Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 28 February 2013[1]

Case C-681/11

Schenker & Co AG and Others

(Request for a preliminary ruling from the Austrian Oberster Gerichtshof)

(Competition — Agreements, decisions and concerted practices — Article 85 EEC, Article 81 EC and Article 101 TFEU — Regulation (EEC) No 17 — Regulation (EC) No 1/2003 — Error by an undertaking as to whether its conduct is contrary to competition law (error of law) — Attributability of the error of law — Expectations created by legal advice — Expectations as to the correctness of a decision taken by a national competition authority — Request to be heard as a cooperative witness under national competition law — Power of a national competition authority to find a cartel offence without imposing penalties)

I – Introduction

1. Can proceedings be brought against an undertaking for a cartel offence if that undertaking erroneously assumed that its own conduct was lawful? This is essentially the legal question with which the Court is confronted in the present preliminary ruling proceedings.

2. Proceedings have been brought by the Austrian competition authority against several freight forwarding undertakings for an infringement of Article 101 TFEU and the relevant provisions of national antitrust law because for many years they made price agreements. The main argument put forward by the undertakings concerned in their defence is that they relied, in good faith, on advice provided by a specialist legal practice and on the decision of the national court having jurisdiction and could therefore neither be accused of participating in a cartel offence nor have fines imposed in respect of that participation.

3. Once again this case shows that, in performing their duties, competition authorities and courts are faced with problems that are not dissimilar to those in criminal law, whose resolution may raise delicate questions relating to the protection of fundamental rights. The approach taken by the Court in this regard is of fundamental importance to the further development of European competition law and for its practical application both at EU level and at national level.

1 — Original language: German.

II – Legislative framework

A – *EU law*

4. The EU law framework for this case is formed at the level of primary law by Article 85 of the E(E)C Treaty and Article 81 EC, and by the general principles of EU law. At the level of secondary law, Regulation (EEC) No 17 [2] was relevant for the period up to and including 30 April 2004, whilst Regulation (EC) No 1/2003 has applied since 1 May 2004. [3]

1. Regulation No 17

5. Under Article 2 of Regulation No 17, undertakings and associations of undertakings had the possibility of obtaining 'negative clearance' from the European Commission:

'Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article [85(1) of the EEC Treaty] or Article [86 of the EEC Treaty] for action on its part in respect of an agreement, decision or practice.'

2. Regulation No 1/2003

6. Article 5 of Regulation No 1/2003, entitled 'Powers of the competition authorities of the Member States', provides as follows:

'The competition authorities of the Member States shall have the power to apply Articles [81 EC and 82 EC] 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.'

7. In addition, Article 6 of Regulation No 1/2003 contains this provision regarding the 'powers of the national courts':

'National courts shall have the power to apply Articles [81 EC and 82 EC].'

8. Under Article 35(1) of Regulation No 1/2003, the competition authorities of the Member States designated for the application of Articles 81 EC and 82 EC may include courts.

2 — Council Regulation (EEC) No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962(I), p. 87).

3 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). According to the second paragraph of Article 45, that regulation has applied since 1 May 2004.

9. The powers of the European Commission are laid down in the following extract of Article 7(1) of Regulation No 1/2003:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [81 EC or of Article 82 EC], 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.'

10. Furthermore, Article 23(2) of Regulation No 1/2003 confers upon the European Commission the following power to impose fines:

'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [81 EC or Article 82 EC] …'

11. Reference should also be made to Article 10 of Regulation No 1/2003, which contains the following provision on the 'Finding of inapplicability':

'Where the Community public interest relating to the application of Articles [81 EC and 82 EC] so requires, the Commission, acting on its own initiative, may by decision find that Article [81 EC] is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article [81(1) EC] are not fulfilled, or because the conditions of Article [81(3) EC] are satisfied.

…'

B – *National law*

12. The Kartellgesetz 1988 (1988 Law on cartels) applied in Austria from 1 January 1989 to 31 December 2005.[4] Paragraph 16 of the Kartellgesetz 1988 contained the following definition of 'minor cartels' ('*Bagatellkartelle*'):

'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.'

13. Under Paragraph 18(1)(1) of the Kartellgesetz 1988, minor cartels could be implemented even before their legally effective approval, unless the limits specified in Paragraph 16 of the Kartellgesetz 1988 would be exceeded as a result of other undertakings joining the cartel.

14. Since 1 January 2006, the Kartellgesetz 2005 ('2005 Law on cartels') has applied in Austria,[5] Paragraph 1(1) of which contains a ban on anti-competitive practices comparable with Article 81(1) EC (now Article 101(1) TFEU). Under Paragraph 2(2)(1) of the Kartellgesetz 2005, that ban excludes

'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)'.

4 — BGBl. No 600/1988.

5 — BGBl. No 61/2005.

15. Paragraph 28(1) of the Kartellgesetz 2005 provides:

'If the infringement … has been committed in the past, the Kartellgericht (Cartel Court) shall find that there is an infringement if there is a legitimate interest.'

III – Facts and main proceedings

16. A dispute is pending before the domestic courts having jurisdiction for cartel matters between the Bundeswettbewerbsbehörde (Austrian Federal Competition Authority) and a number of freight forwarding undertakings which operate in Austria.

17. The background to this dispute is a longstanding cartel on the Austrian market for freight forwarding services, the 'Spediteurs-Sammelladungs-Konferenz' ('Freight Forwarding Agents Consolidated Consignment Conference', SSK), which, as an 'interest group', had around 40 freight forwarding undertakings as its members.[6] Within the SKK, agreements were made between the participating freight forwarding undertakings in particular on tariffs for domestic consolidated consignment transport, i.e. for freight forwarding services where individual consignments from several consignors are combined for logistical purposes into one consolidated consignment and then distributed to different destinations.

18. The SSK was established in the mid-1990s. In view of the foundation of the European Economic Area on 1 January 1994, the participating freight forwarding undertakings made efforts to ensure that they did not infringe European competition law. To that end they restricted their cooperation to the territory of the Republic of Austria.

19. On 30 May 1994, the SSK was given the legal form of a civil-law partnership, conditional upon approval by the Cartel Court.

20. On 28 June 1994, an application was made to the Austrian Cartel Court for approval of the SSK as a contractually agreed cartel.[7] The SSK Framework Agreement was enclosed with the application and the applicants set out the situation under Austrian and European antitrust law. In the proceedings before the Cartel Court an interim report was obtained from the Joint Committee for Cartel Matters,[8] which reached the provisional conclusion that the cartel did not affect trade between Member States and for that reason the European competition rules were not applicable. However, because in its final report the Joint Committee considered that the SSK was 'not justified from the perspective of the national economy', the application for approval was ultimately not upheld.

21. On 6 February 1995, the Zentralverband der Spediteure (Central Association of Freight Forwarding Agents) applied to the Cartel Court for a declaration that the SSK was a minor cartel within the meaning of Paragraph 16 of the Kartellgesetz 1988 and could therefore be implemented without approval.[9] The Cartel Court inspected the case-file for the approval procedure from 1994[10] and was thus aware of the legal position taken in the interim report delivered by the Joint Committee at the time with regard to the applicability of European competition law. By order of 2 February 1996, the Cartel Court declared that the SSK was a minor cartel within the meaning of Paragraph 16 of the Kartellgesetz 1988. The order became final in the absence of any appeal.

