Neutral Citation Number: [2013] EWCA Civ 1234

Case Nos: A3/2012/2914, A3/2013/1034 & A3/2013/1035

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Henderson and Mr Justice Roth
[2012] EWHC 2761 (Ch), [2012] EWHC 3663 (Ch) &[2013] EWHC 822 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2013

Before :

LORD JUSTICE LAWS
LORD JUSTICE RIMER
and
LORD JUSTICE BEATSON

- -

Between :

(1) THE SECRETARY OF STATE FOR HEALTH AND OTHERS	**Claimants/ Respondents**
- and -	
(1) SERVIER LABORATORIES LIMITED AND OTHERS	**Defendants/ Appellants**

And Between:

NATIONAL GRID ELECTRICITY TRANSMISSION PLC	**Claimant/ Respondent**
- and –	
(1) ABB LIMITED AND OTHERS	**Defendants/ Appellants**

- -
- -

Mr Nicholas Green QC and **Ms Kelyn Bacon** (instructed by **Bristows**) for the **Appellants, Les Laboratoires Servier SAS** and **Servier SAS**

Mr Paul Lasok QC and **Mr David Drake** (instructed by **Peters & Peters**) for the **Respondents, The Secretary of State for Health and Others**

Mr Stephen Morris QC and **Ms Maya Lester** (instructed by **Hogan Lovells International LLP**) for the **Appellants, Alstom, Alstom Holdings** and **Alstom Grid SAS**

Mr Stephen Morris QC and **Ms Maya Lester** (instructed by **Shearman & Sterling LLP**) for the **Appellant, Areva SA**

Mr Jon Turner QC and **Ms Laura Elizabeth John** (instructed by **Berwin Leighton Paisner LLP**) for the **Respondent, National Grid Electricity Transmission Plc**

Hearing dates: 2, 3 May and 25 June 2013

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Approved Judgment

Lord Justice Rimer :

Introduction

1. This judgment is on three appeals against interlocutory orders made in two separate claims proceeding in the Chancery Division, the parties in each claim being unrelated to those in the other. In one claim, the appeal is against an order of Henderson J made on 12 October 2012. In the other, the two appeals are against an order of Roth J made on 11 April 2013.

2. All three appeals raise similar questions. Ideally, they should have been heard together. Unfortunately, the court's listing commitments did not enable a joint hearing to be arranged with sufficient expedition. The result was that the court heard the argument on the first appeal (the *Servier* appeal) on 2 and 3 May 2013 and the argument on the two other appeals (the *Alstom* appeals) on 25 June 2013. The parties to the *Alstom* appeals had access to the transcripts of the argument in the *Servier* appeal, and the court reminded counsel in that appeal of their right to attend the *Alstom* appeals, as they did, and informed them that, at the conclusion of the arguments in them, they could make brief submissions in response to such arguments, as they also did. The arrangements were not perfect, but they were the best the court could offer and I consider that no party can fairly claim it was not aware of the arguments advanced by other parties or did not have an opportunity to address them.

3. Henderson J's order in the *Servier* claim required the defendant/appellants to serve a response to the claimant/respondents' request for further information. The order was made pursuant to CPR Part 18. Roth J's order in the *Alstom* claim required the defendant/appellants to give disclosure under specified heads and was made pursuant to CPR Part 31. Each appellant objects to the orders against it on the ground that it claims that compliance will put it in breach of a French statute of 1968, as amended in 1980, and expose it to a risk of criminal prosecution in France. The statute is usually referred to as 'the French blocking statute'. Each appellant argues that, because of the risk of prosecution, the orders should not have been made and it asks this court to set them aside. They say they should only be required to respond to requests for further information or for disclosure made pursuant to the procedure provided by Council Regulation (EC) No. 1206/2001 of 28 May 2001, a route down which neither judge was prepared to travel. Roth J did, as I shall explain, originally sanction such a procedure, but it received a prompt rebuff from the French Ministry of Justice, which said that it was unnecessary to use it, and the end result was that he simply made conventional disclosure orders.

4. In what follows, I shall (i) set out the French blocking statute; (ii) set out the material parts of Regulation 1206/2001; (iii) summarise the issues in the *Servier* claim; (iv) explain Henderson J's reasons for ordering the provision of the information and describe certain events that followed his order; (v) summarise the issues in the *Alstom* claim; (vi) explain Roth J's reasons for ordering the disclosure; (vii) explain the arguments on the appeals; and (viii) express my conclusions.

The French Blocking Statute

5. Article 1 *bis* of the French Statute No 68-678 of 26 July 1968, as modified by the French Statute No 80-538 of 16 July 1980, provides:

> 'Sous réserve des traités ou accords internationaux et des lois et règlements en vigueur, il est interdit à toute personne de demander, de rechercher ou de communiquer, par écrit, oralement or sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier, ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci.'

6. The agreed English translation reads :

> 'Subject to international treaties or agreements and applicable laws and regulations, any individual is prohibited from requesting, seeking or disclosing, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, with a view to establishing evidence in foreign judicial or administrative proceedings or in relation thereto.'

7. The scope of this statute is apparently extremely broad. It applies both to those requesting and to those providing material of the proscribed nature. Article 3 imposes criminal sanctions for breach, being a maximum of six months' imprisonment and/or a fine of up to €18,000 (€90,000 for legal entities). It is agreed that the words 'toute personne', translated as 'any individual', extend to both natural and legal persons. We were told that the statute was introduced in response to what were viewed as the extravagant excesses of discovery processes in American anti-trust claims. By way of diluting any suggestion that the blocking statute is a unique piece of French protectionism, Mr Green QC, for the Servier appellants, pointed out that legislation of a like, though manifestly more limited, nature is to be found in section 2 of the United Kingdom's Protection of Trading Interests Act 1980. The comparison was unhelpful. The purpose and limits of the latter provision are expressly clear from its terms. The like cannot be said of the French blocking statute.

Council Regulation (EC) No 1206/2001 of 28 May 2001

8. This Regulation ('Regulation 1206'), described as being 'on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters', has applied throughout the European Union (save for Denmark) since 1 January 2004. It provides a procedure for taking evidence in another Member State in civil and commercial matters and is also referred to as 'the Evidence Regulation'. It is said by the appellants to provide the procedure that not only can, but must, be adopted in cases such as the present, when compliance with a direct order of the English court for the production of information or for disclosure will incur a risk of prosecution under the French blocking statute. The regulation was said by Mr Green to have been intended to be 'a supercharged version of the Hague Convention', upon which it is said to have improved in several ways.

9. The regulation needs to be read in conjunction with a Practice Guide ('the Guide') drawn up by the Commission Services in consultation with the European Judicial Network in Civil and Commercial Matters. The Guide explains, in paragraph 2, that before 2004 there was no binding instrument between all Member States concerning the taking of evidence and that the regulation 'lays down procedural rules to make it easier to take evidence in another Member State'. Paragraph 4 explains that the primary objective of the regulation is that requests for the taking of evidence are executed expeditiously. Paragraph 8 notes that the regulation does not define the

concept of 'evidence' but says that it 'includes for instance hearings of witnesses of fact, of the parties, of experts, the production of documents, verifications, establishment of facts, expertise on family or child welfare'. Henderson J expressed reservations as to whether the regulation could be said to apply to the making of requests for information; and Roth J was of the view that the regulation was not concerned with the achieving of disclosure as between the parties to litigation.

10. Turning to the regulation, recital (2) in the preamble states that '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'. Recital (5) states that such improvement could not be sufficiently achieved by the Member States and could therefore be better achieved at Community (now EU) level. Recital (6) states that there was, to date, no binding instrument between all the Member States concerning the taking of evidence and it notes that the Hague Convention of 18 March 1970 applied between only 11 Member States. Recital (7) states that as it was 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 was necessary to continue the improvement of cooperation in the field of taking evidence. Recital (17) states that the regulation should 'prevail over the provisions applying to its field of application, contained in international conventions concluded by the Member States' and that 'Member States should be free to adopt agreements or arrangements to further facilitate cooperation in the taking of evidence'.

11. Turning to the substantive provisions of the regulation, Article 1, in describing its '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
>
> (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. …'

Article 1 thus provides for two alternative methods for taking evidence: (1) a request to the court of another Member State to take it; and (2) its taking by the court of the requesting Member State directly in the other Member State.

12. Article 2, 'Direct transmission between the courts', provides by Article 2(1) that:

> 'Requests pursuant to Article 1(1)(a), hereinafter referred to as "requests", shall be transmitted by the court before which the proceedings are commenced or contemplated, hereinafter referred to as the "requesting court", directly to the competent court of another Member State, hereinafter referred to as the "requested court", for the performance of the taking of evidence.'

13. Chapter II deals with the 'Transmission and Execution of Requests', and Article 4(1) prescribes the form and content of the request. Articles 4(1)(a) to (d) provide, inter

alia, that it shall contain details of the requesting court, where appropriate the requested court, and 'a description of the taking of the evidence to be performed'; Article 4(1)(e) provides that, where the request is for the examination of a person, it shall contain his name and address, the questions to be put to him or a statement of the facts upon which he is to be examined and, where appropriate, a reference to his right to refuse to testify under the law of the Member State of the requesting court; and Article 4(1)(f) provides that where the request is for any other form of taking evidence, it shall contain details of 'the documents or other objects to be inspected'.

14. Articles 5 to 9 deal with various formal matters. One then arrives at Section 3, headed 'Taking of evidence by the requested court'. This is, therefore, the section dealing with a type of request falling within Article 1(1)(a) of the regulation, namely a request to the requested court to take the evidence. Article 10(1) provides that such court 'shall execute the request without delay and, at the latest, within 90 days of receipt of the request' and Article 10(2) provides that the 'requested court shall execute the request in accordance with the law of its Member State'. Articles 11 and 12 make provision as to who may be present in the performance of the taking of evidence by the requested court. Article 13, 'Coercive measures', provides that:

> 'Where necessary, in executing a request the requested court shall apply the appropriate coercive measures in the instances and to the extent as are provided for by the law of the Member State of the requested court for the execution of a request made for the same purpose by its national authorities or one of the parties concerned.'

Article 14, 'Refusal to execute', provides so far as material:

> '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:
>
> (a) the request does not fall within the scope of this Regulation or as set out in Article 1; or …
>
> (c) the requesting court does not comply with the request of the requested court to complete the request pursuant to Article 8 within 30 days after the requested court asked it to do so; …
>
> 3. Execution may not be refused by the requested court solely on the ground that under the law of its Member State a court of that Member State has exclusive jurisdiction over the subject matter of the action or that the law of that Member State would not admit the right of action on it.'

Article 16, 'Procedure after execution of the request', provides for the requested court to 'send without delay to the requesting court the documents establishing the execution of the request …'

15. Section 4, 'Direct taking of evidence by the requesting court', deals with a request under the second alternative provided for by Article 1, namely a request under Article 1(1)(b). This has direct relevance in relation to the *Alstom* appeals, and so I should set out the material parts of Article 17:

> '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 referred to in Article 3(3) …
>
> 2. Taking direct evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures. …
>
> 3. The taking of evidence shall be performed by a member of the judicial personnel or by any other person such as an agent, who will be designated, in accordance with the law of the Member State of the requesting court.
>
> 4. Within 30 days of receiving the request, the central body or the competent authority of the requested Member State shall inform the requesting court if the request is accepted and, if necessary, under what conditions according to the law of its Member State such performance is to be carried out, using form J. …
>
> 5. The central body or the competent authority may refuse the 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 is contrary to fundamental principles of law in its Member State. …'

The 'competent authority' referred to in Article 17(1) is, in the case of France, the Ministry of Justice.

