Reports of Cases

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

Case C-287/11 P

European Commission
v
Aalberts Industries NV,
Comap SA, formerly Aquatis France SAS,

Simplex Armaturen + Fittings GmbH & Co. KG

(Appeal — Agreements, decisions and concerted practices — European market in copper and copper alloy fittings — Article 81 EC and Article 53 of the EEA Agreement — Fixing prices, discounts and rebates, introduction of mechanisms for coordinating price increases, allocating customers and exchanging commercial information — Concept of undertaking — Single, continuous infringement — Annulment of the Commission decision in whole or in part)

I – Introduction

1. By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 24 March 2011 in *Aalberts and Others* v *Commission*, [2] by which that Court annulled Articles 1 and 2(a) and (b)(2) of the Commission Decision of 20 September 2006 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F-1/38.121 – Fittings) [3] ('the contested decision'), in so far as that decision found that Aalberts Industries NV ('Aalberts') and its subsidiaries Aquatis France SAS ('Aquatis') and Simplex Armaturen + Fittings GmbH & Co. KG ('Simplex') participated in a cartel during the period from 25 June 2003 to 1 April 2004, and imposed on Aalberts a fine in the amount of EUR 100.8 million, of which EUR 55.15 million was imposed jointly and severally with each of its subsidiaries, and as regards those subsidiaries, imposed on them jointly and severally an additional amount of EUR 2.04 million.

2. That cartel – in which the Commission found that Aquatis and Simplex had already participated during the period from 31 January 1991 to 22 March 2001 before their transfer to Aalberts in 2002 – [4] was described by the Commission as a single, complex and continuous infringement taking the form of a complex of anti-competitive agreements and concerted practices in the market for copper and copper alloy fittings and consisting in fixing prices, putting in place mechanisms for introducing price increases, allocating national markets, and also participating in regular meetings and establishing contacts to facilitate the infringement.

1 — Original language: French.

2 — Case T-385/06 [2011] ECR II-1223.

3 — OJ 2007 L 283, p. 63.

4 — That part of the contested decision, which also concerned the previous parent company (IMI) of Aquatis (formerly Raccord Orléanais SA) and of Simplex (formerly R. Woeste & Co. Yorkshire GmbH), is not the subject of the present proceedings. It gave rise to the judgment of 24 March 2011 in Case T-378/06 *IMI and Others* v *Commission*, which dismissed the action brought by the companies concerned and no appeal was lodged against it.

3. In support of their action before the General Court, Aalberts and its subsidiaries put forward five pleas, the first three of which alleged as follows: that it was unlawful to impute liability for the infringement to the parent company; that there was no infringement of Article 81 EC; and that they did not participate in the single, complex and continuous infringement referred to in Article 1 of the contested decision.

4. In its judgment, the General Court upheld the second and third pleas but did not give a ruling on the other pleas submitted to it. [5]

5. In essence, the General Court held, first, in the context of its examination of the second plea, that the Commission had not proved to the requisite legal standard the anticompetitive nature of the two events alleged against Simplex in the contested decision. [6] Secondly, examining the third plea solely with regard to Aquatis, the General Court held that, although during the period at issue that company did participate in one part of the single, complex and continuous infringement, the Commission had not established that Aquatis had been aware of the fact that it had, through its conduct, joined a cartel made up of different parts that had a common purpose or the cartel in which it had already participated before March 2001 and which was ongoing. [7] Accordingly, the General Court annulled Article 1 of the contested decision and the fine imposed on Aalberts and its subsidiaries in its entirety, and the additional amount of EUR 2.04 million which had been imposed solely on those subsidiaries, on the ground that there was an error in the calculation of that amount. [8]

6. It is against all those findings that on 7 June 2011 the Commission lodged the present appeal.

7. For their part, whilst contending that the appeal should be dismissed, Aalberts and its subsidiaries lodged a cross-appeal, in case the Court of Justice were to uphold in full or in part the main appeal, in which they call upon this Court to set aside the judgment under appeal in so far as it established that there was a single, complex and continuous infringement which continued to exist after the Commission's inspections of March 2001, and to annul the contested decision in so far as they are concerned and/or reduce significantly the amount of the fine that was imposed on them.

8. The parties to the present proceedings presented oral argument at the hearing on 27 September 2012.

9. In accordance with Article 62(1) of the Rules of Procedure of the Court of Justice, the parties were invited at my request to submit their observations on the inferences they draw from the judgment of 6 December 2012 in *Commission* v *Verhuizingen Coppens* [9] as far as the second ground of the main appeal is concerned. The parties lodged their observations within the period prescribed.

II – Analysis

10. The Commission advances three grounds in support of the main appeal. The first alleges failure to provide sufficient reasons and errors of law in the application of the principles governing the burden of proof, and also distortion of factual findings and certain pieces of evidence. The second ground alleges errors of law in respect of the annulment in full of the contested decision. The third ground alleges failure to provide sufficient reasons, infringement of the prohibition of ruling *ultra petita* and a corresponding infringement of the rights of the defence.

5 — Judgment under appeal, paragraphs 28 and 121.
6 — Judgment under appeal, paragraph 68.
7 — Ibid., paragraphs 85, 110 and 119.
8 — Ibid., paragraph 122.
9 — Case C-441/11 P [2012] ECR.

11. The cross-appeal lodged by Aalberts and its subsidiaries in the alternative is based on a single ground, in which they criticise the General Court for wrongly finding that there was a single, complex and continuous infringement.

12. For reasons that will be explained below, I consider that the first ground of the main appeal should be upheld, to a significant extent at least, and that the judgment under appeal should accordingly be set aside. It will then be appropriate to examine the single ground of the cross-appeal, which moreover relates to findings made in that judgment which logically precede the criticisms made by the Commission in the second and third grounds of the main appeal, which I shall consider only in the alternative.

