Neutral citation [2023] CAT 26

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1435/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29 March 2023

Before:

JUSTIN TURNER KC
(Chair)
PROFESSOR ANTHONY NEUBERGER
SIR IAIN McMILLAN CBE FRSE DL

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) PSA AUTOMOBILES SA
(2) GIE PSA TRÉSORERIE
(3) STELLANTIS NV
(4) OPEL AUTOMOBILE GMBH
(5) FCA ITALY SPA
(6) FCA SRBIJA D.O.O. KRAGUJEVAC
(7) FCA POLAND SA
(8) MASERATI SPA
(9) SOCIETA EUROPEA VEICOLI LEGGERI (SEVEL) SPA
(10) VAUXHALL MOTORS LTD
(11) OPEL ESPAÑA SLU

Claimants

- v -

(1) AUTOLIV AB
(2) AUTOLIV, INC.
(3) AUTOLIV JAPAN LTD
(4) AUTOLIV B.V. & CO. KG
(5) AIRBAGS INTERNATIONAL LTD
(6) ZF TRW AUTOMOTIVE HOLDINGS CORP.
(7) ZF AUTOMOTIVE SAFETY GERMANY GMBH
(8) ZF AUTOMOTIVE GERMANY GMBH
(9) TRW SYSTEMS LTD
(10) ZF AUTOMOTIVE UK LTD
(11) TOKAI RIKA CO., LTD
~~**(12) TOYODA GOSEI CO., LTD**~~

Defendants

Heard at Salisbury Square House on 28-29 March 2023

RULING (DISCLOSURE)

APPEARANCES

Colin West KC and Séan Butler (instructed by Hausfeld and Co. LLP) appeared on behalf of the Claimants.

Robert O'Donoghue KC and Hugo Leith (instructed by White & Case LLP) appeared on behalf of the First to Fifth Defendants.

Sarah Ford KC and David Bailey (instructed by Macfarlanes LLP) appeared on behalf of the Sixth to Tenth Defendants.

Daniel Piccinin KC (Instructed by Steptoe and Johnson UK LLP) appeared on behalf of the Eleventh Defendant.

1. This is a claim for infringement of EU Competition Law and particularly a claim for damages relating to agreements or concerted practices concerning the supply of occupant safety systems ("OSS"), including seatbelts, airbags and steering wheels. The claim was issued on 22 December 2020 in the High Court and transferred to this Tribunal on 13 February 2022.

2. The Claimants are companies who are now members of the Stellantis Group. The First to the Fifth Defendants are members of the Autoliv Group (hereafter referred to collectively as "Autoliv"). The Sixth to the Tenth Defendants are members of the ZF TWR Group (hereafter referred to collectively as "ZF" or "TRW"), and the Eleventh Defendant is independent of those groups and incorporated in Japan (hereafter referred to as "Tokai Rika").

3. The Claimants allege breach of Article 101 of the Treaty on the Functioning of the European Union and, in the alternative, Article 53 of the Agreement on the European Economic Area. Re-Amended particulars of claim ("RAPC") make reference to the European Commission ("the Commission") having adopted two decisions, dated 22 November 2017 and 5 March 2019.

4. The first of those is decisions was made on 22 November 2017 (AT.39881 – *Occupant Safety Systems supplied to Japanese Car Manufacturers*) ("OSS1"), and concerned the sale of occupant safety equipment to Japanese car manufacturers, as set out in paragraph 20 of the RAPC, being:

   (1) sale of seatbelts to Toyota, with the participating undertakings being Tokai Rika, Takata, Autoliv and Marutaka;

   (2) sale of airbags to Toyota with the participating undertakings being Takata, Autoliv and Toyoda Gosei;

   (3) sale of seatbelts to Suzuki, with the participating undertakings being Takata and Tokai Rika; and

   (4) sale of seatbelts, airbags and steering wheels to Honda, with the participating undertakings being Takata and Autoliv.