16. Chapter III, 'Final Provisions', provides in Article 21, so far as material:

> '1. This Regulation shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States and in particular the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters in relations between the Member States party thereto.
>
> 2. This Regulation shall not preclude Member States from maintaining or concluding agreements or arrangements between two or more of them to further

> facilitate the taking of evidence, provided that they are compatible with this Regulation.
>
> 3. Member States shall send to the Commission:
>
> (a) by 1 July 2003, a copy of the agreements or arrangements maintained between the Member States referred to in paragraph 2;
>
> (c) a copy of the agreements or arrangements concluded between the Member States referred to in paragraph 2 as well as drafts of such agreements or arrangements which they intend to adopt; …'

17. Pursuant to Article 21(3), the United Kingdom ('UK') notified the Commission that it did not intend to retain any bilateral agreements with other Member States for the taking of evidence between the UK and the other Member States, but that it had informed Member States with which it had bilateral agreements that it wanted these to continue for cases between those Member States and the United Kingdom Overseas Territories that are not part of the EU. As regards France, the latter reference is to a Convention of 1922. The purpose of that notification by the UK was that the UK would not apply that Convention in relation to proceedings between the UK and France.

The Servier proceedings

18. The claimants are the Secretary of State for Health and other bodies within the NHS responsible for the provision of drugs and other pharmaceutical products within the NHS. The four defendants (collectively 'Servier') are: (1) Servier Laboratories Ltd, (2) Servier Research and Development Ltd, (3) Les Laboratoires SAS and (4) Servier SAS. Defendants (1) and (2) are companies incorporated in England and Wales. Defendants (3) and (4) are French companies: they are the appellants ('the French Servier companies'). Servier are the suppliers of the original, branded version of Perindopril, which is supplied in the UK under the brand name Coversyl. It is an angiotensin-converting enzyme inhibitor ('ACE inhibitor') used in the treatment of hypertension and heart failure. It was first commercialised in the late 1980s.

19. The claims against Servier fall under three main heads. First, a claim under Article 102 of the Treaty on the Functioning of the European Union ('TFEU') (formerly Article 82 of the EC Treaty) that Servier was at all material times dominant in a market for the supply of Perindopril or ACE inhibitors in the UK and, between 2001 and 2007, abused that dominant position, including by agreements relied on under the second head of claim. Second, a claim under Article 101 of the TFEU (formerly Article 81 of the EC Treaty) that in 2005 and 2006 Servier concluded agreements with at least five pharmaceutical companies precluding them from challenging Patent EP 1 296 947 for a particular crystalline form of Perindopril that Servier had applied for in 2001 and which, in 2007, was held invalid for lack of novelty and for obviousness, and also from manufacturing, marketing, selling or supplying generic Perindopril in the UK. Third, claims that Servier had tortiously interfered with the claimants' interests by unlawful means. Servier deny all allegations.

20. The matter before Henderson J was Servier's application of December 2011 for a stay of the proceedings on the basis that there was a substantial overlap between the claims

in the action and an ongoing investigation opened by the European Commission against Servier on 8 July 2009. The application was heard on 18 and 19 April 2012 along with various case management issues, including an application by the claimants for a response by Servier to a request for further information that the claimants had served on 23 September 2011. The claimants accepted that there was a degree of overlap between their claims and the European Commission investigation, and that a trial of the action could not take place until after the conclusion of the investigation and any litigation in the Court of Justice of the European Union ('the CJEU') to which it might give rise. They nevertheless opposed the imposition of an immediate stay and, in particular, sought directions for the initial stages of what the judge said would be a complex and lengthy disclosure exercise, including for the provision by Servier of the requested further information.

21. The outcome was that, save as otherwise provided by his order of 12 October 2012, Henderson J stayed the proceedings until 21 days after the conclusion of the oral hearing in the European Commission proceedings. He specifically did not, however, impose a total stay but, by paragraph 5, ordered Servier by 9 November 2012 to answer identified parts of the claimants' request for further information that they had served on 23 September 2011. He did so despite objections that compliance with such an order would expose the French Servier companies to the risk of prosecution in France under the French blocking statute. By paragraph 1 of his order, however, Henderson J gave Servier permission to appeal 'in relation to the issue of the French Blocking Statute', the French Servier companies duly filed their appellant's notice on 9 November 2012 and, by a subsequent order of 23 November 2012, Henderson J stayed parts of paragraph 5 of his order pending the outcome of their appeal.

22. Henderson J granted his permission 'upon the undertaking by [Servier] that if the French Ministry confirms that [Servier] will not be prosecuted for complying with the terms of this Order the appeal will not be pursued.' Such confirmation was sought but not obtained. The French Servier companies seek by their appeal to be relieved from the horns of the dilemma upon which they say Henderson J's order has placed them: (a) if they provide the further information, they risk prosecution in France; (b) if they do not, they risk being held in contempt of court in England.

Henderson J's judgment of 12 October 2012

23. Servier advanced various submissions in support of a stay of the proceedings until after the disposal of the European Commission's proceedings, but the only issue with which this court is concerned relates to their case that anyway no order should be made requiring the French Servier companies to provide information, evidence or documentation within the apparent scope of the French blocking statute to the claimants, because compliance with any such order would infringe such statute. Servier's case to that effect was supported by advice in a letter of 12 January 2012 from a firm of French avocats, Viguié Schmidt Peltier Juvigny AAPI.

24. The claimants' response was that an order for disclosure, or for the giving of further information, would not expose the French Servier companies to any real and significant risk of a criminal sanction in France. There was only one known case of such a prosecution in the previous 30 years, that of *Christopher X* in 2007, a case that had involved obtaining, or an attempt to obtain, information by deception and

accepted by all as readily distinguishable in kind on its facts. They pointed out, as Servier's French lawyers had recognised, that the blocking statute was then under review by the legislature, the purpose of the mooted amendments being said to reduce the prohibition to the provision of material 'likely to impair the sovereignty, security, essential economic interests of France or public order' or the 'disclosure of which is likely to seriously undermine the interests of a company, affecting its scientific and technical potential, its strategic positions, its business or financial interests or its competitive capacity'.

25. The claimants referred Henderson J to three prior cases in which the English courts had considered the French blocking statute: (1) *Partenreederei M/S "Heidberg" v. Grosvenor Grain & Feed Co Ltd , "The Heidberg"* [1993] I.L.Pr. 718, in which Cresswell J held there was no risk that compliance by two French defendants with a discovery order would result in their being charged with any criminal offence in France under the statute; (2) *Christopher Morris v. Banque Arabe et Internationale d'Investissement SA* [2001] I.L. Pr. 37, in which Neuberger J (as he then was) came to a like conclusion in relation to compliance with an order for disclosure and inspection of documents against a French bank; and (3) *Elmo-Tech Limited v. Guidance Limited* [2011] EWHC 98 (Pat); [2011] FSR 24, in which Lewison J (as he then was) also refused to accept the defendant's reliance on the French blocking statute in its opposition to a disclosure order.

26. The claimants also asserted that, contrary to Servier's submissions, neither the machinery of the Hague Convention nor that of Regulation 1206 was suitable for dealing with disclosure issues or the provision of replies to requests for information. They said that such machinery was appropriate for obtaining depositions from identified individual witnesses, or for securing the inspection of documents that can be specified in advance, but that at such an early stage in the *Servier* litigation they could not make any requests of that nature, because Servier had refused to provide any information about how relevant information or documents were organised or managed, or by which individuals and on what basis they were held.

27. In considering whether there was any good reason not to order Servier to provide the requested further information, Henderson J said:

> '55. I have carefully considered the potential impact of the French Blocking Statute, but in common with the three English courts which have so far had to consider the issue I am not persuaded that the risk of prosecution to which it might expose the French defendants or their officers is more than theoretical. The absence of any successful prosecution in France for breach of the statute, over a period of more than thirty years, with the single exception of the *Christopher X* case, in my judgment speaks for itself. The facts in that case were exceptional, involving as they did the use of deception by a French lawyer who was acting unilaterally and without the protection of a court order. I cannot believe that the French authorities would even contemplate prosecuting Servier for complying with a standard set of directions for disclosure in litigation brought in the public interest by the English health authorities alleging serious breaches of EU competition law.

> 56. I take due note of the fact that a contrary view has been expressed by Servier's French lawyers, but the weight which I can attach to their views is in my judgment limited. They do not purport to be independent experts whose overriding duty is owed to the court, and their evidence (in contrast to that adduced in the earlier English cases which I have reviewed) is informal in nature, being contained in correspondence without any statement of the relevant experience or expertise of the joint writers, and without any expert witness's declaration. I do not for a moment doubt that the advice contained in the letters was given in good faith, and with the intention of assisting the court; but the deficiencies to which I have drawn attention do mean, in my view, that it carries considerably less weight than the formal evidence of a properly instructed independent expert. It is also relevant to bear in mind that, by the time when the oral hearing has taken place and the disclosure exercise begins, probably some time early next year, the French Blocking Statute may well have been materially amended in a way which will eliminate even the theoretical risk which I have described.'

As for the proposed amendment of the French blocking statute, we were not told of further progress to that end and, in resisting the appeal, the claimants did not rely on any possibility of its being amended.

28. Henderson J then said that the stay he proposed to impose upon the progress of the action until after the oral hearing in the European Commission proceedings would not affect Servier's obligation to comply with the provision of further information in compliance with the ruling that he then proceeded to give.

29. The critical requests he ordered to be answered were Nos 38, 45 and 52. He said there was no dispute that Servier should provide the requested information. The only dispute was whether it should be provided by answers to the claimants' CPR Part 18 requests or whether (because of the French blocking statute) the claimants' requests should instead be made pursuant to Article 4 of Regulation 1206. He resolved that issue as follows:

> '63. The nature of the requests is briefly as follows. Request 38 asks Servier to identify (by name, job description, employer and tenure) all the individuals who were responsible for drafting and prosecuting the applications for patent EP 1296 947 ("the 947 patent") before the EPO, defending that patent in the EPO opposition proceedings, and conducting the patent infringement and validity proceedings in relation to it before the English courts. In a similar way, request 52 asks Servier to identify the individuals upon whose state of mind Servier relies to substantiate the allegation in paragraph 53(g) of the defence that at all material times the third defendant believed the 947 patent to be valid. Finally, request 45 asks Servier to "clarify the value of US sales of Perindopril in absolute US dollar terms, in particular in and around 2000."
>
> 64. It is clear that much of the information needed to answer these requests will fall within the apparent scope of the French Blocking Statute. Accordingly, if I felt that there were any real risk of the third or fourth defendant being exposed to prosecution by compliance with an order of the English court to answer those requests, or by voluntarily providing the answers to them, I would have been

disposed to direct the claimants in the first instance to attempt to use the procedure of Regulation 1206/2001, despite the extra time and expense which would be involved. I say "attempt to use" because I agree with the claimants that it is very far from clear whether the procedure under the regulation extends to requests for particulars of an opponent's statement of case, and it is only with some linguistic contortion that the provision of answers to such requests could be described as the taking of evidence. Since, however, I am satisfied that the French Blocking Statute does not pose any real threat to Servier, for the reasons which I have already given, I see no reason to depart from the normal practice of the English court. I will therefore direct Servier to answer these requests in the usual way.

