



## Smart Card Chip Cartel

European Commission imposes fines of €138m on participants  
What does this mean for you?

### The decision

The European Commission ("Commission") has imposed fines totalling €138 million on the participants in a cartel involving smart card chips in the EEA.

Smart card chips are used in mobile telephone SIM cards, bank cards, identity cards and passports, pay TV cards, and various other applications. Those used in the SIM segment rely mainly on memory, for example to store telephone numbers, while the smart card chips used in other applications also rely on security devices like cryptography in order to ensure data confidentiality.

The firms involved in the cartel were Infineon, Philips, Samsung and Renesas. Some of the companies involved received full or partial immunity from fines under the Commission's leniency procedure. However, the award of leniency does not protect the companies from damages actions. Philips divested its smart card chips business after the infringement, but remains liable for its conduct during the period of the infringement.

The companies colluded through a network of bilateral contacts in order to coordinate their respective responses to customers' requests to lower prices. The Commission found that the parties discussed and exchanged sensitive commercial information on pricing, customers, contract negotiations, production capacity or capacity utilisation and their future market conduct.

### How does this apply to you?

Those who purchased smart cards from the participants during the operation of the cartel (approximately 2003 to 2005) may be entitled to claw back from them any 'overcharges' resulting from the cartel fine (in simple terms, the difference between the price paid and the price that would have prevailed in a non-cartelised market) by bringing a follow-on damages claim.

Those who purchased smart cards during the operation of the cartel from someone other than the cartel participants may also have a follow-on damages claim against the cartel for umbrella pricing. That is, for paying too much for their smart cards since market prices may have been increased as a subsequent effect of the cartel.

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 without these being reduced on account of the fines.

Regardless of whether you are based in The Netherlands, Germany, the UK or anywhere else in the European Union it may be possible for you to bundle your claims together and bring them, subject to limitation periods, in either the High Court (England and Wales), the Court of Session (Scotland) or the Competition Appeal Tribunal in London.

In the CAT an action must be brought within two years from the latest of: (1) the end of the period within which the decision can be appealed; (2) the final determination of any appeal; or (3) the date of the cause of action. In the High Court an action must be brought within six years from the date on which the cause of action accrued. This means that, at its shortest, the time within which a claim can be raised is two years plus the time period for appealing the relevant decision. However, in practice the limitation period can also be much longer, depending on the facts in hand and the forum in which the action is raised.

The decision in the smart cards cartel was notified on 3 September 2014 so the shortest time for filing a claim is 3 September 2016 plus the time period for appealing the relevant decision

### 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. 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, Gordon Moir or Guy Harvey.

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