

United Kingdom

NEW ENGLISH COURT LIMITATIONS ON DISCOVERABILITY MAY BE IN CONFLICT WITH EUROPEAN UNION COURTS

☞ Cartels; Confidential information; Disclosure; EU law; Presumption of innocence; Private enforcement

Cases in recent years have expanded the EU courts' support for civil competition law claimants: *Pfleiderer*,¹ *Donau Chemie*² and *CDC Hydrogen Peroxide*.³ In conflict with this recent expansion, a new English Court of Appeal case has limited discovery of EU findings in competition law violations in English civil proceedings: *Emerald Supplies*.⁴ In *Emerald Supplies*, civil claimants sought an unredacted version of the European Commission's findings in the Commission's proceedings about an air freight cartel.⁵ The alleged cartelists sought to redact Commission statements describing or alluding to collusive conduct that the cartelists could not challenge through appeal to EU courts.⁶ These companies appealed the Chancery Court's order to disclose an unredacted decision, thereby seeking to keep certain incriminating statements confidential.⁷ The Court of Appeal reversed, stating that EU law protected the redactions from disclosure, based on *Pergan*.⁸

In *Pergan*, the EU's General Court indicated that the EU's professional secrecy obligation and presumption of innocence meant the Commission should not publish a statement that a firm participated in a cartel if the firm could not appeal the statement to EU courts.⁹

"[O]nly matters in the operative part [of a Commission order] (and reasoning in the recitals directly supporting those particular conclusions) ... are binding and ... can be the subject of appeal to the EU courts."¹⁰

In *Emerald Supplies*, British Airways argued respondents' rights of appeal in the Commission's regulatory case did not include challenging the redacted findings because the redactions were not in the operative portion of the Commission's decision.¹¹ In its decision, the Court of Appeal emphasised that disclosing *Pergan* material could conflict with future Commission decisions, in tension with EU Member States' duty to cooperate with the EU.¹² Although the Chancery Court's disclosure was confidential, the Court of Appeal found that the limitation did not protect the respondents from Commission statements used "to support private claims for damages by third parties".¹³ Stating *Pergan* should prevent Commission respondents from facing claims based on Commission statements respondents cannot prevent, the Court of Appeal disapproved disclosing *Pergan* material to civil damages claimants.¹⁴

The ruling of *Emerald Supplies*, however, has limited application. The ruling applies only to statements in Commission decisions that identify respondents' collusive conduct that respondents may not appeal to EU courts. It does not limit disclosure of other Commission documents from either the Commission or other parties in related civil litigation. For example, the parties agreed that British Airways was obliged to disclose civil case documents relevant to claimant's allegations, even though they might relate to the same conduct as *Pergan*-protected statements.¹⁵

¹ *Pfleiderer AG v Bundeskartellamt* (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7; [2012] C.E.C. 50.

² *Bundeswettbewerbshilfe v Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19.

³ *CDC Hydrogene Peroxide Cartel Damage Claims v European Commission* (T-437/08) [2011] E.C.R. II-8251; [2012] 4 C.M.L.R. 14.

⁴ *British Airways v Emerald Supplies Plc* [2015] EWCA Civ 1024.

⁵ *Emerald Supplies* [2015] EWCA Civ 1024 at [2], [4] and [6].

⁶ *Emerald Supplies* [2015] EWCA Civ 1024 at [24].

⁷ *Emerald Supplies* [2015] EWCA Civ 1024 at [24].

⁸ *Pergan Hilfsstoffe für Industrielle Prozesse v Commission of the European Communities* (T-474/04) [2007] E.C.R. II-4225; [2008] Bus. L.R. 1085; [2008] 4 C.M.L.R. 4.

⁹ *Pergan* (T-474/04) [2007] E.C.R. II-4225; [2008] 4 C.M.L.R. 4 at [76], [79] and [80].

¹⁰ *Emerald Supplies* [2015] EWCA Civ 1024 at [25]; see also *Pergan* (T-474/04) [2007] E.C.R. II-4225; [2008] 4 C.M.L.R. 4 at [73]–[74] and [80].

¹¹ *Emerald Supplies* [2015] EWCA Civ 1024 at [58].

¹² *Emerald Supplies* [2015] EWCA Civ 1024 at [70].

¹³ *Emerald Supplies* [2015] EWCA Civ 1024 at [84], [105(i)].

¹⁴ *Emerald Supplies* [2015] EWCA Civ 1024 at [82] and [105].

¹⁵ *Emerald Supplies* [2015] EWCA Civ 1024 at [61].

Emerald Supplies is also inconsistent with recent and more prominent EU decisions allowing wider disclosure of European Commission materials to claimants. *Pergan* was decided in 2007 by the EU's General Court. Since then the Court of Justice, the EU's highest court, held that EU competition law

“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 a perpetrator of that infringement”.¹⁶

Since *Pergan*, the General Court has also endorsed disclosure for civil competition law claims:

“[T]he interest of a company which took part in a cartel in avoiding such actions [for damages] cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition”.¹⁷

The Court of Justice has instructed member states that their national rules should not “make it practically impossible or excessively difficult to obtain such compensation” for EU competition violations.¹⁸ Accordingly, courts should “weigh the respective interests” supporting and opposing disclosure of Commission documents involving leniency applicants in civil cases. The *Emerald Supplies* court declined to apply such balancing for *Pergan* disclosures. However, EU courts' increased support for civil competition law claimants since *Pergan* suggests that courts should apply such a balancing test in considering disclosure of Commission documents. Accordingly, *Emerald Supplies* may lead English courts to conflicts with future decisions by the European Court of Justice.

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¹⁶ *Pfleiderer* (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7 at [32].

¹⁷ *CDC Hydrogene* (T-437/08) [2011] E.C.R. II-8251; [2012] 4 C.M.L.R. 14 at [49].

¹⁸ *Pfleiderer* (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7 at [30].

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