

COMPETITION LITIGATION

English High Court grants disclosure of leniency materials in antitrust follow-on damages claim

On 4 April 2012, the English High Court gave a long-awaited judgment on an application for disclosure of certain documents provided to the European Commission (*National Grid Electricity Transmission Plc v ABB Ltd and Others* [2012] EWHC 869 (Ch)). These documents were provided to the Commission on a voluntary basis in an effort to seek leniency from fines that could otherwise have been imposed for participation in a cartel.

The judgment confirms that the English High Court will be prepared in appropriate cases to order the disclosure of leniency materials to claimants in English follow-on proceedings. In that respect, it may make the English High Court a more claimant friendly forum for follow-on claims relative to courts in other Member States.

This ruling also increases the complexity associated with decisions to apply for leniency. The assessment of whether the likely discount in fines available from the Commission may be outweighed by increased exposure to damages in follow-on litigation down the line will now need to factor in the consequences in terms of disclosure of leniency applications.

Michael Rowe and **Scott Castledine** consider the ruling and its likely effect on private antitrust damages actions and potential leniency applicants.

BACKGROUND

In January 2007, the Commission fined 20 companies over €750 million for participation in a cartel concerning the gas insulated switchgear sector. In 2008, National Grid commenced a follow-on claim for damages against a number of the addressees of the Commission's decision, including ABB, Alstrom, Areva and Siemens, claiming losses suffered as a result of overcharges.

In June 2011, the ECJ held in *Pfleiderer* (Case C-360/09) that EU law does not preclude disclosure of leniency documents submitted to the Commission. Rather, it is for Member State courts to decide the rights of access on a case by case basis, by balancing the need for disclosure by claimants in order to secure compensation for loss suffered as a result of antitrust infringements against the risk of undermining the effectiveness of the leniency regime by disclosing confidential information voluntarily submitted by leniency applicants to the Commission.

Following the *Pfleiderer* ruling, in November 2011, National Grid applied for disclosure from ABB and/or Siemens of the confidential version of the Commission's decision in addition to responses to the Commission's Statement of Objections and responses to the Commission's requests for information in relation to the cartel, both categories of documents likely containing information provided by the defendants to the Commission during their leniency applications. Disclosure of the corporate leniency statements was not at issue, given that these were made orally, and none of the parties held a record or transcript of those statements. That said, the documents in relation to which disclosure was sought contained extracts from those oral statements.

DECISION

Roth J. approached the *Pfleiderer* balancing exercise by considering the factors argued to be relevant in the hearing. These included factors raised by the Commission who submitted written observations to the High Court:

- **Legitimate expectations:** Roth J. did not accept that the defendants had a legitimate expectation that their leniency statements would be protected from disclosure. Although the Leniency Notices issued by the Commission provide that leniency statements will not be disclosed by the Commission to complainants or national courts without consent, the Leniency Notices also clearly state that leniency status cannot protect a party from any civil law consequences of antitrust infringements.
- **Increased exposure:** Roth J. accepted that it was relevant to consider whether disclosure would increase the leniency applicants' exposure to liability compared to addressees that did not seek leniency. However, he decided that this was not the case on the facts. National Grid had made its claim against a range of addressees, including applicants and non-applicants for leniency, on the basis that they were equally liable.
- **Damage to the effectiveness of the leniency regime:** Roth J. also considered the possible deterrent effect of a disclosure order in this case for potential leniency applicants in relation to cartels that had yet to be uncovered. However, he took the view that participants in serious cartels would continue to be incentivised to apply for leniency. He implied that given the scale of Commission fines and the risk that other parties would apply for leniency with consequences in terms of civil liability for all cartel participants, applicants would continue to want to mitigate their exposure to Commission fines through participation in the leniency programme.
- **Proportionality:** Roth J. accepted that proportionality was a relevant factor in determining whether or not to order disclosure. He identified as the relevant factors in this respect as being (i) the availability of information from other sources; and (ii) the relevance of the leniency materials to the dispute.

In the present case, Roth J. held that National Grid did not have other reasonable means available to it by which it could obtain the information it needed to make its case. There was limited documentary evidence of the cartel and the meaning of the documents was often opaque. The explanations of the available documents contained in the oral statements were therefore likely to be of particular utility in understanding the operation of the cartel. Witness statements were unlikely to represent satisfactory alternatives.

As to relevance, Roth J. accepted that the Commission's decision did not focus on the operation of the cartel in the UK, but emphasised that the cartel was worldwide in scope. Therefore, the operation and effectiveness of the cartel in other geographic markets was relevant to assessment of what prices would have been in a hypothetical competitive market. Many of the contemporaneous documents were opaque or cryptic, and so the explanation of those documents contained in the extracts from the oral statements was clearly relevant to the claim.

Having determined that some disclosure of the documents sought should be provided, Roth J. went on to emphasise that it did not follow that all of the documents sought should be provided. He considered it necessary to decide whether the particular documents or parts of documents were of such potential relevance that disclosure should be ordered. The disclosure applications were therefore decided as follows:

- The confidential version of the Commission's decision was not disclosed in its entirety, but a limited number of redacted passages containing extracts from the oral corporate statements were disclosable.

- Certain passages from responses to certain Commission Information Requests, which explained certain contemporaneous documents and the operation of the cartel, were disclosable.
- All other documents in relation to which disclosure was sought – including a response to the Commission's Statement of Objections and other parts of responses to Commission Information Requests – were not disclosable.

COMMENT

Subject to this ruling being appealed, it confirms that the English courts are prepared, on a case by case basis, to order limited disclosure of leniency material in follow-on actions. In contrast, a German court called upon to decide similar issues has ruled against disclosure of leniency materials.

As private litigants become ever more focussed on seeking out the most favourable European jurisdiction in which to bring their claims, the propensity of courts to order disclosure of leniency material is a further factor that will need to be considered. In this respect, the ruling may make the English High Court a more claimant-friendly forum relative to courts in other Member States.

The judgment may also have consequences for proceedings before the Commission, in particular, in terms of increasing the attractiveness to the parties of settlement as a means of concluding cartel cases. Settlement cases typically involve relatively short decisions and are therefore less likely to contain voluminous extracts from leniency statements that may be available to litigants in follow-on claims.

Finally, it should be noted that the Commission has indicated that it intends to create new legislation to protect its flagship leniency policy. The challenge for the Commission will be to strike a fair balance between its public and private enforcement policies. The tension between promoting an effective means of private redress for victims of anti-trust infringements on the one hand and preserving an effective leniency programme on the other is acute.



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