Leniency and disclosure

We will not have to wait long to see what a national court – in this case, the English High Court – makes of the *Pfleiderer* decision

by ***Edward Coulson****

In the *Pfleiderer* judgment handed down on 14 June 2011, the CJEU ruled – in response to a reference from the German courts – on whether a claimant could obtain disclosure of leniency materials submitted by cartelists to the German national competition authority (see also *CLI* 26 July 2011 p3). The CJEU held that EU law does not automatically prevent private claimants obtaining leniency applications.

However, the CJEU opted against issuing a general direction – either in favour of or against – the disclosure of leniency applications in private litigation. The Court of Justice recognised the tension between public and private enforcement of competition law and the importance of leniency applications to both. On the one hand, public enforcers believe their leniency programmes will be weakened if leniency applications are disclosed to third parties. They argue this removes confidentiality and increases the risk for potential leniency applicants of follow-on damages claims. On the other hand, claimants view leniency applications as key evidence, and often necessary to allow their EU rights to be effectively vindicated.

The CJEU ruled that this tension should be resolved by national courts weighing up all the considerations on a case-by-case basis. So what are national courts going to do? The answer is that we will not have to wait long to find out.

Pfleiderer applied

On 15 June 2011 – the day after *Pfleiderer* was handed down – the English High Court heard an application relying on the CJEU's judgment. In the light of *Pfleiderer*, National Grid (the UK electricity transmitter) requested disclosure – from the defendants in its switchgear cartel litigation – of documents submitted to the Commission that may contain or refer to leniency information. The judge, Mr Justice Roth, decided to write to the European Commission (who investigated the switchgear cartel) to obtain its representations on the disclosure of documents containing or referring to leniency material.

The proximity of the *Pfleiderer* judgment – which the judge understandably only saw for the first time during the morning in court – meant that the hearing was necessarily adjourned until the autumn to allow time for the Commission to respond and for the parties to prepare their cases.

What will the English court do?

It remains to be seen what view the English court will take on the particular facts of the case.

One point that might be canvassed in court is whether *Pfleiderer* can be deemed to apply only to leniency applications submitted to national competition authorities (as was the case in *Pfleiderer*) and not to leniency documents provided to the Commission.

The wording of the *Pfleiderer* judgment is broad and clear on its face, and it certainly does not limit its ruling to leniency applications provided to national competition authorities as opposed to the Commission. The issue, therefore, is whether the possibility of recourse to the Commission in the context of a Commission decision, under article 15 of EC Regulation 1/2003, changes things. In considering *Pfleiderer*, the CJEU was not called upon to consider the process available pursuant to article 15(1). This provision enables a national court to ask the Commission to transmit to it documents to assist with litigation "concerning the application of the Community competition rules", if the Commission considers there are no overriding reasons to refuse. The article 15 process relates only to the Commission, not national competition authorities.

It may be argued that this factor can make no possible difference. First, the Commission and the national authorities are equally all part of the integrated European Competition Network, and the same rules relating to follow-on claims for breach of EU rights must therefore apply. Second, the considerations spelt out by the CJEU concerning the need to protect private EU rights would simply not be dealt with by allowing an effective Commission veto in Commission cases. Third, it would be incongruous in practice if, in the context of EC investigations, an administrative authority were able effectively to veto the use of leniency documents in private claims, whereas in national investigations concerning breaches of the same EU rules the position was that the judicial authorities dealing with the private claims concerned were given the task of weighing the competing interests on a case-by-case basis.

Thus, if it were the case that disclosure of leniency documents submitted to the Commission must be sought from the Commission through article 15, a two-tier system would be established. In other words, a party's rights to obtain or, if a defendant, resist disclosure of leniency materials would be dependent on the happenstance of whether the relevant competition law infringement was investigated and penalised by the Commission or by the national competition authority.

It may therefore be that the real focus of the English court when the case returns to it in the autumn will be on the questions of substance, rather than on whether or not *Pfleiderer* applies. What sort of documents, leaving aside corporate statements, raise concerns about the disclosure to private claimants of information derived from leniency materials? Would, for example, the confidential version of a Commission decision be caught? We await the English court's judgment with interest.

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