Neutral Citation Number: [2012] EWHC 869 (Ch)

Case No: HC08C03243

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2012

**Before** :

**MR JUSTICE ROTH**

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**Between :**

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| **NATIONAL GRID ELECTRICITY TRANSMISSION PLC** | **Claimant** |
| **- and -** | |
| **(1) ABB LTD**<br>**(2) ABB POWER T&D LIMITED**<br>**(3) ABB LIMITED**<br>**(4) ABB HOLDINGS LIMITED**<br>**(5) ABB ASEA BROWN BOVERI LTD**<br>**(6) ALSTOM**<br>**(7) ALSTOM LIMITED**<br>**(8) ALSTOM UK HOLDINGS LIMITED**<br>**(9) ALSTOM HOLDINGS**<br>**(10) AREVA SA**<br>**(11) ALSTOM GRID (UK) LIMITED**<br>**(formerly known as Areva T&D UK Limited)**<br>**(12) T&D HOLDING**<br>**(formerly known as Areva T&D Holding SA)**<br>**(13) SIEMENS AG**<br>**(14) SIEMENS TRANSMISSION & DISTRIBUTION LIMITED**<br>**(15) VA TECH REYROLLE DISTRIBUTION LIMITED**<br>**(16) SIEMENS PLC**<br>**(17) VA TECH (UK) LIMITED**<br>**(18) SIEMENS HOLDINGS PLC**<br>**(19) VA TECH SCHNEIDER HIGH VOLTAGE GMBH** | **Defendants** |

**(20) VA TECH TRANSMISSION & DISTRIBUTION GMBH & CO KEG**
**(21) SIEMENS AKTIENGESELLSCHAFT ÖSTERREICH**
**(22) ALSTOM GRID SAS**
**(formerly known as Areva T&D SA)**
**(23) ALSTOM GRID AG**
**(formerly known as Areva T&D AG)**

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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** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **1st to 5th Defendants**
**Mr S Morris QC** (instructed by **Hogan Lovells International LLP**) for the **6th to 9th, 11th to 12th and 22nd to 23rd Defendants**
**Ms M Demetriou QC (instructed by Clifford Chance LLP)** for the **13th – 21st Defendants**
**Ms K Bacon (**instructed by **Shearman & Sterling (London) LLP)** for the **10th Defendant**
**Mr Nicholas Khan (Legal Service of the European Commission)** for the **European Commission by way of written intervention**

Hearing dates: 8-9 November 2011
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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ROTH

**Mr Justice Roth :**

1. On 24 January 2007, the European Commission issued its decision in Case Comp/F38.899 – Gas Insulated Switchgear ("GIS") ("the Decision").

2. The Decision was addressed to 20 companies and found that they had been engaged in an extensive and sophisticated cartel in breach of what is now Article 101 of the Treaty on the Functioning of the European Union ("TFEU") (previously Article 81 EU) 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 power substations. The Decision 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. The cartel involved the sharing of markets, the allocation of quotas and maintenance of market shares, the allocation of individual GIS projects to designated producers and the fixing of prices by means of complex price arrangements for projects which were not allocated. The Decision imposed fines in the total amount of over €750 million, the largest set of fines imposed as at that date in respect of a single cartel.

3. The two applications before the court are made in a 'follow-on' damages claim for breach of Article 101. The claimant ("NGET") owns and maintains the high-voltage electricity system in England and Wales and operates the system across Great Britain. It alleges that it suffered substantial losses by reason of overcharges resulting from the illegal cartel. The schedule to its Re-Amended 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. 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 had applied for leniency from the Commission but their applications were unsuccessful. Several other addressees of the Decision who are not defendants to the present action had also applied unsuccessfully for leniency.

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. All those appeals have now been dismissed as regards liability, save in some minor respects as to the period of involvement in the infringement. In May 2011, Areva, Alstom and Siemens lodged further appeals to the European Court of Justice ("ECJ"). No hearing dates have yet been set for those appeals and they will not be determined for at least another year.

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

7. On 17 November 2008, NGET commenced this damages claim in the High Court. By a judgment of 12 June 2009, [2009] EWHC 1326 (Ch), the Chancellor rejected an application by the defendants for a stay of proceedings on the basis of the ruling of the ECJ in Case C-344/98 *Masterfoods*. However, the Chancellor recognised, 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, provided that any appeals to the ECJ are relevant to the issues in these proceedings. The Chancellor stated, at para [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 the Chancellor's judgment, pleadings were closed and, after extensive discussion and not without some disagreement between the parties, there has been substantial disclosure.

9. On 4 July 2011, I gave judgment on a contested application for further disclosure: [2011] EWHC 1717 (Ch). The position as at that date is summarised in para [8] of the judgment. As is there explained, NGET had obtained only very limited disclosure from Alstom and Areva since Alstom SA (the 6th defendant) and Areva SA, T&D Holding and Alstom Grid SAS (the 10th, 12th and 22nd defendants) are all French companies and contended that they were prevented from making disclosure by the French "blocking statute": French Law No 68-678 of 26 July 1968 (as subsequently modified). However, 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 which the Commission had obtained from Alstom and Areva. They also obtained copies of any responses of the Alstom and Areva companies to the Commission's

information requests. For the reasons explained in my judgment, this court therefore ordered on 4 July 2011 that ABB and Siemens disclose those documents within a confidentiality ring, the terms of which were determined by a separate order ("the Confidentiality Order") made on 11 July 2011.

10. The order of 4 July 2011 excluded from the scope of disclosure documents created for the purpose of a leniency application and permitted redaction from the documents to be disclosed of passages that contain extracts from documents prepared for the purpose of a leniency application. I shall refer to these two excluded categories compendiously as "leniency materials". NGET had not at that point sought disclosure of such leniency materials.