5. The second decision was made on 5 March 2019 (AT.40481 – *Occupant Safety Systems (II) supplied to the Volkswagen Group and the BMW Group*) ("OSS2"), and concerns supplies to Volkswagen and BMW as set out in the RAPC at paragraph 24, being:

   (1) sale of seatbelts, airbags and steering wheels to Volkswagen and Porsche with the participating undertakings being Autoliv, Takata and TRW; and

   (2) sale of seatbelts, airbags and steering wheels to BMW/Mini where the participating undertakings were Autoliv, Takata and TRW.

6. OSS1 and OSS2 found that there had been cartels in respect of OSS products within the EEA, and addressed supplies to Original Equipment Manufacturers ("OEMs") other than the Claimants. Further, OSS1 and OSS2 were settlement decisions and provided relatively little information as to the results of the investigations.

7. At a first case management conference ("CMC"), the Tribunal ordered that the Defendants disclose documents they hold from the Commission file. This led to an expansion of the pleaded case, including what are said to be material communications evidencing a cartel or cartels in operation with respect to supplies of OSS to the Claimants.

8. The RAPC allege that the facts giving rise to the claim are as follows:

> "39. Over a period which extended from at least as early as 6 July 2004 until at least as late as 30 March 2011 (hereinafter "the Cartel Period"), the Undertakings to which the Addressees of the Decisions belonged, or any two or more of them in combination, entered into (and thereafter implemented) one or more agreements or concerted practices to prevent, restrict or distort competition in the supply of OSS products to automotive OEMs including PSA, FCA and Vauxhall/Opel (or any of them) as well as Toyota, Honda, Suzuki, Subaru, BMW/Mini and VW/Porsche.
>
> 40. Prior to full disclosure herein the Claimants are unable to provide full particulars of such agreement(s) or concerted practice(s), and thus reserve the right to provide further particulars in due course. However, the Claimants allege at this stage that they involved at least the following anti-competitive elements:
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> (i) The exchange of confidential information between competing undertakings, including information on costs and prices;

(ii) The allocation of customers and supplies; and

(iii) Co-ordination on pricing."

9. There is then reference to various documents which are said to support the allegations. At paragraph 44, it is stated:

> "In the further alternative, even if there was no cartel concerning supplies of OSS to PSA, FCA or Vauxhall/Opel, the effect of the cartels established in the Commission Decisions (and the findings of the other regulators pleaded above, so far as relevant) would have been to increase the prices charged by the cartelists of supplies to OEMs other than those which were the targets of those particular cartels, by tending to lessen the degree of competition in the market in general and thereby to increase prices in the market. Autoliv, ZF and Tokai Rika are liable for the losses resulting to the Claimants by reason of such increased prices even in the absence of any cartel concerning supplies to PSA (or Vauxhall/Opel) or FCA specifically."

10. At paragraph 47, there is reference to the TPCA joint venture. It is stated that Toyota Peugeot Citroën Automobile Czech s.r.o. ("TPCA") was a joint venture between Toyota and PSA which existed between 2002 and 2020. TPCA manufactured certain models of vehicles, including the Citroën C1, Peugeot 107, Peugeot 108 and Toyota Aygo, primarily at a manufacturing plant at Kolin in the Czech Republic.

11. Paragraph 49 stated:

> "As noted above, the Commission has already held that Autoliv and Tokai Rika were involved in a cartel concerning the supply of OSS products to Toyota in Europe. It is not possible to tell from the public version of the OSS1 Decision whether the sales by the addressees to Toyota falling within the scope of that Decision included sales to TPCA. In any event, there is nothing in the Commission Decisions to suggest that such sales were excluded from the scope of the cartel. If the OSS1 Decision does cover such sales, these proceedings would be a follow-on claim to that extent."