65. I also add, for the avoidance of doubt, that the individuals whose names Servier must provide in answer to requests 38 and 52 are the names of those who had operational responsibility in relation to the relevant decisions or activities, and whose conduct might reasonably be regarded as attributable to Servier.'

Events following Henderson J's judgment of 12 October 2012

30. On 16 October 2012, the French Servier companies wrote to the Ministry of Justice in Paris, for the attention of Mme Blanc. We were also provided with an English translation. The letter opened by referring to the French blocking statute. It referred to Henderson J having made an order equivalent to "discovery" (not strictly an accurate description of his order under appeal) and asked whether criminal proceedings under the French blocking statute could be undertaken against the French Servier companies if they complied with the order. It explained that the companies had invoked that statute in response both to the claimants' original request for further information, in support of the stay application before Henderson J and 'in particular to stay the requirements to give disclosure', although there is no appeal against the disclosure order that Henderson J made. That may be because so far he has only ordered each party to serve a document setting out the 'scope of disclosure' which that party intends to make, and for all I know the French Servier companies intend in due course to say that any disclosure from them will anyway not include any disclosure that would involve a breach of the French blocking statute. The letter explained that the purpose of 'discovery' is to make available evidence supporting or undermining the parties' respective cases. It quoted, as I have, paragraphs 55 and 64 of Henderson J's judgment. It referred to what was said to be an alternative procedural path that would avoid any breach of the blocking statute, namely the application of the procedure stipulated in Regulation 1206, but said that Henderson J had dismissed this on the ground that he did not believe there was a risk of prosecution of the French Servier companies under the blocking statute. It said that the companies had been advised by their French lawyers (those whose opinion had been before Henderson J) that if they complied with the orders, they would risk prosecution and conviction for breaching the blocking statute; and it said that, if they did not comply with it, they could be found guilty of contempt of court in England and face a heavy fine or imprisonment. The letter asked for confirmation 'that the [French Servier companies] will not be prosecuted in France on the basis of the French Statute if they were to comply strictly with the Order of Mr Justice Henderson which requires Servier to act in breach of Article 1 *bis* of the French Blocking Statute'. It said that if the Ministry of Justice was

unable to provide the requested confirmation, the negative response would be placed before the Court of Appeal in support of this appeal.

31. The response was a letter of 5 November 2012 from the Ministry of Justice. The letter, signed by Mme Ab Der Halden, reads materially, in translation:

> 'French criminal law prohibits, at the risk of incurring six months' imprisonment and a fine of €18,000, the search for and provision of, by any person, documents or information of an economic, commercial, industrial, financial or technical nature intended for use as evidence in foreign judicial or administrative proceedings or within the framework thereof.
>
> The scope of this prohibition is particularly wide since it applies even if the search for the document is not effectively followed up and even if the person pursued is neither a French national nor a French resident.
>
> However, the prohibition is only instituted "subject to international treaties and agreements", in such a way that it is possible for lawyers to ask a judge to formalise a request for international judicial collaboration in accordance with the international instruments relating to the provision of proof abroad, in this case on the basis of community regulation no. 1206/2001.
>
> France considers that the provisions of these instruments have an exclusive and obligatory nature, where it is a question for a judicial authority of a State to obtain proof in another State also bound by this instrument. Hence, any search for proof on French territory by foreign authorities, which may be carried out outside the scope of a validly formalised request for judicial collaboration, would clearly constitute a breach of the sovereignty of the French State.
>
> The position consistently expressed by the representatives of the French government, was in particularly [sic] recalled where the Hague Convention of 18 March 1970 is concerned at the time of the last special committee organised by the Permanent Office of the Conference on International Private Law of the Hague, in that town, in February 2009, but also at the time of a Symposium organised by the ABA-International Legal Exchange … dealing with the resolution of international disputes … which was held in London and in Paris in January 2005 ….
>
> Hence, any search for information or documents must be formalised in accordance with the applicable international instruments. Where this is not the case, it is not permitted to communicate them and the penalties of imprisonment and fines provided for by the aforementioned articles of the Law no. 68-678 remain applicable.
>
> Non-compliance with this law has given rise to effective criminal sanctions (for example, a decision by the Court of Cassation of 12 December 2007). In any event, as a result of the power of the assessment of the Public Ministry in the engagement of public action, as well as a result of the constitutional principle of the separation of powers, the Ministry of Justice cannot guarantee the absence of criminal proceedings in an individual case.'

The reference to the decision of 12 December 2007 is to the *Christopher X* case.

32. We were referred (without objection) to some evidence (an opinion from Professor Denys de Béchillon, an associate professor of public law at the University of Pau) about Mme Ab Der Halden. It was to the effect that she has the status of a judicial officer and holds the office of deputy director of economic law, a high position in the hierarchy of the Ministry of Justice. It is said that it is undeniable that she has a very high rank and that it was 'certainly of much interest' that she had signed the letter herself 'which means that the case was deemed important enough to be treated in the Sub-Directorate, by the Deputy Director, and not in the office, which could have been done perfectly. Certainly, this is a sign of strong involvement of the Ministry in the management of this case.' The opinion concluded that:

> 'Given all the above, I consider that, generally, a letter signed by the Deputy Director of Economic Law in the Directorate of Civil Affairs of the Ministry of Justice concerning, in response to a specific request, on a question of law relating to a request for disclosure of international documents, should be regarded as provided with the proper authority of the Ministry, and prevails as such.'

33. All that said, the French Servier companies recognise that the Ministry of Justice does not make decisions as to whether in any particular case a prosecution should or should not be brought. That is the function of the public prosecutor. The Ministry could not therefore give a definitive answer as to the risk of prosecution. On one view, the letter does no more than state the apparent effect of the French blocking statute, which might be said to speak for itself, although it does go to the extra length of saying that the appropriate route forward is via Regulation 1206, and we were told that the Ministry is the responsible authority for the purposes of that regulation.

Henderson J's judgment of 29 April 2013

34. The case returned to Henderson J on 29 April 2013 (three days before the hearing of the *Servier* appeal) for case management directions, the need for such arising because of the impact of the then pending appeal upon the timetable for the judge's earlier directions. The correspondence just summarised was put before the judge. The outcome was that he postponed the commencement of the disclosure timetable earlier laid down until after judgment on the French Servier companies' appeal. The relevant parts of his judgment of 29 April are his views on the correspondence:

> '34 I am also not persuaded by the argument that there is no evidence before me of the potential impact of the French blocking statute. It appears to me that the risk is pretty much self-evident, given the very broad terms in which the statute is framed, if one reaches the position that I was wrong to dismiss any risk as so insubstantial that it could be disregarded.
>
> 35. The effect of the exchange of letters with the French Ministry, at any rate according to Servier, is that there is an appreciable risk which simply cannot be disregarded, and, no doubt, this will found many of the arguments which they address to the Court of Appeal in due course.
>
> 36. Mr Drake [for the claimants] argues that the letter from the French Ministry does not itself purport to deal with the particular circumstances of the present

> case, but only says in general terms that every case will have to be looked at individually. That is true, but since that response was given in answer to a specific request, supported by details of my judgment on the French statute, and since the effect of the letter was to refuse to give the confirmation sought, it appears plain to me that there may be an appreciable risk which cannot be wholly discounted, and that the exchange of correspondence alone is therefore sufficient to establish the possibility of the French blocking statute having an impact on the Servier defendants.
>
> 37. Quite apart from that, there is anyway the evidence of the French lawyers which was before me this time last year which again, it seems to me, provides some prima facie evidence of the existence of a risk on the assumption that I was wrong to dismiss it as insubstantial.'

That is said to reflect a modification of Henderson J's view expressed in his judgment of 12 October 2012.

The Alstom proceedings

35. The claimant is National Grid Electricity Transmission Plc ('National Grid'). There are 23 defendants, of which the first is ABB Ltd. Alstom, Alstom Holdings, Areva SA and Alstom Grid SAS are the sixth, ninth, tenth and twenty-second defendants. These four defendants are French companies ('the French defendants') and are the appellants under two appellant's notices. Their appeals are against disclosure orders made against them by Roth J on 11 April 2013. Areva SA was not represented before Roth J, but the other three appellants were represented by Mr Morris QC, who with Ms Lester represented all four before us.

36. National Grid's claim is a 'follow-on' damages action for breach of Article 101 of the TFEU brought following the European Commission's decision in Case Comp/F38.899 – Gas Insulated Switchgear ('GIS') issued on 24 January 2007 ('the Decision'). GIS is heavy electrical equipment controlling energy flow in electricity grids and is a major component in power stations. The Decision, addressed to 20 companies, found they had been engaged in an extensive cartel regarding the supply of GIS. The cartel lasted, with variation in the involvement of some participants, from 1988 to 2004 and covered much of the world excluding the United States and Canada. The Decision imposed fines totalling over €750m. National Grid alleges that it suffered substantial losses by reason of overcharges resulting from the cartel. Roth J said in his judgment of 11 April 2013 that:

> '3. … The damages it is alleged to have suffered depends on computation of what likely overcharge resulted from the cartel and to what extent [National Grid] passed this through to its customers. Those are complex issues which depend on economic analysis of a very significant amount of data, so no clear value can yet be placed on the claim. However, with interest the amount claimed is likely to run to several £100 millions.'

37. National Grid's proceedings were commenced on 17 November 2009. Various defendants (and other companies not defendants) appealed against the Decision to the General Court, which delayed the progress of the claim, although the Chancellor, Sir Andrew Morritt, refused the defendants' application for a total stay: [2009] EWHC

1326 (Ch). All appeals to the General Court were dismissed as regards liability, save in minor respects as regards the periods of involvement in the infringement. Further appeals have been lodged to the CJEU and are pending but the trial in the claim has been fixed for June 2014 on the basis that they will by then have been determined.

38. In paragraph 7ff, Roth J dealt with the question of disclosure. He explained the unusually complicated nature of the claim and that 'for the task of estimating the cartel overcharge, a matter very dependent on expert economic evidence, disclosure is therefore of great significance'. He explained that disclosure had not been dealt with by way of standard disclosure, but by specific disclosure addressed and determined in stages. Extensive disclosure had been given by all defendants other than the French defendants. The application before him was for an order for the giving by those defendants of specific disclosure of a nature that mirrored that given by other defendants.

39. The application was preceded by some relevant history, which I should explain. National Grid had earlier sought a disclosure order at a case management conference on 8 November 2012. The French defendants objected to such an order and relied on the French blocking statute as a reason why it should not be made. National Grid's response was that as there was no real risk of prosecution, there was no reason not to make the order. The court did not, however, decide that issue at that stage, because the French defendants proposed that a debate on it could be avoided if the court made a request for the direct taking of evidence pursuant to Articles 1(1)(b) and 17 of Regulation 1206. In light of that proposal, National Grid did not press for a disclosure order against the French defendants. The outcome was the making of orders by Roth J on 26 November and 5 December 2012 in respect of the French defendants 'directing requests to be issued and designating those parties' respective solicitors as the person to be identified on the requisite Form I under Art 17 to perform the taking of evidence'.

