IN THE HIGH COURT OF JUSTICE **2014 Folio 1086**

QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE Mr JUSTICE BLAIR

B E T W E E N

MARME INVERSIONES 2007 S.L.

CLAIMANT

– and –

(1) THE ROYAL BANK OF SCOTLAND
(2) HSH NORDBANK A.G.
(3) BAYERISICHE LANDESBANK
(4) ING BANK N.V.
(5) CAIXABANK S.A.

DEFENDANT

EUROPEAN COMMISSION

INTERVENER

OBSERVATIONS IN INTERVENTION BY THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 15(3) OF REGULATION 1/2003

I. INTRODUCTION

1. The European Commission ("the Commission"), acting pursuant to Article 15 of Regulation 1/2003, has assisted national courts on several occasions regarding the disclosure of documents relating to Commission investigations into infringements of the competition rules of the Treaty. The Commission's position on the recurrent

issues raised by requests for the disclosure of such documents is therefore well known,[1] but the present proceedings have some unusual features, the implications of which the Commission addresses in these Observations.

2. These Observations respond to the Court's request for the Commission's opinion on the list of issues set out at Part 3 of the Annex to the Court's letter of 15 June 2016, as refined by the further explanations given in the Court's letter of 29 July 2016.

3. The Commission regrets the delay in providing its substantive response to the matters raised by the Court's letter to the Commission of 15 June 2016. This is due to the nature of the present proceedings; as explained further below, the legal context is novel and it was necessary for the Commission to adopt a decision to intervene in the proceedings under Article 15(3) of Regulation 1/2003 rather than simply give its opinion on the matter under Article 15(1).

4. The Commission should draw the Court's attention to two important developments in the matter since the Court wrote to the Commission in June and July 2016.

   4.1. No public version of the Commission's Decision of 4 December 2013 in Case AT.39914 – *Euro Interest Rate Derivatives (EIRD) (Settlement)*, ("the Settlement Decision") was then available, but on 28 October 2016, a provisional public version of the Settlement Decision was published on the Commission's website.[2]

   4.2. On 7 December 2016, the Commission adopted a further decision in the case, ("the Non-settlement Decision"), by which it found that Crédit Agricole, HSBC and JP Morgan Chase had participated in the same infringement,[3] with the addressees of the Settlement Decision, and imposed fines on those three undertakings.[4]

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1 The Commission's opinions and observations in interventions under Articles 15(1) and (3) are available on the website of DG Competition.

2 Annexed hereto for the Court's convenience as Annex 1.

3 The duration of the infringement committed by the non-settling parties was however not identical to that found in the Settlement Decision.

4 The Commission's Press Release on the Non-settlement Decision is annexed hereto as Annex 2. No public version of this decision is yet available.

II. THE NATURE OF THE PROCEEDINGS AND ARTICLE 15 OF REGULATION 1/2003

5. The Commission's trusts that it has a sufficient understanding of the proceedings to respond to the Court's request, but as the Commission's involvement in these proceedings began through correspondence with the First Defendant, RBS, the Commission will briefly set out its understanding of the proceedings, the nature of which is novel as regards the context in which the Commission's opinion is sought.

6. RBS's correspondence with the Commission appears to be accurately enumerated in RBS's Skeleton Argument for the CMC of 9 May 2016, §15 and §32. In addition to that correspondence, the Commission has received the Fifth Witness Statement of Mr Richard Bunce, to which certain documents are exhibited, notably the Skeleton Argument. The Commission has also read this Court's judgment of 29 June 2016 at [2016] EWHC 1570 (Comm).

7. From these documents, and as confirmed by the Court's Issue 4, the Commission understands that the cause of action in these proceedings is not a claim for damages for alleged breaches of Articles 101 or 102 TFEU, but is contractual. The Claimant's case rests essentially on the allegation that RBS made misrepresentations to the Claimant about the setting of the Euro Interbank Offered Rate ("EURIBOR") which it knew to be untrue because it was engaged (with others) in manipulating EURIBOR. It appears however[5] that the contractual claim relies in this respect, at least to some extent, on the Settlement Decision, which finds that certain banks, including the First Defendant, infringed Article 101 TFEU by participating in agreements and/or concerted practices that had the object of restricting and/or distorting competition in the sector of Euro Interest Rate Derivatives linked to EURIBOR.