12. Reference is then made in the RAPC to further documents including the one at paragraph 49E. Then, at paragraphs 49M and 49N, it sates:

> "49M. In all the circumstances, the most likely inferences from the facts and matters set out above are that:
>
> (i) the cartel activity referred to in each email and/or meeting is part of the larger OSS cartel identified in the OSS1 Decision; and
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> (ii) the cartel targeted sales to TPCA (and, in particular but not exclusively, sales to it in respect of the B0 Project).

49N. The Claimants will rely on the foregoing in support of their case that:

(i) supplies to TPCA are likely to have been cartelised, such supplies having been either within the scope of the Commission Decisions, or the subject of a cartel going beyond the infringements found in such Decisions: further, in the alternative, and in any event

(ii) the Defendants were engaged in an OSS cartel affecting the Claimants during the Cartel Period."

13. This is the second CMC in this case. One of the matters we have to decide is whether disclosure should be provided from overseas regulators. Our attention has been drawn, at tab 24 of the authorities bundle, to a decision of Roth J and Hodge Malek KC in *Ryder Limited and Another v Man SE and Others* [2020] CAT 3, in particular to [34] and [35]:

"34. The CAT does not usually make orders for standard disclosure. Instead orders are tailored to what is proportionate in the individual case. In a case subject to the fast-track procedure under rule 58, there may be disclosure only of specific documents. In a damages claim, such as the present, disclosure can be extensive, and may give rise to dispute between the parties, but remains subject to close case management by the CAT.

35. Even in cases where broad disclosure is required, it is possible to lay down some broad principles that are applied by the CAT. These are:

(1) Orders for standard disclosure will not in general be made.

(2) Disclosure will be confined to relevant documents. Relevance is determined by the issues in the case, derived in general by reference to the pleadings, although in appropriate cases disclosure can be in relation to matters not specifically pleaded.

(3) A strong justification would be required to make any order along the lines of the 'train of enquiry' test in the classic formulation of the test for disclosure enunciated by Brett LJ in *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882) 11 QBD 55 at 63. An example where train of enquiry disclosure may be justified is a case alleging a cartel infringement where the underlying facts are unknown to the claimants but are in the hands of the defendants.

(4) Disclosure cannot be ordered in respect of a settlement submission which has not been withdrawn or a cartel leniency statement (whether or not it has been withdrawn). This does not preclude a party which made such a submission or statement providing it by way of voluntary disclosure.

(5) Disclosure will not be ordered in respect of a competition authority's investigation materials before the day on which the authority closes the investigation to which those materials relate.

(6) Ordinarily disclosure will be by reference to specific pleaded issues and specific categories of documents.

> (7) Disclosure will only be ordered and the order will be framed to ensure that it is limited to what is reasonably necessary and proportionate bearing in mind a number of aspects, the most important of which are:
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> (a) the nature of the proceedings and the issues at stake;
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> (b) the manner in which the party bearing the burden of proof is likely to advance its case on those issues;
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> (c) the cost and burden of providing such disclosure;
>
> (d) whether the information sought can be obtained by alternative means or be admitted; and
>
> (e) the specific factors listed in r. 4(2)(c)."

14. The first category we need to consider is documents that were provided to the US Department of Justice by the Defendants during the course of an investigation which resulted in plea agreements being entered into in June and July 2012 against the Defendants. We have relatively little information about those proceedings, save that it was not said that those proceedings were specific to cars manufactured in the United States.

15. During the course of those proceedings ZF provided 50,000 documents to the Department of Justice, Autoliv provided 45,000 documents and Tokai Rika provided 4,700 documents. The application made is that those repositories of documents should be searched for relevant documents – we will come back to the details of that search that in due course.

16. It is submitted on behalf of the Defendants that it is not proportionate to provide disclosure of documents when one balances the likely relevance of those documents against the costs of disclosure and inspection. It was said that there was no reason to believe that the documents would be particularly useful and that it was not proportionate to provide disclosure.