40. By mid-January 2013, nothing having happened, National Grid was becoming concerned at the delay. Something did then happen, namely that by responses of 21 January 2013 the French Ministry of Justice rejected the requests. The rejection was written by Clémentine Blanc, the addressee of the Servier letter for clearance sent to the Ministry on 16 October 2012, although in the event it was not she who had replied to it on 5 November 2012. Mme Blanc wrote as follows, according to the agreed translation:

> 'Direct execution in conformity with the request is not approved for the following reasons.
>
> Article 17.3 of [Regulation 1206] provides that the taking of evidence be carried out by a judge or by any other person, for example an expert, appointed in conformity with the law of the Member State to which the requesting court belongs.
>
> In the present case, the request for direct execution (Form I) specifies that the taking of evidence (consisting of receipt of documents) will be carried out not by Judge ROTH as stated in the communication from the firm of lawyers which sent the request, but by the lawyer of the defendant company in the proceedings meant to produce the documents which are the subject of the taking of evidence. Such a

> procedure leads to charging one party to the lawsuit with executing the taking of evidence necessary for the resolution of the lawsuit, which seems contrary to the fundamental principles of the law of the Member State applied to. The refusal to grant direct execution under these conditions is in conformity with Article 17.5(c) of [Regulation 1206].
>
> Moreover, in order to have one party produce documents considered necessary for the outcome of the lawsuit it has to settle, a court does not need to make an international application to obtain evidence: it suffices for it to order the party concerned to produce the said evidence. Certainly, recourse to a rogatory commission based on international instruments allows the parties to avoid the risk of being prosecuted in France on the basis of the law … known as the "blocking statute", but this is an abuse of procedure, as no taking of evidence is in reality necessary to achieve the result sought by the judge.'

41. That letter is of some interest. Article 17(3) of Regulation 1206 provides that 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.*' For Roth J to have designated the French defendants' lawyers as the persons to 'take the evidence' (if giving disclosure amounts to such taking) was, in accordance with English legal procedure, a conventional course for him to have adopted, and one which apparently complied with Article 17(3), yet Mme Blanc, for undeveloped reasons, regarded the provisions of Article 17(5)(c) as trumping the requesting court's designation under Article 17(3).

42. As for Mme Blanc's final paragraph, it is not entirely clear what it amounts to. My reading of it is that she was expressing the view (later shared by Roth J) that an international instrument such as Regulation 1206 either does not apply to the obtaining of disclosure from another party in legal proceedings, or at any rate is not an instrument to which recourse needs to be had for the purpose of obtaining such disclosure; and therefore, although its use would avoid any risks arising under the French blocking statute, its invocation would be an abuse of process. The claimants' proper course was simply to ask the English court to order the French defendants to give the required disclosure.

43. The consequence of that setback was that National Grid renewed its application to Roth J for a conventional disclosure order against the French defendants. Roth J explained that although Areva SA was not represented on the application, it had by a letter from its solicitors associated itself with the position adopted by the other French defendants, namely that they continued to object to the making of a direct order.

44. Roth J had expert evidence from both sides as to the application of, and risks presented by, the French blocking statute, and although they represented a sharp division of opinion, there was no cross-examination and he was asked to reach his decision on the basis of their written reports. He reviewed that evidence in paragraphs 32 to 40. He recorded an acceptance by the French defendants that the court had a discretion as to whether it should order a foreign party to give disclosure notwithstanding that compliance might violate a prohibition under an applicable foreign law, and he cited from Hoffmann J, as he then was, in *Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation and Others* [1986] Ch 482.

That was a decision under the former Rules of the Supreme Court but Roth J explained how in the *Morris* case Neuberger J (as he then was) had accepted that the like principle applied under the CPR. Roth J went on to refer to the four prior English authorities that had considered the approach to be taken to the French blocking statute: namely, the three authorities to which Henderson J had referred in his judgment of 12 October 2012 (see paragraphs 25 and 27 above), plus Henderson J's own judgment of that date. He came to his conclusions at paragraph 41ff.

45. Roth J assumed, without deciding, that production of the documents of which disclosure was sought would infringe the French blocking statute. In paragraphs 42ff, he gave his reasons for his conclusion in paragraph 47 that:

> 'I find it virtually inconceivable that where jurisdiction over a company is exercised pursuant to an EU regulation to make it a defendant to proceedings in another EU Member State, for damages alleged to result from an established and serious violation of a fundamental provision of EU law, which proceedings serve an objective of EU policy, the public authorities of one EU Member State would in the exercise of their discretion institute criminal proceedings against that company for complying with the procedural rules of the courts of the Member Sate where the proceedings are brought. …'

He then said that, absent the existence of Regulation 1206, he would have little hesitation in ordering the French defendants to give disclosure. He turned to consider whether the regulation changed anything. He held that it did not.

46. First, he said that the regulation was not concerned with the provision of disclosure between parties to litigation:

> '50. [Regulation 1206] is not basically concerned with the provision of disclosure between parties to litigation at all: see *Masri v. Consolidated Contractors Int (No 4)* [2008] EWCA Civ 876, [2010] 1 AC 90, *per* Sir Anthony Clarke MR at [45] [and Roth J added in a footnote that although the Court of Appeal's decision was reversed by the House of Lords, it was not reversed on that point]. Such disclosure does not involve the *taking* of evidence in another Member State. This is what I understand the official of the French Ministry of Justice to mean by the first sentence of the final paragraph of her letters. Thus to use the regulation as the means to ensure ordinary disclosure would be an extraordinary route.'

47. Roth J referred next to the decision of the CJEU in Case C-170/11 *Lippens v. Kortekas* [2012] I. L. Pr 42, the essence of which was that Regulation 1206 did not oblige a national court to use its procedure for taking evidence, but that the court could use its own national procedure to summon as a witness a party residing in another Member State.

48. He then considered the then recent decision of the CJEU of 12 February 2013 in Case C-332/11 *ProRail BV v. Xpedys NV*, of which Henderson J had not had the benefit but which was central to the argument before us. He summarised the facts and cited from the judgment. He said that, whilst the case showed that in its particular circumstances use of Regulation 1206 was mandatory, the decision to that effect:

> '56 … was clearly referring to the situation where an individual designated by the court of one state would be personally taking evidence in another state in a manner which the latter state restricts, since it involves the exercise of judicial or official authority in that state. In those circumstances, collaboration with the public authorities through [the regulation] is the only way that the evidence can properly be taken. The *ProRail* case accordingly concerns the "direct" route under the regulation, which the French Ministry of Justice has already refused to accept as appropriate in response to this court's requests. Moreover, the judgment has no bearing on the requirement for a company based in a second state which is a party to litigation in the first state itself to supply information and documents to the other parties to that litigation. Like *Lippens*, the *ProRail* case concerns the official taking of evidence, not disclosure of documents by one party to another.'

49. The outcome was that Roth J made the disclosure order sought. I shall set out his final comments as to why it was expedient to make such an order:

> '57. I appreciate that there is still some time before this case comes to trial. However, significant time was lost through an abortive attempt to use the direct route under [Regulation 1206]. The case is now proceeding on a carefully structured timetable to trial, and the details on the operation of the cartel and as regards GIS projects which the disclosure from the French Defendants will provide is needed by the experts for the process of assembling and assimilating data for the complex exercise of estimating the cartel overcharge. There is, in my view, a real risk that the respective French courts might reject a further request under the regulation as inappropriate since they are not being asked to take evidence but, in effect, to order documentary disclosure. Moreover, if resort to a request under the regulation were found inappropriate for the present disclosure by reason only of the blocking statute, further and repeated requests may similarly be needed whenever additional information or clarification is sought from any of the French Defendants. Given my conclusion regarding the risk of prosecution under the French blocking statute, I see no sound basis for taking a course that involves further delay and uncertainty. I consider that the French Defendants should be subject to an order for disclosure in the same way as all the other defendants, including the Swiss, German and Austrian defendants.'

50. The disclosure so ordered is, we were told, likely to relate to a very substantial volume of documents. Apart, however, from the question raised by the French blocking statute, no question arises before us as to the propriety of the disclosure order, save only that Mr Morris, in his closing submissions in reply, sought to downplay the claimed importance of the disclosure, an undeveloped submission to which I would attach no weight. Roth J gave the French defendants permission to appeal and stayed his disclosure order until after judgment on any appeal.

51. I add this. The argument before Roth J was on 14 February, and he gave his reserved judgment on 11 April 2013. Between the hearing and the judgment, the French defendants, by their solicitors' Paris office, wrote a similar letter to the French Ministry of Justice on 1 March 2013 as had the French Servier companies on 16 October 2012. They set out the history, including the earlier abortive attempt to invoke Regulation 1206, and quoted the final paragraph of Mme Blanc's letter of 21 January 2013. They ventured their view that Roth J would order the French

defendants to produce documents outside the procedure provided for by the regulation and asked for confirmation that, upon the French defendants complying with such order, no criminal proceedings would be brought against them under the French blocking statute. The response, on 25 March 2013, from Mme Blanc, was that no such confirmation could be given. The letter made the point that the Ministry of Justice was not authorised to give individual instructions in criminal proceedings. Mme Blanc had but two months before advised that the only proper way to obtain disclosure from the French defendants was by the making by the English court of an order against them directly. Is it credible that she had it in mind that such procedure could lead to the prosecution of the French defendants?

The arguments on the appeals

(a) The Servier appeal

52. Mr Green's primary submission in support of the *Servier* appeal is that the procedure offered by Regulation 1206 was not just an option open to Henderson J as the modus for obtaining the requested 'further information' but the *only* option open to him. Its use was mandatory. For that he relied upon the *ProRail* decision of the CJEU, which, as I have said, post-dated Henderson J's ruling on the matter on 12 October 2012, although the Opinion of Advocate General Jääskinen in *ProRail* had been delivered on 6 September 2011. Since *ProRail* featured centrally in all the appeals, and there was a fundamental dispute as to what it decided, I propose to refer to it fully and to quote extensively from both the Opinion and the judgment in order to let them speak for themselves as to what the case decided.

53. The facts in *ProRail* were as follows. In November 2008, a freight train was derailed near Amsterdam whilst *en route* from Belgium to the Netherlands. The accident led to the bringing of proceedings by Belgian, German and Netherlands companies in both Belgian and Netherlands courts. The Belgian proceedings were brought by ProRail against four other companies, including DB Schenker Rail Nederland NV. ProRail, whose registered office was in the Netherlands, controlled the Netherlands railways.

54. On 11 February 2009, DB Schenker applied to the Belgian court for the designation of a judicial expert and on 5 May 2009 the Belgian court acceded to its application and made an appropriate order. The Advocate General said that most of the expert's task under the order was to be carried out in the Netherlands. He said, in paragraph 23:

> '… 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 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.'

55. ProRail appealed against the order to the Belgian Court of Appeal, contending that the Belgian expert's task should be limited to determining the damage insofar as that task

could be carried out in Belgium; and, at least, that the expert should carry out his activities in the Netherlands only in accordance with the procedure laid down in Regulation 1206. The appeal was dismissed on the ground that neither of the Article 1 conditions was present and that the assertion that an expert could not be charged with an investigation in the Netherlands other than via the regulation was unfounded. ProRail appealed to the Belgian Court of Cassation, which stayed the proceedings and referred to the CJEU for a preliminary ruling the question whether an investigative measure ordered by the Belgian court to be carried out partly in the territory of another Member State must, for the direct performance of that part of the task, be implemented in accordance with Regulation 1206.

