Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

18 June 2013*

(Agreements, decisions and concerted practices — Article 101 TFEU — Regulation (EC) No 1/2003 — Articles 5 and 23(2) — Intention-related or negligence-related conditions for imposing a fine — Impact of legal advice or of a decision of a national competition authority — Power of a national competition authority to find the infringement of European Union competition law without imposing a fine)

In Case C-681/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 5 December 2011, received at the Court on 27 December 2011, in the proceedings

Bundeswettbewerbsbehörde,

Bundeskartellanwalt

v

Schenker & Co. AG,

ABX Logistics (Austria) GmbH,

Alpentrans Spedition und Transport GmbH,

Logwin Invest Austria GmbH,

DHL Express (Austria) GmbH,

G. Englmayer Spedition GmbH,

Express-Interfracht Internationale Spedition GmbH,

A. Ferstl Speditionsgesellschaft mbH,

Spedition, Lagerei und Beförderung von Gütern mit Kraftfahrzeugen Alois Herbst GmbH & Co. KG,

Johann Huber Spedition und Transportgesellschaft mbH,

Kapeller Internationale Spedition GmbH,

Keimelmayr Speditions- u. Transport GmbH,

* Language of the case: German.

Koch Spedition GmbH,

Maximilian Schludermann, as insolvency administrator of Kubicargo Speditions GmbH,

Kühne + Nagel GmbH,

Lagermax Internationale Spedition Gesellschaft mbH,

Morawa Transport GmbH,

Johann Ogris Internationale Transport- und Speditions GmbH,

Logwin Road + Rail Austria GmbH,

Internationale Spedition Schneckenreither Gesellschaft mbH,

Leopold Schöffl GmbH & Co. KG,

'Spedpack'-Speditions- und Verpackungsgesellschaft mbH,

Johann Strauss GmbH,

Thomas Spedition GmbH,

Traussnig Spedition GmbH,

Treu SpeditionsgesmbH,

Spedition Anton Wagner GmbH,

Gebrüder Weiss GmbH,

Wildenhofer Spedition und Transport GmbH,

Marehard u. Wuger Internat. Speditions- u. Logistik GmbH,

Rail Cargo Austria AG,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, M. Ilešič and M. Berger, Presidents of Chambers, E. Juhász (Rapporteur), U. Lõhmus, E. Levits, A. Ó Caoimh, J.-C. Bonichot, J.-J. Kasel, M. Safjan, D. Šváby and A. Prechal, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2013,

after considering the observations submitted on behalf of:

— the Bundeswettbewerbsbehörde, by T. Thanner, K. Frewein and N. Harsdorf Enderndorf, acting as Agents,

— the Bundeskartellanwalt, by A. Mair, acting as Agent,

— Schenker & Co. AG, by A. Reidlinger and F. Stenitzer, Rechtsanwälte,

— ABX Logistics (Austria) GmbH, Logwin Invest Austria GmbH and Logwin Road + Rail Austria GmbH, by A. Ablasser-Neuhuber and G. Fussenegger, Rechtsanwälte,

— Alpentrans Spedition und Transport GmbH, Kapeller Internationale Spedition GmbH, Johann Strauss GmbH and Wildenhofer Spedition und Transport GmbH, by N. Gugerbauer, Rechtsanwalt,

— DHL Express (Austria) GmbH, by F. Urlesberger, Rechtsanwalt,

— G. Englmayer Spedition GmbH, Internationale Spedition Schneckenreither Gesellschaft mbH and Leopold Schöffl GmbH & Co. KG, by M. Stempkowski and M. Oder, Rechtsanwälte,

— Express-Interfracht Internationale Spedition GmbH, by D. Thalhammer, Rechtsanwalt,

— Kühne + Nagel GmbH, by M. Fellner, Rechtsanwalt,

— Lagermax Internationale Spedition Gesellschaft mbH, by K. Wessely, Rechtsanwältin,

— Johann Ogris Internationale Transport- und Speditions GmbH and Traussnig Spedition GmbH, by M. Eckel, Rechtsanwalt,

— Gebrüder Weiss GmbH, by I. Hartung, Rechtsanwältin,

— the Italian Government, by G. Palmieri, acting as Agent, and L. D'Ascia, avvocato dello Stato,

— the Polish Government, by M. Szpunar and B. Majczyna, acting as Agents,

— the European Commission, by N. von Lingen, M. Kellerbauer and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU.