11. NGET had also sought to obtain copies of Alstom and Areva's responses to the Commission's Statement of Objections ("SO"). Since ABB and Siemens had not received copies of those documents, the route of obtaining disclosure from them was not available. Accordingly, NGET asked the court to request the Commission to provide those documents pursuant to Article 15(1) of Council Regulation (EC) No 1/2003. It was common ground that such documents would normally fall to be disclosed by Alstom and Areva under the ordinary rules for standard disclosure and no party objected to the court making such a request, although several parties indicated that they would make representations to the Commission as to why the request should not be granted: see para [13] of the judgment. I duly made such a request by letter to the Commission on 13 July 2011. That request expressly excluded leniency materials.

12. The solicitors to Alstom and Areva subsequently wrote to the Commission making submissions as to why the Commission should not accede to the court's request. However, by its response dated 28 October 2011 the Director General of the Commission's Competition Directorate stated that it would provide the documents, as requested. The Director General's letter stated:

> "The Commission's general duty of loyal co-operation pursuant to Article 4(3) of the Treaty on European Union requires that it transmits information in its possession to requesting national courts, except: (i) when this would jeopardise the protection of information covered by the obligation of professional secrecy or (ii) in case of overriding reasons relating to the need to safeguard the interests of the Union or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to the Commission.

13. The Commission accepted that the issue which gave rise to the first exception was addressed by the Confidentiality Order. As regards the second exception, the Director General stated:

> "… I consider that, in the very particular circumstances of this case, the disclosure of the requested documents would not unduly interfere with the functioning of the Union. In this respect, the Commission firstly notes that, having regard to

> point 26 of the Notice on Cooperation with National Courts, you have excluded leniency documents (as defined in paragraph 10 of your judgment of 4 July 2011 in this case) from the scope of your Article 15(1) request (see paragraph 12 of your judgment). I also consider the following elements to be particularly relevant: (i) your request comes at a time that the Commission has already adopted its decision in the *GIS* case and (ii) other parties asserted impediments to disclosure under French law (Alstom and Areva), thereby rendering a disclosure order under English rules of civil procedure more difficult, if not impossible."

14. The Commission issued its formal decision letters to that effect to Alstom and Areva some three months later, on 26 January 2012. Alstom and Areva have apparently both indicated that they intend to challenge this decision before the General Court and therefore the documents have not yet been supplied.

**The adjourned disclosure application**

15. In its application as originally issued, NGET had also sought inclusion of the confidential version of the Decision within the request which the court was asked to address to the Commission under Article 15(1). However, on the day before the hearing of NGET's application, the ECJ issued its judgment in Case C-360/09 *Pfleiderer* [2011] 5 CMLR 219. As a result, NGET changed its stance and submitted that this document should be disclosed directly by ABB and Siemens. Moreover, *Pfleiderer* raised the possibility that the exclusion and redaction of leniency materials from the scope of disclosure may not be necessary. The *Pfleiderer* judgment was clearly very significant and the question whether it applied to leniency materials submitted to the Commission and, if so, how it should be applied in the context of the Commission's leniency policy required fuller consideration. NGET submitted that it would therefore be appropriate to give the Commission the opportunity to present its views to the court and, unsurprisingly, none of the defendants objected. I agreed to that course and, accordingly, the balance of NGET's disclosure application was adjourned, both to enable NGET to submit an amended application which the defendants could consider and to permit the Commission to intervene in the proceedings if it so wished.

16. NGET duly amended its application (for which permission was formally granted on 22 June 2011). It now seeks disclosure from ABB and/or Siemens of:

    i) the confidential version of the Decision;

    ii) the responses (including any accompanying documents) to the Commission's Statement of Objections by investigated companies in the ABB defendant group;

    iii) the responses by the investigated companies in the ABB defendant group to requests for information made by the Commission that explain the meaning of pre-existing documents relating to the operation and/or effects of the cartel, or otherwise provide information on the operation and/or effects of the cartel;

iv) save insofar as disclosed pursuant to the order of 4 July 2011, the responses by investigated companies in the Alstom and Areva defendant groups to requests for information made by the Commission that explain the meaning of pre-existing documents relating to the operation and/or effects of the cartel, or otherwise provide information on the operation and/or effects of the cartel.

17. It is common ground that those documents will or may include leniency materials[2] and that inspection should be restricted to those within the confidentiality ring. In the rest of this judgment, the term disclosure is used as encompassing permission to inspect, since the fact that the relevant defendants hold copies of these documents is not in question.

18. In my letter to the Commission of 13 July 2011, I invited the Commission to submit written observations to the court pursuant to Article 15(3) of Regulation 1/2003, with regard to the following three issues; I also stated that the court would grant the Commission permission to make oral submissions with regard to those issues at the adjourned hearing:

> "(1) Whether the ruling in *Pfleiderer* applies, directly or by analogy, to disclosure of leniency materials in the context of a decision by the Commission;
>
> (2) Whether the national court has jurisdiction to determine an application for disclosure of documents containing leniency materials submitted to the Commission or whether such a request has to be made to the Commission pursuant to Article 15(1) of Regulation 1/2003;
>
> (3) If the national court has jurisdiction to order disclosure of such materials, what are the factors which militate in favour of or against an order being made that are to be weighed in accordance with paragraphs 30-31 of the ruling in *Pfleiderer*."

19. The Commission decided that it would intervene pursuant to Article 15(3) by way of written observations. Regrettably, these were not submitted by 21 October as requested by the court but only (with an apology for the delay) on 3 November, a few days before the hearing. Nonetheless, those submissions, on what is believed to be the first occasion when the Commission has intervened pursuant to Article 15(3) in the English courts, have been of considerable assistance. I am also grateful to all counsel for giving full consideration to the Commission's views at short notice in their skeleton arguments.

*Pfleiderer*

20. The judgment of the Grand Chamber of the ECJ is central to the present application and it is therefore appropriate to refer to it in detail (with some repetition from my previous judgment).

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[2] Indeed, the only purpose of category (iv) is to include leniency materials that were excluded or redacted in the prior disclosure of those documents under the order of 4 July 2011.

21. *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]?"

