

## UK Court orders limited disclosure of confidential European Commission competition decision

### A. Introduction

1. In the recent case of *Emerald Supplies Ltd & Ors v British Airways plc & Ors* [2014] EWHC 3513 (Ch) (the “**Emerald Supplies case**”), the UK High Court ordered the disclosure of the confidential version of a European Commission cartel decision to a group of potential follow-on claimants.
2. This case note highlights the salient points of the *Emerald Supplies* case, and examines how it may be relevant in the Singapore context.

### B. Facts

3. In November 2010, the European Commission (“**EC**”) issued an infringement decision (“**Decision**”) against British Airways (“**BA**”) and eleven other international airlines for their involvement in a cartel in the market for air freight services.<sup>1</sup>
4. 565 claimants (“**Claimants**”) subsequently commenced a claim for damages against BA in respect of losses suffered in connection with the cartel. The claims related to overcharges on various international air routes.
5. In the course of commencing the claim against BA, the Claimants applied to inspect the Decision.
6. However, at the date of the case (in early 2014), the EC had yet to publish a redacted and non-confidential version of the Decision. The EC explained that this was due to “*numerous confidentiality claims made by addressees of the Decision*” and the “*widespread objections to publication on grounds of confidentiality*”, which prevent[ed] publication of a meaningful non-confidential version of the Decision”.
7. The High Court ordered BA, and other parties potentially affected by the disclosure of the Decision, to provide a suitably

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<sup>1</sup> The EC’s decision was released as *Case/Comp/99258 Air Freight* on 9 November 2010.

redacted version of the Decision to the Claimants.

8. However, the redacted version of the Decision that was provided to the Claimants was so heavily redacted that it was “*completely useless*”.
9. The Claimants therefore applied to review the full and un-redacted version of the Decision.

## C. Decision

10. The High Court noted two main concerns in disclosing the full Decision:<sup>2</sup>
  - a. the potential damage caused by releasing confidential information into the public domain; and
  - b. the likelihood of fresh claims (whether civil or criminal) being brought by the Claimants against existing or new parties identified in the Decision.
11. In order to address these concerns, the High Court ordered the publication of the full Decision (with certain exclusions<sup>3</sup>) on condition that:
  - a. the Decision was only to be disclosed within a tightly drawn confidentiality ring consisting of the existing parties to the claim; and
  - b. the Claimants were barred from commencing fresh proceedings in any jurisdiction against existing or new parties.<sup>4</sup>
12. The High Court further cautioned that any party who breached these conditions would potentially be liable for contempt of court.

other jurisdictions may differ.

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<sup>2</sup> See [51] of the *Emerald Supplies* case.

<sup>3</sup> Material prepared for leniency applications and material subject to legal privilege were to be excluded from the published decision.

<sup>4</sup> See [56] of the *Emerald Supplies* case.

## D. Reasoning

13. In making the orders mentioned above, the High Court reasoned that:<sup>5</sup>

- a. It was in the interests of justice to ensure that all parties had equal access to the Decision;
- b. The obligation of confidence and the obligation not to bring fresh proceedings sufficiently addressed the concerns highlighted in paragraph 10 above;
- c. The EC's failure to publish a redacted version of the Decision after 4 years was unacceptable. There was a risk that the action "*would remain paralysed for many years pending the finalisation of the redacted Decision*";<sup>6</sup> and
- d. The court would not decline to order a confidentiality ring because somebody might breach it. The court was entitled to assume that its orders would be obeyed.<sup>7</sup>

## E. Relevance in the Singapore context

14. The *Emerald Supplies* case shows that the court must carefully balance the confidentiality concerns of the addressees of a decision against the rights of affected persons to commence follow-on actions against the addressees.

15. Singapore's Competition Act expressly provides for a 2-year window from the date of an infringement decision (including decisions issued by the Competition Appeals Board, High Court and/or Court of Appeal) within which a plaintiff must commence a follow-on action.<sup>8</sup>

16. If a redacted, non-confidential version of an infringement decision were not issued within this 2-year window, it would

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<sup>5</sup> *Ibid.* at [27], [36]-[42], [52], [56] and [82].

<sup>6</sup> *Ibid.* at [98]-[99].

<sup>7</sup> *Ibid.* at [56].

<sup>8</sup> See Section 86(6) of the Competition Act.

effectively prevent any follow-on action from being commenced in Singapore. It is suggested that the Singapore courts would not allow such a situation to occur, and would possibly make a similar order as was made in the *Emerald Supplies* case, so as to preserve the rights of potential follow-on plaintiffs.

17. The Competition Commission of Singapore has been releasing redacted, non-confidential versions of its infringement decisions in a timely manner. It is therefore unlikely that a follow-on plaintiff in Singapore would face a similar lengthy delay as in the *Emerald Supplies* case.
18. If you would like further information on the *Emerald Supplies* case, or if you require advice on competition-related matters, please feel free to contact our Mr Tan Tee Jim, S.C. at 6557 4615 (DID) or [tanteejim@leenlee.com.sg](mailto:tanteejim@leenlee.com.sg), or Mr Jeremiah Chew at 6557 4889 (DID) or [jeremiahchew@leenlee.com.sg](mailto:jeremiahchew@leenlee.com.sg).