

Optical Disk Drive Cartel



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European Commission fines eight optical disk drive (ODD) suppliers over €116m. What does this mean for you?

The decision

The European Commission ("Commission") has imposed fines totalling €116 million on the suppliers of optical disk drives (ODDs) in the EEA for their participation in a cartel. ODDs read or record data stored on optical disks, such as CDs, DVDs or Blu-ray and are used in personal computers, CD and DVD players and video game consoles.

The companies coordinated their responses to tenders launched by Dell and Hewlett Packard (who were not part of the cartel), agreed on price increases and exchanged commercially sensitive information. The finished products that included ODDs were marketed to consumers all over the EEA.

The firms involved in the cartel and which received fines were **Hitachi-LG Data Storage, Toshiba Samsung Storage Technology, Sony, Sony Optiarc** and **Quanta Storage**. Additionally, **Phillips, Lite-On, Philips & Lite-On Digital Solutions** were also part of the cartel. Whilst they have received no fines under the Commission's leniency programme, they remain open to third party actions for damages alongside the other companies.

How does this apply to you?

Those who purchased significant volumes of laptops or computers from the Dell and Hewlett Packard during the operation of the cartel (June 2004 to November

2008) may be entitled to claim from the companies any 'overcharges' resulting from the cartel by bringing a follow-on damages claim. In simple terms, the overcharge is the difference between the price paid and the price that would have prevailed in a non-cartelised market. A Commission decision is binding proof that the behaviour took place and was illegal, meaning that, even though the Commission has fined the participants concerned, damages can still be awarded to compensate for any overcharge paid as a result of the cartel.

Damages claims may be of particular interest to large groups, government departments or agencies, who not only have significant claims themselves, but who may also be able to bundle claims with other agencies.

Those who purchased laptops or computers during the operation of the cartel from someone other than the Dell or Hewlett Packard may also have a follow-on damages claim against the cartel for so-called umbrella pricing. That is, for paying too much for their products from other companies not affected by the cartel if it can be shown the cartel operated in such a way that prices of the whole market (rather than only the computers or laptops supplied by Dell or Hewlett Packard) were higher than would otherwise have been the case.

Regardless of where you are based in the European Union it may be possible for you to bundle your claims



together and bring them, subject to limitation periods, before the UK courts. Limitation periods vary depending on the court but broadly are either two years from the decision becoming final (final appeal determination or expiry of appeal period) or six years from the date on which the cause of action accrued.

The decision in the optical disc drives cartel was notified on 21 October 2015 so the shortest time for filing a claim is 21 October 2017 plus the time period for appealing the relevant decision (21 December 2017).

If there is an on-going supply relationship the question of damage can often be resolved through discussions with your supplier.

Funding a follow-on damages claim

Clearly, the costs to pursue a complex litigation will be a key factor for businesses when considering the merits of pursuing a damages action. We believe that costs, however, should not be an obstacle. There are many ways to fund competition damages actions which can significantly reduce exposure to costs. Options range from the traditional private client retainer to third party funding as well as getting a group of potential claimants together in a joint or parallel action or via a trade body. In some instances, the way in which you fund your litigation can offload risk onto the law firm or a third party in return for a share of the potential damages. To help illustrate this, we have set out below a brief overview of the types of funding that are most common when bringing a competition damages claim.

Third Party Funding

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 you.

The funder provides the money purely as an investment and is otherwise unconnected with the litigation. However, a funder will want to be advised of any settlement offers from the other side and be involved in the resulting discussions.

The share of recoveries payable can be subject to negotiation, but funders will usually have reference to: (i) the expected quantum of damages; (ii) the merits of the client's case; (iii) the amount of funding needed; and (iv) the expected duration of the case.

After the Event Insurance

Unlike the USA and some other jurisdictions, the usual rule is that the loser pays the costs (or a proportion of them) of the winner. This means that in complex cases 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 you against your potential liability in the event you lose the case. An ATE policy typically covers your own disbursements, including Counsel, and the other side's costs (subject to a maximum limit).

ATE premiums are often sizeable, to reflect the risk being underwritten by the Insurer. However, ATE providers offer a number of ways of paying for the premium, including:

- Staged premiums – the premium increases as the case progresses and therefore remains proportionate to the costs actually being incurred;
- Deferred premiums – the premium is only payable at the end of the case; or
- Contingent premiums – the premium is only payable if the case is successful.

Premiums can be calculated by reference to a number of factors including: (i) the amount of cover being sought; (ii) the merits of the case; and (iii) the method of payment. ATE removes your risk of having to pay the other side's costs in the event the case is unsuccessful. It demonstrates that you will not be intimidated by the projected high level of your opponent's costs as, in the event of the case being unsuccessful, the insurer will meet these liabilities. It can, if disclosed, also be used as a tactical weapon to encourage settlement. 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.

How can we help?

Our team of competition law experts and litigators have experience of follow-on damages claims, third party funding and ATE. We have considerable experience of cartel damages claims in the CAT and High Court, acting for both Claimants and Defendants. In fact we acted for Albion Water Limited in its successful claim for follow-on damages against Welsh Water using third party funding and ATE – the first and only case (so far) to be funded in this way before the Competition Appeal Tribunal. We are able to provide advice to any parties who may be considering claiming compensation. If you would like to know more, please contact John Schmidt or Guy Harvey.