6 — The precursor organisations to the SSK, the 'Auto-Sammelladungskonferenz' ('Road Consolidated Consignment Conference') and the 'Bahn-Sammelladungskonferenz' ('Rail Consolidated Consignment Conference'), dated back to the 1970s and, until they were dissolved on 31 December 1993, had the status of 'approved cartels' in Austria.

7 — Ref. 4 Kt 533/94.

8 — Until it was abolished by the Kartellgesetz-Novelle 2002 (2002 Law amending the Law on cartels), the Joint Committee for Cartel Matters was a specialist ancillary organ of the Cartel Court. Its activity was regulated in Paragraphs 49, 112 and 113 of the Kartellgesetz 1988.

9 — Ref. 4 Kt 79/95-12.

10 — See immediately above, point 20 of this Opinion.

22. The legal practice consulted by the SSK's 'cartel representative' as an adviser [11] also took the view that the SSK could be regarded as a minor cartel. That view is expressed in several of its guidance letters.

23. First of all, the lawyers engaged confirmed that the SSK's activities could be implemented unconditionally in accordance with its Framework Agreement. In a letter of 11 March 1996, they noted the points to which attention had to be paid in the implementation of the SSK as a minor cartel. However, the letter did not expressly address the issue of whether the minor cartel is compatible with European antitrust law.

24. In another letter from 2001 in connection with a change to the SSK's tariff structure, the legal practice also stated that the question as to whether a minor cartel existed depended solely on whether or not the participating undertakings jointly exceeded certain market shares.

25. With a view to the entry into force of the Austrian Kartellgesetz-Novelle 2005 (2005 Law amending the Law on cartels) on 1 January 2006, the Zentralverband der Spediteure asked the legal practice again to examine the effects of the new legislative provisions on the SSK. In its reply of 15 July 2005, the legal practice pointed out that it would be necessary to review whether the SSK's share of the domestic market exceeded 5% and whether the agreements made within the framework of the SSK were excluded from the prohibition of cartels. The letter did not address the question whether the SSK was compatible with European antitrust law.

26. The Zentralverband der Spediteure ascertained the market shares of the members of the SSK in domestic consolidated consignment transport in the general cargo sector for 2004, 2005 and 2006 by means of an e-mail questionnaire. Applying the principles governing market demarcation which formed the basis of the declaratory order by the Cartel Court, the Zentralverband calculated that the SSK had market shares of 3.82% for 2005 and 3.23% for 2006. The most prominent members of the SSK at least were informed that this was below the 5% threshold. According to the order for reference, 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.

27. On 11 October 2007, the European Commission made public that it had made unannounced visits to the business premises of various suppliers of international freight forwarding services because of suspicions of restrictive business practices. Thereupon, on 29 November 2007 a unanimous resolution was adopted within the SSK board to dissolve the SSK. The members of the SSK were informed of that resolution on 21 December 2007.

28. The Bundeswettbewerbsbehörde now alleges that the freight forwarding undertakings involved in the SSK took part, from 1994 to 29 November 2007 'in a single, complex and multi-faceted infringement of European and national cartel law by fixing tariffs for domestic consolidated transport throughout Austria'. In the main proceedings the Bundeswettbewerbsbehörde has applied for the imposition of fines on most of the undertakings concerned for participating in the cartel. [12] With regard to Schenker, which had offered evidence as a cooperative witness for the competition authority, it applied only for a declaration of an infringement of Article 101 TFEU and Paragraph 1 of the Kartellgesetz 2005 (and Paragraph 9 in conjunction with Paragraph 18 of the Kartellgesetz 1988) without financial penalties.

11 — [Footnote not intended for publication]

12 — The legal bases for the fine are Paragraph 142(1)(a) and (d) of the Kartellgesetz 1998 and Paragraph 29(1)(a) and (d) of the Kartellgesetz 2005.

29. The freight forwarding undertakings claim in their defence, in particular, that they had relied on expert advice provided by a reliable legal adviser who was experienced in matters of competition law and that the SSK had been recognised by the Cartel Court as a minor cartel within the meaning of Paragraph 16 of the Kartellgesetz 1988. In their view, European competition law was not applicable because the restriction of competition emanating from the SSK had not affected trade between Member States.

30. At first instance, this defence submission was successful. By interim decision of 22 February 2011, the Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as a court with jurisdiction in cartel cases, dismissed the applications made by the Bundeswettbewerbsbehörde.[13] As grounds, it was stated inter alia that the freight forwarding undertakings could not be held responsible for any culpable act in connection with their price agreements, as they were able to rely on the declaratory order of the Cartel Court of 2 February 1996 and had also obtained legal advice from a specialist legal practice. With particular regard to Schenker as a cooperative witness, the Oberlandesgericht took the view that solely the European Commission had competence to find infringements without at the same time imposing a fine.

31. The Bundeswettbewerbsbehörde and the Bundeskartellanwalt (Austrian Federal Cartel Prosecutor) have now brought an appeal against the order made at first instance by the Oberlandesgericht Wien before the Oberster Gerichtshof as the supreme court in cartel cases. In the proceedings before the Oberster Gerichtshof, the European Commission submitted written observations by a document of 12 September 2011.[14]

IV – Request for a preliminary ruling and procedure before the Court

32. By order of 5 December 2011, which was received at the Court Registry on 27 December 2011, the Austrian Oberster Gerichtshof, as the supreme court in cartel cases,[15] (also 'the referring court') referred 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:

   1a. 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?

   1b. Is an error with regard to the lawfulness of conduct unobjectionable in the case where the undertaking has expectations as to 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 to be heard as a cooperative witness?

13 — Ref. 24 Kt 7, 8/10-146.

14 — See the third sentence of Article 15(3) of Regulation No 1/2003.

15 — Ref. 16 Ok 4/11.

33. In the proceedings before the Court, in addition to Schenker and a number of other undertakings which are parties to the main proceedings, the Austrian Bundeswettbewerbsbehörde and the Bundeskartellanwalt, the Italian and Polish Governments and the European Commission submitted written observations. The Bundeswettbewerbsbehörde, most of the undertakings involved and the European Commission were also represented at the hearing held on 15 January 2013.

V – Assessment

34. The present case concerns the SSK, a longstanding cartel which was active in Austria partly in the time when Regulation No 17 applied and partly in the time when Regulation No 1/2003 was applicable.

35. Substantively, everything turns on the question whether the undertakings participating in the SSK could assume, in good faith, that their price agreements did not affect trade between Member States and thus fell solely within the scope of Austrian national antitrust law, and not also within the scope of European competition law.

36. Apparently, the members of the SSK wrongly considered that they had stayed 'on the safe side', as far as European Union law was concerned, by restricting the geographical scope of their cartel to Austria alone. In the light of the case-law of the European Union courts and the administrative practice of the European Commission, there is no doubt that that legal opinion was *objectively* incorrect.[16] However, it is unclear whether the infringement of the prohibition of cartels under EU law can also be attributed *subjectively* to the undertakings concerned. In other words, it must be examined whether the undertakings participating in the SSK *culpably* infringed the prohibition of cartels under EU law.

