OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 2 September 2010[1]

I — Introduction

1. The present reference for a preliminary ruling concerns the interpretation 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] The essential issue is whether the requested court may make the examination of a witness conditional on payment of witness expenses by the requesting court. It must, however, first be established whether the reference is admissible because it is possible that the referring court was not entitled to make a reference at the time when it did so.

1 — Original language: German.

2 — OJ 2001 L 174, p. 1. The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and to the Treaty establishing the European Community, gave notice of their wish to take part in the adoption and application of the regulation (recital 21 in the preamble to the regulation).

II — Legal framework

A — *European Union law*

2. Recital 16 in the preamble to Regulation No 1206/2001 states:

'The execution of the request, according to Article 10, should not give rise to a claim for any reimbursement of taxes or costs. Nevertheless, if the requested court requires reimbursement, the fees paid to experts and interpreters, as well as the costs occasioned by the application of Article 10(3) and (4), should not be borne by that court. In such a case, the requesting court is to take the necessary measures to ensure reimbursement without delay. Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the costs.'

3. Article 10 of the regulation, which contains general provisions on the execution of the request, provides:

'1. The requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.

2. The requested court shall execute the request in accordance with the law of its Member State.

…'

4. Article 14 of the regulation states as follows:

'1. A request for the hearing of a person shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence,

(a) under the law of the Member State of the requested court; or

(b) under the law of the Member State of the requesting court, and such right has been specified in the request, or, if need be, at the instance of the requested court, has been confirmed by the requesting court.

…

2. In addition to the grounds referred to in paragraph 1, the execution of a request may be refused only if:

…

(d) a deposit or advance asked for in accordance with Article 18(3) is not made within 60 days after the requested court asked for such a deposit or advance.

…'

5. Article 18 of the regulation provides:

'1. The execution of the request, in accordance with Article 10, shall not give rise to a claim for any reimbursement of taxes or costs.

2. Nevertheless, if the requested court so requires, the requesting court shall ensure the reimbursement, without delay, of:

— the fees paid to experts and interpreters, and

— the costs occasioned by the application of Article 10(3) and (4).

The duty for the parties to bear these fees or costs shall be governed by the law of the Member State of the requesting court.

3. Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the requested costs. In all other cases, a deposit or advance shall not be a condition for the execution of a request.

The deposit or advance shall be made by the parties if that is provided for by the law of the Member State of the requesting court.'

B — *International conventions*

6. The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ('the Hague Evidence Convention') did not apply between all the Member States of the European Union. Regulation No 1206/2001 was intended to provide a legal framework which applies to all Member States [3] and to that extent replaces the Hague Evidence Convention, to which recital 6 in the preamble to the regulation also refers.

7. Article 14 of the Hague Evidence Convention states:

'The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.'

3 — With the exception of Denmark, see Article 1(3) of the regulation.

8. Article 26 of the Hague Evidence Convention provides:

'A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.'

III — Facts and question referred for a preliminary ruling

9. The reference for a preliminary ruling arises from litigation between Artur Weryński and Mediatel 4B spólka z o.o. concerning a damages claim under a non-compete agreement. In those proceedings, on 6 January 2009 the Sąd Rejonowy dla Warszawy Śródmieścia (the referring court in Poland) requested the Dublin Metropolitan District Court in Ireland to examine a witness, on the basis of Regulation No 1206/2001. The requested court, however, made the examination of the witness conditional on payment of an advance of EUR 40 to cover the expenses payable to the witness under Irish law and asked the Polish court by letter of 12 January 2009 to pay that amount.

10. By order of 17 July 2009, the referring court stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Under 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, does the requested court have the right to demand from the requesting court an advance for witness expenses or reimbursement of the expenses paid to the witness heard, or must it cover them out of its own financial resources?'

11. Ireland, the Polish Government and the Commission submitted written observations and presented oral argument in the proceedings before the Court. The German, Finnish and Czech Governments submitted written observations.

