Neutral Citation Number: [2011] EWHC 1717 (Ch)

Case No: HC08C03243

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 July 2011

Before :

MR JUSTICE ROTH

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Between :

NATIONAL GRID ELECTRICITY TRANSMISSION PLC — **Claimant**

- and -

(1) ABB LTD
(2) ABB POWER T&D LIMITED
(3) ABB LIMITED
(4) ABB HOLDINGS LIMITED
(5) ABB ASEA BROWN BOVERI LTD
(6) ALSTOM
(7) ALSTOM LIMITED
(8) ALSTOM UK HOLDINGS LIMITED
(9) ALSTOM HOLDINGS
(10) AREVA SA
(11) AREVA T&D UK LIMITED
(12) AREVA T&D HOLDING SA
(13) SIEMENS AG
(14) SIEMENS TRANSMISSION & DISTRIBUTION LIMITED
(15) VA TECH REYROLLE DISTRIBUTION LIMITED
(16) SIEMENS PLC
(17) VA TECH (UK) LIMITED
(18) SIEMENS HOLDINGS PLC
(19) VA TECH SCHNEIDER HIGH VOLTAGE GMBH
(20) VA TECH TRANSMISSION & DISTRIBUTION GMBH & CO KEG
(21) SIEMENS AKTIENGESELLSCHAFT ÖSTERREICH
(22) AREVA T&D SA
(23) AREVA T&D AG — **Defendants**

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Mr J Turner QC and Mr D Beard QC (instructed by **Berwin Leighton Paisner LLP**) for the **Claimant**
Mr M Hoskins QC and Sarah Ford (instructed by **Freshfields Bruckhaus Deringer LLP**)

for the **1st to 5th Defendants**
Mr D Jowell QC (instructed by **Hogan Lovells International LLP**)
for the **6th to 9th, 11th to 12th and 22nd to 23rd Defendants**
Mr M Brealey QC and Ms M Demetriou (instructed by Clifford Chance LLP) for the 13th – 21st Defendants
Ms K Bacon (instructed by **Shearman & Sterling (London) LLP) for the 10th Defendant**

Hearing date: 15 June 2011

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Judgment

Mr Justice Roth :

Introduction

1. This application concerns disclosure in a follow-on damages action for breach of the competition rules in Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The claim is brought subsequent to the European Commission's decision in Case Comp/F38.899 – Gas Insulated Switchgear ("GIS") issued on 24 January 2007 ("the Decision").

2. The Decision was addressed to 20 companies and found that they had been engaged in an extensive and sophisticated cartel regarding the supply of GIS. GIS is heavy electrical equipment used to control energy flow in electricity grids, and is therefore used as a major component for turnkey power substations. The Decision is detailed and lengthy, comprising 552 recital paragraphs. It found that the cartel lasted, with variation in the involvement of some of the participants, over a period of some 16 years from 1988 to 2004. However, as is customary, the published version of the Decision has redacted certain passages and information on the ground of commercial confidentiality. It is not in dispute in the application now before this court that the redacted passages include matters that may be very relevant to a claimant seeking damages for loss allegedly suffered by reason of the cartel.

3. The claimant ("NGET") alleges that it suffered substantial losses by reason of overcharges resulting from the illegal cartel. The schedule to its Particulars of Claim lists over 40 projects which may have been affected with a total contract or out-turn value of over £383 million.

4. There are now, following amendments, 23 defendants to this claim. They comprise companies that fall into four corporate groups. They have been referred to, for convenience, by the name of the parent company as the ABB, Siemens, Alstom and Areva defendants. Some, but not all, of the individual defendants to this action were addressees of the Decision; others are subsidiaries of addressees of the Decision. However, several addressees of the Decision have not been sued by NGET.

5. The Decision imposed fines in excess of €750 million. Of the corporate groups from which companies are defendants to the present claim, ABB was granted immunity from fine pursuant to the Commission's 2002 Leniency Notice.[1] Areva and Siemens applied for leniency from the Commission but their applications were unsuccessful.

6. Areva, Alstom and Siemens, along with several other addressees of the Decision who are not defendants to the present action, appealed to the General Court. On 3 March

[1] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C45/03.

2011, in Case T-10/07, the General Court dismissed Siemens' appeal; in joined Cases T-122/07 to T-124/07, the Court largely dismissed the appeals by, among others, the Siemens companies that are the 14th, 20th and 21st defendants to the present action; and in joined Cases T-117/07 & T-121/07, the Court largely dismissed the appeals of Areva and Alstom. The General Court has not yet delivered judgments on appeals brought by some of the other addressees of the Decision who are not defendants to this action. Areva, Alstom, and Siemens have recently lodged further appeals to the European Court of Justice ("ECJ"). It will take at least a year before those further appeals are determined.