37. In its order for reference the referring court cites, like the parties in their observations, Article 101 TFEU, which has, however, been applicable only since 1 December 2009. However, the cartel offence at issue occurred in a period when Article 81 EC was applicable for some of the time and even Article 85 of the E(E)C Treaty still applied for some of the time. Consequently, in order to give the referring court a useful answer for adjudicating in the main proceedings, the questions in the request for a preliminary ruling must be answered having regard to the latter two provisions. Of course, the statements made below may be applied without any problem to the prohibition of cartels under EU law in the version of Article 101 TFEU which is now applicable. For the sake of simplicity, I will therefore refer primarily to the 'prohibition of cartels under EU law' which is enshrined in substantively identical form in all three of the abovementioned provisions.

A – *The concept of error of law precluding liability in European competition law (first part of the first question)*

38. With the first part of its first question, the Oberster Gerichtshof is seeking to ascertain whether a fine may be imposed on an undertaking for an infringement of the prohibition of cartels under EU law committed by it in the case where the undertaking erred with regard to the lawfulness of its conduct and it cannot be held responsible for that error. In other words, it is necessary to clarify the

16 — Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29; Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, end of paragraph 22; Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paragraph 37; and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 38; Commission Notice 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' (OJ 2004 C 101, p. 81), section 3.2.1 (in particular paragraph 78).

fundamental question whether the concept that an error of law as to the wrongfulness of an act precludes liability, which is familiar from general criminal law, is recognised in European competition law. The Court has at most touched on this problem in its previous rulings,[17] but has never considered it in depth.

39. Contrary to the view taken by the European Commission, an answer to this first part of the first question is certainly not superfluous and, furthermore, cannot be replaced simply by considering the other questions. Some of those other questions are asked only in the alternative and they are all based on the logical assumption that there is an error of law precluding liability in European competition law. It must therefore be examined first whether that is the case.

40. The starting point for the analysis of this problem should be that although antitrust law is not part of the core area of criminal law,[18] it is recognised as having a character similar to criminal law.[19] This means that regard must be had in antitrust law to certain principles stemming from criminal law which can ultimately be traced back to the rule of law and the principle of fault. These include, in addition to the principle of personal responsibility, which occupied the European Union courts frequently until recently,[20] the principle of *nulla poena sine culpa* (no punishment without fault).

41. Although the Court has not given in-depth consideration to the principle of *nulla poena sine culpa* in its case-law thus far, there are nevertheless indications that it takes it as a given that the principle holds at EU level.[21] I would add that the principle enjoys the status of a fundamental right which is common to the constitutional traditions of the Member States.[22] Although this principle is not expressly mentioned in the Charter of Fundamental Rights of the European Union or in the ECHR,[23] it is the necessary precondition for the presumption of innocence. The principle of *nulla poena sine*

17 — See in particular Case 19/77 *Miller International Schallplatten* v *Commission* ('Miller') [1978] ECR 131, paragraph 18 and Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] 1825, paragraphs 111 and 112. In Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 60, the notion of an error in law precluding liability is mentioned in passing. In Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* ('BMW Belgium') [1979] ECR 2435, paragraphs 43 and 44, and 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, the Court simply states – without specifically considering any error of law – that it is irrelevant whether or not an undertaking was aware that it was infringing the prohibition contained in Article 85 of the EEC Treaty. In the Opinion of Advocate General Mayras in Case 26/75 *General Motors* v *Commission* [1975] ECR 1367, 1390, an error of law is taken to exist and a fine on the basis of intent is therefore rejected.

18 — In its judgment in *Jussila v. Finland* of 23 November 2006 (Application No 73053/01, *Reports of Judgments and Decisions* 2006-XIV, paragraph 43), the European Court of Human Rights does not consider competition law to belong to the traditional categories of criminal law and takes the view that the criminal-head guarantees under Article 6(1) of the ECHR outside the 'hard core' of criminal law will not necessarily apply with their full stringency.

19 — See my Opinions in Case C-280/06 *ETI and Others* [2007] ECR I-10893, point 71, and in Case C-17/10 *Toshiba Corporation and Others* [2011] ECR, point 48, each with further references. The Court consistently applies criminal-law principles in European competition law (see, with regard to the presumption of innocence, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and with regard to the prohibition of double penalties – the '*ne bis in idem*' principle – Case C-17/10 *Toshiba Corporation and Others* [2012] ECR, paragraph 94. In its judgment in *A Menarini Diagnostics S.R.L. v. Italy* (no 43509/08, §§ 38 to 45, 27 September 2011), the European Court of Human Rights found that a fine imposed by the Italian competition authority in cartel proceedings could be regarded as criminal within the meaning of Article 6(1) ECHR.

20 — See, inter alia, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 145 and 204; Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39; Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 56; and Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* [2012] ECR, paragraph 42.

21 — In Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 14, the Court stated that the principle of *nulla poena sine culpa* was a principle 'typical of criminal law'. Its existence in EU law is also presumed in Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, in particular paragraphs 35 and 44. See also the Opinion of Advocate General Lenz in Case C-143/91 *Van der Tas* [1992] ECR I-5045, point 11, and – more generally with regard to the principle of fault in connection with administrative penalties – the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-55/07 and C-56/07 *Michaeler and Others* [2008] ECR I-3135, point 56.

22 — Opinion of Advocate General Van Gerven in Case C-116/92 *Charlton and Others* [1993] ECR I-6755, point 18.

23 — European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR', signed in Rome on 4 November 1950).

culpa may therefore be considered to be contained implicitly in both Article 48(1) of the Charter and Article 6(2) ECHR, which, as has been recognised, must be taken into account in cartel proceedings.[24] Ultimately, these two provisions of the Charter and the ECHR can be regarded as the expression in procedural law of the principle of *nulla poena sine culpa*.

42. In connection with the penalties to be imposed by the European Commission in cartel proceedings, the principle of *nulla poena sine culpa* finds expression both in Article 15(2) of the old Regulation No 17 and in the currently applicable Article 23(2) of Regulation No 1/2003: under both provisions, fines may be imposed in cartel proceedings only for intentional or negligent infringements.

43. The same must hold where infringements of EU antitrust law are the subject of proceedings before national competition authorities or courts. Within the scope of EU law, when they exercise their powers national authorities must comply with general principles of EU law.[25] The situation is the same in respect of Article 3(2) of Regulation No 1/2003, which ultimately seeks to ensure that the approach of EU antitrust law takes precedence over national competition law.

44. According to the principle of *nulla poena sine culpa*, an undertaking may be held responsible for a cartel offence which it has committed on a purely objective basis only where that offence can also be attributed to it subjectively. If, on the other hand, the undertaking commits an error of law precluding liability, an infringement cannot be found against it nor can it form the basis for the imposition of penalties such as fines.

