Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

4 July 2013 *

(Appeals — Agreements, decisions and concerted practices — European market — Copper and copper alloy fittings sector — Commission decision — Finding of an infringement of Article 101 TFEU — Fines — Single, complex and continuous infringement — Cessation of the infringement — Continuation of the infringement by certain participants — Repeated infringement)

In Case C-287/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 June 2011,

European Commission, represented by F. Castillo de la Torre, V. Bottka and R. Sauer, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Aalberts Industries NV, established in Utrecht (Netherlands), represented by R. Wesseling, advocaat,

Comap SA, formerly Aquatis France SAS, established in Lyon (France), represented by R. Wesseling, advocaat,

Simplex Armaturen + Fittings GmbH & Co. KG, established in Argenbühl-Eisenharz (Germany), represented by R. Wesseling, advocaat,

applicants at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, acting as President of the Third Chamber, E. Juhász (Rapporteur), G. Arestis, T. von Danwitz and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 27 September 2012,

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

gives the following

* Language of the case: English.

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court in Case T-385/06 *Aalberts Industries and Others* v *Commission* [2011] ECR II-1223 ('the judgment under appeal') by which the General Court annulled Article 1 and Article 2(a) and (b)(2) of Commission Decision C(2006) 4180 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), (OJ 2007 L 283, p. 63; 'the contested decision') in so far as it finds that Aalberts Industries NV ('Aalberts'), Comap SA ('Comap'), formerly Aquatis France SAS ('Aquatis'), and Simplex Armaturen + Fittings GmbH & Co. KG ('Simplex') participated in an unlawful cartel during the period from 25 June 2003 to 1 April 2004 and imposed a fine of EUR 100.8 million on Aalberts, EUR 55.15 million of which was imposed jointly and severally with its subsidiaries, Aquatis and Simplex, and an additional fine imposed jointly and severally on each of those two companies.

2 By their cross-appeal, Aalberts, Aquatis and Simplex seek, in the event that the Court grants the Commission's appeal, the annulment of Articles 1, 2(a) and (b)(2) and 3 of the contested decision, so far as Aalberts, Comap ('Aquatis') and Simplex are concerned.

3 In the alternative, the respondents seek to have the judgment under appeal set aside in so far as it finds that there was a single, complex and continuous infringement, which was continued after the inspections carried out by the Commission in March 2001, and the annulment of Articles 1, 2(a) and (b)(2) and 3 of the contested decision inasmuch as it concerns those companies or, in the further alternative, the annulment or significant reduction of the amount of the fine imposed upon them.

Background to the dispute and the contested decision

4 The General Court made the following findings:

> '1 …The infringement consisted in fixing prices, agreeing on price lists, agreeing on discounts and rebates, agreeing on implementation mechanisms for introducing price increases, allocating national markets, allocating customers and exchanging other commercial information and also in participating in regular meetings and in maintaining other contacts intended to facilitate the infringement.
>
> 2 [Aalberts, Aquatis and Simplex] are among the addressees of the contested decision.
>
> 3 Aalberts is the parent company of an international industrial group listed on the Euronext Securities Market in Amsterdam (Netherlands). It controls, directly or indirectly, a number of undertakings active in the fittings production or distribution sector. On 30 August 2002 Aalberts acquired the entire fittings production and distribution business of IMI plc ["IMI"], although the business was collectively known as "Yorkshire Fittings Group". That transaction consisted in particular of the acquisition of the totality of the shares in Raccord Orléanais SA ["Raccord Orléanais"] (which later became Aquatis) and R. Woeste & Co. Yorkshire GmbH ["Woeste & Co"] (which later became Simplex). Those two undertakings were integrated within one of the two main businesses of the Aalberts group, Flow Control.
>
> 4 In March 2006, Comap, an addressee of the contested decision by virtue of its participation in the infringement under the control of Legris Industries SA and the applicant in Case T-377/06, was transferred to the Aalberts group. By email of 16 April 2007, the Court was informed that all of Aquatis' assets and liabilities had been transferred to Comap and that Aquatis had ceased to exist as a legal entity. …

5 On 9 January 2001, Mueller Industries Inc., another producer of copper fittings, informed the Commission of the existence of a cartel in the fittings sector and in other related industries in the copper tubes market, and expressed its willingness to cooperate with the Commission under the terms of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; "the 1996 Leniency Notice") (recital 114 to the contested decision).

