

Competition - Austria

Error in law cannot protect against competition fine

Contributed by [Preslmayr Attorneys at Law](#)

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In December 2011 the Supreme Court referred a question to the European Court of Justice (ECJ) regarding whether an error on the legality of actions based on advice from a specialist adviser or a decision by a national competition authority would be a viable defence against fines imposed on an undertaking for infringing Article 101 of the Treaty on the Functioning of the European Union (for further details please see "[Can an error in law protect against competition fines?](#)").

On June 18 2013 the ECJ answered this question in the negative. It stated that Article 101 must be interpreted as meaning that an undertaking which has infringed this provision cannot escape the imposition of a fine where the infringement has resulted from the undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer or a decision of a national competition authority.

The ECJ stated, with reference to earlier case law, that an undertaking is liable to be punished by a fine in accordance with Article 23 of EU Regulation 1/2003 where it could not be unaware of the anti-competitive nature of its conduct, regardless of whether it was aware that it was infringing the treaty's competition rules. The court further reasoned that the undertakings concerned coordinated their behaviour in relation to tariffs throughout Austria, and thus evidently could not have been unaware of the anti-competitive nature of their conduct.

As regards national competition authorities, since they do not have the power to adopt a negative decision (ie, a decision concluding that there was no infringement of Article 101), they cannot cause undertakings to entertain a legitimate expectation that their conduct does not infringe that provision. Furthermore, in the case at hand, it seems that the national competition authority examined the relevant conduct on the basis of only national competition law.

Consequently, the court set the threshold for any error-in-law defence to be extremely high - if there was such defence at all.

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