Neutral Citation Number: [2024] EWHC 1424 (KB)

Case No: QB-2021-004141 and others

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
KING'S BENCH DIVISION

IN THE NISSAN/RENAULT DIESEL NOX EMISSIONS GROUP LITIGATION AND IN THE PEUGEOT/CITROËN/DS NOX EMISSIONS GROUP LITIGATION

Rolls Building
Fetter Lane
London
EC4A 1NL

Before:

MRS JUSTICE COCKERILL DBE

- -

Between:

1) THOMAS JOHN JOSHUA AND OTHERS
2) MICHAEL LOTT AND OTHERS

Claimants

- and -

1) RENAULT S.A. AND OTHERS
2) STELLANTIS AUTO SAS AND OTHERS

Defendants

- -
- -

Adam Kramer KC and Kate Boakes (instructed by **Leigh Day and Pogust Goodhead)** for the **Claimants**
Toby Riley-Smith KC and David Myhill (instructed by **Signature Litigation LLP)** for the **Renault Defendants**
Maya Lester KC and Paul Wright (instructed by **Kennedys Law LLP)** for the **PCD Defendants**

Hearing dates: 13, 14 May 2024

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APPROVED JUDGMENT

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 11 June 2024 at 10:00am.

Cockerill J:

INTRODUCTION

1. This hearing arises in the context of the so-called "Pan-NOx" or "Dieselgate" Emissions litigation. In that litigation it is alleged that diesel vehicles sold widely by a variety of manufacturers to consumers throughout Europe (and indeed the world) contained what are referred to as "defeat devices" within the meaning of the EU Emissions Regulation 2007/715. In broad terms a defeat device can be any vehicle hardware, software, or design that interferes with or disables emissions controls under real-world driving conditions, even if the vehicle passes formal emissions testing; though the precise legal meaning of the term will be a topic for later argument.

2. Over a million and a half claimants have now commenced proceedings against car manufacturers and others. A series of Group Litigation Orders ("GLOs") have been made by the President of the King's Bench Division. Broadly speaking in those claims the Claimants rely on five English law causes of action: (i) breach of statutory duty; (ii) deceit; (iii) negligent misrepresentation; (iv) breach of contract; and (v) claims under the Consumer Protection from Unfair Trading Regulations 2008.

3. It has been determined that the overall "Pan-NOx" litigation will be advanced by means of trials in a limited number of Lead GLO cases, with the remainder of the many actions started being stayed pending the outcome of those trials. The original Lead GLO was Mercedes; to that, Ford was added in January of this year. At the March CMC, Nissan/Renault and Peugeot-Citroën ("PCD") were added as Additional Lead GLOS ("ALGLOs"). This approach is designed (i) to enable the Court to determine issues across a number of engines so as to maximise the chances of producing rulings which will enable fruitful negotiated resolutions of as many of the remaining cases as possible and (ii) to ensure that trials can still go ahead even if one of the existing Lead GLOs settles its disputes.

4. The Nissan/Renault and PCD ALGLOs were chosen as Lead GLOs, despite the spectre of this application, for a variety of reasons. Amongst those are the facts (i) the claims against them, though in absolute terms at an early stage, are more advanced than in many of the other actions (ii) they are relatively large claims in terms of claimant numbers and (iii) engines designed and built by those manufacturers are to be found in a number of the other manufacturers' cars. For example it has been suggested that Renault's K9K diesel engines are fitted not just in two thirds of the vehicles in its own litigation but also in vehicles manufactured by other manufacturers including Suzuki and Mercedes (in particular the OM607 engine). While that is an oversimplification in that there are variations of hardware and calibration within the K9K contingent, that fact remains significant both in terms of logistics to trial (issues have already arisen in the context of Mercedes disclosure because of the OM607's authorship) and in terms of the impact of trial determinations on the overall cohort of cases.

5. This hearing therefore concerns the appropriate method to be adopted for the provision of recently-ordered sampling disclosure and information by the PCD

Defendants and the Renault Defendants and to provide guidance for the further wider disclosure exercise which lies ahead in the light of the provisions of the French statute of 26 July 1968 entitled "*Loi relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères"*. It is commonly and imprecisely referred to as the French Blocking Statute ("FBS"). For want of a better precise abbreviated reference this judgment continues to use that terminology.

6. The relevant provision of the FBS, Article 1 *bis* states that:

> "it is prohibited to any person to request, seek or disclose, in writing, verbally, or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of gathering evidence with a view to or within the framework of foreign judicial or administrative proceedings."

7. The debate engages the law as to the extent to which the Court will compel a party to produce disclosure where to do so would expose them to a criminal penalty or sanction. There is a good deal of law on this, which is considered further below, but the parties are agreed that the leading authority here is *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 at [52-63].

8. In particular the issue in practical terms translates into whether the Court should appoint (or seek the appointment of) a Commissioner under Chapter II of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 ("Hague Convention"); a step which it is agreed would negate any risk to the Renault and PCD Defendants.

9. The FBS and the risk of prosecution thereunder has been the subject of numerous cases before these courts in the past and these too will be considered further below. In previous cases reliance upon that enactment has not been successful.

10. The short version of the argument which has been conducted with such diligence and skill before me over a day and a half of court time, is that the Claimants say that nothing material has changed, and the same result as has been arrived at in the previous cases should be produced by an application of the relevant principles. The PCD and Renault Defendants say that there has been a material change as regards whether there is a real risk of prosecution since 2022; that a shake up in the French administration relating to the jurisdiction means that risks of prosecution have gone up very greatly. They point to recent correspondence and summonses which have been issued to a PCD employee and a Renault employee as evidencing that change and urge me to conclude that there is a real risk of prosecution and that an assessment of the factors points to the order which they seek.

The claims and the parties

11. The PCD Defendants are variously manufacturers, importers, distributors, marketers, dealers of and financing providers in relation to the PCD Vehicles.

The PCD Defendants include four companies domiciled in France: Stellantis Auto SAS, Automobiles Peugeot SA, Automobiles Citroën SAS and Stellantis Financial Services (together the French Defendants). To date some 26 Claim Forms have been issued on behalf of over 65,000 Claimants against the PCD Defendants.

12. The Renault Defendants are companies which are in a strategic partnership with another manufacturer, Nissan. In the Pan-NOx litigation they are sued together by a total of over 80,000 Claimants.

13. Proceedings are at a fairly early stage in both sets of claims. Generic Particulars of Claim ("GPOC") have been served, but a Generic Defence is not due until 26 July 2024. Case management directions have been given setting out the overall shape of the trials which lie ahead. Further case management directions (including for disclosure) are to be given at a CMC in October 2024 leading to a trial of various defeat device issues across all Lead GLOs in October 2025.

The genesis of the FBS issue

14. The FBS issue has been trailed from early on. In the PCD litigation on 3 February 2023, the Claimants issued an application for early disclosure and the provision of information by the PCD Defendants of certain categories of documents said to be required to assist with drafting the GPOC. The PCD Defendants referred the disclosure application to the relevant French authority. The question of this disclosure was then listed for a hearing before Senior Master Fontaine.

15. The Claimants' application for a GLO in Renault was also accompanied by an application for early disclosure. On 1 June 2023 Renault's solicitors (Signature Litigation LLP ("Signature")) raised the issue of the FBS in that context with the Claimants' solicitors (Pogust Goodhead ("PG") on behalf of PG and Leigh Day, together the Lead Solicitors). Renault was aware that the Court was about to consider essentially the same issue in the PCD Litigation. It suggested that the Claimants' disclosure requests should be considered in light of that judgment. After further correspondence on other matters, on 29 September 2023 the parties agreed that it would be prudent to wait for the decision in the PCD Litigation.

16. Following the then Senior Master's judgment in *Lott v PSA Automobiles SA* [2023] EWHC 2568, on 25 October 2023 Signature wrote to PG confirming that Renault's position on the FBS was unchanged. They indicated that Renault would obtain expert evidence and would need to inform the relevant authorities if the Claimants maintained their requests for disclosure and information.

17. On 27 October 2023 PG asked Renault not to incur the costs of instructing experts, or notify the authorities, because "*such costs are premature and disproportionate"*. On 3 November 2023 the Claimants again disputed that the FBS was engaged by their requests for other classes of documents; but they indicated that they would revisit their requests. Reformulated requests followed in PG's letter of 14 November 2023. In their response on 1 December 2023, Signature asked the Claimants to agree that any disclosure could be provided via the Hague Convention.

18. On 15 December 2023 PG reserved their position "*pending confirmation as to whether the disclosure requested… is held by any entity in the UK*". The same day Renault notified the French authorities of the issue.

19. On 22 December 2023, the Claimants nominated the Nissan/Renault NOx Litigation as an ALGLO. As the hearing of the Claimants' GLO application was approaching, on 29 December 2023 Renault sought clarification of the Claimants' position in relation to the FBS and invited the Claimants to agree that any disclosure or information should be provided by means of the Hague Convention so as to avoid the risk that Renault or its employees would face prosecution.

20. In response, the Claimants confirmed that they were not, in fact, seeking disclosure at the forthcoming GLO hearing and that "*we trust that this puts an end to any discussion of instructing an expert regarding the FBS for the time being*".

21. For the purposes of ALGLO selection, Renault nonetheless obtained an expert's report from a French academic, Professor Louis d'Avout, dated 10 January 2024 and a letter dated 11 January 2024 from a potential Chapter II Commissioner, Mr Alexander Blumrosen. Both documents were before the Court at the Pan-NOx Hearing in January. At that hearing PCD and Renault argued that they should not be selected as ALGLOs, *inter alia* because their involvement would lead to additional complication, expense and delay "*because (i) French legislation regulates its disclosure and (ii) it is subject to a French Criminal investigation.*"

22. On 9 February 2024 Signature reiterated the Defendants' position that any documents or information under the control of French companies needed to be provided through the Hague Convention process. It identified some information which Renault could provide without infringing the FBS.

23. On 5 March 2024 PG indicated that it "seems inevitable" that the FBS issue would need to be determined by the Court. That position was reflected in the Claimants' draft directions for the Pan-NOx CMC on 11 to 14 March 2024 ("the March CMC") and the ordering of this FBS Hearing.

The experts

24. Following the direction for this hearing further expert evidence was served. Ultimately:

    1) The PCD Claimants' French law expert evidence came from Mr William Feugère by way of a report dated 5 April 2024;

    2) The Renault Claimants' French law expert evidence came from Maître Stéphane Bonifassi in a report dated 8 April 2024;

    3) The PCD Defendants relied upon:

        a) The first report of Professor Didier Rebut dated 25 May 2023; and

        b) The second report of Professor Rebut dated 29 April 2024.