45. It should be stressed that not every error of law is capable of precluding completely the liability of the undertaking participating in the cartel and thus the existence of a punishable infringement. Only where the error committed by the undertaking regarding the lawfulness of its market behaviour was *unavoidable* – sometimes also called an *excusable* error or an *unobjectionable* error – has the undertaking acted without fault and it cannot be held liable for the cartel offence in question.

46. Such an unavoidable error of law would appear to occur only very rarely. It can be taken to exist only where the undertaking concerned took all possible and reasonable steps to avoid its alleged infringement of EU antitrust law.

47. If the undertaking concerned could have avoided its error regarding the lawfulness of its market behaviour – as is often the case – by taking adequate precautions, it cannot escape any penalty for the cartel offence committed by it. Rather it will be liable at least for a negligent infringement,[26] which, depending on the seriousness of the questions of competition law involved, *may* (but not *must*) lead to a reduced fine.[27]

48. It is necessary to assess whether the error of law committed by an undertaking participating in a cartel was avoidable or unavoidable (objectionable or non-objectionable) on the basis of uniform criteria laid down in EU law, so that uniform conditions in respect of EU substantive competition law apply to all undertakings operating in the internal market ('level playing field').[28] This issue will be considered in more detail in connection with the second part of the first question, which I will address below.

24 — *Hüls* v *Commission*, cited in footnote 19, paragraphs 149 and 150, with regard to Article 6(2) ECHR, and Case C-89/11 P *E.ON Energie* v *Commission* [2012] ECR, paragraphs 72 and 73, with regard to Article 48(1) of the Charter of Fundamental Rights; see also Case 27/76 *United Brands and United Brands Continentaal* v *Commission* ('United Brands') [1978] ECR 207, paragraph 265.

25 — See, inter alia, Case C-376/02 '*Goed Wonen*' [2005] ECR I-3445, paragraph 32; Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 56; and Case C-184/05 *Twoh International* [2007] ECR I-7897, paragraph 25.

26 — See the Opinion of Advocate General Mayras in *General Motors* v *Commission*, cited in footnote 17.

27 — European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2, 'the 2006 Guidelines'), paragraph 29, second indent.

28 — See also recital 8 in the preamble to Regulation No 1/2003 and my Opinion in Case C-226/11 *Expedia* [2012] ECR, point 37, with further references.

B – *The attributability of the error of law (second part of the first question)*

49. If, as I propose,[29] the concept of an error of law precluding liability is recognised in EU antitrust law, it is also necessary to consider the second part of the first question (question 1a and 1b), which is asked in the alternative. By that subquestion, the referring court is essentially seeking to ascertain which due diligence requirements an undertaking must have satisfied in order for it to be assumed that it has committed an unavoidable (unobjectionable) error, which thus precludes liability, regarding the lawfulness of its market behaviour, with the result that that undertaking cannot be held liable for any cartel offence.

50. Specifically, it must be considered whether and under what conditions expectations on the part of the undertaking concerned created by legal advice (question 1a; see immediately below, section 1) or created by a decision taken by a national competition authority (question 1b; see below, section 2) can lead to the assumption that any error of law cannot be attributed to the undertaking, which is therefore spared from penalties imposed in cartel proceedings.

1. The undertaking's expectations created by legal advice (question 1a)

51. With question 1a, the referring court is seeking to ascertain whether an error of law precluding liability must be taken to exist where an undertaking relied on legal advice in connection with its alleged anti-competitive conduct.

52. This subquestion arises against the background of several written opinions from a legal practice consulted by the SSK, on which the undertakings concerned are now relying in the main proceedings to avoid their liability.

53. It is fiercely disputed between the parties whether legal advice must be taken into consideration in assessing an undertaking's fault in respect of a cartel offence. Whilst the undertakings participating in the preliminary ruling proceedings all take this to be the case,[30] the European Commission and the Member States and national authorities represented before the Court have taken the opposite view.

(a) The importance of legal advice in the system of Regulation No 1/2003

54. As far as can be seen, the Court has thus far dealt with this problem only once, and relatively incidentally. In *Miller* it stated that the opinion of a legal advisor cannot excuse an infringement by an undertaking of Article 85 of the EEC Treaty.[31]

55. That finding by the Court in *Miller* must be seen against the background of the legal situation which applied at the time. Until 30 April 2004 undertakings were free, under Regulation No 17, to submit agreements concluded between them to the European Commission for authorisation or to request negative clearance from the Commission. It was thus possible for an undertaking operating in the common market to obtain legal certainty from an official source as to the compatibility of its conduct with European competition law. An undertaking which did not take that path but merely

29 — See my statements concerning the first part of the first question (points 38 to 48 of this Opinion).

30 — With the exception of Schenker, which has not commented on this issue and submitted written and oral observations only on the second question.

31 — *Miller*, cited in footnote 17, paragraph 18. For the sake of completeness, it should be added that in *BMW Belgium* (cited in footnote 17, paragraphs 43 and 44) it is reported that the undertaking concerned relied, in its defence, upon the opinion of a lawyer, but the Court did not rule specifically on this aspect.

relied upon advice provided by a lawyer did not take every possible and reasonable step in order to avoid an infringement of European competition law. The expectations of the undertaking created by the opinion of a lawyer were not sufficient in themselves, at the time, to regard any error of law as unavoidable and thus as precluding liability.

56. The *Miller* case-law cannot be transposed to the current legal situation, however. With Regulation No 1/2003, which has applied since 1 May 2004, there was a paradigm shift in the enforcement of EU antitrust law. The old system of notification and authorisation under Regulation No 17 was replaced by the new directly applicable exception system.[32] Since then, neither the European Commission nor the national competition authorities or courts have granted authorisation or negative clearance for individual cases.[33]

57. Instead, since 1 May 2004, the undertakings operating in the internal market are expected to take responsibility for assessing whether their market behaviour is compatible with European antitrust law. In principle, the undertakings concerned therefore themselves bear the risk of any incorrect assessment of the legal situation. The general maxim that ignorance is no defence applies. For that reason, obtaining expert legal advice has a completely different importance in the system under Regulation No 1/2003 than was the case in the system under Regulation No 17. Consulting a legal adviser is now often the only way for undertakings to obtain detailed information about the legal situation under antitrust law.

58. It is not acceptable, on the one hand, to encourage undertakings to obtain expert legal advice but, on the other, to attach absolutely no importance to that advice in assessing their fault in respect of an infringement of EU antitrust law. If an undertaking relies, in good faith, on – ultimately incorrect – advice provided by its legal adviser, this must have a bearing in cartel proceedings for the imposition of fines.

59. In particular, the purely civil liability of a lawyer for incorrect legal advice given by him does not, contrary to the view taken by the European Commission, constitute adequate compensation in itself. Civil recourse by a client against his lawyer is generally subject to considerable uncertainty and, moreover, cannot dispel the condemnation ('stigma') associated with the imposition of cartel – i.e. quasi-criminal – penalties against the undertaking.

60. Of course, obtaining legal advice cannot exempt an undertaking from all individual responsibility for its market behaviour and for any infringements of European competition law. The opinion of a lawyer can never give carte blanche. Otherwise, this would open the way to the production of opinions tailored to the interests of the undertaking and the power to give official negative clearance abolished by Regulation No 1/2003 would be transferred *de facto* to private legal advisers, who do not have any legitimacy in that regard.

