Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 6 September 2012 [1]

Case C-332/11

ProRail NV
v
Xpedys NV,
FAG Kugelfischer GmbH,
DB Schenker Rail Nederland NV,
Nationale Maatschappij der Belgische Spoorwegen NV

(Reference for a preliminary ruling from the Hof van Cassatie (Belgium))

(Judicial cooperation in civil or commercial matters — Taking of evidence — Regulation (EC) No 1206/2001 — Article 1 — Substantive scope — Article 17 — Direct taking of evidence by the requesting court — Designation of an expert and the assignment to him, by a court of one Member State, of a task to be carried out partly in the territory of another Member State — Whether or not application of the judicial cooperation procedure laid down in Article 17 of the regulation is mandatory)

I – Introduction

1. The reference for a preliminary ruling from the Hof van Cassatie (Court of Cassation, Belgium) requires an interpretation of Articles 1 and 17 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. [2]

2. It is a question of whether an investigative measure ordered in this matter by a court of a Member State [3] which is to be carried out partly in the territory of that Member State and partly in the territory of another Member State must, for the direct performance of the latter part of the task entrusted to a national expert, be implemented in accordance with the process of cooperation between courts laid down in Article 17 of Regulation No 1206/2001.

3. This question is raised in proceedings brought before a Belgian court by Belgian, German and Netherlands companies following an accident, which took place near Amsterdam involving a train bound from Belgium to the Netherlands. That court, ruling in interlocutory proceedings, designated, in accordance with national rules of procedure, a Belgian expert whose task was to investigate not only in Belgium but also in the Netherlands, an aspect which was challenged by one of the Netherlands companies concerned.

1 — Original language: French.

2 — OJ 2001 L 174, p. 1.

3 — In this Opinion, the concept ‘Member State’ will refer to the Member States of the European Union, except for the Kingdom of Denmark, in accordance with Article 1(3) of Regulation No 1206/2001.

4. The Court of Justice must therefore rule on the substantive scope of Regulation No 1206/2001, and on whether it is mandatory to apply it, in particular where a court intends to take evidence in another Member State directly and not through a requested court in that country.

5. However, the question referred for a preliminary ruling also refers to the principle of the recognition judgments given in the other Member States, set out in Article 33(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[4] a principle in the light of which the Court may find it necessary to interpret Articles 1 and 17 of Regulation No 1206/2001.

II – Legal framework

A – *Regulation No 1206/2001*

6. The preamble to Regulation No 1206/2001 states:

'(2) For the purpose of the proper functioning of the internal market, cooperation between courts in the taking of evidence should be improved, and in particular simplified and accelerated.

…

(7) As it is often essential for a decision in a civil or commercial matter pending before a court in a Member State to take evidence in another Member State ... It is therefore necessary to continue the improvement of cooperation between courts of Member States in the field of taking of evidence.

(8) The efficiency of judicial procedures in civil or commercial matters requires that the transmission and execution of requests for the performance of taking of evidence is to be made directly and by the most rapid means possible between Member States' courts.

…

(15) In order to facilitate the taking of evidence it should be possible for a court in a Member State, in accordance with the law of its Member State, to take evidence directly in another Member State, if accepted by the latter, and under the conditions determined by the central body or competent authority of the requested Member State. …

…

(17) This Regulation should prevail over the provisions applying to its field of application, contained in international conventions concluded by the Member States. Member States should be free to adopt agreements or arrangements to further facilitate cooperation in the taking of evidence.'

7. Article 1(1) and (2) of Regulation No 1206/2001, entitled 'Scope', provides:

'1. This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests:

(a) the competent court of another Member State to take evidence; or

4 — OJ 2001 L 12, p. 1.

(b) to take evidence directly in another Member State.

2. A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.'

8. Articles 10 to 16, which are contained in section 3 of the regulation, establish the procedures for the taking of evidence by a requested court of another Member State (so-called 'indirect' method of cooperation).

9. Article 10(2) of Regulation No 1206/2001 states that '[t]he requested court is to execute the request in accordance with the law of its Member State'.

10. Article 17 of the Regulation, which governs direct taking of evidence by the requesting court (so-called 'direct' method of cooperation), provides:

'1. Where a court requests to take evidence directly in another Member State, it shall submit a request to the central body or the competent authority … in that State …

2. Direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures.

Where the direct taking of evidence implies that a person shall be heard, the requesting court shall inform that person that the performance shall take place on a voluntary basis.

3. The taking of evidence shall be performed by a member of the judicial personnel or by any other person such as an expert, who will be designated, in accordance with the law of the Member State of the requesting court.