IV — Legal assessment

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

12. It must first be established whether the reference for a preliminary ruling is admissible.

1. Jurisdiction of the Court

13. The reference for a preliminary ruling concerns Regulation No 1206/2001, adopted on the basis of Articles 61(c) EC and 67(1) EC which appear in Title IV (visas, asylum, immigration and other policies related to free movement of persons, including judicial cooperation in civil matters) of Part III of the EC Treaty. Under Article 68(1) EC, only courts or tribunals against whose decisions there is no judicial remedy under national law are empowered to make a reference for a preliminary concerning legal acts based on that title. Following the entry into force of the Treaty of Lisbon, Article 68 EC no longer applies, so that that limitation of the right to make a reference for a preliminary ruling now no longer exists. [4]

14. The reference was lodged with the Court of Justice on 23 July 2009, before the entry into force of the Treaty of Lisbon. Under Article 68 EC as applicable at that time, it would therefore have to be established whether the referring court is a court against whose decisions there is no judicial remedy.

15. The Sąd Rejonowy dla Warszawy Śródmieścia (a district court) is a court of first instance, against whose decisions an appeal lies to the Sąd Okręgowy (regional court). The categorisation of a court as one against whose decisions there is no judicial remedy is based, however, under Article 68(1) EC, as in the case of the third paragraph of Article 234 EC, on a case-specific approach: lower courts whose decisions in the particular proceedings

4 — Under Article 10(1) of Protocol No 36 to the Treaty of Lisbon (on transitional provisions), the limited powers of the Court of Justice continue to apply as a transitional measure with respect to acts of the European Union in the field of police cooperation and judicial cooperation in criminal matters that were adopted before the entry into force of the Treaty of Lisbon. Under Article 10(3), the transitional measure in Article 10(1) is in any case to cease to have effect five years after the date of entry into force of the Treaty of Lisbon. To that extent, the question relevant in the present case of the subsequent removal of the limitation on the power to make a reference may also arise once again in the future.

cannot be challenged also constitute courts of last resort for the purposes of that provision. [5]

16. As I have stated already in my Opinion in *Tedesco*, it must be taken into account specifically with regard to Regulation No 1206/2001 that the finding of facts is typically the task of the lower courts and not of courts of last resort. [6] For Regulation No 1206/2001 to be made in any way susceptible to interpretation by the Court, the concept of a court against whose decisions there is no judicial remedy within the meaning of Article 68(1) EC must therefore not be interpreted too strictly. In particular, it is inappropriate to treat only the highest courts as being empowered to refer.

17. The Polish Government has submitted that no legal remedy exists under Polish law against the decision of the referring court concerning who bears the costs incurred for the examination of a witness.

18. However, not every procedural measure which a court adopts as an order and which cannot be challenged makes that court one against whose decisions there is no judicial remedy for the purposes of Article 68(1) EC. Rather, the interim decision which is incapable of challenge must conclude an independent procedure or a particular stage of the proceedings and the question referred must concern precisely that procedure or stage of the proceedings. [7]

19. It is questionable whether the relevant decisions of the referring court in this case concerning examination of the witness or the costs connected with that procedure fulfil that criterion of an independent stage of the proceedings.

20. It is, however, ultimately not necessary to decide whether the referring court is to be regarded as a court of last resort which was therefore already entitled to make a reference under Article 68(1) EC. Since the entry into force of the Treaty of Lisbon, the reference for a preliminary ruling has in any event become admissible retrospectively.

21. By virtue of the entry into force of the Treaty of Lisbon, the former restriction on the making of a reference contained in Article 68(1) EC is no longer applicable and has not been replaced. The general rules relating to references for a preliminary ruling under

5 — See my Opinion in Case C-175/06 *Tedesco* [2007] ECR I-7929, points 21 and 22, and Case C-14/08 *Roda Golf & Beach Resort* [2009] ECR I-5439, paragraph 29, and the Opinion of Advocate General Ruiz-Jarabo Colomer in that case, point 28 et seq.