22. In its judgment, the ECJ observed that although Commission notices and guidelines may have some effect on the practice of national competition authorities, they 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": para 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: para 24.

23. The ECJ proceeded to state as follows:

> "25 …, as maintained by the Commission and the Member States which have submitted observations, leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU.
>
> 26 The effectiveness of those programmes could, however, be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, even if the national competition authorities were to

grant to the applicant for leniency exemption, in whole or in part, from the fine which they could have imposed.

27 The view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes, particularly when, pursuant to Articles 11 and 12 of Regulation No 1/2003, the Commission and the national competition authorities might exchange information which that person has voluntarily provided.

28 Nevertheless, it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition (see Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraphs 24 and 26, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 59 and 61).

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.

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.

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."

*Does* Pfleiderer *apply to the Commission leniency programme?*

24. For Alstom, Mr Morris QC submitted that the ruling in *Pfleiderer* governs only documents subject to a national leniency procedure of a Member State and does not apply in the context of the Commission's leniency procedure. He argued that in the latter context, a uniform EU-wide approach was required and that the Commission rather than various national courts was best placed to decide on the effect of disclosure of leniency materials. Ms Demetriou QC on behalf of Siemens adopted those submissions.

25. It is of course the case that in *Pfleiderer* the ECJ was concerned directly with documents obtained by the German national competition authority under its leniency procedure. That explains the court's reference in para 20 of the judgment to a national leniency programme. However, as the Commission rightly emphasised in its written observations, the reasoning of the ECJ is expressed in general terms. Hence, the court refers in para 23 of its judgment to the application of national rules on access to documents "relating to leniency procedures" without qualification. The reasoning in paras 25-32 at no point draws any distinction between a leniency programme of a national authority and the Commission. It should be recalled that the national leniency programme at issue in *Pfleiderer* was concerned with enforcement of the same legislation as the Commission (i.e. Article 101 TFEU). Significantly, the substance of the court's judgment, expressing the general requirements and principles of EU law, apply with equal force to a national or EU leniency programme.

26. Although the Commission may be well placed to consider the effect of disclosure on its leniency programme, that does not mean that it should be the arbiter of disclosure since it can present its views to the national court, as it indeed has done in the present case. Moreover, 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. I attach significance to the fact that the Commission in its observations does not suggest that there is any policy reason to give *Pfleiderer* such a restricted application contrary to its ordinary meaning. I conclude that the ruling of the ECJ clearly applies to the Commission leniency programme as well as to national leniency programmes.

*Does the Commission have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency programme?*

27. This question to an extent overlaps with the previous issue. Article 15(1) of Regulation 1/2003 provides, insofar as material:

> "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 …"

28. Accordingly, it is doubtless possible for the national court faced with such an issue to request the Commission to transmit to it the leniency materials. Where such documents are not available from the parties to the litigation under national procedures for access or disclosure, there may indeed be no alternative, as with the Article 15(1) request made by the court in the present case: see paras 11-13 above. However, there is nothing in Regulation 1/2003 that even remotely suggests that the court is precluded from applying its national procedures for access to documents. On the contrary, the Regulation emphasises the role of national courts in the enforcement of EU competition law: see recital (7). And the ECJ stated expressly in *Pfleiderer* that "in the absence of binding regulation under EU law on the subject" the question of access to leniency materials by the victim of a cartel is to be determined under national rules: para 23 of the judgment.

29. Accordingly, I accept the submission by the Commission that "Article 15 does not oust the jurisdiction of national courts to determine their procedural rules, such as those relating to the disclosure of documents." I would add that the contrary would, in my view, create a highly undesirable situation. 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*. Compulsory resort to the Commission under Article 15(1), with potential appeals against its decisions to the General Court, would also give rise to significant delay, as is demonstrated in the present case: see para 14 above.

*Application of Pfleiderer in the present case*

30. *Pfleiderer* requires the court to conduct a balancing exercise, weighing the interest in disclosure as against the need to protect an effective leniency programme. This is not an easy exercise because the considerations that apply on the two sides are of a very different character, although it has similarities to the task of the court where a claim to public interest immunity is raised: see per Lord Clarke in *Al Rawi v Security Service* [2011] UKSC 34, [2011] 3 WLR 388 at [145]. Here, the ECJ makes clear that this is to be done on a case-by-case basis, "taking into account all the relevant factors in the case": *Pfleiderer*, para 31.

31. At the outset, it is important to have regard to what documents are being sought by way of disclosure in this case. The comprehensive corporate leniency statements made to the Commission were made orally, in accordance with the Commission's practice, and the record or transcript of those statements is not held by any of the parties. What are at issue are the extracts from those statements incorporated by the Commission in the confidential version of its Decision, the reply by ABB to the SO,

and the replies by ABB and Areva as leniency applicants to requests for further information or explanations from the Commission, which in that regard may supplement their corporate leniency statements. (NGET also sought unredacted versions of such replies by Alstom, but it appears that there were no such information requests to Alstom so this does not arise.)

32. Several of the defendants submitted that a very relevant factor was that disclosure would defeat the legitimate expectations of the leniency applicants that their statements would be protected from disclosure. They relied on the statements in the Commission's notices that it would not make available leniency statements to complainants nor provide them to national courts in response to a request under Article 15(1) without the consent of the leniency applicant: 2006 Leniency Notice,[3] para 31; Notice on the cooperation between the Commission and national courts,[4] para 26.

33. In fact, the leniency applications in the present case were made under the terms of the Commission's 2002 Leniency Notice, before the 2006 Notice was issued, and the earlier notice contained no equivalent provision. But quite aside from that distinction, these Notices concern only the practice and conduct of the Commission. For this reason, Mr Hoskins QC, appearing for ABB, submitted that this was a case of what he termed "legitimate expectation light". By contrast, the Commission in its written submissions, although contending for other reasons that the court should not order disclosure, does not suggest that to do otherwise might defeat any legitimate expectation of ABB or Areva.