17. Mr O'Donoghue KC, on behalf of the Autoliv Defendants, submitted that the lack of relevance was evidenced by the fact that a sample search had failed to identify relevant documents. The sample search to which he referred was that carried out by agreement with Tokai Rika. An electronic search of the 4,700 documents produced approximately 400 responsive documents. Mr O'Donoghue submitted that these documents were not relevant. This

submission seemed to derive from the fact there was considerable overlap with those documents obtained from the Commission, pursuant to the order previously made by the Tribunal. It did, however, produce relevant documents, in the sense that the document pleaded at paragraph 49E of the RAPC, which is a document relied on by the Claimants in these proceedings against Tokai Rika, was among those documents supplied to the Department of Justice. This supports the proposition that documents relevant to European proceedings are among those submitted to the Department of Justice. We accept there may be overlap or, indeed, considerable overlap between documents provided to the Department of Justice and those provided to the Commission.

18. We keep in mind that it is challenging for the Claimants, particularly in a cartel case, to understand what took place, and obtaining documents by disclosure is particularly necessary for proving a case in these circumstances. As a general matter, we do not understand this to be disputed.

19. Commission documents have been disclosed, but we are reminded that the Commission did not address a cartel operating against the Claimants. It is unclear whether the Commission focused on such matters and dismissed them, for example because there was insufficient evidence, or alternatively that the Commission did not properly consider them at all. At times the Defendants suggested that the fact that the Commission did not find a case involving the Claimants was a relevant factor. But this is not a follow-on claim and it is not, in our view, appropriate to rely upon the Commission's investigation in that respect. First, because we do not have sufficient insight into the Commission's decisions or the investigations it carried out and, second, in any event, there may also be questions of admissibility if reliance was to be placed on the Commission's appraisal of such matters.

20. The Claimants have pleaded a case against Autoliv and ZF which is going to trial, and there is no application to strike out that claim. There is only an application to strike out the claim against Tokai Rika which we have refused.

21. Notwithstanding submissions that the documentary evidence provided to date is said to have been thin, disclosure is, in our view, appropriate and we are not

satisfied that the provision of documents to the Commission is *prima facie* sufficient to give the Claimants an adequate opportunity to make out their case. Appropriate searches should be carried out. We are not here directly concerned with the question of whether the Department of Justice documents are relevant; we are concerned with whether searching those documents is an appropriate way of going about a disclosure exercise.

22. Ms Ford KC, on behalf of ZF, fairly acknowledged that the documents supplied by her clients to the Department of Justice could contain relevant documents and that could only be determined by searching, and that such searching had not yet taken place.

23. As to Mr O'Donoghue's point on duplication, there may be duplication, but we cannot know how much. And so what? Proportionate searching needs to be carried out, and insofar as documents have already been disclosed, subject to further observations, they do not need to be disclosed twice if the same documents appear in the Department of Justice file.

24. We then need to turn to what is proportionate. It is in our view unsatisfactory that we have been provided with no substantive evidence on proportionality. We agree that on its face searching 45,000 or 50,000 documents may involve considerable resources, but it is difficult to contextualise that without any evidence. It depends on how documents are organised and stored and so forth. It would have been helpful to know the costs involved and the time involved in searching 45,000 or 50,000 documents.

25. Furthermore, the Defendants' position is that if there is to be searching of these documents for relevant documents, it would be helpful if the Defendants can do this by electronic searching. Yet the Defendants are not in a position to tell us whether electronic searching is universally possible, as opposed to possible for a subset. It seems that no investigations have yet been made.

26. What we propose to do is to order disclosure of relevant documents from those documents submitted to the Department of Justice. We will provisionally order this be done by electronic searching. We have not been asked to rule on the

search terms and would hope that these can be agreed. If it turns out that electronic searching is inadequate, then there may need to be a further application.

27. As to Tokai Rika, we understand that some electronic searching has been done, but there was some discussion about the possibility of the need to use additional search terms, so we do not know whether we need to hear any further argument on that.

