Phone and tell

Secret recordings and transcripts of conversations between competitors can be used as evidence in cartel cases

*by **Jaime Rodriguez-Toquero****

On 27 November 2013, the European Commission fined four North Sea shrimp traders (Heiploeg, Klaas Puul, Stührk and Kok Seafood) a total of approximately €28m for operating a cartel lasting from June 2000 until January 2009 (the Commission Decision). According to the Commission, the cartel involved market sharing, allocation of customers, exchanges of commercially sensitive information and co-ordination of sales prices to retailers and purchase prices to fishermen.

Recording conversations

In this context, the Commission found that Heiploeg and Kok Seafood concluded a long-term strategic alliance agreement by which Heiploeg would purchase North Sea Shrimps from Kok Seafood at a price determined by Heiploeg's average resale price downstream. In return, Kok Seafood would refrain from competing with Heiploeg and Klaas Puul (see the Commission Decision, para 57). At a later stage, however, both parties fell out with one another and Kok Seafood started secretly recording telephone conversations with Heiploeg and other undertakings in the business. Kok Seafood threatened Heiploeg that it would use the recordings against them. Neither the Commission nor any national authorities were involved in the recording of the telephone conversations.

In March 2009, the Commission carried out inspections and gathered the recordings at one of the companies' premises. The recordings and transcripts were part of the evidence used by the Commission to establish the infringement in the present case.

The General Court's view

Heiploeg appealed against the Commission's decision to the General Court (GC) claiming that the recordings and transcripts were inadmissible evidence against it because, among other reasons, under the laws of certain EU member states it is prohibited to record telephone conversations secretly, and their use as evidence could not be justified on the basis of the case law of the European Court of Human Rights (ECtHR).

In its judgment in Case T-54/14 *Goldfish v Commission* EU:T:2016:455, the GC noted that the recordings and transcripts had been obtained legally by the Commission. The telephone conversations were recorded and seized in the Netherlands and, under Dutch law, the recording is not a criminal offence. According to article 139c (1) of the Dutch Criminal Code, the recording of a telephone conversation is a criminal offence only if it is done by someone who is not a party to the conversation. It is important to note that neither the Commission nor the national authorities were involved in the recordings of the telephone conversations and, as the Commission's decision notes, the company where these were found "had no incentive to provide incriminating evidence to the Commission. This is an important distinction with other investigations where recordings are made and provided by complainants or leniency applicants that may have a personal interest in providing the Commission with evidence." (See the Commission Decision, para 266.)

Furthermore, should the parties have obtained the evidence in an unlawful way, the GC noted that, according to ECtHR case law, the material could be used as evidence as long as the following two conditions were met, namely: (1) the appellant's (Heiploeg) right to a fair trial (see article 6 of the European Convention on Human Rights) had not been violated (ie that the appellant has been given the opportunity of challenging the authenticity and use of the evidence); and (2) the material in question was not the only piece of evidence used to establish an infringement.

As regards the first point, Heiploeg had been given access to all the recordings and transcripts and never denied their content or authenticity (see *Goldfish*, para 69). In relation to the second point, the Commission verified the consistency of the recordings with other evidence included in the Commission's file (besides the recordings and transcripts) to establish an infringement (see *Goldfish*, para 70). It could be argued that this is comparable to the burden that the Commission has when using incriminating evidence found in company statements submitted in support of a leniency application against other parties, where those parties dispute their involvement and, therefore, the material needs to be corroborated by other evidence (see Case T-67/00 *JFE Engineering v Commission*, EU:T:2004:221, para 219).

The GC concluded that, even if the recordings made by competitor Kok Seafood were to be considered illegal, the Commission was entitled to use them as evidence in order to prove an infringement of article 101 TFEU.

Practical application

The present case shows that recordings and transcripts of conversations between competitors can legitimately be used as evidence in cartel investigations (together with other evidence available to the Commission). If corroborated by other evidence gathered in the context of the investigation, the Commission will not hesitate to use these recordings and transcripts as incriminating evidence. In practical terms, companies should bear in mind that they are never off the record when speaking with a competitor and the same standards of conduct apply in all scenarios. Essentially, whatever you say can and will be used against you.

References

Commission Decision C (2013) 8286 final relating to a proceeding under article 101 of the treaty on the functioning of the European Union (Case AT.39633 Shrimps). The non-confidential version is available at *http://tinyurl.com/pb9kalh*

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