Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

6 December 2012 *

(Appeal — Competition — Agreements, decisions and concerted practices — Article 81 EC and Article 53 of the EEA Agreement — International removal services market in Belgium — Cartel involving three individual agreements — Single and continuous infringement — Failure to prove that an undertaking party to an individual agreement was aware of the other individual agreements — Annulment, in whole or in part, of the Commission decision — Articles 263 TFEU and 264 TFEU)

In Case C-441/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 August 2011,

European Commission, represented by A. Bouquet, S. Noë and F. Ronkes Agerbeek, acting as Agents, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Verhuizingen Coppens NV, established in Boutsersem (Belgium), represented by J. Stuyck and I. Buelens, advocaten,

applicant at first instance,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, acting as President of the Fourth Chamber, J.-C. Bonichot, C. Toader, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2012,

gives the following

* Language of the case: Dutch.

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of 16 June 2011 in Case T-210/08 *Verhuizingen Coppens* v *Commission* [2011] ECR I-3713 ('the judgment under appeal'), by which the General Court of the European Union annulled Articles 1(i) and 2(k) of Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services) ('the contested decision').

Background to the dispute and the contested decision

2 It emerges from paragraphs 3 to 7 of the judgment under appeal that, in the contested decision, the Commission found that the addressees of that decision – one of which was Verhuizingen Coppens NV ('Coppens') – had participated in a cartel in the international removal services sector in Belgium by fixing prices, sharing customers and manipulating the submission of tenders at least from 1984 to 2003, or were considered responsible for that cartel, and accordingly had committed a single and continuous infringement of Article 81 EC.

3 Paragraphs 8 and 9 of the judgment under appeal relate that the services concerned by the infringement included removals of goods, both for natural persons and for undertakings or public institutions, with Belgium as either the starting place or the destination. In view of the fact that the international removal companies in question are all located in Belgium and that the activities of the cartel took place there, Belgium was considered to be the geographic centre of the cartel. Secondly, the combined turnover of the cartel members for those international removal services was estimated by the Commission at EUR 41 million for the year 2002, the combined market share held by the undertakings involved being considered to account for approximately 50% of the sector concerned.

4 According to paragraph 10 of the judgment under appeal, the Commission stated in the contested decision that one of the aims of the cartel was to establish and maintain high prices and to share the market, and the cartel itself took various forms: agreements on prices; agreements on sharing the market by means of a system of false quotes known as 'cover quotes' ('the agreement on cover quotes'); and agreements on a system of financial compensation, known as 'commissions', for rejected offers or for not quoting at all ('the agreement on commissions').

5 In the contested decision, as emerges from paragraph 11 of the judgment under appeal, the Commission found that, between 1984 and the early 1990s, the cartel had operated inter alia on the basis of written price-fixing agreements, the 'commission' and 'cover quote' practices being introduced at the same time. According to that decision, as was stated in the judgment under appeal, the 'commissions' practice had to be treated as the indirect fixing of prices for international removal services in Belgium, since the cartel members issued invoices to each other for commissions on rejected offers or offers not made, referring to fictitious services, and the amount represented by those commissions was moreover invoiced to the customers.

6 As regards cover quotes, paragraphs 12 and 13 of the judgment under appeal relate that the Commission found in the contested decision that, through the submission of cover quotes, the removal company which wanted the contract ensured that the customer paying for the removal received several quotes. To that end, that company indicated to its competitors the total price that they were to quote for the planned removal, which was higher than the price quoted by the company itself. Thus the system in operation was one of fictitious quotes submitted by companies which did not intend to carry out the removal. The Commission took the view that that practice constituted a manipulation of the tendering procedure to ensure that the price quoted for a removal was higher than it would have been in a competitive environment.

7 According to paragraph 14 of the judgment under appeal, the Commission found in the contested decision that those arrangements were in place until 2003 and that those complex activities had the same object: price-fixing and market-sharing, and thereby the distortion of competition.

8 In the light of those factors, the Commission adopted the contested decision, Article 1 of which is worded as follows:

'By directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders, the following undertakings have infringed Article 81(1) [EC] and Article 53(1) of the [Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1,p. 3)] in the periods indicated:

...