56. The Advocate General described the reference as requiring an interpretation of Articles 1 and 17. His opinion was that if the investigation that the expert would be required to carried out in the other Member State would require the cooperation of the authorities of that State, adoption of the procedure provided by Regulation 1206 was mandatory; otherwise it was not. The heart of his reasoning is in paragraphs 47 to 62, of which I shall quote the material parts:

> '47. The underlying principle in this sphere is that of territorial sovereignty of the Member States, as I have already stated in my opinion in *Lippens and Others* (Case C-170/11 [2012] ECR I-0000). 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.
>
> 48. [Regulation 1206] 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.
>
> 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, 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.
>
> 50. The current wording of the two articles of [the regulation] 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" that the relevant provisions of that regulation, namely those of Article 17, must be applied. 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. 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 [the regulation]. …

55. The decisive criterion for knowing in which cases [the regulation] 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 [the regulation]. Acts which do not concern the sovereignty of the Member State in which the evidence is to be gathered tend not to fall within the scope of [the regulation]. 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 [the regulation] 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 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 the 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 laid down in Article 17 of [the regulation] 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.

60. This seems to me to be the case in the 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 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 [the regulation] should have been implemented in the present case.

61. There can be no risk that Article 17 of [the regulation] 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. [The regulation] 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 [the regulation], it is now no longer possible to designate experts to carry out investigations abroad without systematically applying the procedures laid down by that regulation. [The regulation] is not designed to restrict the options of national courts for action regarding the taking of evidence, by excluding 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.'

57. The judgment of the court was to like effect. The court said:

'40. It must be observed that, according to Article 1(1)(b) of [the regulation], the latter is applicable in civil and commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, makes a request to take evidence directly in another Member State.

41. The conditions for such direct taking of evidence are governed by Article 17 of that regulation. According to Article 17(1) and (4), such evidence may be taken directly in the requested Member State with the prior authorisation of the central body or competent authority of that State. According to Article 17(3), the taking of evidence is to 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.

42. It follows that [the regulation] applies as a general rule only if the court of a Member State decides to take evidence according to one of the two methods

provided for by that regulation, in which case it is required to follow the procedure relating to those methods (Case C-170/11 *Lippens and Others* [2012] ECR I-0000, paragraph 28).

43. Next, it must be recalled that, according to recitals 2, 7, 8 , 10 and 11 in the preamble to [the regulation], the aim of the regulation is to make the taking of evidence in a cross-border context simple, effective and rapid. The taking of evidence, by a court of one Member State in another Member State must not lead to the lengthening of national proceedings. That is why [the regulation] established a regime binding on all the Member States, with the exception of the Kingdom of Denmark, to remove obstacles which may arise in that field (see Case C-283/09 *Werynski* [2011] ECR I-601, paragraph 62, and *Lippens and Others*, paragraph 28).

44. Furthermore, as the Advocate General observed, in point 62 of his Opinion, the regulation does not restrict the options to take evidence situated in other Member States, but aims to increase these options by encouraging cooperation between the courts in that area.

45. An interpretation of Articles 1(1)(b) and 17 of [the regulation] according to which the court of a Member State is obliged, for any expert investigation which must be carried out directly in another Member State, to take evidence according to the method laid down by those articles would not be consistent with those objectives. In certain circumstances, it may be simpler, more effective and quicker for the court ordering such an investigation, to take such evidence without recourse to the regulation. …

47. It must be stated that, in so far as the expert designated by a court of a Member State must go to another Member State in order to carry out the investigation which has been entrusted to him, that might, in certain circumstances, affect the power of the Member State in which it takes place, in particular where it is an investigation carried out in places connected to the exercise of such powers or in places to which access or other action is, under the law of the Member State in which the investigation is carried out, prohibited or restricted to certain persons.

48. In such circumstances, unless the court wishing to order cross-border expert investigation foregoes the taking of that evidence, and in the absence of an agreement or arrangement between Member States within the meaning of Article 21(2) of [the regulation], the method of taking evidence laid down in Articles 1(1)(b) and 17 thereof is the only means to enable the court of a Member State to carry out an expert investigation directly in another Member State.

49. It is clear from the foregoing that a national court wishing to order an expert investigation which must be carried out in another Member State is not necessarily required to have recourse to the method of taking evidence laid down in Articles 1(1)(b) and 17 of [the regulation].'

58. Mr Green's submission, in reliance upon *ProRail,* was that Henderson J's order requiring the French Servier companies to provide information in contravention of French law involved a like impact upon French authority and sovereignty as did the

carrying out of an expert investigation on Netherlands soil of a nature that could only lawfully be carried out there with the prior sanction of the Netherlands authorities. He submitted that Roth J's different, narrower view in the *Alstom* case as to the impact of *ProRail* was wrong. He submitted that we should rule that the further information that the French Servier defendants agree has to be provided can and must only be ordered to be provided by an appropriate request under the regulation. In his final submissions following the arguments in the *Alstom* appeals, he went so far as to submit that the present case calls for the invocation of the regulation even more strongly than did the facts in *ProRail.*

59. Second, as to whether there is in fact a risk of prosecution, he submitted that the position had changed materially since Henderson J's assessment by his judgment of 12 October 2012. Henderson J's observations in his judgment of 29 April 2013 recognised that the French Servier companies would face a real risk of prosecution if they were to comply with his earlier order.

60. Third, he said the adoption of the procedure prescribed by the regulation was a practical way forward, and that although the attempt to engage it in the *Alstom* case had gone wrong, there was no reason not to assume that it could and would be properly operated in the *Servier* case.

61. Fourth, whilst the adoption of such procedure would involve delay, there can be no trial of the claim against the Servier defendants until after the European Commission proceedings have been decided and the appeal process exhausted, which will not be for months, perhaps years.

62. Fifth, Mr Green submitted that even though the claims include allegations of deceit, the case will turn substantially on documents and there will be no risk of their being lost or of the adoption of the regulation's procedure affecting the efficacy of the trial.

63. Mr Lasok QC, for the claimants, opened his responsive submissions by referring to the further information ordered. He made quite telling points that, in certain respects, compliance with such order would not obviously involve an infringement of the French blocking statute, although the judge proceeded on the premise that it would, at any rate in part, and the correctness of that was not challenged by a respondent's notice. Mr Lasok was, however, entitled to say that, blocking statute apart, the requested information was of an apparently anodyne nature and there is no dispute that it must be provided. The requests are important from the claimants' viewpoint, requests 38 and 52 being directed at identifying individuals who may be relevant sources of evidence.

64. Mr Lasok next made the point that there was something odd about Servier's position in that, whilst it had appealed against the judge's order in relation to the provision of further information, it had not sought to appeal against his order in relation to the giving of disclosure generally. I have already referred to the unappealed paragraph 7 of the judge's order of 12 October 2012, which required the parties within a specified period to serve a document 'setting out the scope of the disclosure that that party intends to provide and setting out the searches for documents which that party intends to make'.

65. Third, Mr Lasok made points to the effect that Servier's letter to the Ministry of Justice had not provided the Ministry with a full and fair explanation of the issues. In particular, the Ministry was informed that Henderson J had made an order equivalent to 'discovery' against the French Servier defendants (a word also used in the French version), whereas the order in question was for the provision of further information. It is, however, fair to note that later in the letter Servier made clear that it had been the subject of an order for the provision of 'further information', and Mr Green told us that the requests themselves had been provided to the Ministry of Justice in November 2011. I shall not devote more time to Mr Lasok's objections in relation to the letter, which he did not develop. I would not discount whatever significance is to be attached to the Ministry of Justice's response on the basis that, so it was said, it was induced by a less than comprehensively fair statement of the position.

66. Turning to the French blocking statute, Mr Lasok made six points. First, he said that Article 1 *bis* was and is directed at abusive non-French intrusion and that there was no evidence of any decision of a French court holding, or suggesting, that it applies to the normal operation of the procedures of non-French courts or courts of a Member State of the EU in which a French company is a party. In support, Mr Lasok invoked the views of Servier's own French lawyers before Henderson J, who in section 3 of their report wrote:

> 'In other words, we consider that the spirit of the law is to protect French interests against abusive foreign intrusions, and not to reduce the rights of defence of French individuals/entities. The problem with this is that, unlike the case where specific information is sought from the Servier French Companies, where the information request can be made under the procedure set out in the Hague Convention or [the Regulation], there is no procedure under the relevant international rules allowing a French company to provide evidence on a voluntary basis, such as in the form of a witness statement.
>
> In those circumstances, our advice would be for Servier to write to the competent minister in order to inform him/her, at least two months in advance, that its representative plan to provide evidence in the context of proceedings before the High Court of Justice on certain issues to be described in the relevant letter.
>
> Whilst the minister has no obligation to respond and no mandate to grant any authorisation, informing the minister in compliance with the French Blocking Statute and the French administration guidelines would indicate Servier's good faith. Thus, such communication would significantly reduce the risk of criminal procedure and sanctions. If the minister opposes to the proposed provision of evidence, Servier may consider whether to appeal the decision to the French courts.
>
> A judge may be sympathetic to Servier's position in light of, in particular, the right to a fair trial protected under French law. However, we are not aware of any prior jurisprudence on this matter, so no concrete conclusions may be set out as to the likely approach of the French courts if such an appeal were to be made.'

67. That, said Mr Lasok, made the point that the blocking statute is not directed at preventing compliance with the ordinary rules of disclosure in civil proceedings, in particular because such disclosure may have to be made in order for the French party

to defend his own position. The lawyers were not suggesting that a party like Servier would have no defence to a claim that compliance with a disclosure order involved a breach of the blocking statute. They were saying simply that there was no jurisprudence on the point. Mr Lasok submitted that their opinion was to much the same effect as the expert evidence before Cresswell J in the *Heidberg* case, which had included evidence emanating from M. Battesti of the French Ministry of Justice to the effect that 'the purpose of the [statute] had never been to "punish" French individuals/companies who gave evidence for trial abroad, either as plaintiff or defendant. It was to protect French nationals against procedural abuse by foreign tribunals, in particular by American tribunals applying their anti-trust law, or when making extensive and abusive requests for discovery, or allowing American lawyers to carry out any sort of "fishing expeditions" in France' (see [1993] 1.L.Pr. 718, at 729).

68. Mr Lasok's second point on the blocking statute was that, if it applies at all in circumstances such as the present, it is directed at non-French administrative and judicial proceedings. It is therefore discriminatory on the grounds of nationality and so infringes Article 18 of the TFEU. He cited as an analogous example a case illustrating that a national court cannot apply a national procedural rule requiring litigants from other Member States to provide for security for costs where nationals of the Member State in question would not be required to do so (Case C-323/95 *Hayes v. Kronenberger GmbH* [1997] ECR I-1711). He said this underlines the frailty of the suggestion that compliance with Henderson J's order would or might result in a prosecution.

69. Mr Lasok's third point was that the blocking statute does not purport to impose an absolute prohibition on the provision of requested information or disclosure. Article 1 *bis* is expressly stated to be 'Subject to international treaties or agreements and applicable laws and regulations …'. Contrary to the Servier submissions, Regulation 1206 is not the only such international treaty or agreement. The blocking statute must also yield to France's other international commitments with which it cannot stand, one of which is France's international commitment of sincere co-operation under Article 4.3 of the TFEU, which requires Member States to 'assist each other in carrying out tasks which flow from the Treaties'; and that, he said, includes assistance in relation to claims brought under Articles 101 and 102 against the French Servier companies in the present proceedings. That too shows either that no prosecution could be brought under the blocking statute if Servier complies with Henderson J's order, or that any prosecution is highly unlikely.