7. This damages claim was commenced in the High Court on 17 November 2008. The defendants applied for a stay of proceedings on the basis of the ruling of the ECJ in Case C-344/98 *Masterfoods*. By a judgment of 12 June 2009, 2009 EWHC 1326 (Ch), the Chancellor declined the application for a stay while recognising, as NGET indeed accepted, that this case cannot come on for trial until after the appeals against the Decision (at least by any of the defendants) have been finally determined. The Chancellor stated, at paragraph [44]:

> "… the proper balance, in my judgment, requires me to allow this action to proceed at least to the close of pleadings. In addition I consider that it is premature to decide that no disclosure should take place before the conclusion of the applications and appeals to the CFI and the ECJ. In principle, therefore, I accept the submissions of counsel for NGET that the action should proceed to the stage of the close of pleadings, the parties advisers should meet to consider the scope and basis for proceeding with disclosure and that that topic and the need or desirability for other directions should be reconsidered at a case management conference to be held in October 2009. I reach this conclusion because I consider that in the circumstances of this case, in particular the time which has already elapsed since the occurrence of the relevant events, the need for the follow on action to be processed so as to be as ready for trial as soon after the conclusion of the proceedings before the CFI and ECJ are concluded as is reasonably possible outweighs the need to avoid expenditure which may be wasted if and to the extent that it is not compensated for by an award of costs. Unless the preparation of the follow on action continues then the parties will not be on an equal footing because NGET will not know what are the relevant issues or what documents relevant to those issues, particularly causation, are available."

Disclosure

8. Following that judgment, pleadings were exchanged and closed, and there were discussions between the parties regarding disclosure. It is unnecessary for present purposes to set out the details of the various objections taken by different defendants at different stages. Over time, a measure of agreement was reached and the position as of the making of the present application is as follows:

(a) Siemens has disclosed all its pre-existing documents that were submitted to or obtained by the Commission, its reply to the Statement of Objections ("SO"), and its responses to requests for information made by the Commission (with redactions to remove reference to leniency applications);

(b) ABB has disclosed its pre-existing documents but not its response to the SO or to information requests from the Commission on the basis that both of those categories contain materials relating to or in support of its leniency application;

(c) Alstom's English subsidiaries (the 7th and 8th defendants), who were not addressees of the Decision, agreed to disclose pre-existing documents although in the event it appears that they held very limited documentation. Alstom SA (the 6th defendant), which was an addressee of the Decision, has declined to agree to disclosure on the basis that it is a French company and French Law No 68-678 of 26 July 1968 (as subsequently modified) ("the French blocking statute") prohibits it from making such disclosure;

(d) Areva's English and Swiss subsidiaries (the 11th and 23rd defendants), of which the latter but not the former was an addressee of the Decision, agreed to give disclosure of documents submitted by them to the Commission save, as regards the 23rd defendant, of documents held outside Switzerland and, as regards both of them, of corporate statements and other documents created by any of the Areva defendants for the purposes of their leniency application. However, despite the consent order to that effect made on 14 June 2010, the 11th defendant then said that it had not submitted any documents to the Commission and so was not obliged to make any disclosure under the terms of the order, and the 23rd defendant said that it did not hold any relevant documents in Switzerland and insofar as they were held outside Switzerland, disclosure would need the consent of the 10th, 12th and 22nd defendants which are all French companies which were prevented from giving consent by reason of the French blocking statute. It appears that there has therefore been very limited disclosure from any of the Areva defendants of documents submitted to or obtained by the Commission.

(e) All defendants who were addressees of the Decision object to disclosure of the confidential version of the decision on the basis that such disclosure would conflict with the duty of confidentiality which they owe to the Commission. ABB also expressed concern that parts of the confidential version of the Decision contained information submitted as part of its successful leniency application.

The present application

9. There is no dispute that the documents of which disclosure is sought by NGET are relevant to these proceedings and are documents to which NGET would be entitled by way of standard disclosure under English rules of procedure in the absence of some supervening provision of EU law. Indeed, it is commonplace that the victim of a cartel will not have all the information necessary for it to assess whether, and if so to what extent, the prices it has been charged were inflated as a result of the operation of the cartel. Thus in the absence of satisfactory disclosure, prosecution of damages claims by those who suffered from the operation of a cartel becomes difficult and one-sided. This is expressly recognised in the European Commission's Staff Working

Paper accompanying the White Paper on Damages Actions for Breach of the EC anti-trust rules of 2 April 2008 at paragraphs 89-90.

