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European Commission Provides Guidance on Disclosure of Leniency Documents

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In response to a request from the English High Court, which is currently reviewing a cartel damage claim, the European Commission has submitted an *amicus curiae* brief on the disclosure of leniency documents. The Commission's opinion is that national courts should not order the disclosure of leniency documents prepared specifically for the purpose of an application under the EU leniency programme. In contrast, the applicant's reply to the statement of objections and the replies to requests for information could be ordered to be disclosed, insofar as they do not concern leniency material.

Uncertainty Concerning Disclosure of Leniency Documents

The Plaintiff in the English case, utility company National Grid, is claiming damages from several undertakings fined by the Commission in 2007 for their participation in the gas insulated switchgear cartel. National Grid has sought access to the leniency applications in order to substantiate its claims.

The High Court invited the Commission to submit observations about the possible *inter partes* disclosure of various documents, some of which contain information prepared specifically for the purpose of an application under the Commission's leniency programme. The High Court's invitation followed the landmark judgment by the Court of Justice of the European Union (ECJ) in C-360/09 - *Pfleiderer AG v Bundeskartellamt* of 14 June 2011. In *Pfleiderer,* the ECJ ruled that it is for national courts to assess in each individual case—by balancing the interests of the plaintiff and the leniency applicant—whether to order the disclosure to private damage claimants of leniency documents submitted to national antitrust authorities.

The Commission's Response

The Commission's response deals with the question of whether a national court should order the disclosure of leniency documents submitted to the European Commission. The Commission holds the view that the general principles of the

Pfleiderer case should apply in this case. In the Commission's opinion, the balance of the different interests, *i.e.,* those of damages claimants and those of immunity and leniency applicants, means that leniency documents, *i.e.,* documents prepared *specifically* for the purpose of an application under the leniency programme, as well as documents including material derived from leniency documents, should not be disclosed to private litigants.

With regard to the disclosure of other documents, the Commission's opinion differs according to the type of documents:

- In the Commission's view, the confidential version of a Commission decision should not be disclosed if this would be disproportionate. According to the Commission, in the case at hand at least, the confidential version adds little to National Grid's case and National Grid would have other sources of evidence. The Commission therefore recommends that the confidential version should not be disclosed.
- With regard to the leniency applicant's refusal to disclose its reply to the statement of objections, the Commission sees no reason why the leniency applicant should not be required to disclose the reply, unless the reply contains material derived from other leniency documents.
- The same principle applies, according to the Commission, to responses to a request for information. Where a response contains material derived from other leniency documents it should be withheld. If not, disclosure may be ordered. However, consideration should be given to the fact that leniency applicants are under a duty of cooperation and therefore some responses should not be ordered to be disclosed, such as further explanations about pre-existing documents and the operation of the cartel that are given because of the leniency applicant's duty of cooperation.
- For companies that did not apply for leniency, the Commission sees no reason why disclosure of documents could not be ordered.

Comment

The Commission's response lays down some general principles that national courts should—in the Commission's view—take into account when deciding on the disclosure of documents submitted by leniency applicants. However, the Commission's observations are far from providing clear guidance; they are vague in some respects, but case-specific in others. This flexibility of approach is, of course, in line with the general approach taken in *Pfleiderer,* where the ECJ decided that the national court must balance the divergent interests in each individual case.

The Commission maintains its position that documents submitted by leniency applicants should be protected in order to safeguard the Commission's leniency programme. It seems to concede, however, that not all documents in its case file must be protected under all circumstances, a concession that is likely to be welcomed by claimants in damages actions.

The High Court is not bound by the European Commission's recommendations and may well reach different conclusions. The same question could also arise in damages actions before courts in other Member States of the European Union, which could lead to a disparate landscape of different case law for the disclosure of the same

documents, which may lead subsequently to forum shopping. The European Commission is therefore expected to publish a legislative proposal to provide uniform rules for the disclosure of leniency documents.

Christoph Voelk, Stagiaire in the Firm's Brussels office, also contributed to this article.