8. As to the possible relevance of the Settlement Decision, the Commission draws attention to the fact that its Press Release on the adoption of the Settlement Decision stated that, "The EIRD cartel operated between September 2005 and May 2008" but notes that the swap agreement that is the subject of the present proceedings was

[5] Letter from Simmons & Simmons of 8 April 2016, §3.3 – "The claimant's EURIBOR allegations are premised upon the EC Press Release [on the Settlement Decision]" [RJRB5/2].

entered into only several months later, on 12 September 2008. RBS states the Claimant's case as alleging that, "RBS knew at all material times that it and the panel banks involved in setting the Euribor rate had been colluding, *and were continuing to collude*, with a view to distorting the rate".[6] It is unclear to the Commission why the Claimant considers that the Settlement Decision and the evidence on which it was based could assist the Claimant in establishing that the swap agreement was tainted by such collusive conduct, given the lapse of time between the end of the infringement found by the Settlement Decision and the conclusion of the swap agreement in issue. The Commission will however proceed on the basis that the Settlement Decision is potentially relevant to the proceedings[7] and address the issues raised by the Court.

9. Although these are not proceedings "for the application of Article [101] or Article [102] of the Treaty" and they therefore fall outside the scope of Article 15(1) of Regulation 1/2003, the Commission does consider however that the proceedings fall within the scope of Article 15(3) of Regulation 1/2003 as proceedings that give rise to "issues relating to" those Articles of the Treaty and which potentially call into question the "coherent application" of those Articles of the Treaty.[8] This is because the extent of the disclosure contemplated runs counter to the position taken by EU law about the recognition to be given to the interest in maintaining the effectiveness of enforcement of competition law by the Commission. As further discussed below however, EU law relating to the use in private litigation of documents arising from

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6 RBS's Skeleton Argument for the CMC on 9 May 2016, §6. Emphasis added.

7 The Settlement Decision, although not evidence of infringing conduct after May 2008 nevertheless also does not constitute proof that no infringement subsisted in September 2008 or thereafter. The Commission assumes that the Claimant intends to rely on the Settlement Decision as establishing that a certain pattern of conduct took place involving, *inter alia*, RBS and that the Claimant will further argue that such conduct continued or was repeated at the relevant time for the purposes of the swap agreement in issue.

8 The distinction between Article 15(1) and 15(3) was emphasised in Case C-429/07 *X v Belastingdienst* EU:C:2009:359, at §30 – "a literal interpretation of the first subparagraph of Article 15(3) of Regulation No 1/2003 leads to the conclusion that the option for the Commission, acting on its own initiative, to submit written observations to courts of the Member States is subject to the sole condition that the coherent application of Articles 81 EC or 82 EC so requires. That condition may be fulfilled even if the proceedings concerned do not pertain to issues relating to the application of Article 81 or Article 82 of the Treaty."

investigations by competition authorities is based on the premise that any relevant private litigation will take the form of a claim based on the competition rules of the Treaty. The difficulties raised by the Court's request principally arise from the fact that these are not proceedings for the application of Articles 101 or 102 TFEU.

10. Whether the present proceedings fall within the material scope of the Damages Directive[9] as proceedings in respect of "harm caused by an infringement of competition law"[10] is a question that does not need to be resolved, since Article 21 of Damages Directive provides that Member States are to implement the Directive into national law only by December 2016 and in any event, Article 22 of the Damages Directive provides that it does not apply to actions for damages commenced prior to 26 December 2014, whereas the present proceedings were commenced in September 2014.[11]

III. THE CATEGORIES OF DOCUMENTS SUBJECT TO THE COURT'S REQUEST UNDER ARTICLE 15 OF REGULATION 1/2003

11. RBS has identified the following categories of documents which relate to the Commission's investigation in Case AT.39914 as documents that should normally be disclosed under the CPR, which are enumerated in the Court's letter of 15 June 2016:

- The Contemporaneous Documents,
- The Settlement Decision,
- RBS's leniency statements and settlement submissions,
- Other Relevant Material, and
- RBS's report to the Central Bank of the Netherlands.

12. The Court requests the Commission's opinion about the disclosure of those categories of documents, by reference to seven issues. These are considered below,

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9 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("the Damages Directive"), OJ L123, 27.04.2004, p. 18.

