

EU & UK COMPETITION LAW

BULLETIN

3 June 2009

Please click on the following links to go directly to your area of interest:

[Mergers](#)

[Antitrust](#)

[State aid](#)

[Market investigations](#)

[Litigation](#)

Covert recordings can count as evidence in French proceedings

On 29 April 2009, the Paris Court of Appeal dismissed for the second time the appeal of Philips and Sony against a decision of the Competition Council in 2005 condemning an agreement between the two companies and their respective distributors. In so doing, the Court of Appeal expressed its opposition to the judges of the French Supreme Court concerning the delicate matter of the admissibility of evidence obtained without the knowledge of the companies under investigation.

In its decision, the French Competition Authority accepted as evidence audio recordings, produced by the claimant, of conversations with representatives of suppliers and wholesalers, accompanied by their transcripts. Philips and Sony lodged an appeal against the decision, arguing, *inter alia*, that the recordings had been made without the knowledge of the authors. The Paris Court of Appeal upheld the decision of the Council on 19 June 2007. The Commercial Chamber of the French Supreme Court, however, pronounced its opposition to this procedure, arguing that the recording of a telephone conversation made by a party without the other knowing it, is an unfair practice and an inadmissible piece of evidence insofar as it is contrary to Article 6 paragraph 1 of the European Convention on Human Rights (ECHR). By a decision dated 2 June 2008, the Supreme Court annulled the first decision of the Paris Court of Appeal and ordered the case to be remitted to the same, though differently composed, Court in order to re-judge the case on its merits.

What is unusual about this case is the fact that in its second ruling, the Court of Appeal maintained its initial position and did not follow the Supreme Court's interpretation of the right to a fair trial guaranteed by Article 6 paragraph 1 of the ECHR. According to the Court of Appeal, the European Court of Human Rights case law on Article 6 paragraph 1 entitles adversely affected parties to be informed of all the evidence, to submit a complete statement of their objections and to make known their own views. Article 6 paragraph 1, however, merely requires that the procedure guarantees a fair trial and it does not apply to the admissibility of the evidence, which remains a matter governed by national law.

The Court of Appeal then mentioned that in the absence of specific rules of evidence, violations of Articles 81 and 82 EC Treaty can be established by any means admissible under the laws of Member States. In order to apply this reasoning in the case of national French law, the Court evoked the difference between the objectives pursued by the provisions of the Civil Procedure Code and the nature of the procedure followed by the French Competition Authority. The Competition Authority's mission is to ensure the economic protection of consumers and it has the power to impose criminal penalties in the exercise of this mission. Consequently, the provisions of the Civil Procedure Code do not apply to its conduct and the Authority enjoys procedural autonomy.

The admissibility of a piece of evidence must therefore, according to the Court of Appeal, be assessed in relation to the objectives pursued and the rights of parties against whom the evidence is brought. Evidence obtained illegally should be disallowed only if it specifically violates the right to a fair trial, the adversarial principle, or the rights of defence of those against whom the evidence is brought.

However, in the present case, the Court of Appeal underlined that those whose words were secretly recorded did not protest for reasons of undue process of law, nor did they express any doubts as to the authenticity of the records or contest the content of the recorded conversations. They did not even deny what they said, nor did they imply that they would have said different things if they had been aware that their conversations were being recorded. On the contrary, the persons in question confirmed and clarified the recorded evidence by providing additional evidence. Furthermore, all the recorded discussions related to professional topics, without any reference to privacy.

Interestingly, the Court also pointed out that the principle that guarantees every person the right against self-incrimination is not applicable to companies where the words recorded are not those of their representatives.

In addition to this, since the parties were aware of the evidence in question and were able to make known their views on both the form and the content of this evidence in the context of an adversarial procedure, they can not establish any specific violation of the right to a fair trial, the adversarial principle or the rights of defence.

The Court of Appeal has confirmed the Authority's decision not to disallow the recordings in question purely on the basis that they were obtained illegally and has ruled that they are admissible because they were examined in the context of an adversarial procedure. It also established the fact that the Authority is the sole body competent to assess the recordings' probative value. Although the recordings were produced by the claimant and not by the investigators or the court reporter, the Authority's mission of ensuring consumers' economic protection justifies their admissibility.

Moreover, according to the Paris Court of Appeal, the particular context of cartels should justify the admissibility of audio recordings obtained without the knowledge of the person being recorded. In cartel cases, victims usually do not have the economic power and market knowledge of their trading partners. Thus, the use of evidence obtained illegally is not disproportionate to the pursued goal, particularly when it comes to proving a practice which is itself illegal.