A – *The main appeal: first ground of the main appeal: failure to provide sufficient reasons, errors of law in the application of the principles governing the burden of proof, and also distortion of factual findings and certain pieces of evidence*

13. Although it is somewhat disordered, the first ground of the main appeal may, in essence, be divided into two parts. The first part alleges a methodological error and failure to provide sufficient reasons for the fragmentary examination of the evidence in isolation. The second part alleges distortion of the evidence.

1. The first part: a methodological error and failure to provide sufficient reasons for the fragmentary examination of the evidence in isolation

a) Arguments of the parties

14. In the first part the Commission criticises the General Court for not assessing the continuous participation of the economic entity constituted by Aalberts and its subsidiaries, carrying out instead an isolated and individual examination of the evidence of participation in the infringement in respect of each of the two subsidiaries, and failing, without adequate reason, to consider the various links between individual pieces of evidence. Such an isolated and fragmentary examination of the evidence would not have taken place if the General Court had first dealt with the first plea of the action at first instance, which denied that Aalberts Industries and its subsidiaries constituted a single undertaking for the purposes of the application of Article 81 EC. The Commission adds that the participation of one or other of the subsidiaries in the cartel should be viewed as the manifestation of the participation in that cartel of the undertaking of which that subsidiary forms a part, contrary to the appraisal made by the General Court. The lack of an explanation by the General Court as to why, within a single undertaking, evidence for each subsidiary had to be examined separately constitutes, in the Commission's view, a manifest failure to state reasons.

15. Aalberts and its subsidiaries contend that that part of the first ground of the appeal, and that ground of appeal in general, is manifestly inadmissible, for the Commission raises, in the guise of issues of law, errors of assessment of facts and pieces of evidence that are not amenable to review by the Court of Justice on appeal. In any event, the Commission's objections are manifestly unsubstantiated. The General Court, quite logically, assessed the alleged participation of the two companies in the cartel and then examined all the pieces of evidence in context. The line of argument followed by the General Court is consistent and the judgment under appeal is sufficiently reasoned.

b) Analysis

16. Contrary to what Aalberts and its subsidiaries contend, there is no doubt that this part of the first ground of the Commission's appeal is admissible, for it is by no means confined to criticism of the General Court's assessment of the facts or evidence.

17. The Commission claims, in essence, that the General Court vitiated the judgment under appeal by inconsistency. It contends that that Court assessed the evidence relating to the participation of Simplex and Aquatis in the single, complex and continuous infringement in isolation, whilst at the same time, by failing to rule on the first plea submitted by Aalberts and its subsidiaries at first instance, it neither invalidated the premise of the contested decision that those companies belonged to a single economic entity for the purposes of the competition rules of EU law nor explained the reasons which led it to conduct a separate examination of pieces of evidence within a single economic entity.

18. Such a claim, relating both to the consistency of the reasoning followed by the General Court and the sufficiency of the reasons given in its judgment, is clearly a legal issue amenable to review by the Court of Justice on appeal. [10]

19. As regards the substance, I consider that this part of the ground of appeal must be upheld.

20. First of all, it should be noted that it is settled case-law that the concept of an undertaking, for the purposes of Article 81 EC, designates an economic unit even if in law that economic unit consists of several natural or legal persons. [11]

21. It is also clear from case-law that the conduct of a subsidiary may be attributed to the parent company when that subsidiary does not determine independently its own conduct on the market, for, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking. [12]

22. Likewise, when such an economic entity infringes the competition rules it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. [13]

23. Also, it is common ground in the present case that the General Court, in the interest of procedural economy, did not give an answer to the first plea submitted at first instance by Aalberts and its subsidiaries, which alleged that it was unlawful to impute liability for the infringement to Aalberts as the parent company. By that plea, Aalberts and its subsidiaries contested the Commission's assessment in the contested decision that those companies constituted an undertaking, that is to say, an economic unit for the purposes of Article 81 EC and of the case-law cited above, and that Aalberts, as the parent company, exercised decisive influence over the conduct of its two subsidiaries.

24. There is clearly nothing in itself wrong with using the technique of procedural economy. It generally enables a court to ensure compliance with the requirements of sound administration of justice.

10 — See, inter alia, with regard to casting doubt on consistency of the reasoning, Case C-89/11 P *E.ON Energie* v *Commission* [2012] ECR, paragraph 84 and the case-law cited.

11 — See to that effect Case C-289/11 P *Legris Industries* v *Commission* [2012] ECR, paragraph 45 and the case-law cited.

12 — Ibid. and the case-law cited.

13 — See, to that effect, Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 56 and the case-law cited.

25. In the context of the presumption that acts of EU institutions are lawful,[14] the fact that the General Court did not rule on the first plea in the action, whereas it upheld the second and third pleas criticising participation by Aalberts and its subsidiaries in the infringement complained of, gives grounds for assuming, at the very least, that it started from the premiss, established in the contested decision, that Aalberts and its subsidiaries did constitute a single company for the purposes of Article 81 EC.

26. Indeed, it makes little sense to economise by not examining a particular plea if the court intends to uphold it.

27. Hence, it is reasonable to think that if the General Court decided that it was appropriate not to examine the first plea submitted to it, in order to concentrate solely on the second and third pleas raised at first instance, it was because it considered that that plea, which should logically be examined before the subsequent pleas, was unlikely to succeed.

