in accordance with the Regulation. It is also apparent from the history of the origin of Article 8(1) of the Regulation that rectification is possible since it is to be inferred from the explanatory report in relation to Article 8 of the European Convention on Service, which is comparable in this respect, that initial service that has failed for linguistic reasons can be rectified within a reasonable time-limit.

57. The *Portuguese Government* bases its view on a similar understanding of Article 8 (2) of the Regulation, and furthermore emphasises that any difficulties associated with the transmission of documents must be resolved in a spirit of cooperation in good faith between the parties.

58. In contrast, the starting point for the observations of the *French Government* is the fact that the Regulation emphasises protection of the addressee, this being evident in particular from its 10th recital. [34] However, having regard to the objectives of the Regulation, the French Government concludes that Article 8(1) of the Regulation requires national law to provide for the possibility of rectification of initial service that has failed to be effected for linguistic reasons, in order to guarantee a proper balancing of interests.

(b) Legal assessment

59. As already indicated, [35] it must be examined first whether the absence of a rule in relation to legal consequences in Article 8 (1) of the Regulation necessitates or allows recourse to national legal provisions. Thereafter, any requirements of Community law in relation to the legal consequences in question must be addressed.

(i) The relevant legal system

60. It is to be debated on a number of counts whether the legal consequences of the legitimate exercise of the right to refuse to accept a document under Article 8(1) of the Regulation must be based on national law simply because the Regulation provides no explicit rule in relation to legal consequences.

34 — See above, footnote 32.

35 — See above, point 37.

61. The very history of the origin of the Regulation demonstrates that national legal systems were often incapable of solving questions relating to international service, failing to achieve effective operation of procedures or to protect adequately the legitimate interests of both the claimant and the defendant. Instruments of international law also proved inadequate, so that an initiative at Community level was necessary. Regulation No 1348/2000 accordingly provides a specific tool in the shape of the decentralised procedure laid down in Article 2 et seq., which is amenable only to autonomous implementation, both itself and in particular in regard to any regulatory gaps. In my view an unmistakable regulatory connection exists between the recognition of a right, in this case in the form of a right to refuse to accept a document, and the legal consequences of the exercise of that right.

62. This need for autonomous interpretation of specific instruments of Community law can also be founded on the objectives of the legislation in question. [36] The Regulation has the objective of developing an area of freedom, security and justice, in which the free movement of persons is assured. [37] This objective alone requires approximation as far as possible of the legal consequences of rights arising out of the Regulation, since divergent interpretation of the legal consequences would lead to unacceptable legal uncertainty and fragmentation in the area of civil procedure in particular, which is sensitive in terms of fundamental rights.

63. It must also be borne in mind in this context that in the fourth recital the need for the Regulation is justified on the basis that its objectives cannot be sufficiently achieved at national level. Against this background, it is hardly logical to 'flee' to national law in order to fill any regulatory gaps.

64. It is also to be borne in mind that the law of Member States could preclude rectification, or could shape the procedural rules governing it in different ways. However, if a national legal system were able to preclude rectification, the question of the limits of the procedural autonomy of the Member State in question would arise in turn at Community level, for instance in the shape of the principle of effectiveness. This 'detour' via national law can be avoided if the Regulation, paying due regard to its restricted field of application, is interpreted autonomously with respect to the legal consequences of a legitimate exercise of the right to refuse to accept a document laid down in Article 8(1).

36 — The Court has relied on this need in other areas of Community law: I would for example simply recall at this point that in Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss* [2001] ECR I-8691 the Court interpreted autonomously the legal term 'consent' — that is specifically embodied in the civil law of the Member States and is to be found in Article 7(1) of Directive 89/104/EEC — on the basis of the directive's objectives. Concerning the Regulation, see also Mignolet (cited in footnote 6), p. 351 : '... l'objectif poursuivi par un instrument communautaire est determinant lorsqu'il s'agit de sanctionner une règle de procedure qu'il établit'.

37 — See the first recital in the preamble to the Regulation.