61. In accordance with the fundamental objective of the effective enforcement of European competition rules,[34] any expectations on the part of an undertaking created by legal advice may be recognised as the basis for an error of law precluding liability only where, in obtaining that legal advice, certain minimum requirements were complied with, which I will describe briefly below.

32 — Fourth recital in the preamble to Regulation No 1/2003.

33 — The absence of a power held by national competition authorities to find that there has been no breach of EU antitrust law was not highlighted by the Court until recently (Case C-375/09 *Tele 2 Polska* [2011] ECR I-3055, in particular paragraphs 29 and 32).

34 — See, with regard to this objective, recitals 8, 17 and 22 in the preamble to Regulation No 1/2003, Case C-439/08 *VEBIC* [2010] ECR I-12471, paragraph 56, and Case C-360/09 *Pfleiderer* [2011] ECR I-5161, paragraph 19.

(b) Minimum requirements in obtaining legal advice

62. The basic condition for taking into consideration the legal advice obtained by an undertaking is that the undertaking relied in good faith on that advice. Protection of legitimate expectations and good faith are closely related.[35] If the facts justify the assumption that the undertaking relied on a legal opinion against its better judgment or that the report was tailored to the interests of the undertaking, the legal advice given is irrelevant from the very outset in assessing fault for an infringement of the rules of European competition law.

63. Furthermore, the following minimum requirements apply to obtaining legal advice, in respect of which the undertaking concerned itself bears the risk and responsibility for compliance.

64. First of all, the advice must always be obtained from an independent external lawyer.[36] Advice given by the staff from an undertaking or group's own in-house legal department cannot under any circumstances preclude liability in the event of an error of law. Company lawyers are – even if they have the status of in-house lawyers[37] – directly dependent as employees of the undertaking concerned and their legal advice can therefore be attributed to their employer. An undertaking cannot give itself carte blanche for its potentially anti-competitive conduct.

65. Second, the advice must be given by a specialist lawyer, which means that the lawyer must be specialised in competition law, including European antitrust law, and must also regularly work for clients in this field of law.

66. Third, the legal advice must have been provided on the basis of a full and accurate description of the facts by the undertaking concerned. If an undertaking has given only incomplete or even false information to the lawyer consulted by it regarding circumstances which originate from the area of responsibility of the undertaking, the opinion of that lawyer cannot have an exculpating effect in cartel proceedings in relation to any error of law.

67. Fourth, the opinion of the consulted lawyer must deal comprehensively with the European Commission's administrative and decision-making practice and with the case-law of the European Union courts and give detailed comments on all legally relevant aspects of the case at issue. An element which is not expressly the subject-matter of the legal advice but may possibly be inferred implicitly from it cannot form the basis for recognition of an error of law precluding liability.

68. Fifth, the legal advice given may not be manifestly incorrect. No undertaking may rely blindly on legal advice. Rather, any undertaking which consults a lawyer must at least review the plausibility of the information provided by him.

69. Of course, the diligence expected of an undertaking in this regard depends on its size and its experience in competition matters.[38] The larger the undertaking and the more experience it has with competition law, the more it is required to review the substance of the legal advice obtained, especially if it has its own legal department with relevant expertise.

35 — See Case C-298/96 *Oelmühle and Schmidt Söhne* [1998] ECR I-4767, paragraph 29; Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 58; Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 93.

36 — The term 'lawyer' used here and below obviously includes lawyers employed by an independent legal practice.

37 — See Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others* [2010] ECR I-8301, and my Opinion of 29 April 2010 in that case.

38 — This is can also be inferred from *United Brands*, cited in footnote 24, paragraphs 299 to 301, and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 134; see also Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 22, and Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 54.

70. In any event, every undertaking must be aware that certain anti-competitive practices are, by their nature, prohibited, [39] and in particular that no one is permitted to participate in '*hardcore restrictions*', [40] for example in price agreements or in agreements or measures to share or partition markets. Furthermore, large, experienced undertakings can be expected to have taken note of the relevant statements made by the European Commission in its notices and guidelines in the field of competition law.

71. Sixth, the undertaking concerned acts at its own risk if the legal opinion obtained by it shows that the legal situation is unclear. In that case, the undertaking is at least negligent in accepting that by its market behaviour it infringes the rules of European competition law.

72. Admittedly, in the light of the minimum requirements I have just proposed, the value of legal opinions given by lawyers is slightly diminished for the undertakings concerned. However, this is inherent in the system created by Regulation No 1/2003 and is also no different in conventional criminal law; in the final analysis, any undertaking is itself responsible for its market behaviour and bears the risk for infringements of the law it commits. Absolute legal certainty cannot be secured by obtaining legal advice from a lawyer. However, if all the abovementioned minimum requirements are satisfied, an error of law precluding liability can be taken to exist where the undertaking concerned has relied in good faith on an opinion from its legal adviser.

73. It should be added that a lawyer who, by delivering opinions tailored to the interests of an undertaking, becomes an accomplice in the undertaking's anti-competitive practices will have to contend with not only consequences under the rules of civil law and of professional conduct, but may possibly also himself be subject to penalties imposed in cartel proceedings. [41]

(c) Conclusions for the present case

74. If the criteria described above are applied to a case like the present one, it is clear that the undertakings concerned have not committed an excusable error of law, and any error regarding the lawfulness of their market behaviour in the light of European competition law may be held against them.

75. First of all, the starting date of the infringement, as well as the largest part of the life span of the SSK cartel, falls within the temporal scope of Regulation No 17. As the Austrian Bundeskartellanwalt rightly states, the undertakings concerned [42] therefore had the option to apply at an early stage to the European Commission and to request that it grant negative clearance under Article 2 of Regulation No 17. [43] [44] Their failure to do so cannot be compensated for by obtaining legal advice from a lawyer. The situation cannot really be any different for the part of the SSK cartel which took place after 30 April 2004, i.e. in the period when Regulation No 1/2003 applied. If the Austrian Bundeswettbewerbsbehörde is correct in its view that the cartel in question constituted a single and continuous infringement, the initial failure by the members of the SSK to obtain negative clearance must have a bearing on the assessment of their fault for the entire life of the cartel.

39 — See *Miller*, cited in footnote 17, paragraphs 18 and 19; Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 41; and Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261, paragraph 2 of the summary of the judgment; see also Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Austria and Others* v *Commission* [2006] ECR II-5169, paragraph 205.

40 — With regard to the notion of hardcore restriction, see in particular the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001 C 368, p. 13.

41 — See Case T-99/04 *AC-Treuhand* v *Commission* [2008] ECR II-1501, in relation to the participation in a cartel by a consultancy firm which was not itself active on the market affected by the cartel.

42 — This applies to all undertakings which were members of the SSK before 1 May 2004.

43 — A similar provision was contained at the time in Article 2 of Protocol No 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (OJ 1994 L 344, p. 12).

44 — See *Hoffmann-La Roche* v *Commission*, cited in footnote 38, paragraphs 129, last sentence, 130 and 134, penultimate sentence.