6 — See my Opinion in *Tedesco* (cited in footnote 5), point 22.

7 — See my Opinion in *Tedesco* (cited in footnote 5), point 26.

Article 267 TFEU apply from now on with regard to references for a preliminary ruling concerning the interpretation of legal acts in the field of visas, asylum, immigration and other policies related to free movement of persons, and thus the interpretation of Regulation No 1206/2001. Therefore, in that field too courts of first instance are entitled to make a reference.

22. Although the Treaty of Lisbon entered into force only after the reference for a preliminary ruling was lodged with the Court, the rules of the Treaty on the Functioning of the European Union are also applicable to the present reference *ratione temporis*. It is not the time when the reference for a preliminary ruling is lodged which should be decisive for the question of the power to refer but the time when a decision on that reference is made.

23. According to settled case-law, procedural rules apply to all proceedings pending at the time when they enter into force, whereas substantive rules usually do not apply to situations existing before their entry into force. [8] It is not necessary to decide whether that case-law can be applied to the legal provisions concerning the power of national courts to make a reference for a preliminary ruling, as it follows in any event from the spirit and purpose of the original limitation of the power to refer under Article 68 EC that a reference which was initially inadmissible is to be regarded retrospectively as admissible. The purpose of the limitation was, first, to prevent the possibility of the Court of Justice being overloaded by innumerable references for a preliminary ruling. [9] Second, the purpose was to prevent national proceedings from being unduly delayed as a result of references for a preliminary ruling by the lower courts.

24. The removal of the limitation of the power to refer under the Treaty of Lisbon proves that the Member States no longer perceive those dangers and instead specifically wish to make it possible in cases concerning the area covered by the former Title IV of the EC Treaty – as in other instances where the preliminary ruling procedure applies – for all courts to make a reference. In order to avoid procedural delays in cases in this area, which are particularly urgent in nature, the new urgent preliminary ruling procedure was finally introduced in 2008. [10] That altered assessment is an argument for regarding a reference for a preliminary ruling that was already lodged, but not yet ruled upon, when the Treaty of Lisbon entered into force as admissible.

8 — See, inter alia, Case C-293/04 *Beemsterboer Coldstore Services* [2006] ECR I-2263, paragraph 21, and Case C-467/05 *Dell'Orto* [2007] ECR I-5557, paragraphs 48 and 49.

9 — See, in this regard, also the Opinion of Advocate General Ruiz-Jarabo Colomer in *Roda Golf & Beach Resort* (cited in footnote 5), point 22 et seq.

10 — Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice; amendments to the Rules of Procedure of the Court of Justice, which the Court adopted on 15 January 2008 (OJ 2008 L 24, p. 39).

25. Finally, practical considerations and the principle of procedural economy are arguments for regarding references for a preliminary ruling as admissible where they were lodged by lower courts during the transitional period shortly before the entry into force of the Treaty of Lisbon and have been examined by the Court only thereafter. Rejection on the ground of inadmissibility would ultimately lead the court which is now empowered to make a reference to refer the same question for a preliminary ruling once more, [11] causing considerable additional administrative burdens and unnecessary lengthening of the duration of the main proceedings.

26. The referring court is therefore empowered to make a reference.

2. The relevance of the question referred

27. It must now be examined whether the questions referred by the national court are relevant for deciding the case.

28. In accordance with settled case-law on Article 234 EC, which is also applicable to Article 267 TFEU, in the context of the cooperation between the Court and the national courts it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling, [12] and there is therefore a presumption that the questions referred by national courts for a preliminary ruling are relevant. [13]

29. That presumption may however be rebutted in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of European Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is,

11 — That is what occurred in Case C-278/09 *Martinez* [2009] ECR I-11099, in which the Court by order of 20 November 2009 – that is to say, before the entry into force of the Treaty of Lisbon – declared that it lacked jurisdiction because of the limitation contained in Article 68 EC on the power to refer. The referring court re-lodged the reference on 6 April 2010 (Case C-161/10).