10. In the course of the investigation by the Commission, ABB and Siemens obtained, by exercising their right of access to the file, copies of documents obtained by the Commission from Alstom and Areva. They also obtained copies of the responses of the Alstom and Areva companies to the Commission's information requests. Faced with the difficulty of obtaining documents directly from Alstom and Areva by reason of the French blocking statute, NGET therefore applies for disclosure of those documents from ABB and Siemens. However, it excludes from this application documents created specifically for the purpose of a leniency application ("leniency documents"). That exception of course applies only as regards Areva since Alstom never made a leniency application. Furthermore, as ABB and Siemens did not receive from the Commission copies of Alstom's and Areva's responses to the SO, NGET invites the court to ask the Commission to provide those documents pursuant to Article 15 of Council Regulation (EC) No 1/2003.

11. Article 15 of Reg 1/2003 is headed "Co-operation with National Courts" and paragraph 1 provides:

> "In proceedings for the application of Article [101] or Article [102] of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules."

12. No objection is raised to the court making such an Article 15(1) request and accordingly I shall do so, on the agreed basis that if these documents are supplied by the Commission then copies will be provided to the parties within the confines of a confidentiality ring since those responses are likely to contain commercially confidential information. The order that I make therefore contains provision for the establishment of such a confidentiality ring on the usual terms, which have sensibly been agreed between the parties. In excluding leniency documents from the scope of the request, I take account of the Commission's statement at para 26 of its Notice on cooperation with the courts of the EU Member States that it will not transmit such documents without the consent of the leniency applicant.

13. Any party of course is free to make submissions to the Commission if it so wishes as to whether the Commission should accede to this court's request. But I direct that a copy of any such submission should be served on every other party.

14. As regards those documents emanating from Alstom and Areva of which disclosure is sought directly from ABB and Siemens, Alstom and Areva, who have appeared by counsel on this application, do not consent to that disclosure – indeed Alstom submits that it could not consent in the light of the French blocking statute – but they do not object. Their only concern is that a mechanism is incorporated in the order whereby they can ensure that the proviso that the disclosure does not include leniency documents is effective. NGET did not oppose the incorporation of such a mechanism in the court's order.

15. However, ABB and Siemens have resisted the making of such an order, although it concerns documents originating not with them but with Alstom and Areva. ABB raised a number of objections on the grounds of EU law. Siemens maintained in correspondence from its solicitors that the appropriate course was for NGET to seek these documents by way of an Article 15(1) request by the court to the Commission and not by way of disclosure from Siemens.

16. Faced with these contentions, the solicitors for NGET wrote to the Director-General for Competition at the Commission on 12 April 2010 seeking to ascertain whether the Commission has any objection to disclosure of these various categories of documents, including the confidential version of the Decision. The Director-General finally replied on 15 December 2010, with an apology for the considerable delay. After describing the general legal position, he set out what he described as "several general remarks" as being relevant for reply to the questions raised. Because of its importance to the argument before the court and to my decision, it is appropriate to quote these in full (with paragraph numbering inserted for convenience):

> "[1.] Following Article 339 TFEU and Article 28 of Regulation 1/2003, the Commission is bound to protect the confidentiality of the information covered by the obligation of professional secrecy. As a result, where pursuant to national disclosure rules parties to the proceedings pending before a national court or third parties are ordered disclosure of documents that originate from the Commission, including the confidential versions of the Commission Decision, the national court has to provide for appropriate protection of business secrets or other confidential information that belong to legal or natural persons other than the one(s) to whom the disclosure order has been addressed.
>
> [2.] In order not to jeopardise the investigatory powers of the Commission, national courts are asked to refrain from ordering disclosure where such disclosure could undermine an ongoing investigation concerning a suspected infringement of the EU competition rules.
>
> [3.] Finally, the Commission is requiring a high level of protection of information that has been specifically prepared by the parties for voluntary submission to the Commission within the framework of its leniency program set out in the Commission Leniency Notice. Such information is of vital importance to the Commission's ability to accomplish the tasks entrusted to it, as expressed for example in point 26 of the Commission Notice on Co-operation with National Courts or point 40 of the Commission Leniency Notice. This position only applies to information specifically prepared for voluntary submission to the Commission under the leniency program (including documents prepared by leniency applicants in the context of the continuous cooperation with the Commission). The Commission, however, does not object to the disclosure of other information, such as pre-existing information and