28. However, in its assessment of the merits of the second and third pleas in the action at first instance, the General Court merely examined, for each of the Aalberts subsidiaries in isolation, in other words, in a fragmentary manner, the pieces of evidence which the Commission had gathered against the economic unit formed by Aalberts and its subsidiaries, without ascertaining the interaction between those pieces of evidence within that unit itself or giving the reasons why it had done so.

29. Thus, it should be noted that the conduct attributed by the Commission to Simplex was examined by the General Court in the context of the second plea, which alleged that there was no infringement of Article 81 EC, whereas Aquatis's conduct was assessed by the General Court in relation to the third plea, which alleged that there was no participation in the single, complex and continuous infringement.

30. As regards Simplex, the General Court found that the Commission had not demonstrated that that company had participated in the infringement.

31. Of the two events on which the Commission had based the contested decision against Simplex, the General Court held, first, that neither provided evidence with regard to 2003 that that company had participated in the infringement.

32. Secondly, with regard to 2004, the General Court held that the first event at issue, namely, telephone contact between a representative of Simplex and a representative of another undertaking which had participated in the cartel (in this case FRA.BO) concerning an alleged price increase on the Greek fittings market, was based ultimately on a set of handwritten notes from the FRA.BO representative, which was 'not sufficient in itself to prove that Simplex participated in the infringement alleged in the present case. *It is conceivable that that contact could be regarded as an isolated incident*'.[15]

33. As regards the second event relied on as against Simplex, namely, a meeting at the trade fair at Essen on 18 March 2004 between a representative of an undertaking that had participated in the infringement (in this case IBP Ltd, 'IBP') and two Simplex representatives, the General Court held that the statements made by the former in connection with a leniency application made by IBP were not more credible than those made by employees of Simplex.[16]

14 — See, inter alia, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48, and Case C-27/09 P *France* v *People's Mojahedin Organization of Iran* [2011] ECR I-13427, paragraph 74.

15 — Paragraph 61 of the judgment (italics added).

16 — Paragraph 67 of the judgment under appeal.

34. With regard to Aquatis, the General Court held that it had participated, between June 2003 and April 2004, in meetings of the Logistics Committee of the Fédération Française des Négociants en Appareils Sanitaires, Chauffage, Climatisation et Canalisations ('the FNAS'), concerning the coordination of pricing, meetings which concerned only one part of the infringement that had taken place between 1991 and March 2001. [17]

35. The General Court found, however, that the Commission had not demonstrated that Aquatis was aware of the anti-competitive activities of the other undertakings when it took part in the FNAS meetings during the period at issue or that it could reasonably have foreseen them, and therefore that its conduct was part of an overall plan including all the constituent elements of the cartel. [18] In that regard, the General Court held that the Commission had not demonstrated that Aquatis had re-joined the cartel after March 2001, that there was nothing to indicate that Aquatis was aware of the continuation of that infringement by IBP, Comap SA (formerly Aquatis) and FRA.BO, that the discussions within the FNAS Logistics Committee related only to the French market and hence that the collusion in those meetings was not pan-European in scope and that, despite contact between Aquatis and FRA.BO in April 2004, there was nothing in the handwritten notes made by the FRA.BO representative to indicate that anti-competitive matters were raised during that contact. [19]

36. It may be seen, therefore, that the General Court did not explain, inter alia, why, contrary to what had been stated in the contested decision brought before it, it was not necessary to take into joint consideration the individual conduct of each of the subsidiaries, although the premise of its reasoning lies implicitly but necessarily in the assessment made in the contested decision that, in essence, those subsidiaries formed, with their parent company, a single economic unit adopting its own particular conduct.

37. This impediment, which affects both the reasoning followed by the General Court and the sufficiency of the reasons given in the judgment under appeal, is particularly evident when, without further explanation, the General Court held in paragraph 61 of that judgment, that *it was conceivable* that the contact established between a FRA.BO representative and a Simplex representative could be regarded as an *isolated incident*, without its even appearing that the General Court considered the possible impact on that assessment of the fact that, during the same period and within the same economic unit, Aquatis was participating in meetings whose purpose was to coordinate prices on the French fittings market involving, inter alia, FRA.BO.

38. As the Commission correctly submits, the assessment of whether or not the incident concerned is 'isolated' depends on the other pieces of evidence in the file attributable to the economic unit formed by Aalberts and its subsidiaries relied on in the contested decision.

39. Similarly, it is difficult to understand how the General Court could find, in paragraph 117 of the judgment under appeal, that Aquatis could not reasonably have foreseen that the FNAS meetings in which it participated were part of a wider infringement that was part of an overall plan, without at the very least taking into account the allegedly isolated conduct of Simplex in relation to the Greek market, when it did not rebut the assessment made in the contested decision that those two companies did not behave independently but constituted an economic unit with their parent company Aalberts.

17 — Paragraph 110 of the judgment under appeal

18 — Paragraph 112 of the judgment under appeal.

19 — Paragraphs 113, 114, 116 and 118 of the judgment under appeal.

40. It is even more difficult to understand the General Court's failure to carry out an overall examination of the evidence adduced by the Commission against Aalberts and its subsidiaries because, according to the case-law, it is sufficient for the Commission to show that *the undertaking concerned* participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that *that undertaking* participated in the cartel. [20]

41. That is not, of course, an instance of failure to make an individual assessment of the pieces of evidence adduced by the Commission against the companies which are alleged to have participated in the infringement.