12 — See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 26.

13 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 30; Case C-404/07 *Katz* [2008] ECR I-7607, paragraph 31; and Case C-82/09 *Dimos Agios Nikolaos* [2010] ECR I-3649, paragraph 15.

in principle, bound to give a preliminary ruling on the questions referred to it concerning the interpretation of legal acts. [14]

30. The referring court wishes by the question referred to ascertain whether the requested court, that is to say, the Irish Metropolitan District Court, has the right to demand an advance or reimbursement for the examination of a witness or whether the requested court is obliged on the contrary to bear those costs itself.

31. So formulated, the question referred concerns only actions and duties of the requested court. To that extent an answer would have no direct bearing on the referring court. Were there to be doubts concerning the duties of the requested court, it would be for that court if appropriate to refer the matter to the Court of Justice for an interpretation of Regulation No 1206/2001. Interpreting the wording of the question literally, the question would therefore be irrelevant to the dispute to be decided on by the referring court.

32. However, the question of interest to the referring court is in fact whether it is itself obliged to pay such an advance or to reimburse the costs. The issue therefore concerns not only the rights and obligations of another court. On the contrary, the rights and obligations of the requested court which form the subject-matter of the question referred correspond directly to those of the requesting court that has submitted the reference. For that reason the question referred should in my opinion be reformulated so that it asks whether the requesting court is obliged to pay an advance to the requested court or subsequently to reimburse the costs incurred by it.

33. However, even if the question referred is reformulated in that way, the question remains whether the interpretation of Regulation No 1206/2001 is relevant to the decision in this particular instance. That is because any requirement to reimburse witness expenses concerns as such only the relationship between the requested court and the requesting court. It has no direct consequences for the outcome of the dispute in the main proceedings, which concerns a claim for damages.

34. The Commission too has also observed that the question referred appears at first sight to be inadmissible, because it concerns only the cooperation between the courts and thus the referring court's administrative functions and not its judicial role.

35. The question must in any event be regarded as relevant in so far as it concerns whether the requesting court is obliged to pay an advance to cover the witness's expenses, in order to ensure that the requested court

14 — See, inter alia, *Bosman* (cited in footnote 12) paragraph 61, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24.

examines the witness. If the requested Irish court makes the examination of the witness dependent on payment of an advance, the only option for the requesting Polish court is ultimately to refrain from gathering the evidence in question or to pay the advance in respect of the expenses which it is arguably not required by Regulation No 1206/2001 to do. If it does not pay the advance and the witness is then not examined, that may have a direct impact on the substantive decision in the main proceedings. The court could for example – because of the lack of further evidence – reach a decision concerning discharge of the burden of proof which goes against the party which called the foreign witness.

36. It is more difficult to assess relevance with regard to the *subsequent* reimbursement of witness costs. In that situation the requested court has examined the witness, and the requesting court can use that examination as a basis for its decision on the main proceedings. The reimbursement of the costs does, however, arise in relation to the decision on costs in the main proceedings, so that it is in any event not clearly irrelevant to the decision on the main proceedings. Moreover, it should once more be recalled that most questions as to the interpretation of Regulation No 1206/2001, which relates to the taking of evidence, will concern the main proceedings only indirectly. In many cases an interpretation of the regulation by means of a request for a preliminary ruling would not be possible if the requirements imposed as to the relevance of the question were too stringent.

37. It remained unclear at the hearing before the Court whether the referring court had already paid the sum to cover witness expenses requested by the Irish court. The referring court gave no details on that point. Even following a payment,[15] the question referred would not however be obviously irrelevant. Were Regulation No 1206/2001 to preclude payment, the question of reimbursement of the requesting court would arise. In addition, the question of the lawfulness of the demand by the requested court for payment of the expenses would remain relevant in the context of the decision on costs.