34. I do not consider that the principle of legitimate expectation has any bearing in the present case. Both the 2002 and the 2006 versions of the Leniency Notice make clear that the grant of immunity or leniency cannot protect an undertaking from the civil law consequences of its infringement of Article 101: 2002 Notice, para 31; 2006 Notice, para 39. The Notices cannot govern the application by a national court of its procedural rules in civil proceedings, as the ECJ expressly stated in *Pfleiderer*: para 21. Although Mazak AG in his Opinion in *Pfleiderer* expressed the view that the leniency applicants may have a legitimate expectation that leniency documents would not be disclosed, that view was not adopted by the ECJ. Nor did the Court make its ruling prospective, so that it would apply only to leniency applications made after the date of the judgment when the applicants would be aware of the potential for disclosure. The fact that ABB and Areva may not have anticipated the ECJ's judgment in *Pfleiderer*, insofar as they gave the matter any thought at all, is not in my view a reason why the balancing exercise prescribed by the ECJ should be conducted in a different way in their case.

35. I accept the Commission's submission that one relevant factor is whether disclosure would increase the leniency applicants' exposure to liability compared to the liability of parties that did not cooperate. If only ABB had been sued (e.g., on the basis that it was not appealing the Decision so that there was no reason to delay a trial), that would be a powerful factor against disclosure of leniency materials, even allowing for

[3] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/17.
[4] OJ 2004 C101/54.

the fact that ABB might then have been able to make a contribution claim against the other participants in the cartel. However, as the Commission appears to recognise (at para 17.2 of its observations), there is no prejudice of that kind to ABB or Areva in the present action. The other defendant groups are alleged to be equally liable with them. Nor does there appear any realistic prospect that NGET would apply to join any of the other leniency applicants who have not been sued so far as a result of the disclosure now sought.

36. The defendants, along with the Commission, nonetheless contend that there may be a *perception* that leniency applicants may be at such a relative disadvantage if disclosure were ordered, and this would serve to deter undertakings from seeking leniency in future cases. However, in the first place, if there might have been such a perception, the terms of this judgment should serve to dispel it. Secondly, if that argument was decisive, it would operate to trump disclosure in any case. There is no doubt that leniency programmes have proved very effective tools in the detection of cartels. Almost all cartel decisions of the Commission now include a grant of leniency. That is the premise on which the balancing exercise directed by *Pfleiderer* proceeds. It was for that reason that Mazak AG in his Opinion advised that the court should rule that disclosure of leniency materials should not be permitted. But the ECJ declined to adopt that approach.

37. It is clearly relevant to consider the potential effect of a disclosure order in this case in deterring potential leniency applicants as regards other cartels as yet uncovered on the basis that subsequent disclosure may assist private claims against them. I accept that there may be some deterrent effect, and that is an important factor to put in the balance against disclosure. However, in assessing that factor I regard as relevant the gravity and duration of the infringement, and the consequent scale of the fines, imposed in this case. ABB, as a result of receiving immunity, avoided a fine calculated at over €215 million: Decision, recital 522. That reflects the fact that this was a "very serious" cartel lasting almost 16 years (and a 50% increase because of ABB's involvement in a prior cartel): Decision, recitals 479, 510. Although any consideration of what would have been sufficient to deter ABB from informing the Commision of the cartel and thus obtaining immunity is inherently speculative, it is significant that a decision not to go to the Commission would not have given ABB any guarantee of protection from civil liability since if any of the other participants had informed the Commission the cartel would have been exposed. Then ABB would similarly have been liable to civil claims but in addition would have faced a very substantial fine. Of course, any disincentive to seek leniency because of potential disclosure in civil litigation might have dissuaded all the other participants from approaching the Commission, but this would have been a high-risk gamble for ABB to take. The same considerations would accordingly apply by analogy for an undertaking deciding whether to approach the Commission with information under its leniency programme as regards another very serious cartel.

38. Although several other participants in the cartel made leniency applications (including Areva), the information which they provided did not give significant (or in some cases, any) added value to the Commission's investigation and all their applications for leniency were unsuccessful: Decision, recitals 530-550.

39. The Commission also submits that a relevant factor is whether the disclosure sought is proportionate, having regard to the potentially adverse effect of disclosure on leniency programmes. I agree, and indeed proportionality is in any event a consideration in applying the English rules on disclosure and inspection: CPR rule 31.3(2) and PD 31A, para 2. Here, because of the balancing exercise proportionality assumes particular significance in a different context from reference to the size of the claim and the amount of work involved. In my judgment, proportionality should be considered in terms of (a) whether the information is available from other sources, and (b) the relevance of the leniency materials to the issues in this case.

40. Before addressing those two aspects specifically, it is appropriate to have regard to the particular evidential difficulty that confronts a claimant seeking damages for an infringement of the competition rules. These were well set out in the Commission's Staff Working Paper accompanying its 2008 White Paper on Damages actions for breach of the EC antitrust rules, at para 89:

> "Even where claimants are in a position to describe and prove the actual elements necessary for finding an infringement, having to demonstrate in detail the causation and quantification of their damages remains a particular difficulty in competition cases. To establish their damage, claimants have to compare the anti-competitive situation to a situation which would have existed in the absence of the infringement, i.e. a hypothetical competitive market. In a breach of contract case, a claimant can normally use market prices at the time of the breach of contract as the benchmark for calculating his loss. However, in a typical competition case, the claimant cannot rely on the prices at the time of the infringement and has to establish what the price would have been in the absence of the restriction of competition. For this purpose, he will often depend on information that is in the sphere of the defendant and possibly their partners in the infringement: for example, notes on the price overcharges agreed secretly between cartel members, details on how and when they influenced price and other parameters of competition, or internal documents of the infringer showing his analysis of market conditions and developments. Also the reconstruction of a hypothetical competitive market to quantify the damage caused by the infringer usually presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market. The same or similar types of difficulty arise in the context of causation, e.g. when claimants try to identify the precise elements of anti-competitive behaviour by an infringer that have caused the claimants damage, or the extent to which several infringers had individually contributed to the damage caused."

