IN THE HIGH COURT OF JUSTICE

Claim No. HC08C03243

CHANCERY DIVISION

BEFORE MR JUSTICE ROTH

BETWEEN:

NATIONAL GRID ELECTRICITY TRANSMISSION PLC

Claimant

- and -

(1) ABB LTD
(2) ABB POWER T&D LIMITED
(3) ABB LIMITED
(4) ABB HOLDINGS LIMITED
(5) ABB ASEA BROWN BOVERI LTD
(6) ALSTOM
(7) ALSTOM LIMITED
(8) ALSTOM UK HOLDINGS LIMITED
(9) ALSTOM HOLDINGS
(10) AREVA SA
(11) AREVA T&D UK LIMITED
(12) AREVA T&D HOLDING SA
(13) SIEMENS AG
(14) SIEMENS TRANSMISSION & DISTRIBUTION LIMITED
(15) VA TECH REYROLLE DISTRIBUTION LIMITED
(16) SIEMENS PLC
(17) VA TECH (UK) LIMITED
(18) SIEMENS HOLDINGS PLC
(19) VA TECH SCHNEIDER HIGH VOLTAGE GMBH
(20) VA TECH TRANSMISSION & DISTRIBUTION GMBH & CO KEG
(21) SIEMENS AKTIENGESELLSCHAFT ÖSTERREICH
(22) AREVA T&D SA
(23) AREVA T&D AG

Defendants

Observations of the European Commission

pursuant to Article 15(3) of Regulation 1/2003

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1. These Observations are submitted by the European Commission, pursuant to Article 15(3) of Regulation 1/2003 and to the invitation issued by this Honourable Court in Roth J.'s letter to the Commission of 13 July 2011.

(i) Background to the present proceedings

2. The Commission is not a party to the present proceedings and its knowledge of the claims made by the parties is therefore limited. In preparing these Observations, the Commission has had access to information from the following sources:

   2.1. The Chancellor of the High Court's judgment of 12 June 2009 in these proceedings, [2009] EWHC 1326 (Ch).

   2.2. Roth J.'s judgment of 4 July 2011 in these proceedings [2011] EWHC 1717 (Ch) ("the Judgment").

   2.3. Letters from the parties to these proceedings, as follows;

   - Alstom - 25 July 2011
   - Areva - 26 July 2011
   - ABB – 31 August 2011
   - Siemens – 7 September 2011
   - National Grid – 15 September 2011

3. Following the adoption of the Commission's Decision of 24 January 2007 in case COMP/F/38.899 - *Gas insulated switchgear (GIS)* ("the Decision"), the present proceedings were commenced in November 2008. Actions for the annulment of the Decision were brought pursuant to Article 263 TFEU before the General Court of the European Union by all those Defendants to the present proceedings who are also addressees of the Decision, except ABB (which was granted immunity from fines by the Decision).

4. Although the Chancellor, in his judgment of 12 June 2009, refused the Defendants' application for a stay of these proceedings pending the disposal of the actions under Article 263 TFEU, he nevertheless ordered that the trial of the substantive issues should not be fixed for hearing "against any defendant until after the period of three months has elapsed from the exhaustion by that defendant of its rights of application for annulment to the [General Court] or of subsequent appeal to the ECJ". As noted in the Judgment/6, the General Court has given judgment in all the proceedings brought by Defendants to the present action.[1] The General Court dismissed all the applications brought by the addressees of the Decision insofar as those applications contested the addressees' participation in the infringement found by the Decision. The General Court reduced or set aside the fines imposed on some addressees, but for reasons unrelated to participation in the infringement.[2]

5. Pursuant to the Chancellor's order, pleadings were exchanged and some disclosure has taken place, the current position being set out in Judgment/8. Some of the issues raised there are the subject of a request pursuant to Article 15(1) of Regulation 1/2003, to which the Commission responded by its letter of 28 October 2011. The other issues, on which the Court has invited the Commission's observations pursuant to Article 15(3), relate to the possible disclosure of material contained in leniency documents in the light of the judgment of the Court of Justice in Case C-360/09, *Pfleiderer AG v Bundeskartellamt*. In that respect, it appears that although the Claimant previously accepted that material derived from leniency documents should be excluded from the scope of disclosure, in the light of

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1 It has also since given judgment in the remaining proceedings brought by addressees of the Decision that are not Defendants to the present action.