10 Damages Directive, Article 1(1).

11 RBS's Skeleton Argument for the CMC on 9 May 2016, §6.

but as several of the issues identified by the Court relate to the judgment of the Court of Justice of the European Union ("CJEU") in Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, the Commission will begin by some preliminary observations on that case.

IV. THE RELEVANCE OF THE *PFLEIDERER* PRINCIPLES

13. The Commission assumes that the "*Pfleiderer* principles" referred to in the Court's list of issues is the CJEU's ruling in *Pfleiderer* that, when deciding whether certain documents should be disclosed to a claimant for damages arising out of a breach of Articles 101 or 102 of the Treaty, the Court should weigh the respective interests in favour of disclosure against those in favour of the protection of material provided to a competition authority by an applicant for leniency. The interests identified in *Pfleiderer* are; (i) the interest of a person in claiming damages for loss caused by an infringement of the competition rules of the Treaty and (ii) the interest in maintaining the effectiveness of leniency programmes, which contribute to the public enforcement of competition rules of the Treaty.

14. The Commission firstly notes that the CJEU's ruling in *Pfleiderer* was given in the context of proceedings arising out of an investigation conducted by a national competition authority, not an investigation conducted by the Commission. The Commission considers however that this factor does not render *Pfleiderer* irrelevant: the competing interests identified by the CJEU are equally applicable to determining the extent to which disclosure should be ordered irrespective of whether the investigation was conducted by a national competition authority or the Commission. The Court has been referred to Roth J's judgment in *National Grid v ABB* [2012] EWHC 869 (Ch),[12] which took account of the Commission's Article 15(3) observations in that case, where the Commission explained why it considered that *Pfleiderer* was also applicable to cases where the relevant investigation had been conducted by the Commission.

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[12] RBS's Skeleton Argument for CMC of 9 May 2016, §22. See the Commission's Article 15(3) Observations in that case, §10.

15. The Commission considers however that the CJEU's judgment in *Pfleiderer* is limited to the issue of the extent to which leniency applications should be disclosed. The question referred to the CJEU was expressly limited to such material and the reasoning of the judgment is based on the tension between ensuring the effective application of the competition rules, notably through the right to seek damages for breaches thereof, and the need to maintain the attractiveness of leniency programmes. The limited scope of the judgment is simply a function of the question referred in *Pfleiderer*: it does not mean that *Pfleiderer* is an exhaustive catalogue of all the tensions that can arise between different aspects of the enforcement of the competition rules of the Treaty.

16. This is illustrated by Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie* ECLI: EU:C:2013:366, where the CJEU again held that a weighing of interests was required in deciding whether disclosure was to be ordered of *all* categories of documents relevant to a claim for damages arising out of a breach of the competition rules of the Treaty, including but not limited to leniency documents. In *Donau Chemie*, the CJEU took a broad view of the principles articulated in *Pfleiderer*, holding, at §30 that:

> ...it should be observed that, in exercising their powers for the purpose of applying national rules on the right of access, by persons believing themselves to be adversely affected by a cartel, to documents relating to national proceedings concerning that cartel, the national courts must weigh up the respective interests in favour of disclosure of the information and in favour of the protection of that information.

17. The Commission submits therefore that although the judgment in *Pfleiderer* itself is limited to the issue of disclosure of leniency material, the "*Pfleiderer* principles", as more broadly reformulated in *Donau Chemie*, are nevertheless applicable to questions of disclosure more generally, in proceedings seeking damages for breaches of the competition rules of the Treaty.

18. As noted by the Court's Issue 4, there remains however the further question of whether the contractual cause of action relied on it these proceedings means that the *Pfleiderer* principles are simply irrelevant. As the CJEU put it in *Donau Chemie*, §37, a national court hearing a damages claim had to be able, "to weigh up the interests protected by European Union law". As regards the interest in maintaining the

effectiveness of public enforcement of the competition rules of the Treaty, notably of leniency programmes that contribute significantly to the work of competition authorities, the Commission submits that this remains a valid interest irrespective of the cause of action relied on: there is no reason to suppose that the potentially inhibiting effect on leniency applicants if leniency statements are freely disclosed in legal proceedings would be allayed simply because the disclosure would serve to support claims not directly based on a breach of the competition rules.