65. It must therefore be found that the field of application of the Regulation includes not only the circumstances in which the addressee may refuse to accept documents to be served, but must also include the resultant legal consequences.

(ii) The possible effects of service that is not effected as a result of the legitimate exercise of the right to refuse to accept a document

66. The question arises as to whether service which could not be effected as a result of the legitimate exercise of the right to refuse to accept a document under Article 8(1) of the Regulation must be considered to be entirely inoperative, or whether it can in fact produce certain legal effects.

— Is translation of the document to be served a precondition for operative service?

67. It must first be noted that neither the wording, nor the broad logic nor the spirit and purpose of Regulation No 1348/2000 demand translation of the document to be served. If such a translation is not recognisably conceived as a precondition for operative service, it is not clear how its absence can be regarded as a ground for the service procedure being inoperative. [38]

68. An obligation on the applicant, that is to say on the person in whose interest service is effected, to arrange for translation of the document to be served into the language of the 'requested' State, cannot be inferred from the Regulation. [39]

69. All that may be inferred from Article 8 (1) of the Regulation is that the absence of a translation of the document to be served entitles the addressee to refuse to accept it. Therefore, only the exercise or failure to exercise this right makes it clear whether service of the document in question could or could not be effected.

70. The reference in Article 7(2) of the Regulation to 'all steps required for service' does not justify the view that the absence of a translation into one of the languages referred to in Article 8(1) would cause service to be inoperative in its entirety. That provision merely declares the law of the Member State

38 — Considered in this light, the absence of a translation of the document to be served does not constitute a *defect* in the transmission and service procedure in question.

39 — See to this effect, but with reference to the European Convention on Service, Burgstaller, 'Chapter 81: Europäische Zustellungsverordnung', in *Internationales Zivilverfahrensrecht*, Article 5(1). See in particular the explanatory report on the European Convention on Service (cited in footnote 21), in the section on Article 8: 'However, the Convention does not oblige the applicant to forward the document written in or translated into one of the above languages; it allows the addressee to refuse to accept the document on the grounds that these rules have not been observed.'

addressed to be applicable in principle with regard to the manner of service, and does not cast doubt on the lack of an obligation to supply a translation, which is rooted in the Regulation itself.

71. Article 8(2) of the Regulation is also a bar to the view that the absence of a translation into one of the languages referred to in Article 8(1) would render service inoperative in its entirety. When this provision requires documents of which a translation is requested to be returned, it must be concluded that the initial service has an effect, even if it does not comply with the language rule in Article 8(1) of the Regulation. When this were not the case, it would be pointless to return to the applicant the documents to be translated, but not the remaining documents, since he would in any case be obliged to deliver the translated documents in order to produce any legal effects therefrom at all. In any event, a possible splitting of the legal consequences, to the effect that only that part not refused produces legal effects, whereas the documents returned for translation produce no effect whatsoever, hardly appears compatible with the objectives of the Regulation as regards effectiveness.

72. It is also evident from elsewhere in the Regulation — from the 'rectification procedure' in Article 6(2) [40] — that complete inoperativeness of initial service without a translation can scarcely be reconciled with the objectives of the Regulation as to effectiveness. One may arguably infer from this provision the legal principle that the impossibility of discharging a request for service, which may be compared with the case in which the absence of a translation gives rise to an entitlement to refuse to accept a document, does not of itself cause the request for service to be treated as if, in the sense of an inoperative act, it had never been made. An attempt at rectification should rather first be made. The return by the receiving agency under Article 8(2) of the Regulation of documents whose translation is requested forms part of the same idea.

73. The absence of a clear legal basis, rightly pointed out by the Commission, also suggests that the initial service is not rendered inoperative in its entirety by legitimate exercise of the right to refuse to accept a document.

