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When the walls (and the competition authorities) have ears…

Imagine…

Your company is involved in a cartel investigation: the competition authority conducting it believes that your company made price agreements and exchanged sensitive commercial information with competitors. The authority arrived at these conclusions on the basis of leniency declarations from a number of competitors, responses to information requests and evidence it discovered while searching various premises. Along with the written notes of employees, however, the evidence gathered at a competitor's also includes audio recordings of telephone calls between said competitor and yourself. It appears that he had been secretly taping your cartel discussions.

You are dumbfounded – nay, thunderstruck: how could such audio recordings be used as evidence for a competition law violation? This really is a bridge too far – does privacy mean *nothing* any longer? You hurry along to your legal department to learn how this could possibly be happening...

A brief clarification.

In the North Sea shrimp cartel, a number of companies trading in North Sea shrimp and other shellfish had for almost a decade made agreements about their purchase and sale prices and about dividing up the clientele. To prove the existence of this cartel, the European Commission relied on, amongst other things, audio recordings of telephone calls and notes of these discussions that it had found during a

search of premises.

One of the cartel participants objected to the use of such recordings and notes, and brought the case before the General Court of the European Union in Luxembourg. According to that company, the recordings and notes were not sufficiently reliable and therefore should not be admissible as evidence. To do so would constitute a violation of privacy and of the rights of defence.

In a judgment of 6 September 2016, the General Court took a different view.

The Court found that the Commission had lawfully gathered the recordings during a search of one of the companies and noted that the discussions had been taped by one of the involved companies themselves, not by the Commission. It ruled that the Commission may use the evidence lawfully gathered by it, even if the audio recordings themselves were unlawfully made by one of the "competitors".

The Court ruled that the company´s rights of defence are *not* automatically threatened if evidence violates privacy. According to the Court, that is not the case if at least the following conditions are satisfied:

- The company had the right to a fair trial, and does not adduce any reason to doubt that it got one.
- The audio recordings are not the sole evidence on which the Commission relies. That evidence also includes other proofs, including the leniency declarations and the responses to information requests.
- The audio recordings are directly related to the object of the investigation. They confirm the other evidence, and the company has never denied their content.
- The company that made the recordings was also sanctioned.

Concretely.

Within the framework of their investigation mandate, competition authorities have broad powers to gather and evaluate evidence.

Evidence that is obtained by violating the right to privacy does not automatically have to be removed from the authority's file.

Thus competition authorities can use audio recordings they find in a search of premises as evidence, even if they were made secretly, in violation of the right to privacy.

The use of such recordings must satisfy at least the following conditions:

- The audio recordings are of discussions that actually took place, and that fact is not disputed by the companies involved.
- The recordings are not the only evidence on which the authority relies to prove the violation.
- The content of the recordings relates directly to the object of the investigation and confirms the tenor of the other evidence.

Want to know more?

The *Goldfish BV* decision can be found on the Court’s website.

The investigative powers of the competition authorities are discussed in the book ‘Horizontal

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Agreements and Cartels in EU Competition Law', edited by **contrast** and published by Oxford University Press. You can find more information on this book here.