2 Save in some minor respects as to the duration of participation in the infringement. For instance, in Joined Cases T-122/07 to T-124/07, *Siemens AG Österreich and Others v Commission*, the duration was reduced by three months without any effect on the fine; see paragraph 1 of the operative part of the judgement.

Pfleiderer, the Claimant now asserts that there is no impediment to the disclosure of such material.

6. As noted in the learned judge's letter of 13 July 2011, the Claimant's request gives rise to a number of questions, which the Commission addresses below. The Commission will first consider the second question raised, since this goes to the logically prior question of whether a national court has any jurisdiction at all to order disclosure[3] of leniency documents submitted to the Commission.

(ii) The national court's jurisdiction to order disclosure of leniency documents

7. The Commission would first emphasise that the issues raised under the Article 15(3) request concern only one category of material, namely, "leniency documents" within the meaning of the Judgment/10.[4] The material in issue therefore principally comprises documents quoting from corporate statements. As explained at point 32 of the *Leniency Notice*, corporate statements themselves are generally made orally at the Commission's premises, with the very objective of ensuring that not even the maker of the statement has a corporate statement in its possession or control for the purposes of CPR r.31.8. As further explained at point 33 of the *Leniency Notice*: "Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf -, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained

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3 The Commission assumes that references to "disclosure" in the Judgment and in Roth J.'s letter of 13 July 2011 mean disclosure with a right of inspection, within the meaning of CPR r.31.3.

4 It appears from the Judgment/8 and the correspondence the Commission has received from the parties that the parties' obligation to disclose pre-existing documents is not questioned by reference to EU competition law, subject to satisfactory arrangements being made to protect the confidentiality of such documents. The Commission's observations therefore only address issues relating to the *inter partes* disclosure of leniency documents, or documents including material drawn from leniency documents.

from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements."

8. While the main issue at stake in *Pfleiderer* was the extent to which principles of EU competition law impinged upon national provisions relating to the disclosure of leniency material, the Judgment/36, raises the question of whether Article 15 constitutes a *lex specialis* with respect to the disclosure of documents containing leniency documents (as defined above). The Commission submits that this question is to be answered in the negative.

8.1. It follows from the description above of the procedure for taking corporate statements that the original, direct transcript of the oral corporate statement is only in the Commission's possession.

8.2. The position is different however as regards other documents quoting material from leniency documents. This category comprises a wider range of documents, such as replies to statements of objection or requests for information, which are within the control of parties to proceedings in national courts.

8.3. Articles 101 and 102 TFEU and Regulation 1/2003 do not purport to harmonise Member States' civil procedure rules. The 21st recital to Regulation 1/2003 shows that the purpose of Article 15 is to ensure consistency in the application of the competition rules of the Treaty, whereas it is silent on the role of the Commission in determining whether certain documents already under the control of parties subject to the national court's jurisdiction should be disclosed. Article 15 does not oust the jurisdiction of national courts to determine their procedural rules, such as those relating to the disclosure of documents.

(iii) The relevance of *Pfleiderer* to the present proceedings

9. As noted in the Judgment, *Pfleiderer* concerned disclosure of leniency documents created in the context of an investigation by the *Bundeskartellamt*, not a Commission investigation, although the relevant *Bundeskartellamt* decision was one applying Article 101 TFEU. As the Court of Justice also notes (at § 20 – 21), the Treaty and Regulation 1/2003 do not "lay down common rules on leniency or common rules on the right of access to documents" relating to a leniency regime of a Member State (even when applying Articles 101 or 102 TFEU) and although there are some Commission notices that are relevant to the issue, those notices only concern Commission proceedings and they are not binding on Member States.

10. Although the question referred by the *Amtsgericht Bonn* was framed in terms of leniency documents submitted to a national competition authority, the judgment analyses the issues surrounding the disclosure of documents in proceedings for the private enforcement of Articles 101 and 102 TFEU by referring to leniency programmes generally. Accordingly, the judgment refers (at § 25 – 27) to "leniency programmes" without distinguishing between the Member States' or the Commission's leniency programmes. Moreover, the operative part of the Court of Justice's judgment rules that Articles 101 and 102 TFEU are to be interpreted as "not precluding a person... from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement." In answer to the first question put by the learned judge's letter of 13 July 2011, the Commission therefore submits that the general principles of EU law enunciated in *Pfleiderer*, as set out in point 14 below, are applicable to disclosure of leniency documents created for the purposes of a Commission investigation, by analogy to the reasoning developed by the Court of Justice in answering a question about leniency documents submitted to a national competition authority when applying Article 101 TFEU.