38. In my view the question is therefore relevant, and thus admissible, with regard to both the obligation to pay an advance and the requesting court's reimbursement obligation.

15 — Following the hearing, Ireland and the Polish Government indicated in written observations that the referring court paid the advance of EUR 40 in respect of witness expenses.

B — *The question referred*

39. By its question, the Polish court wishes in essence to ascertain whether it is obliged to cover the expenses incurred by the witness examined by the requested court, in the form of either payment of an advance or the subsequent reimbursement of those expenses.

40. It must be noted first that the facts of the present case fall within the scope of Regulation No 1206/2001, in accordance with Article 1(1). In the course of civil proceedings a court of a Member State is requesting the competent court of another Member State to take evidence. The examination of a witness is expressly referred to in Article 4(1)(e) as the subject of a request.

41. Under Article 10(2) of the regulation, the requested court is to execute the request in accordance with the law of its Member State. Under Irish law a witness is obliged to appear before a court only if he has first received payment for his expenses (for example his travel costs). All parties are agreed in that regard that the witness may not be denied the reimbursement to which he is entitled. It is only unclear whether it is the requesting court that must pay.

1. Advance to cover witness expenses

42. It must first be examined below whether the requesting court can be obliged to pay to the requested court an advance covering the witness's expenses so that the requested court examines the witness, in other words whether the requested court may refuse to examine the witness until the requesting court has paid an advance for witness expenses.

43. Ireland is of the opinion – since the request must be executed according to Irish law – that it is compatible with the regulation to make it a condition of examination of the witness that the requesting court has first made a payment covering witness expenses.

44. The grounds for refusing a request are stated in Article 14 of Regulation No 1206/2001. Article 14(1) concerns refusal to execute a request where the person concerned has the right to refuse to give evidence or is prohibited from doing so. Article 14(2) contains further grounds on which the execution of a request may be refused. Article 14(2)(d) covers the case of failure to pay a deposit or advance asked for in accordance with Article 18(3) of the regulation.

Under Article 18(3), an advance may be requested for the opinion of an expert. No provision is made in Article 18(3) regarding a request for an advance in relation to the examination of a witness.

45. Making execution of a request conditional on payment of witness expenses would therefore not be inconsistent with Article 14 of the regulation only if the grounds for refusal contained in that provision were not listed exhaustively, but merely by way of example. However, the wording of Article 14(2) militates against such an interpretation. That provision states that, in addition to the grounds referred to in Article 14(1), the execution of a request 'may be refused *only* if …'[16] Finally, recital 11 in the preamble to the regulation also states that – to secure the effectiveness of the regulation – the possibility of refusing to execute the request should be confined to strictly limited exceptional situations. It therefore follows that the grounds for refusal of a request are listed exhaustively in Article 14.

46. The requested court is therefore not entitled to make the examination of a witness conditional on prior payment of an advance covering witness expenses. The requesting court is therefore not obliged to pay such an advance.

2. Reimbursement of witness expenses

47. Furthermore, it must be established whether the requested court may request that the requesting court reimburse witness expenses subsequently.

48. Article 18(1) of the regulation provides that the execution of the request is not to give rise to a claim for any reimbursement of taxes or costs. The decisive point is therefore whether witness expenses are to be classified as taxes or costs within the meaning of that provision.

49. The requested court and Ireland refer to the fact that under Article 10(2) of the regulation the requested court is to execute the request in accordance with the law of its Member State. They state that under Irish law witnesses are obliged to attend to give evidence in court only if they have first received payment of their expenses. Payment of those

16 — Emphasis added.

expenses is a matter for the party who calls the witness, not the court. They are not court costs and the court is not responsible for their payment. That is stated to be in keeping with the adversarial nature of Irish civil proceedings.