MERGERS

[Back to Top](#)

EU

Decisions

1 Commission approves proposed acquisition of Schokinag by Archer Daniels Midland

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of chocolate manufacturer Schokinag of Germany by the US agricultural commodity undertaking Archer Daniels Midland. After examining the operation, the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

Archer Daniels Midland (ADM) is active in the production, processing and distribution of agricultural commodities and products such as oilseed, corn and cocoa. Schokinag manufactures and distributes semi-finished cocoa and chocolate products, with a focus on industrial chocolate.

The Commission examined the competitive effects of the proposed merger in the markets for the procurement of cocoa beans and semi-finished cocoa products (cocoa mass, cocoa butter, cocoa powder) where both parties are active. The Commission's analysis found that ADM and Schokinag are not close competitors with respect to the range and types of products that they offer. The Commission's investigation also established that a number of effective competitors were supplying the relevant products. The Commission therefore concluded that the proposed transaction would not lead to competition concerns.

IP/09/839 – 27 May 2009

2 Commission approves joint venture of SGL Carbon and Brembo

The European Commission has cleared under the EU Merger Regulation the proposed creation of a joint venture between SGL Carbon SE of Germany and Brembo S.p.A of Italy to develop and produce carbon-ceramic brake discs and systems. After examining the operation, the Commission concluded that the transaction would not significantly impede effective competition in the EEA or any substantial part of it.

SGL Carbon produces carbon-based products, including carbon fibres and brake discs. Brembo manufactures brake products including brake discs and callipers for cars, motorbikes, commercial vehicles and racing cars. The joint venture would be active in the development of carbon-ceramic brake systems and the sale of carbon-ceramic brake discs for cars and light commercial vehicles. In particular, it would combine Brembo's ceramic brake systems business and SGL Carbon's brakes business, exploit resulting synergies, increase the capacity and production volume of the existing plants and aim to create and operate facilities for the mass production and sale of carbon-ceramic brake discs.

The Commission's examination of the proposed transaction showed that for the products concerned, the joint venture would continue to face effective competition from high performance cast iron brake discs, whereas carbon-ceramic brake discs constitute a very moderate proportion of the overall high performance market.

IP/09/841 – 27 May 2009

Invitations to Comment

3 Itochu/Mitsubishi/Enolia/JV

Interested parties are invited to comment by 8 June 2009 on the proposed acquisition of Enolia Solar Systems S.A., Greece ('JV') by Itochu Corporation ('Itochu', Japan), Mitsubishi Heavy Industries Ltd. ('Mitsubishi', Japan) and Enolia Energy S.A. ('Enolia', Greece) by way of purchase of shares.

COMP/M.5520

4 CVC/Belgian State/De Post-La Poste

Interested parties are invited to comment by 7 June 2009 on the proposed acquisition of Post NV/La Poste SA ('De Post-La Poste', Belgium) by CVC Capital Partners SICAV-FIS S.A. ('CVC', Luxembourg) by way of purchase of shares.

COMP/M.5523

5 GE/NewsCorp/Disney/Hulu JV

Interested parties are invited to comment by 7 June 2009 on the proposed acquisition of joint control of Hulu LLC ('Hulu', USA), an existing company currently jointly controlled by GE and NewsCorp, by way of purchase of shares by General Electric ('GE', USA), News Corporation ('NewsCorp', USA) and The Walt Disney Company ('Disney', USA).

COMP/M.5541

6 Access/PCH/LBI

Interested parties are invited to comment by 5 June 2009 on the proposed acquisition of LyondellBasell Industries AF S.C.A; ('LBI', Luxembourg) by way of purchase of shares in a newly created company constituting a joint venture by Access industries group ('Access', The United States) and ProChemie Holding Limited ('PCH', Jersey)

COMP/M.5534

UK

Decisions

7 OFT publishes decision to seek undertakings in lieu in relation to Sport Direct's acquisition of stores from JJB Sports

On 21 May 2009, the Office of Fair Trading (OFT) published the full text of its decision to seek undertakings from Sport Direct International plc in lieu of referring its completed acquisition of a number of stores from JJB Sports plc to the Competition Commission under the Enterprise Act 2002. The OFT concluded that the acquisition of 31 stores over a 13 month period constituted a single merger. It found that Sports Direct and JJB are each other's closest competitors. The OFT identified competition concerns in five local overlap areas in relation to one or all of sports clothing, sports equipment and/or sports footwear. Sports Direct has agreed to divest stores in each of the five areas to an up-front buyer.