(i) [Coppens], from 13 October 1992 to 29 July 2003;

...'.

9 Consequently, the Commission imposed, under Article 2(k) of the contested decision, a fine of EUR 104 000 on Coppens, calculated in accordance with the methodology set out in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210,p. 2; 'the Guidelines').

The procedure before the General Court and the judgment under appeal

10 By application lodged at the Registry of the General Court on 4 June 2008, Coppens brought an action for the annulment of Articles 1 and 2 of the contested decision in far as they related to it and, in the alternative, for the reduction of the fine imposed on it to an amount not exceeding 10% of its turnover on the international removal services market.

11 In support of its action, Coppens relied on two principal pleas in law, alleging respectively infringement of Article 81(1) EC and infringement of Article 23(2) and (3) 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); it also raised an alternative plea in law in support of its claim that the fine imposed on it should be cancelled or reduced.

12 The first plea was divided into three parts, by which: (i) Coppens denied that it had participated in a complex cartel; (ii) it challenged the duration of its participation in the cartel; and (iii) it claimed that the Commission had failed to assess the relative weight of its participation. In expounding the first part of the plea, Coppens noted, inter alia, that it was accused only of issuing cover quotes and argued, moreover, that the Commission had not shown that Coppens had been aware of the agreement on commissions. The Commission was not justified, therefore, in concluding that Coppens had participated in that complex cartel. Coppens submitted, in addition, that the agreement on cover quotes did not have the object or the effect of restricting competition.

13 The Commission contended that it was of little consequence whether competition was distorted by cover quotes or by commissions. It took the view that, in either case, the distortion of competition generally led to an increase in prices for the customer and that, accordingly, the various forms of the cartel could be treated as a single and continuous infringement of Article 81 EC.

14 By the judgment under appeal, the General Court upheld the first part of the first plea raised by Coppens. In paragraphs 28 to 32 of the judgment under appeal, the General Court held as follows:

> '28 As regards the first limb of the plea, it is common ground that the … active participation [of Coppens] in the cartel was limited to issuing cover quotes (see recitals 173 and 296 of the [contested decision]). According to the Commission's findings, Coppens is the only company not to have participated in the agreement on commissions.
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> 29 [Coppens] denies, however, that it took part in a single and continuous infringement. In that connection, it should be observed that, according to the case-law, an undertaking which has participated in a multiform infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 87 and 203). Thus, in order to hold a company liable for a single and continuous infringement, awareness (proved or presumed) of the offending conduct of the other participants in the cartel is required.
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> 30 In addition, the mere fact that there is identity of object between an agreement in which an undertaking participated and a global cartel does not suffice to render that undertaking responsible for the global cartel. It is only if the undertaking knew or should have known when it participated in the agreement that in doing so it was joining in the global cartel that its participation in the agreement concerned can constitute the expression of its accession to that global cartel (Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 45).
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> 31 It must be stated that the Commission has not shown that, when [Coppens] participated in the agreement on cover quotes, it was aware of the other companies' anti-competitive conduct concerning the commissions, or that it could reasonably have foreseen such conduct. The Commission expressly acknowledges that, as regards [Coppens'] awareness of the other participants' offending conduct, the [contested decision] is not based upon specific evidence. It contends that [Coppens] does not deny that it was aware of the agreement on commissions and that it failed to state to what extent it knew of the conduct of the other participants in the infringement. However, [Coppens] is in no way required to state, on its own initiative, the extent to which it knew of the conduct of the other participants in the infringement, since the burden of proof is borne by the Commission. The Commission must first adduce proof of a fact before [Coppens] can dispute this. Moreover, at the hearing, [Coppens] expressly stated, at the request of the Court, that it was not aware of the [agreement] on commissions. Therefore, the Commission has not discharged the burden of proof.
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> 32 Accordingly, the Commission was not entitled to find that [Coppens] had participated in a single and continuous infringement.'