42. However, when such evidence relates to the conduct of a single undertaking for the purposes of Article 81 EC, although that economic unit consists of several legal entities, that evidence must necessarily be assessed as a whole in order to ascertain whether that undertaking participated in the alleged infringement. [21]

43. Any other interpretation would render Article 81 EC redundant since it would amount to accepting that a group of companies could rely on the formal separation of those companies, resulting from their separate legal personality, in order to preclude a finding that they had acted jointly on the market for the purposes of the application of the rules on competition. [22]

44. It follows that, by failing to examine together the evidence adduced against Simplex and Aquatis in the contested decision, although the General Court did not cast doubt on the premiss of that decision to the effect that Aalberts and its subsidiaries constituted a single undertaking for the purposes of Article 81 EC, the General Court vitiated the judgment under appeal by an error of law.

45. Such an error must, in my view, lead to the setting aside of the judgment under appeal inasmuch as the General Court annulled Article 1 of the contested decision and Article 2(a) of that decision imposing a fine on Aalberts, jointly and severally with Aquatis and Simplex, amounting to EUR 100.80 million.

46. Accordingly, such an error of law must also result in the setting aside of the General Court's annulment of Article 2(b)(2) of the contested decision, which, I would recall, imposed a fine of EUR 2.04 million on Aquatis and Simplex jointly and severally.

47. That annulment is incorrectly based on the implicit reasoning [23] that the Commission could not take into account Aalberts's turnover when calculating that amount of the fine imposed on its two subsidiaries, because the Commission had not demonstrated to the requisite legal standard that those subsidiaries had participated in the single, complex and continuous infringement complained of.

48. The judgment under appeal being flawed by an error of law in that latter regard, as the preceding considerations show, I therefore propose that points (1) and (2) of the operative part of that judgment should be set aside.

20 — See inter alia Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 81.

21 — According to case-law, the Commission must establish in particular all the facts enabling the conclusion to be drawn that an *undertaking* participated in such an infringement and that it was responsible for the various aspects of it: see inter alia Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86.

22 — See, to that effect, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 140.

23 — According to case-law, the reasoning of a judgment of the General Court may be implicit on condition that it enables the persons concerned to understand it and provides the Court of Justice with sufficient material for it to exercise its powers of review on appeal (see, to that effect, inter alia, the judgment of 21 December 2011 in Case C-320/09 P *A2A* v *Commission*, paragraph 97).

49. In those circumstances, it is not necessary to adjudicate either on the merits of the second part of the first ground of the main appeal or on the second and third grounds of that appeal.[24]

50. In contrast, the cross-appeal which was lodged by Aalberts and its subsidiaries in the alternative, in the event of one of the grounds of the main appeal's being upheld, must be examined.

B – *The cross-appeal*

1. Arguments of the parties

51. Aalberts and its subsidiaries submit that the General Court erred in law in finding, in paragraph 106 of the judgment under appeal, that the cartel having continued after the Commission's inspections in March 2001, the Commission had concluded that there was a single, complex, and continuous infringement.

52. According to Aalberts and its subsidiaries, the pre-inspections cartel and the conduct after the inspections had no unitary objective. The object of the former was to operate a pan-European cartel aimed at excluding practically all sources of potential competition by focusing not only on price fixing but also on the allocation of national markets and customers and coordination against manufacturers or distributors that were not members of the cartel. By contrast, the post-2001 incidents merely covered the exchange of price-related information and did not entail forms of collusion aimed at excluding other aspects of competition such as market allocation and customer sharing which were constituent parts of the objective of the cartel that existed before the inspections.

53. Aalberts and its subsidiaries submit that, whereas the various instances of conduct before the inspections were clearly interlinked and complementary, the post-2001 incidents were not. That demonstrates that the core characteristics of the cartel before the inspections no longer existed after 2001.

54. In addition, the differences in geographic scope, in the methods used, and in the periods of application of the single infringement also raise doubts, the existence of which in the reasoning of the General Court ought, they claim, to have operated to their advantage, as to the connection between the instances of conduct before and after 2001.

55. Aalberts and its subsidiaries conclude therefore that there is clearly a lack of evidence precise and consistent enough to support the firm conviction that the conduct before and after the inspections formed part of a single and continuous infringement within the meaning of Article 81 EC. Therefore, the General Court misinterpreted that concept.

56. In its response to the cross-appeal, the Commission contends, first of all, that that appeal is inadmissible, Aalberts and its subsidiaries in reality seeking a fresh assessment of the facts.

57. Secondly, the Commission contends that the cross-appeal is ineffective on the ground that Aalberts and its subsidiaries have no legal interest in bringing proceedings. If, as it claims, there were two separate infringements, one before and one after the Commission's inspections, the resulting overall fines would at least be the same for the three companies.

24 — As stated above, the second and third pleas of the appeal will however be briefly considered in Section C below.

58. Lastly, the Commission contends that the cross-appeal is unfounded. The Commission notes that the ground of appeal raised in support of the cross-appeal is solely whether the anticompetitive events following the inspections constituted a continuation of the same infringement occurring before the inspections. It considers in that regard that the General Court correctly applied the case-law of the Court of Justice according to which it is necessary to examine whether events before and after the inspections shared the same objective. The similarity of elements before and after the inspections need not be particularly high. Nor, contrary to what Aalberts and its subsidiaries suggest, does there exist in EU law a 'presumption of separate offences'. To contend that in case of doubt one has to assume separate infringements is, in the Commission's view, quite simply illogical.