> documents in the possession of the parties that were used in the preparation of any such submission.
>
> [4.] Equally, and subject to the above conditions, the Commission would not object to the disclosure in proceedings before the English Court concerning the application of Articles 101 and 102 TFEU of documents obtained through access to the Commission file, provided that the originators of that information (parties from whom the information was obtained by the Commission) are guaranteed protections equivalent to those addressees of a disclosure order enjoy under applicable national law. The documents referred to are both those the Commission obtained itself (e.g. during inspections) and those prepared and sent by the parties in response to the questions the Commission raised in the course of its investigation."

17. Following circulation of the Commission's letter, the solicitors to other parties wrote to the Commission raising further or supplementary queries but the Commission by response declined to engage in further substantive correspondence on the basis that the present application was pending before the English court.

The objection to disclosure of documents obtained by access to the file

18. As I have noted, ABB and Siemens have objected to disclosure of the Alstom and Areva documents which they obtained by their right of access to the Commission file during the investigation that preceded the Decision. They refer, in particular, to Article 15 of Commission Regulation (EC) No 773/2004 (the procedural regulation) concerning access to the file and use of documents. Article 15(4) provides:

> "Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles [101] and [102] of the Treaty."

19. The operation of this provision by the Commission is clarified in its Notice on the rules for access to the Commission file, OJ 2005 C325/7 ("the Access Notice"). Paragraph 48 of the Access Notice states:

> "Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the Bar of that counsel with a view to disciplinary action."

20. The objections, advanced in particular by ABB, were placed on several grounds. First, it was submitted that such disclosure would undermine an ongoing investigation concerning the GIS cartel. In that regard, reliance was placed upon a decision letter

from the Commission dated 16 June 2008 concerning an application by German lawyers on behalf of their client for access to virtually all the documents in the Commission's file in the GIS case ("the EnBW decision"). That application was made under Regulation (EC) No 1049/2001 on public access to documents of a European institution. In refusing that application, the Commission relied on the protection of the purpose of investigations and, as regards the question of an ongoing investigation, it stated:

> "In fact, nearly all the companies have submitted appeals against the decision of the Commission of 24 January 2007, and the applications for (partial) rescission of the Decision in the matter are currently before the Court of First Instance. In view of the competence of the Court of First Instance for the full verification of discretion, it cannot be excluded that the Court may order further information from the Commission's file which the Commission was not necessarily required to mention in the appealed decision in order to fulfil its obligation to provide reasons for its decision under 253 EC. Furthermore, there is clearly not only a hypothetical possibility that the Commission is required to reopen its own investigation if the Court reverses the Decision, but rather a real prospect which is not to be dismissed out of hand.
>
> Therefore, the investigation to which the documents to which you have applied for access relate, cannot be considered closed as long as the appeal against the Decision which concludes the administrative section of the procedure has not been decided.
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> If the relevant documents were to be publicly distributed before the decision becomes legally valid, then the investigation would not be able to fulfil its purpose, which consists of enforcing compliance with the EC anti-trust laws on the part of the companies involved."

On that basis, it was argued that although the General Court has largely dismissed the appeals of Siemens, Areva and Alstom, they have all lodged further appeals to the ECJ. Further, it is as yet unclear how the General Court will determine the appeals brought by some other addressees of the Decision who are not defendants to this action. In those circumstances, the administrative section of the procedure cannot be regarded as finally closed. As Mr Hoskins QC put it, this court is not in a position to anticipate the likely outcome of those appeals; nor can it asses the likelihood of any consequential reopening of the investigation by the Commission.

21. However, it is important to recognise that the EnBW decision was taken under Reg 1049/2001 which concerns *public access* to documents. As the Commission emphasised in its introductory remarks of that Decision:

> "…documents distributed according to this regulation are made generally accessible and made publicly accessible by the Commission either via its public register or upon application."

The risk to an ongoing investigation, to which the Commission refers in the substantive paragraph of its reasoning quoted above, is directly related to the *public distribution* of the relevant documents. In my view, that has no application to what is being sought by NGET here. As Mr Turner QC on behalf of NGET pointed out, the Commission Staff Working Paper expressly recognises that for this reason Reg 1049/2001 will not normally be an appropriate legal basis for obtaining access to evidence for the purposes of pursuing a damages action: see at para 104 and, in particular, fn 50.