70. Mr Lasok's fourth point was, by reference to paragraph 12.2 of an opinion dated 13 March 2013 of Professor de Béchillon, to the effect that the French Ministry of Justice has, for several years, publicly renounced their willingness to give instructions as to whether or not to prosecute in any particular case. Whilst the Ministry can issue general instructions as to matters of policy in relation to the enforcement of the criminal law in particular fields, there is no evidence that the Ministry has issued any general policy instruction in relation to the French blocking statute. The essence of the point was that the Ministry can tell this court nothing as to the likelihood that the French Servier companies will or will not be exposed to a risk of prosecution if they comply with Henderson J's order. That opinion was in line with Mme Blanc's letter of 25 March 2013 to the French defendants in the *Alstom* proceedings. Mr Green's

response to it was one of confession and avoidance, namely that the Ministry of Justice is the only authority that, as he put it, can even partially express a view on the likelihood of prosecution. That is because there is no French equivalent of the Director of Public Prosecutions or the Crown Prosecution Service. He told us that the courts have lists of prosecutors attached to them and there is no practice or history of prosecutors giving pre-action advice.

71. Mr Lasok's fifth point (in effect the other side of his fourth point and also derived from Professor de Béchillon) was that whether or not any prosecution would or would not be brought would be a matter exclusively for the prosecutorial discretion of the public prosecutor, in which the Minister of Justice does not interfere. To the extent, therefore, that the French Servier companies are saying that the letter of 5 November 2012 from Mme Ab Der Halden gives rise to a conclusion that compliance with Henderson J's order would raise a real risk of prosecution, it must be taken with a large pinch of salt. The only prosecution apparently ever brought under the blocking statute is that in the case of *Christopher X*, which everyone accepts was a very different type of case.

72. Mr Lasok's sixth submission was this. Even if it is uncontroversial that compliance with an English court order will be illegal in another jurisdiction, that is not by itself a reason for the English court not to make the order. The court still has a jurisdiction to make it, and a discretion as to whether or not to exercise it, and in exercising such discretion it will take into account the extent of the risk of prosecution. Henderson J manifestly applied the correct test and this court cannot interfere with the way he did so unless it is satisfied that he committed some legal error, which Mr Lasok said he did not.

73. This submission assumes, as Mr Lasok submitted, that it was not mandatory for Henderson J to apply the procedure under Regulation 1206, and Mr Lasok also addressed us on *ProRail*, which Mr Green had submitted operated to trump all other considerations. Before coming to that, I should flesh out Mr Lasok's submission to the effect that Henderson J had applied the correct test.

74. Mr Lasok placed primary reliance on *Morris v. Banque Arabe et Internationale D'Investissement SA* [2001] 1.L.Pr. 568, the decision of Neuberger J to which Henderson J was referred, which pre-dated Regulation 1206 but post-dated the 1970 Hague Convention. The claim was by the liquidators of two BCCI companies against a French bank, BAII, which was said to have become involved in illegal actions by BCCI. The claimants sought disclosure from BAII, whose documents were in France. BAII gave disclosure of its documents by list, but supported its resistance to permitting inspection of them by relying on the French blocking statute: it said that BCCI should invoke the Hague Convention. Neuberger J's typically comprehensive judgment dealt with all the points. He described the issues, at paragraph 12, as being (i) whether, under the Civil Procedure Rules 1998, a litigant could avoid giving inspection of documents it had disclosed by list in circumstances in which to do so would involve the contravention of the legislation of another country in which he carries on business and where the documents are; and (ii) the impact on that question of the Hague Convention.

75. Neuberger J said that if the giving of inspection would involve the commission of an offence in England and Wales, an English court could not order it. The position if inspection would involve the commission of an offence under a foreign law was, however, different: the risk of prosecution in another country is not an absolute reason for refusing to answer questions or to produce documents and the privilege against self-incrimination does not provide otherwise. He referred to what Lord Nicholls of Birkenhead had said in giving the judgment of the Privy Council in *Brannigan and Others v. Davison* [1997] AC 238, at 249F to 250B:

> 'It is the unqualified nature of the right [the privilege against self-incrimination], so valuable as a protection for the witness, which gives rise to the problem when a foreign law element is present. If the privilege were applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to the foreign law in all cases. Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings.
>
> This surely cannot be right. Different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings.'

Brannigan was not a case in which the evidence revealed the commission of an offence in the other country. It was, like the present cases, one in which it was said that the giving of the evidence would itself constitute such an offence. After referring to a further passage from Lord Nicholls's speech, at 250F, Neuberger J rejected the submission that he had no jurisdiction to order the inspection of the documents even though to do so would involve the commission of an offence under French law.

76. Neuberger J then considered whether, accepting that the court had jurisdiction to make the order, the court had a discretion as to whether or not to order an inspection in a case where its giving would constitute an offence under foreign law. He referred, at paragraphs 53 to 58, to various authorities, including the observations of Hoffmann J in *Mackinnon v. Donaldson Lufkin & Jenrette Securities Corporation and Others* [1986] Ch. 482, at 494H to 495A (a decision under the former Rules of the Supreme Court) and held, at paragraph 60, that under the CPR the court had a like discretion, for reasons he explained. Roth J considered these matters in his judgment in the *Alstom* case.

77. Neuberger J then explained why, subject to considering the impact of the Hague Convention, he would have little hesitation in ordering inspection. He gave several reasons, including that the evidence supported the conclusion that the risk of prosecution under the French blocking statute was 'little more, and indeed is probably

no more, than purely hypothetical', which he said accorded with the evidence before Cresswell J in *The Heidberg.* Finally, as to whether he should refuse to order inspection, leaving it to the liquidators to apply to the French court under the Hague Convention, he explained why that was inappropriate.

78. Mr Lasok submitted that Neuberger J's decision in *Morris* showed clearly what the principles were, namely that Henderson J had jurisdiction to make the order he did, although he also had a discretion as to whether or not to make it; and, in light of the evidence before him as to the theoretical risk of prosecution under the blocking statute, his exercise of the discretion could not be faulted. Mr Lasok added that it was not even clear on the evidence before Henderson J that there was any risk at all of a prosecution under the statute: the appellants' own case, as advanced by their expert French lawyers, was that the statute is not directed to a case such as the present.

79. As to whether the option before Henderson J of invoking the Regulation 1206 procedure changed everything, and that it was mandatory for him to invoke it, Mr Lasok submitted that it did not and was not. What was in question in *ProRail* was an order of one Member State for the carrying out of an evidence-gathering exercise in another Member State in circumstances in which the exercise could only be carried out with the assistance of the authorities of the latter state. The ordered exercise was, therefore, one which intruded upon that state's national sovereignty. In such a case, it is mandatory for the regulation to be used. But *ProRail* is of no direct relevance for the purposes of a case such as *Servier.* Henderson J's order required the engagement of the assistance of neither the French courts nor any French public authorities. *ProRail,* like *Lippens* before it, made it clear that the regulation is merely an additional option open to Member States: it does not exclude and replace other options. It illustrates a case in which, on its facts, recourse had to be made to the regulation. But this was not a like case. Mr Lasok submitted that Roth J's rejection of the reliance placed on *ProRail* was right, and for the right reasons.

80. Mr Lasok submitted, as follows, that Regulation 1206 does not operate in a cross-border context to replace CPR Parts 18 and 31 (further information and disclosure). It does not need to be invoked in a case in which the relevant party is before the English court and can be ordered directly to provide the information or make the disclosure. As regards disclosure, I add that that this was apparently also the view of the French Ministry of Justice, as expressed via Mme Blanc in her letter of 21 January 2013 in the *Alstom* case.

(b) The Alstom appeals

81. Mr Morris asked us to proceed with the French defendants' appeals on the same basis as Roth J had approached the matter, namely on the assumption that the production of documents by such defendants would infringe the blocking statute. I agree. Mr Morris added perhaps unnecessary flesh to that submission by referring to the expert evidence of Justice Jean-Paul Béraudo before Roth J, who explained the, apparently astonishing, reach of the blocking statute. He explained that French criminal law applies to any crime committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time of the offence. As regards this case, the French defendants would commit the offence by disclosing documents whether held in or out of France. Justice Béraudo also explained that 'the

request itself would constitute a criminal offence', adding (by way of an apparently inconsequential explanation) 'as searching is an express element of the definition of the French Blocking Statute'.

82. Mr Morris recognised that, the attempt to invoke the 'direct' route under Regulation 1206 having failed, it is understandable that Roth J had been reluctant to try it again upon the renewed application that came before him. Nevertheless, he said there remained the untried 'court to court' procedure under the regulation and he said that Roth J was in error in not accepting that that was not only the right way forward, but the only way forward.

83. Like Mr Green, Mr Morris submitted that the use of the regulation in the *Alstom* case was mandatory. Alternatively, if not mandatory, the judge should anyway have exercised his discretion to use it. So far as concerns the judge's point that 'disclosure' by parties was not within the regulation at all, Mr Morris submitted that he was wrong. He referred to the Guide, paragraph 8 of which showed how wide the concept of 'evidence' is and that it includes the 'production of documents'. Apart from the fact that the Guide does no more than reflect the views of the Commission, it is anyway not clear that such reference is to anything other than the production of documentary evidence. Disclosure is not strictly an exercise in the nature of the taking of evidence. It is directed at the identification of documents that *may* be used as evidence.

84. As to that last observation, Mr Morris submitted that whilst that distinction is one that an English lawyer would recognise, a European court would not do likewise. He referred to Article 4(1)(f) of the Regulation as covering a disclosure exercise, although it does not appear to do so expressly. Mr Morris also referred us to the Opinion of Advocate General Kokott in Case C-175/06 *Tedesco*, delivered on 18 July 2007, which he said supported his proposition.

85. The case concerned a reference to the CJEU as to whether a request from an Italian court to the English High Court fell within Regulation 1206. Mr Tedesco claimed to be the inventor of a harness system which he had protected by filing a patent application. He asserted that RWO (Marine Equipment) Ltd, a UK company, had infringed his patent. He obtained *ex parte* in Italy an order requesting the English court, as the Advocate General put it in paragraph 15, to 'perform a description of RWO's product at its premises', the description to encompass 'other evidence of the contested conduct, including by way of example, invoices, delivery notes, payment orders, commercial offer letters, advertising material, computer archive data and customs documents'. The requested exercise was, therefore, in the nature of a search and seizure order. The question for the CJEU was whether the request was for the 'taking of evidence' for the purposes of Regulation 1206.

86. In paragraph 44, the Advocate General said the subject matter of a request under the regulation is 'not strictly limited to the taking of evidence' since requests are:

> '… not limited to the hearing of witnesses. Rather, it follows from Article 4(1)(f) that the taking of evidence may include also documents or other objects which may be visually examined or inspected by experts.'

She may perhaps there have been recognising no more than that the 'taking of evidence' within the meaning of the regulation is not limited to taking oral evidence from witnesses, but includes the obtaining of documentary evidence. Any other view would be surprising, and it is also consistent with paragraph 8 of the Guide. Thus, the type of material sought by way of the request to the English court was, in principle, 'liable to be the subject-matter of taking of evidence' for the purposes of the regulation; and the Advocate General concluded that the request did fall within the regulation.

