

Joined cases C-272/09 P, C-386/10 P and C-389/10 P KME Germany and Chalkor v Commission, judgments of 8 December 2011

Facts: The appellants were companies which had entered into agreements intended to fix prices and share markets in the semi-finished copper tubes sector for use in refrigeration and air conditioning. The Commission, by way of two decisions, fined them. They then appealed against the General Court's refusal to reduce the fines, stating that the General Court had infringed Union law and their fundamental right to effective judicial remedy, by having failed to examine their arguments closely and thoroughly and having deferred, to an excessive and unreasonable extent, to the Commission's discretion.

Held: Firstly, the system of penalties for infringement of the competition rules as established by Regulations No 17 and No 1/2003 was intended to provide for severe fines for cartels. To this effect, the Court said that the question of what impact this fixing had on the market, and more specifically whether the restriction of competition resulted in a market price higher than would have obtained without the cartel, would not constitute a decisive factor for determining the level of fines. Therefore, all the Commission had to show in proving the 'actual impact' was, following Case T 241/01] *Scandinavian Airlines System v Commission* [[2005] ECR II 2917], specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market. Therefore, the Commission had not erred in its finding, and nor had the General Court.

Secondly, as regards the review of legality, there was no infringement of the principle of effective judicial protection laid down in Art. 47 of the Charter of Fundamental Rights. Given that the review conducted fell under Art. 263 TFEU and Art. 31 of Regulation No 1/2003, and neither had provisions contrary to Art. 47 of the Charter, this argument could not be maintained by the appellants. The Court said that the review of legality entailed a review of both the law and the facts and meant that the Commission and General Court had the power to assess the evidence, to annul the contested decision and to alter the fines.

Thirdly, on the argument that the doctrines of judicial deference and margin of appreciation should no longer apply as the fines imposed by the Commission are so large, the Court held that the Courts of the Union were required to establish not only whether the evidence relied on was factually accurate, reliable and consistent but also whether that evidence contained all the information which had to be taken into account in order to assess a complex situation and

whether it was capable of substantiating the conclusions drawn from it, and so their discretion was not unfettered.

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