4) The Renault Defendants relied upon:

   a) The first report of Professor Louis d'Avout dated 10 January 2024;

   b) The second report of Professor d'Avout dated 25 April 2024; and

   c) Following a contested hearing before me, the report of Mr Stéphane de Navacelle dated 25 April 2024.

25. It was not seriously contested that any of these experienced lawyers were not suitable experts. They co-operated sensibly to produce a very helpful compressed Joint Statement dated 6 May 2024 setting out their views on the key sub-issues in spreadsheet form.

The FBS and the SISSE

The FBS

26. The FBS is a French law dated 26 July 1968. Its full title is the *Loi relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères* (or, in translation: "*on the disclosure of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural persons or legal entities)*".

27. As originally drafted, the law regulated the provision of documents or information on carriage by sea only. The scope of the FBS was significantly extended in July 1980.

28. Article 1 provides that:

> "Subject to international treaties and agreements, it is prohibited for any individual of French nationality or habitually residing on French territory and/or any officer, representative, agent or employee of a legal entity having its registered office or an establishment on French territory, to communicate to foreign public authorities in writing, orally or by any other means, in any place whatsoever documents or information relating to economic, commercial, industrial, financial or technical matters, the disclosure of which may damage sovereignty, security or essential economic interests of France or the public order, specified by the administrative authority as required."

29. Article 1 is intended to protect the fundamental interests of the French state. It bears some similarity to the Protection of Trading Interests Act 1980 (which allows the Secretary of State to prohibit disclosure which would be prejudicial to UK sovereignty, security or international relations, and is analogous to Article 1 but not Article 1 *bis* of the FBS). It is not in issue in this application.

30. Article 1 *bis*, which is rather different, is the contentious provision. It was introduced by Law no. 80-538 of 16 July 1980. It provides that:

> "Without prejudice to international treaties or agreements and laws and regulations in force, it is prohibited for any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative proceedings or in relation thereto."

31. The Defendants emphasise that the article is subject to applicable conventions. In this context this means in particular the Hague Convention, to which I shall come.

32. Article 2 of the FBS requires the persons mentioned in Article 1 and Article 1 *bis* to inform the "competent minister" without delay when they receive any request concerning such disclosure. The Article does not specify the types of request covered.

33. Failure to comply with the prohibitions in Articles 1 and 1 *bis* of the FBS is a criminal offence. Article 3 provides in relation to natural persons for either a prison sentence up to a maximum of six months or a fine of €18,000 for each breach. Legal persons are subject to a fine of up to €90,000 for each breach. The financial penalties are agreed by the experts to be very low – or, in the words of one - derisory.

34. The law has thus been in force for over forty years. The experts agree that there has so far been only one reported conviction for a breach of Article 1 or Article 1 *bis* of the FBS, in the *Cour de Cassation* case called the *Christopher X* case or the *Executive Life* decision. They also agree that that was an exceptional case. In that case a civil action had been filed in the United States by a North American public authority - the Insurance Commissioner of the State of California – against a French company that allegedly purchased an insurance company in the United States in breach of local regulations. Documents were being sought under the process set out under the Hague Convention ("Hague process"). But at the same time Christopher X, a French lawyer, the correspondent in France of the California Insurance Commissioner's lawyer, fraudulently sought and obtained information from a former director of the French defendant company about the Board of Directors. That company then filed a criminal claim against him. The convicted individual was fined €10,000 but was not sentenced to any term of imprisonment.

35. Some of the experts have suggested that there may be unreported decisions and current investigations under the FBS which are not public knowledge. The experts disagree about how likely that is. Given the long history of the legislation and the reforms to which I will come I have no difficulty in concluding that it is not at all likely that any decisions – or even charges - would have remained unreported. Investigations prior to charge are a different matter; that is simply impossible to know.

36. It is agreed that one of the reasons for the 1980 reforms was to seek to prevent extensive US pre-trial disclosure orders against French companies. Such orders – particularly against third parties to any putative litigation – were and are seen as abusive. The experts disagree about whether that was the sole aim and whether

Article 1 *bis* only covers abusive requests or was designed to compel the use of co-operation mechanisms, such as the Hague Convention, in disclosure in transnational cases.

The SISSE and the 2022 reforms

37. *The Service de l'Information Stratégique et de la Sécurité Economiques* ("the SISSE") was created by Decree 2016-66 of 29 January 2016 as a department within the Ministry of the Economy. One of its functions is to oversee the application of the FBS.

38. A report presented to the French National Assembly by Raphaël Gauvain MP in June 2019 (the "Gauvain Report"), recommended certain measures relating to the FBS, including the creation of a mandatory early warning mechanism and the introduction of support for the SISSE. More detail of Mr Gauvain's report and arguments can be found in the judgment of Waksman J in *Qatar v Airbus* [2022] EWHC 3878 (TCC). Mr Gauvain also recommended that the criminal sanctions for violations of the FBS should be increased considerably (the penalties not having been increased since 1980). A figure of a million euros was mentioned. However, that recommendation was not implemented, and it was decided not to increase the penalties in the FBS beyond the current levels. The reforms do not alter the terms of the FBS itself.

39. Decree no 2022-207 ("the 2022 Decree") did however provide that the SISSE would be the contact for persons subject to the prohibition from disclosing the documents and information provided in Articles 1 and 1 *bis* of the FBS. Article 3 of the 2022 Decree therefore requires the parties subject to the prohibitions in the FBS to inform the SISSE without delay of any requests falling within Article 1 and/or Article 1 *bis*, together with the case file. The SISSE is obliged to investigate the case with the relevant ministries and to issue, within one month, an opinion on the applicability of the FBS. It is agreed that unlike opinions under Article 1, opinions under Article 1 *bis* are not binding. Their significance in the context of risk of prosecution and the facts of this case are hotly contested. The PCD Defendants submit that the Court should place significant weight on the views of the SISSE, as the government body charged with responsibility for overseeing the FBS and that the fact that its written opinions on Article 1 are binding is indicative of the importance of the SISSE's views.

40. The experts agree that the aim of the 2022 reforms (as per the press release by which they were announced) was to increase the effectiveness of the FBS, including through the creation of a "one-stop shop" to assist companies.

41. The French Minister of the Economy published a press release on 16 March 2022 setting out the aim of the 2022 reforms:

> "The aim of this reform is to clarify the referral procedure for companies and to designate a single point of contact for the players concerned: the Strategic Information and Economic Security Department (SISSE) of the Directorate General for Companies. Companies will thus benefit from a privileged interlocutor who, in conjunction with the various State

> administrations, will assist them with regard to foreign requests in compliance with the Blocking Statute. The aim is also to strengthen legal certainty for companies by providing them with administrative opinions within a timeframe adapted to administrative and judicial procedures. These opinions will strengthen the enforceability of the Blocking Statute against foreign jurisdictions. The SISSE thus proposes a real path of support for companies faced with extraterritorial threats."

42. The French authorities have made a number of statements emphasising that from their perspective these reforms in 2022 have strengthened the effectiveness of the FBS. As examples:

    1) In March 2023 the Minister for the Economy answered a Parliamentary question by emphasising that "*in 2022 the one-stop shop operated by the SISSE was referred to 38 times, contributing to confirming our economic and judicial sovereignty. The validity and the scope of the Blocking Statute has been recognised in all cases*";

    2) The Director of the SISSE stated that the "observed revitalisation" of the FBS could be explained because of a "fear of the policeman".

43. Again, the significance of these communications is contentious. The Defendants submit that it is a sea change or, in the words of Mr de Navacelle, "a paradigm shift".

44. Article 40 of the French Code of Criminal Procedure obliges any French authority, such as the SISSE, becoming aware of an offence, to notify the Public Prosecutor without delay and to share with them any relevant information. There is no suggestion of any change in the law or procedure relating to the prosecutor itself.

<u>The involvement of the SISSE and the French Prosecutor</u>

45. There is then the question of the application of this revitalised regime in this case. The PCD Defendants referred the early disclosure application to the SISSE on 3 May 2023. The terms of the letter are worthy of note:

> "Subject: Contact being made in order to obtain an opinion regarding applicability ....
>
> The approaching of your Department forms part of the Group's desire to get your opinion as regards the possible applicability of the following provisions, be it in order to answer the requests to send information, intelligence or documents which the PSA Companies are likely to be faced with in the context of the aforementioned English proceedings, or in order to back up in their defence in these same proceedings:
>
> i. The provisions of Articles 1 and 1 bis of Law no. 68-678 of July 1968 relating to the sending of documents and information of an economic, commercial,

> industrial, financial or technical nature of foreign natural or legal persons (the "Blocking Statute");
>
> ii. The provisions of Articles 11 and 434-7-2 of the Code of Criminal Procedure providing for the secret nature of the preliminary inquiry procedure and obliging the persons contributing to these proceedings to professional secrecy, where necessary combined with the provisions of the Blocking Statute;
>
> iii. The provisions of Articles 114 and 114-1 of the Code of Criminal Procedure prohibiting any party to a preliminary inquiry from circulating to third parties the reproduction of exhibits or instruments from the proceedings which have been sent to it at its request and with the agreement of the investigating magistrates, where necessary combined with the provisions of the Blocking Statute;...
>
> At this point, the Group seeks more specifically: ... the written opinion of your Department ...
>
> Both the Opinion as well as the Illustration may then be sent by the PSA Companies to the various current and future parties to the legal action which is pending in England and to the English court before which the case has been brought …
>
> To this end, this letter sets out:
>
> - A summary of the proceedings brought in France as well as in England against the PSA Companies in connection with allegations regarding the emission levels of Nox, from some of their vehicles fitted with diesel engines (1.);
>
> - A table summarising the requests to send documents and information sought by the complainants within the context of the proceedings in England by way of an application for the purpose of sending exhibits from the English Court (2)".

46. The SISSE responded on 16 May 2023 saying it considered that Article 1 *bis* of the FBS was applicable to the requests. The SISSE said it would be obliged to report any breach of the FBS to the prosecuting authorities. The letter also noted (i) that the Hague Convention would provide a means by which disclosure could be provided without breaching the FBS and that a Letter of Request should be solicited from this Court and (ii) that part of what was sought covered material covered by French criminal investigation secrecy, and that disclosure of any such matter would constitute a breach of the Criminal Code and Article 1 (as opposed to Article 1 *bis*) of the FBS.

47. On 13 October 2023 Master Fontaine, in the *Lott* judgment, ordered disclosure of some of the documents sought (not including the criminal investigation documents) and refused to order disclosure through the Hague Convention.

48. The PCD Defendants informed the SISSE of the judgment of Master Fontaine and indicated an intention to seek permission to appeal at a hearing on 9 November 2023.