…

5. The central body or the competent authority may refuse direct taking of evidence only if:

(a) the request does not fall within the scope of this Regulation as set out in Article 1;

(b) the request does not contain all of the necessary information pursuant to Article 4; or

(c) the direct taking of evidence requested is contrary to fundamental principles of law in its Member State.

6. Without prejudice to the conditions laid down in accordance with paragraph 4, the requesting court shall execute the request in accordance with the law of its Member State.'

B – *Regulation No 44/2001*

11. Article 31 of Regulation No 44/2001 provides that 'application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter'.

12. Article 32 of the regulation, which is at the beginning of Chapter III, entitled 'Recognition and enforcement', states that '[f]or the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court'.

13. Under Article 33(1) of Regulation No 44/2001, '[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'.

III – The main proceedings, the question referred for a preliminary ruling and the procedure before the Court of Justice

14. On 22 November 2008, a freight train bound from Belgium to Beverwijk (Netherlands) was derailed near Amsterdam.

15. Following that accident, legal proceedings were instituted before the Belgian and Netherlands courts.

16. The main proceedings, in which the Belgian courts are hearing an application for interim relief, have been brought by ProRail NV ('ProRail') against four other companies connected with the aforementioned accident, namely Xpedys NV, ('Xpedys'), FAG Kugelfischer GmbH ('FAG'), DB Schenker Rail Nederland NV ('DB Schenker') and Nationale Maatschappij der Belgische Spoorwegen NV (Société Nationale des Chemins de fer Belges, the Belgian National Railway Company, 'SNCB').

17. ProRail is a company having its registered office in Utrecht (Netherlands) which controls the railways in the Netherlands and which, for that purpose, concludes access agreements with railway companies, including DB Schenker.

18. DB Schenker, which also has its registered office in Utrecht, is a private rail carrier. Its rolling stock consists of wagons originally leased from the SNCB, a public limited company which has its registered office in Brussels.

19. According to DB Schenker and the SNCB, Xpedys, which has its registered office in Anderlecht (Belgium), took over as the lessor of the wagons held by DB Schenker on 1 May 2008.

20. FAG, which has its registered office in Schweinfurt (Germany), is a manufacturer of wagon components.

21. On 11 February 2009, the carrier, DB Schenker, summoned Xpedys and the SNCB, in their capacity as the lessors of some of the wagons involved in the aforementioned accident, to appear before the presiding judge of the Rechtbank van Koophandel te Brussel (Commercial Court, Brussels) in interlocutory proceedings. The action sought the designation of a judicial expert. ProRail and FAG intervened in the proceedings, during which ProRail requested the Court to declare the action for the designation of an expert unfounded or, if an expert were to be appointed, to limit his task to determining the damage to the wagons, not to order an investigation of the whole of the Dutch rail network, and to order that he carry out his task in accordance with the provisions of Regulation No 1206/2001.

22. On 26 March 2009, ProRail instituted substantive proceedings against DB Schenker and Xpedys before a Dutch court, namely the Rechtbank, Utrecht (District Court, Utrecht), seeking a declaration that that carrier and that owner and lessor of the wagons involved in the accident were liable for the damage suffered by its rail network and seeking compensation from them in that regard.

23. By order of 5 May 2009, the presiding judge of the Rechtbank van Koophandel te Brussel declared DB Schenker's action well-founded and designated the expert, defining the scope of his task, most of which was to be carried out in the Netherlands. In the course of this, after having invited the parties to attend his activities, the expert was to proceed to the scene of the accident in the Netherlands, and to all other places where he might be able to gather useful information. Moreover, he was required to determine the manufacturer and the condition of certain technical parts of the wagons. He was also asked to advise on the damage suffered and on the extent of the damage. Finally, the expert was to investigate the rail network and the railway infrastructure controlled by ProRail and give his advice as to whether and to what extent that infrastructure contributed to the causes of the accident.

24. ProRail appealed against that order, before the hof van beroep te Brussel (Brussels Court of Appeal) requesting that the Court declare the designation of an expert unfounded or, in the alternative, limit the task of the Belgian expert to determining the damage in so far as that task could be carried out in Belgium, and, at the very least, order that the expert carry out his activities in the Netherlands only in accordance with the procedure laid down in Regulation No 1206/2001.

25. On 20 January 2010, the hof van beroep te Brussel dismissed that appeal, on the ground that Regulation No 1206/2001 was not applicable since, on the one hand, neither of the situations provided for in Article 1 thereof was present in this case and, on the other, ProRail's assertion that an expert cannot be charged with an investigation in the Netherlands other than through the application of that regulation was unfounded.