19. On the other hand, the competing interest of ensuring the effectiveness of the remedy of a claim for damages for losses caused by a breach of the competition rules of the Treaty appears to be absent. An infringement of Article 101 TFEU implies that two or more undertakings are party to a restrictive agreement or concerted practice, whereas a misrepresentation requires only that the party making the representation knows that its representation is untrue or is negligent as to its truth. It appears that although the Claimant's case is that RBS was itself a party to the manipulation of EURIBOR, that averment is made to substantiate the claim that RBS knew its representations about the objectivity of EURIBOR were untrue, rather than to show that RBS was a party to an infringement of Article 101 TFEU.[13]

20. The absence of competing interests within the sphere of EU competition law implies that the interest in maintaining the effectiveness of public enforcement of the competition rules should be fully upheld. This does not however mean that disclosure of all the categories of documents should simply be refused: as further discussed below, the interest in maintaining the effectiveness of public enforcement of the competition rules does not require this.

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[13] The Commission notes that the English courts have, in the parallel context of claims based on manipulation of LIBOR, emphasised that the right to claim damages for a breach of Article 101 TFEU is a separate matter from the issue of the validity of a contract connected to the manipulation of LIBOR – see Teare J in *Deutsche Bank v Unitech Globa*l [2013] EWHC 2793 (Comm), at §31, approving the dictum of Morgan J in *Bookmakers' Afternoon Greyhound Services Limited v Amalgamated Racing UK Limited* [2008] EWHC 1978 (Ch) at §409. The Commission concludes therefore that the absence of a claim for damages based on Article 101 TFEU in these proceedings is a deliberate choice made by the Claimant.

V. THE ISSUES RAISED BY THE COURT

21. In the light of the preliminary observations above, the Commission will address the issues raised by the Court. It appears appropriate to take the first three issues together.

1. Please could the Commission explain if it is of the view that the principle in Case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECLI:EU:C:2011:389 ("*Pfleiderer*"), applies to either sub-category of the Contemporaneous Documents. If so, on what basis does the Commission take that position?

2. Does the Commission consider there is any other principle of EU law which the English court should take into account in relation to the disclosure of the Contemporaneous Documents, and which may be relevant to the Commission's refusal to consent to disclosure? If it is the Commission's position that there is any such principle, please explain the basis on which it is said to apply in this case.

3. To what extent does the Commission's answer to issue (1) or (2) differ in relation to the disclosure (potentially into a confidentiality ring) of the search terms applied in order to identify the Contemporaneous Documents?

22. The Court's enquiry as to the relevance of *Pfleiderer* to the Contemporaneous Documents appears to arise from RBS's view that *Pfleiderer* implies that a balancing exercise is to be undertaken in respect of all four categories of documents,[14] at least in a procedural context where the Commission's investigation is still open.

23. The Commission's letters to RBS of 18 March 2016 and 22 July 2016 expressed concern about the disclosure of the Contemporaneous Documents because of the possible implications that disclosure of those documents might have on the conduct of that part of the investigation that was, at the time, still open against the non-settling parties.

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[14] RBS's Skeleton Argument for CMC of 9 May 2016, §22. RBS proceeds on the basis that it is axiomatic that *Pfleiderer* is applicable here, despite being firmly of the view that the proceedings "do not involve the application of either Article 101 or Article 102 TFEU" - RBS's Skeleton Argument for CMC of 9 May 2016, §19.

24. Given however that the Commission has now concluded its investigation against both the settling parties and the non-settling parties, the position is comparable to that in *National Grid*, where the Commission's observations were submitted in the context of a proposed disclosure that was to take place after the relevant Commission Decision had been adopted. In such circumstances, the Commission has no objection to the disclosure of the Contemporaneous Documents, irrespective of the sub-category to which they belong,[15] subject only to the general observation that the Commission's policy is that disclosure should be limited to that which is necessary and proportionate, consistent with the CJEU's dictum in *Donau Chemie*, §33 that "generalised access" to all documents relating to competition proceedings is unnecessary and liable to be counter-productive in terms of the wider implications for public law competition law enforcement.[16]

25. Although, as explained below, the Commission does have concerns about the disclosure of leniency statements and settlement submissions, insofar as any of the Contemporaneous Documents were submitted to the Commission in support of leniency or settlement statements, the Commission should make it clear that it does not regard such documents as sheltered by the protection given to leniency statements or settlement submissions. The position can be illustrated by reference to Article 6(6) of the Damages Directive. This prohibits the disclosure of leniency or settlement statements for use in damages actions, but as appears from the definition of those categories of documents in Article 2(15) and (18) of the Damages Directive, contemporaneous documents do not fall within the definition of a leniency or settlement statement, even if adduced in support of such a statement.