6 On 22 and 23 March 2001, in the framework of an investigation concerning copper tubes and fittings, the Commission, pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), carried out unannounced inspections at the premises of a number of undertakings, including IMI which was the parent company of Raccord Orléanais and [Woeste & Co.] at that time (recital 119 to the contested decision).

7 Following those first inspections, the Commission, in April 2001, split the investigation relating to copper tubes into three different proceedings, namely the proceedings relating to Case COMP/E-1/38.069 (Copper Plumbing Tubes), Case COMP/F-1/38.121 (Fittings) and Case COMP/E-1/38.240 (Industrial Tubes), respectively (recital 120 to the contested decision).

…

9 From February/March 2002, the Commission sent the parties concerned a number of requests for information pursuant to Article 11 of Regulation No 17, and then pursuant to Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) (recital 122 to the contested decision).

10 In September 2003, IMI submitted an application for leniency under the 1996 Leniency Notice. That application was followed by applications from the Delta group (March 2004) and FRA.BO SpA ["FRA.BO"] (July 2004). The final leniency application was submitted in May 2005 by Advanced Fluid Connections plc ("AFC"). FRA.BO provided, inter alia, information drawing the Commission's attention to the fact that the infringement had continued during the period from 2001 to 2004, that is to say, after the Commission's inspections (recitals 115 to 118 to the contested decision).

11 On 22 September 2005, the Commission initiated an infringement proceeding in the framework of Case COMP/F-1/38.121 (Fittings) and adopted a statement of objections, which was then notified to the [respondents] (recitals 123 and 124 to the contested decision).

12 On 20 September 2006, the Commission adopted the contested decision.

13 In Article 1 of the contested decision, the Commission found that the [respondents] had participated in the infringement for the following periods:

— from 25 June 2003 to 1 April 2004, as regards Aalberts;

— from 31 January 1991 to 22 March 2001, as members of the IMI group, and from 25 June 2003 to 1 April 2004, as members of the Aalberts group, as regards Aquatis and Simplex.

14 For that infringement, the Commission imposed the following fines on the [respondents] in Article 2(a) and (b) of the contested decision:

"(a) [Aalberts]: EUR 100.80 million;

of which jointly and severally with:

[Aquatis]: EUR 55.15 million; and

[Simplex]: EUR 55.15 million;

(b) 1. [IMI], jointly and severally with IMI Kynoch Ltd: EUR 48.30 million;

of which jointly and severally with:

…

[Aquatis]: EUR 48.30 million; and

[Simplex]: EUR 48.30 million;

2. [Aquatis] and [Simplex] are jointly and severally liable for the additional amount of EUR 2.04 million."

15 Under Article 3 of the contested decision, the undertakings referred to in Article 1 were required immediately to bring to an end the infringement in so far as they had not already done so, and to refrain from any act or conduct described in Article 1 and from any act or conduct having the same or similar object or effect.

16 For the purposes of setting the amount of the fine imposed on each undertaking, the Commission applied, in the contested decision, the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; "the 1998 Guidelines").

17 As regards, first of all, the fixing of the starting amount of the fine by reference to the gravity of the infringement, the Commission characterised the infringement as very serious, on account of its nature and its geographic scope (recital 755 to the contested decision).

18 Taking the view, next, that there was considerable disparity between the undertakings concerned, the Commission applied differentiated treatment, taking as its basis their relative importance on the relevant market as determined by their market. On that basis, the Commission divided the undertakings concerned into six categories, relying on the respective turnover – in the EEA [European Economic Area] in the year 2000 – of each of the undertakings with the product concerned by the present proceedings, except in regard to Aalberts and AFC, for which the year 2003 was taken into consideration (recital 758 to the contested decision).