26. ProRail appealed in cassation against that decision before the hof van beroep te Brussel, alleging infringement of provisions of Union law, and in particular of Articles 1 and 17 of Regulation No 1206/2001, and also of Article 31 of Regulation No 44/2001.

27. The national court points out that it is apparent from Articles 1 and 17 of Regulation No 1206/2001 that, where a court of a Member State wishes to take evidence – such as an investigation carried out by an expert – directly in another Member State, the prior authorisation of the latter country must be requested. It states that the grounds of appeal presented by ProRail are also based on an *a contrario* interpretation of Article 31 of Regulation No 44/2001, from which it is clear that such an inquiry does not have extraterritorial effect without the authorisation of the country in which it is to be carried out. Finally, the national court raises the question of the impact, within the context of the present case, of Article 33(1) of Regulation No 44/2001, according to which a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

28. Against that background, by decision lodged on 30 June 2011, the Hof van Cassatie Verwaltungsgerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 1 and 17 of [Regulation No 1206/2001], in the light, inter alia, of European legislation concerning the recognition and enforcement of judgments in civil or commercial matters, and of the principle expressed in Article 33(1) of [Regulation No 44/2001] that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required, be interpreted as meaning that the court which orders an investigation by a judicial expert whose task is to be carried out partly in the territory of the Member State to which the court belongs, but partly also in another Member State, must, for the direct performance of the latter part of the task, make use only and therefore exclusively of the method created by Regulation No 1206/2001 as referred to in Article 17 thereof, or as meaning that the judicial expert assigned by that country may also be charged with an investigation which is to be partly carried out in another Member State of the European Union, outside the provisions of Regulation No 1206/2001?'

29. Written observations have been presented to the Court by ProRail, Xpedys, DB Schenker and the SNCB jointly ('*Xpedys and Others*'), by the Belgian, Czech, German and Portuguese Governments, by the Swiss Confederation and by the European Commission. No hearing has been held.

IV – Analysis

A – *Admissibility of the reference for a preliminary ruling*

30. Xpedys and Others challenge the admissibility of the reference for a preliminary ruling, arguing that it is purely hypothetical in nature and irrelevant for the purpose of the decision in the main proceedings, since Regulation No 1206/2001 is not applicable in the present case.

31. In support of their challenge, Xpedys and Others raise four pleas. The first of them is based on the fact that the initiative to obtain a cross-border expert's report was taken by one of the parties in the proceedings, and not by the court, although the wording of Articles 1 and 17 of Regulation No 1206/2001 requires that initiative to be taken by a 'court' of the requesting Member State. The second alleges that the court hearing the application for interim measures was asked only to designate an expert, although those articles and the seventh recital in the preamble to that regulation require that the taking of evidence is necessary to enable the court to pronounce judgment on the merits. The third is based on the idea that there is no need to apply that regulation where, as in the present case, the exercise of the State on the territory of another Member State is not in issue and it is therefore unnecessary to have the latter's permission to carry out the expert's task. The fourth is based on the finding that the application of Regulation No 1206/2001 in the main proceedings would have prolonged the duration of the proceedings, which would be diametrically opposed to the objectives stated in the second recital of that regulation, namely, to simplify and accelerate the taking of evidence.

32. I consider that these last two pleas lie outside the problem of the possible inadmissibility of the reference for a preliminary ruling and concern rather the substance of this case.

33. As regards the first two allegations made by Xpedys and Others, I would point out that it is settled case-law [5] that, in the context of the preliminary ruling procedure, the national court is best placed, having regard to the specific features of the case, to assess both the need for a preliminary ruling to enable it to give judgment and the relevance of the question it intends to ask. Since this relates to the interpretation of European Union law, the Court is, theoretically, required to give a ruling, unless it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, or where the problem is purely hypothetical.

34. However, in my view, that is not the situation in the present case. The reference for a preliminary ruling adequately states in what respect the interpretation of Articles 1 and 17 of Regulation No 1206/2001 may prove necessary for giving the ruling in the main proceedings, since the judgment to be given by the Court would give guidance to the national court regarding whether that part of the expert's investigation conducted in the Netherlands, for the purposes of determining the cause of the rail accident at issue in the main proceedings and the extent of the resulting damage, should be carried out in accordance with the Belgian rules of procedure or with Regulation No 1206/2001.

5 — See, inter alia, Joined Cases C-65/09 and C-87/09 *Gebr. Weber and Putz* [2011] ECR I-5257, paragraph 35 et seq., and judgment of 21 June 2012 in Case C-84/11 *Susisalo and Others*, paragraphs 16 and 17.