49. The SISSE responded in a letter dated 7 November 2023. In that letter the SISSE stated that:

    1) The disclosure required by the Judgment fell within Article 1 *bis* of the FBS;

    2) Therefore, it would be a criminal offence to disclose these documents other than under the Hague Convention. This offence carried a maximum sentence of 6 months in prison for natural persons, or a fine of €18,000;

    3) If the SISSE were to become aware of any disclosure by the French Defendants in breach of the FBS, they would be under a duty to report this to the public prosecutor.

50. On 13 December 2023 the PCD Defendants were granted permission to appeal against Master Fontaine's Order. The appeal is currently stayed until further order in the light of the wider Pan NOx developments which have led to this hearing.

51. At the hearing about sampling disclosure in late March 2024 Constable J ordered the PCD Defendants to provide early disclosure and inspection of technical documents in respect of each of the identified variants that they manufactured or supplied ("the Disclosure Order").

52. On 9 April 2024 the PCD Defendants updated the SISSE on developments in the litigation, including the Disclosure Order.

> "By virtue of a ruling dated 16 October 2023, the Court partially granted the claims of the complainants in relation to correspondence request no. l (technical information relating to Peugeot, Citroën and DS vehicles sold in the United Kingdom since 1 September 2009) and in relation to correspondence request no. 3 (information and documents relating to recall campaigns), all the while refusing the possible submission of these documents and information through the channels of a simple request for mutual assistance, on the basis of the Hague Convention of 1970....
>
> By virtue of writings which were legalised on 13 February 2024, the counsels of the complainants indicated <u>for the verv first time</u> that the PSA Companies should be selected as ALGLO, alongside Renault, Nissan and FCA/Suzuki ...
>
> The PSA Companies did not fail to remind the complainants (and the Court), in addition to the extremely tardy and unexpected nature of this potential nomination, of all of the

> reasons why it was not pertinent to select them as an ALGLO Among these reasons, the obstacles already highlighted in your two opinions naturally appeared, namely the provisions of the Blocking Statute and those of the code of criminal procedure relating to the secrecy of the inquiry and of the investigation
>
> The Court also judged that hearings - dedicated to the question of knowing whether, under the meaning of English law, the provisions of the Blocking Statute were of such a nature as to hinder the requests for the submission of documents and information as evidence within the context of the procedure (discovery) - should take place in May 2024.
>
> In this regard, the Court will specifically examine the question of knowing whether there is a genuine risk of criminal proceedings in France based on the breach of the Blocking Statute, in the event of direct transmission of this evidence to the complainants, outside channels of mutual legal assistance.....
>
> At the end of another hearing on the date of 26 March 2024, the Court ordered, in essence and subject to the outcome of the hearings of 13 and 14 May, that the manufacturers referenced as ALGLOs (Ford, Renault, Nissan and the PSA Companies) should provide <u>for the 100 categories of vehicles which will be identified by the complainants</u>: (i) the specific description of the hardware components which are relevant for the emission control system and (ii) all of the IT files making up the software which governs the operating of the emission control system and their possible subsequent updates...
>
> In light of these new developments, I would be most grateful if you could send me a new opinion from your Department regarding the applicability of the Blocking Statute to these new requests for the sending of documents and information (including that request mentioned in the previous paragraph) and, more generally speaking, to share with me any other observation which you might have."

53. The SISSE responded in a letter dated 7 May 2024. However, before that letter was sent there was apparently a meeting between the Paris prosecutor's office and the lawyers for PCD and Renault.. That meeting was apparently convened at the request of the Defendants. It was described thus in correspondence:

> "... on 3 May 2024, the same French counsel for Renault attended a meeting with the Paris prosecutor's office and PCD's criminal counsel (at Renault and PCD's request). From Renault's perspective, this was: (a) to ensure that the Prosecutor office was aware of Renault's criminal law representation in the event that a prosecution was commenced; and (b) to make clear that any sanctions for breach of the FBS by Renault ought to take into account that such a breach is a

> direct consequence of Renault's obligations to comply with directions orders of the English Court in these proceedings."

54. In the letter of 7 May 2024 the SISSE made the following key points:

    1) The Hague Convention provides the appropriate route for disclosure of documents covered by Article 1 *bis*;

    2) The requirement to use the Hague Convention had always been respected by the UK and France in criminal and administrative matters. The French authorities were seeking the same commitment in civil and commercial matters;

    3) A Chapter II Request would be processed as soon as possible;

    4) The aim of Article 1 *bis* is to penalise non-compliance with the cooperation mechanisms provided for in international agreements;

    5) Since 2022 the French administration had been investigating an increasing number of cases concerning the applicability of the FBS;

    6) Any violation of the FBS must be reported to the public prosecutor.

55. On the same day a Ms Perret, Senior Legal Counsel at PCD, was summoned by the Public Prosecutor to a meeting on 10 May 2024. Letters of 7 and 10 May 2024 were sent by the SISSE to Renault. On 10 May 2024 Mr Mistral, General Counsel of Renault, was told that he was required to attend the Prosecutor's office for questioning on 15 May 2024.

56. I was given no further account of the 3 May 2024 meeting or the meetings with the prosecutors.

THE HAGUE CONVENTION

57. France and the United Kingdom are parties to the Hague Convention. The Hague Convention is a "treaty or international agreement" within the meaning of Article 1 *bis* of the FBS and therefore it is common ground between the experts that if Article 1 *bis* is engaged, the provision of documents and information under Chapter II of the Hague Convention would negate the risk of prosecution.

58. The Hague Convention contains detailed provisions relating to international cooperation in relation to provision of evidence to assist a foreign court. It provides two distinct routes for the transfer of evidence from abroad to this jurisdiction. The obtaining of evidence under Chapter I entails a letter of request and the involvement of a French judge. Amongst other issues it indubitably takes some time to implement.

59. The taking of evidence under Chapter II is what is in focus here. Chapter II allows the voluntary provision of evidence through a commissioner appointed by the English Court and approved by the French Ministry of Justice ("MoJ").

60. Article 17 provides that:

> "in a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if
>
> (a) a competent authority designated by the state where the evidence is to be taken has given its permission either generally or in the particular case; and
>
> (b) he complies with the conditions which the competent authority has specified in the permission.
>
> A Contracting State may declare that evidence may be taken under this Article without its prior permission."

61. France's accession to the Hague Convention is subject to certain derogations. The derogation applicable to Article 17 reads thus:

> "In accordance with the provisions of Article 17, the *Service Civil de l'Entraide Judiciaire Internationale*, *Ministère de la Justice*, has been designated as the authority competent to authorize persons duly appointed as commissioners to take evidence without compulsion in aid of proceedings commenced in the courts of a Contracting State.
>
> This authorization, which will be given for each particular case, accompanied if need be by particular conditions, shall be subject to the following general conditions:
>
> 1. the evidence must only be taken within the precincts of the Embassies;
>
> 2. the *Service Civil de l'Entraide Judiciaire Internationale* must be given due notice of the date and time at which the evidence is to be taken so that it can make representatives available if necessary;
>
> 3. the evidence must be taken in a room to which the public has access;
>
> 4. the persons who are to give evidence must receive due notice in the form of an official summons drawn up in French or accompanied by a translation into French, and stating:
>
> (a) that the taking of evidence for which the person concerned is summoned is based on the provisions of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, and is part of the judicial proceedings taken in a court designated by a Contracting State by name;

> (b) that appearance for the giving of evidence is voluntary and that non-appearance cannot lead to prosecution in the requesting State;
>
> (c) that the parties to any action consent to it or, if they do not, their reasons for this;
>
> (d) that the person who is to give evidence is entitled to legal advice;
>
> (e) that the person who is to give evidence can claim dispensation or prohibition from doing so.
>
> A copy of the summonses will be sent to the *Ministère de la Justice*.
>
> 5. The *Service Civil de l'Entraide Judiciaire Internationale* will be kept informed of any difficulties.
>
> The application for authorization, which will be addressed to the *Ministère de la Justice* by the requesting authority, should specify:
>
> 1) the reasons why this method of investigation was chosen in preference to that of Letters of Request, bearing in mind the judiciary expenses involved.
>
> 2) the criteria for designating the commissioners when the person designated does not reside in France."

62. Article 19 provides that:

> "The competent authority, in giving the permission referred to in Article 17, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence."

63. Article 21 provides that:

1) The commissioner may take all kinds of evidence which are not incompatible with the law of the state where the evidence is taken or contrary to any permission granted;

2) The evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

3) A person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11. Article 11 allows the person to refuse to give evidence insofar as he has a privilege or duty to refuse to give it under the law of the state of execution or under the law of the state

of origin, provided that it is specified in the letter of request or otherwise confirmed by the requesting authority.

64. By Article 33 the contracting parties are entitled to exclude, in whole or part, application of Chapter II. Neither the UK nor France has excluded the application of any part of Chapter II.

65. There are a number of uncontentious points which arise out of the text. First, there seems no doubt that Chapter II processes can apply to documents. "Evidence" is to be given a uniform interpretation in each chapter of the Hague Convention and should be interpreted liberally. Chapter I includes the provision of documents; for example, Article 3 contemplates letters of request being used to examine persons (whether parties or not) or to secure the inspection of documents. The scope of the evidence to be taken under Chapter II should be the same. The editors of the Practical Handbook to the Convention state at paragraph 391 that "*Traditionally, Consuls and Commissioners have been used to obtain witness testimony, however the law of the state of origin [i.e. the requesting state] may provide for Consul or Commissioner to take other types of evidence, such as the inspection of documents or other property, real or personal*".

66. Second, there is agreement as to the mode of taking evidence. The evidence may be taken in the manner provided by the court of origin (the English court here) provided that it is not forbidden by the state of execution (France, in this case) (Article 21(d)).

67. A further point which was not contentious was as to the role of the "Article 23 derogation".

68. Article 23 provides that "*A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries*." This is the provision specifically designed to deal with disclosure requests seen as acceptable in some jurisdictions but contrary to the practices of the receiving state. The United Kingdom, for example, has a derogation which echoes its historic rules for *sub poenae duces tecum* and thus in practice requires requests for documents to be for trial documents and for those documents to be *"individual documents separately described"*. France too has made such a derogation. This states:

> "[in pursuance of Article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries will not be executed;…]
>
> Modification dated 19 January 1987 of the declaration relating to Article 23: …
>
> The declaration made by the French Republic in accordance with Article 23 relating to Letters of Request issued for the purpose of obtaining pre-trial discovery of documents does not apply when the requested documents are enumerated

> limitatively in the Letter of Request and have a direct and precise link with the object of the procedure."

The approaches of France and the UK to document disclosure under Hague Chapter I can thus be seen to have much in common. Although the French Article 23 derogation does not strictly apply to the Chapter II procedure, as that process does not need to involve a letter of request, it is common ground that in practice these requirements are applied to it.

