



Press and Information

Court of Justice of the European Union

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Judgment in Case C-681/11

Bundeswettbewerbsbehörde, Bundeskartellanwalt v Schenker & Co. and Others

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**Legal advice given by a law firm or a decision of a national competition authority does not exempt an undertaking from anti-competitive conduct or from imposition of a fine**

*National competition authorities may by way of exception refrain from imposing a fine where the infringing undertaking has participated in a national leniency programme*

Schenker and 30 other companies were members of the Austrian Freight Forwarding Agents Consolidated Consignment Conference (Spediteur-Sammelladungs-Konferenz (SSK)), an interest group comprising some of the members of the Central Association of Freight Forwarding Agents (Zentralverband der Spediteure). That association represented the collective interests of freight forwarding agents and of logistics service providers with a forwarding licence.

In 1994 the SSK was established as a civil law partnership, conditionally upon approval by the Austrian Cartel Court (Kartellgericht). The SSK pursued the objective of enabling more favourable road and rail consolidated consignment rates to be granted to shippers and to end consumers. Through the creation of equal conditions of competition the SSK had the aim of promoting fair competition among its members.

By a decision in 1996, the Kartellgericht declared that the SSK was a minor cartel within the meaning of Austrian law. An Austrian law firm specialising in competition law, which was consulted as an adviser, also took the view that the SSK constituted a minor cartel and was therefore not prohibited.

On 11 October 2007 the Commission made public that its officials had made unannounced visits to the business premises of various suppliers of international freight forwarding services and that it had reason to believe that the companies concerned might have infringed provisions of EU law which prohibit anti-competitive business practices.

The Higher Regional Court, Vienna, held that there was no fault on the part of the undertakings in question by agreeing on prices in reliance upon an order of the Kartellgericht declaring that their agreement constituted a minor cartel. According to that court, the SSK's conduct had no effect on trade between Member States and EU law was not infringed. The absence of fault on the part of the undertakings concerned was also held to be due to the fact that they had in advance sought legal advice on the lawfulness of their conduct from a law firm.

The Federal Competition Authority (Bundeswettbewerbsbehörde) had claimed that Schenker, which submitted an application for leniency and cooperated with the authorities in the investigation proceedings, should be declared to have infringed EU and Austrian law on cartels, but not fined. That claim was dismissed on the ground that it was for the Commission alone to find infringements without imposing a fine.

The Supreme Court decided, when the case was brought before it, to refer two questions to the Court of Justice for a preliminary ruling. The Court of Justice has been asked, first of all, whether a company which has infringed EU competition law may escape imposition of a fine where the infringement has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer or of the terms of a decision of a national

competition authority. The second question that the Court has been asked is whether, where a company participates in a leniency programme, the national competition authorities may, whilst finding an infringement of competition law, refrain from imposing a fine upon it.

The Court points out first of all that the fact that a company has characterised its conduct wrongly in law cannot have the effect of exempting it from imposition of a fine, save in exceptional cases, for example where a general principle of EU law, such as the principle of the protection of legitimate expectations, precludes imposition of a fine. However, a person may not plead breach of the principle of the protection of legitimate expectations unless he has been given precise assurances by the competent authority. Consequently, legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of a company that its conduct does not infringe EU competition law or will not give rise to the imposition of a fine.

As for the national competition authorities, since they do not have the power to adopt a decision concluding that there is no infringement of EU law, they cannot cause companies to entertain a legitimate expectation that their conduct does not infringe the competition rules. Moreover, in the present instance the national authority examined the companies' conduct on the basis of national competition law only.

Consequently, the Court decides that **EU competition law must be interpreted as meaning that a company which has infringed that law may not escape imposition of a fine where the infringement has resulted from the company erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer or of the terms of a decision of a national competition authority.**

Secondly, the Court notes that EU competition law does not provide expressly that the national authorities have the power to find an infringement of the EU competition rules without imposing a fine, but it does not exclude that power either.

The Court states that such a decision not to impose a fine can be made under a national leniency programme only in so far as the programme is implemented in such a way as not to undermine the requirement of effective and uniform application of EU competition law.

Thus, in the case of the Commission's power to reduce fines under its own leniency programme, the Court recalls that reduction of a fine for cooperation on the part of companies participating in infringements of EU competition law is justified only if such cooperation makes it easier for the Commission to carry out its task. The company's conduct must also reveal a genuine spirit of cooperation.

Finally, immunity from or not imposing a fine is possible in strictly exceptional situations only, such as where a company's cooperation has been decisive in detecting and actually suppressing the cartel, in order not to undermine the effective and uniform application of EU law.

Consequently, the Court decides that **the national competition authorities may by way of exception confine themselves to finding the infringement without imposing a fine where the company concerned has participated in a national leniency programme.**

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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