19 Aalberts was placed in the first category, for which the starting amount was set at EUR 60 million, while IMI was placed in the second category, for which the starting amount was set at EUR 46 million (recital 765 to the contested decision).

20 Next, the Commission increased the starting amount of the fine imposed on each of the undertakings in question by 10% per annum of participation in the cartel and, where appropriate, by 5% for each period of between six months and one year. As regards the period between 31 December 1988 and 31 January 1991, the Commission considered it appropriate, on account of the limited geographic scope of the cartel at that time, to increase the fine by 5% per annum (recital 775 to the contested decision).

21 Finally, the fact that participation in the infringement continued after the Commission's inspections, that is during the period between 21 June 2003 and 25 April 2004, was regarded as an aggravating circumstance for which an increase of 60% of the basic amount of the fine imposed on the [respondents] was justified (recitals 779 and 782 to the contested decision).'

The action before the General Court and the judgment under appeal

5 By application lodged on 14 September 2006, the respondents claimed that the General Court should:

— annul Articles 1, 2(a) and (b)(2) and 3 of the contested decision, in so far as those measures concern them;

— in the alternative, significantly reduce the amount of the fine imposed on them.

6 In support of the action before the General Court, the respondents put forward five pleas in law, alleging, respectively, the unlawfulness of imputing liability for the infringement to Aalberts as the parent company, that there was no infringement of Article 81 EC, that the respondents did not participate in the single, complex, and continuous infringement referred to in Article 1 of the contested decision, breach of Article 23(2) of Regulation No 1/2003 and of the 1998 Guidelines and, finally, breach of Article 2 of Regulation No 1/2003 and of Article 11(2) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18).

7 The General Court considered it appropriate to begin by examining the second and third pleas in law.

8 The General Court pointed out, in paragraph 48 of the judgment under appeal, that it was undisputed that the respondents' conduct alleged by the Commission, namely the participation in the meetings of the Fédération Française des Négociants en Appareils Sanitaires, Chauffage, Climatisation et Canalisations (FNAS), held between 25 June 2003 and 20 January 2004, and a telephone conference on 16 February 2004 which also took place within the context of FNAS, the contact between an employee of one of the respondents and a representative of FRA.BO, and the contacts made at the trade fair in Essen (Germany) on 18 March 2004, occurred. However the respondents contested the anti-competitive nature of that conduct, which is a prerequisite for a finding of an infringement of Article 81 EC.

9 The General Court examined the evidence and concluded, in paragraph 68 of the judgment under appeal, that Simplex's participation in an infringement of Article 81 EC during the period at issue had not been proved to the requisite legal standard. It deduced therefrom, in paragraph 69 of the judgment under appeal, that Article 1 of the contested decision had to be annulled in so far as the Commission found that Simplex had participated in a single, complex and continuous infringement during the period at issue.

10 As regards the participation of Aquatis in the infringement, the General Court found, in paragraph 119 of the judgment under appeal, 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 having a common purpose or the cartel in which it had already participated prior to March 2001 and which was ongoing.

11 The General Court thus annulled Article 1 of the contested decision, not only with regard to Aquatis and Simplex but also with regard to Aalberts, to whom the contested decision had imputed the liability for its subsidiaries, ,in so far as the Commission found that they had participated, during the period at issue, in a single, complex and continuous infringement by taking part in a complex of agreements and concerted practices in the market for copper and copper alloy fittings.

12 The General Court held that it was not necessary to rule on the other pleas and annulled the fine in the amount of EUR 100.8 million imposed on Aalberts, of which it was jointly and severally liable with Aquatis and Simplex for EUR 55.15 million, in addition to the amount of EUR 2.04 million for which Aquatis and Simplex were separately held jointly and severally liable for.