41. What the Commission proceeded to describe as "the structural asymmetry in the distribution of information required by claimants" forms the background to consideration of the two aspects of proportionality.

(a) Other sources of information

42. As regards other sources, the disclosure which has taken place is of contemporaneous (or 'pre-existing') documents. It appears that further disclosure of that nature is being provided. However, the Decision records, at recital 170:

> "At both the worldwide level and the European level, the participants took elaborate precautions in order to disguise or conceal their contacts and meetings. These concealment measures existed since the start of the cartel and multiplied from 2002 onwards. The participants continued to use these measures until the end of the cartel."

43. This was a very sophisticated international cartel operated with regular meetings. Of its nature, documents which reveal the cartel's activities are limited and their meaning is often opaque. It is presumably for those reasons that the Commission relied on information and extracts from the leniency statements in articulating its findings about the cartel in its Decision. Although the Commission suggested that NGET might be able to get instead appropriate evidence by way of witness statements from employees of the participants in the cartel that supplied the UK market, none of the defendants suggested that such individuals are likely to provide NGET with statements. And even statements from a few individuals are unlikely to be an adequate substitute for the comprehensive overview of the cartel obtained by the Commission from the participating undertakings.

44. Accordingly, in the circumstances of this case, to the extent that the information in the disclosure sought is of real assistance, I do not consider that other means are available, at least not without excessive difficulty, for NGET to derive that information.

(b) Relevance

45. The Commission in its observations points out that the United Kingdom was treated as a "home country" for the purpose of the cartel, and therefore not included in the cartel quota calculations at either worldwide or European level. The Commission notes that "the functioning and effect of the cartel in the UK market [are] not a central preoccupation of the Decision" and states that the Decision "therefore says little about how the cartel functioned in relation to the United Kingdom market" (paras 20.3-20.4).

46. These submissions reflect the findings in the Decision regarding 'home countries'. To quote from the Decision:

> "(114) … Japan on one side and the European domestic markets of the European members of the cartel on the other side (where some of them had their stronghold) were respectively allocated as a block (100%) to the Japanese group or to the European group. Those territories were known as 'home markets' or 'home countries'. Thus, Japanese projects did not need to be discussed with the European members and

> European projects originating in 'home countries' did not need to be discussed with the Japanese counterparts. Consequently, none of those projects had to be accounted for.
>
> (115) Also amongst the European members of the cartel there was the understanding that projects in 'home countries' within Europe (see recitals (133) to (138) below) were to be left to 'home producers'. Sometimes there were several 'home producers' for a single 'home country'. The other European cartel members were not supposed to intervene in the arrangement amongst 'home producers'. Therefore, European projects originating in 'home countries' did not need to be discussed with the other European producers and they did not have to be accounted for.
>
> ……
>
> (125) The worldwide sharing of projects relied on the 'common understanding' that (a) the Japanese should not quote for projects in Europe and vice-versa, and (b) Japan and the European countries where the European cartel members had their stronghold were reserved to the cartel members concerned, without interference by the others….
>
> …..
>
> (133) The cartel applied a 'home-producer' principle, that is to say, certain national markets were reserved for one, sometimes several, companies with a traditional stronghold in these markets. These were the 'home countries' or 'home markets'. They were not discussed amongst the rest of cartel members and the volumes sold in these countries were left outside the quota calculation both at worldwide and at European level, unlike the volumes sold in the other markets."

47. The United Kingdom was such a 'home country': recitals 134 and 138.

48. However, this was a worldwide cartel and the Commission found that the market for GIS projects was "at least EEA wide": recital 78. Mr Turner QC, appearing with Mr Beard QC for NGET, submitted that the effect on prices in the EEA outside the 'home countries' is therefore relevant to the exercise of constructing notional competitive prices that would serve as the basis for NGET's damages claim. He contended that the information was relevant to ascertain how successful the cartel was over the prolonged period of its operation, and when it was perceived to be working well and when it was perceived to be working badly. The fact that the UK market or projects in the UK may not have been expressly discussed did not, therefore, render details about the functioning of the cartel irrelevant.

49. I broadly accept those submissions. The United Kingdom was clearly not excluded from the cartel but, on the contrary, was an expressly protected market under its

terms. The task of seeking to determine what prices would have been in a hypothetical competitive market is a difficult one. Since the relevant geographic market here included at least the whole of the EEA, the operation and effectiveness of the cartel outside the United Kingdom is relevant to consideration of a benchmark price or prices.

50. Furthermore, since many of the documents that have been disclosed are opaque or, literally, cryptic, for the reasons set out above, explanations provided as part of the leniency process as to the meaning of such documents may clearly be very relevant.

51. Accordingly, on this issue I do not find the submissions of the Commission of such assistance. In its intervention, the Commission rightly emphasises that its knowledge of the details of the claim in this case is limited, and it of course has not heard NGET's arguments as to why information on the operation of the cartel outside the United Kingdom is relevant.

52. However, it does not follow that all of the documents now sought are relevant on the basis summarised above. The mere fact that it is common ground that according to the relatively low threshold for standard disclosure these documents would otherwise fall to be disclosed is not determinative when there is a powerful countervailing factor to be weighed against disclosure. It is necessary to ascertain whether the particular documents or parts of the documents really are of such potential relevance that specific disclosure should be ordered. Just as a blanket objection to disclosure on the grounds that this might prejudice the Commission's leniency programme cannot, without more, be accepted, so also would it be wrong to permit disclosure of the entirety of the leniency materials sought without closer examination.