50. According to Ireland, Article 18(1) of Regulation No 1206/2001 concerns only administrative costs, that is to say, those incurred by the court in carrying out its functions. Witness expenses are stated not to fall within that category as they are costs which, at least under Irish law, are to be borne by the parties and are not administrative costs. Since witness costs do not fall under Article 18(1) in the first place, Regulation No 1206/2001 does not preclude those costs from being claimed by the requested court. They are then to be borne either by the requesting court or by one of the parties to the main proceedings.

51. It must, in my view, first of all be made clear that the concept of costs is to be determined autonomously in European Union law and cannot depend on the classification under the respective national legal system. If the question of costs were to depend on the respective national concept of costs, that would run counter to the spirit and purpose of the regulation, which is intended to enable requests for the taking of evidence to be executed quickly and in an uncomplicated way.

52. In my opinion, taxes and costs within the meaning of Article 18(1) of Regulation No 1206/2001 also include the payment of expenses to a witness who has been examined by the requested court.

53. That argument is supported, first, by the wording of the provision. Article 18(1) refers to 'taxes' and 'costs'. The word 'taxes' should be understood as referring to the sums received by the court for carrying out its functions, that is to say, the institutional costs mentioned by Ireland, whereas 'costs' are to be understood as the sums which the court pays out to third parties in the course of the proceedings, for example to experts or witnesses. The other language versions also fail to provide any indication that the payment of witness expenses should not fall within Article 18(1), [17] since those expenses can also be subsumed under the terms respectively employed.

54. Ireland's view is also contradicted by a systemic interpretation. If Article 18(1) in fact only concerned institutional costs, it would not be necessary to provide for the reimbursement of experts' costs – which presumably would also fall within Ireland's understanding of non-institutional costs – as

17 — See, in particular, in the French version, 'frais' and 'remboursement de taxes ou de frais'; in the Spanish version, 'gastos' and 'abono de tasas o gastos'; in the English version, 'costs' and 'reimbursement of taxes and costs'; in the Swedish version, 'Kostnader' and 'avgifter och kostnader'; in the Italian version, 'spese' and 'rimborso di tasse o spese'.

an exception to that principle in Article 18(2). They would rather fall outside the concept of taxes and costs within the meaning of Article 18(1) of the regulation from the outset.

55. The spirit and purpose of the regulation also support a broad understanding of the concept of taxes and costs within the meaning of Article 18(1), so that witness expenses are also covered.

56. The purpose of Regulation No 1206/2001, as indicated by the recitals in its preamble, [18] is to enable evidence to be taken in a cross-border context in a simple, efficient and rapid way. The taking of evidence in another Member State should not lead to delays in national proceedings, which is the reason why Regulation No 1206/2001 was introduced, as a set of rules binding on all Member States, [19] in order to remove obstacles which may arise in this field.

18 — See, in particular, recitals 1, 2, 8, 10, and 11.

19 — With the exception of Denmark, see Article 1(3) of the regulation.

57. An obligation to pay an advance in respect of, or to reimburse, witness expenses complicates and slows down the cross-border examination of witnesses. On the other hand, they also represent a financial burden for the requested Member State. It must however be borne in mind – as the Finnish Government has pointed out – that every Member State can be both a requested and a requesting Member State, with the result in the final analysis that the costs incurred balance out. They do not of course balance out exactly. A precise balancing out is however also not intended in the slightest; rather, in the light of the objectives of the regulation, it was accepted that a financial imbalance may arise. In order to avoid excessive disadvantage, particularly high costs, such as those for experts and interpreters, were therefore expressly regarded as reimbursable.

58. An obligation on the referring court to pay expenses can therefore arise only if one of the exceptions laid down in Article 18(2) of Regulation No 1206/2001 applies.