69. The course of argument has also highlighted some questions as to the process. The Hague Convention does not expressly state who appoints the commissioner; it appears to be contemplated that they are to be appointed by the court of origin, although there is nothing in the Convention to prevent them being appointed by an authority of the state of execution, if the law of that state provides for the appointment of commissioners to take evidence. The Hague Convention does not specify who applies for authorisation if that course is taken, but the French derogation makes clear that such an application flows to their Competent Authority from the "Requesting Authority". It appears that authorisation in France is, in practical terms expected. Aligning with this Mr Blumrosen, whose appointment as commissioner the Defendants invite, and who apparently has considerable experience acting as a commissioner to facilitate disclosure from French companies to foreign court, says that in cases on which he has worked, a request is filed with the French MoJ seeking the approval for the appointment of the commissioner and the production of the requested documents.

70. That however leaves open the question of what happens this end; and that is, in current circumstances, a point of some potential significance. The Claimants suggest that a letter of request should be issued and passed to the French MoJ via the High Court's Foreign Process section. That is certainly the correct process for a letter of request under Chapter I; but the Chapter II process is not strictly speaking a Letter of Request process (i.e. it is not a request from a court to another court). Having said that, there appears to be no other apt means of going about the appointment. The Defendants suggest that the court can simply appoint the commissioner. That may be effective in practice, but it is hard to see how it finds a jurisdictional base. Mr Blumrosen (or other commissioner) is not subject to the jurisdiction of this court; he/they cannot properly be ordered to do anything. The Defendants suggested that a jurisdictional base could be found in CPR 31.5 ("*the Court may at any point give directions as to how disclosure is to be given*"); but as the sub-paragraphs to that provision make clear, that is focusing on directions to the parties as to the mechanics of disclosure (in stages, lists etc).

71. If a letter of request forms the appropriate basis, it is a letter of request pursuant to the Hague Convention, and that makes clear that the mechanics require it to go not direct from any judge (as may be the case under some bilateral conventions or where there is no applicable convention) but via the "Central Authority" of England to the "Central Authority" of France. In other words, from the Senior Master to the French MoJ. That this is the appropriate process is perhaps underlined by (i) the evidence that the Article 23 derogation (applicable to letters of request) is applied to applications for the authorisation of a commissioner in

France and (ii) the terms of the French derogation which refer to an application from a Requesting Authority.

72. The point of this amusing diversion through the by-waters of the Hague Convention is this: if a letter of request must be sent, it needs to go through the Foreign Process Section and the Foreign Process Section has a very significant backlog of work at this point. This court is seeing repeated applications for extensions of time for service out of the jurisdiction because of this factor. This procedural point therefore has an impact on the question of delay at the stage of the balancing exercise.

73. There are also issues between the experts as to the extent to which the procedure in Chapter II is "simple and cost effective". Mr Blumrosen has provided two letters to the PCD Defendants explaining his experience of disclosure requests under Chapter II and there is also some evidence in the letters from the SISSE.

74. From that evidence I conclude the following about the process:

1) In many cases the process is "straightforward" and should be completed quickly. The SISSE estimates within a month for the current early disclosure orders. Mr Blumrosen estimates 5 to 15 days for authorisation with his own review to be counted in hours thereafter. He indicates that the quantity of documentation had little impact on its length;

2) The mechanism involved apparently involves a list of specific documents, which is either approved or subjected to an Article 23 rejection or modification on the basis that they do not "*have a direct and precise link with the object of the procedure*" by the French MoJ at the point of authorisation. Mr Blumrosen has known this to happen. He has never known a jointly-sought Chapter II request to be rejected;

3) Unless the requesting court widens the scope of his review, the review is fairly narrow and it essentially deals with the question of whether the documents authorised by the French MoJ are the ones made available to him. The quantity of documents produced has little impact on the length of time it takes since his review does not require a thorough reading of each page but rather a global assessment that the documents are the ones for which approval has been given. He says that the document review usually takes about 2-6 hours. I cannot entirely accept the evidence that the time taken will deviate little regardless of the size of the request. Checking compliance of 70,000 documents must take longer than checking compliance of 70;

4) The costs associated with Mr Blumrosen's previous appointments have usually been under £8,000. This does suggest that costs are not particularly high, though they would be scaled up for an exercise which took longer; and

5) If further disclosure is required which goes beyond the initial authorisation then a fresh authorisation is required. However, the approval for this is usually even quicker than the initial approval, often in the region of 1 to 7 days.

RELEVANT ENGLISH LAW AND PRINCIPLES AND CASES

Breach of foreign criminal law and disclosure

75. The starting point is that the Court has jurisdiction to order disclosure and inspection of documents even if compliance would or might entail a breach of foreign criminal law: *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 at [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."

76. The Defendants naturally emphasise the fact that 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, citing also *Akhmedova v Akhmedov* [2020] EWHC 2235 (Fam) at [64] (Mrs Justice Knowles) and Lord Nicholls in *Brannigan v Davison* [1997] AC 238 at 249B-C:

> "different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege [against self-incrimination], 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 proceedings….
>
> Expressed in various ways, the chief strand of reasoning discernible in the common law rule is the undesirability of the state compelling a person to convict himself out of his own mouth. There is an instinctive recoil from the use of coercive power to this end...a person should not be put in a position where he is exposed to punishment whatever he does."

77. But at the same time the party who alleges that it is under a risk of prosecution has the burden of proving that and that a difference of views between experts does not mean that there is such a risk: *Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 [156] per Henshaw J. But there is no presumption standing in the way of that proof. The Defendants suggest that the passage in Matthews and Malek, Disclosure (5th ed) at paragraph 8.26 (cited in *Bank Mellat* at [62]) that the court will rarely be persuaded not to make a disclosure order on this ground and only if the disclosing party shows that the foreign law is regularly enforced so that the threat to the party is real puts the case too high. This is naturally the submission which must be made where (as here) there is said to have been a recent change of approach by the foreign state which makes prosecution more likely but which has not, in the short passage of time since, resulted in actual prosecutions.

78. I do accept that submission. In many cases the passage cited may be right; but it is not a safe rule. The rule is proof (by the party invoking it) of **a real risk of prosecution**. The past may or may not be a safe guide to future performance or risk, depending on the circumstances. The party relying on a risk of prosecution must show that the criminal law relied on is not merely a *"text or an empty vessel"*, to adopt the words used by Butcher J in *Tugushev v Orlov* [2021] EWHC 1514 (Comm), and that the risk is a real, rather than fanciful one. The relevant issue is risk of prosecution, not risk of a sanction or risk of breaching the foreign law. The greater the risk the more weight is to be given to this factor: *Tugushev* [32-36].

79. If there is a real risk the Court must conduct a balancing exercise. In many cases that will involve balancing the risk of prosecution in the foreign state against the importance of the documents to the fair disposal of the proceedings. That was the position before the Court of Appeal in *Bank Mellat*, where the issue had narrowed on appeal to whether there should be disclosure or no disclosure at all. However, in the present case and some of the others, the risk of prosecution must

be balanced against the fairness and convenience of adopting the Hague Convention route. This will involve considering a portfolio of features which may include any prejudice to the fair disposal of the proceedings, including delay and additional expense, as well as what was neatly referred to by Mr Riley-Smith KC in argument as "*the three C's*": the parties' conduct, comity and confidentiality.

80. This last point links to the point made at [63(v)] of the *Bank Mellat* judgment, which is that the Court can fashion an order to reduce or minimise the concerns under foreign law. As Bingham LJ said in *Ventouris v Mountain* [1991] 1 WLR 607, 622: "*While the court's ultimate concern must always be to ensure the fair disposal of the cause or matter, it need not be unmindful of other legitimate concerns nor is it powerless to control the terms upon which production and inspection may be ordered. I would not wish it thought that because, as I conclude, production and inspection may be ordered therefore they must at once be ordered unconditionally*".

81. The letter of request process under the Hague Process was also considered by Henshaw J in *Al Wazzan* in the context of an argument that there should be no disclosure of certain documents (including documents held by the Swiss Prosecutor's office) by the first and second defendants because of a risk of prosecution under Swiss law and as a matter of comity more generally. It was said that the documents could be sought by the claimant through the letter of request process, which Henshaw J described as cumbersome and slow and likely to be opposed by the defendants themselves (paragraph 163). The process in question was however probably there the Chapter I process and was therefore a far cry from the present case.

82. It is plain from Mr Blumrosen's letters describing his experience that disclosure in France via the Hague Convention has been ordered in a number of cases based in England and Wales. It is not however apparent whether that process was ever opposed. Given the lack of correlation between those cases and the FBS authorities discussed in the next section it seems unlikely that any of them were the result of contested applications relating to the FBS.

83. Finally I note that the Californian Court has very recently been prepared to order disclosure through the Hague Convention. In the well-known case of *Pitt v Jolie* the Superior Court of the State of California in March 2024 ordered that disclosure be provided under the Hague Convention because of the risk of a breach of the FBS through the normal discovery route. The Court was particularly influenced by the fact that the French authorities had warned that disclosure other than through the Hague Convention would be a breach of the FBS.

The FBS cases

84. The Court has previously, in a succession of cases, considered the impact of the FBS, and whether to order disclosure to take place under the Hague Convention, or, when the UK was still a member of the EU, Council Regulation (EC) No 1206/2001 of 28 May 2001.

85. The first decision is of Cresswell J in *The Heidberg* [1993] ILPr 718. The case concerned a ship collision and discovery was ordered against French Defendants

with a view to enabling the Court to determine which Defendants were party to the bill of lading which contained an arbitration agreement. The French Defendants relied on the FBS to contend that the English Court should never order discovery against any company incorporated in France which would require that company to search for or communicate documents or information of an economic, commercial, industrial, financial or technical nature with a view to proceedings in England without first utilising either the Bilateral Convention between the United Kingdom and France of 1922 or the Hague Convention of 1970. This argument is effectively the same as the Defendants' argument before me, but obviously against the backdrop of the "old" iteration of the FBS.

86. In that case the French Ministry of Justice had confirmed that the FBS would be engaged and refused to confirm that it would not prosecute. Cresswell J found (at [36] onwards) on the evidence before him (see in particular [33]) that documents were often disclosed by French defendants without prosecution, and that the purpose of the FBS was to provide a defence against exorbitant US orders. On that basis he found no risk of prosecution and noted a distinction between the English approach to disclosure and the much more extensive procedures available in many jurisdictions in the United States, which can include wide-ranging requests for production, by persons who are not parties to the action, of documents which may not necessarily be relevant to the issues but could possibly assist the plaintiff to formulate allegations against the defendant.

87. In *Morris v Banque Arabe et Internationale d'Investissement SA* (No.1) [2001] I.L Pr 37 Neuberger J considered whether he should refuse inspection or adjourn the question to allow an application to be made to the French Court under Chapter I of the Hague Convention. He rejected it on the facts of that case. He also made two observations worthy of note:

    1) First, at [73], he said:

> "Although not necessary to my decision, I agree with Mr Sheldon's submission that the Court should normally lean in favour (probably heavily in favour) of ordering inspection, especially where a substantial number of important documents are involved."