76. Second, according to the descriptions given by the referring court, the legal advice obtained in the present case appears to be incomplete. The various letters from the consulted legal practice – subject to further examination by the national court – do not comment specifically on the question on which the penalisation of the cartel offence by the members of the SSK hinges under EU law, namely the scope *ratione materiae* of Article 85 of the E(E)C Treaty and Article 81 EC. Contrary to the view apparently taken by some of the undertakings participating in the proceedings, it is not sufficient in this connection that the legal opinions possibly permit implicit inferences to be drawn as to whether trade between Member States was affected. An element which is not expressly the subject-matter of the legal advice but may possibly be inferred indirectly from it cannot, as has already been mentioned,[45] form the basis for recognition of an error of law precluding liability. This applies *a fortiori* where – as in this case – it is the central, crucial legal question in a case.

77. I would add that at least the larger undertakings among the cartel participants can also be expected to be aware of the relevant European Commission notices and guidelines.[46] It is absolutely clear from them that horizontal cartels like the SSK, covering the whole of a Member State, are normally capable of affecting trade between Member States,[47] with the result that they fall under the prohibition of cartels under EU law.

78. Lastly, the fact stressed by some of the parties that the SKK was not a secret cartel and, by their own admission, the members of the SSK intended to avoid an infringement of EU antitrust law is irrelevant to the question of fault on the part of the undertakings participating in the cartel. An error of law precluding liability cannot be taken to exist solely because the perpetrator feels that he is in the right and is otherwise sure of what it is doing. It matters only whether he took all possible and reasonable steps to avoid committing an infringement.

2. The undertaking's expectations created by the decision taken by a national competition authority (question 1b)

79. By question 1b, the referring court would like to know whether an error of law precluding liability can be taken to exist where, in connection with its alleged anti-competitive conduct, an undertaking has expectations created by the decision taken by a national competition authority which assessed that conduct solely on the basis of national competition law and found it to be permissible.

80. The background to this subquestion is the fact that, by final order of 2 February 1996, the Austrian Cartel Court, as the competent national authority, recognised the SSK as a 'minor cartel' within the meaning of Paragraph 16 of the Kartellgesetz 1988. The undertakings concerned are now relying on that order in the main proceedings to avoid their liability.

81. As with the abovementioned expectations created by legal advice, it is fiercely disputed between the parties whether the decision taken by a national competition authority should be taken into consideration in assessing an undertaking's fault for a cartel offence. The situation is essentially the same for both problems.

45 — See above, point 67 of this Opinion.

46 — See above, point 70 of this Opinion.

47 — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, section 3.2.1 (in particular paragraph 78).

(a) The importance of decisions taken by national competition authorities and courts

82. One of the main objectives of Regulation No 1/2003 was to involve national authorities more fully than previously in the enforcement of European antitrust law.[48] Thus, the role played by national competition authorities and national courts in the new, decentralised enforcement system for antitrust law should not be underestimated. Under Articles 5 and 6 of Regulation No 1/2003, the competition authorities and courts of the Member States are expressly given the power, and if necessary – under the circumstances set out in Article 3 of that regulation – are even required, to apply EU antitrust law.[49]

83. In the period before 30 April 2004, at the time when the Cartel Court made its order invoked by the undertakings concerned, the application of Article 85 of the E(E)C Treaty and Article 81 EC also certainly did not fall outside the competence of the national authorities and courts. It is true that the European Commission did have the sole power under Article 9(1) of Regulation No 17 to issue exemptions under Article 85(3) of the E(E)C Treaty and Article 81(3) EC. Otherwise, however, national authorities and courts were not prevented in principle from applying the directly applicable Article 85(1) of the E(E)C Treaty and Article 81(1) EC and, in particular, from examining whether collusion by undertakings fell within the scope *ratione materiae* of European competition rules, i.e. whether they appeared likely to affect trade between Member States.[50] Such an examination was necessary, for example, where, in the event of a conflict between the rules of Community antitrust law and national antitrust law, regard had to be had to the principle highlighted by the Court that Community law takes precedence.[51]

84. Accordingly, the decisions taken by national competition authorities and courts – including those taken prior to 1 May 2004 – may, along with the European Commission's administrative practice and the case-law of the European Union courts, give undertakings operating in the internal market important indications as to the understanding of the applicable legal situation in European competition law.

85. When determining the effects which reliance by the undertakings concerned on such decisions has on their fault for cartel offences, it is necessary to bear in mind the principle of protection of legitimate expectations, which is recognised at EU level.[52] According to that principle, it is by no means impossible for undertakings to rely upon decisions taken by national authorities and courts in matters of EU law.[53] Furthermore, expectations created by the statements made by such State authorities appear to be more legitimate than expectations created by the opinions of private legal advisers.

86. Nevertheless, it would be a step too far to give any statement by a national authority regarding EU antitrust law effects in relation to the assessment of fault on the part of undertakings for their alleged infringements. Certain minimum requirements must also be satisfied here in order not to impair the effective enforcement of European competition rules.

48 — Sixth, seventh and eighth recitals in the preamble to Regulation No 1/2003.

49 — With regard to this requirement, see also *Toshiba Corporation and Others*, cited in footnote 19, paragraph 77.

50 — Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraphs 15 to 22.

51 — Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1, end of paragraph 6.

52 — See, inter alia, Case 112/80 *Dürbeck* [1981] ECR 1095, paragraph 48, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25.

53 — See Case C-201/08 *Plantanol* [2009] ECR I-8343, paragraph 53; see also my Opinion in Case C-568/11 *Agroferm* [2013] ECR, points 43 to 50.

(b) Requirements for the recognition of legitimate expectations created by decisions taken by national competition authorities and courts

87. First of all, the decision must be taken by a national competition authority with powers to apply EU antitrust law under Article 5 and Article 35 or a national court within the meaning of Article 6 of Regulation No 1/2003.

88. A national *competition authority* may not give authorisation or negative clearance in respect of EU antitrust law. However, under the second paragraph of Article 5 of Regulation No 1/2003, it may decide that there are no grounds for action on its part where on the basis of the information in its possession the conditions for prohibition are not met. The undertaking concerned must then be able to have expectations that it can continue the market behaviour examined by that authority at least within its regional jurisdiction.

89. A decision taken by a national *court* forms a possible basis for the recognition of an error of law precluding liability where in that decision the court finds that certain market behaviour does not constitute an infringement of EU antitrust law. This can occur in particular in connection with the termination of judicial proceedings for the imposition of a fine, the annulment of an administrative penalty or the dismissal by the national court of an action for damages or for a prohibitory injunction brought against the undertaking concerned.

90. Second, it is necessary that the undertaking concerned has previously informed the national authority comprehensively and truthfully of all relevant circumstances if – like the members of the SSK in 1995/96 – it was already participating in the original administrative or judicial procedure. If the decision in question is vitiated by a defect attributable to the undertaking itself, the undertaking cannot subsequently rely on that decision to avoid its liability.