28. We now turn to Brazil. Again, we are talking about the disclosure of documents in the Defendants' control that have been provided to the Brazilian Competition Authority ("CADE"). Relevance and proportionality have not been pressed in relation to these documents and, insofar as they have been relied upon, we would point to essentially the same reasons we have given in respect to the documents of the Department of Justice.

29. In Brazil, there were two investigations, the 2015 national investigation and the 2017 international investigation. The 2015 investigation included Autoliv and Takata. The 2017 investigation included ZF in addition to other undertakings.

30. Paragraphs 38B and 38D of the RAPC make reference to CADE in the following terms:

> "38B. On 5 June 2017, [CADE] published an annex to a "Technical Note" of the CADE's Case 08700.002938/2017-35. That Technical Note states, in material part, that:
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> (i) the CADE's investigation concerns "*anticompetitive conduct in the international market for airbag modules, seat belts and steering wheels*"; and
>
> (ii) That the undertakings subject to investigation include Autoliv, ZF/TRW and Tokai Rika.
>
> …
>
> 38D. In those circumstances, the proper inference is that the CADE's investigation encompasses cartel activity aimed at (at least) PSA; and as showing that the cartel conduct was not limited to that found by the Commission."

31. Expert evidence of Brazilian law has been provided by ZF, and there is a report from Vivian Fraga of TozziniFreire Advogados, who has been dealing with matters for the ZF Group in Brazil. This has been answered by a report from Willi Sebastian Künzli, who is a partner at Manassero Campello Advogados in São Paulo, Brazil. There is also a report in reply from Ms Fraga. There was argument about whether or not this Tribunal should admit expert evidence at this stage. We give permission as we consider it important that we should do so in the circumstances.

32. The argument based on Ms Fraga's evidence is that the provision of documents in these proceedings, which were supplied to CADE, would be a breach of Brazilian law giving rise to criminal and civil liability. The approach to disclosure in these circumstances is set out in Bank Mellat v HM Treasury [2019] EWCA Civ 449: see [63(i)] to [63(vi)]:

> "63. Pulling the threads together for present purposes:
>
> i) In respect of litigation in this jurisdiction, this Court (i.e., the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the "home" country of the party the subject of the order.
>
> ii) Orders for production and inspection are matters of procedural law, governed by the *lex fori*, here English law. Local rules apply; foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law.
>
> iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind (discussed in *Dicey, Morris and Collins, op cit,* at paras. 1-008 and following). This Court is not, however, in any sense precluded from doing so.
>
> iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.
>
> v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

vi) Where an order for inspection is made by this Court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways."

33. Ms Fraga refers to various sections of Brazilian legislation. At paragraphs 11 to 13, 15 and 16.1 of her First Witness Statement, she cites the following:

"11. Law No. 12,529/2011 (Brazilian Competition Law)

Art. 49. The Tribunal and the General Superintendence shall ensure, in regard to the procedures provided for in items II, III [non-merger administrative proceedings], IV and VI [merger review proceedings] of Article 48 of this Law, the confidential treatment of documents, information, and procedural acts necessary for the elucidation of the facts or required in the interests of society.

12. CADE's Internal Rules

Art. 49. CADE gives the following treatment to records, information, data, communications, objects, and documents related to all sorts of administrative proceedings:

II. restricted access, when access is only granted to the party that presented it, to Principals, according to the case, and other persons authorized by CADE;

Article 51. As far as investigations and discoveries are concerned, CADE ensures confidential treatment to records, documents, objects, information, and procedures, to the extent needed to clarify the facts and protect the public interest, in the following cases:

III. administrative proceedings to impose sanctions for antitrust violations;

13. CADE's Resolution No. 21/2018

Art. 1. Documents and information contained in the Administrative Proceedings for the Imposition of Administrative Sanctions for Violations to the Economic Order, including those arising from the Leniency Agreement, Cease and Desist Commitments (TCC) and search and seizure legal actions are public, and their disclosure shall occur in the adequate procedural stage, according to articles 8 to 11 of this Resolution.