Procedure before the Court of Justice and the forms of order sought by the parties

13 The Commission advances three grounds of appeal, seeking to have the judgment under appeal set aside.

14 By its first ground of appeal, the Commission submits that the General Court infringed various rules on the burden of proof and procedural rules on evidence, distorted certain pieces of evidence and did not provide reasons for its factual assessment. By its second ground of appeal, raised in the alternative, the Commission alleges that the General Court wrongfully annulled the contested decision in its entirety. By its third ground of appeal, raised in the further alternative should the Court reject the first two grounds, the Commission submits that the General Court failed to state sufficient reasons for its annulment of Article 2(b)(2) of the contested decision, that it ruled *ultra petita* and infringed the adversarial principle.

The first ground of appeal

Arguments of the parties

15 The first ground of appeal is divided into three parts.

– The assessment in isolation of the participation of Simplex and Aquatis in the continuous infringement

16 According to the Commission, the General Court did not assess the participation in the continuous infringement by Aalberts but instead carried out a separate and individual examination for the two subsidiaries, Simplex on the one hand, and Aquatis on the other. The judgment under appeal therefore disregarded the very premiss on which the evidence had been assessed in the contested decision, namely that Simplex and Aquatis formed part of one economic entity and thus one undertaking within the meaning of Article 101 TFEU and Articles 7 and 23(2) of Regulation No 1/2003. In that regard, the General Court should have first dealt with the plea which claimed that Aalberts and its subsidiaries constituted a single undertaking; a plea which was not examined in the judgment under appeal.

– The failure to take into account the overall body of evidence, in particular the various links among the individual elements of the evidence

17 The Commission submits that the General Court failed to consider the overall body of evidence presented to it in the contested decision and during the proceedings at first instance, by, on the one hand, disregarding, without adequate grounds, certain elements of the evidence and, on the other, by not examining all such pieces of evidence together, and thereby ignoring the links among them.

18 By so acting, the General Court ignored the links between various elements of the evidence which were helpful to a correct assessment of the collusive conduct. According to the Commission, the General Court erred in law by adopting a selective and compartmentalised approach to the analysis, failing to take into account, on the one hand, the similarities between the cartel activities in the first period of

the cartel (before the inspections carried out by the Commission) and the later contacts for which Aalberts is held liable, and on the other, the obvious links between the various collusive contacts in 2003/2004.

– The distortion of evidence and the lack of reasons

19 The Commission submits that the General Court failed to give sufficient reasons for the rejection of the handwritten notes of Ms P. (FRA.BO) of 25 February 2004 and the explanations given in relation thereto. In paragraph 60 of the judgment under appeal, the General Court states that 'it is conceivable that it was Simplex's independent importer (Mr D.) who had decided to increase his prices', but there is no explanation of why that statement would be relevant, or any other explanation as to the conclusion the General Court might draw from it.

20 In addition, the Commission claims that the General Court distorted both the content of the agenda entry and FRA.BO's submissions. In the Commission's view, based on an analysis of the second FRA.BO submission and the agenda entry itself, the General Court could only conclude that FRA.BO was informed by Simplex of a 5% price increase in Greece, which was logically in relation to Mr D., the distributor.

21 Furthermore, the Commission claims that the General Court disregarded parts of the evidence concerning the involvement of Simplex representatives (Messrs Be. and H.) in a collusive meeting with a representative from IBP (Mr Ha.) at the Essen trade fair on 18 March 2004. The General Court distorted the statements of various participants in the cartel at issue during that event, which gave rise to collusive meetings.

22 Finally, the Commission submits that the General Court disregards once again the overall body of evidence and misrepresents the facts, in its assessment of the participation of Aalberts (Aquatis) in the FNAS meetings. Furthermore, the General Court does not explain the relevance of the finding made in paragraph 60 of the judgment under appeal, that it is conceivable that it was Simplex's independent importer (Mr D.) who had decided to increase his prices by 5% from 1 March 2004. Moreover, the General Court provides contradictory reasoning, in that, in the present case, it concludes that the participation of Aalberts in the FNAS meetings presents no 'obvious' link with the overall cartel, whereas, in a parallel case, it found that participation in those meetings was a link sufficient to establish the overall infringement in relation to IBP (Case T-384/06 *IBP and International Building Products France* v *Commission* [2011] ECR II-1177).