2. Analysis

a) The admissibility and effectiveness of the cross-appeal

59. It must be stated from the outset that the issue of the admissibility of the cross-appeal could arise if that appeal had not been lodged in the alternative, supposing the Court were to uphold one or more of the grounds of the main appeal. The legal interest of Aalberts and its subsidiaries in bringing proceedings would then be in question since the General Court upheld their claim for annulment submitted at first instance. [25]

60. However, in a situation such as that in the present case, in which the cross-appeal is lodged as described above, it does not appear that its admissibility ought to be open to debate. First, that appeal seeks to have set aside, at least in part, the judgment under appeal on a plea in law which was not raised in the main appeal. [26] Secondly, it is the only procedure open to Aalberts and its subsidiaries to challenge the reasons given by the General Court to support the existence of a single, complex and continuous infringement. If Aalberts and its subsidiaries had not lodged a cross-appeal and if the Court of Justice were to hold, after upholding the main appeal, that the state of the proceedings was such that judgment could be given, the Court of Justice would not be able to rule on those parts of the General Court's judgment that had not been contested, including therefore those relating to the finding that there was a single, complex and continuous infringement. [27] To deprive Aalberts and its subsidiaries of the right to avail themselves of the remedy of a cross-appeal would thus amount to a denial of justice.

61. However, certainly aware of such an undesirable consequence, the Commission did not submit that the cross-appeal is inadmissible on so general a ground.

62. It confined its submission, on the one hand, to stating that the cross-appeal was intended merely to take issue with the General Court's factual findings and, on the other hand, from the viewpoint of its ineffectiveness rather than its inadmissibility, that the cross-appeal, even if it were upheld, would not affect the level of the fines imposed on Aalberts and its subsidiaries.

63. In my view, both grounds should be rejected.

25 — According to case-law, for an appellant to have an interest in bringing proceedings the cross-appeal must be capable, if successful, of procuring an advantage to the party bringing it: see, inter alia, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 33.

26 — See, inter alia, Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 186, and Joined Cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa* [2012] ECR, paragraph 94.

27 — See to that effect, Case C-32/00 P *Commission* v *Boehringer* [2002] ECR I-1917, paragraphs 64 and 65. The possibility for Aalberts and its subsidiaries to lodge an application for substitution of the grounds of the judgment, instead of a cross-appeal, appears to be excluded since such an application would go beyond the scope of the subject-matter of the main appeal: see, to that effect, points 24 and 25 of the Opinion of Advocate General Kokott delivered on 13 December 2012 in Case C-439/11 P *Ziegler* v *Commission*, with reference to Case C-329/09 P *Iride (formerly AMGA)* v *Commission* [2011] ECR, paragraph 48.

64. As regards the first ground, it should be noted that Aalberts and its subsidiaries do not seek to reopen debate either on the existence of the infringement before the Commission's inspections in 2001, as it was found by the General Court in paragraphs 91 to 100 of the judgment under appeal, or on the assessment that the post-inspection incidents, examined in paragraphs 101 to 105 of that judgment, concerned the exchange of price-related information.

65. They contend, on the other hand, that the General Court's assessment of the facts ought to have led it to reject the finding reached by the Commission that the cartel, found to exist before the 2001 inspections, had continued after those inspections and took the form of a single, complex and continuous infringement.

66. In so far as it therefore criticises the reasoning of the judgment under appeal merely with regard to the legal characterisation of the conduct at issue as constituting a single, complex and continuous infringement, the cross-appeal is admissible. [28]

67. As regards the alleged ineffectiveness of the cross-appeal, the latter, contrary to what the Commission states, is not confined to criticism of those grounds of the judgment under appeal having a bearing solely on the amount of the fines imposed on Aalberts and its subsidiaries, but is directed against the General Court's findings with regard to the examination of the existence of an infringement of Article 81 EC ascribable to those companies. Moreover, if the Court were to uphold the cross-appeal and therefore to hold that the General Court was wrong to find that there was a single, complex and continuous infringement, the question of participation by Aquatis in that infringement, which is itself the subject of the second ground of the Commission's main appeal, would become irrelevant. The cross-appeal is therefore rightly directed against the grounds of the judgment under appeal having a bearing on the General Court's findings other than those concerning the imposition of fines on Aalberts and its subsidiaries.

b) The merits of the cross-appeal

68. As I stated above, Aalberts and its subsidiaries do not contest either the existence of the infringement before the Commission's inspections in 2001, as it was found by the General Court in paragraphs 91 to 100 of the judgment under appeal, or the finding that the post-inspection incidents, examined in paragraphs 101 to 105 of that judgment, concerned the exchange of price-related information.

69. As regards those latter paragraphs of the judgment under appeal, Aalberts and its subsidiaries maintain, in essence, that the General Court was wrong to find that the events following the 2001 inspections constituted a continuation of the (complex) infringement as it existed before those inspections. They contend therefore that the infringement was not 'continuous' and that accordingly the conduct in question related to two separate infringements (and not a single infringement).

70. That argument does not persuade me.

71. According to the case-law recalled in essence in paragraphs 86 and 87 of the judgment under appeal, an infringement of Article 81(1) EC can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. [29]

28 — See Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 153.

29 — *Commission* v *Anic Partecipazioni*, paragraph 81; *Aalborg Portland and Others* v *Commission*, paragraph 258; and *Commission* v *Verhuizingen Coppens*, paragraph 41.

72. What is decisive is the fact that the various actions form part of an 'overall plan' owing to their identical object distorting competition within the single market. [30]

73. In such circumstances, the Court has held both that it would be artificial to subdivide into a number of distinct actions an agreement characterised by a series of efforts pursuing a single economic end and that it is immaterial, in the context of an overall agreement extending over several years, whether there is a gap of several months between the manifestations of the agreement. [31]

74. Likewise, responding to an argument based on the difference in nature between two decisions taken by an association of undertakings concerning, in one case, price-fixing and, in the other, the commercial advertising policy of members of that association, a difference which, according to that association, ought to have led the Commission and the General Court to describe those decisions as autonomous infringements by reference to Article 81 EC, the Court of Justice held that those differences had no impact on the characterisation of those decisions as a 'single infringement', inasmuch as they fell within the framework of a series of practices having the same object, namely to restrict price competition. [32]

75. In the present case, the General Court correctly applied the case-law just cited when considering, in paragraphs 102 to 105 of the judgment under appeal, whether the conduct alleged to have taken place after the Commission's investigations in 2001 shared the same objective as the anti-competitive practices before that date, namely collusion on prices in relation to fittings.