2 The request has been made in proceedings between, on the one hand, the Bundeswettbewerbsbehörde (Federal Competition Authority) and the Bundeskartellanwalt (Federal Cartel Lawyer) and, on the other, 31 undertakings, including Schenker & Co. AG ('Schenker'), relating to the finding of an infringement of Article 101 TFEU and of provisions of national law on cartels and to the imposition of a fine under provisions of national law.

Legal context

European Union law

3 Recital 1 in the preamble to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) states:

'In order to establish a system which ensures that competition in the common market is not distorted, Articles [101 TFEU] and [102 TFEU] must be applied effectively and uniformly in the Community. …'

4 Article 5 of Regulation No 1/2003, headed 'Powers of the competition authorities of the Member States', provides:

'The competition authorities of the Member States shall have the power to apply Articles [101 TFEU] and [102 TFEU] in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

— requiring that an infringement be brought to an end,

— ordering interim measures,

— accepting commitments,

— imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.'

5 Article 7 of Regulation No 1/2003, headed 'Finding and termination of infringement', states in paragraph 1:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101 TFEU] or of [102 TFEU], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. ... If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.'

6 Article 10 of Regulation No 1/2003, headed 'Finding of inapplicability', provides in its first paragraph:

'Where the Community public interest relating to the application of Articles [101 TFEU] and [102 TFEU] so requires, the Commission, acting on its own initiative, may by decision find that Article [101 TFEU] is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article [101(1) TFEU] are not fulfilled, or because the conditions of Article [101(3) TFEU] are satisfied.'

7 The first subparagraph of Article 15(3) of Regulation No 1/2003 is worded as follows:

'Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article [101 TFEU] or [102 TFEU]. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent

application of Article [101 TFEU] or [102 TFEU] so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.'

8 Article 23(2) of Regulation No 1/2003 states that the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 TFEU or 102 TFEU.

9 As provided in Article 23(5) of Regulation No 1/2003, '[d]ecisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature'.

Austrian law

10 Paragraph 16 of the Law on Cartels 1988 (Kartellgesetz 1988, BGBl. 600/1988), which was in force from 1 January 1989 until 31 December 2005, provided:

'Minor cartels are cartels which, at the time of their formation, have:

1. a share of less than 5% of the supply of the entire domestic market and

2. a share of less than 25% of any domestic local submarket.'

11 Paragraph 18(1)(1) of the Law on Cartels 1988 stated:

'The implementation of cartels, even partially, shall be prohibited under the following conditions:

1. prior to legally effective approval (Paragraphs 23 and 26); this does not cover cartels by effect or minor cartels unless the limits specified in Paragraph 16 are exceeded as a result of an operator joining the cartel'.

12 Paragraph 1(1) of the Law on Cartels 2005 (Kartellgesetz 2005, BGBl. I, 61/2005), which has been in force since 1 January 2006, provides:

'All agreements between operators, decisions by associations of operators and concerted practices between operators which have as their object or effect the prevention, restriction or distortion of competition (cartels) shall be prohibited.'

13 Paragraph 2(2)(1) of the Law on Cartels 2005 states:

'The following cartels shall in any event be excluded from the prohibition laid down in Paragraph 1:

1. cartels involving operators which have, jointly, a share of no more than 5% of the entire domestic market and of no more than 25% of any domestic regional submarket (minor cartels)'.

14 Paragraph 29(1)(a) and (d) of the Law on Cartels 2005 is worded as follows:

'The Kartellgericht [Cartel Court] must impose fines:

1. not exceeding 10% of the total turnover in the preceding business year on an operator or association of operators which intentionally or negligently:

(a) infringes the prohibition on cartels (Paragraph 1), the prohibition on abuse of a dominant position (Paragraph 5), …

or

(d) infringes Article [101 TFEU] or Article [102 TFEU]'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 It is apparent from the order for reference that the defendants in the main proceedings were members of the Spediteur-Sammelladungs-Konferenz (Freight Forwarding Agents Consolidated Consignment Conference; 'the SSK'). The SSK was an interest group comprising some of the ordinary members of the Zentralverband der Spediteure (Central Association of Freight Forwarding Agents; 'the Zentralverband'). The Zentralverband, which was set up as an association, represents the collective interests of freight forwarding agents and of logistics service providers with a forwarding licence.