15 As regards the inferences to be drawn from that conclusion, the General Court found, in paragraphs 33 to 35 of the judgment under appeal, that the fact that the operative part of the contested decision does not refer to the single and continuous nature of the infringement is irrelevant, especially given that the enacting terms of a measure are inextricably linked to the statement of reasons for them and the grounds of the contested decision state clearly that the Commission regarded Coppens as liable for participation in such an infringement.

16 In paragraph 36 of the judgment under appeal, the General Court drew the following inference from this:

'Therefore, although participation in the system of cover quotes may in itself constitute an infringement of Article 81 EC punishable by a fine, Article 1(i) and Article 2(k) of the [contested decision] must be annulled, as [Coppens] requests.'

17 Consequently, in paragraph 37 of the judgment under appeal, the General Court held that there was no need to examine the other parts of the first plea in law relied on by Coppens in support of its action, or the other pleas raised by it, and accordingly annulled Articles 1(i) and 2(k) of the contested decision.

Forms of order sought by the parties

18 By its appeal, the Commission claims that the Court should:

— set aside the judgment under appeal;

— dismiss the action for annulment or – in the alternative – annul Article 1(i) of the contested decision, to the extent that it finds Coppens liable for the agreement on commissions;

— set the fine at such a level as the Court may consider appropriate; and

— order Coppens to pay the costs of the appeal and such proportion of the costs of the proceedings before the General Court as the Court of Justice may consider appropriate.

19 Coppens contends that the Court should:

— dismiss the appeal;

— in the alternative, in the event that the Court sets aside the judgment under appeal in whole or in part, limit the amount of the fine imposed by the Commission to 10% of Coppens' turnover on the market concerned; and

— order the Commission to pay the costs of the proceedings before the General Court and the costs of the appeal proceedings.

The appeal

20 In support of its appeal, the Commission submits that the General Court infringed Articles 263 TFEU and 264 TFEU and acted in breach of the principle of proportionality.

Arguments of the parties

21 By its ground of appeal, the Commission submits in essence that, in the light of its reasoning in paragraph 36 of the judgment under appeal, the General Court erred in not annulling the contested decision, to the extent that it concerns Coppens, only in part. In the present case, the only aspect that has not been proved is that Coppens knew or should have known of the agreement on commissions. As it is, according to settled case-law, partial annulment of a decision is possible where the elements which it is sought to have annulled can be severed from the remainder of the decision, which was the position in the present case. It is disproportionate for the General Court to annul a decision in its entirety where only one aspect of the infringement cannot be proved.

22 The Commission notes that the contested decision found Coppens liable for a single and continuous infringement which, during the period in question, consisted of two separate aspects: the agreement on commissions and the agreement on cover quotes. Consequently, the General Court would have been justified in annulling that decision in its entirety in respect of Coppens only if it had been able to find that – in addition to the lack of proof that Coppens was aware of the other companies' anti-competitive conduct concerning the commissions or that it could reasonably have foreseen such conduct – the Commission had also failed to prove that Coppens had participated in the agreement on cover quotes. However, there can be no doubt that such participation has been proved and that such participation constitutes in itself an infringement of Article 81 EC, as the General Court moreover acknowledged.

23 Accordingly, the judgment under appeal is inconsistent with the case-law to the effect that the General Court cannot annul a measure in its entirety where it is obvious that the plea which it considers to be well founded can provide a basis only for partial annulment, such case-law being the expression of the principle of proportionality.

24 In addition, the annulment of anti-trust decisions in their entirety on the ground that part of the infringement has not been proved would be incompatible with the proper administration of justice and the effective enforcement of the competition rules, in so far as it would require procedures to be repeated, unless it is accepted that the part of the infringement which has been proved will remain unpunished. Moreover, it is not certain that the repetition of such procedures would be compatible with the *ne bis in idem* principle.

25 Lastly, the Commission submits that the Court of Justice is in a position to give final judgment in the matter. The relevant facts are not in dispute, since Coppens did not deny before the General Court that it had taken part in implementing the agreement on cover quotes in 67 cases, as established and documented in the contested decision. In that connection, the Commission further submits that that agreement had both an anti-competitive object and anti-competitive effects. The Commission also concedes that, for the years 1994 and 1995, there was no evidence that Coppens had participated actively in the implementation of the agreement on cover quotes and that the fine could be reduced if that were the only agreement for which Coppens could be held liable.