76. From the same perspective, which is to focus on the objective of anti-competitive practices rather than their various manifestations or the methods of their implementation, [33] the General Court rightly held, in paragraph 105 of the judgment under appeal, that the fact that certain characteristics or the intensity of those practices had changed is not conclusive, for it is conceivable that the cartel became less structured after the Commission's inspections and the intensity of its activities more variable.

77. The fact that certain aspects of the cartel had ended and that it was thus less structured than before the Commission's inspections would appear to be quite logical, since the undertakings which continued to take part in it after those inspections knew that they were the subject of the investigation being conducted by that institution. It was therefore a 'normal', prudent reaction by businesses wishing to continue pursuing the objective of their earlier practices, namely, to fix the price of fittings, in a context and in forms necessarily more discrete.

78. Accordingly, contrary to what Aalberts and its subsidiaries maintain, those different methods for implementing the cartel before and after the Commission inspections cannot be relied on in order to reject the finding made in the judgment under appeal that the infringement was single and continuous.

79. There is therefore no longer any need to rule on the somewhat curious argument put forward by Aalberts and its subsidiaries that the presence of doubt on the part of the General Court as to the single and continuous nature of the infringement ought to have led that Court to find that there were two separate infringements, there being no basis for the alleged doubt.

80. Consequently, I propose that the cross-appeal lodged by Aalberts and its subsidiaries in the alternative should be dismissed as unfounded.

30 — See to that effect *Aalborg Portland and Others* v *Commission*, paragraphs 258 and 260.

31 — Ibid., paragraphs 259 and 260. In the present case, there was a gap of 14 months.

32 — *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 163.

33 — See, to that effect also, inter alia, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 4127, and judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, paragraph 482.

C – *In the alternative, the second and third grounds of the main appeal*

1. The third ground of the main appeal: failure to provide sufficient reasons, infringement of the prohibition of ruling *ultra petita* and a corresponding infringement of the rights of the defence

81. The Court should not spend too much time on the third ground of the main appeal, in which the Commission essentially criticises the General Court for failing to explain the reasons why it annulled the fine of EUR 2.04 million imposed jointly and severally on Aquatis and Simplex under Article 2(b)(2) of the contested decision.

82. As I stated in point 47 above, that annulment, although in my view flawed by an error of law, was easily understandable in the context of the present case and was based on the Commission's allegedly incorrect taking into account of Aalberts's turnover when calculating the amount of that fine. The Commission was therefore perfectly well placed to understand the reasoning given by the General Court in paragraphs 123 and 124 of the judgment under appeal.

83. The second ground of the main appeal would warrant greater attention if the Court were to decide not to adopt my proposal to uphold the first ground of that appeal.

2. The second ground of the main appeal: errors of law in respect of the annulment in full of the contested decision

a) Arguments of the parties

84. The Commission claims that the General Court committed a clear error of law by annulling in its entirety Article 2(a) of the contested decision as regards the subsidiary Aquatis and the parent company Aalberts, despite the fact that the General Court confirmed the participation of Aquatis in cartel activities related to the French market.

85. The Commission submits that the General Court accepted in paragraph 106 of the judgment under appeal that the same cartel infringement continued after the Commission's inspections and that the FNAS meetings in which Aquatis participated were part of that infringement, in the form it took after 2001. However, the General Court annulled the whole of the contested decision and the fine imposed on Aquatis and its parent company solely on the ground that the Commission had not established that Aquatis was aware (paragraphs 111 and 119 of the judgment under appeal) or must have known (paragraph 111 of the judgment under appeal) that it was participating in a pan-European cartel and was aware of the existence of the two other constituent elements of the single, continuous infringement.

86. The Commission claims that the judgment under appeal is vitiated by three errors of law.

87. The first error is to be found in the General Court's having applied an incorrect legal test. Contrary to what the General Court stated, the case-law is limited, not to actual awareness, or to the supposition that an undertaking 'must have known' that it was participating in an overall infringement, but to a demonstration that the undertaking could reasonably have foreseen such participation and that it was prepared to take the risk.

88. The second error is evident from the General Court's having annulled the contested decision on the ground that Aquatis had a different degree of awareness of the cartel, compared to the other participants in the FNAS meetings in France. However, the Commission contends that, according to established case-law, the differing degree of awareness of a participant in a cartel ought not to lead to the total annulment of the single and continuous infringement, but could, at most, lead to a partial annulment of the finding of an infringement and probably a reduction of the fine.

89. The third error, linked to the preceding one, is characterised by the General Court's exceeding its powers by annulling in full the decision concerning Aalberts and its two subsidiaries, when annulment in part would have been the most appropriate solution in keeping with the case-law.

90. In response to the question put to it following delivery of the judgment in *Commission* v *Verhuizingen Coppens*, the Commission submits in essence that the findings of the Court in that judgment support its line of argument, must lead to the second ground of its appeal's being upheld and cause the judgment under appeal to be set aside in part so far as Aquatis and Aalberts are concerned.

91. Aalberts and its subsidiaries maintain that that ground of the main appeal must be rejected as being in part inadmissible, inasmuch as the Commission requests the Court to reappraise facts established at first instance.

92. For the remainder, they submit that the second ground is based on an incorrect reading of the General Court's judgment and an incorrect application of the concept of the single, complex and continuous infringement.

