

## EU Commission decision: truck cartel

The EU Commission's investigation into a suspected cartel among producers of heavy and medium-duty trucks has concluded with a record breaking fine of € 2.93 billion.

What does this mean for you?

### The EU Commission Decision: Key facts

In a settlement decision of 19 July 2016, the European Commission (the Commission) found that **MAN, Volvo/Renault, Daimler, Iveco**, and **DAF** broke EU competition law. Over the period of 14 years, these companies have colluded on (i) truck pricing, as well as (ii) timing and passing on the costs of compliance with stricter emission rules. This decision relates specifically to the market for the manufacturing of medium (weighing between 6 to 16 tons) and heavy trucks (weighing over 16 tons).

In particular, these companies illegally coordinated on the following:

- Prices at "gross list" (factory price) level for medium and heavy trucks in the European Economic Area (EEA);
- The timing for the introduction of emission technologies for medium and heavy trucks to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI);
- The passing on to customers of the costs for the emissions technologies required to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI).

The infringement covered the entire EEA and lasted 14 years, from 1997 until 2011. Between 1997 and 2004, meetings were held at senior manager level, and from 2004 onwards, the cartel was organised via the truck producers' German subsidiaries, with participants generally exchanging information electronically.

All companies acknowledged their involvement and agreed to settle the case with the Commission, in exchange for a 10% reduction of the fine. The investigation was originally sparked by a leniency applicant, MAN. Scania, who was also investigated, is not covered by this decision and the investigation will continue under the standard (non-settlement) cartel procedure for this company. Scania has made a provision in its accounts for SEK 3.8 billion (approximately €398 million) to cover possible fines.

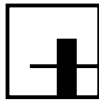
The press release from the Commission made the following important points:

- This was a very serious infringement, which lasted for 14 years;
- There are over 30 million trucks on European roads, which account for around three quarters of inland transport of goods in Europe and play a vital role for the European economy;
- The companies concerned together account for around 9 out of 10 medium and heavy trucks produced in Europe;
- Collusion was two-pronged – on pricing, as well as on the costs and timings for meeting environmental standards to customers.

### How does this apply to you?

Companies who purchased a medium or heavy-duty trucks, directly or indirectly, from any one of these six companies between 1997 and 2011, may be entitled to claim damages (plus interest) in the UK courts for the 'overcharges' resulting from the cartel. At the basic level these overcharges relate to the factory level price. It may also be possible to claim further damages in relation to any losses suffered as a result of collusion in relation to emission technologies, namely delaying tactics and collusion of passing on the costs.

The Commission decision establishes the addressees' liability for infringing the EU competition law. The liability is joint and several for all addressees. This means that any potential claimant will only need to establish (i) the amount of the loss suffered (i.e. extent of the overcharge and (ii) that this was caused by the conduct described in the infringement decision.



## SHEPHERD+ WEDDERBURN

In simple terms, the damages may be calculated as a difference between the price paid and the price that would have prevailed in a non-cartelised market. In 2010 alone – just one year of the fourteen-year cartel - 200,000 medium and heavy-duty trucks were sold in Western Europe. The Commission estimates that companies produce 9 out of 10 trucks sold in the EEA, whereas other sources put this figure closer to 100%.

You may also be able to claim damages for trucks bought from other producers (in relation to the so-called umbrella pricing effects). Given that producers involved covered almost the whole of market, it may well be the case that prices of other producers not involved in the alleged conduct were also higher than they would otherwise have been. That difference can also be recovered from those involved.

It is likely that you will have a choice of whether to bring a claim in the High Court in London or in the specialist Competition Appeal Tribunal. Limitations differ in the two tribunals but broadly they are six years in the High Court from the start of the competition investigation or two years in the CAT from the infringement decision becoming final.

### Assessing a potential claim

**Step 1 Ballpark Value Estimate.** You should estimate the ballpark value of medium and heavy trucks you purchased in the period between 1997 and 2011 for the EEA by all group companies. If you assume 10-15% overcharge that will give you a very high level ballpark indication of the overall size of likely damage and whether it is worthwhile claiming for damages. In addition, a separate calculation would have to be made for collusion on emission technologies. We can advise you further on how to develop that analysis further.

**Step 2 Jurisdiction.** You should identify in which countries within Europe your group companies purchased trucks. Typically, the UK, Germany and the Netherlands are the key jurisdictions for bringing such claims. We can advise you on which jurisdiction might be best suited for your claim if, as in most cases, you have a choice.

**Step 3. Consider Litigation Funding.** There are many ways to fund competition damages actions which can significantly reduce claimants' exposure to costs. In the UK, options range from the traditional retainer to third party funding as well as getting a group of potential claimants together in a joint or parallel action or an action via a trade body. In some instances, the way in which you fund your litigation can shift the whole or part of the risk to a third party in return for a share of the potential damages.

Third party funding typically involves a commercial funder agreeing to pay some or all of a claimant's legal fees (and disbursements) in return for a fee. This fee is usually a proportion of the proceeds recovered as part of the litigation process whether by judgment or settlement. If the claim is unsuccessful then the funder loses its investment and is not entitled to receive any payment from the claimant.

The usual rule in the UK is that the loser pays the winner's reasonable costs (typically in the region of around 60% of actual costs incurred). This means that in large stake damages claims such as this one the incidence of costs can be a big issue and, indeed, can determine whether a case should be pursued.

After the Event Insurance ('ATE') is a form of legal expenses insurance which is taken out after a legal dispute has arisen. An ATE insurance policy insures the claimant against potential liability in the event you lose the case. An ATE policy typically covers claimant's own disbursements, including certain legal fees, and the other side's costs (subject to a maximum limit). ATE, if disclosed, can also be used as a tactical weapon to encourage settlement as the other side will know that an insurer has conducted an independent analysis of the merits of the case and decided it was strong enough to cover. Third party funders often cover ATE as part of an overall package. We can advise you on the choice of third party funders and assist you in obtaining such funding. Third party funding is becoming increasingly attractive, particularly for large companies, as an alternative to self-funding. It can protect cash-flow, it can reduce risk or it can turn a legal department into a self-standing profit centre.

Third party funders are also particularly interested in funding a portfolio of cases where you might have a number of claims in different jurisdictions. It has can also be effectively used in the field of brand and trade mark protection.

### Shepherd and Wedderburn – what we offer?

Shepherd and Wedderburn competition law experts and litigators have experience of competition damages claims. We regularly act not just in the defence of companies but also to pursue individual large claims for companies both in the High Court and in the CAT. Outside of the UK we work with specialist local lawyers to pursue such claims.

We have significant experience in arranging third party funding for clients. We do not receive a commission nor do we have a financial stake in arranging such funding. This is part of our service in protecting your interests and maximising the chances of success where appropriate.



SHEPHERD+ WEDDERBURN

“The communication is so good that I tend to think of the lawyers as internal legal counsel rather than an external resource.”

Chambers and Partners

“Shepherd and Wedderburn is able to give us very fast and business-focused advice.”

Chambers and Partners

“They combine their competency with efficiency. They don't over-lawyer a case and they identify the correct route to a solution.”

Chambers and Partners



## John Schmidt

Partner

T +44 (0)207 429 4967

M +44 (0)788 400 4396

E [john.schmidt@shepwedd.co.uk](mailto:john.schmidt@shepwedd.co.uk)



## Jane Wessel

Partner

T +44 (0)207 429 4946

M +44 (0)792 169 7509

E [jane.wessel@shepwedd.co.uk](mailto:jane.wessel@shepwedd.co.uk)