    2) Second, at [74], echoing an observation of Toulson J in an earlier case, he noted:

> "It would, I think, be highly unusual if the French criminal authorities were to prosecute a party to an action such as this in England, in circumstances where he was required to comply with an order of the Court for production of documents for the purposes of that action. The enforcement of a law such as the Blocking Statute in a case such as this would not correspond with generally accepted notions of comity."

88. By the time of the third case, *Elmo-Tech Ltd v Guidance Ltd* [2011] F.S.R. 24, the "*Christopher X*" case had occurred. That did not however change the outcome. The case concerned the manufacturer of electronic tags for criminal offenders and a claim that the defendant had breached the claimant's patent.

Lewison J decided that Article 1 *bis* was not an impediment to an order for disclosure although it was a relevant discretionary consideration in deciding whether or not to order inspection of documents. In that case there was a similar letter from the French MoJ to those sent in this case by the SISSE. While it was not a determinative point Lewison J's view was that it was relevant to the issue of conduct that the defendants had been far from seeking to persuade the French MoJ not to involve themselves, saying:

> "I do not consider that Guidance have made any real effort to persuade the Ministry of Justice to allow to it comply with an obligation to serve a compliant PPD. The obvious way of doing this would have been to have provided the Ministry with a draft for approval. Guidance's letter to the Ministry of October 18, 2010 was not an attempt to persuade the Ministry that Guidance could comply with its procedural obligations in England. On the contrary, the letter unequivocally asserted that 'of course' it cannot. Moreover, it overstates the extent of the disclosure of information that would be required."

89. Perhaps the best known of the FBS cases is the Court of Appeal decision *in Secretary of State for Health v Servier Laboratories Ltd; National Grid Electricity Transmission Plc v ABB Ltd* [2013] EWCA Civ 1234; [2014] 1 W.L.R. 4383 where the Court of Appeal unanimously and "unhesitatingly" ([99]) dismissed three appeals against interlocutory disclosure and further information orders by two High Court Judges in two unrelated claims. In conclusion, Beatson LJ at [117] said this:

> "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."

90. The Claimants also rely upon [104] of *Servier* where it was stated that:

> "It is obvious that as between obtaining disclosure (i) 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."

91. One further point arises out of this authority. In *National Grid* Roth J had been prepared to make an order that disclosure be provided under the "direct route" under Regulation 1206 (i.e. the EU equivalent of the Hague Convention). However, this was rejected by the French Ministry of Justice on the basis that it was inappropriate for the disclosing party's solicitor to act as taker of the evidence and there was an abuse of process. The terms of that rejection by the senior French MoJ official dealing with the *Servier* case, were considered in argument and can be found at [40] of the Court of Appeal's judgment:

> "Direct execution in conformity with the request is not approved for the following reasons.
>
> Article 17(3) of Regulation No 1206/2001 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 No 1206/2001].
>
> 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."

92. The Court of Appeal doubted the correctness of the first part of this answer and regarded the second part as being not entirely clear but as apparently suggesting her view that:

> "an international instrument such as Regulation No 1206/2001 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."

93. The final relevant case in the FBS grouping is *Qatar Airways v Airbus* [2022] EWHC 3678 (TCC). In that case, early disclosure was ordered against Airbus (to be followed in the usual way by disclosure, witness statements, expert reports). Airbus argued that it should only give disclosure through the Hague Convention and that this would be speedy and straightforward. Waksman J decided that it was not appropriate to adopt the Chapter II procedure on the facts of that case. The particular features of the judgment which are of note are:

1) The comment at [39] that "*The type of disclosure which is going to be given, which although it is technical and although there is a great deal of it, is otherwise utterly common place for a civil dispute of this kind. It is very hard to see why a French prosecutor should take a particular interest in prosecuting Airbus in these circumstances*";

2) The finding at [52] that the information sought was not sensitive;

3) He reached the "firm" view that there was no real risk of prosecution: [58];

4) He considered that the Hague Commissioner route, even if it would cause no harm to the proceedings, would not justify displacing the normal disclosure route as there is no real risk of prosecution [60];

5) He noted that any process such as this would inevitably be more cumbersome than ordinary disclosure [63], including because it would need the letter of request to be approved by the Senior Master and issued by the Foreign Process Section of the High Court, which has a huge backlog ([66]);

6) He considered that [67] an "optimistic" article by Mr Blumrosen was "*not… necessarily a safe guide"* to how long the process would take in France, given it was merely an article by someone *"clearly seeking to increase his business*";

7) He also noted that if a Commissioner was employed, the Minister of Justice may want a more proactive exercise rather than leaving it to a rubber stamp [68]; and

8) He was critical of the defendants' failure to progress the Hague route earlier.

Expert evidence in foreign law

94. The principles are well known and not in issue: So far as relevant for present purposes:

1) Foreign law is a question of fact to be proved, generally, by a qualified expert in the law of the foreign country and whose expertise extends to the interpretation and application of the foreign law;

2) The court will not undertake its own research but is not inhibited from using its own intelligence and common sense.

THE PARTIES' SUBMISSIONS

95. For the Defendants it was submitted that:

1) The "long losing streak" of previous FBS authorities should not be given much weight because on the facts it was established that there had been a genuine paradigm shift since 2022 and that this was evidenced by the public statements, the pro-active approach of the SISSE and the specific correspondence and summonses.

2) Here the evidence was clear that compliance would involve breach of the FBS – uniquely in this case there were both letters and summonses to prove that and the risk of prosecution, which was said to be not just real but significant;

3) Each of the earlier cases could be distinguished. All but *Qatar* pre-dated this paradigm shift and all had differences. For example:

a) In *Bank Mellat* foreign law was used as an objection to disclosure, Hague was not an option so the choice was more stark – a factor important at the stage of balancing;

b) Every previous case was one of the FBS being used to block, frustrate or delay inspection;

c) None of the previous cases showed letters from the SISSE opining on breach and warning on prosecution.

d) *Qatar* had the feature of being a very late application and prejudice caused by that effectively drove the judge's analysis.

4) The balance clearly favours the Defendants. There is a significant risk of prosecution. The Defendants are not seeking to block disclosure or to delay matters. They have made prompt and sensible enquiries about the Hague

Process and have sought to agree matters with the Claimants who have unreasonably refused to agree to this route. They have also been actively engaging with the French regulator, the SISSE. A confidentiality ring would not adequately protect the Defendants from the risk of prosecution.

5) By contrast there is no real prejudice to the Claimants in adopting the Hague Convention route and no risk to the fair and timely resolution of this dispute. In particular Chapter II is a well-known and frequently used procedure in France. It is relatively speedy. It is unlikely to cause any serious delay and there is no risk to the timetable. In particular, none of the hearing dates would be threatened by adopting the Hague Convention route. The likely cost is not great in the context of this litigation.

6) The Court should have regard to the clear policy of French law, as contained in the FBS, that the provision of information and documents of the type sought should be provided through the Hague Convention.

7) In all circumstances, exposing the Defendants to the risk of prosecution would be wholly unjust.

96. The Claimants rested heavily on the authorities as regards the law. On the facts they submitted that the argument based on paradigm shift was unsustainable bearing in mind the absence of real change to the statutory regime and the fact that two years on from the reforms there still remained no prosecutions. They contended that:

1) There is no real risk of prosecution given the circumstances of the present case (where the disclosure is entirely proper and inoffensive, and the available protections for confidence or sensitivity more than adequate) and given the lack of prosecutions in the past.

2) If there were a real risk, granting the application would set a bad precedent, and improperly suborn the interests of English civil procedure to the approach of a foreign state in (assuming there is a real risk) prosecuting in serious breach of comity.

3) It would cause untold (perhaps fatal) practical difficulties and costs for the progress of this claim in these two ALGLOs, which claims are on a tight timetable towards resolving issues for the benefit of huge number of litigants both in these claims and in the other non-ALGLOs.

ANALYSIS

97. As is apparent from the previous sections of the judgment, to resolve the FBS issue the following issues arise:

1) Whether the FBS applies to the information and disclosure that has already been ordered or which is contemplated to be involved as the case progresses to the main disclosure stage;

2) Whether in the circumstances of this case there is a (real) risk of prosecution against the PCD Defendants and/or the Renault Defendants;

3) If there is such a risk what result emerges from the balancing exercise?

98. There are also issues about the geographic extent of the FBS and the implications of the future full disclosure exercise, as opposed to the early disclosure exercise currently in focus.

Does the FBS apply?

99. This can be dealt with relatively briefly. All the experts except Mr Feugère agree that it does.

100. Mr Feugère relies on two reasons. First he considers that the FBS is directed to prevent abusive extraterritorial procedures with an external investigator searching for these documents and that therefore searches by a person of its own documents is not caught.

101. This engages squarely with the third of the questions in the Joint Report – the purpose of the legislation. The experts are agreed that (in line with what might be expected as a matter of English Law) in French Law it is permissible to have regard to the intent of the legislator when interpreting the FBS. Moving on from that they are largely agreed that requests considered in French Law to be abusive were the focus of the legislation, or as Mr Feugère put it: *"the law has the very clear objective of preventing intrusions and abuse, of protecting companies, not sanctioning them themselves or hindering spontaneous cooperation in a court proceeding."* Beyond this however the experts offer diverging variations. M Feugère's is summarised above. The Defendants' experts suggest that it also had the purpose of compelling the use of co-operative procedures in transnational trials.

102. In large measure I reject the experts' evidence outside their common ground. So far as the Defendants' variation goes the basis for this argument seems to be lacking in the underlying material, so far as the original legislation is concerned, and as I noted in argument it seems contrary to the ethos of co-operation to compel its use, especially where to do so would potentially run contrary to the requirements of comity. This argument was in fact largely founded on the changes to the legislation and then the executive administration of it and the idea that purposes can change over time as Professor d'Avout suggested. It is of course possible that purposes can change over time – the narrow intent of the 1968 iteration of the Act was widened expressly by the change brought about by the addition of Article 1 *bis*. But there was no subsequent change to the legislation which would justify concluding that there was a further change in the purpose of the legislation itself.