23 The respondents submit that the alleged infringements of Aquatis and Simplex are based on four events, of which two concern Aquatis, namely the participation of representatives of Aquatis in five meetings of the FNAS Logistics Committee and a telephone conference in the context of FNAS, and two concern Simplex, namely a telephone conversation between a representative of FRA.BO and of Simplex, and a meeting at the Essen trade fair on 18 March 2004. The respondents contend that those events do not mutually corroborate each other, and the General Court, logically, first assessed the alleged participation of those two companies, and then examined the entire body of evidence in its context.

Findings of the Court

24 It is apparent from paragraph 3 of the judgment under appeal that Raccord Orléanais and Woeste & Co were subsidiaries of Aalberts. All the shares in those subsidiaries were bought by Aalberts on 30 August 2002. Both subsidiaries were integrated into one of the activities of the Aalberts group, namely fluid control.

25 It must also be borne in mind that, in recitals 649 to 656 to the contested decision, the respondents were regarded as a single undertaking within the meaning of Article 81 EC. It is for that reason that, in Article 1 of the contested decision, the Commission imputed the alleged infringements by Aquatis and Simplex to their parent company, Aalberts.

26 It is settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (see Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 58 and the case-law cited).

27 It is apparent from the judgment under appeal that, in the first plea in law in their application before the General Court, the respondents disputed the classification of Aalberts and its subsidiaries, Aquatis and Simplex, as a single undertaking within the meaning of Article 81 EC.

28 However, the General Court did not examine that plea in law in the judgment under appeal. It examined only the second and third pleas of the application, in particular whether Aquatis and Simplex, on the basis of an assessment of the evidence of each of those subsidiaries, could be regarded as having participated separately in the infringement stated in Article 1 of the contested decision.

29 By proceeding in that manner, the General Court erred in law in that it disregarded the very premiss of the contested decision, namely that Aalberts, Aquatis and Simplex formed a single economic entity and therefore a single undertaking within the meaning of Article 81 EC.

30 The first part of this ground of appeal is therefore well founded.

31 In those circumstances, it must be examined whether, in the light of that error, the judgment under appeal must be set aside.

32 In that regard, it is apparent from the case-law of the Court of Justice that an error of law committed by the General Court does not invalidate the judgment under appeal if the operative part of that judgment appears to be well founded on other legal grounds (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 47, and Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 136).

33 In the action before the General Court, an examination of the first plea in law of the application could have given rise to two results.

34 If the General Court had reached the conclusion that the three companies concerned did not form a single undertaking for the purpose of European Union competition law, the criticism made by the Commission in connection with the present ground of appeal, concerning the examination carried out by the General Court, would be unfounded.

35 If, however, one undertaking, for the purpose of European Union competition law, had been identified, such a finding could, in principle, have given rise to an operative part different from that of the judgment under appeal.

36 That second scenario must be examined by the Court of Justice.

37 It is not in dispute that the Commission, in the contested decision, examined and assessed the cartel in two stages, which were interrupted by unannounced inspections by the Commission during the month of March 2001 on the premises of several undertakings. The inquiry concerning the Aalberts group was conducted in the second stage, in particular during the period from 15 June 2003 and 1 April 2004. In that regard, the Commission itself uses the expression 'second period' in its appeal.