35. I would add that it seems to me that Articles 1 and 17 of Regulation No 1206/2001 by no means require that the decision to take evidence directly in another Member State must be taken of its own initiative by the court of the requesting State which orders it. They do not preclude such a measure being initially requested by the parties to the proceedings, which is generally the case in practice, since one of them is interested in establishing the existence of facts which are contested by the other for the purposes of showing the validity of its claims.

36. Moreover, in my view it is irrelevant that it was decided to take evidence, not during the substantive proceedings, but in proceedings for interim relief the sole purpose of which was the designation of an expert. Article 1(2) of Regulation No 1206/2001 requires only that the evidence it is sought to obtain is 'intended for use in judicial proceedings, commenced or contemplated'. As the Commission rightly stated in its Practice Guide, this latter expression includes the taking of evidence before the possible filing of the proceedings on the merits, during which the evidence will actually be used, particularly in cases in which it is necessary to obtain evidence which may not be available later.[6] Since a cross-border measure of inquiry *in futurum* such as that at issue in the main proceedings[7] definitely falls within the scope of Regulation No 1206/2001, the reference for a preliminary ruling is therefore not inadmissible on this ground.

B – *Substance*

1. The lack of impact of the provisions of Regulation No 44/2001

37. According to the wording of the question it has referred for a preliminary ruling, the national court seeks the interpretation of Articles 1 and 17 of Regulation No 1206/2001. However, it also refers to Regulation No 44/2001 and, in particular, to the principle of automatic mutual recognition of judgments given in civil and commercial matters by the courts of the various Member States, which is set out in Article 33(1) thereof.[8] It is therefore asking the Court whether the first two articles are to be interpreted in the light, inter alia, of the provisions of Regulation No 44/2001 and of that principle.

38. It is apparent from the order for reference that the comparison between Regulation No 1206/2001 and Regulation No 44/2001 was initiated by ProRail, whose appeal, according to the Hof van Cassatie, alleges infringement not only of Articles 1 and 17 of Regulation No 1206/2001, but also of Article 31 of Regulation No 44/2001, which provides that application may be made to the courts of a Member State for provisional or protective measures even if a court of another Member State has jurisdiction as to the substance of the matter. It is clear that ProRail seeks to infer from that article that the power to order that an expert's report be obtained lies exclusively with the courts of the place in which it is to be executed and, *a contrario*, that such a measure does not have any extraterritorial effect except by virtue of the authorisation of the Member State in which that investigative measure is to be carried out.

6 — Point 10 of the Practice Guide for the application of the regulation on the taking of evidence, which was drawn up by the Commission Services in consultation with the European Judicial Network in Civil and Commercial Matters ('the Practice Guide') available on the Internet at the following address: http://ec.europa.eu/civiljustice/evidence/evidence_ec_guide_en.pdf).

7 — References for preliminary rulings concerning this type of measure have already been brought before the Court of Justice. In respect of Article 24 of the Convention signed in Brussels on 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('the Brussels Convention') see Case C-104/03 *St. Paul Dairy* [2005] ECR I-3481, paragraph 13, and the opinion delivered by Advocate General Ruiz-Jarabo Colomer in that case (especially point 32 concerning the possible objectives of such measures in the light of the legislations of the Member States). In respect of Regulation No 1206/2001, see the opinion delivered by Advocate General Kokott in Case C-175/06 *Tedesco* [2007] ECR I-7929, particularly point 76 et seq.

8 — Recital 16 in the preamble to Regulation No 44/2001 states that '[m]utual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute'.

39. The Swiss Confederation, which is interested in any interpretation by the Court of Regulation No 44/2001 owing to the similarity between the provisions of that regulation and those of the Lugano Convention,[9] has expressed a view only in that regard. It maintains that the measure by which a court charges an expert to carry out an investigation in the territory of another Member State is neither a provisional nor a preventive measure within the meaning of Article 31 of Regulation No 44/2001, on the ground that such a measure cannot produce extraterritorial effects, nor a judgment which may be the subject of recognition or enforcement within the meaning of Article 32 of the same regulation.[10]

40. However, since neither of those articles is expressly mentioned by the national court in the question which it has referred for a preliminary ruling and the grounds which it has stated in support of the question, I consider that it is not necessary for the Court to rule on these points, according to settled case-law.[11]

41. As regards Article 33(1) of Regulation No 44/2001, the only provision of the regulation cited in the question referred for a preliminary ruling, I consider, like the parties in the main proceedings and the governments of the Member States which have presented observations to the Court, that that legislation does not provide sufficient criteria for interpreting Articles 1 and 17 of Regulation No 1206/2001 in the present case.

