

National Grid: Disclosure of EC Leniency Materials at Stake

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On November 8 and 9, proceedings resumed before the English High Court (the High Court) in noteworthy litigation that could affect civil damages actions in both Europe and the United States: *National Grid Electricity Transmissions v. ABB Limited & Ors (National Grid)*. In *National Grid*, the High Court will address the highly controversial issue of disclosure of leniency documents submitted to the EU Commission in the context of a civil damages proceeding, an issue the European courts so far have failed to satisfactorily address. The recent proceedings focused on the eagerly awaited letter from Alexander Italianer, head of the European Commission's directorate for competition, received by the High Court last month, and stating the agency's position on the issue.

The extent of disclosure of EU Commission leniency material in courts in the European Union is of considerable importance not only for EU civil claim proceedings, but also for U.S. civil damages actions. U.S. courts generally have been willing to protect the confidential nature of EU Commission leniency materials on the basis of comity considerations, often with the support of the U.S. Justice Department's Antitrust Division. Those comity considerations may be undermined if equivalent protection is not granted in courts in the European Union.

The *National Grid* proceeding concerns a damages action that was brought by National Grid Electricity Transmission plc (NGET) on November 17, 2008, based on an EU Commission decision finding the existence of an unlawful agreement among suppliers of gas-insulated switchgear (GIS) and imposing a fine on the suppliers concerned totalling 750 million euros. NGET alleges before the High Court that, as a result of the unlawful cartel activity, it suffered substantial losses by reason of overcharges and seeks damages from ABB, Siemens, Alstom and Areva. By judgment of June 12, 2009, the High Court held that the trial date should be postponed until the appeals process in the European Courts had been exhausted, but refused to grant an immediate stay to the proceedings in the meantime (the parties were ordered to progress until close of written pleadings and, in addition, to try and agree upon the scope of disclosure).

In the context of the pending proceedings, NGET brought an action before the High Court requesting the disclosure of certain documents from the EU Commission's files. Initially the request was formulated to be addressed to the Commission based on an application of Article 15 of Regulation 1/2003. However, after the judgment of the European Court of Justice in *Pfleiderer AG vs. Bundeskartellamt (Pfleiderer)* on June 14, 2011, NGET modified its request to seek to obtain the documents directly from the defendants. In particular, NGET sought disclosure of: (i) the confidential version of the decision and (ii) to the EU Commission's statement of objections and to the EU Commission's information requests (containing leniency material).

The High Court subsequently requested that the EU Commission submit its observations on the possible application of the *Pfleiderer* judgment to the disclosure of leniency documents submitted to the EU Commission. In *Pfleiderer*, the European Court of Justice found that it is for the national courts and tribunals of the EU member states to balance the need to protect the effectiveness of the

(in that case national) leniency program against the right of individuals to claim damages for losses caused by an infringement of the competition law. In this regard, the High Court requested that the EU Commission indicate, if *Pfleiderer* applied, those matters “that it considers should be placed in the balance in carrying out” the balancing exercise. The disclosure proceeding resumed to discuss the response from the EU Commission received by the High Court last month.

The Commission asserts that although *Pfleiderer* concerned the disclosure of leniency documents included in a national competition authority’s file, that case also was applicable “by analogy” to the disclosure of leniency documents submitted to the EU Commission.

The debate centered on the relevance of the documents for the civil claims brought, and the implications of disclosure for the EU Commission’s leniency program. The High Court commented that it is not necessarily the case that an immunity applicant will be at a disadvantage regarding damage claims unless the immunity applicant is the only cartel member named in the suit for damages. However, it concluded that before ruling on the issues, it ought first review the documents requested by NGET.

Before ruling, the High Court may decide to await the European Court of Justice’s judgment in a reference from an Austrian court also made last month, as to whether Austrian law, which prohibits disclosure of documents without the approval of the defendant companies and the authority, is compatible with EU law. It also is possible that, upon review of the documents, and as suggested by Alstom at the hearing, the High Court may make a reference to the European Court itself rather than make its own assessment on the application of *Pfleiderer* to EU Commission file records.

The disclosure issue being considered by the High Court in *National Grid* also has potential trans-Atlantic implications. Interestingly and coincidentally, in September the EU Commission was likewise asked by the U.S. Court for the Eastern District of New York, with regard to the pending *Air Cargo Shipping Services* antitrust litigation, to comment on the *Air Cargo* plaintiffs’ motion to compel production of the confidential version of the European Commission’s November 9, 2010 decision in *Airfreight* (Case 39258). In response to the *Air Cargo* court’s request, Mr. Italianer filed a letter with that court on October 11, 2011, supporting the confidentiality of the leniency materials in the Commission’s file. The letter, which is a matter of public record, refers to the EU Commission’s leniency program as the “cornerstone” of its practice in cartel detection and enforcement, the success of which “crucially depends on the willingness of companies to provide comprehensive and candid information.” In keeping with the tradition of the EU Commission’s letters to U.S. courts on the issue, the letter refers to considerations of international comity.

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The question of disclosure of EU Commission leniency materials before courts in the European Union remains unresolved for now. Indeed, absent more specific guidance from the European Court, whether on reference from the *National Grid* proceedings or otherwise, the correct approach to this matter may continue to remain uncertain in the U.K. and elsewhere in the European Union. Nevertheless, the way in which the disclosure question is resolved in *National Grid* and elsewhere within the European Union will, in any event, be watched with great interest on both sides of the Atlantic as an indicator of the way jurisprudence is developing in this area.