16 On 30 May 1994 the SSK was established as a civil law partnership, subject to approval by the Kartellgericht. Under points 1 and 7.1 of the SSK Framework Agreement, the SSK pursued the objective of 'enabling more favourable road/rail consolidated consignment rates to be granted to shippers and to end consumers (compared with the rail tariffs for general cargo) and – through the creation of equal conditions of competition – of promoting fair competition among its members, an objective … to be pursued whilst having particular regard to ensuring compliance with Austrian, [European Union and European Economic Area (EEA)] law on cartels'.

17 On 28 June 1994 an application was submitted to the Kartellgericht for approval of the SSK as a contractually agreed cartel ('Vereinbarungskartell'). The application outlined the fundamental provisions of the framework agreement and assessed the situation in the light of European Union and EEA law. It was explained in the application that the SSK covered only consolidated consignment transport within Austria and that transport between Austria and the other States in the EEA was not prejudiced. The application also stated that, because of the very small market share concerned, namely less than 2% of the Austrian goods transport market, there was no appreciable restriction of competition, that the market was not foreclosed and, furthermore, that the market was open to foreign service providers. The paritätischer Ausschuss für Kartellangelegenheiten (Joint Committee for Cartel Matters) took the view that the SSK's existence was not justified from the point of view of the national economy, which led to the application for approval being withdrawn.

18 By document of 6 February 1995, the Zentralverband applied to the Kartellgericht for a declaration that the SSK was a minor cartel ('Bagatellkartell') within the meaning of Paragraph 16 of the Law on Cartels 1988 and could therefore be implemented without approval. The formation of the SSK, the conclusion of the SSK Framework Agreement, the model for the future joint tariff-fixing arrangements and the system applicable to exceptional customers were fully disclosed in that document. By order of 2 February 1996, the Kartellgericht declared that the SSK was a minor cartel within the meaning of Paragraph 16 of the Law on Cartels 1988. The order became final in the absence of any appeal.

19 The legal practice consulted as an adviser by the SSK's Kartellbevollmächtigte (cartel representative) also took the view that the SSK constituted a minor cartel. In a letter of 11 March 1996, it set out the points which were to be observed in implementing the SSK as a minor cartel. On the other hand, the letter does not address the issue of whether that minor cartel was compatible with European Union law on cartels.

20 In the context of the forthcoming entry into force, on 1 January 2006, of the Law on Cartels 2005, the Zentralverband asked that legal practice to examine the effects which that new law would have on the SSK. In its reply of 15 July 2005, the legal practice considered that it was necessary to review whether the SSK's share of the domestic market exceeded 5% and, should the share be greater, whether the

arrangements made within the framework of the SSK were excluded from the prohibition of cartels. That reply does not address the question whether the SSK was compatible with European Union law on cartels.

21 The Zentralverband ascertained by means of an e-mail questionnaire the market shares of the members of the SSK in domestic consolidated consignment transport in the general cargo sector for 2004, 2005 and 2006. In calculating the various market shares, it adhered to the principles governing market definition and market share calculation which had been used in the Zentralverband's application for a declaration and the resulting order by the Kartellgericht. It is apparent from that survey that the SSK had market shares of 3.82% in 2005 and 3.23% in 2006. The most prominent members of the SSK at least were informed that the SSK remained below the 5% threshold in respect of those two years. According to the referring court, it can be ruled out that, in the years up to and including 2004, the 5% threshold was exceeded as a result of new members joining.

22 On 11 October 2007 the Commission made public that on the previous day Commission 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 undertakings concerned might have infringed provisions of the EC Treaty which prohibit anti-competitive business practices.

23 On 29 November 2007 discussions took place between the board of the SSK and the executive committee of the Zentralverband as well as a representative from the legal practice consulted as an adviser by the SSK, concerning the application of Austrian and European competition law to cooperation within the SSK and the Zentralverband. Doubts were on that occasion expressed for the first time concerning the lawfulness of the SSK as a minor cartel. Reference was made to the risk that European Union law on cartels might be applicable, given that it is not easy to determine whether agreements or understandings may actually affect trade between States. The SSK's board thus resolved unanimously to dissolve the SSK immediately.

24 On 18 February 2010 the Bundeswettbewerbsbehörde requested the Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as the court with jurisdiction in cartel cases, to declare that Schenker had infringed, inter alia, Article 101 TFEU, but without fining it, and, on the other hand, to order the remaining defendants to pay a fine for infringement of Article 101 TFEU. It submitted that the defendants took part, from 1994 to 29 November 2007, in a single, complex and multi-faceted infringement of national and European Union law on cartels by agreeing on tariffs for domestic consolidated consignment transport throughout Austria.