26. As to disclosing the search terms used to identify the Contemporaneous Documents, from the limited material the Commission has seen, it appears that although the Contemporaneous Documents are defined in the Court's letter of 15 June 2016 as RBS documents which came into the Commission's possession during the

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15 As defined by the sub-categories identified in the Court's letter of 15 June 2016.

16 This is not a significant concern here if the Commission is correct in its understanding that the Contemporaneous Documents are only a selection of those obtained from RBS by the Commission during the investigation. (See §26 below).

investigation, not every contemporaneous RBS document acquired by the Commission is a Contemporaneous Document, presumably because not every contemporaneous RBS document acquired by the Commission is relevant to the present proceedings. It appears therefore that certain search terms were applied to identify which RBS documents on the Commission's file were relevant to these proceedings.[17] If those search terms were devised by reference to the issues in these proceedings, then this does not call for any comment by the Commission.

27. The Commission notes that the Court's letter of 29 July 2016, §8, states that the Court intends to order that the list of Contemporaneous Documents to be disclosed will not reveal to which of the two sub-categories any specific Contemporaneous Document belongs. Indeed, it appears from the Court's letter of 15 June 2016, §11, that it will not be possible for the other parties to ascertain which of the RBS documents disclosed belongs in the category of Contemporaneous Documents at all. These points allay the Commission's concerns, notably in view of the subsequent adoption of the Non-settlement Decision.

28. As regards the use of a confidentiality ring, the concern expressed in other Article 15 opinions that disclosure should be controlled in this way has been prompted by the fact that, in other cases, the documents to be disclosed include documents of third parties, obtained by the defendant in the national proceedings through the exercise of its rights of access to the Commission's file. As the disclosure of the Contemporaneous Documents is limited to RBS's own documents, this concern is absent (for this category of documents), although of course the Commission has no objection to the use of a confidentiality ring.

29. In conclusion on the first three issues raised by the Court, the Commission is of the opinion that neither *Pfleiderer* nor any other principle of EU law stand in the way of the Court ordering the disclosure of the Contemporaneous Documents, notably if they are not identified as documents that were part of the Commission's file, but are simply included in a list of disclosed documents from RBS.

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[17] This is the Commission's understanding of Section 7 of Simmons & Simmons's letter of 5 May 2016 to Kobre & Kim [Exhibit RJRB5/2]

4. Please could the Commission provide its view as to whether it considers that the principles in the *Pfleiderer* case are applicable at all to any of the categories of documents listed in the Request for an Opinion, notwithstanding that the Claimant is asserting a claim for misrepresentation rather than a claim for damages for breach of competition law (albeit that the Claimant's pleading sets out what it surmises is set out in the Commission's Decision by reference to the Commission's Press Release dated 4 December 2013)?

5. Please could the Commission provide its view as to whether, if the *Pfleiderer* principle is not applicable to any of the categories of documents listed in the Request for an Opinion, there is any other provision or principle of EU law (including as set out in Article 16(a) of Regulation 773/2004 and Articles 6(5) and 6(6) of Directive 2014/104) relevant to the English Court's determination of the question of disclosure of those documents in the Litigation in relation to each category? If the Commission considers there is any such provision or principle, please explain the legal basis (or bases) by reference to each category. Please also explain whether the Commission's view would be different were disclosure to be given into a confidentiality ring.

30. Issues 4 and 5 essentially ask if there are any EU law rules relevant to the disclosure of the other categories of documents. As to the EU law rules potentially applicable, the Commission's view is as follows.

30.1. As noted above, these proceedings do not fall within the temporal scope of the Damages Directive.

30.2. As discussed above, the absence of competing EU law interests means that no *Pfleiderer* balancing exercise is required, but the EU interest in maintaining the effectiveness of public enforcement of the competition rules does not thereby mean that the disclosure of all other categories of documents is to be refused.