93. In the first place, Aalberts and its subsidiaries submit that the Commission relies on an incorrect reading of the judgment under appeal, interpreting the wording of paragraph 119 of that judgment in isolation. The General Court did not confine itself to examining whether Aquatis actually knew about the other constituent elements of the alleged single, complex, and continuous infringement, but also considered whether Aquatis must have known about those elements. This follows unequivocally from paragraph 117 of the judgment under appeal.

94. Secondly, they submit that the Commission disregards the fact that the contested decision did no more than state that the FNAS meetings were part of a larger scheme of arrangements, together constituting a single, complex, and continuous infringement. The Commission did not fine Aquatis and Aalberts on the ground that the FNAS meetings as such formed an infringement for the purposes of Article 81 EC. The General Court, having found that Aquatis did not participate in the infringements alleged in the contested decision, was right to annul in full the fine imposed on that company and on Aalberts. The new argument raised by the Commission, that the General Court ought to have established the participation of Aquatis in a separate infringement, was not the subject of administrative proceedings, and is therefore unfounded.

95. In answer to the question put to them concerning the consequences of the judgment in *Commission* v *Verhuizingen Coppens* with regard to the second ground of the main appeal, Aalberts and its subsidiaries contend in essence that the conditions stated by the Court of Justice in that case, which would have allowed the General Court, instead of annulling the contested decision in full, merely to annul it in part, are not fulfilled. Hence they consider that the General Court was right to annul the contested decision in full.

b) Analysis

96. There is not the slightest doubt that this ground is admissible inasmuch as the Commission confines itself to noting alleged errors of law on the part of the General Court.

97. As for the substance, it is necessary above all to refer briefly to certain paragraphs of the judgment under appeal.

98. In paragraph 89 of that judgment, the General Court rightly recalls the case-law of the Court of Justice, according to which, in order to establish that an undertaking has participated in a single, complex and continuous infringement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk. [34]

99. In the following paragraph of the judgment under appeal, the General Court emphasises also, in accordance with the case-law of the Court, that the fact that an undertaking did not participate in all aspects of a cartel is not relevant to the establishing of the existence of an infringement with regard to that undertaking; that factor must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the amount of the fine. [35]

100. Having established, in paragraph 109 of the judgment under appeal, that the constituent elements of the single, complex and continuous infringement after March 2001 were bilateral contacts, contacts at a trade fair and contacts in the context of FNAS meetings to coordinate pricing, and in paragraph 110 of that judgment that Aquatis had participated only in FNAS meetings and not in two other parts of the infringement, the General Court held, in paragraph 111 of the same judgment, that it therefore needed to ascertain whether 'Aquatis knew or must have known when it participated in [those] meetings that it was joining the circle of participants in the pan-European cartel. Only if it is established that Aquatis *was aware of the existence* of the two other constituent elements of the infringement can its participation in the agreement relating to the French market be regarded as expressing its participation in the infringement.' [36]

101. In paragraph 114 of the judgment under appeal the General Court held that there was nothing to indicate that Aquatis 'was aware' of the continuation of that infringement by IBP, Comap and FRA.BO, whilst in paragraph 119 it found that it had not been established that Aquatis 'was aware' of the fact that it had, through its conduct, joined a cartel made up of different parts that had a common purpose or the cartel in which it had already participated before March 2001 and which was ongoing.

102. At first sight, that reading of the judgment under appeal, which was moreover the way in which the Commission read it, might be taken to support the latter's argument that the General Court did not ascertain whether Aquatis 'could reasonably have foreseen' the anti-competitive activities of the other undertakings participating in an overall plan including all the constituent elements of the infringement.

103. However, it must be stated that both in paragraph 112 and in paragraph 117 of the judgment under appeal the General Court did ascertain whether this test was met by Aquatis and held that it had not been established that that company could 'reasonably have foreseen' that the FNAS meetings, which related only to the French market, were part of a wider infringement that was part of an overall plan, that is to say, were used by the other participants as a framework for discussion in order to coordinate the pricing of fittings on other national markets.

34 — *Commission* v *Anic Partecipazione*, paragraphs 83, 87 and 203, and *Aalborg Portland and Others* v *Commission*, paragraph 83. See also *Commission* v *Verhuizingen Coppens*, paragraphs 42 and 44.

35 — *Commission* v *Anic Partecipazioni*, paragraph 90, *Aalborg Portland and Others* v *Commission*, paragraph 86. See also *Commission* v *Verhuizingen Coppens*, paragraph 45.

36 — Italics added.

104. I suggest therefore that the Commission's first complaint in support of the second ground of its appeal should be rejected. [37]

105. With regard to the second and third complaints, which in my view should be considered together, the Commission challenges the annulment in full of the contested decision in so far as it concerns Aquatis (and the parent company Aalberts), even though the General Court held in paragraph 110 of the judgment under appeal that Aquatis had participated in only one of the three parts of the single, complex and continuous infringement, the object of which was the same as that of the two other parts, namely, the coordination of pricing.

106. As the Court has previously held, the mere fact that the General Court finds that a plea relied on in support of an action for annulment is well founded does not automatically enable it to annul the contested measure in its entirety, where, being directed only at a specific part of the contested measure, that plea can provide a basis only for partial annulment. [38]

107. Annulment in part of an act of EU law is possible only if the elements which it is sought to have annulled can be severed from the remainder of the measure. That requirement is not satisfied when annulment in part of a measure would cause the substance of that measure to be altered, a point which must be determined on the basis of an objective criterion. [39]

108. In order to review whether the General Court was right to annul the contested decision in full in so far as Aquatis is concerned, including the fine that was imposed on it jointly and severally with Aalberts, it is necessary to ascertain whether annulment in part of that decision would have altered the substance of the decision. [40]

109. Generally, as is clear from the judgment in *Commission* v *Verhuizingen Coppens*, if an undertaking has directly taken part in one or more of the forms of anti-competitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, when it has been shown that the undertaking was aware of that conduct or could reasonably have foreseen it and was prepared to take the risk. [41]

110. That finding cannot, however, relieve that undertaking of liability for conduct in which it has undeniably taken part or for conduct for which it can undeniably be held responsible, according to the case-law referred to in point 99 above.