25 The defendants contended that the application of the Bundeswettbewerbsbehörde should be dismissed and, with the exception of Schenker, they in particular denied fault, arguing that the SSK had been found by the Kartellgericht to be a minor cartel, that the SSK was publicly known, and that they had obtained advice from a reliable legal practice experienced in matters of competition law. They submitted that European Union law was not applicable because the restriction of competition had not affected trade between Member States.

26 By order of 22 February 2011, the Oberlandesgericht Wien dismissed the application of the Bundeswettbewerbsbehörde.

27 The grounds stated by the Oberlandesgericht Wien for dismissing the application included in particular that there was no fault on the part of the undertakings in question by agreeing on prices, as they could invoke the order of 2 February 1996 by which the Kartellgericht had declared that their agreement constituted a minor cartel. According to the Oberlandesgericht Wien, that order signifies that the SSK had no effect on trade between Member States and that Article 101 TFEU therefore was not infringed. The Oberlandesgericht Wien considers, furthermore, that the absence of fault on the

part of the undertakings concerned is also due to the fact that the undertakings participating in the cartel had sought in advance legal advice on the lawfulness of their conduct from a legal practice that specialised in law on cartels.

28 The Bundeswettbewerbsbehörde had claimed that Schenker, which submitted an application for leniency and cooperated with the authorities in the investigation proceedings relating to the law on cartels, should be declared to have infringed Article 101 TFEU and Austrian law on cartels, but not fined. That claim was dismissed by the Oberlandesgericht Wien on the ground that, under Articles 5, 7 and 10 of Regulation No 1/2003, it is for the Commission alone to find infringements without imposing a fine.

29 The Bundeswettbewerbsbehörde and the Bundeskartellanwalt appealed against the order of the Oberlandesgericht Wien. By document of 12 September 2011, the Commission submitted written observations on the case pending before the Oberster Gerichtshof (Supreme Court), pursuant to Article 15 of Regulation No 1/2003.

30 In that context, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) May breaches of Article 101 TFEU committed by an undertaking be penalised by means of a fine in the case where the undertaking erred with regard to the lawfulness of its conduct and that error is unobjectionable?

If Question 1 is answered in the negative:

(a) Is an error with regard to the lawfulness of conduct unobjectionable in the case where the undertaking acts in accordance with advice given by a legal adviser experienced in matters of competition law and the erroneous nature of the advice was neither obvious nor capable of being identified through the scrutiny which the undertaking could be expected to exercise?

(b) Is an error with regard to the lawfulness of conduct unobjectionable in the case where the undertaking has relied on the correctness of a decision taken by a national competition authority which examined the conduct under review solely on the basis of national competition law and found it to be permissible?

(2) Are the national competition authorities competent to find that an undertaking participated in a cartel which infringes European Union competition law in a case where no fine is to be imposed on the undertaking on the ground that it has requested application of a leniency programme?’

Consideration of the questions referred

31 By its questions, the referring court wishes to obtain clarification with respect to intention-related or negligence-related conditions regarding the imposition of a fine on a person who has infringed European Union competition rules, in particular with respect to the effects that legal advice or a decision of a national competition authority may have on those conditions. In addition, the referring court seeks to ascertain whether a national competition authority may find an infringement of European Union competition rules without imposing a fine on the perpetrator of the infringement where the undertaking concerned has participated in a leniency programme.

32 These questions are raised in the context of national competition proceedings concerning the application of Article 101 TFEU by the national competition authorities and the national courts over a period from 1994 until 29 November 2007, that is to say, in part after 1 May 2004, the date from

which Regulation No 1/2003 is applicable. Furthermore, in the explanation of its questions the referring court mentions, in addition to the relevant Treaty provision, that regulation as the legal basis for its questions.

The first question

33 By its first question, the referring court asks, in essence, whether Article 101 TFEU must be interpreted as meaning that an undertaking which has infringed that provision 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.

34 Under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, 'either intentionally or negligently', they infringe Article 101 TFEU or 102 TFEU.

35 Article 5 of Regulation No 1/2003 defines the powers of the competition authorities of the Member States for the purpose of applying Articles 101 TFEU and 102 TFEU and provides that those authorities may, in particular, impose fines, periodic penalty payments or any other penalty provided for in their national law. It is not apparent from the wording of Article 5 of the regulation that conditions relating to intention or negligence have to be met in order for the measures of application which are provided for by the regulation to be adopted.