42. The issue raised by the present case relates only to the scope and detailed rules for the application of Regulation No 1206/2001, and not of Regulation No 44/2001. Since the first of those instruments constitutes, in relation to the latter, a *lex posterior*,[12] and also a *lex specialis*, as regards judicial cooperation in the specific sphere of the taking of evidence, it is, in my view, irrelevant to interpret Regulation No 1206/2001 in the light of Regulation No 44/2001.[13]

9 — **Convention on jurisdiction and the enforcement of judgments in civil and commercial matters**, signed in Lugano on 16 September 1988 (OJ 1988 L 319, p. 9), as revised by the Convention signed in Lugano on 30 October 2007 (see Council Decision 2007/712/EC of 15 October 2007 on the signing of the Convention on behalf of the European Community (OJ 2007 L 339, p. 1), which came into force on 1 May 2011 and which binds the Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation.

10 — In that regard, it relies, by analogy, on the Report by Mr P. Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71, see, in particular, point 187), since Article 25 of that Convention is identical to Article 32.

11 — See, inter alia, Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 24, and Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 18.

12 — In point 61 of his opinion in *St. Paul Dairy*, Advocate General Ruiz-Jarabo Colomer mentions that '[a]s regards any residual applicability of Regulation No 44/2001, the primacy of the new instrument is founded on the principle lex posterior derogat priori'.

13 — See, by analogy, the study carried out at the request of the European Parliament entitled 'Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law', Brussels, 2011, according to which 'a clear tendency of cross-referring among the different instruments is found with regard to the interpretation of the public policy clauses. ... However, any transfer requires a similarity of the underlying factual and legal circumstances' (which does not appear to be the case regarding Regulations Nos 44/2001 and 1206/2001 (available on the Internet at the following address: http://www.europarl.europa.eu/studies, document 453.189, pp. 14 and 137).

2. Interpretation of Articles 1 and 17 of Regulation No 1206/2001

43. I would point out, first of all, that it is undeniable that an investigative measure such as the judicial expert report falls within the substantive scope of Regulation No 1206/2001, even though the concept of evidence which may be taken under that regulation [14] is not defined by the regulation. [15] This is apparent from Article 17(3) of the regulation, under which the taking of evidence may be performed directly in another Member State by the requesting court which may be represented by any person, 'such as an expert', [16] designated in accordance with the law of the Member State of the requesting court.

44. The question raised in the present case is whether it is apparent from a combined reading of Articles 1 and 17 of Regulation No 1206/2001 that, where a court of one Member State intends to take evidence, such as an investigation entrusted to an expert, directly in the territory of another Member State, it is bound to seek the prior authorisation of the latter State in accordance with Article 17, or whether it may choose to order that such an expert's report be obtained on the basis of national rules of procedure of the forum. [17]

45. The opinions of the observers who have expressed a view on this matter vary. Whereas ProRail and the governments of the Member States which have intervened in the proceedings before the Court maintain that it is therefore necessary to apply only Article 17 of Regulation No 1206/2001, Xpedys and Others and the Commission argue that other procedures for the direct performance of such taking of evidence must be possible in certain situations.

46. I would point out that this issue and that submitted to the Court in *Lippens and Others*, [18] still pending, in which I have also delivered an opinion, are similar but not identical. Even though that case also concerns the interpretation of the provisions of Regulation No 1206/2001, and, in particular, whether or not it is mandatory to apply the two cooperation procedures – the direct and the indirect – for which the regulation provides, the situations are rather different. In *Lippens and Others*, the main proceedings concerned the hearing, ordered by the court of one Member State, of witnesses residing in another Member State who had been summoned to appear before the former court. On the other hand, an investigation which, as in the present case, is to be carried out in another Member State, may require further intrusion in that territory. However, I consider that the reasoning to be followed concerning whether Regulation No 1206/2001 is systematically applicable must be the same, whatever kind of investigation is involved.

47. The underlying principle in this sphere is that of the territorial sovereignty of the Member States, as I have already stated in my opinion in *Lippens and Others*. [19] Traditionally, the exercise of a State's power is territorial in nature. As a rule, it is not possible to exercise it outside the Member State in which the court or other national authority is situated, except with the agreement of the local 'sovereign', that is, with the agreement of the authorities of the other Member State in whose territory that power may be exercised.