(iv) The application of the *Pfleiderer* principles to the present case

11. Before discussing the factors considered relevant by the Commission for the purpose of the weighing exercise mandated by *Pfleiderer*, the Commission would firstly make some general observations on the importance of its leniency programme to the Commission's ability to carry out its duties under the competition rules of the Treaty.

12. The willingness of companies to provide comprehensive and candid information is crucial to the success of the leniency programme, which is the most effective tool at the Commission's disposal for the detection of secret cartels. To this end, the Commission's policy has been that undertakings which voluntarily cooperate with DG Competition in revealing cartels should not be put in a significantly worse position in respect of civil claims than other cartel members which refuse any cooperation. In practical terms, this means the Commission's long established practice is that the corporate statements specifically prepared for submission under the leniency programme are given protection against disclosure both during and after its investigation.

13. This position has been articulated in a number of Commission's documents:

13.1. Points 31 to 35 of the *Leniency Notice* explain the procedure for taking corporate statements and for access thereto during the Commission's investigation. As noted at § 7 above, corporate statements are usually given orally and are not disclosed to complainants.

13.2. Point 26 of the *Notice on Cooperation with National Courts* states that the Commission's policy is not to disclose to national courts information specifically prepared for voluntary submission to the Commission under the Leniency Notice.

13.3. Point 6 of the *Leniency Notice*, consistent with the rationale explained above, states that corporate statements;

"have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article [101 TFEU] in cartel cases and thus its subsequent or parallel effective private enforcement."

The Commission notes that in this case, the immunity applicant claims that it made its corporate oral statements to the Commission in the light of that policy.[5]

14. *Pfleiderer* establishes that in exercising their jurisdiction over the disclosure of leniency documents to claimants seeking damages for loss allegedly caused by an infringement of the competition rules of the Treaty, national courts must reconcile:

(i) the objective of the effective application of those rules by competition authorities, in which respect the utility of leniency programmes is well recognised, with

(ii) the right of persons harmed by infringements of the competition rules of the Treaty to seek redress, actions for damages also being recognised as contributing to the maintenance of effective competition.

15. The Court of Justice did not place one of these interests above the other. The approach taken by the Court of Justice acknowledges that the detection of infringements of the competition rules by public authorities and damages actions

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5 ABB's letter to the Commission of 31 August 2011, at p. 4.

by private parties both serve the objective of maintaining effective competition within the European Union. The judgment refers (at § 25) to leniency programmes as "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 [those rules]". It goes on (at § 26) by stating that "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". It accepts (at § 27) that "the view can reasonably be taken" that potential leniency applicants could be deterred by disclosure obligations, thereby compromising the effectiveness of leniency programmes and thus the enforcement of the competition rules by public authorities. The Court of Justice refers on the other hand (at § 28) to the right flowing from Articles 101 and 102 TFEU for a person harmed by conduct that infringes those rules to claim damages, citing Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, where at § 25 the Court of Justice emphasised that "national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals."

16. *Pfleiderer* emphasises (at § 31) that weighing the respective interests must be conducted on a case-by-case basis, according to national law, taking into account all the relevant factors in the case in hand and the Commission's submissions below are therefore directed only at assisting this Court in deciding how the *Pfleiderer* principles apply to the present proceedings. Before turning to the factors to be weighed, it should be noted that this area of law is far from settled and it may be expected that further references to the Court of Justice for preliminary rulings will be made seeking clarification of *Pfleiderer*.[6] In making its submissions, the Commission is conscious that, as stated above, its knowledge of the details of the present proceedings is limited. The factors that the Commission considers relevant

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6 For example an Austrian Cartel court referred a case to the Court of Justice on 12 October 2011 (Case C-536/11 *Donau Chemie*).

are therefore not necessarily exhaustive, but from its understanding of the present proceedings, the Commission respectfully submits that the following matters should be taken into account by this Court in determining the Claimant's amended application for disclosure.

