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High Voltage Power Cable Cartel

European Commission imposes fines of €302m on participants
What does this mean for you?

The decision

The European Commission has imposed fines totalling just over €300 million on the participants in a cartel involving the supply of underground and submarine high voltage power cables for important high voltage power cable projects in the EEA (including large infrastructure and renewable energy projects such as offshore wind farms).

The firms involved in the cartel were ABB, Nexans, Prysmian (previously Pirelli), J-Power Systems (previously Sumitomo Electric and Hitachi Metals), VISCAS (previously Furukawa Electric and Fujikura), EXSYM (previously SWCC Showa and Mitsubishi Cable), Brugg, NKT, Silec (previously Safran), LS Cable and Taihan. ABB received full immunity from fines as it was the first to reveal the cartel to the Commission.

Fines were also imposed on some of the parent companies of the participants involved, as they exercised a decisive influence over their subsidiaries. This included Goldman Sachs' investment arm which is the former owner of Prysmian.

For almost 10 years these companies shared markets and allocated customers and parts of the world between themselves. The Commission also found that the participants were well aware that they were breaking competition rules.

How does this apply to you?

Those who purchased cables from cartel participants during the operation of the cartel (approximately from 1999 to 2009) may be entitled to claw back from them any 'overcharges' resulting from the cartel (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 did not purchase cables from cartel participants during the operation of the cartel may also have a follow-on damages claim against the cartel for umbrella pricing (in simple terms, for paying too much for their cables as 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 Sweden, 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 or Competition Appeal Tribunal in London.

Funding a follow-on damages claim

There are many ways to fund litigation, some of which are more common than others. 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 actions 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, therefore controlling cash flow; although these options all come at a cost.

Set out below is a brief overview of the types of funding that are most common when bringing a follow on damages claim.

Traditional retainer

Under a traditional retainer, a client pays for work carried out on its behalf on the basis of standard hourly rates, irrespective of the outcome of the litigation.

There are also fixed fee retainers and capped fee retainers. Fixed fee retainers are often fixed by reference to each stage of the litigation i.e. £x for pre-action work, £x for issuing proceedings and so on. Capped fee retainers may be provided on a similar basis i.e. by stage, or as an overall figure for the litigation.

Fixed and capped fees provide you with certainty and allocate the risk of inefficiency onto the law firm.

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 in English disputes 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 or Guy Harvey.

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