36 However, if, in the general interest of uniform application of Articles 101 TFEU and 102 TFEU in the European Union, the Member States establish conditions relating to intention or negligence in the context of application of Article 5 of Regulation No 1/2003, those conditions should be at least as stringent as the condition laid down in Article 23 of Regulation No 1/2003 so as not to jeopardise the effectiveness of European Union law.

37 In relation to the question whether an infringement has been committed intentionally or negligently and is, therefore, liable to be punished by a fine in accordance with the first subparagraph of Article 23(2) of Regulation No 1/2003, it follows from the case-law of the Court that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraph 45; Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 107; and Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 124).

38 Therefore, the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct.

39 It is apparent from the order for reference that the members of the SSK coordinated their behaviour in relation to their tariffs for domestic consolidated consignment transport throughout Austria. Undertakings which directly coordinate their behaviour in respect of their selling prices quite evidently cannot be unaware of the anti-competitive nature of their conduct. It follows that, in a situation such as that at issue in the main proceedings, the condition in the first subparagraph of Article 23(2) of Regulation No 1/2003 is met.

40 Finally, the national competition authorities may exceptionally decide not to impose a fine although an undertaking has infringed Article 101 TFEU intentionally or negligently. That may in particular be the case where a general principle of European Union law, such as the principle of the protection of legitimate expectations, precludes imposition of a fine.

41 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 (see Case C-221/09 *AJD Tuna* [2011] ECR I-1655, paragraph 72, and Case C-545/11 *Agrargenossenschaft Neuzelle* [2013] ECR, paragraph 25). It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine.

42 As for the national competition authorities, since they do not have the power to adopt a negative decision, that is to say, a decision concluding that there is no infringement of Article 101 TFEU (Case C-375/09 *Tele2 Polska* [2011] ECR I-3055, paragraphs 19 to 30), they cannot cause undertakings to entertain a legitimate expectation that their conduct does not infringe that provision. It appears, moreover, from the wording of the first question that the national competition authority examined the conduct of the undertakings at issue in the main proceedings on the basis of national competition law only.

43 Consequently, the answer to the first question is that Article 101 TFEU must be interpreted as meaning that an undertaking which has infringed that provision may not 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

44 By its second question, the referring court asks, in essence, whether the national competition authorities and national courts entrusted with applying Article 101 TFEU may find an infringement of that provision without imposing a fine where the undertaking concerned has participated in a national leniency programme.

45 Article 5 of Regulation No 1/2003 admittedly does not provide expressly that the national competition authorities have the power to find an infringement of Article 101 TFEU without imposing a fine, but it does not exclude that power either.

46 However, in order to ensure that Article 101 TFEU is applied effectively in the general interest (see Case C-439/08 *VEBIC* [2010] ECR I-12471, paragraph 56), the national competition authorities must proceed by way of exception only not to impose a fine where an undertaking has infringed that provision intentionally or negligently.

47 It should be noted, furthermore, 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 Article 101 TFEU.

48 Thus, in the case of the Commission's power to reduce fines under its own leniency programme, it is apparent from the Court's case-law that a reduction of a fine for cooperation on the part of undertakings participating in infringements of European Union competition law is justified only if such cooperation makes it easier for the Commission to carry out its task of finding an infringement and, where relevant, of bringing it to an end, whilst the undertaking's conduct must also reveal a

genuine spirit of cooperation (see, to this effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 393, 395 and 396).

49 As regards immunity from or not imposing a fine, in order for such treatment – which is moreover at issue in the main proceedings – not to undermine the effective and uniform application of Article 101 TFEU, it can be accorded in strictly exceptional situations only, such as where an undertaking's cooperation has been decisive in detecting and actually suppressing the cartel.

50 The answer to the second question therefore is that Article 101 TFEU and Articles 5 and 23(2) of Regulation No 1/2003 must be interpreted as meaning that, in the event that the existence of an infringement of Article 101 TFEU is established, the national competition authorities may by way of exception confine themselves to finding that infringement without imposing a fine where the undertaking concerned has participated in a national leniency programme.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 101 TFEU must be interpreted as meaning that an undertaking which has infringed that provision may not 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.**

2. **Article 101 TFEU and Articles 5 and 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] must be interpreted as meaning that, in the event that the existence of an infringement of Article 101 TFEU is established, the national competition authorities may by way of exception confine themselves to finding that infringement without imposing a fine where the undertaking concerned has participated in a national leniency programme.**

[Signatures]