74. In addition, the contrary view would make inoperativeness of the initial service in its entirety dependent on whether or not the addressee exercises his right to refuse to accept a document, and not on the objective observance of linguistic requirements, a

40 — According to this provision 'the receiving agency shall contact the transmitting agency by the swiftest possible means in order to secure the missing information or documents' where the request for service cannot be fulfilled on the basis of the information or documents transmitted.

position which would in turn exclusively benefit the addressee. [41]

75. It must be noted in this context that although the right to refuse to accept a document serves to protect the addressee, this does not mean, however, that the addressee may, or should be in a position to, paralyse judicial procedures by his refusal to accept a document.

76. That the protection of the addressee may not be made absolute as regards language is clear not only from the fact that the language rule in Article 8(1) of the Regulation has opted for an abstract approach to the language abilities of the addressee in question, but also from the fact that the Regulation recognises, in addition to the formal method of service under Article 2 et seq., other methods of service of equal status, [42] in particular service by post which is commonly employed in practice. [43] Under Article 14(2) of the Regulation, it is however for the Member State to specify the conditions 'under which it will accept service of judicial documents by post'. Since only a few Member States [44] had specified linguistic conditions, it was made clear in the third update of information communicated by Member States under Article 23(1) of the Regulation [45] that, 'as regards Article 14, the fact that a Member State has not communicated a specific language requirement means implicitly that the language requirements of Article 8 are applicable'. Doubts would however appear to subsist regarding the value to be attached to this statement. [46]

77. In order to achieve a proper balancing of interests, refusal to accept a document may not deprive the applicant of his right to a lawful judge that is guaranteed by fundamental rights, as would for example be the case if he were no longer able to observe any time-limits for a judicial remedy following a refusal to accept a document.

41 — The fact that both the applicant and the addressee merit protection is also evident from the rule in Article 9 of the Regulation in relation to the date of service. See De Leval and Lebois, 'Betekenen in Europese Unie op grond van de Verordening 1348/2000 van 29 mei 2000', in *Het nieuwe Europese IPR: van verdrag naar verordening*, 2001, 169 (p. 185), points 6 to 38.

42 — There is debate as to whether they are of equal status. In my view, the subsidiary methods of service are not lower-ranking methods. See for example Gsell (cited in footnote 23), 115 (p. 117); Mignolet (cited in footnote 6), p. 349; De Leval and Lebois, 'Signifier en Europe sur la base du règlement 1348/2000: bilan après un an et demi d'application', in *Liber amicorum Pierre Marchal*, p. 261, point 6; Frigo (cited in footnote 23), pp. 138 and 139; however, a different view appears to be taken by Heß (cited in footnote 11), 15 (p. 20) and Ekelmans, *Journal des tribunaux No 6014* (2001), 481.

43 — According to Article 14(1), each Member State is to be free 'to effect service of judicial documents directly by post to persons residing in another Member State'.

44 — Malan (cited in footnote 26), Note 11, gives an overview.

45 — Third update of information communicated by Member States under Article 23(1) 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 (OJ 2002 C 13, p. 2).

46 — Doubts are also expressed in this respect by Boularbah, 'Le cadre général des règles communautaires en matière de procédure civile: coopération judiciaire, droit judiciaire européen et droit processuel commun', in *Le droit processuel et judiciaire européen — Het Europees gerechtelijk recht en procesrecht*, 2003, 167 (p. 180); in this respect, he goes further than Mignolet (cited in footnote 6), p. 351.

78. It is apparent from Article 8(1)(b) of the Regulation in conjunction with Article 5(2) that the Regulation also seeks to protect the applicant from unnecessary costs, which include in particular translation costs. However, if the applicant as a precaution arranges for a translation into one of the languages mentioned in Article 8(1), through fear that refusal to accept a document will adversely affect his ability to adhere to time-limits, any simplification under the Regulation, including in terms of cost-savings, is precluded.

79. It is to be concluded from all of the foregoing that neither the wording of the Regulation, nor the history of its origin, its broad logic or its spirit and purpose suggest that exercise of the right to refuse to accept a document under Article 8(1) of the Regulation is to lead to inoperativeness of the service in question in its entirety. Thus, a document that could not be served due to the legitimate exercise of the right to refuse to accept it under Article 8(1) of the Regulation must not be treated as if no attempt at service had ever been made.