38 In paragraph 570 of the contested decision, the Commission accepts that IMI, the predecessor of Aalberts and parent company of Aquatis and Simplex, in March 2001, ceased its involvement in the cartel immediately after the unannounced inspections carried out by the Commission. Furthermore, paragraph 80 of the judgment under appeal contains the statement of the applicants at first instance that when Aalberts acquired the whole of the fittings production and distribution business from IMI, it satisfied itself that IMI and its subsidiaries, including Raccord Orléanais and Woeste & Co., had effectively ceased to participate in the infringement. This is not disputed by the Commission. With regard specifically to Aquatis, in paragraph 114 of the judgment under appeal, it is the General Court which points out that, when it was controlled by IMI, Aquatis had ended its participation in the infringement immediately after the Commission's inspections in March 2001.

39 In any event, the Commission does not allege that, during the period from March 2001 to 25 June 2003, there is anything in the conduct of Aalberts or its subsidiaries which could be regarded as an infringement. Consequently, it must be considered established that, during that reference period, no member of the Aalberts group was involved in the cartel at issue.

40 In those circumstances, even if the view were to be taken that Aalberts, Aquatis and Simplex formed one undertaking for the purposes of European Union competition law, in order for it to be possible to impute the liability for the cartel at issue to that undertaking, it would be necessary for one member at least of that group to have rejoined the cartel (see, to that effect, Case C-286/11 P *Commission* v *Tomkins* [2013] ECR, paragraph 37).

41 Thus, the General Court acted correctly when it examined all the incriminating evidence referred to in the contested decision which could have proved that one of the subsidiaries of Aalberts had rejoined the cartel.

42 In that regard, the General Court held, firstly, in paragraph 68 of the judgment under appeal, that 'Simplex's participation in an infringement of Article 81 EC during the period at issue has not been proved to the requisite legal standard' and, in paragraph 119 of that judgment, that 'it has not been established that Aquatis was aware of the fact that it had, by 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'.

43 There is nothing to suggest that the General Court would have found that there was an infringement of the European Union competition rules by one or several of the companies in question if it had previously found that those companies formed a single undertaking for the purpose of European Union competition law.

44 Furthermore, it must be noted that the General Court has carried out its assessments of the facts in light of the evidence in the file put before it, in particular as regards the links between Aalberts, Aquatis and Simplex.

45 In those circumstances, the error in law found in paragraph 29 of the present judgment cannot lead to the setting aside of the judgment under appeal.

46 With regard, next, to the second part of the first ground of appeal, in essence the Commission complains that the General Court examined separately the incriminating evidence for each of the subsidiaries without taking into account the links between all the elements of evidence, in order to assess whether the conduct of each subsidiary amounted to an infringement,.

47 In that regard, it should be recalled that it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the General Court has established or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see Case C-445/11 P *Bavaria* v *Commission* [2012] ECR, paragraph 23 and the case-law cited).

48 Clearly, by that line of argument, the Commission is requesting the Court of Justice to carry out a fresh assessment of the facts. The assessment of the evidence called into question by the Commission thus relates to an assessment of the facts which, save where the evidence adduced before the General Court has been distorted, cannot be reviewed by the Court of Justice (see *Bavaria* v *Commission*, paragraph 24 and the case-law cited).

49 It follows that the second part of the first ground of appeal is inadmissible.

50 With regard to the third part of the first ground of appeal, where a party alleges distortion of the evidence by the General Court, it should be borne in mind that, under the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 51 of the Statute of the Court of Justice and point (d) of the first subparagraph of Article 168(1) of the Rules of Procedure of the Court of Justice, the appellant must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to that distortion (see, to that effect, 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 50).

51 There is such distortion where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect (Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 37, and Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 17).

52 However, by the third part of the first ground of appeal, the Commission merely suggests a reading different from that adopted by the General Court of the various elements of evidence relating to Simplex's alleged participation in the cartel at issue, in particular, Ms P.'s handwritten notes of 25 February 2004 concerning a telephone conversation with Mr W. and the statements of Messrs Be., H. and Ha. concerning an allegedly collusive meeting which took place at the Essen trade fair on 18 March 2004. The arguments raised in the present case by the Commission do not, however, permit the conclusion that the General Court manifestly exceeded the limits of a reasonable assessment of the evidence (see, by analogy, Case C-260/09 P *Activision Blizzard Germany* v *Commission* [2011] ECR I-419, paragraph 57).