ME/3986/08 - 21 May 2009

8 OFT publishes decision in acquisition by Canada Pension Plan Investment Board of Macquarie Communications Infrastructure Group

On 21 May 2009, the OFT announced that it has decided not to refer the anticipated acquisition by Canada Pension Plan Investment Board (CPPIB) of Macquarie Communications Infrastructure Group (MCG) to the Competition Commission under the Enterprise Act 2002. The OFT published the full text of its clearance decision on 27 May 2009.

The OFT concluded that there are no horizontal overlaps between the activities of CPPIB and MCG. There is a very limited vertical overlap between the parties due to the fact that CPPIB has a stake in Wales and West Utilities, which rents space on a number of Arqiva-owned structures in the UK. In addition Wales and West Utilities provides utility services to Arqiva. However, the OFT concluded that there are no plausible competition concerns arising from this vertical relationship. There is no risk of the merger resulting in foreclosure in either gas distribution or in any of the services provided by Arqiva.

The OFT also concluded that there is no risk of conglomerate effects arising from the merger, resolving therefore that the merger would not result in a substantial lessening of competition in any market in the UK.

ME/4106/09 - 21 May 2009

9 OFT refers Stagecoach's Preston Bus acquisition to Competition Commission

The OFT has referred the acquisition of Preston Bus Limited by Stagecoach Bus Holdings Limited to the Competition Commission. Both Stagecoach and Preston Bus provide local bus services in Preston and, as a result of this acquisition, Stagecoach has become the predominant provider of commercial bus services in this area. Given the absence of any evidence of likely entry in the short to medium term by other bus operators, the OFT was concerned that this could result in higher prices or decreased service quality to local bus users.

The OFT was made aware that Preston Bus was in significant financial difficulties prior to its sale, and carefully considered whether it could be characterised as a 'failing firm'. However, while it is possible that Preston Bus may have failed and gone into administration had it not been sold, the OFT was not confident that all the failing firm conditions were met to the standard required for a first phase investigation. Specifically, it considered that there could have been a more competitive alternative to the merger: given the interest in Preston Bus expressed by other bidders, the OFT could not rule out that Preston Bus' assets could have been used by another operator to enter the market and compete against Stagecoach.

62/09 - 21 May 2009

10 Anticipated acquisition by Elster Group GMBH of the water meter and boundary box businesses of Severn Trent Metering Services Limited

On 28 May 2009, the OFT published the full text of its decision in the anticipated acquisition by Elster Group GMBH of the water meter and boundary box business of Severn Trent Metering Services. The OFT announced

its decision not to refer the merger to the Competition Commission under the Enterprise Act 2002 on 29 April 2009. The OFT concluded that the merger would not result in a substantial lessening of competition in relation to the supply of residential water meters in the UK. On the basis of bidding data, the OFT found that the parties were not each other's closest competitors and that there will remain effective competition from alternative suppliers.

CR/20/09 - 28 May 2009

11 Competition Commission consults on draft undertakings to block BBC Worldwide/ ITV/ Channel 4 joint venture

On 22 May 2009, the Competition Commission published for consultation draft final undertakings in relation to the proposed video on demand joint venture (Project Kangaroo) between the BBC, through BBC Worldwide Limited, Channel Four Television Corporation and ITV plc. The Competition Commission concluded that the joint venture would be likely to result in a substantial lessening of competition in the supply of UK TV video on demand content at both the wholesale and retail levels. The Competition Commission concluded that prohibition would be the only effective and proportionate solution to the substantial lessening of competition identified. The final draft undertakings therefore prohibit (for a five year period) each of the parties from entering into arrangements whereby they acquire control of all or any part of the video on demand activities carried on by both the other parties.

22 May 2009

12 OFT publishes clearance decision in acquisition by Prince Minerals of Castle Colours

On 22 May 2009, the OFT published the full text of its decision in the anticipated acquisition by Prince Minerals Limited of Castle Colours Limited. The OFT announced its decision not to refer this merger to the Competition Commission under the Enterprise Act 2002 on 6 May 2009. The OFT found that the merger raises a realistic prospect of a substantial lessening of competition in the supply of non-calcined clay stains. However, it concluded that it was appropriate to exercise its discretion to apply the de minimis exception and the OFT, therefore, decided not to refer the merger to the Competition Commission on the basis that the market affected is of insufficient importance to justify a referral.