91. Third, the administrative or judicial decision must concern exactly the same matters of fact and law in respect of which the undertaking concerned invokes an error of law precluding liability. Furthermore, as with legal opinions given by lawyers, only statements made by the authority or the court which are expressly contained in the relevant decision may be invoked and not other conclusions which may possibly be inferred implicitly from it.[54]

92. Fourth, the statement made by the national competition authority or the national court regarding EU antitrust law may not be manifestly incorrect.[55] In principle, final administrative decisions and legally binding judicial decisions which make statements regarding EU antitrust law carry the presumption of lawfulness, with the result that the person to whom they are directed may have expectations as to the correctness of their content and are not required to review their plausibility in the same way as legal advice. Nevertheless, as has already been mentioned,[56] any undertaking must be aware that certain anti-competitive practices are, by their nature, prohibited, and in particular that no one is permitted to participate in *hardcore restrictions* such as price agreements or agreements or measures to share or partition markets.

54 — Similarly, the Court states with regard to the protection of legitimate expectations that a party may not plead breach of that principle unless it has been given precise assurances by the administration and that vague indications are not sufficient in this regard (Case C-47/07 P *Masdar* v *Commission* [2008] ECR I-9761, paragraphs 81 and 86).

55 — It is settled case-law that the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of EU law; see Case 316/86 *Krücken* [1988] ECR 2213, paragraph 24; Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 35; Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 31.

56 — See above, point 70 of this Opinion.

93. Fifth, an undertaking's expectations created by an administrative or judicial decision are legitimate only if that undertaking acts in good faith.[57] It fails to act in good faith not only in the – certainly unlikely – case of collusion between the undertaking and the national authority or the national court. Rather, the undertaking's expectations as to the correctness of the content of the decision are also undermined where the undertaking has learnt of a contrary legal opinion on the part of the competent Union institutions, namely the European Commission and the Court of Justice of the European Union. This may be the case, for example, where the European Commission participates in national court proceedings pursuant to Article 15(3) of Regulation No 1/2003 and the undertaking concerned has learnt about its legal opinion in that context.

94. At the hearing before the Court, it was also discussed whether recognition of legitimate expectations on the part of the undertaking created by the decisions taken by national *courts* requires the case in question to have been previously referred to the Court for a preliminary ruling. In my view, that is not the case. I do not think that protection of legitimate expectations should be confined only to national judicial decisions which are based on a preliminary ruling from the Court.

95. As a general rule, they will be decisions by courts or tribunals within the meaning of the second paragraph of Article 267 TFEU which are not required to request a preliminary ruling. If the Union legislature declares that *all* national courts have the power to apply EU antitrust law (Article 6 of Regulation No 1/2003), the persons concerned must also be able to rely on the relevant decisions of *all* national courts, whether or not – optional – preliminary ruling proceedings took place.

96. Regulation No 1/2003 provides specific instruments which contribute to the uniform interpretation and application of EU antitrust law. The European Commission plays a key role in this regard. The Commission may participate in proceedings before national *courts*.[58] The Commission works closely with national *competition authorities* in the European Competition Network (ECN) and may, if necessary, even assume responsibility for the administrative procedures conducted by them.[59]

(c) Conclusions for the present case

97. If the criteria described above are applied to a case like the present one, it is clear, as with regard to legal advice provided by a lawyer, that the undertakings concerned have not committed an excusable error of law, and any error regarding the lawfulness of their market behaviour in the light of European competition law may be held against them.

98. As the referring court reports, the order of the Cartel Court of 2 February 1996, upon which the members of the SSK rely, examined the alleged conduct of the freight forwarding undertakings solely on the basis of national competition law and found it to be permissible. That order does not examine whether the members of the SSK breached the prohibition of cartels under EU law. Nor was there an obligation under EU law for the parallel application of EU antitrust law alongside national antitrust law before 1 May 2004, as Article 3 of Regulation No 1/2003 was not yet applicable.[60]

57 — See above point 62 of this Opinion and the case-law cited in footnote 35.

58 — Article 15(3) of Regulation No 1/2003.

59 — Article 11(6) of Regulation No 1/2003.

60 — *Toshiba Corporation and Others*, cited in footnote 19, paragraph 62.

99. It may be that in advance of its order of 2 February 1996 the Cartel Court examined an interim report of the Joint Committee for Cartel Matters produced in 1994,[61] which had rejected the applicability of European competition law. However, this fact alone did not give the members of the SSK grounds to assume that their market behaviour was not contrary to European competition rules. The crucial factor is that the Cartel Court did not itself expressly comment on the compatibility of the SSK with European competition law.[62]

100. Admittedly, the national competition authorities and courts were required even before 1 May 2004 to have regard to the principle that Community law at the time took precedence and not to prejudice the full and uniform application of Community law.[63] At the time, an obligation to have regard to the European competition rules could also follow from national law, as the undertakings involved pointed out at the hearing.

101. However, it cannot be inferred from this alone that national and European competition rules necessarily always led to the same results even before Article 3 of Regulation No 1/2003 began to apply. It should be recalled that the scope of the European competition rules is not the same as the scope of national competition rules,[64] and both view restrictions on competition from different angles.[65] This was the situation before 1 May 2004 and this has not changed with Regulation No 1/2003.[66] A rule like the Austrian provision on minor cartels shows particularly clearly what differences could exist and can continue to exist between EU antitrust law and national antitrust law.[67]

102. Consequently, an order based solely on national competition law like that made by the Cartel Court on 2 February 1996 cannot create legitimate expectations on the part of the undertakings concerned in a matter of EU law such as the one at issue in the main proceedings.

C – *The declaratory power of national competition authorities vis-à-vis cooperative witnesses (second question)*

103. The second question is geared specifically to the situation of a cooperative witness in which Schenker finds itself in the present case. It logically presupposes that – as explained in connection with the first question – the undertaking concerned *cannot* rely upon an error of law precluding liability. In the event of such an error, there would be no infringement at all which a competition authority or a court could find against the undertaking.[68]

104. The referring court is essentially seeking to ascertain whether the competition authorities of the Member States are permitted under Regulation No 1/2003 to find that an infringement of the prohibition of cartels under EU law has been committed by an undertaking and to refrain from imposing a fine.

61 — See above, points 20 and 21 of this Opinion.

62 — See above, point 92 of this Opinion.

63 — *Walt Wilhelm and Others*, cited in footnote 51, paragraphs 6 and 9.

64 — Case C-505/07 *Compañía Española de Comercialización de Aceite* [2009] ECR I-8963, paragraph 52, and *Toshiba Corporation and Others*, cited in footnote 19, paragraph 81.

65 — *Walt Wilhelm and Others*, cited in footnote 51, paragraph 3; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 38; *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others*, cited in footnote 37, paragraph 103; and *Toshiba Corporation and Others*, cited in footnote 19, paragraph 81.

66 — *Toshiba Corporation and Others*, cited in footnote 19, paragraph 82.

67 — In Case C-226/11 *Expedia* [2012] ECR the Court explained that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of its concrete effects, an appreciable restriction on competition (paragraph 37), and that may be the case even if the thresholds specified in the Commission's de-minimis notice are not reached.

68 — See above, point 44 of this Opinion.