103. At the same time, I cannot follow Mr Feugère to the full extent of his argument. While I entirely accept that the primary focus of the FBS was abusive extraterritorial procedures against a non-party I accept the evidence of the other experts (which seems best to cohere with the wording of the provision) that it can and always did extend to disclosure by a party to litigation. The kinds of intrusive

requests which originally prompted the concern may have been most offensive in the context of non-party disclosure, but they existed also in the context of litigation (or potential litigation) between parties. This is implicit in the passage from the Travaux Preparatoires quoted both by Mr Feugère and by Professor Rebut: *"But beyond the purely commercial aspects, American judicial and administrative practices raise fundamental problems insofar as they undermine our sovereignty."*

104. Of course, I do note the passage from the French MoJ official's letter in *Servier*, which on one reading suggests that the Hague Process would be an abuse of process because in the context of party to party disclosure (or what Waksman J in *Qatar* called "*utterly commonplace disclosure"*) the FBS did not arise. There are of course other readings. But in any event the secondary argument of an French MoJ official, however senior, is not one with any precedential value. At the same time and looking in the other direction, neither is it determinative that (i) Mr Blumrosen's letters show that he has acted as a commissioner in relation to requests for documents in the context of party and party disclosure exercises and (ii) the SISSE have stated in letters to each of the Defendants that in order to avoid the application of the FBS they should provide any disclosure through the Hague Convention.

105. The bottom line is that what the French MoJ or the SISSE says about the law is not itself the law. This is not the first case where opinions have been expressed by a French authority (then the French MoJ) on this subject. Previous judges have not been swayed by such letters from the French MoJ and there is no difference in the status of the letters now that they are sent by the SISSE. The French MoJ or the SISSE might express a view about the law which was wrong; even those most closely involved in the administration of particular areas of law can find themselves mistaken. This is the view which underpins this court's approach to the use of official "Guidance" as an aid to construction (see for example *Chief Constable of Cumbria v Wright* [2007] 1 WLR 1407 at [17] and the recent sanctions cases in which the value of OFSI Guidance have been discussed).

106. My conclusion on this aspect of the question of application is one based on the expert evidence in this case as well as a reading of the statute. I conclude that the FBS does apply to disclosure between parties and not merely to disclosure requests made of non-parties.

107. A similar point arises as to the content of the disclosure. It might be argued (as the Claimants in effect do) that the statutory purpose of Article 1 *bis* was addressed not just to the intrusive nature of such requests but also to the trading interests of the French companies (analogous to the national interests protected by Article 1) and that the material sought is not such that it falls within the ambit of Article 1 *bis*.

108. However the reality is that while the information sought is not sensitive in the Article 1 sense or even at the extreme end of what one might term commercial sensitivity it is, as Professor Rebut notes, undoubtedly industrial, technical or commercial in nature. Article 1 *bis* is not narrowly drafted, and the disclosure sought is plainly apt to fall within its wording. That is the clear view of the expert majority.

109. This then brings me to Mr Feugère's final point which is that the FBS is itself susceptible of challenge as being unconstitutional precisely because it is so broad. He says that it protects no particular interest of the state or even of the company. It is not even restricted to sensitive information. As such his view is that "*the judicial application of such an imprecise and unclear text is contrary to the contemporary requirements of the principle of clarity of criminal offences and penalties."* While I understand this argument – particularly in the context of the core statutory aims on which the experts appear to be agreed, this can only go to a defence – and indeed Mr Feugère deals with it in his report under the heading of "Defence of unconstitutionality". The merits of that defence I shall deal with together with the other defences at a later stage in the judgment.

The Risk of Prosecution

110. This was a far more substantial argument.

111. The experts disagree about the risk of prosecution in this case. Professor Rebut says that the risk of prosecution is high. Professor d'Avout says it is high or very likely. Mr de Navacelle says that the risk is likely. By contrast, for the Claimants Mr Feugère and Mr Bonifassi regard Article 1 *bis* in cases involving standard disclosure in normal commercial litigation in England as effectively what Butcher J in *Tugashev* termed "an empty vessel". Mr Feugère says that the risk of prosecution here is theoretical and that it is extremely unlikely that the public prosecutor would take any action if informed of the matter, including starting an investigation. Mr Bonifassi says he agrees with this, adopting the terminology of "very low" risk.

112. There are three main strands to the arguments. The first concerns the past and the significance of the changes brought about by the 2022 innovations. The second is what I can and should take from what has actually happened to date in this case. The third is the impact, if any, of comity.

<u>The past: doing things differently?</u>

113. As for the past, it is clear that before 2022 the FBS really could very fairly be called an empty vessel. The *Christopher X* case was so exceptional as to be an aberration; the experts are essentially agreed on this. The facts of that case were such that if the French prosecutors had not prosecuted the case they would have been telegraphing that a prosecution would never occur. It follows that pre-2022 request for the disclosure sought now, and the disclosure likely to be sought in the future in this case would quite plainly have raised no real (or probably even fanciful) risk of prosecution.

114. What has changed? The statute itself has not changed. I have concluded that the purposes of the statute have not changed. The penalties under the statute have not changed. The number of prosecutions has not changed. Much therefore indicates no change in terms of the critical question – risk of prosecution and whether it is real.

115. But the experts are at odds essentially as to the effect of the introduction of the SISSE into the equation. Has that structural change, and the impetus of Mr

Gauvain's subsequent attempts to achieve more far-reaching reform, turned the FBS from dead letter into something which creates that real risk of prosecution? Mr Feugère and Mr. Bonifassi consider that the changes have not changed the practices of the Public Prosecutor. For the PCD Defendants, Professor Rebut states that "*because they aim to increase the effectiveness of the FBS*" the reforms "*necessarily increase the risk of prosecution*". For the Renault Defendants, Professor d'Avout states that the reforms are of "*great relevance"* because the SISSE's officers are obliged to inform the prosecuting authorities if they learn of the commission of a criminal offence. Mr de Navacelle, sits on the fence, opining that "*it is much too early to say that they would have no effect."*

116. I conclude that while to some extent there is evidence of a "sea change" or "paradigm shift" as argued for by the Defendants, it is a change/shift in the attitude of the executive. Regardless of what the original aims of the legislation were, there is evidence that alongside a stated purpose of wishing to create a "one stop shop" to assist companies and individuals, the executive wishes to use a more "front foot" approach to the jurisdiction. It wishes to increase its effectiveness - and to strongly encourage evidence gathering only via Hague. Judging by Mr Blumrosen's listed appointments, it may well be that this is having a certain amount of success.

117. However, that says nothing about prosecution. When the focus is on that - and setting aside what one can infer from the events in this case, to which I shall come next - there is no real evidence to support the conclusions of Professor Rebut or Professor d'Avout. Both are based on a logical flaw – an assumption that more contact by companies/individuals with the SISSE and more reports by the SISSE must lead to more prosecutions. However, the executive's wish to "encourage" Hague approaches actually says nothing about risk of prosecution. The Public Prosecutor has to make its own decisions about prosecution - as Article 40 of the French Criminal Code makes clear. Those decisions will be based on a number of factors of which prospects of success (after defences are taken into account) and public interest factors must logically be too.

118. Further, even if there were not this logical flaw in the analysis, theory and practice do not always align. To be clear: the conclusion that evidence is lacking comprehends a consideration not just of the changes and non-changes to the law and administrative set up but also the absence of reported prosecutions since 2022 and the *dicta* of the Minister of Economy and the Director of the SISSE cited at paragraphs 41-42 above. The Defendants are of course right that the absence of evidence of prosecutions does not necessarily import an absence of prosecutions or at least pre-prosecution investigations. I do consider it likely that any actual prosecution would, given the background, attract attention once in the public domain, even at a preliminary stage; but at the same time the *Christopher X* case in 2007 concerned events in 2000 indicating a long lead time to final result. But the fact remains – the Defendants have adduced no evidence that there has been a shift, still less a paradigm shift, when one moves past ministerial/executive words and into action.

119. This would not prevent a conclusion that such a shift had occurred were I persuaded that the opinions of Professor Rebut and Professor D'Avout were to be preferred. However I am not so persuaded. Absent a superior fact base or a

conclusion that their evidence is in terms of expertise intrinsically superior to that of Mr Feugère or Mr Bonifassi, I cannot do so – particularly in the light of the conclusions to which I come below about defences and comity.

The acts of the SISSE and the Prosecutor

120. Much therefore hangs on what one takes from the facts in this case. The Defendants understandably say that the letters and summonses move this case comfortably into another category from all those which have gone before in that we know that the PCD Defendants and the Renault Defendants have been warned by the SISSE that disclosure in this case would be a breach of Article 1 *bis* and that it would be reported under Article 40 to the French prosecutors. Indeed, the SISSE told the PCD Defendants that they would report them to the prosecutor if they provided the disclosure ordered by Senior Master Fontaine. This is of course the first case where English Court has the SISSE's opinion and I am told that it is uncommon for the SISSE to warn of consequences of breach. It is that which leads Mr de Navacelle to opine that this makes a prosecution more likely than in any case he has been involved in. The Defendants also point out that the Claimants' experts opined that it was highly unlikely that the Public Prosecutor would open an investigation and that the summonses demonstrate that they were wrong on this; that, it is said, casts considerable doubt on their next opinion that they very much doubt that prosecution would result where the English court orders disclosure in an ordinary commercial dispute.

121. The Claimants have urged me to treat the SISSE letters and the summonses from the Public Prosecutor with some caution, particularly given the absence of contextual explanations. Indeed, Mr Kramer KC submitted that I should draw adverse inferences from the combination of the letters and the summonses, their timing and the lack of explanation as to the timeline. It was suggested that I should infer from the absence of any explanation as to the narrative that far from indicating an intention to prosecute, the Public Prosecutor has indicated an intention **not** to prosecute. As I indicated in the course of argument, I am not remotely persuaded that this adverse inference, or any adverse inference, is appropriate.

122. However ultimately, and despite the very best efforts of Ms Lester KC, I do not regard the letters or recent events as indicating that a real risk of prosecution exists.

123. So far as the summonses are concerned: I accept the submission that they cannot indicate a real risk of prosecution based on anything done to date since on any analysis no disclosure had been given at the time, so there was nothing to prosecute. So far what the summonses indicate is that the Public Prosecutor has opened a file and interviewed a potential witness in a potential future crime. The Prosecutor has – so far as the evidence before me discloses - gone no further than this. The Public Prosecutor has been aware of this hearing and has had the opportunity to write a clear letter for provision to this court. It has not done so. There is therefore in the summonses an appearance of affirming the FBS but one which falls well short of indicating a real risk of prosecution.

124. This actually aligns well with the approach indicated in the Gauvain report and in the passage of the Minister of Justice's letter quoted above – to indicate more rigour with a view to (i) prosecuting abusive cases and (ii) "encouraging" the use of the Hague route as much as possible (or as the Minister's letter suggests – assisting parties to resist or limit foreign disclosure requests).

125. Secondly the fact of the summonses' existence cannot be given much weight where (quite aside from adverse inferences) there does appear to have been a degree of causative nexus between the Defendants seeking a meeting and giving the name of their criminal lawyers and the sending of a summons by the Prosecutor. The summonses do not appear to be the sole product of a SISSE report.