53. In *Wallace Smith Trust Co v Deloitte* [1997] 1 WLR 257, the claimant bank by its liquidators brought proceedings against its former auditors alleging that they had failed to detect that its business was being fraudulently conducted. The claimant sought disclosure of the defendants' copies of the transcripts of interviews conducted by the Serious Fraud Office in the course of a criminal investigation into the affairs of the company. The Court of Appeal upheld the judge's dismissal of the opposition to disclosure on grounds of public interest immunity, but held that the judge should not have refused to order disclosure on the ground that the documents were not necessary for the fair disposal of the action without inspecting the documents. In his judgment (with which Waite LJ agreed), Neill LJ referred to the objection made to disclosure on ground of confidentiality, and stated at 267-68:

> "The judge has a discretion whether or not to inspect the documents. But if the party seeking discovery shows that the production of the documents may be necessary for the fair disposal of the action an order should normally only be refused after the court has examined the documents and considered them in the light of the material already in the applicant's possession. Indeed, as is apparent from the speech of Lord Wilberforce in the *Nassé* case [1980] AC 1028 the court will need to inspect the documents where relevance is admitted but it is asserted that the documents are confidential. Similarly, inspection is likely to be the only safe course where it seems

> probable that the documents contain a version of events given soon after their occurrence and at a time when the recollection of the witness would have been fresh."

54. Although decided under the former rules governing production of documents under the RSC, the test then applicable under Order 24, r 13 of whether production of the documents, which it was conceded were relevant, was "necessary … for disposing fairly of the case" is equally apposite in the present context.

55. Accordingly, before determining an application under the *Pfleiderer* test where relevance, or the degree of relevance, is in issue, unless the decision is obvious I consider that it is appropriate for the court to inspect the documents and consider them individually before reaching a decision. None of the parties objected to my taking that course, and I was duly supplied with the various documents in the weeks following the hearing.

*Conclusion*

56. Having read the documents, it seems to me that the Decision is in a different category from the other documents. It sets out the Commission's findings of the infringement, including the nature of the cartel and how it operated. The unredacted text of the Decision is made available to the EU Courts on the appeals brought by some of the present defendants. Moreover, the findings are likely to be binding on the English court in this claim against the addressees of the Decision arising out of the same facts: cp *Inntrepreneur Pub Co v Crehan* [2006] UKHL 38, [2007] 1 AC 333. It would be unsatisfactory in those circumstances if the court could not see the relevant parts of the Decision, and therefore if it was not available to the claimant.

57. Some of the redactions from the non-confidential version of the Decision are made on the grounds of commercial confidentiality, or, as the Commission points out in its submissions, to reflect its policy of not publicly disclosing the source of evidence given through corporate statements. Those concerns are met by restricting any disclosure to the confidentiality ring. They do not affect a leniency applicant's defence to the damages claim.

58. The Decision comprises 552 recital paragraphs and two annexes. Having read the relevant parts of the Decision in unredacted form, I conclude that a number, but by no means all, of the redacted passages should be disclosed. I set out the list of paragraphs (or parts of paragraphs) to be disclosed in the Appendix to this judgment. I should add that although, at my suggestion, NGET supplied a list of the paragraphs which it thought were the most likely to be relevant, in the end that was not of great assistance since NGET's advisers obviously could only guess at what might be contained in redacted passages and they would not be aware of a large number of redacted footnotes since those are not evident at all from the non-confidential version of the Decision.

59. As regards the other documents covered by the amended application, I consider that only very limited passages from a few of those documents should be disclosed. From the responses by ABB to the information requests from the Commission, those are passages which for the most part provide explanations of some of the pre-existing

documents supplied by ABB to the Commission, which as I understand it have already been disclosed by ABB to NGET, or which explain the way the cartel operated. From the response of Areva to the information request from the Commission, the version of this document held by ABB and Siemens is in itself in redacted form. I find that in respect of only one answer which gives some explanation of the nature of the discussions at cartel meetings, and the documents involved, is the potential relevance of the material such that it should be disclosed. I set out those references in the Appendix. As regards all the other ABB leniency materials, including the responses by ABB to the SO, and the other parts of the Areva document, I find that they are not of such relevance to these proceedings and that the interest of protecting information supplied under the leniency programme outweighs the interest of providing disclosure to assist this compensation claim.

60. I should add that I was supplied with a copy (both in original and translation) of the judgment of the Amstgericht Bonn of 30 January 2012 in the *Pfleiderer* case, where the German court ruled against disclosure of leniency documents. However, I find that of little assistance since, as the ECJ made clear, the balancing exercise is to be conducted on a case-by-case basis; it is therefore very fact-sensitive to the particular proceedings, in the context of the relevant national procedural rules. Nor do I think that there is any ground for making a reference to the ECJ for a preliminary ruling, as suggested in particular by Mr Morris for Alstom. I regard the conclusion that *Pfleiderer* applies in this case and that EU law does not preclude the English court from ordering disclosure as *actes clairs.* And as for the particular application of the balancing exercise to the documents sought by NGET's application, that is, as I have just stated, a fact-sensitive exercise to be conducted on the basis prescribed by the ECJ in its ruling in *Pfleiderer* and does not therefore give rise to a question of EU law for reference.[5]

## The Request for Further Information

61. On 14 October 2011, NGET served a Request for Further Information under CPR Part 18 ("Part 18 Request") on ABB and Siemens. By its application issued on 1 November 2011, NGET seeks an order that they reply to the four questions (and various sub-questions) in the Request.

62. Question 1 asks in relation to the GIS cartel that is the subject of the Decision:

> "(a) please identify who were the main individuals acting on behalf of your company in relation to the agreement and/or implementation of the cartel between 15 April 1988 and 2 March 2004 (the "relevant periods");
>
> (b) save insofar as covered by (a) above, please identify who were the main individuals acting on behalf of your company in relation to the Agreement and/or implementation of the cartel in the relevant period in the UK;

[5] The pending reference from the Austrian court that is referred to by the Commission in its intervention concerns the application of particular provisions of Austrian national law and is not relevant to the issues in the present case: see OJ 2011 C13/5.

> (c) please set out the roles that were played in the cartel by each individual referred to in (a) and (b) above, in relation to each period of time during which they took part."

63. Question 2 refers to a passage in the Decision that says that codes were given to individuals in the cartel to cover their identities and asks which of the individuals identified in answer to question 1 were given codes and what these codes were.