105. The powers of national competition authorities in the application of EU antitrust law are set out in Article 5 of Regulation No 1/2003. Courts may also be entrusted with their exercise pursuant to Article 35(1) of the regulation, as is the case in Austria.

106. There is no express provision in Article 5 of Regulation No 1/2003 for a power held by national authorities simply to find an infringement of EU antitrust law. On the other hand, under the last sentence of Article 7(1) of that regulation, the European Commission has the express power to find that an infringement has been committed in the past if there is a legitimate interest.

107. Contrary to the view taken by Schenker, however, it certainly cannot be inferred from the silence in Article 5 of Regulation No 1/2003 that the national authorities would be prohibited from merely finding the existence of an infringement without imposing penalties. Nor can this be inferred conversely from the Commission's powers under the last sentence of Article 7(1) of Regulation No 1/2003.

108. It is true that Regulation No 1/2003 deliberately withholds certain powers from the national competition authorities and courts, so that the Commission's leading role, firmly anchored in the system of that regulation, in framing European competition policy[69] and the newly created exception system are not undermined. For example, the Commission is the only authority in the ECN which has the power under Article 10 of Regulation No 1/2003 exceptionally to find, by means of a declaration, the inapplicability of EU antitrust law,[70] whereas under the second paragraph of Article 5 of that regulation the national competition authorities may at most decide that there are no grounds for action on their part in a specific case, which excludes the possibility of taking a negative decision on the merits.[71]

109. However, it cannot be assumed that in the opposite case, i.e. with regard to the power to find infringements, the Union legislature also intended to restrict the competences of the national competition authorities and courts. As has already been mentioned, one of the main objectives of Regulation No 1/2003 was to involve national authorities more fully than previously in the enforcement of European antitrust law.[72] The competition authorities of the Member States were to be given not fewer, but more possibilities to apply EU antitrust law effectively.[73] In the decentralised system of Regulation No 1/2003 the detection, declaration and, if appropriate, penalisation of infringements of the European competition rules are an integral part of their list of tasks[74] and contribute to the effective enforcement of those rules.

110. The possibility of simply finding an infringement is necessarily included in the national competition authorities' power to impose penalties under the last indent of Article 5(1) of Regulation No 1/2003 (*a maiore ad minus*). Without the prior declaration of a cartel offence, any penalties which an authority imposes on the undertakings involved for their conduct would not be conceivable.

111. National competition authorities and courts certainly do not lose their power to find an infringement if they refrain from imposing penalties in order, for example, to reward a cooperative witnesses for its cooperation in cartel proceedings. Rather, it may even be necessary, for the effective enforcement of EU competition rules, to find the existence of an infringement in such a case even in the absence of the imposition of penalties.

69 — See recital 34 in the preamble to Regulation No 1/2003, which stresses the central role played by the Union institutions in the application of the principles laid down in Articles 81 EC and 82 EC; see also Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission*, cited in footnote 17, end of paragraph 105; Case C-344/98 *Masterfoods* [2000] ECR I-11369, paragraph 46, first sentence; and my Opinion in *Expedia*, cited in footnote 28, point 38.

70 — See also recital 14 in the preamble to Regulation No 1/2003.

71 — *Tele 2 Polska*, cited in footnote 33, paragraphs 22 to 29 and 32.

72 — Recitals 6, 7 and 8 in the preamble to Regulation No 1/2003.

73 — Recitals 28 and 34 in the preamble to Regulation No 1/2003.

74 — See in particular the first sentence of Article 5, Article 6 of and recitals 6, 7 and 8 in the preamble to Regulation No 1/2003.

112. If the national authority or the national court refrained not only from imposing a penalty, but also from finding the infringement and simply terminated the cartel proceedings against the undertaking concerned, this could create the misleading impression that its market behaviour was lawful. On the other hand, by finding the infringement, which is, in reality, tantamount to determining a zero fine, it is unquestionably made clear and documented that the undertaking culpably infringed the EU competition rules.

113. The question whether and how the competent national authorities exercise their power, implicitly contained in Article 5 of Regulation No 1/2003, to find an infringement without imposing penalties falls within the scope of the procedural autonomy of the Member States. Consequently, there is nothing to prevent national law placing the declaration of an infringement at the discretion of the competent authority or the court having jurisdiction or, bearing in mind the last sentence of Article 7(1) of Regulation No 1/2003, requiring a legitimate interest, provided the principles of equivalence and effectiveness [75] enshrined in EU law are respected.

114. Against the background of the principle of effectiveness, which finds expression in the objective of the effective enforcement of EU antitrust law, [76] there will, as a general rule, be a legitimate interest in finding an infringement even if no penalties are imposed. First of all, proceedings may be brought against the undertaking concerned in future on the basis of such a declaration as a repeat offender if it commits a repeat infringement of the rules of European competition law. [77] Second, the declaration of the infringement acts as a deterrent to other undertakings and boosts the confidence of all market operators in the power of the competition rules in the European internal market. Not least, the official declaration of the infringement also makes it considerably easier for undertakings and consumers which suffer damage as a result of a cartel to make civil claims against the participants in the cartel. [78]

VI – Conclusion

115. In the light of the foregoing considerations, I suggest that the Court answer the questions referred by the Austrian Oberster Gerichtshof as follows:

‘(1) A fine may not be imposed on an undertaking for an infringement of the prohibition of cartels under EU law committed by it in a case where the undertaking erred with regard to the lawfulness of its conduct (error of law) and its error is not objectionable.

(2) The error of law committed by an undertaking is objectionable if the undertaking has relied on legal advice provided by a lawyer or a decision taken by a national competition authority in which the crucial legal problem is not addressed, at least not expressly.

In the case of infringements whose starting date lies before 1 May 2004, an error of law by an undertaking is also objectionable if the undertaking failed to apply at an early stage to the European Commission for the grant of negative clearance under Article 2 of Regulation (EEC) No 17.

75 — With regard to the importance of these principles in the context of competition law, see Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, and *Manfredi and Others*, cited in footnote 65.

76 — With regard to this objective, see the references cited above in footnote 34.

77 — First indent of paragraph 28 of the 2006 Guidelines.

78 — With regard to the importance of private enforcement of competition law, see, in addition to the judgments cited in footnote 74, in particular the White Paper on damages actions for breach of the EC antitrust rules, presented by the European Commission on 2 April 2008 (COM(2008) 165 final). In its White Paper, the Commission proposes measures designed to ‘create an effective system of private enforcement [of competition law] by means of damages actions that complements, but does not replace or jeopardise, public enforcement’ (p. 4, section 1.2). The EFTA Court also recently had the opportunity to indicate the importance of private enforcement of competition law and to stress that it lies in the public interest (judgment of 21 December 2012 in Case E-14/11 DB Schenker v EFTA Surveillance Authority, paragraph 132).

(3) Regulation (EC) No 1/2003 does not prohibit the competition authorities of the Member States from finding that an infringement of the prohibition of cartels under EU law has been committed by an undertaking as such and, in doing so, from refraining from imposing a fine, provided the general principles of equivalence and effectiveness enshrined in EU law are respected.'