30.3. As to Article 16(a) of Regulation 773/2004, this governs the use that may be made by a party of information "obtained pursuant to this Regulation". Documents such as the Contemporaneous Documents are RBS's own documents; they were not "obtained" by RBS and are therefore not subject to

any of the limitations imposed by Article 16a. As regards other documents, as Regulation 773/2004 concerns the conduct of and the rights and obligations of parties concerned by Commission investigations, Article 16a is directed at the use that such parties may make, at their own initiative, of documents they obtained during the course of an investigation. As the Commission noted in its Opinion in *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others*, §13, Article 16a is not a rule that "directly prohibits the Court itself from ordering the disclosure of the requested document". Article 16a does however reflect the rule binding on the Commission that information it obtains using its powers under the competition rules can only be used for that purpose and as explained further below, this has implications for the Court in the light of Article 4(3) TEU.

30.4. The Commission notes that RBS has raised[18] the issue of redactions to be made in the light of Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* ECLI:EU:T:2007:306. This is addressed below.

31. The Commission will first consider the implications of (i) the EU interest in maintaining the effectiveness of public enforcement of the competition rules and (ii) the principle underlying Article 16a of Regulation 773/2004 for each of the other categories of documents.

– The Settlement Decision

32. As regards the Settlement Decision, it may be that no difficulties arise now in view of the availability of the public version of the Settlement Decision. The public version is not extensively redacted: it is only two pages shorter than the original confidential version of the Settlement Decision as notified to RBS. Given that it is a settlement decision, which therefore proceeds on the basis of the addresses' admissions that they committed an infringement, the narrative of the events is succinct, even in the confidential version of the Settlement Decision. It may be that the Court finds that

[18] RBS's Skeleton Argument for the CMC on 9 May 2016, §28.

the public version of the Settlement Decision obviates the need for disclosure of the original confidential version of the Settlement Decision in RBS's possession.[19]

33. If the Court were to decide that something more than the public version of the Decision should be disclosed, the Decision does not contain any direct quotation from leniency statements or settlement submissions and thus the Commission considers that the Settlement Decision does not reveal such evidence. However, it does indicate which participants were involved in specific aspects of the infringement and the nature of some of the leniency evidence submitted by certain participants.

34. If the Court orders disclosure of the Settlement Decision as notified to RBS, then in view of the third party confidential information included in the Settlement Decision, it is submitted that such disclosure should only be made into the confidentiality ring. The draft confidentiality order submitted by the Court does not give any indication of the eligibility criteria for membership of the confidentiality ring and the Commission would draw the Court's attention to its Opinion in the *Servier* case, where it requested that third party interests be more fully taken into account and submitted that a confidentiality ring should be confined to a very limited number of lawyers (and, if necessary, other experts), each to be specifically identified.

35. The Commission notes that the judgment of Henderson J in that case, appended to the Court's letter of 29 July 2016, held that third party interests would be sufficiently protected by disclosure into a confidentiality ring (at §59). If the Court were also to decide here that the confidentiality ring, on the terms presently proposed, is sufficient to accommodate third parties' interests, the Commission would nevertheless request that any third party information that is confidential information

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[19] The Commission assumes that the Claimant's interest in the Settlement Decision lies principally in the narrative of the infringing conduct (at recital (32)). Although that narrative is drawn from the parties' leniency statements and settlement submissions, this does not mean it is protected from disclosure, as is shown by the public version of the Settlement Decision, which redacts only personal information or the identity of addresses in relation to specific facts. The limits on the protection from publication of information drawn from leniency statements is discussed in Case T-341/12 *Evonik Degussa v Commission*, ECLI:EU:T:2015:51 (Appeal pending in Case C-162/15 *Evonik Degussa v Commission*).

and/or clearly irrelevant to the present proceedings[20] be redacted from the Settlement Decision. Given that these are not proceedings for the application of Article 101 TFEU, the Commission considers that disclosure of third party information arising from the Commission's investigation should be limited to that necessary for the disposal of the case. It is respectfully suggested that this approach would take the greatest account of third party interests, without imposing an undue burden on the Court or the parties in organising disclosure. For example, for the purpose of calculating the fines, Table 1 of the Settlement Decision sets out the addressees' value of sales, as defined in recital (91), which is normally considered confidential and which does not appear to be of any possible relevance to the proceedings. The Commission therefore submits that such third party information should be redacted from the Settlement Decision before its disclosure into the confidentiality ring.