64. Question 3 is as follows:

> "Please:
>
> (a) identify which of the individuals referred to in paragraph 1 above are still within your employment;
>
> (b) state whether, during the relevant period, any of these individuals still within your employment who took part in the cartel in the UK gave, or were given, an estimate of the amount by which the prices of GIS or GIS projects, or particular descriptions of GIS or GIS projects (such as a 400 kV equivalent bay), were, would be, or may be, raised, or of the extent to which your company or any participant in the cartel would or may benefit, as a result of any of the activities of the cartel (i) generally; or (ii) in the UK; or (iii) in relation to any of the projects listed in Appendix 2 to the Particulars of Claim.
>
> (c) if the answer to (b) above is Yes, please provide details of the estimate."

65. Question 4 refers to three documents obtained by way of disclosure, the third of which is confidential. The first document contains reference to a "UK forum". On that basis, the request made is as follows:

> "Please state, insofar as this is within the knowledge of the individuals still within your employment who took part in the cartel in the UK, how the "home country" cartel arrangement in the UK was operated in the relevant period, by explaining and setting out:
>
> (a) what was the "*UK forum*", what were its rules, how it was operated, and which representatives of your company or of other participants in the cartel were involved in it at any material time;
>
> (b) to which particular cartel members the supply to UK customers were reserved, and for which period and in what shares or proportions or amounts;
>
> (c) how these shares or proportions or amounts were calculated, based on different elements of GIS;

> (d) how the cartel arrangement in the UK was implemented to ensure that each relevant cartel member supplied no more than the shares or proportions or amounts allowed;
>
> (e) in particular (without prejudice to the foregoing), having regard to document SD009823 [CONFIDENTIAL] and to the methodology referred to briefly in recital 165 of the Decision, what pricing or weighting formulae were used (and explain precisely how were they used) in order to value different elements of GIS such as 400kV bays or 132kV bays, and to value GIS projects as a whole;
>
> (f) how the cartel arrangement in the UK was monitored to ensure that each relevant cartel member supplied no more than the shares or proportions or amounts concerned, and what "compensation" arrangements were applied under the cartel rules."

66. On the same day as the application was issued, Siemens consented to the making of an order that it provide "the names and positions of the individuals acting on their behalf identified in [the Decision]" and identify which of them remain employed by one of the Siemens defendants. Siemens explained that it required a formal court order to that effect because of German data protection law. Although not framed in precisely the same terms as NGET's question 1(a), Mr Turner did not suggest that this does not effectively provide an answer. Siemens duly provided on 23 November 2011 a list of 14 individuals and stated that none of them remains in its employment. I note that this list is in fact drawn from Annex 2 to the Decision, disclosure of which is being ordered in any event on NGET's other application.

67. Prior to the hearing, ABB had served an answer to Questions 1(a) and 3(a) but said that it did not have the information to answer Question 2. Moreover, its answer to Question 1(a), although identifying four individuals, was slightly ambiguous. In the hearing, ABB agreed to clarify that answer and to take instructions from the individuals whom they still employed as regards the issue of codes and thus respond to Question 2. ABB served an Amended Response to the Part 18 Request on 16 December 2011. I consider that the Amended Response effectively answers Question 1(a) and answers also Question 2 in that it states that so far as the individuals it has contacted are aware, no codes were in fact used for individuals in the cartel. There are grounds to suppose that the statement to the contrary in the Decision is the result of a misunderstanding of information provided to the Commission by ABB, regarding codes used by an individual for messages on his encrypted mobile telephone.

68. Both ABB and Siemens refused to answer the other questions in the Part 18 Request. They both provided evidence from the partners in their respective solicitors that the requested information is not at present in the knowledge of their clients. That is explained on the basis that neither the amount by which the cartel may have raised prices nor the operation of the cartel in the United Kingdom was a focus of the Commission's investigation. Moreover, in Siemens' case, none of the relevant individuals are still in its employment, which explains its inability to provide any

answer to Question 2. The solicitors to ABB and Siemens state that at this stage of the litigation, with no date yet set for witness statements, they have not yet conducted full interviews with all the potential witnesses and that in those circumstances if they had to provide this information now it would be a burdensome exercise.

69. Moreover, Mr Hoskins and Ms Demetriou submitted that it would be entirely inappropriate and premature to require the defendants to provide such information now. The defendants are entitled to set out their evidence on the matters in issue in their witness statements and the Part 18 procedure should not be used to force a defendant, in adversarial litigation, to provide what amounts to fragmentary witness evidence at the behest of the claimant at an earlier stage in the proceedings.

70. For NGET, Mr Turner referred to the opaque nature of many of the pre-existing documents, as mentioned above. He submitted that disclosure had provided little information on the operation of the cartel in the United Kingdom or the effect which the participants thought the cartel was having on price. In the nature of cartels, discussion of the latter is likely to have occurred. He said that some three years since the litigation started, NGET has therefore made little progress in quantifying its damages. The defendants should by now have taken steps to gather this information and equality of arms means that they should provide it to the claimant so that the action could progress.

71. CPR rule 18.1(1) states, insofar as material:

> "The court may at any time order a party to –
>
> (a) clarify any matter which is in dispute in the proceedings; or
>
> (b) give additional information in relation to any such matter,
>
> whether or not the matter is contained or referred to in a statement of case."

72. PD 18 para 1.2 provides:

> "A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or understand the case he has to meet."