53 Finally, as regards the alleged lack of reasoning, the Commission's argument relates in essence to the assessment of those handwritten notes of 25 February 2004. Although the General Court does not explain the relevance of the finding which it makes in paragraph 60 of the judgment under appeal, it states, in paragraph 61 of that judgment, that the note in question 'is not sufficient in itself to prove that Simplex participated in the infringement alleged in the present case [since it] is conceivable that that contact could be regarded as an isolated incident [and, furthermore], … that single handwritten note could not demonstrate Simplex's involvement in the cartel in 2003 either'. Nor can the complaint relating to alleged contradictory reasoning be accepted. While, in its judgment in *IBP and International Building Products France* v *Commission*, the General Court held that the evidence

showed, to the requisite legal standard, that the applicants concerned participated in the infringement referred to in Article 1 of the contested decision, the assessment of the evidence relating to Aalberts, Aquatis and Simplex, in the judgment under appeal, did not give the General Court grounds for such a finding as regards the alleged undertaking formed by those companies.

54 In the light of the foregoing, the third part of the first ground of appeal is unfounded.

55 Consequently, the first ground of appeal raised by the Commission in support of its appeal must be rejected.

The second ground of appeal

Arguments of the parties

56 The Commission claims, in its second ground of appeal, alleging an error of law, that the General Court committed a manifest error by annulling in full 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. The judgment under appeal contains at least two errors of law.

57 The first error of law lies in the fact that the General Court annulled the contested decision on the ground that Aquatis had a different degree of awareness of the cartel compared to the other companies participating in the FNAS meetings in France.

58 The second error of law 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 a more appropriate solution. The Commission argues that, if there were two separate infringements concerning Aquatis during the two reference periods of the cartel, the General Court erred in law by annulling in full the amount of the fine instead of merely reducing it to reflect the infringement consisting of its participation in the FNAS meetings during the second period of the cartel.

59 The respondents submit that the second ground of appeal must be rejected as partly inadmissible on the ground that, in reality, it is an application for a re-examination of the facts already put forward at first instance. In the alternative, the second ground must be rejected as it is based on an incorrect reading of the judgment under appeal and an incorrect application of the concept of the single, complex, and continuous infringement.

Findings of the Court

60 It must be noted that, in paragraph 108 of the judgment under appeal, the General Court recalled that, in the contested decision, the Commission claimed that Aquatis had participated during the period at issue in a single, complex and continuous infringement described in Article 1 of the decision and covering the entire 'pan-European' market.

61 After having recalled, in paragraph 109 of the judgment under appeal, that the constituent elements of the single, complex and continuous infringement post March 2001 were bilateral contacts, contacts at a trade fair and contacts in the context of FNAS meetings to coordinate pricing, the General Court found, in paragraph 110 of that judgment, that, during the period in question, Aquatis participated only in FNAS meetings and not in the two other parts of the infringement. However, in finding, in paragraph 119 of the judgment under appeal, 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, the General Court annulled Article 1 of the contested decision in its entirety as regards the defendants.

62 As regards the alleged error in law referred to in paragraph 57 of the present judgment, it must be pointed out that, even if the conduct of Aquatis at the FNAS meetings could be classified as anti-competitive in itself, it is clear that the criteria established by the case-law of the Court of Justice on the basis of which that conduct can be regarded as part of a single, complex and continuous infringement are not met.

63 In accordance with the case-law, it must be established 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 conduct planned or put into effect by other undertakings in pursuit of those same objectives, or that it could reasonably have foreseen it, and that it was prepared to take the risk (see, to that effect, Case C-441/11 P *Commission* v *Verhuizingen Coppens* [2012] ECR, paragraph 42 and the case-law cited). The findings made by the General Court in paragraphs 112 and 119 of the judgment under appeal exclude that possibility.