– RBS's leniency statements and settlement submissions

36. As to RBS's leniency statements and settlement submissions themselves, the Commission submits that, in the light of the recognition given by *Pfleiderer* to the interest in protecting such material in order to maintain the effectiveness of public enforcement of the competition rules, the Court should refuse to order the disclosure of that material (to the extent that it is in RBS's control).[21]

37. As noted above, in these proceedings there is no competing EU law interest in favour of disclosure and the Commission's long standing policy of refusing to transmit such documents from its files to national courts is reflected in Article 6(6) of the Damages Directive. As also noted above, the Damages Directive is inapplicable here and the Commission considers that it would be invidious if a category of document arising from a competition investigation, which could not be disclosed in

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20 Unless of course information, although irrelevant, is already in the public version of the Settlement Decision.

21 The Commission will not enter into the details of RBS's leniency application, but as explained in the Commission's Notice on immunity from fines and reductions of fines, Section IV, applications may be made by corporate statements, given orally and recorded at the Commission's premises, which thereby means that the leniency applicant will not have control over the statement within the meaning of CPR 31.8.

an action based on Article 101 TFEU, could nevertheless be disclosed in other proceedings.

– Other Relevant Materials

38. For the Other Relevant Materials, different considerations apply according to whether the documents fall within the scope of Article 16a of Regulation 773/2004.

39. As regards RBS's own documents, given that the Commission's proceedings against both the settling and non-settling parties have been concluded, those documents have the same status as the Contemporaneous Documents and the Commission has no objection to their disclosure, subject to the *caveat* that insofar as RBS's own documents might constitute leniency statements, they should be redacted.

40. As regards documents that were "obtained pursuant to this Regulation" by RBS, RBS has noted,[22] on the basis of the predecessor provision in Article 15(4) of Regulation 773/2004, that the nature of the proceedings thereby precludes disclosure of documents obtained by RBS through the exercise of its right to access the Commission's file. Regulation 773/2004 also provides for the notification of a Statement of Objections (SO) to parties under investigation and this document is therefore also a document "obtained pursuant to this Regulation". Although Requests for Information (RFI) are not specifically mentioned in Regulation 773/2004, as appears from Article 1, the Regulation is generally concerned with the conduct of the Commission's investigations, in the course of which RFIs are issued. Article 16a appears under Chapter VIa, which has the general title, "Limitations to the use of information obtained in the course of Commission proceedings". The Commission submits therefore that RFIs also fall within the scope of Article 16a

41. As noted above, Article 16a is directed at the use of documents by parties involved in the Commission's investigation. Although the Commission has the power to require parties to provide it with information in the course of its investigation, such as through inspections by decision under Article 20(4) of Regulation 1/2003, or an RFI by decision under Article 18(3), and to apply sanctions for non-compliance, it

[22] RBS's Skeleton Argument for the CMC on 9 May 2016, §19.

nevertheless remains the case that the effectiveness of the Commission's enforcement of the competition rules depends on parties providing complete and candid information to the Commission. To this end, it is important to ensure that information provided to the Commission can only be used for the purposes of applying the competition rules and not for an unlimited and unknown range of wider purposes. The Commission submits therefore that it would be consistent with the principle of sincere cooperation under Article 4(3) TEU for the Court to take cognizance of the limits placed on parties by Article 16a of Regulation 773/2204 and refuse to order the disclosure of the SO and the RFIs.

42. A refusal to disclose the SO and the RFIs is in any event unlikely to be of any practical consequence in this case. It is inherent to the nature of the settlement procedure that the SO will not contain any wider allegations that would have been contested by the addressees and thus (had this been a non-settlement decision) possibly omitted from the final decision.[23] The disclosure of the SO would therefore not add to the facts or evidence already available through the disclosure of the Settlement Decision. As regards RFIs, as the disclosure of RBS's responses and any accompanying documents is no longer a concern to the Commission now its investigation is closed, the non-disclosure of the RFIs would not significantly affect the evidence available to the Claimants.

