

Release of Confidential Cartel Information by European Commission to English High Court Suspended

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On 29 November 2012, the EU General Court (GC) issued a provisional order suspending the European Commission's decision to communicate to the High Court of England and Wales a copy of Alstom's reply to the statement of objections in the gas insulated switchgear cartel. The statement of objections, which contained confidential business secrets, had been requested by the High Court in the context of a follow-on damages claim brought by National Grid, one of Alstom's former customers.

For defendants, it will be reassuring to know that the GC will not allow the Commission to disclose contentious documents until the matter has been debated fully in court. Plaintiffs will be relieved that they are not completely shut out of court on the issue of access to Commission documents that might support their claim for damages. The matter does have to be debated at length, however, and the result is likely to be a set of nuanced and finely balanced rules that turn on the circumstances of each individual case.

This order is, therefore, another piece in the increasingly complex puzzle of procedures on access to documents in the European Union for the purposes of follow-on damages actions. There are also wider issues surrounding document protection that must be considered carefully.

Background

Alstom, Siemens, Areva and various other company groups were found to have participated in the switchgear cartel by the European Commission and were fined a total of €750 million. Appeals against these fines are currently pending, but these were not at issue.

Subsequently, National Grid brought an action for damages (*National Grid Electricity Transmission PLC v ABB Ltd and others*, [2012] EWHC 869 (Ch)) before the High Court of England and Wales. In the context of this action, the High Court requested that the Commission, under Article 15(1) of Regulation (EC) No 1/2003, provide the Court with a copy of Alstom's reply to the statement of objections in the cartel investigation. The Commission notified Alstom of its decision to accede to the High Court's request, whereupon Alstom brought proceedings before the GC for annulment of the decision. At the same time, Alstom applied for interim and immediate suspension of the effects of the Commission's decision, pending final judgment.

Present Decision

In *Alstom v Commission* Case T-164/12R 29 November 2012, the GC granted Alstom's request for interim suspension because the three conditions for doing so were satisfied:

- The *prima facie* test: The case raised novel issues of law that could not be considered, *prima facie*, to be without relevance, and so merited thorough examination in the main proceedings.
- The urgency/irreparable harm test: Alstom would suffer serious and irreparable harm if the application for interim measures was dismissed because, once its confidential business secrets had been disclosed, annulment of the decision to communicate that information would be an ineffective remedy.
- The balance of interests test: The balance of interests was in favour of suspension. Suspension would do no more than maintain, for a limited period, the *status quo* that had existed for several years. In the meantime, there was nothing to prevent the Commission from communicating a non-confidential version of the reply to the statement of objections to the High Court, pending judgment in the main action before the GC.

Analysis

Alstom illustrates the complex interplay between the different procedures that can run concurrently in EU cartel cases.

In the background of *Alstom*, the judge knew that the fines imposed by the Commission had already been reduced by the GC, and were still subject to appeal before the Court of Justice of the European Union (CJEU). This, in itself, was not a reason to prevent the judge from examining the civil claim made by National Grid. Quite naturally, the judge invoked the procedures laid down by Regulation (EC) No 1/2003 in order to obtain a copy of a relevant document used in the Commission's investigation. As a result, the judge found himself on the sidelines of another legal battle before the GC, this time over the question of whether or not the Commission was entitled to disclose the requested document in its original confidential form.

The approach adopted by the GC carries messages for both defendants and plaintiffs in follow-on damages claims. For defendants, it will be reassuring to know that the GC will err on the side of caution and will not allow the Commission to disclose contentious documents until the matter has been debated fully in court. Plaintiffs will be relieved that they are not completely shut out of court on the issue of access to Commission documents that might support their claim for damages. The matter does have to be debated at length, however, and the result is likely to be a set of nuanced and finely balanced rules that turn on the circumstances of each individual case.

Wider Document Protection Issues

On the basis of existing case law, both at EU and national level, one can draw up the following catalogue of procedures on access to documents in the European Union:

- *A request by a national court pursuant to Article 15(1) of Regulation (EC) No 1/2003 for the Commission to provide a copy of documents used in the Commission's cartel investigation.*
- *Alstom v Commission, referred to above, is an illustration of this.*
- *A request by a potential plaintiff for access to documents held by the Commission pursuant to Regulation (EC) No 1049/2001, whether or not follow-on damages proceedings have been instituted.*

Illustrations can be found in *CDC Hydrogene Peroxide v European Commission*, Case T-437/08 15 December 2011 (not yet reported in the ECR), in which the document at issue was the index to the Commission's file; and *EnBW Energie Baden-Württemberg AG v Commission* Case T-344/08 22 May 2012 (not yet reported in the ECR) in which many documents were at issue, including documents provided in connection with an immunity or leniency application, replies to Commission requests for information, documents obtained by the Commission during on-site investigations, the confidential version of the statements of objections and the parties replies thereto and internal documents of the Commission.

- *A challenge by a cartel participant to a Commission decision rejecting that party's claim for confidential treatment of parts of the text of the published version of a decision imposing fines on the participants in the cartel.*

An illustration of this can be found in *Akzo Nobel NV and others v Commission* Case T-345/12R 16 November 2012, decided a fortnight before *Alstom* and along very similar lines.

- *A request by a potential plaintiff for access to documents held by the national competition authority.*

In *Pfleiderer vs Bundeskartellamt* Case C-360/09 14 June 2011, the CJEU ruled that the question of access to such documents is governed by national rules of law and procedure. The documents in question in *Pfleiderer* were the cartel files held by the German competition authority.

- *Requests by the plaintiff, pursuant to national procedural rules on discovery, for disclosure of relevant documents held by the defendant.*

By extension of the principle in *Pfleiderer*, these requests are also governed by national rules. In fact, in *National Grid* the High Court applied the guidance given by the CJEU in *Pfleiderer* and ordered two of the defendants to produce certain paragraphs of the Commission's confidential fining decision, and certain parts of one defendant's reply to a Commission request for information.

A Convoluted Outcome

In its present state, the decided case law provides very little guidance on which of the documents held by the Commission can be accessed by a private litigant. In both *CDC Hydrogene Peroxide* and *EnBW Energie Baden-Württemberg*, the GC did annul the Commission's refusal to communicate the requested documents, but only on purely formal grounds, leaving it open to the Commission to adopt a new, more fully reasoned decision.

The only substantive guidance that one can read is that disclosure of the index to a Commission's file is unlikely to undermine the protection of leniency programmes, provided it does not contain any confidential information (*CDC Hydrogene Peroxide*).

After the CJEU's ruling in *Pfleiderer*, the referring Amtsgericht Bonn held that the plaintiff would be granted access only to non-confidential versions of other parts of the file, and not to the leniency applications (Amtsgericht Bonn, Order of 18 January 2012 (51 Gs 53/09)).

As for the decision of the High Court of England and Wales in *National Grid*, this concerned documents held by the parties to the case, not documents held by the Commission. The request for the documents held by the Commission is still unresolved (*Alstom*).

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