22. Even if it is assumed that there is a possibility of the Commission still reopening the investigation into the GIS cartel in such a way that disclosure of these documents emanating from Areva and Alstom could impair the investigation, a possibility which I regard as somewhat theoretical, I cannot begin to see how disclosure as between parties to English court proceedings, with the added protection of a confidentiality ring could possibly undermine such an investigation. It is notable that in para [2] of the Director-General's letter, quoted above, he says that national courts are asked to refrain from ordering disclosure only where, such disclosure could "undermine an ongoing investigation" and continues, in para [4], to say that subject to that condition the Commission would not object to disclosure in English court proceedings of this nature of documents obtained through access to the file, provided that the parties from whom the documents or information originates receive the same protection of business secrets which the addressees of the disclosure order enjoy under our domestic law.

23. In that regard, it is to be noted that CPR Rule 31.22 provides:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where-"
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> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public."

In the present case, additional protection is provided by the imposition of a confidentiality ring.

24. Secondly, it was submitted that such disclosure might impair future investigations as it would make parties less willing to submit documents and cooperate with the Commission. This submission also seeks to draw support from the EnBW decision at section 3.2. However, the argument is misplaced for the same reason as the first argument since what is being sought is disclosure only to the other parties in English

court proceedings, subject to the rules governing such disclosure to which I have referred and with the additional safeguard of a confidentiality ring. I also note that the Director-General does not even raise this as a relevant consideration in his letter.

25. Thirdly, ABB, and also Siemens, have submitted that it is more appropriate for these documents to be obtained by way of an Article 15(1) request from this court to the Commission than by way of disclosure. It is said that this is particularly the case when the court is going to make a request under Article 15 in any event.

26. However, in my judgment, it is neither appropriate nor necessary to involve the Commission in the provision of documents in the hands of parties to English proceedings for the purposes of those proceedings when those documents can clearly be furnished under the domestic rules for disclosure. The English court must of course apply its procedural rules in accordance with any governing principles of EU law. But if, as I find, there is no supervening objection under any rule of EU law to this disclosure, I consider that it would infringe the EU principle of equivalence if the court were to deny a claimant disclosure of documents from another party in what is, in effect, an action for breach of statutory duty when there would be no basis for refusing disclosure if this were a claim for breach of statutory duty arising only under domestic law: see Case C-453/99 *Courage and Crehan*, para 29.

27. In the end, neither Mr Hoskins QC nor Mr Brealey QC (appearing for Siemens) sought to persist in opposing the making of a disclosure order against their clients. Mr Brealey said that it was necessary for them to raise the objections in the light of what is said the Access Notice at para 48. I should therefore state that, in my judgment, although that may justify a party in adopting the position that it would not agree to disclosure in the absence of a court order for specific disclosure, it does not require it to raise sustained objections, whether in correspondence or at a contested hearing, especially in the light of the letter from the Director-General setting out the views of the Commission and when the third party undertaking that is the originator of the information or documents of which disclosure is sought makes clear that it has no objection. In the light of this, it is unnecessary to determine whether, as Mr Turner submitted, provision of the documents by way of disclosure in a follow-on damages claim would in any event constitute use falling within the scope permitted by paragraph 48 of the Access Notice.

28. Accordingly, I shall grant the application for this disclosure, but because those documents supplied by the Commission by way of access to the file were apparently commingled with other documents originating from other addressees of the SO (ie not only from Alstom and Areva), I will allow a more generous time for ABB and Siemens to identify those documents in the first place to the Alstom and Areva defendants that were addressees of the Decision, and then a further two weeks for those parties to determine whether they include documents outside the scope of the disclosure order so that those can be removed before disclosure is given to NGET.

Disclosure of the confidential version of the Decision and of ABB documents including leniency documents

29. As appears from the Director-General's letter, the Commission does not object to disclosure of the confidential version of the Decision, so long as appropriate protection is provided for business secrets and confidential information. That

protection should be given in the present case by the confidentiality ring to which I have referred. However, NGET did not in the first place seek disclosure of the confidential version from the other parties but applied to the court to include this in an Article 15 request to the Commission. But NGET then changed course as a result of a ruling by the ECJ in a case decided the day before the hearing of the present application: Case C-360/09 *Pfleiderer*, judgment of 14 June 2011.