– Pergan

43. As to the implications of *Pergan*, the Commission would agree that, prior to the adoption of the Non-settlement Decision, any non-addressee of the Settlement Decision referred to or identifiable from the Settlement Decision was in the same position as those classified as Non-Addressee Airlines in the Court of Appeal's judgment in *Emerald Supplies v British Airways* [2015] EWCA Civ 1024. However, in the light of the Non-settlement Decision, the material scope of which is the same as the Settlement Decision, the Commission considers that the principle recognised in *Pergan* no longer applies generally as regards any references to those who are the

[23] Under the settlement procedure, "Only when the Commission and the parties are *ad idem* on all essential issues is the SO issued" – Kerse & Khan, *EU Antitrust Procedure*, 6th Ed., §4-043.

addressees of the Non-settlement Decision, as they may now challenge the findings made against them by a challenge to that decision.

44. Thus if the Court were to order the disclosure of the Settlement Decision as notified to RBS, the names of the addressees of the Non-settlement Decision need not now be redacted. As regards other information in the Settlement Decision, it does not appear to the Commission that any further redactions are necessary in the light of *Pergan*.

6. Please could the Commission explain, to the extent not already addressed in answers to the issues above, whether there is any rule of EU law which prevents the disclosure (potentially into a confidentiality ring) of the report prepared by solicitors for RBS to De Nederlandsche Bank (the Netherlands Central Bank) dated 5 October 2012 describing the allegations made by the Commission against RBS in the EIRD Investigation?

45. It is difficult for the Commission to comment, as it has not seen the report to the Netherlands Central Bank and does not know to what extent it reveals any identifiable leniency statements or settlement submissions. If "describing the allegations made by the Commission against RBS in the EIRD Investigation" means a summary of the Commission's Statement of Objections, it appears unlikely that the disclosure of the report would be a cause of concern to the Commission.

7. Please could the Commission explain what it considers, as a matter of EU law, is the legal relevance and / or effect of the Commission's Opinion in relation to the English Court's determination of the issue of RBS's disclosure of any of the categories of documents listed in the Request.

46. The Commission considers that Article 15 is simply an articulation, in the specific context of competition law, of the general principle of sincere cooperation set out in Article 4(3) TEU. The Commission's opinions and interventions under Article 15 are intended only to offer assistance to national courts. The Commission's Opinions under Article 15 are therefore not binding on national courts.

47. Only the CJEU can give a definitive interpretation of EU law and as the Court will be aware, Article 267 TFEU provides that if a question on the interpretation of EU law is

raised before a national court, that court may request the CJEU to give a preliminary ruling on the interpretation of the relevant EU law.

8. In Part 2 paragraph 6 it was explained that the court would have the power to order disclosure into a confidentiality ring whereby only specifically identified members of the parties' legal teams would be able to review it. A draft confidentiality order of the type the court would have power to order, in a form agreed by the parties to the litigation, is attached at Appendix A, upon which the Commission is invited to comment.

48. The Commission has no particular comments to make on the draft confidentiality order, which it notes limits disclosure of confidential information to specifically identified persons. As noted above, the membership of the confidentiality ring is unknown, but it is submitted that it should be as narrowly drawn as practicable and that third party information that is irrelevant to the proceedings be redacted prior to disclosure into the confidentiality ring.

VI. CONCLUSION

49. The present case is novel in that it relates to the disclosure of documents in proceedings that are not proceedings for the application of Articles 101 or 102 TFEU. In the Commission's opinion, this implies that in the light of Article 4(3) TEU, particular attention should be given to ensuring that the Commission's task of effective enforcement of the competition rules of the Treaty is not undermined, but in the present case, taking account of that concern greatly affect the Court's proposed disclosure order.

50. In this respect the Commission considers that the issue of the disclosure of the various categories of documents should be determined as follows:

50.1. The Contemporaneous Documents may be disclosed.

50.2. If the Court decides that the public version of the Settlement Decision would not provide sufficient disclosure, the Settlement Decision as notified to RBS may be disclosed, provided; (i) any third party information which is not

disclosed in the public version and not relevant to the proceedings is redacted and (ii) disclosure is within a confidentiality ring.

50.3. The SO and RFIs should not be disclosed, but the Other Relevant Material may be disclosed, subject to any redactions necessary to remove identifiable references to leniency statements and settlement submissions.

50.4. The disclosure of the RBS report to the Netherlands Central Bank does not appear to raise any problems.

50.5. The confidentiality ring appears to be appropriate, but its membership should be limited as far as possible.

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