126. I then turn to the letters. As to these I do not read them as indicating a real risk of prosecution against all the facts of the case. As already noted, it is not for the SISSE to prosecute; and it plainly is for the SISSE to pass on as many reports as possible with a view to improving the efficiency of the FBS. While it is right that it is SISSE's job to give opinions, that is a fact of limited utility in circumstances where (i) the opinion which they are to give is (it is agreed) not binding where the question is one of Article 1 *bis* and (ii) it is, on the evidence before me, the SISSE's job to do all it can to encourage Hague use in all cases. Accordingly, what one sees in these letters is therefore exactly what one might expect to see in this context. The SISSE would write in essence the same letter if a reasonable disclosure exercise were contemplated to the one it would write if an abusive third party request were made: the case is within Article 1 *bis*, Hague should be used, failure to do so will result in prosecution. Further it is wrong to categorise these letters as exceptional; as noted in the summary of the law above in *The Heidberg* the French MoJ wrote just such a letter.

The nature of the case

127. I should deal specifically with the argument that the very high-profile nature of the case gives rise to a high risk of prosecution because such a prosecution of the companies and their managers would act as a deterrent to others. I do not accept the opinion of Mr de Navacelle that a real risk follows because a failure to prosecute in such a high-profile case as this would risk undermining the effectiveness of the post-2022 regime and the SISSE's credibility. That opinion is not firmly founded in any evidence or experience (given the absence of other prosecutions). It also entirely ignores the impact of comity.

Comity

128. Even if, contrary to the above, I were to consider that the terms of the letters have some relevance, that approach must itself be treated with caution because of the impact of comity. This is not a question of drawing a simple distinction between pre-order and post-order reactions; not least because (i) I note that the experts (although for markedly different reasons) agree that the fact that the disclosure is ordered by the Court does not affect the risk of prosecution and (ii) bearing in mind the purpose of Article 1 *bis* it plainly comprehends inter partes disclosure which one legal culture might consider perfectly justifiable but which from a French perspective is extravagant or abusive.

129. As noted earlier comity has a significant impact in this area. This appears not to be a question which any of the experts was asked to address. Comity may only be a discretionary concept, and not a matter of absolute binding obligation, but it is a discretionary concept which has sufficient reach that this court can and does regularly make inferences about its application by other courts. It is for example "*widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction.*" *Crédit Suisse Fides Trust SA v Cuoghi* [1998] Q.B. 818, 827 (CA), per Millett L.J.

130. That is the approach reflected in the authorities in this area which proceed from the basis that the *lex fori* governs the parties' disclosure obligations – or as Hoffman J so trenchantly put it: "*If you join the game you must play according to the local rules. This applies not only to plaintiffs but also to defendants who give notice of intention to defend*".

131. That reflection of the application of comity is then seen in such dicta as that of Neuberger J in *Morris v Banque Arabe et Internationale d'Investissement SA (No.1*) [2001] I.L.Pr. 37.

> "It would, I think, be highly unusual if the French criminal authorities were to prosecute a party to an action such as this in England, in circumstances where he was required to comply with an order of the Court for production of documents for the purposes of that action. The enforcement of a law such as the Blocking Statute in a case such as this would not correspond with generally accepted notions of comity."

132. Bearing in mind this comity aspect, the argument which was advanced in *The Heidberg* and which underpins this argument, that the FBS not only can comprehend and result in prosecution where the disclosure is ordered by another court but in fact carries with it a (real) risk of prosecution in all cases, cannot be right. Because of comity the prosecutor would never be expected to pursue prosecution of every technical breach of the FBS; that is indicated by the historical approach to prosecutions and even the approach indicated to be favoured by Mr Gauvain. Such an approach would not be in line with the apparent purposes of the statute, which I have concluded have not changed since the introduction of Article 1 *bis*. I therefore do not accept the submission that there is nothing which should lead me to believe that the French Public Prosecutor will pick and choose which cases to prosecute.

133. The question is whether in this case there is such a risk and what (assuming they have any relevance) is the appropriate "read across" from these letters bearing in mind the impact of comity.

134. If one accepts that the SISSE's correspondence is nuanced to the individual case such that its likely approach to an order of this court (in terms of the way in which it will report to the Public Prosecutor) might be indicated by correspondence sent pre-order, I conclude that it would not be a safe assumption that the attitude evinced in the letters to date in this case would be that which would follow from any order which I make. That is because if the answer given by the SISSE is

nuanced to the facts it follows that that answer will depend on the facts as understood by the SISSE.

135. Thus were the presentation of the facts in the Defendants' letters to the SISSE neutral, or one whereby the merits (or inoffensiveness) of the direct disclosure route were indicated or advocated, it might be appropriate to consider that the responsive letters were reliable indicators of likely prosecution if an order is made and complied with. But that is not the case. Perhaps understandably, when one reads the communications from the Defendants to the SISSE it cannot be said that they overall read as a neutral or favourable depiction of the direct route. They are "*questions expecting the answer no*"; and it is no surprise that they attract the answer no.

136. In particular:

    1) The first letter of 3 May 2023 while neutral in its structure says nothing about the basis upon which early disclosure is ordered in this jurisdiction, and the length of the letter and the table "summarising" the requests manages to create an impression of breadth;

    2) The April 2024 letter does not explain the basis for the rulings of this court but emphasises the Defendants' opposition. It makes tolerably clear that a further opinion is sought for the purposes of opposing the orders;

    3) The same is apparent from the email of 17 October where the SISSE were specifically informed of the intention to appeal and of the date for the application. It reads as a request for assistance in resisting the order;

    4) The Renault December notification speaks broadly of "*various requests for disclosure*" and "*many documents located in France"* and again is supported by a schedule which is said to summarise the requests, but which conveys an impression of breadth.

137. If it were the case that the presentation to the SISSE and on to the Public Prosecutor drew attention to the factors which engage comity considerations, I do not consider that a real risk of prosecution would result because the SISSE and then the Public Prosecutor would not be operating on the basis of this limited presentation, but would be apprised of factors which amount to a significant comity issue. Those factors include:

    1) The fact that the Disclosure Order had been made as part of the disclosure exercise in a trial over which the Defendants accept that this Court had jurisdiction;

    2) That it was not pre-action disclosure but was trial disclosure ordered after specific consideration by a Managing Judge specifically charged with managing this case, and closely familiar with the issues;

    3) That the jurisdiction to order that disclosure involved a consideration of relevance and proportionality. The documents sought are sought as part of a normal disclosure exercise, and that the court operates on the basis that

disclosure has to be relevant to the issues and proportionate – accordingly this Court will already have considered very similar considerations to those which lie at the heart of the Article 23 derogation now in force in the context of Letters of Request;

4) That the Judgment of Senior Master Fontaine was likewise one where such considerations were key and that:

   a) [57] of Senior Master Fontaine's judgment noted the Defendants' concession that there was merit in early disclosure;

   b) [59] of the judgment reflected her conclusion that what was sought was "*reasonably necessary and proportionate, in the context of a group action of this size and complexity to enable the Claimants to prepare their own case or to understand the case they have to meet*";

5) That this is high profile consumer litigation which has been given a high priority by this Court, and that Renault and PCD have been specifically selected to form part of the first trial in part because they are parties who can make a particular contribution to the resolution of issues affecting such a large numbers of individuals;

6) The fact that the claims are not ones which are offensive to French law – with one of the causes of action being based on EU law; akin to *Servier* where the claims arose under EU law and in the words of Beatson LJ *"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"* [118]. Further in this case there are French criminal proceedings in train for the actions at the heart of the case - indicating that this claim is aligned with matters which have also been identified as important public interest matters in France;

7) The potential for any Hague Process to disrupt the timetable in the litigation as well as the inflation of costs for both parties.

Conclusion on risk of prosecution

138. Accordingly I do not accept that the evidence about the risk of prosecution here is "*much stronger than in the earlier cases"*. It is in fact very similar in terms of strength, though different in points of detail, to the earlier cases.

139. The 2016/2022 changes were administrative and did not affect either the substance or the purpose of the legislation. There is nothing on the facts of what has happened so far which indicates that there is a real risk of prosecution. The recent opening of a criminal investigation does not, on the facts of this case, show that there is a real – or any - risk of prosecution. The letters from the SISSE stating that disclosure would constitute a breach of the FBS are essentially similar to letters sent in the earlier cases by the French MoJ. The indication that any breach would be reported to the prosecuting authorities does no more than state what is in the Decree setting out the SISSE's role. Further there are multiple factors in this case which engage comity and which the SISSE and the French

Public Prosecutor have not had drawn to their attention. I consider that in those circumstances there is no or no real risk of prosecution in this case.

The balancing exercise

140. As noted above if (contrary to my finding in the previous section) there is a real risk of prosecution that real risk must be balanced against the fairness and convenience of adopting the Hague Convention route. That is done by considering a range of relevant features. Here these include (i) prejudice to the fair disposal of the proceedings, including delay and additional expense, (ii) the parties' conduct, (iii) defences, (iv) comity and (v) confidentiality. This consideration of course proceeds on the hypothetical basis that on one side of the balance is a real risk of prosecution. What follows therefore does not arise on my prior finding, but is included for completeness and the parties' assistance.

Prejudice to the fair disposal of the claims?

141. The first question is whether use of the Hague process would prejudice the fair disposal of the claim. As indicated in the discussion of legal principles, in this case the test is rather different to that in *Bank Mellat.* There, Iran was not a signatory to the Hague Convention, so key information would not have been available had redactions been made to protect the bank in a foreign jurisdiction. Here, the Hague Convention provides a solution. The Defendants submit that adopting the Hague route would allow the Claimants to obtain all the documents and information to which the Court has decided they are entitled, whilst also answering concerns as to comity. Here therefore it must be right that the correct comparator is whether what is proposed (the contemplated Hague process) would prejudice the fair disposal of the case.

142. That involves a consideration of the practicalities of the Hague Convention process, including the question of delay and in particular any effect on current hearing dates, the proportionality of the expense of the step to the value of the claims and any factors dependent on the importance of the case, the complexity of the issues; and the financial position of the parties.

143. The Defendants' submission was that the Hague Convention provides a workable and effective means by which documents and/or information could be provided in a way that does not contravene French law. Certainly in the context of this first step as to disclosure this appears to be correct. But that does not mean that it is without negative implications – indeed the very use of the word "workable" implies some downside.

144. The comparison has to be conducted by looking at both upsides and downsides. I will consider first the potential balance of prejudice in the context of the specific order for early disclosure, but will go on to make some assessment of the likely impacts over the full disclosure exercise.

145. So far as this exercise is concerned, I leave to one side the question of delay in transmitting a Letter of Request to the French MoJ; if any Letter of Request has to go through the standard FPS queue, there would be considerable delay in relation to each request, including this initial request. As matters currently stand

that delay would be sufficient to prejudice preparation for the initial PDD trial and it is likely that future delays in relation to the fuller disclosure exercise would do likewise.