Whether disclosure would increase the leniency applicants' exposure to liability, compared to the liability of parties that did not cooperate

17. It is common ground that, as noted in point 39 of the *Leniency Notice*, "The fact that immunity or reduction in respect of its fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article [101 TFEU]."[7] However, *Pfleiderer* recognises (at § 26) that leniency programmes could be compromised if documents relating to a leniency procedure were disclosed to claimants.

17.1. The Commission's experience in operating its leniency programme is that leniency applicants fear that the disclosure of their corporate statements would particularly jeopardise their position in actions for damages. Since a successful immunity applicant is very unlikely to challenge a cartel decision finding that it participated in an infringement, such a decision becomes definitive against that party long before it becomes definitive against those who contest their liability for the infringement through proceedings brought under Article 263 TFEU. In those circumstances, the disclosure of corporate statements could facilitate a claim brought against the immunity applicant alone, which might face sole liability for damages claims, subject only to the possibility of pursuing further litigation seeking contributions from those parties whose definitive liability for the infringement would only be established at a later date (when all avenues of appeal under Article 263

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7 The possibility that a leniency applicant's civil liability might be restricted is canvassed in the Commission's *White Paper on damages actions for breach of the EC antitrust rules* at Section 2.9. Clearly however, the implementation of this suggestion depends on legislative action.

TFEU had been exhausted). Such a situation is contemplated by point 6 of the *Leniency Notice*, as noted above at § 11.3.

17.2. The Commission notes that, due to the Chancellor's order about the timing of the trial on the substantive issues in these proceedings, it is not obvious that leniency applicants would be prejudiced in this way in these proceedings.

17.3. However, the general perception by potential leniency applicants that disclosure of their corporate statements would particularly disadvantage them in actions for damages remains an important concern for the Commission.

17.4. It is for these reasons that the Commission adopted its general policy against giving disclosure of oral corporate statements from its own files, as noted in the Judgment/12. The Commission recalls that it has repeatedly, and successfully, intervened in litigation in the United States, where discovery of leniency documents was at stake.[8]

18. It is submitted therefore that it is for the Court to assess whether, in the circumstances of the case, disclosure of leniency documents, or documents including material derived from leniency documents, would expose the leniency applicants to greater liability than those parties that did not cooperate with the Commission in the *GIS* case. The Commission notes that ABB appears to invoke the risk of such a disadvantage in its letter to the Commission of 31 August 2011 (at p. 4). In any case, there seems to exist a general perception amongst potential leniency applicants that disclosure of their corporate statements would particularly disadvantage them in actions for damages compared to those parties that did not

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8 Most recently in *re Air Cargo Shipping Services Antitrust Litigation, M.D.L. No. 1775* (E.D.N.Y) and previously in *TFT-LCD (Flat Panel) Antitrust Litigation, No. M: 07-1827* (N.D. Cal. 2011), *Re Vitamins Antitrust Litigation*, Misc. No. 99-197, Docket No. 3079 (D.D.C. May 20, 2002); *Re: Methionine Antitrust Litigation*, No. C-99-3491, MDL no. 1311 (N.D. Cal. June 17, 2002).

cooperate by exposing them to greater liability. The Commission therefore respectfully submits that this particular factor augurs in favour of non-disclosure of leniency documents.

Whether disclosure is proportionate in the light of its possible interference with leniency programmes

19. *Pfleiderer* emphasises (at § 30) that where a person seeking to obtain damages applies for access to leniency documents, 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". In weighing the respective interests in favour of disclosure of leniency documents and in favour of the protection of those documents, the Court should therefore take into account whether the document for which disclosure is sought is at all relevant for the purpose of the claim, and whether there are other available sources of evidence that are equally effective for that purpose, which therefore do not give rise to concerns about the consequences of disclosure for the effective functioning of a leniency programme.

20. In that context, the Commission notes the following.

20.1. As the Court is aware, a non-confidential version of the Decision is publicly available.[9] The non-confidential version of the Decision identifies the United Kingdom as a "home country" and the undertakings for which it had that status.

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9 The Judgment/2 states that the non-confidential version has redacted certain passages on the ground of commercial confidentiality, but the Commission should point out that the redactions also reflect the Commission's policy of not publicly disclosing the precise content of corporate statements and the identity of the source of evidence given through corporate statements.