87. It is, however, the later section of her Opinion, headed *Prohibition on pre-trial discovery*, which is of more direct relevance. The Advocate General appears to have opened that section with a fairly clear view that the regulation does not apply to the conventional obtaining of pre-trial disclosure. She said:

> '68. Unlike the Hague Evidence Convention (Article 23), Regulation No 1206/2001 does not contain any explicit proviso with regard to the pre-trial discovery. However, when [the regulation] was adopted, the Council issued the following Statement 54/01: "The scope of application of this Regulation shall not cover pre-trial discovery, including the so-called "fishing expeditions".
>
> 69. According to settled case-law, a statement in the Council minutes may be taken into account in the interpretation of a legal act inasmuch as its content is referred to also in the wording of the legal act and if it serves to clarify a general concept. In the context of the present proceedings, the statement in the minutes clarifies the condition concerning the "use of evidence in judicial proceedings, commenced or contemplated" within the meaning of Article 1(2) of [Regulation 1206].
>
> 70. In that regard, the exclusion of pre-trial discovery referred to in the statement cannot be interpreted as precluding every procedure aimed at establishing facts prior to the bringing of proceedings in the main claim. That position is precluded by the wording of Article 1(2). Rather, the statement indicates that the evidence must be described with a sufficient degree of precision that the link to the proceedings commenced or contemplated is evident and that the judicial cooperation may relate only to the items themselves which are capable of constituting proof and not to circumstances which linked only indirectly to the judicial proceedings.'

88. So, although it appears that the regulation does not apply generally to 'pre-trial discovery', it can apparently apply to some types of pre-trial fact-ascertaining exercises. I quote the remainder of the Advocate General's opinion in this section of her Opinion, by way of a search for further guidance:

> '71. In order to prevent the other party to the proceedings from having to comply with excessive requests for discovery (so-called fishing expeditions), in the case of orders for the discovery of specific documents a distinction must be drawn in the following manner.
>
> 72. An order to produce documents is inadmissible if the documents whose discovery is sought lead only to the identification of items which are capable of serving as evidence but which do not in themselves serve an evidential function

> in the proceedings (a so-called "train of enquiry" – the inadmissible search for material which may be relevant as evidence). In such cases, the evidence is used merely indirectly. Accordingly, the condition "[for] use in judicial proceedings" is not satisfied.
>
> 73. On the other hand, an order to produce documents which are discovered only upon execution of the order is admissible, if such documents are specified or described with sufficient precision and are directly linked to the subject-matter of the dispute. Only in this manner can the excessive gathering of material – to the detriment of the other party to the proceedings --- going beyond the matter in dispute be avoided.
>
> 74. In the main proceedings, the order of the Italian court requiring a description to be obtained of the sales and purchase invoices, delivery notes, payment orders, commercial offer letters, advertising material, data stored in computer archives and customs documents, serves the purpose of discovery of that evidence. Using those documents, the plaintiff in the main proceedings intends to prove the existence of a patent infringement as such, the extent thereof and, accordingly, to quantify his damages claim. To the extent that that evidence is intended to be used in proceedings pending or contemplated, the request of the Italian court is admissible.
>
> 75. However, the passage in that order of the Italian court by which it requires further unspecified documents ("by way of example, however, not exhaustively") is inadmissible. What is lacking in that passage is a precise description of the other types of documents.'

89. I admit to difficulty in identifying any clear statement of principle in those paragraphs as to when pre-trial discovery might properly be the subject of a request under the regulation, although paragraph 73 may be said to support the view that the specific disclosure ordered in the present case would qualify. We were not referred to any decision of the CJEU in *Tedesco*, my understanding being that the reference was disposed of by agreement.

90. On the footing that he was correct in his submission that Regulation 1206 covers applications for disclosure against parties to proceedings, Mr Morris submitted that the use of the regulation was mandatory in the *Alstom* case. He said its use is mandatory when otherwise a procedural order of Member State A would require the performance of an act in Member State B that would amount to a breach of a prohibition imposed, or of conduct restricted, by Member State B. The underlying rationale of the applicable principle is that for Member State A to make such an order would be for it to impinge upon the sovereignty of Member State B. The enactment of the blocking statute was an exercise of sovereignty by the French state; and to compel the French defendants to breach the statute would be to intrude upon that sovereignty. In support, he relied upon paragraph 47 of the CJEU's judgment in *ProRail*. He also relied upon paragraphs 47 and 48 of the Advocate General's Opinion. He referred also to paragraph 59 of that Opinion and said that Roth J's order was 'an exercise of judicial power with external effect, namely effect in the territory of another Member State, …'. The Advocate General, in paragraph 57, had expressly contrasted that situation with the case of 'acts which do not concern the sovereignty of the Member

State …'. Mr Morris submitted that, for there to be a relevant intrusion, there is no need for the challenged order to require anyone to enter the territory of the other Member State. The mere fact that compliance with it will involve a breach of the law of that Member State is a sufficient infringement of its sovereignty. Mme Ab Der Halden had said as much in the fourth paragraph of her letter of 5 November 2012 to the French Servier companies. (Mme Blanc's letter of 21 January 2013 suggested, however, that she did not share Mme Ab Der Halden's view in that respect).

91. If Mr Morris was wrong that it was mandatory for Roth J to invoke Regulation 1206, he said that Roth J was anyway materially in error in his approach to his discretionary decision to make a direct order against the French defendants. He said that the judge's approach had been to decide that in principle he would exercise his discretion to order disclosure, and only then to consider whether the existence of the regulation changed the position. Mr Morris submitted that that was the wrong way round and that the existence of the regulation should have been at the forefront of the discretionary considerations. He said that Roth J's approach to the regulation was also infected by his wrong conclusion that it did not apply to a request for disclosure. In Mr Morris's submission it followed that Roth J's exercise of discretion was flawed, and that it was open to this court to exercise the discretion afresh and make an order invoking the procedure under the regulation.

92. Mr Turner QC, for the claimants in the *Alstom* appeal, submitted that all matters of procedure in the *Alstom* claim are, like all such matters in claims proceeding in England and Wales, governed by the *lex fori*, namely the law of England and Wales. That law, in matters of procedure, recognises that its orders may expose parties subject to them to consequences under the law of foreign states, including penal consequences. It does not, however, give primacy to such foreign law in considering whether to make its orders, although it will have regard to it in deciding whether, as a matter of discretion, to make them. A foreigner who is a party to English proceedings, whether as a claimant or a defending defendant, is ordinarily required, as Hoffmann J explained in the *Mackinnon* case, to give disclosure in the ordinary way, and Mr Turner referred us to Lord Nicholls's speech in the *Brannigan* case. He also referred to the *Heidberg*, *Morris* and *Elmo Tech* cases as good working examples of how, in cases raising like questions as the present cases, the courts made discretionary judgments resulting in the conventional application of the *lex fori* notwithstanding that to do so theoretically exposed those subject to the orders to the risk of prosecution under the French blocking statute.

93. As for the proposition that Regulation 1206 had changed all that, and required the English courts now to subordinate the application of the *lex fori* to a compulsory adoption of the regulation, Mr Turner said it was wrong. Regulation 1206 was not directed at reducing the options open to Member States with regard to obtaining evidence but at increasing them. The use of the regulation was ordinarily optional, and it ought not to be used if there is a more convenient or expeditious procedure.

94. As to whether applications for disclosure were within the scope of the regulation, Mr Turner submitted that the essence of what Roth J had decided in paragraph 50 of his judgment (see paragraph 46 above) was that an application in accordance with the *lex fori* for an order for disclosure against another party to the proceedings was not one that involved the taking of evidence in another state at all. It was not, therefore, a case

that required recourse to the regulation because it was an order of a type that the court could properly make against a party that had submitted to its jurisdiction and had impliedly accepted the procedural rules under the law of such jurisdiction. Mr Turner invoked, as had Roth J, the support of Sir Anthony Clarke's observations in *Masri*, in particular those at paragraph 45.

95. In further support of the right of the national court so to apply the *lex fori*, Mr Turner referred us to the decision in *Lippens*. The Advocate General in that case was Advocate General Jääskinen, who was also the Advocate General in the later *ProRail* case. In paragraph 40, he said that Regulation 1206 is not applicable to a case in which a judge considers that he can obtain the evidence, even if it is situated in another state, without having to request the intervention of the judicial authorities in that state and without having to go there himself. He then said:

> '43. In fact, [the regulation] does not seek to interfere with the functions of the competent court by restricting its power to ensure the proper conduct of procedure within the limits of the rules of international law, European Union law or national law imposed on it, but reinforces that power and delimits it in order to protect the rights of the parties and respect the prerogatives of the other Member States. I consider that the purpose of that instrument is to facilitate the cross-border activity of the courts of the Member States and not to impede it by restricting the means which they have of taking evidence.
>
> 44. The very spirit of the regulation would be called into question if its mandatory implementation led to a reduction in the means of gathering evidence by excluding the possibility for the court of a Member State of using alternative evidence-gathering methods where it considers them to be preferable to the methods of cross-border judicial cooperation contained in [the regulation].'

96. Mr Turner also referred us to the emphasis in the CJEU's judgment in *Lippens* on the national court's right in an appropriate case to apply the *lex fori* rather than to have recourse to the regulation. The court said:

> '27. However, [the regulation] does not contain any provision governing or excluding the possibility, for the court in one Member State, of summoning a party residing in another Member State to appear and make a witness statement directly before it.
>
> 28. It follows that [the regulation] applies as a general rule only if the court of a Member State decides to take evidence according to one of the two methods provided for by that regulation, in which case it is required to follow the procedures relating to those methods.
>
> 29. Next, it must be recalled that, according to recitals 2, 7, 8, 10 and 11 in the preamble to [the regulation], the aim of the regulation is to make the taking of evidence in a cross-border context simple, effective and rapid. The taking, by a court of one Member State, of evidence in another Member State must not lead to the lengthening of national proceedings. That is why [the regulation] established a regime binding on all the Member States, with the exception of the Kingdom of Denmark, to remove obstacles which may arise in that field ….

> 30. An interpretation of the provisions of [the regulation] which prohibits, in a general manner, the court in a Member State from summoning as a witness, pursuant to its national law, a party residing in another Member State and hearing that party under that national law would be contrary to that objective. …
>
> 31. Thus, it is clear that, in certain circumstances, in particular if the party summoned as a witness is prepared to appear voluntarily, it may be simpler, more effective and quicker for the competent court to hear him in accordance with the provisions of its national law instead of using the means of taking evidence provided for by [the regulation].'

97. As for *ProRail* itself, it did not, said Mr Turner, have the wide effect attributed to it by Mr Morris. It was simply an illustration of a case in which a 'court to court' request under the regulation had to be made, since the evidence that the Belgian court intended should be obtained could in practice only be obtained by enlisting the assistance of the Netherlands courts or authorities. It was therefore not a case in which, without making use of the regulation, the national court could itself obtain the expert evidence as to the relevant facts and matters within the Netherlands. In his reference to the Advocate General's opinion, Mr Turner placed particular emphasis on paragraph 55, which identified 'the decisive criterion' for knowing in which cases the regulation has to be applied, namely the criterion relating to the national 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'; and also to paragraph 61 where the Advocate General made the same point again. In his reference to the judgment of the court, Mr Turner said that the same points were to be found in paragraphs 47 and 48. In the case under appeal, the like criterion simply does not apply. There is no reason why the English court could not, as it did, make an order for the required disclosure in accordance with the *lex fori*, to which the French defendants had submitted.

Discussion and conclusion

98. I have set out the issues and rival arguments at probably unnecessary length but the result is that I can express my conclusions relatively shortly. I regard all three appeals as raising really only one substantive point, namely whether, in the circumstances before Henderson and Roth JJ, it was mandatory for them to make use of Regulation 1206 in order to obtain the requested information and achieve the desired disclosure.