37 — Provided always that the Court of Justice rejects the first ground of the main appeal. The General Court's examination criticised in the second ground of the Commission's appeal was not, contrary to what is required by the case-law of the Court of Justice, conducted in respect of the undertaking – within the meaning of Article 81 EC – formed of Aalberts and its two subsidiaries but only in respect of Aquatis.

38 — See Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraph 104, and *Commission* v *Verhuizingen Coppens*, paragraph 37.

39 — See *Commission* v *Département du Loiret*, paragraphs 105 and 106, and *Commission* v *Verhuizingen Coppens*, paragraph 38.

40 — See, by analogy, *Commission* v *Verhuizingen Coppens*, paragraph 39.

41 — *Commission* v *Verhuizingen Coppens*, paragraph 44.

111. The Court of Justice does not accept that a Commission decision categorising a global cartel as a single and continuous infringement may be divided in that manner unless two cumulative conditions are satisfied. First, the undertaking in question must have been put in a position, during the administrative procedure, to understand that it is also alleged to have engaged in each of the forms of conduct comprising that infringement, hence in a position to defend itself on that point. Second, the Commission decision itself must be sufficiently clear in that regard. [42]

112. It follows that if those conditions are met and if the Commission has not proved to the requisite legal standard that the undertaking participated in the single, continuous infringement as a whole, the Commission decision must be held to be unfounded to that extent alone. [43]

113. In those circumstances, the Union judicature must confine itself to annulment in part of the Commission decision. By virtue of the very purpose of such a decision, which is to make a finding of one or more forms of conduct constituting an infringement of Article 81 EC, such an annulment in part cannot alter its substance. [44]

114. However, when one at least of the two conditions identified by the Court of Justice and referred to in point 111 above is not satisfied, the Union judicature cannot but annul in full the Commission decision that it holds to be unlawful.

115. In the circumstances of this case, as the Commission claims, none of the grounds of the judgment under appeal indicates that the General Court considered, before annulling the contested decision in full, whether annulment in part of that decision might not be contemplated.

116. The General Court ought, therefore, to have ascertained whether, during the administrative procedure, in particular in the context of the statement of objections sent by the Commission to Aalberts and its subsidiaries, the latter had been put in a position to understand that the FNAS meetings could be regarded *as such* as forming an infringement of Article 81(1) EC, and whether the contested decision itself was sufficiently clear in that regard.

117. In their respective answers to the question put to them following the delivery of the judgment in *Commission* v *Verhuizingen Coppens*, Aalberts and its subsidiaries submit that neither of the two conditions stated by the Court of Justice is satisfied in the present case, while the Commission argues to the contrary, referring to a whole series of paragraphs in the statement of objections, in the response of Aalberts and its subsidiaries to that statement and in the contested decision which seek to show that those conditions are met.

118. My personal view is that the contested decision is far from free of ambiguity as regards the characterisation of the participation of Aquatis (and Aalberts) in FNAS meetings as an autonomous infringement of Article 81(1) EC, so it would be possible to consider that one of the two conditions for the partial annulment of that decision is not satisfied.

119. However, it does not appear to me that the Court of Justice is in a position to substitute the grounds for the judgment under appeal, because before doing so, in order to consider the merits of the operative part of the judgment under appeal, it would have to make an assessment of facts pleaded by the parties to the appeal which were not taken into account in any way in that judgment. [45]

42 — See, to that effect, *Commission* v *Verhuizingen Coppens*, paragraph 46.

43 — Ibid., paragraph 47.

44 — Ibid., paragraphs 50 and 51.

45 — An error of law committed by the General Court can be made good by the Court of Justice on appeal only when the review which the latter is required to carry out relates exclusively to grounds of pure law, but not when it is necessary, at least in part, to assess facts which were not examined by the General Court: see, to that effect, point 91 (and case-law cited) of my Opinion in Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669.

120. Accordingly, if the Court should not concur with my proposal to uphold the first ground of the main appeal, I consider that the second ground of that appeal should be upheld and that points 1 and 2 of the operative part of the judgment under appeal should be set aside in so far as participation by Aquatis in the infringement and the fine of EUR 55.15 million imposed on that company jointly and severally with Aalberts are concerned.

III – Referral of the case back to the General Court

121. Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to quash the decision of the General Court. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

122. Because the General Court did not give a ruling either on three of the five pleas raised by Aalberts and its subsidiaries at first instance, including the plea relating to the imputability of the conduct of those subsidiaries to their parent company Aalberts, or moreover on the question whether, in the case of Aquatis, annulment in part of the contested decision might not be contemplated in the light of facts not taken into account by the court of first instance, I am of the view that the state of the proceedings does not permit the Court of Justice to give final judgment in the matter.

123. I would therefore suggest that the case be referred back to the General Court and that the costs relating to the present proceedings be reserved.

IV – Conclusion

124. In the light of the foregoing considerations, I propose that the Court should:

(1) set aside the judgment of the General Court of the European Union of 24 March 2011 in Case T-385/06 *Aalberts Industries and Others* v *Commission*;

(2) refer this case back to the General Court of the European Union;

(3) reserve the costs.