26 Coppens contends, principally, that the appeal must be dismissed. In the first place, it argues that no elements of the contested decision are severable within the meaning of the case-law of the Court. Since the Commission had found in that decision that there was a complex cartel, constituting a single and continuous infringement of Article 81 EC, it was incumbent upon the General Court to adjudicate on Coppens' participation in such a cartel. The General Court accordingly held that the mere fact that an agreement in which an undertaking has participated has the same object as a global cartel does not support the inference that that undertaking had joined the global cartel. It is not a question of 'part of an infringement.'

27 In the second place, under the case-law in question, a decision may be annulled in part only if such partial annulment does not alter the substance of that decision. In the present case, it was the characterisation of the infringement allegedly committed by Coppens, hence the very substance of the contested decision in relation to Coppens, which was at issue before the General Court. The annulment of that decision in its entirety in respect of Coppens follows from the fact that it had not been proved that Coppens was implicated in all the aspects essential for a finding that there was a single and continuous infringement.

28 In any event, the General Court could not simply have annulled the contested decision in part. A mere adjustment to the amount of the fine would have afforded Coppens insufficient legal protection. In such a case, the imposition of a penalty on Coppens would still be based on all the aspects of the infringement, whereas Coppens' involvement is deemed to have been proved in respect of only one of those aspects.

29 In the third place, the annulment of the contested decision in its entirety in respect of Coppens in the judgment under appeal does not run counter to the case-law devolving from Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363. The plea in law upheld in the present case was directed against the general premiss for the contested decision, that is to say, against the accusation concerning the complex cartel. Consequently, the annulment of that decision in its entirety does not go beyond the bounds of the plea raised. In addition, the argument based on the proper administration of justice and the effective enforcement of the competition rules cannot be upheld. In accordance with the principle of legality, it is possible to impose a penalty on an undertaking only if it is shown that the undertaking committed the infringement alleged. As it is, since the infringement found in the contested decision was that of a complex cartel – that is to say, an infringement involving a number of aspects, each of which is essential to a finding that that infringement existed – the General Court was fully entitled to hold that the Commission had not sufficiently shown that Coppens had participated in the various aspects essential to that infringement and that, in consequence, it could not be held that Coppens had participated in the complex cartel.

30 In the alternative, Coppens claims that the Court should cancel the fine or, at the very least, reduce it to an amount not exceeding 10% of Coppens' turnover on the international removals market in Belgium. In the further alternative, in the event that the Court sets aside the judgment under appeal and does not annul the contested decision in relation to Coppens, Coppens claims that the Court, in the exercise of its unlimited jurisdiction, should reduce the amount of the fine imposed. In support of those claims, Coppens relies on two grounds.

31 First, Coppens contends that the basic amount of the fine was incorrectly determined, as the Commission did not draw any distinction between the participants in the cartel, whereas it was under a duty to take into account the different roles of the various cartel members. Thus, the infringement committed by Coppens was less serious than the infringement attributed to it by the Commission, given, in particular, its limited role and participation in the cartel in question; its market share, which amounted to only 0.04% of the market concerned; and its overall turnover which was considerably lower than that of the other participants. Consequently, as regards Coppens, the Commission was not entitled to take as the starting point for the calculation of the fine the same percentage (17%) of the value of sales as for all the other participants. In addition, Coppens claims to have shown that the duration of the infringement attributable to it is 7 years at most, not 10 years and 9 months. Furthermore, the basic amount of the fine should have been reduced pursuant to points 27 to 35 of the Guidelines. In that connection, Coppens contends, in particular, that it has adduced evidence proving that it is unable to pay and faces a genuine risk of insolvency.

32 Second, Coppens contends that the fine was set in clear breach of the principle of proportionality, in so far as the fine amounted to 10% of its total turnover and represented approximately 200% of the value of sales taken into account. The Commission should have taken into consideration, in accordance with the case-law, the fact that Coppens' turnover from the activity affected by the cartel represented no more than approximately 3.2% of its total turnover.