64 As regards whether, as the Commission claims, the General Court ought in any event to have annulled Article 1 of the contested decision in part in respect of the respondents since the undertaking concerned participated in a constituent element of the single, complex and continuous infringement, namely the FNAS meetings, the Court of Justice has previously held that partial annulment of an act of European Union law is possible only if the elements which it is sought to have annulled can be severed from the remainder of the act (see *Commission* v *Verhuizingen Coppens*, paragraph 38 and the case-law cited).

65 Nevertheless, it must be noted that the contested decision complains only that the respondents participated in a single, complex and continuous infringement. Thus, that decision does not qualify the participation of Aquatis in the FNAS meetings as an infringement of Article 81 EC. On the contrary, recital 546 to the contested decision, which lists the anti-competitive conduct which that decision covers, does not contain any reference to the FNAS meetings. Furthermore, recital 590 to the contested decision expressly confirms that the Commission took the view that it would be 'artificial to split up continuous conduct [by the undertakings concerned], characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement'.

66 In those circumstances, even if the FNAS meetings had had an anti-competitive purpose or effects, that constituent element of the single, complex and continuous infringement could not be severed from the remainder of the measure within the meaning of the case-law cited in paragraph 64 of the present judgment.

67 Thus the General Court was correct, after having found that the undertaking did not participate in the single, complex and continuous infringement, in annulling Article 1 of the contested decision as regards the respondents.

68 In consequence, the second ground of appeal must be rejected.

The third ground of appeal

Arguments of the parties

69 The Commission submits that the General Court did not give sufficient reasons for the annulment of Article 2(b)(2) of the contested decision. As regards the 10% cap under Article 23(2) of Regulation No 1/2003, calculated on the combined turnover of Aquatis and Simplex only, the General Court's ruling was *ultra petita* since the respondents had not raised such a plea.

70 Moreover, the infringement of Article 23(2) of Regulation No 1/2003 was not raised by the respondents in either the written submissions or at the oral hearing at first instance. The Commission claims that, consequently, the General Court violated the adversarial principle and the principle of the right to a fair hearing. Therefore, the judgment under appeal could not lawfully find any error in the calculation of the portion of the fine in Article 2(b)(2) of the contested decision and should be set aside in that respect also.

71 The respondents contest the Commission's arguments and seek the rejection of this ground of appeal.

Findings of the Court

72 In paragraphs 123 and 124 of the judgment under appeal, the General Court explained the method of calculation used to reach the amount of EUR 2.04 million for the fine imposed on Aquatis and Simplex and referred to in Article 2(b)(2) of the contested decision.

73 It is apparent from paragraph 123 of the judgment under appeal that the amount of EUR 100.8 million for the fine imposed on Aalberts by the Commission in its contested decision constituted an important factor in that calculation. The removal of that amount by the annulment of the fine imposed on Aalberts renders the amount referred to in Article 2(b)(2) of the contested decision necessarily incorrect, which justifies its annulment.

74 The reference by the General Court, in paragraph 125 of the judgment under appeal, to the fact that IMI had been divided into two separate entities at the time when the decision was adopted is superfluous and cannot alter the conclusion reached in the preceding paragraph.

75 Consequently the third ground of appeal must be rejected.

76 Given that all the grounds of the appeal have been rejected, the appeal must be dismissed in its entirety.

The cross-appeal

77 It must be noted that the cross-appeal was raised by the respondents to the appeal in the event that the Court of Justice granted that appeal. It is clear from paragraph 76 of the present judgment that the Court has dismissed the Commission's appeal.

78 In those circumstances, there is no need to examine the cross-appeal.

Costs

79 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.

80 Under Article 138(1) of those Rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, and Aalberts, Aquatis have Simplex have applied for costs, the Commission must be ordered to pay the costs of this appeal.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeal;

2. Declares that there is no need to examine the cross-appeal;

3. Orders the European Commission to pay the costs.

[Signatures]