146. Concentrating therefore on prejudice issues other than FPS delays:

1) The evidence suggests that once the order made its way to the French MoJ the discrete exercise would be relatively straightforward, and that it could be conducted within a month or so. This balances Mr Bonifassi's scepticism against Mr Blumrosen's optimistic views;

2) Each such order will mean additional administrative steps and an increase in the time and cost incurred in providing disclosure. In a case like this, where there is already so much detail and complication the cost and administrative burden is probably to be regarded as a fairly small downside. However the content of the process adds nothing other than FBS compliance; if the French MoJ does no more than approve the list, and the Commissioner does no more than audit that the documents in broad terms match the list (and that is the thrust of the Defendants' evidence) this delay and cost has effectively no substantive content.

3) The Hague Process adds an element of uncertainty. This has two levels:

a) It is clear from Mr Blumrosen's evidence that the French MoJ does sometimes recast lists to comply with the Article 23 derogation. It is unclear when this happens. It seems unlikely that the specific list in play via the Disclosure Order would give rise to this problem. However given the complexity of the case there must be a risk that this could happen on the full disclosure exercise. If that occurs there is a risk that, even with re-iterated lists, the full disclosure considered appropriate by this court would not occur and that delay which would prejudice the trial date would occur;

b) It is quite clear that disclosure via the Hague Commissioner is voluntary and not compelled. While this should not matter in a party and party disclosure exercise (as opposed to a third party disclosure exercise) it adds a potential complication.

147. I conclude that (absent FPS issues) and as regards the current Disclosure Order specifically the Hague Process involves very little prejudice, but that it is likely that factor will be heavier when one looks at the question of full trial disclosure.

148. As to the FPS issue, I have left this to the end of this section because it is not dispositive in the light of the sections which follow. However I conclude that strictly speaking the appointment of a commissioner does indeed need to be done by issuing a Letter of Request, and that that Letter of Request does (given the terms of our Hague Convention accession) need to emanate from the Senior Master. There is no separate track for letters of request, and accordingly strictly speaking any letter of request would involve a considerable delay in reaching the top of the pile within the FPS. A single letter of request might be expedited; but it would not be realistic or fair on other litigants to ask for expedition of further

letters of request. Accordingly so far as the wider disclosure exercise is concerned this further aspect of delay should be added into the balance against the Hague route.

Conduct of the parties

149. This comprehends such matters as the promptness with which these issues were raised by the French company; whether it has engaged appropriately with its regulator; and the manner of the response from those opposing such an order.

150. While the Defendants say rightly that this is not a case (such as in *Morris* or *Qatar*) in which the defendant's conduct weighs heavily in the balance against such an order, there is still an element of conduct to be considered. It is true that these defendants have not raised these arguments to "block" disclosure but that they are rather deployed out of caution, for the reasons I have already given one cannot say that there has been wholehearted co-operation or any attempt to persuade the SISSE that the FBS is not engaged.

151. On the other side it is said that the Claimants have behaved unreasonably in that the Defendants have repeatedly offered the Claimants the opportunity to use the Hague Convention route. However both as a matter of principle (given the history of FBS litigation) and given the implications of accepting the Hague route going forward I cannot regard the Claimants' conduct as weighing in the balance against them.

152. Accordingly on conduct a small weight enters the scale against the Defendants.

Confidentiality

153. As was noted in *Bank Mellat*, if the production of documents or information is ordered, the 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*."

154. In that case the court imposed confidentiality restrictions in order to reduce the extent of the breach of confidentiality that was contrary to Iranian law. It appears to have done so both to reduce the prospect of prosecution and as an expression of comity when the Hague Convention was not an option.

155. There is a conflict between the experts on this point. Mr Feugère and Mr Bonifassi agree that to the extent that there is any risk of prosecution, it would be entirely negated through disclosure into a confidentiality ring. Professor Rebut and Mr de Navacelle declined to answer this question. Professor d'Avout is of the view that disclosure into a confidentiality ring would have "*no impact on the risk of prosecution*". However it is not clear what basis in his expertise Professor d'Avout draws on here. He is not a practitioner indeed his lack of practical experience was used to justify the introduction of Mr de Navacelle.

156. While I have a degree of sympathy with Professor d'Avout's view in terms of the logical basis in that this is not a case in which a foreign law of confidentiality is breached, so that confidentiality does not substantively meet the SISSE's concern

or mitigate the breaches of the FBS that would follow from compliance I do ultimately prefer the evidence of the Claimants' experts on this. Professor d'Avout does not really engage on the practical/comity aspect which is central to the Claimants' experts' opinion on this point. That aspect was one which the Court of Appeal in *Bank Mellat* felt was significant. I agree with that view. Confidentiality weighs against the Hague route.

Are there defences to any prosecution under the FBS?

157. Also relevant to the balancing exercise is the question of defences. The seriousness of a real risk of prosecution is very much ameliorated if any prosecution is likely to be successfully defended. This is what the Claimants say would happen. Two potential defences have been identified.

158. The first is the unconstitutionality argument identified earlier. Mr Feugère opines that if the scope of Article 1 *bis* of the FBS is as wide as the Defendants contend, it is unconstitutional, because it violates the principle that criminal offences and penalties should be precise and narrow in scope.

159. Both the Defendants' experts are sceptical about this. Professor d'Avout accepts that "*it is certainly not impossible that a particular word, or a particular implication of a word in Article 1 bis, could one day give rise to a successful constitutional challenge*" but states that "*that eventuality can reasonably be extended to any other law*". Professor Rebut's evidence is that he "*doubt[s] very much*" that Article 1 *bis* would be declared unconstitutional.

160. This argument is one that effectively operates as a backstop to considerations of comity. At the end of the day the argument is an extreme one, and one to which a French Court would be reluctant to accede. I cannot conclude that it is likely that such a defence would succeed. At the same time I can entirely see and sympathise with the view that if, contrary to the apparent purpose of the legislation, the executive were to pursue prosecutions in all cases, including where a reasonable disclosure order, ruled on by a court accepted by both parties to be competent, was in issue, the argument would certainly have to be taken very seriously.

161. The second potential defence is that if prosecuted, the Defendants could rely upon the defence of "necessity" under Article 122-5 of the French Criminal Code, on the basis that violation of the FBS would be necessary for the purposes of defending the English proceedings and avoiding sanctions, such as being found in contempt of court. It is fair to say that the consideration of this issue by the experts is somewhat cursory and confused. Professor d'Avout's position – which cites authorities which make no mention of Article 122 but deal instead with Act of State - appears to be that this defence is not available to the Defendants in the circumstances of this case because it is confined to conduct by the defendant in the territory of the compelling court. Professor Rebut's evidence is that if a part of Article 122 is relevant it is not 122-5 but 122-7 and that this case does not fall within the scope of the state of necessity described there because the defence is only available under strict conditions (present or imminent danger to self, another or property) which do not arise on these facts. Mr de Navacelle's view is that Article 122-7 is the relevant provision and the defence "*would likely not succeed*".

162. I am unpersuaded by the Claimants' argument that Article 122-5 (which appears to encapsulate a rule relating to self defence) is relevant and could provide a defence. I accept the Defendants' submissions that if the apt provision is Article 122-7 the conditions for the defence of necessity as set out in that provision are not satisfied. I am interested that none of the experts cites Article 122-4 of the Penal Code[1] which would seem more obviously apt than any of Articles 122-5, 122-7 or the doctrine of Act of State.

Comity

163. Both of these questions are therefore answered as separate questions in favour of the Defendants. They do however both elide into the question of comity.

164. Comity is an acknowledged important factor which can cut in either or both directions. This court will not lightly make an order which involves a risk of prosecution of its subject in another jurisdiction: "*An order will not lightly be made where compliance would entail a party to English litigation breaching its own (ie foreign) criminal law*". But as *Bank Mellat* also makes clear, this court will, as a matter of comity, assume a respect for its proceedings by other courts.

165. At the earlier stage of the analysis this feeds into the analysis of the existence or otherwise of a risk of prosecution. If that analysis is incorrect and there is a risk which is to be seen as real (as opposed to fanciful) then I am entitled to weigh in the balance the various comity points identified above. Were I to do so I would conclude that a successful prosecution of a party to English proceedings for complying with an order for disclosure which this court, acting within its accepted jurisdiction, has considered and decided is both necessary to resolve this case and proportionate in ambit, would be an act which did breach comity and that a considerable weight should be given to that factor.

Conclusion on the balancing exercise

166. It follows therefore that were there a risk of prosecution I would nonetheless conclude – even at this stage – that the balancing exercise indicated that it would be appropriate to make the order even if it did result in a risk of prosecution to the Defendants, and that that risk could be appropriately mitigated by a confidentiality ring. At this stage that conclusion is based most heavily on comity considerations, since cost and delay are (ignoring FPS issues) fairly minor factors.

167. I also conclude that it is highly likely that the case for direct disclosure (i.e. for the refusal of an order for evidence to be given via the Hague Convention) is only likely to become stronger as the disclosure exercise progresses, because at that point issues of delay, cost and disruption will loom larger.

[1] "A person is not criminally liable who performs an act prescribed or authorised by legislative or regulatory provisions.

A person is not criminally liable who performs an action commanded by a lawful authority, unless the action is manifestly unlawful."

Geographical extent

168. The PCD Defendants' case is that Article 1 *bis* applies to all documents held in France, all documents controlled by French companies, all documents produced by French entities and all documents held for the benefit of French entities. This is an argument advanced on the basis that it is consistent with the SISSE chart. On this basis the only information and documents that could be disclosed are those exclusively held by a foreign subsidiary that have not been produced by the French entities and which are not held on private servers for the benefit of those French entities.

169. In the circumstances this should not arise and so can be dealt with very briefly – the more so since it appeared to be common ground that it did not in any event arise as regards the documents the subject of the current Disclosure Order.

170. The following indications of this contingent/non-issue may however be useful:

    1) I find it hard to understand how it can be the case that the production of documents actually held on servers in England or which are the documents of an English company (albeit a subsidiary of a French parent company) are the subject of the FBS jurisdiction. The SISSE chart, which must be seen as guidance, cannot be determinative of this.

    2) If it were the case that this was the correct analysis it would add an extra element into the balancing exercise against the making of an order for disclosure via Hague methods.

CONCLUSION

171. Accordingly, I reject the Defendants' applications for orders appointing a commissioner to process the documents that are to be disclosed and the information that is to be provided by the PCD Defendants and the Renault Defendants under the Disclosure Order.

172. I further declare that:

    1) There is no real risk of prosecution in this case;

    2) If there were such a risk, the balancing exercise indicates that I should nonetheless decline to make the order sought in respect of the Disclosure Order.