33 Lastly, Coppens claims that the Court should order the Commission to pay the costs, pursuant to the second subparagraph of Article 69(3) of the Rules of Procedure of the Court, a provision which is now Article 139 of those rules.

Findings of the Court

34 It is not in dispute that, after finding in paragraph 36 of the judgment under appeal that Coppens' participation in the agreement on cover quotes could in itself constitute an infringement of Article 81 EC punishable by a fine, the General Court none the less held that Articles 1(i) and 2(k) of the contested decision had to be annulled. By its ground of appeal, the Commission challenges the annulment by the General Court of that decision in its entirety in respect of Coppens.

35 It should be noted that, under the sixth paragraph of Article 254 TFEU and the first paragraph of Article 264 TFEU, if an action under Article 263 TFEU is well founded, the General Court is to declare the act concerned void.

36 As the Advocate General observed in point 25 of her Opinion, the first paragraph of Article 264 TFEU is to be interpreted, however, as meaning that the measure contested by the action for annulment must be declared to be void only to the extent that the action is well founded.

37 In that connection, the Court has held that 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. Annulment of the measure in its entirety is not acceptable where it is obvious that, being directed only at a specific part of the contested measure, that plea can provide a basis only for partial annulment (*Commission* v *Département du Loiret*, paragraph 104).

38 However, partial annulment 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 where the partial annulment 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 and not of a subjective criterion linked to the political intention of the authority which adopted the measure at issue (see, to that effect, Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, paragraphs 12 to 14, and *Commission* v *Département du Loiret,* paragraphs 105 and 106).

39 It follows that, in the present case, the only circumstances in which the General Court would have been justified, under the first paragraph of Article 264 TFEU, in annulling the contested decision in its entirety in respect of Coppens would have been if the partial annulment of that decision would have altered the substance of the decision, a point which must be addressed.

40 In that connection, it should be observed, first of all, that Article 1 of the contested decision states that Coppens and other undertakings have infringed Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area by directly and indirectly fixing prices for international removal services in Belgium, by sharing part of that market, and by manipulating the procedure for the submission of tenders – in the case of Coppens, during the period from 13 October 1992 to 29 July 2003. In the judgment under appeal, however, the General Court observed that the Commission regarded Coppens as liable for participation in a single and continuous infringement (paragraph 35), and did not rule out the possibility that the agreement on cover quotes, in which Coppens did not deny having participated, may in itself infringe Article 81 EC (paragraphs 28 and 36).

41 According to settled case-law, 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. Accordingly, if the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (*Commission* v *Anic Partecipazioni,* paragraph 81, and 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 258).

42 An undertaking which has participated in such a single and complex infringement through its own conduct, which fell within the definition of an agreement or a concerted practice having an anti-competitive object for the purposes of Article 81(1) EC and was intended to help bring about the infringement as a whole, may accordingly be liable also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the

offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (*Commission* v *Anic Partecipazioni*, paragraphs 87 and 203, and *Aalborg Portland and Others* v *Commission*, paragraph 83).

43 An undertaking may thus have participated directly in all the forms of anti-competitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anti-competitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anti-competitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole.

44 On the other hand, 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, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk.

45 That cannot, however, relieve the undertaking of liability for conduct in which it has undeniably taken part or for conduct for which it can undeniably be held responsible. Nor is the fact that an undertaking did not take part in all aspects of an anti-competitive arrangement or that it played only a minor role in the aspects in which it did participate material for the purposes of establishing the existence of an infringement on its part, given that those factors need to be taken into consideration only when the gravity of the infringement is assessed and only if and when it comes to determining the fine (*Commission* v *Anic Partecipazioni,* paragraph 90, and *Aalborg Portland and Others* v *Commission*, paragraph 86).

46 However, a Commission decision categorising a global cartel as a single and continuous infringement can be divided in that manner only if the undertaking in question has 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 to defend itself on that point, and only if the decision is sufficiently clear in that regard.