80. The question remains as to what legal effects the initial service can produce, despite the legitimate exercise of the right to refuse to accept a document.

— The effects of the initial service after exercise of the right to refuse to accept a document

81. The conflicting interests of, firstly, the applicant and, secondly, the addressee may be accommodated by making the exercise of the right to refuse to accept a document give rise to a procedural suspension. [47]

82. This suspensive effect firstly prevents the addressee's refusal, as a unilateral declaration of intent, to accept a document from rendering the initial service inoperative in its entirety, and consequently from depriving the applicant of the required legal protection. In particular, any procedural time-limits cease to run until a judicial determination that the refusal to accept the document was legitimate.

83. Secondly, however, the addressee's right to a fair hearing is preserved by a refusal to accept a document and the immediate notification of the refusal under Article 8(2) of the Regulation. [48] The suspensive effect of

47 — Also suggested by De Leval and Lebois (cited in footnote 41), points 6 to 38.

48 — In *Lancray* (cited in footnote 33), the Court made it clear, referring to Case 49/84 *Debaecker* [1985] ECR 1779, that although the Convention is, as is clear from the preamble, intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, that aim cannot be attained by undermining in any way the right to a fair hearing.

the refusal to accept the document serves to protect the addressee inasmuch as the initial service cannot produce full legal force against him.

84. The suspensive effect does not affect the authority of the court seised of the procedure in connection with which the document was transmitted to determine whether the refusal to accept the document was legitimate. [49]

85. The view that there is a suspensive effect is also supported by Article 19(1) of the Regulation, which provides for a stay of proceedings, and therefore a procedural suspension, in the event of failure to enter an appearance. If the defendant refuses the document with reference to the language rule laid down in the Regulation, this must a fortiori apply.

86. It must therefore be found that the suspension that has occurred in favour of the addressee through a refusal to accept a document is lifted only by complete service, while the suspension in favour of the applicant lapses when the court finds that the refusal was legitimate.

49 — See the explanatory report on the European Convention on Service (cited in footnote 21), in the section on Article 8: 'If a dispute arises as to whether or not the addressee of the document understands a language, it will be settled in accordance with the relevant rules, for example by raising the question of whether the document was properly served in the court seised of the procedure in connection with which it was transmitted'.

3. The third question, concerning the procedural rules for subsequent transmission of the translation of the document to be served

87. The third question, concerning the procedural rules for subsequent transmission of the document to be served, remains to be answered.

88. In this connection, it is in particular necessary to clarify what legal effects the document in question produces, and above all at what time, if acceptance of the document was initially legitimately refused and the transmission and service procedure, with the attachment of a translation, had to be repeated.

(a) Arguments of the parties

89. The parties submitting observations in the written procedure also emphasise varying points in relation to the procedural rules governing any rectification.

90. The fact that national law, in particular the law of the Member State of transmission, is largely applicable with regard to the procedural rules governing any rectification, because of the lack of harmonisation of procedural law, is emphasised by most of the parties submitting observations. Only the *Portuguese Government* proposes that the

procedural rules governing subsequent transmission of the translation should be determined exclusively according to Regulation No 1348/2000.

91. *Mr Leffler* proposes that the time-limit for rectification of the application for service should be determined according to national law, but that the manner of service should be determined in accordance with the Regulation and the national transposing law (sic).

92. The *German Government,* in keeping in this respect with the legal view it expressed in relation to the first question, comments that is for the court of the Member State of transmission to examine whether or not the refusal to accept the document was legitimate. The resulting legal consequences will also be based on the lex fori, including the procedural rules governing subsequent transmission of translations that is allowed under that law.

93. The *French Government* proposes a nuanced answer to the third question, in that it argues that the subsequent transmission of the translation must be effected in accordance with the procedure laid down in the Regulation, but that as to the remainder the court of the Member State of transmission must apply national procedural law.