Art. 2 The following are exceptions to the provisions of art. 1 and shall be kept as restricted access, even after the final decision by the Plenary of Cade's Court, and may not be made available to third parties:

I – the History of Conduct and its amendments, prepared by Cade's General Superintendence based on self-accusatory documents and information voluntarily submitted within the scope of the negotiation of a Leniency Agreement and TCC, due to the risk (...) and/or to the effectiveness of Cade's Leniency and TCC Programs; and/or

II - documents and information:

a) that fall under the restrictions provided for in arts. 44, §2, 49, 85, §5 and 86, §9 of Law No. 12,529 of 2011; (...)

Art. 3 The exceptional granting of access to the documents and information referred to in Art. 2 may occur in the following cases:

I - express legal determination;

II – specific judicial decision;

III – authorization of the signatory of the Leniency Agreement or the committee of the TCC, with the consent of Cade, provided that there is no detriment to the investigation; or

IV - international legal cooperation, provided for in the arts. 26 and 27 of the Code of Civil Procedure, with the authorization of CADE and authorization of the signatory of the Leniency Agreement or the committee of the TCC, provided that there is no detriment to the investigation.

…

15. Administrative (emphasis added):

15.1. Law No. 12,527/2011 – Brazilian Law on Access to Information:

Art. 33: The individual or private entity that holds information due to a link of any nature with the public authority and fails to observe the provisions of this Law shall be subject to the following sanctions:

I - warning;

II - fine;

III - termination of the relationship with the government;

IV - temporary suspension of participation in bidding and impediment to contract with the public administration, for a term not to exceed 2 (two) years;

V - declaration of ineligibility to bid or contract with the public administration, until requalification is promoted before the authority that applied the penalty.

§ 1 The sanctions provided for in items I, III and IV may be applied together with that of item II, ensuring the right of defense of the interested party, in the respective process, within 10 (ten) days.

15.2. CADE's Resolution No. 21/2018:

Art. 4. Pursuant to art. 248, §2, II of Cade's Internal Regulation, and art. 44 of Law No.12,529/2011, the person who discloses, shares with third parties or uses documents and information of restricted access referred to in arts. 2 and 3 of this Resolution is subject to administrative, civil, and criminal liability.

16. Criminal (emphasis added):

16.1. Decree Law No. 2,848/1940 – Brazilian Criminal Code:

> *Art. 153 – Disclose to someone, without just cause, the content of a private document or confidential correspondence, of which they are the recipient or holder, and whose disclosure may cause harm to others:*
>
> *Penalty – detention, of one to six months, or a fine (...).*
>
> *§ 1. It is only carried out through representation. (...)*
>
> ***§ 1-A. Disclose, without just cause, confidential or reserved information, as defined by law, contained or not in the information systems or database of the Public Administration:*** *(...)*
>
> *Penalty – detention, of 1 (one)* ***to 4 (four) years, and a fine.****"*

34. These provisions are broadly understandable to an English lawyer, in that they ensure that documents, which have been filed with CADE, are treated as confidential and that confidentiality is not abused by third parties who gain access to those documents.

35. According to Ms Fraga, the reference to legal determination and judicial decisions in Article 3 of CADE's Resolution No. 21/2018 is not a reference to the courts of other jurisdictions, and that subparagraph IV of Article 3 requires an application to the Brazilian authorities. This is in dispute by Mr Künzli, who also refers to Article 53 at paragraph 8 of his Expert Report, which says:

> "CADE does not restrict access to information and documents when:
>
> III. they pertain to the following categories, amongst others: […]
>
> (g) information companies are to publish or disclose due to legal or regulatory requirements to which they are subject in Brazil or in another jurisdiction."