47 It follows that, where the conditions set out in the preceding paragraph are satisfied, if the Court of the European Union finds that the Commission has not proved to the requisite legal standard that, when participating in one of the forms of anti-competitive conduct comprising a single and continuous infringement, the undertaking was aware of the other anti-competitive conduct adopted by the other participants in the cartel in pursuit of the same objectives or could reasonably have foreseen that conduct and was prepared to take the risk, the only inference which that Court must draw is that the undertaking may not be attributed liability for that other conduct and, in consequence, may not be attributed liability for the single and continuous infringement as a whole, and, to that extent alone, the contested decision must be held to be unfounded.

48 In the present case, it is apparent from paragraphs 10 to 12 of the judgment under appeal that, in the contested decision, the Commission stated that the cartel in question took three forms – a price agreement, an agreement on cover quotes and an agreement on commissions – and that the Commission took the view that the agreement on commissions had to be regarded as the indirect fixing of prices for international removal services in Belgium, while the agreement on cover quotes was a manipulation of the tendering procedure resulting in the prices quoted in all the bids being deliberately higher than they would have been in a competitive environment. In addition, the General Court noted, in paragraph 28 of the judgment under appeal, that, according to the contested decision, Coppens' active participation in the cartel was limited to the agreement on cover quotes and that Coppens had not participated in the agreement on commissions.

49 It is apparent also from the file on the case before the General Court and from paragraph 25 of the judgment under appeal that Coppens was put in a position to understand that it would be attributed liability for the single and continuous infringement in question and that it would be accused of participating in the agreement on cover quotes as such, and Coppens therefore had the opportunity to defend itself on that point; and, secondly, that the contested decision was sufficiently clear in that regard.

50 In addition, since a finding, on the part of a Court of the European Union, that the Commission has failed to prove to the requisite legal standard that, when participating in one of the forms of anti-competitive conduct comprising a single and continuous infringement, an undertaking was aware of the other anti-competitive conduct adopted by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and was prepared to take the risk, cannot, in accordance with the case-law referred to in paragraph 45 above, lead that undertaking to be relieved of its liability for that part of the conduct in which it has undeniably taken part or for conduct for which it can undeniably be held responsible, that Court must confine itself to partial annulment of the contested decision.

51 Since the very purpose of a Commission decision establishing that, in breach of Article 81 EC, an undertaking has participated in a cartel is to make a finding that that undertaking has engaged in one or more forms of conduct constituting an infringement of that nature, such a partial annulment could not alter the substance of a decision of that kind.

52 In those circumstances, by annulling the contested decision in its entirety in relation to Coppens, even though it had not called in question Coppens' participation in the agreement on cover quotes or the anti-competitive nature of that agreement, the General Court made an error of law flawing its judgment.

53 Lastly, since it is apparent from the foregoing that, in the circumstances of the present case, the General Court would have been justified in annulling the contested decision only partially in respect of Coppens, Coppens cannot usefully argue, as justification for the General Court's annulment of the contested decision in its entirety, that a mere reduction of the fine imposed on it would have afforded it insufficient legal protection.

54 It follows from all of the foregoing that, by annulling the contested decision in its entirety in respect of Coppens, despite the fact that it had not called in question either Coppens' participation in the agreement on cover quotes or the fact that that agreement may in itself constitute an infringement of Article 81 EC, the General Court infringed the first paragraph of Article 264 TFEU. Since the ground of appeal relied on by the Commission is accordingly well founded, the appeal must be allowed and the judgment under appeal set aside.

The action before the General Court

55 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if an appeal is well founded, the Court of Justice may, where the decision of the General Court is set aside, itself give final judgment in the matter, where the state of the proceedings so permits. The Court considers that to be the position in the present case.

56 As is apparent from paragraphs 11 and 12 above, Coppens raised two main pleas before the General Court – alleging, respectively, infringement of Article 81(1) EC and infringement of Article 23(2) and (3) of Regulation No 1/2003 – and one alternative plea in support of its claim that the fine imposed on it should be cancelled or reduced. The first plea consists of three parts, by which Coppens disputes that it participated in a complex cartel, challenges the duration of its participation in the cartel and claims that the Commission failed to assess the relative weight of that participation.