14 — In its Practice Guide, the Commission stated that that concept 'includes for instance hearings of witnesses of fact, of the parties, of experts, the production of documents, verifications, establishment of facts, …' (Point 8, and also, as regards expert reports, points 17, 37 and 55).

15 — That absence of definition causes problems in practice, particularly with regard to expert reports, according to the Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Regulation No 1206/2001 (COM(2007) 769 final, point 2.9).

16 — See also, this time concerning the procedure for the indirect performance of the taking of evidence, Article 12(2) of Regulation No 1206/2001.

17 — I note that, in the main proceedings, the expert investigation to be carried out principally in the Netherlands was ordered by a Belgian court on the basis of Article 962 of the Belgian Judicial Code, which provides that '[t]he court may, in order to decide a case brought before it or if there is an objective and current threat of proceedings, commission experts to carry out investigations or to give technical opinions'.

18 — Judgment of 6 September 2012 in Case C-170/11 *Lippens and Others*.

19 — See point 54 and the sources cited in footnote 40 of that Opinion.

48. Regulation No 1206/2001 is designed to counteract that compartmentalisation of powers within the European Union, by enabling the movement of persons having to take part in investigations and, thereby, the transmission of evidence from one Member State to another, on the basis of mutual trust. In particular, it has become apparent that an investigation carried out in another Member State outside that framework could come up against the fact that certain national legislations limit the active participation of a member or representative of the requesting court. [20]

49. In the light of the two main objectives of that regulation, namely, first, to simplify cooperation between the Member States and, second, to accelerate the taking of evidence, [21] I consider that, where it is not specifically necessary to make use of the judiciary in another Member State in order to obtain evidence, a court ordering an investigation is not required to implement one of the two forms of simplified judicial cooperation prescribed by that regulation. [22]

50. The current wording of the two articles of Regulation No 1206/2001 the interpretation of which is sought by the national court does not, in my view, contradict this point of view. Article 1(1)(b) of that regulation states that it is only '*where* the court of a Member State ... *requests* ... to take evidence directly in another Member State' [23] that the relevant provisions of that regulation, namely those of Article 17, must be applied. [24] That article provides that the direct execution of such a measure by the requesting court which intervenes in that regard is preceded by a request to the central body or competent authority of the Member State in which the evidence is to be taken. [25] On the other hand, if a court does not intend to use that form of judicial cooperation, because it considers that the assistance of the local authorities is not necessary for the investigation it is conducting to be completed successfully, it is not required to comply with the formalities laid down by Regulation No 1206/2001.

51. It is apparent from the *travaux préparatoires* for Regulation No 1206/2001 that it had initially been envisaged, in the text proposed by the Federal Republic of Germany, [26] that expert inquiries which had to be carried out directly in another Member State should be subject to special treatment. Article 1(3) of that proposal provided that an expert inquiry could be carried out on the territory of another Member State without the court which had decided to order that taking of evidence seeking prior authorisation or giving prior notification. [27] In spite of a European Parliament report which agreed, [28] as well as the opinion of the Economic and Social Committee [29] and the subsequent opinion of the Parliament [30] which also agreed, that provision was deleted from the final version adopted by the Council on 28 May 2001. [31]

20 — Thus, in Italy, Luxembourg and Sweden, that active participation is denied, according to the Council memorandum dated 28 July 2000 summarising the replies given by the delegations of the Member States to the questionnaire concerning a possible Union instrument to improve cooperation between the courts of the Member States in the taking evidence in civil or commercial matters (10651/00 JUSTCIV 85, p. 10, point 9).

21 — As the abovementioned Commission report (COM(2007) 769 final) points out. See also the second recital of Regulation No 1206/2001.

22 — For an account of those two methods of judicial cooperation, see, inter alia, point 32 of my Opinion in *Lippens and Others*.

23 — Emphasis added.

24 — Those provisions are set out in recital 15 in the preamble to Regulation No 1206/2001.

25 — Concerning the respective functions of the central body and competent authority, see Article 3(1) and (3) of Regulation No 1206/2001.

26 — Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (OJ 2000 C 314, p. 1).

27 — 'The taking of evidence should not as a rule be requested when the court of a Member State wishes inquiries to be conducted by an expert in another Member State. In such cases the expert may be appointed directly by the court of that Member State without any prior consent or notification of the other Member State being required.'

28 — That provision, unlike others, was not the subject of an amendment proposal by the Parliament in its report of 27 February 2011 on the German proposal, the explanatory statement of which stated only that 'Article 1(3) provides that the Regulation shall not apply in cases where the court of a Member State wishes inquiries to be conducted by an expert, in which case the court of that Member State may appoint the expert directly, with no authorisation being required' (session document final 298.394, A5-0073/2001, p. 10, point 1.3.1).