99. In my judgment, the answer is that it was not, and I would unhesitatingly reject the submissions to the contrary by Mr Green and Mr Morris. The orders in question were, respectively, for the provision of further information and disclosure. They were orders of a procedural nature in the pending claims and their making was, therefore, governed by the *lex fori*, namely the law of England and Wales. The domestic authorities to which we were referred show that the fact that such orders might, if complied with, expose the parties subject to them to the risk of prosecution under a foreign law provides no defence to their making. The English court still retains a jurisdiction under the *lex fori* to make them, although it has a discretion as to whether to do so in the particular circumstances. In the present cases, both Henderson and Roth JJ correctly recognised that, and they exercised their discretion to make the orders now under challenge.

100. No-one before us challenged the English jurisprudence that established such principles. I do not know whether it was implicit in the respective submissions of Mr Green and Mr Morris that such jurisprudence is, and has always been, fundamentally mistaken, inasmuch as it purports to legitimise the making of domestic orders said to involve unjustifiable invasions of the sovereignty of other states. If so, we were referred to nothing by way of support for any such suggestion beyond the decision of the CJEU in *ProRail.* None of the judges who contributed to the development of the domestic jurisprudence regarded orders such as those made by Henderson and Roth JJ as amounting to any sort of improper intrusion upon another state's sovereign authority.

101. The problem with the appellants' submissions is that they seek to draw from *ProRail* principles which are not to be found in it and are anyway wrong. *ProRail* is not authority for the proposition that a Member State, applying its domestic procedural law in litigation to which the parties before it have submitted, cannot lawfully make a procedural order against a party if compliance with it might expose that party to a risk of prosecution under some foreign law. It is authority for no more than that, if the domestic court wishes to obtain evidence in another Member State of a nature that can in practice only be obtained with the assistance of that Member State's judicial or other public authorities, the court can only obtain such evidence by a 'court to court' request under the regulation. That is all that *ProRail* decides. What, however, it also makes clear is that nothing in the regulation was intended to limit, or reduce, the options already available to Member States in the way of obtaining evidence or disclosure from the parties to the litigation before it. If, therefore, before the introduction of the regulation, it was lawful for a Member State, applying the *lex fori,* to make orders such those made by Henderson and Roth JJ, it was not the purpose of the regulation to deprive Member States of such judicial power. The regulation cannot be read as doing so, *ProRail* does not decide that it did and nothing else to which we were referred decided any such thing either. That, in my view, is all that needs to be said about the impact of Regulation 1206.

102. I turn to the exercise by the courts below of their discretion to make the orders they did, notwithstanding the theoretical risk of prosecution under the French blocking statute. In my view, the approach by each of Henderson and Roth JJ to the exercise of their discretion in their judgments of 12 October 2012 and 11 April 2013 was unimpeachable, and nothing submitted to us caused me to conclude that either judge committed any error of principle in his approach to the exercise of discretion.

103. Mr Morris, however, submitted that Roth J went materially wrong in leaving the consideration of Regulation 1206 until after he had come to a view as to how he would dispose of the case apart from the regulation. He said that was the wrong way round, also submitting that the judge was wrong to hold that the regulation did not apply to the obtaining of disclosure from a party to litigation.

104. In my judgment, there is nothing in those submissions. It is obvious that as between (i) obtaining disclosure by a direct order against the parties, and (ii) by a 'court to court' request under the regulation, the former is plainly the more appropriate course. The latter is likely to be a slow, cumbersome and inadequate alternative, which may well, as Roth J noted, spawn follow up applications under the regulation if, as is likely to happen in practice, National Grid considers that yet further disclosure needs to be

given. It is obvious that the just and efficient disposal of National Grid's disclosure application required a conventional order directly against the French defendants, and no judge would have contemplated the use of the regulation unless compelled to do so. Roth J, having decided that it would be appropriate to make a disclosure order, concluded that the existence of the regulation did not require any different course. He was not only entitled to come to that view, it was, I consider, one that was manifestly correct.

105. As for the suggestion that Henderson J changed his mind about the risk of prosecution following his sight of the letter of 5 November 2012 from Mme Ab Der Halden, his judgment of 29 April 2013 does apparently reflect a view that the risk of prosecution was higher than he had assessed it in coming to his judgment of 12 October 2012. What, however, this court is concerned to decide is whether his exercise of his discretion in making his order of 12 October 2012 was in any respect materially flawed. He gave his reasons for his decision in paragraph 55 of his main judgment, and it was an assessment that was, in my view, unimpeachable. If, however, the subsequent letter of 5 November 2012 from the Ministry of Justice demonstrated it to be materially mistaken, then this court could and no doubt would take that into account in considering whether Henderson J's exercise of discretion should be re-considered afresh.

106. For my part, I fail to understand how that letter demonstrates any error in Henderson J's original assessment. The Ministry of Justice was in no position to give any sort of clearance as to the risk of prosecution: that was and is beyond its powers. Whether or not in any case a prosecution is to be brought is exclusively a matter for the prosecutors. In those circumstances, the Ministry could not and did not give the requested guarantee. All that it did say was, in effect, that the French blocking statute was still on the books and that breach of the statute can give rise to criminal prosecutions and penalties.

107. In saying what it did, it was saying nothing that Henderson J did not already know from the material earlier before him. What else could the Ministry say? Yes, the blocking statute is still on the books, but even though it is not within our remit to say so, you can safely ignore it? It is obvious that it could not and would not say that. It was giving no more than a conventional reply to a letter that could not reasonably have expected anything different. As for the suggestion that it heightened the risk of prosecution, it did no such thing. So far as this court is aware, it remains the case that, apart from the *Christopher X* case, no prosecutions have been brought under the blocking statute. Mr Lasok advanced cogent additional reasons to us as to why, in the circumstances of the *Servier* case, and in light of France's European Union commitments, any prosecution of the French Servier companies is particularly improbable. In my judgment, there was nothing in the letter of 5 November 2012 tending to show that Henderson J's original exercise of discretion was in any way flawed.

Disposition

108. I would dismiss all three appeals.

Lord Justice Beatson :

109. I am grateful to my Lord, Rimer LJ, for his comprehensive description and analysis of the facts and legal issues in these two appeals. I agree with his conclusion that the appeals should be dismissed. I express my own reasons shortly as follows.

110. The appeals concern the impact of what has been described as the "French Blocking Statute" on interlocutory process in proceedings in this country involving issues of competition law. Henderson J ordered the Servier appellants to serve a response to specified parts of a Part 18 request. Roth J required the Alstom/Areva appellants to make disclosure of documents relating to the supply of a number of items, including the response by the companies in the Alstom group to the European Commission's statement of objections in its investigation.

111. The appellants contend that complying with the orders of Henderson and Roth JJ would put them in breach of the French Blocking Statute and at risk of criminal prosecution. Because the statute is subject to international treaties and applicable laws and regulations, they contend that, in the circumstances of these cases, it was mandatory for the English court to use the procedures in Regulation EC/1206/2001.

112. My first reason for rejecting the submissions on behalf of Servier and Alstom/Areva concerns the purpose and scope of Regulation EC/1206/2001. I observe that what happened in *National Grid v Alstom* shows that its application to cases such as these is by no means straightforward. Rimer LJ has (see [40] – [42] of his judgment) summarised the circumstances of the unsuccessful earlier attempt to deploy the Regulation in that case. Against that background, when considering whether it is mandatory to use the procedures in the Regulation, it is important to emphasise that the purpose of those procedures is to improve and accelerate the procedures for taking evidence in another Member State in civil and commercial matters. It was aimed at increasing and not reducing options in such a context and does not, on its face, remove or restrict existing forms of proceeding.

113. The cases referred to by my Lord, in particular the judgments of the First Chamber of the CJEU on 6 September 2012 in Case C-170/11 *Lippens and others v Kortekas AAS and others* and of the CJEU on 21 February 2013 in Case C-332/11 *ProRail BV v Expedis NV*, show that it is not mandatory to use Regulation 1206/2001 in circumstances such as those in the cases before this court. In *Lippens*, the CJEU held that Regulation 1206/2001 is not the exclusive means by which a court in one Member State should seek to obtain information and evidence located in another Member State. The court stated that a national court is entitled to use its national procedural law to summon as a witness a party residing in another State.

114. In the *ProRail* case, the CJEU held (at [47]) that, while it is not normally mandatory to use the Regulation, it will be where what is ordered in another Member State affects "the powers of the Member State". That qualification refers (as Roth J stated at [56]) to the situation where an individual designated by the court of one Member State wishes personally to take evidence in another State in a manner which the latter Member State restricts. It thus concerns the "direct" route under Regulation 1206/2001 described by my Lord at [15] of his judgment.

115. The *ProRail* case concerned a Belgian expert taking evidence in the Netherlands pursuant to the Order of the Presiding Judge of the Rechtbank van Koophandel te Brussel. It did not concern the disclosure of documents or responses to questions. The

scenario involved the Belgian court ordering evidence to be gathered in the Netherlands in circumstances where that evidence could only be gathered with the assistance of the Dutch authorities. The exercise involved access to objects, information and places which were not public. It involved taking evidence in a Member State, in a manner which that Member State restricts, by a person designated by the court of another Member State. That is not the position in these cases.

116. One of the cases before this court (*Servier)* involves the provision of answers by one party to litigation to a Part 18 request by another party to the litigation. The other (*National Grid v Alstom)* involves an order for disclosure. The first scenario does not appear to me to be "the taking of evidence" so as to fall within the Regulation. As to the second, an order for ordinary disclosure should not be equated with taking evidence in another State: see *Masri v Consolidated Contractors International (No 4)* [2008] EWCA Civ 876 at [45]. As Roth J observed (at [50]), to use Regulation 1206/2001 to obtain ordinary disclosure "would be an extraordinary route".

117. Secondly, I accept the respondents' submissions based on *Morris v Banque Arabe et Internationale D'Investissement SA* [2001] ILPr 37 and *Brannigan v Davison* [1997] AC 238. Whether or not compliance with the orders of the English court in the cases before us is illegal under French law, the English court has jurisdiction to make them as part of the ordinary process of disclosure in civil proceedings because such matters are governed by English law as the *lex fori*. In the exercise of its jurisdiction, it is legitimate for the court to take account of the real risk of prosecution. On the information available to Henderson and Roth JJ when they made their orders, it cannot be said that their exercise of discretion was flawed in law. First, there is no evidence of any prosecutions under the French Blocking Statute in the years since 1968 when it was enacted, apart from that in *Christopher X*. That was a case in which, as Henderson J stated, the facts were exceptional, involving as they did the use of deception by a French lawyer without the protection of a court order.

118. Furthermore, and more fundamentally, as France is a signatory to the European Treaties, the TEU and the TFEU, French law must generally give way to the principle of the supremacy of EU law. This makes any attempt to use the French Blocking Statute to trump the requirements of EU law extremely unlikely. I refer in particular to the duty to co-operate under Article 4.3 of the TFEU, the principle of non-discrimination encapsulated in Article 18, the controls over anti-competitive agreements and behaviour, and abuse of dominant position in Articles 101 and 102, and the extensive jurisprudence on those provisions. They mean that, putting it at its lowest, France's obligations under the Treaty mean that a prosecution in respect of any information provided in response to the order of Henderson J, or disclosure made as a result of the order of Roth J is highly unlikely.

Lord Justice Laws :

119. I agree with both judgments.