73. The making of a Part 18 Request, as here, that is not directed at a matter in a statement of case has taken the place of interrogatories under the RSC. In *Hall v Sevalco Ltd* [1996] PIQR 344, the Court of Appeal considered the question of the appropriate time for service of interrogatories. Lord Woolf MR, giving the judgment of the court, stated:

> "The guiding principle in this field must be that laid down in R.S.C. Ord. 26, r.1(1), that interrogatories must be necessary either for disposing fairly of the cause or matter or for saving costs. Necessity is a stringent test. It cannot be necessary to interrogate to obtain information or admissions which are or are

> likely to be contained in pleadings, medical reports, discoverable documents or witness statements unless, exceptionally, a clear litigious purpose will be served by obtaining such information or admissions on affidavit. As a general statement we would agree with the statement in the Guide to Commercial Court Practice, paragraph 11.6 (Supreme Court Practice 1995, volume 1, para. 72/A14) endorsed by Coleman J. that
>
> > "Suitable times to interrogate (if at all) will probably be after discovery and after exchange of witness statements."
>
> Interrogatories should not be regarded as a source of ammunition to be routinely discharged as part of an interlocutory bombardment preceding the main battle. The interrogator must be able to show that his interrogatories, if answered when served, will serve a clear litigious purpose by saving costs or promoting the fair and efficient conduct of the action."

74. Perhaps because that case concerned the RSC and not the CPR, none of the parties to this application cited it to the court. However, those provisions of RSC Order 26 were introduced only in 1989 following the report of the Civil Justice Review Body, and I consider that the observations of Lord Woolf apply, mutatis mutandis, to the making of a Part 18 Request that does not seek further information regarding a pleading: cf *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14, [2011] 1 WLR 2735, per Lloyd LJ at [74].

75. The submissions of Mr Turner doubtless amount to the contention that in the particular circumstances of a cartel damages claim, given the asymmetry of information as between the parties, the supply of the information here requested does serve a clear litigious purpose and promote the fair conduct of the action. However, that does not in my judgment meet the objection to seeking such information in advance of witness statements. This is not a case where the further information requested may be very significant for a summary judgment application, a consideration that might provide a good reason for making a Part 18 request at an early stage. One reason why these proceedings have made such slow progress is that no trial can take place in any event until all the relevant appeals before the EU courts are determined: see para 7 above. It may be, as Mr Turner indicated, that it will be another year before witness statements are exchanged. But the answers now given to Questions 1(a) and 3(a) identifying former employees will enable NGET to approach those individuals to see if they are prepared to provide statements before memories are dimmed further.

76. I have no doubt that the information in the other parts of this Request appears to be very relevant and, subject to the timing of the request, meets the requirement of PD 18, para 1.2. Indeed, Questions 3(b) and (c), as Mr Turner recognised, go evidentially to the heart of the case. Early provision of that information would doubtless assist NGET in that regard. But that only reinforces the argument of Mr Hoskins and Ms Demetriou that the defendants should not be compelled to have their witness evidence

ready at this stage, especially when both ABB and Siemens may seek to call evidence from individuals no longer in their employment. A reply to a Part 18 Request has to be verified by a statement of truth, and therefore there is a significant burden in responding to questions such as these to check the proposed answers with all accessible sources of relevant information.

77. However, I consider that the substance of Question 4(a) is in a different category. It addresses references in a document disclosed by Siemens that is expressly referred to in the Decision: see recital 138. It appears to emanate from the 20th defendant, which is now part of the Siemens group. The document discusses potential supply by another cartel participant to the UK market, and states that this would constitute "Bad Behaviour" as discussed in "the UK forum". NGET is essentially asking for clarification of this statement, to explain what this UK forum was. The terms of the request are restricted to information in the knowledge of those still employed by the defendants. I do not think that it is appropriate to require ABB to respond to this Question since it does not relate to their document. But as regards Siemens, and the 20th defendant in particular, this is a document that was clearly regarded as significant by the Commission during its investigations; and the concept of a "UK forum" is clearly of very direct relevance to this action. In those circumstances, I would find it very surprising if Siemens and the 20th defendant had not by now investigated what was meant by this statement. Even if they have not yet done so, to carry out an investigation now among their current employees does not in my view constitute disproportionate work in the overall context of this case. To the extent that the question therefore seeks an explanation of the statement in their document, I shall order that Siemens provides the information. I therefore exclude from the order the words at the start of Question 4: "how the "home country" cartel arrangement in the UK was operated in the relevant period, by explaining and setting out".

78. At one stage of the argument, I thought that it might be appropriate to order Siemens also to provide a response to Question 4(e), on a similar basis, since that also concerns a document originating from them. However, on reflection, I consider that that question goes beyond simple clarification of the document and that obtaining the requested information is likely to involve a wide ranging inquiry of the kind that I consider should not now be imposed on the defendants.

79. My conclusion that to require answers to the other questions in the Part 18 Request is premature should not be misunderstood as indicating that I regard those questions as inappropriate. ABB and Siemens are now clearly on notice, if they were not before, that NGET regards those matters as very relevant. It will be for ABB and Siemens to determine, with their respective legal advisers, whether and how to deal with these matters in their witness evidence. If those matters are not addressed in that evidence, NGET may then wish to issue a fresh Part 18 Request that may include some or all of the unanswered questions in the Request currently before the court. Any opposition to provision of such information at that stage will require separate consideration.

80. Save as indicated above, NGET's application under CPR Part 18 is therefore dismissed.

# APPENDIX

## LIST OF DOCUMENTS TO BE DISCLOSED

### By ABB and Siemens

(1) From the confidential version of the Decision, the following recital paragraphs:

15, 22, 27, 34, 40, 44, 48, 56, 60, 63, 68, 76,

119 - footnote 65: first two sentences (ending "on a national basis")

127 - first sentence

134 - footnote 92

135 (excluding footnotes)

136 (excluding footnotes)

137 (including footnote)

138 (excluding footnotes)

165 - Table V

166

192 to 196 (excluding footnotes)

202 (excluding footnote)

205, 207 (excluding footnote), 208, 209, 213 (excluding footnote)

Annexe II

(2) From Arriva's response to the Commission's request for information dated 5 November 2004:

The answer to question 17 (pages 29-30)

**By ABB**

(3) From the response to the Commission's request for information dated 4 October 2004:

Part 2: answers to questions (5) to (8)

Part 3: answers to questions (9) - (11)

(4) The updated "List of Abbreviations" provided in response to the Commission's information request dated 18 October 2005 and labelled Exhibit 37