29 — Opinion of the Economic and Social Committee of 11 May 2001 (OJ 2001 C 139, p. 10).

30 — Opinion of the Parliament, single reading, issued on 14 March 2001 (A5-0073/2001, OJ 2001 C 343, p. 184).

31 — The Council had already provided that amendment in the revised version of the draft regulation published on 16 March 2001, without explaining the reasons for the deletion in question (6850/01 JUSTCIV 28, p. 7).

52. Contrary to what some of the observers maintain, that information concerning the origin of Regulation No 1206/2001 does not call into question the analysis which I propose that the Court should accept. Even though, in the end, the initial approach was not accepted by the Union legislature, it is not inconceivable that certain expert inquiries which have to be undertaken in another Member State may nevertheless be excluded from the scope of Regulation No 1206/2001, namely those for which the experts have been designated to carry out a task for which it is not necessary to call for the assistance of the local judicial authorities in order to be able to complete it successfully.

53. Nor does the Court's previous case-law disprove my analysis. I note that the judgment in *St. Paul Dairy*[32] is quoted by ProRail, which considers that that judgment lays down an obligation to apply Regulation No 1206/2001 'in order to obtain evidence (by means of a hearing of witnesses and a visit to the scene, in the present case)'. However, in my view, such an interpretation of that judgment is incorrect, as I have already demonstrated in the opinion delivered in *Lippens and Others*.[33]

54. It is true that the direct taking of evidence provided for in Article 17 of Regulation No 1206/2001 can only take place on a voluntary basis,[34] unlike the indirect taking of evidence, in which coercive measures are possible, under Article 13 of that regulation. Nevertheless, the persons affected by an inquiry may agree to submit voluntarily to that measure and to cooperate with the expert, although that does not appear to be the case in the main proceedings as far as ProRail is concerned.

55. The decisive criterion for knowing in which cases Regulation No 1206/2001 has to be applied by a court of a Member State is, in my view, the criterion relating to that court's need to obtain the collaboration not of the parties in the case but of the public authorities of the other Member State in which the inquiry is to be conducted.

56. I therefore consider that it is necessary to draw a distinction, as to whether or not the expert designated by a court of one Member State has to use the State authority of another Member State, on the basis of the specific assessment which will be made by that court.

57. If an expert is in a situation in which he is required to perform investigative tasks and to draw technical conclusions in circumstances which are permitted to anybody and everybody, because they relate to things, data or places which are accessible to the public, it seems to me that it is not necessary for such investigations to be carried out in accordance with the procedure laid down in Article 17 of Regulation No 1206/2001. Acts which do not concern the sovereignty of the Member State in which the evidence is to be gathered and which therefore do not require the assistance of the local judicial authorities tend not to fall within the scope of Regulation No 1206/2001. I consider that, in that case, there is merely an option to implement the cooperation procedure established by Article 17. If the court which orders that an expert's report be obtained considers it more expedient than to use the national rules of procedure, it may employ that mechanism, but it is not obliged to do so and may dispense with it if it does not need the cooperation and coercive power of the Member State of the place in which the task entrusted is to be carried out.

58. In the observations which it has presented to the Court, the Commission is also clearly of the opinion that the purpose of Regulation No 1206/2001 is not to exclude or impose a priori certain formal requirements or rules for obtaining evidence. It rightly infers that the court of a Member State must be at liberty to order that an expert investigation be carried out in another Member State without

32 — Cited above.

33 — See point 36 of my abovementioned opinion.

34 — According to Article 17(2).

following the procedure laid down in Article 17 of that regulation, and therefore without requesting the assistance of the authorities of the other Member State, 'provided that' the performance of that part of the investigation does not require the collaboration of the authorities of the Member State in which it is to take place.

59. On the other hand, if, in order to complete his task, the expert needs to have access to objects, information or places which are not public, he must then obtain the assistance of the authorities of the other Member State. In that case, in which there is an exercise of judicial power with external effect, namely effect in the territory of another Member State, the procedure for the direct taking of evidence [35] laid down in Article 17 of Regulation No 1206/2001 must be applied in order to obtain assistance from the requested Member State and to be entitled to all the attributes of the corresponding power. [36]