30. *Pfleiderer* arose out of a decision of the German national competition authority ("the BKA") finding an infringement of Article 101 TFEU by reason of a cartel of European manufacturers of décor paper. *Pfleiderer* is a purchaser of décor paper and with a view to preparing a follow-on claim for damages it submitted an application to the BKA, following that decision, seeking access to all the material in the file, including the leniency material. The BKA largely rejected that application in that it restricted access to the file to a version from which confidential information and leniency documents had been removed. Under German domestic law, the lawyer of an aggrieved person with a legitimate interest is entitled to inspect documents and evidence held by the authorities but inspection may be refused on the basis of certain overriding interests. *Pfleiderer* challenged the decision of the BKA before the Amtsgericht Bonn. The Amtsgericht made clear that it wished to make a decision granting access, restricted to documents required for the purpose of substantiating a claim for damages but, being concerned that such a decision could run counter to EU law, it made a reference to the ECJ of the following question:

> "Are the provisions of Community competition law – in particular Articles 11 and 12 of Regulation No 1/2003 and the second paragraph of Article 10 EC, in conjunction with Article 3(1)(g) EC – to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article [101 TFEU]?"

31. In its judgment, the Grand Chamber of the ECJ observed that Commission notices are not binding on the Member States and that it is therefore for the Member States to establish and apply national rules on the right of access by persons adversely affected by a cartel to documents relating to leniency procedures: paragraph 23. However, that jurisdiction must be exercised in accordance with EU law and therefore, in particular, must not jeopardise the effective application of articles 101 and 102 TFEU: paragraph 24.

32. The ECJ proceeded to note that leniency programmes are useful tools to uncover and thereby terminate cartels, and that the effectiveness of those programmes could be compromised if documents relating to a leniency procedure were to be disclosed to persons wishing to bring damages claims. On the other hand, it is established that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition.

33. The Court proceeded to state as follows:

> "29. The existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union (*Courage and Crehan*, paragraph 27).
>
> 30. Accordingly, in the consideration of an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation (see, to that effect, *Courage and Crehan*, paragraph 29) and to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency.
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> 31. That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case.
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> 32. In the light of the foregoing, the answer to the question referred is that the provisions of European Union law on cartels, and in particular Regulation No 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law."

34. While *Pfleiderer* concerns specifically leniency material, it was pointed out that the confidential version of the Decision may similarly contain leniency material.

35. In the light of *Pfleiderer*, NGET applied to amend its application so as to seek disclosure of the confidential version of the Decision directly from the defendants who had received it. Moreover, it also now seeks disclosure from ABB of documents that may include leniency material, namely ABB's responses to the SO and the Commission's information requests. I granted NGET permission to make that amendment as all the parties are now before the court and as a result of a judgment

given by the ECJ the day before this hearing NGET no longer wishes to pursue its application as originally formulated. It is clearly convenient and sensible for the application to be considered in the form that NGET now wishes to adopt in the light of the *Pfleiderer* judgment.

36. NGET accordingly submits that the jurisdiction to order disclosure of documents that may contain leniency material rests in this court, which should conduct the weighing exercise referred to by the ECJ in *Pfleiderer*; and that it is therefore not necessary for the court to make an Article 15 request in that regard to the Commission. But NGET says that in order to ascertain the degree of concern regarding leniency, which may of course differ as between the confidential version of the Decision and, for example, ABB's response to specific questions from the Commission, the court should give the Commission an opportunity to present its views to the court. I raised in argument my concern that it is not clear that the ECJ in *Pfleiderer* had in mind the situation where leniency documents were submitted to the Commission, where the Article 15 mechanism is available, as opposed to an application for disclosure of documents obtained in the operation of a leniency programme by a national competition authority, where Article 15 obviously does not apply. That appears to me a potentially important question regarding the application of the ruling in *Pfleiderer*, on which arguments can be put forward either way. In necessarily abbreviated submissions, the defendants echoed those observations. But no party objected to the court giving the Commission the opportunity to make submissions on that issue and also, if this is a matter for this court to determine by way of a disclosure application as between the parties and not by way of Article 15 request, to submit to this court observations regarding the matters that it considers should be placed in the balance in carrying out the weighing exercise in accordance with paras 30-31 of *Pfleiderer*.

37. In any event, it would clearly be inappropriate for this matter to be determined on the basis of an amended application which NGET raised only on the day of the hearing and which the other parties therefore did not have a fuller opportunity to consider. I shall accordingly adjourn that part of this application to a further hearing to be fixed. That will enable the Commission to make submissions to this court in writing, as envisaged by Article 15(3) of Regulation 1/2003 and, if it so wishes, to be represented at the adjourned hearing when all parties can fully address this issue which is of potentially wide implication and has arisen as a result of the ECJ's judgment given only the day before the hearing of the present application.