94. The *Commission* argues that the legal consequences of exercise of the right to refuse to accept a document under Article 8 (1) of the Regulation cannot be determined entirely autonomously, inasmuch as firstly the court of the Member State of transmission must make a finding as to whether this right was exercised legitimately, and secondly, the procedural rules governing any rectification must be those of the Member State of transmission, subject to the requirement that individual provisions of the Regulation, such as Article 9 for time-limit calculations, be applied analogously.

(b) Legal assessment

(i) Applicability of national law

95. There would appear to be little doubt that in Regulation No 1348/2000 the Community legislature was not seeking comprehensive harmonisation of the procedural law of the Member States. Accordingly, it is fundamentally compatible with the spirit of the Regulation to proceed on the basis that the court of the Member State of transmission must in principle rule in accordance with its own procedural law (lex fori).

96. This is supported in particular by Article 9 of the Regulation, which refers, in relation to the date of service, in part to the law of the Member State addressed (Article 9(1)), but also in part to the law of the Member State of origin (Article 9(2) which deals with the

adherence by the applicant to procedural time-limits), and Article 19 which deals with the defendant not entering an appearance. According to Article 19, in such a case the relevant court of the Member State addressed must in particular clarify whether or not service has been effected in accordance with the requirements of that Member State. Article 7(1), which refers explicitly to the law of the Member States with regard to service, is also to be cited.

97. However, inasmuch as a legal question connected with the subsequent transmission of the translation of the document to be served falls within the regulatory scope of the Regulation, I see no reason not to allow the Regulation to apply. For this reason, the view of the French Government, under which this transmission must be effected in accordance with the Regulation, appears convincing.

(ii) Procedural rules governing the second transmission and service procedure

98. This subsidiary point follows from the third question, which essentially asks about the procedural rules — from a temporal and practical viewpoint — governing subsequent transmission of the document to be served together with a translation into one of the languages referred to in Article 8(1) of the Regulation.

99. The Regulation contains no directly applicable provisions in this respect. Apart from the form of the document to be served, no explicit rule exists either in relation to the requirements for fresh service or in relation to possible time-limits within which fresh service must be effected.

100. Inasmuch as the suspensive effect of the addressee's refusal to accept a document is recognised under an autonomous interpretation of the Regulation, Article 9 may be applied analogously in calculating time-limits, although this provision only represents a conflict-of-laws rule and accordingly refers to national law.

101. Inasmuch as Article 7(1) refers, in relation to the form of service, to the law of the Member States, that is to say primarily to the law of the Member State addressed, the same must no doubt apply to the fresh transmission and service of a document with a translation, because it is clear from this provision that the form of service is not a matter covered by the Regulation. This solution is also imposed by the protection of the addressee sought by the Regulation, and by considerations related to legal certainty: although one cannot exclude the possibility that the addressee, notwithstanding his right to refuse to accept a document and its possible exercise, is already in a position to prepare his defence effectively at the time of the initial attempt at service, [50] this does not however justify setting aside the

50 — For example if the particular circumstances of the case in question mean that he is in fact capable of understanding the document to be served.

Regulation's mechanism based on an abstract approach that has been put in place in order to protect the addressee.

102. Moreover, in the event of further defective service, the addressee must also be able to resort to the institutions provided for in the procedure. This legal protection could be called into question inter alia if further service is effected which is not subject to the obligation to provide information concerning possible channels of legal remedy in the event of a rejection. The objective is uniform legal protection, which can be guaranteed only with a uniform form of service.

V — Conclusion

103. On the basis of the foregoing considerations, I propose that the Court reply as follows to the questions submitted for a preliminary ruling:

(1) Article 8(1) of Regulation (EC) No 1348/2000 must be construed as meaning that refusal by an addressee to accept a document on the ground of failure to comply with the language rule laid down by that provision does not mean that service is to be treated as inoperative in its entirety. Rather, a suspensive effect arises, which continues vis-à-vis the applicant until it is clarified whether the refusal is legitimate, and vis-à-vis the addressee until due service has been effected.

(2) The service procedure repeated after preparation of any translations that may be required is determined by Regulation No 1348/2000 to the same extent as the initial service that failed through the refusal to accept a document.