CR/019/09 - 22 May 2009

13 Coca-Cola / Fresh Trading Limited merger clearance

On 26 May 2009, the Office of Fair Trading announced on the Regulatory News Service that it has decided not to refer the anticipated acquisition by The Coca-Cola Company of a minority interest in Fresh Trading Limited to the Competition Commission under the Enterprise Act 2002.

ME/491/09 - 22 May 2009

ANTITRUST

[Back to Top](#)

EU

14 Germany pushing for closer look at Google's digital book plans at EU level

Concern is growing among some EU member states over the possible effect on European rights-holders of a class-action settlement with Google as part of its project to digitise books. Spearheaded by Germany, EU ministers may ask the European Commission to look into the deal.

27 May 2009

15 Commissioner Kroes welcomes progress on pan-European music licensing following Online Commerce Roundtable

European Commissioner for Competition Neelie Kroes has welcomed progress made towards pan-European

music licensing following discussions in the Online Commerce Roundtable. In particular, she welcomes confirmation by French collecting society SACEM that it is willing, in principle, to entrust other collecting societies with pan-European licensing of its repertoire and to act as non-exclusive rights manager for publishers and other collecting societies. She also welcomes confirmation by multinational record company EMI that it is ready to entrust rights managers to offer its repertoire for the whole European Economic Area and notes Apple's statements that if iTunes was readily able to license rights on a multi-territorial basis from publishers and collecting societies, it would consider making its content available to all European consumers, including those in EU countries where iTunes is currently not available.

IP/09/832 – 26 May 2009

OTHER

16 Commission welcomes conclusion of cooperation agreement between EU and Republic of Korea

The European Commission welcomes the signature in Seoul of a cooperation agreement on competition enforcement between the EU and the Republic of Korea. The agreement aims at fostering the effective application of competition laws by promoting cooperation between the Commission and the South Korean competition authority. In particular, the agreement includes provisions on mutual assistance, coordination of enforcement activities and regular bilateral meetings.

IP/09/827 – 25 May 2009

STATE AID

[Back to Top](#)

17 Commission approves Italian risk-capital measure to boost real economy

The European Commission has approved, under EC Treaty State aid rules, an Italian framework temporarily adapting certain existing risk-capital schemes to increase companies' financing possibilities during the current economic crisis. The measure will allow for more flexible risk-capital investments until 2010, in line with the Commission's Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis.

IP/09/825 – 25 May 2009

18 Commission authorises two Italian crisis schemes to boost real economy

The European Commission has authorised under EC Treaty State aid rules two schemes aimed at helping companies to deal with the current economic crisis. The measures allow national, regional and local authorities to grant aid in 2009 and 2010 to businesses facing funding problems because of the current credit squeeze. The first scheme enables grants of up to €500 000 per company, while the second one provides for aid in the form of guarantees. Both schemes meet the conditions of the Commission's new Temporary Framework for State aid measures, as outlined above, which gives Member States additional scope to facilitate access to financing in the present economic and financial crisis. In particular, they are limited in time and only apply to companies that were not in difficulties on 1 July 2008. They are therefore compatible with Article 87(3)(b) of the EC Treaty, which permits aid to remedy a serious disturbance in the economy of a Member State.

IP/09/852 – 29 May 2009

UK**19 CAT publishes summary of BAA's appeal against Competition Commission's final market investigation report**

On 22 May 2009, the Competition Appeal Tribunal (CAT) published a summary of the application, under section 179 of the Enterprise Act 2002, by BAA to challenge the legality of certain findings of the Competition Commission in its final report on the BAA airports market investigation. BAA is seeking an order that the CAT quash those findings in the final report requiring the divestiture of Gatwick Airport, Stansted Airport and one of Edinburgh or Glasgow airports and the findings on which that requirement is based. It claims that the divestiture remedies are unlawful on the basis of apparent bias and lack of proportionality.

1110/6/8/09 - 22 May 2009

If you require further information or advice on any of the items covered, then please contact either Diarmuid Ryan in London or Tom Pick in Brussels who are both partners in our EU Competition team.

CONTACTS**Diarmuid Ryan**

T: +44(0)161 830 5331

E: diarmuid.ryan@hammonds.com

F: +44 (0)870 460 2884

Tom S. Pick

T: +32 2 627 7692

E: tom.pick@hammonds.com

F: +32 2 627 7686