59. Article 18(2) enables the reimbursement of fees paid to experts and interpreters and the costs occasioned by the application of Article 10(3) and (4). Article 10(3) and (4) concern, first, the situation where, as asked for by the requesting court, the request is executed in accordance with a special procedure; Article 10(4) governs the taking of evidence using communications technology. The payment of

witness expenses is not mentioned. An obligation to reimburse witness expenses would thus be compatible with the regulation only if the exceptions to non-reimbursement were listed in Article 18(2) by way of example only. The spirit and purpose of the regulation run counter to such a view. The regulation is intended to simplify and speed up the taking of evidence in a cross-border context. The exceptions in Article 18(2) should therefore also be categorised as exhaustive.

60. Finally, the origin of the regulation also supports the view that witness expenses are not reimbursable. According to recital 6 in the preamble to, and Article 21(1) of, Regulation No 1206/2001, the regulation is designed to replace the Hague Evidence Convention, which means that the relevant provisions of that convention can also be used for interpretation purposes.

61. The content of Article 18 of the regulation corresponds to that of Article 14 of the Hague Evidence Convention. The first paragraph of Article 14 of the Hague Evidence Convention provides that the execution of the request is not to give rise to any reimbursement of taxes or costs. The second paragraph of Article 14 of the Hague Evidence Convention entitles the State of execution only to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under the second paragraph of Article 9. [20] The Hague Convention on Civil Procedure of 1 March 1954 still expressly laid down [21] that witness fees were in principle to be reimbursed. The explanatory report to the Hague Evidence Convention makes clear that the number of instances in which costs were to be reimbursable was to be deliberately reduced compared to the 1954 Convention, with the consequence that the reimbursement of witness expenses – precisely because of the small amount typically involved – was deliberately dropped. [22] Only the constitutional limitation was adopted in Article 26 of the Hague Evidence Convention, according to which a Contracting State may request the reimbursement by the State of origin inter alia of the costs of attendance of persons called upon to give evidence in

20 — In addition, Article 14(3) provides for a further instance of liability being assumed for costs. According to that provision, an authority which is not able itself to execute the request may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking consent, the requested authority is to indicate the approximate costs which would result from this procedure. By its consent the requesting authority assumes liability for the costs.

21 — See Article 16 of the Hague Convention of 1 March 1954 on Civil Procedure: 'The execution of Letters of Request shall not give rise to reimbursement of taxes or costs of any nature. However, unless there is agreement to the contrary, the State of execution shall have the right to require the State of origin to reimburse the fees paid to witnesses or experts, and the costs occasioned by the employment of a judicial officer, rendered necessary because the witnesses did not appear voluntarily, or the costs resulting from any application of the second paragraph of Article 14.'

22 — See Philip W. Amram, *Explanatory Report on the 1970 Hague Evidence Convention* (Section J), which can be downloaded from http://hcch.e-vision.nl/upload/expl20e.pdf.

execution of letters of request solely if it is required to do so because of constitutional limitations.

62. The fact that Regulation No 1206/2001 reproduced the text of Article 14 of the Hague Evidence Convention but failed to adopt the constitutional exception contained in Article 26 of that Convention is an argument in favour of regarding witness expenses as in principle not reimbursable. In principle, therefore, under Article 18(1) of Regulation No 1206/2001 witness expenses may not be reimbursed.

63. The last aspect of the referring court's question, namely whether the requested court must ultimately cover the expenses out of its own financial resources, is of no relevance for the answer to the question referred. Under Article 10(2), the request is to be carried out in accordance with the law of the Member States. That law also governs the question of how and by whom witness expenses are to be paid. Since that question merely constitutes a synthesis of the first two parts of the question referred, the Court need not answer the point specifically.

V — Conclusion

64. I therefore recommend that the question referred by the Sąd Rejonowy be answered as follows:

Article 14 and Article 18 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 the requesting court is not obliged to pay an advance to the requested court for the expenses of a witness or subsequently to reimburse the expenses paid to the witness examined.