



EU Commission Investigation: Trucks Cartel

The EU Commission's investigation into a suspected cartel among producers of heavy and medium-duty trucks is drawing to a close. A final decision and record fines are expected to be imposed on the truck producers in the upcoming weeks.

What does this mean for you?

The EU Commission Investigation: Key facts

The EU Commission suspects that six major truck producers engaged in a cartel between 1997 and 2011 covering the entire European Economic Area (EEA). According to the EU Commission the suspected cartel involved colluding on prices of medium and heavy-duty trucks, and agreeing on the timing and price increases for the introduction of new emission technologies. Medium and heavy-duty trucks are those whose gross vehicle weight (GVW) is respectively over 5 tons and 16 tons.

The following companies were formally charged by the Commission in 2014: **DAF, Daimler, Iveco, Renault, Scania, Volvo** and **MAN**. Since then, in anticipation of potential fines, four of the six companies have made the following accounting provisions:

- Paccar (parent company of DAF): €850 million
- Daimler: increased original provision (unknown) by €600 million
- CNH (parent company of Iveco): €450 million
- Volvo: €400 million

Under standard accounting rules such provisions typically mean that the companies consider there to be more than a 50% chance that they will be fined. Scania has made no provision although indicates in its annual return that it cannot rule out the possibility of a fine. MAN notified the Commission of the conduct under the leniency regime and so, as whistleblower, would ordinarily escape a fine (although this does not preclude it from being pursued in any potential damages claims).

The provisions made by the companies indicate that the combined fines expected to be imposed by the EU Commission will be a record high, outstripping the current record combined fine of €1.47 billion which was imposed in 2012 on parties to a cathode ray tube cartel. This is a reflection of both volume of products affected by conduct as well as the duration (here 14 years).

How does this apply to you?

Companies who purchased a medium or heavy-duty truck, 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. A European Commission decision, once issued, will establish the addressees' liability for infringing the 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 in the infringement decision.

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 which the alleged cartel spanned - 200,000 medium and heavy-duty trucks were sold in Western Europe. The six companies involved sold some 96.8% of those trucks.

You may also be able to claim damages for trucks bought from other producers. 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 worth your while claiming for damages. 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 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 Funding.

There are many ways to fund competition damages actions which can significantly reduce claimants' exposure to costs. 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 Counsels' 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

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.

"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."

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