60. This seems to me to be the case in circumstances such as those in the main proceedings. The access to the installations of the railway network, which is most probably restricted by legislative, statutory or administrative provisions, particularly for reasons of traffic regulation and above all of safety, requires the use of State authority. Even though ProRail has the use of that network as controller of the infrastructure concerned, any agreement of that private company [37] is not sufficient, given the public nature of the actions necessary to carry out such a task. Since, in my view, the Belgian courts therefore needed the assistance of the Dutch judicial authorities in order that the task entrusted to the expert could be performed directly in the territory of the Kingdom of the Netherlands, I consider that the cooperation procedure laid down in Article 17 of Regulation No 1206/2001 should have been implemented in the present case. [38]

61. There can be no risk that Article 17 of Regulation No 1206/2001 will lose its effectiveness if the interpretation I propose is upheld by the Court. I note that ProRail maintains that the adoption of that regulation would not have been of interest if the Member States were not bound by it. Nevertheless, I consider that, taken like this, the issue is distorted. Regulation No 1206/2001 does indeed have a binding effect but only in the sphere corresponding to its scope, that is to say that, in my view, it is applicable only in cases in which the collaboration of the authorities of another Member State is specifically necessary to enable or improve the taking of evidence, and is therefore requested by a court of a Member State.

62. I consider that it would be wrong, and would even amount to a misinterpretation, to consider, as ProRail claims, that owing to the entry into force of Regulation No 1206/2001, it is now no longer possible to designate experts to carry out investigations abroad without systematically applying the procedures laid down by that regulation. Regulation No 1206/2001 is not designed to restrict the

35 — The requesting court may, alternatively, use the procedure for the indirect taking of evidence laid down in Article 10 et seq. of Regulation No 1206/2001 if it does not insist on taking the evidence itself.

36 — According to the study on the application of Regulation No 1206/2001 carried out in 2007 at the request of the Commission (accessible on the Internet in English at the address: http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf), although Article 17(3) of the regulation allows for the designation of an expert to represent the requesting court, 'when it comes to determining who can take evidence it should be borne in mind that in those cases where the presence of a judge is required, if the judge of the requesting State does not agree to travel to the other Member State, he will need to ask for the foreign court's help' (p. 88, point 4.1.10.2).

37 — The party concerned may agree under pressure of the possibility that the Belgian court hearing the substance of the case in the main proceedings may subsequently draw adverse conclusions from that party's failure to cooperate. See, by analogy, point 64 of my Opinion in *Lippens and Others*.

38 — A fortiori because there is a risk of overlapping between investigations carried out by an expert in civil proceedings, as in the present case, and investigations conducted by a special body prescribed for serious or potentially serious accidents in Articles 19 to 24 – above all in Article 20(2)(a) – and Annex V of Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) (OJ 2004 L 164, p. 44).

options of national courts for action regarding the taking of evidence, by excluding the other methods of inquiry but, on the contrary, to increase those options, by creating an alternative which encourages cooperation between those courts as necessary, that is to say, when the court before which a case has been brought considers that the procedures established by that regulation are the most effective.

63. That option stems inter alia from the fact that, under Article 21(2) of Regulation No 1206/2001,[39] international conventions remain applicable between the Member States if they enable evidence to be taken more effectively than the procedures provided by the regulation, provided that they are compatible with the provisions of that regulation, as I have already pointed out in the opinion delivered in *Lippens and Others*.

64. I would add that this functional approach to the interpretation of Articles 1 and 17 of Regulation No 1206/2001 is consistent with the view taken in a subsequent piece of legislation, namely Regulation (EC) No 861/2007 establishing a European Small Claims Procedure,[40] Article 9 of which provides that the court or tribunal hearing the case shall determine the means of taking evidence and the extent of the evidence necessary for its judgment under the rules applicable to the admissibility of evidence and that, in that regard, it must use the simplest and least burdensome method of taking evidence. In my view, the same should apply with regard to the procedures for implementing Regulation No 1206/2001.

V – Conclusion

65. In the light of the foregoing considerations, I propose that the Court should reply to the question referred for a preliminary ruling by the Hof van Cassatie as follows:

Articles 1 and 17 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters are to be interpreted as meaning that, where a court of a Member State orders evidence to be taken by an expert whose task is to be performed partly in the territory of the State in which the court is situated and partly in another Member State, that court may opt to designate the expert, for the purpose of carrying out this latter part of his task directly, either making use of the procedure for the direct taking of evidence by the requesting court laid down in Article 17, or without applying the provisions of that regulation, provided that the performance of that part of the investigation does not require the cooperation of the authorities of the Member State in which it is to take place.

39 — See also recital 17 of that regulation.

40 — Regulation of the European Parliament and of the Council of 11 July 2007 (OJ 2007 L 199, p. 1). Recital 20 of that regulation states that '[t]he court or tribunal should use the simplest and least costly method of taking evidence'.