



The Interplay between Leniency Applications and Follow-on Litigation: a closer look at Pfeiderer and National Grid

GCLC, Brussels, Lunchtime Talk

Mark Powell
27 April 2012

Devil's Overview

- **Pfleiderer – a storm in a teacup?**
- **National judges have been entrusted with carrying out a balancing exercise: maybe they are better placed**
- **In light of Pfleiderer and National Grid, do we need hard law?**
- **Is the leniency program really under threat?**

Pfleiderer

- **Absent EU legislation, it is for Member State courts to apply national law to determine the conditions for disclosure of information provided as part of a leniency application**
- **In so doing, national courts have to balance the interests in favour of disclosure (right to claim damages) and those in favour of protecting the information provided voluntarily by a leniency applicant (effectiveness of competition law enforcement)**
- **The balancing exercise can be carried out by national courts and tribunals only on a case-by-case basis, taking all relevant factors into account**
- **The Court, quite rightly, shied away from setting out a prescriptive list of what should and should not be disclosed (AG Mazak not followed)**

A storm in a teacup...



- **On January 18, 2012, Amtsgericht Bonn held that Bundeskartellamt must release non-confidential versions of decisions and any seized documents, but has the right to prevent access to leniency application and annexed documents**
- **Bundeskartellamt immediately published a press release saying that the ruling supports its policy not to give access to its files**
- **A good outcome for those anxious about leniency statements**
- **Certainly no obvious need to legislate in light of this ruling**

National Grid v. ABB – April 4, 2012

- **National judges are better placed to carry out Pfleiderer balancing exercise**
 - Commission does not have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency programme
 - **“the Commission is naturally far less well placed than the national court to assess the relevance and importance of the disclosure being sought to the litigation before the court.”** [Para 26]
 - **“As private damages claims for breach of competition law start to increase, a situation that the Commission has been keen to promote, such questions of access to documents are likely to arise with greater frequency. If every application for disclosure of leniency materials had to be referred to the Commission, that would place a significant burden on the Commission in having to familiarise itself with the details and state of the evidence in private proceedings in various national courts across the EU in order properly to carry out the balancing exercise required by Pfleiderer.”** [Para 29]

National Grid v. ABB – April 4, 2012

- **Legitimate Expectations**
 - Reliance on Leniency Notice
 - Defendants conceded that this was only Legitimate Expectation “light”
 - “I do not consider that the principle of legitimate expectation has any bearing in this case.” (Para. 34)
 - “The Notices cannot govern the application by a national court of its procedural rules in civil proceedings.”
 - AG Mazak’s argument on legitimate expectations rejected by the Court.

Factors considered in granting disclosure

- **Would disclosure of leniency documents expose the leniency applicants to greater liability than those parties who did not cooperate with the Commission?**
 - “If only ABB had been sued...that would be a powerful factor against disclosure of leniency materials, even allowing for....a contribution claim.” (Para 35)
- **Is disclosure proportionate, considering:**
 - The degree of **relevance** of the information sought for the purpose of the claim (Roth J rejects possible fishing expedition due to countervailing factors to be weighed against “standard” disclosure; “necessary ... for disposing fairly of the case”); and
 - The availability of information from **other sources** (e.g. pre-existing documents; witness statements).
- **Amstgericht Bonn of little assistance due to case-by-case analysis**

Documents disclosed within Confidentiality Ring

	FULL DISCLOSURE	PARTIAL DISCLOSURE	DISCLOSURE PENDING	DISCLOSURE DENIED
Siemens	1) Pre-existing documents 2) Respond to the SO 3) Responses to the Commission RFIs <i>[voluntarily]</i>			
ABB	Pre-existing documents <i>[voluntarily]</i>	Parts 2 & 3 of the Response to the Commission RFI dated 4 October 2004 & updated “List of abbreviations” <i>[by Order of 4/4/2012]</i>		Response to the SO <i>[by Order of 4/4/2012]</i>
Areva	Non-confidential versions of responses to the Commission RFIs <i>[by Order of 4/7/2011]</i>	Response to Q17 of the Commission RFI dated 5 November 2004 <i>[by Order of 4/4/2012]</i>	Response to the SO <i>[by Order of 4/7/2011; Court’s request to Commission 13/7/2011; Com Decision 26/1/12]</i>	
Alstom	Non-confidential versions of responses to the Commission RFIs <i>[by Order of 4/7/2011]</i>		Response to the SO <i>[See above]</i>	
Relevant to all Defendants		A “number by no means all” of recitals from the Confidential version of the Commission Decision <i>[by Order of 4/4/2012]</i>		
				White & Case 8

Arguments For Hard Law

- **Risk of fewer leniency applicants – they need certainty**
 - But have leniency applications plummeted since *Pfleiderer*? Probably not
- **There is nonetheless the perception that leniency applicants may be at a relative disadvantage**
 - *However, Mr. Justice Roth says (i) the terms of his judgement should dispel any concerns; and (ii) ABB avoided a fine of Euro 215 million (para 36 & 37)*
 - *If ABB had sat on its hands, it could have been faced with civil liability and a fine*
- **Commission's severe fines appear to overshadow any concerns in relations to a sloppy disclosure ruling by a national judge (which one should not presume)**

Arguments Against Hard Law

- **The Leniency Strategies of the Commission and the Applicants may evolve to take account of *Pfleiderer***
- **Oral statements, which tend to contain the meat of the application, are in any event protected: greater reliance on oral statements?**
 - The principal concern, therefore, relates to extracts
- **Relevance of effects to object-based infringements**
- **Balancing transparency / efficiency of judicial system vs. effectiveness of EU competition rules *à la Pfleiderer* is best done on a case-by-case basis**
 - National judge, with knowledge of the facts of the case and the national disclosure regime, is best placed to conduct this balancing exercise (Roth J, National Grid, para 26)
- **Harmonising national procedural law is tricky**

Devil's Conclusions

- **No obvious need to dash to legislate in this area**
- **We have just a few national decisions, none of which seem to be manifestly unreasonable**
- **In the interim, maybe the chilling effect on leniency statements has been overstated**
- **Severe fines still remains the principal leniency driver**

Mark Powell

White & Case LLP

Wetstraat 62 rue de la Loi

1040 Brussels

Belgium

Tel: + 32 2 239 2620

Fax: + 32 2 219 1626

Email: mpowell@whitecase.com

Please note that the views expressed in these slides are mine and are prepared for the purposes of a lively lunchtime debate. Accordingly, they do not represent the views of the Firm or of its clients.

In this presentation, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.