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SECRET RECORDINGS OF PHONE CONVERSATIONS CAN BE USED TO PROVE AN ANTICOMPETITIVE PRACTICE

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The judgment handed down on September 8, 2016 by the General Court of the European Union[1](the "Court") in the case of the North Sea shrimp cartel has just confirmed, contrary to the position expressed by the French Supreme Court in 2011, that secret recordings of telephone conversations are admissible as evidence of a violation of Article 101 of the Treaty on the Functioning of the European Union prohibiting anticompetitive agreements and practices.

The fight against anticompetitive agreements and practices is a shared top priority of national and EU competition authorities. In this context, the gathering of indications, if not evidence, of practices that the competition authority may use to establish the existence of an anticompetitive practice is essential. This is one of the reasons explaining the promotion by the competition authorities of leniency procedures (whereby an undertaking party to an anticompetitive practice and who blows the whistle to a competition authority may obtain full or partial immunity from fines). This is also one of the explanations for the significant increase in the legal and material resources made available to competition authorities these past years. This case is an example of this trend.

On January 26, 2009, Klaas Puul company submitted its leniency application to the European Commission (the "Commission"), blowing the whistle on the existence of a cartel between traders of North Sea shrimps. Following this application, unannounced inspections were carried out on the premises of a company named Kok Seafood. The Commission had seized audio files of the recordings of telephone conversions made by an employee of Kok Seafood unbeknownst to his interlocutor at the competitor company Heiploeg, as well as transcripts or notes of the telephone conversations with that person.

In its decision on November 27, 2013,[2] the Commission considered that between June 2000 and January 2009, Heiploeg and Klass Puul fixed the prices and the allocation of the volumes of sales of North Sea shrimps in Belgium, in France, in Germany and in the Netherlands. It added that Kok Seafood had participated in this cartel at least since February 2005, while Stührk had participated in the price-fixing agreement in Germany between March 2003 and November 2007. The Commission levied a total fine of €28,716,000 on Heiploeg, Stührk and Kok Seafood. For its part, Klaas Puul benefited from complete immunity from the fine.

The appeal lodged by Heiploeg against the Commission's decision argued in particular that the secret recordings of telephone conversations were not admissible as legal evidence of the existence of an anticompetitive agreement.

In its decision of September 8, 2016, the Court considered that inasmuch as the sanctioned company had not been deprived of the right to a fair trial, or of its rights of defense,[3]and the disputed recordings had not constituted the sole evidence on which the Court relied upon in entering its decision, the Commission could use them to establish the existence of a cartel. The Court added that, while the recordings were made illegally by a third party in breach of the right to privacy,[4] it remains that in the case at point this evidence was lawfully obtained by the Commission, and that its credibility is not disputed. On this last point, the Court noted that the Commission checked the congruency of the disputed recordings with the other evidence on file.

In other words, regardless of how the sound recordings were made, they can be validly used by the Commission to establish the existence of an anticompetitive cartel provided they were lawfully obtained by the Commission. This means that recordings obtained during inspections (search and seizures), as occurred in this case, can be used. This also means that the spontaneous communication of such recordings by a complainant or a leniency applicant is admissible.

This position is contrary to that applied in France. The French Supreme Court, in its ruling on January 7, 2011,[5]held that recordings of telephone conversations made by a person, unbeknownst to the person on the other end of the phone, which had been produced as evidence before the competition authority, were necessarily inadmissible as not fairly obtained. In that case, the recordings had been produced in support of a referral to the competition authority by a company wanting to blow the whistle on what it considered to be anticompetitive practices on the market for consumer electronic goods.

Heiploeg relied on that ruling in support of its argument, but it was rejected by the Court as the "only concrete example" in support of the argument that *"use of such conversations is prohibited as evidence in the laws of several Member States"*.

Put differently, the high courts of other Member States would have to rally around the position of the French Supreme Court in order to challenge the solution applied by the Court in its ruling on September 8, 2016. In the meantime and unless this hypothetical reversal takes place, secret recordings of telephone conversations will continue to be found admissible by the Commission.

[1] Judgment of the General Court of the European Union no. T-54/14 of September 8, 2016, *Goldfish and others v European Commission*.

[2] European Commission decision no. 39633 of November 27, 2013, Shrimps.

[3] Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[4] Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[5] Decision by the French Supreme Court in plenary session on January 7, 2011, *Philips France and Sony France v Ministry of the Economy, Industry and Employment and others*, no. 09-14316 and 09-14667.