

General Court Confirms that the European Commission May Rely on Lawfully Seized Recordings Even if Made Unlawfully by a Third Party

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On 8 September 2016 the General Court (“GC”) dismissed Heiploeg’s appeal against the European Commission’s (“Commission”) decision in *Shrimps* (AT.39633) and confirmed that the Commission may rely on recordings seized *lawfully* in a “dawn raid” even if the recordings were made illegally by a third party (T-54/14). This judgment reminds us of the delicate balance between the right to respect for private life and the Commission’s need to obtain high probative evidence when investigating cartels.

Commission Decision

By decision of 27 November 2013, the Commission fined four North Sea shrimp traders, Heiploeg, Klaas Puul, Stührk, and Kok Seafood, a total of approximately €28 million for their involvement in a cartel, which consisted of price fixing, market sharing and exchanges of sensitive commercial information. The cartel lasted from June 2000 until January 2009 and

extended to at least Belgium, France, Germany and the Netherlands. Heiploeg and Kaas Puul, the two largest traders of North Sea shrimps in the EU, engaged in frequent contacts to discuss, among other things, prices to be paid to their suppliers, prices to be charged to their customers, and the allocation of those customers. Heiploeg also concluded a long-term strategic alliance with Kok Seafood whereby Kok Seafood agreed to refrain from actively competing with Heiploeg and Kaas Puul in return for Heiploeg’s purchases of North Sea shrimps from Kok Seafood at a cartelised price.

Over the course of the strategic alliance, Heiploeg and Kok Seafood developed a conflict and Kok Seafood made secret recordings of its telephone conversations with Heiploeg so as to be able to use them against Heiploeg and, possibly, even to use them as support for a leniency application (although this latter aspect was not proved, and no leniency application was made). The recordings of the telephone conversations were subsequently seized by the Commission during an on-the-spot inspection (“a dawn raid”) and relied on by the Commission in its findings, alongside other evidence.

Heiploeg challenged the Commission’s decision before the GC, contesting, among other things, the admissibility and credibility of the recordings and the transcripts made thereof.

GC Judgment

The first issue before the GC was to determine whether there was any legal obstacle to the use by the Commission of secret recordings and notes thereof when these were made illegally by a third party. If it was decided that there was no legal obstacle to their use, the second issue was whether the secret recordings and notes were credible enough to be relied upon by the Commission when discharging the burden of proof imposed on it by Article 2 of Regulation (EC) No 1/2003 when investigating cartels.

(1) Admissibility

The GC observed that the recordings and transcripts had been seized legally by the Commission during a dawn



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raid. Next, the GC observed that, according to the principle of the unfettered evaluation of evidence, the admissibility of evidence obtained lawfully cannot be contested before the GC, the only relevant criterion for the purpose of assessing its probative value being its credibility (see, to that effect, Joined Cases C-239/11 P, C-489/11 P and C-498/11 P, *Siemens v Commission*, ECLI:EU:C:2013:866, paragraph 128).

In response to Heiploeg's claim that the recordings at issue were obtained by Kok Seafood's employee in violation of the right to respect for private life enshrined in Article 8 of the European Convention on Human Rights (ECHR), the GC went on to consider whether the Commission can use evidence that was obtained unlawfully by a third party but subsequently obtained by the Commission in a lawful dawn raid. The Court first recalled the case law of the European Court of Human Rights, according to which the use of unlawfully obtained evidence, particularly evidence obtained in violation of Article 8 ECHR, does not in itself breach the right to a fair trial guaranteed by Article 6 ECHR when the appellant has not been deprived of fair proceedings or of his rights of defense and when such evidence does not constitute the only evidence on which a finding of liability was based (ECHR, *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140). There was no indication that Heiploeg had been deprived of fair proceedings or of its rights of defense; nor were the recordings at issue the only evidence relied upon by the Commission. Furthermore, the contents or authenticity of the recordings at issue had never been contested by Heiploeg. The Commission also verified that the recordings at issue were consistent with other elements of evidence in its file. Moreover, the recordings at issue were particularly valuable as evidence given their direct nature and were also disadvantageous to the party who made them, Kok Seafood. The GC therefore concluded that even if the recordings had been obtained by a third party unlawfully, the Commission was entitled to use them.

The GC also dismissed Heiploeg's argument that, because the use of secret recordings is illegal in certain Member States, the use of such recordings to establish a violation of Article 101 TFEU is also illegal. The GC relied on several points: first, that the European Union and the Member States all applied the ECHR, second, that the Commission and the GC were bound to apply European Union law, which did not prohibit the use of secret recordings in the circumstances of the present case, and third, although the GC could draw inspiration from a preponderance of legal thinking in the Member States, Heiploeg had not proved such a preponderance in support of its argument, and the GC could not be expected to apply the rules on evidence of a Member State that were the strictest.

Consequently, the GC concluded that the recordings at issue, and for the same reasons the transcripts thereof, were admissible as evidence in the Commission's investigation.

(2) Credibility

The GC dismissed all the arguments brought by Heiploeg to dispute the credibility of the transcripts of the recordings, in particular because the recordings were made by the third party, Kok Seafood, against its own interest and because also they were consistent with other elements of evidence in the Commission's file.

Concluding Remarks

There can be no doubt that if the Commission itself had made the recordings illegally, they would not have been admissible as evidence. The critical element in the *Shrimps* case is that the Commission obtained the evidence *legally*. The evidence was clearly not protected by professional legal privilege. So the only possible defence for Heiploeg was to invoke human rights. If this had been a criminal case decided in a Member State, the outcome might have been different, at least in some states, based on notions of fundamental rights. But EU competition law, like all the other areas of EU law cannot create penal sanctions, only administrative penalties, and so does not fall within the scope of criminal law for human rights purposes.

Arguably the fines at stake in EU competition investigations are so large that the cases are quasi-criminal. Indeed, some general principles of substantive criminal law as well as essential procedural safeguards specific to criminal cases, such as the principle of non-retroactivity and the principle of *non bis in idem*, have been applied to EU competition law cases. However, unlike the principle of non-retroactivity or the principle of *non bis in idem*, which are universally accepted, there is no consensus yet among Member States as to the prohibition of the use of evidence illegally obtained by private persons even in criminal procedures.

There are already many good reasons why operators should not become involved in cartel activity and this case illustrates one of them. A cartel participant can never be sure that another cartel participant is not recording the discussions of its co-conspirators for some nefarious purpose, or even to make an immunity application. And if the Commission seizes the recording everyone is caught red-handed, with no defence.

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