20.2. The non-confidential version of the Decision includes a description of the functioning of the cartel, which as regards "home countries" is found notably at recitals (115) and (133) – (138). It is apparent from the limited redactions made to this part of the Decision that the non-confidential version is little different here from the confidential version of the Decision.

20.3. As explained in recital (133), projects in "home countries" such as the United Kingdom "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". The Decision, and the evidence supporting its findings, therefore says little about how the cartel functioned in relation to the United Kingdom market. Some further indications about the limited evidence in the investigation relating to "home countries" are given in the General Court's judgments in the *GIS* cases, notably the judgment in Joined Cases T-122/07 to T-124/07 *Siemens AG Österreich and others v Commission*, at §§ 38 – 45.

20.4. To the extent that the Claimant's case is based on the arrangements made by the cartel for the protection of "home countries" and given that the functioning and effect of the cartel on the United Kingdom market is not a central preoccupation of the Decision, it may be that there are other sources of evidence that are better suited to the Claimant's purpose, such as witness evidence from employees of the undertakings that claimed the United Kingdom as a "home country" (see, the *GIS* Decision, at recital (138)).

21. It is submitted therefore that the Court should consider the nature of the Claimant's case in the light of the description of the cartel in the Decision, in order to evaluate to what extent disclosure of the confidential version of the Decision (or parts thereof) (and the leniency documents (or quotations from them) contained in other categories of material listed in the learned judge's letter of 13 July 2011, which contain some of the evidence supporting the Decision) would be likely to

assist the Claimant. In the Commission's view, taking into account the considerations highlighted above and in particular the availability of other sources of equally effective evidence referred to above, it appears disproportionate to order disclosure of this material.

(v) The four categories of documents sought

22. The learned judge's letter of 13 July refers to four categories of documents, containing material from leniency documents, for which the Claimant now seeks disclosure. The Commission considers that, in view of the observations above, it is unnecessary to comment in detail on each category of documents, but offers below some brief observations on each category.

— The confidential version of the Decision

23. As indicated above, the confidential version of the Decision adds little to the limited information given in the non-confidential version about the operation of the cartel in the United Kingdom.

— ABB's reply to the statement of objections

24. It appears from the Judgment/8(b) that ABB has refused to disclose its reply to the SO at all. Insofar as this document does not comprise a leniency document, the Commission sees no reason why ABB should not be required to disclose that document; insofar as it is a leniency document (or uses material from other leniency documents), the Commission's view is set out above.

— ABB's responses to requests for information from the Commission

25. The Commission notes that ABB has stated[10] that its responses to requests for information under Article 18 of Regulation 1/2003 do not contain leniency material. There does not appear therefore to be any obstacle to the disclosure of such

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10 ABB's letter to the Commission of 31 August 2011, at p. 3.

responses. However, as stated at recital (88) to the Decision, the Commission's investigation was initiated as a result of an immunity application made by ABB in March 2004, ABB being given conditional immunity immediately thereafter. As ABB has also pointed out, ABB thereby became subject to a duty of cooperation with the Commission pursuant to the Leniency Notice and further explanations about pre-existing documents and the operation of the cartel were given to the Commission further to ABB's obligations as an immunity applicant (rather than pursuant to requests made under Article 18). The Commission's view on the disclosure of this material is set out above.

— Alstom and Areva's responses to requests for information from the Commission

26. Alstom made no application under the Leniency Notice, so the Commission sees no objection to ordering disclosure of such documents, (subject to the question of whether Alstom's documents use material from other leniency documents). As stated in recital (91) of the Decision, Areva made an application under the Leniency Notice at an early stage of the investigation, in May 2004 and thereafter came under a duty of cooperation with the Commission. Although Areva therefore gave further explanations in the form of oral corporate statements, it also received an Article 18 request for information in September 2004, the response to which contains some leniency material (drawn from earlier Areva leniency statements). The Commission's view on the disclosure of this material is set out above.

(vi) The possibility to refer a preliminary question to the Court of Justice

27. The Commission hopes that these observations will be of some assistance to the Court in determining the Claimant's amended application for disclosure. The Commission need only add in conclusion that if this Court finds it necessary to seek definitive guidance on any question of European Union law raised by these

proceedings, it is of course open to this Court to refer a question to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU.

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