36. Mr Künzli concludes that this is an answer to the concerns raised by the Defendants. Ms Fraga disagrees with Mr Künzli's analysis and says he is misinterpreting the section.

37. Standing back, the position seems to be as follows: the provisions we have been shown do not on their face appear to deal with the situation where a party is required to comply with a disclosure order made by a court of another jurisdiction. We do not feel well-positioned on this application to rule on the rival positions of law being advanced by the experts. However, we do attach weight to the fact that Ms Fraga and, indeed, the Defendants are aware of no

examples where a party has in fact been sued or prosecuted for complying with the disclosure order of a foreign court. We therefore are of the view that, irrespective of the detailed legal reasoning, which seems to be theoretical rather than real, the risk of prosecution would seem to be extremely low.

38. We also note Ms Ford was assuming a broad and robust position. Her position was that all the documents, even the Defendants' own documents, cannot be disclosed in these proceedings without risk of prosecution in Brazil. It would seem to follow that if an email evidencing a cartel had been sent to CADE, it could then not be used in proceedings in other jurisdictions; nor could it be used in the ordinary course of business. We find this a surprising proposition and we see no basis for it in the material that we have been shown. This objection to use of documents, if it is a good one, could in our opinion only apply to third party documents provided to CADE or documents generated by the CADE itself.

39. This tribunal drew to the parties' attention paragraph 28 of Schedule 8A to the Competition Act 1998, which applies in this jurisdiction. That provides:

> "**Restriction in relation to settlement submissions and cartel leniency statements**
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> For the purposes of competition proceedings, a court or the Tribunal must not make a disclosure order in respect of—
>
> (a) a settlement submission which has not been withdrawn, or
>
> (b) a cartel leniency statement (whether or not it has been withdrawn)."

40. There seem to be sound policy reasons behind this provision. The aim of the legislator is to encourage defendants to communicate with the relevant Competition Authority. Similar policy reasons may apply to CADE. It would be odd to order that leniency statements in Brazil, for example, should be disclosed when the same would not apply to leniency statements submitted here.

41. Turning back to the evidence, Ms Fraga's First Witness Statement, at paragraph 10 she identifies the documents that TozziniFreire holds on behalf of ZF in connection with the 2017 investigation. She identifies:

(1) at paragraph 10.1.1, that there are settlement submissions;

(2) at paragraph 10.1.2, "contemporaneous documents". "Contemporaneous documents" are described as documents provided to CADE by ZF and she suggests these are the same as those provided to the Commission in connection with the OSS2 investigation, but it is not clear how she knows that;

(3) at paragraph 10.1.3, she refers to terms of the settlement reached between ZF and CADE;

(4) at paragraph 10.2.1, she refers to "documents submitted to CADE by Autoliv and Takata pursuant to CADE's leniency and settlement procedures, including Autoliv and Takata's leniency and settlement submissions, contemporaneous documents and terms of the leniency and settlement arrangements between the parties and CADE"; and

(5) at paragraph 10.2.2, "overviews provided by CADE".

42. We are going to order that the documents identified by Ms Fraga at paragraph 10.1.2 of her First Witness Statement, being "contemporaneous documents" are searched and disclosed insofar as they are relevant; and the documents identified at paragraph 10.2.1, that is the documents submitted to CADE by Autoliv (which we anticipate would be caught by the category comprising "contemporaneous documents" anyway) and by Takata. We understand Takata no longer exists.

43. We are not going to order the leniency and settlement procedures referred to in paragraph 10.2.1 of Ms Fraga's First Witness Statement, or leniency or settlement submissions be disclosed, and we are not going to order anything in respect of paragraphs 10.1.1, 10.1.3 or 10.2.2 of Ms Fraga's First Witness Statement.

Justin Turner KC Chair	Professor Anthony Neuberger	Sir Iain McMillan CBE FRSE DL

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 29 March 2023