The first part of the first plea

57 Coppens submits, in essence, that the Commission erred in concluding that Coppens had participated in a single and continuous infringement. The Commission failed to prove that Coppens was aware of the agreement on commissions. In addition, Coppens submits that the agreement on cover quotes did not have the object or effect of restricting competition and that, in any event, it had only an insignificant effect on the market and Coppens' participation in the agreement was very limited.

58 The Commission contends that those arguments are not well founded.

59 In the first place, it should be observed that Coppens denies, in essence, that it is possible for the Commission to attribute to it liability for a single and continuous infringement, since its participation in one of the two agreements comprising that infringement in the present case has not been established in accordance with the requirements laid down by case-law.

60 In that connection, it should be observed that, according to the case-law cited in paragraph 42 above, in order to establish that an undertaking has participated in the implementation of a single and continuous infringement, the Commission must prove that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen such conduct and was prepared to take the risk.

61 In the present case, it is not in dispute that the single and continuous infringement in respect of which Coppens was found liable by the Commission was, during the period in which Coppens was alleged to have participated in the cartel in question, composed of two agreements: (i) the agreement on cover quotes, whose implementation is described in recitals 229 to 278 of the contested decision and whose restriction of competition is set out, in particular, in recitals 358 to 364 of that decision; and (ii) the agreement on commissions, whose implementation is described in recitals 161 to 228 of the contested decision and whose restriction of competition is set out, in particular, in recitals 351 to 357 of that decision.

62 As regards the agreement on cover quotes, it should be observed that Coppens does not deny its participation in that agreement. Moreover, contrary to Coppens' assertions, it cannot be accepted that that agreement had neither the object nor the effect of restricting competition. Undertakings which submit such quotes abstain from competition with the removal company which requests them. By the same token, in requesting its competitors to draw up such quotes, the requesting company knows that its bid will not be exposed to competition from more competitive bids. The undertaking which carries out the removal is thus in a position to ask for a price that is higher than it would have been in a competitive environment – to the detriment of consumers.

63 Nor – since, according to recital 89 of the contested decision, the combined market share of the undertakings involved in the cartel accounted for approximately 50% of the international removal services market in Belgium, which Coppens does not deny – can it be accepted that the agreement on cover quotes had only insignificant effects on the market concerned and could therefore fall outside the prohibition laid down in Article 81(1) EC, in accordance with the case-law of the Court (Case 5/69 *Völk* [1969] ECR 295, paragraph 7, and Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paragraph 50 and the case-law cited).

64 As regards Coppens' purportedly limited participation in the agreement on cover quotes, it is sufficient to observe that, under the very terms of Article 81(1) EC, the only points to be determined for the purposes of applying the prohibition laid down in that provision are whether the agreement in which the undertaking participated alongside other undertakings had as its object or effect the restriction of competition and whether it was capable of affecting trade between Member States. Consequently, the question whether the individual participation of an undertaking in such an agreement could, by itself, restrict competition or affect trade between Member States, account being taken of the undertaking's weak position on the market concerned, is irrelevant when it comes to ascertaining whether there is an infringement.

65 It follows from the foregoing that the Commission was justified in finding Coppens liable for participating in the agreement on cover quotes, in breach of Article 81 EC.

66 On the other hand, as regards the agreement on commissions, it should be pointed out that, in recital 296 of the contested decision, the Commission noted that Coppens had not agreed commissions with the other undertakings involved in the cartel. The Commission would therefore have been justified in finding Coppens liable for the agreement on commissions only if it had proved that Coppens intended, through its participation in the agreement on cover quotes, to contribute to the common objectives pursued by all the other participants in the cartel and that it was aware of the agreement on commissions put into effect by them or that it could reasonably have foreseen that agreement and was prepared to take the risk. It must be pointed out, however, that, in its pleadings, the Commission claims that it is entitled to assume such knowledge on the part of Coppens, particularly given that Coppens does not deny that it was aware of the agreement on commissions. In addition, the Commission expressly acknowledges that the contested decision is not based upon specific evidence on that point.

67 It follows that the Commission has not discharged the burden of proof in the matter and has accordingly failed to show that, when Coppens participated in the agreement on cover quotes, it was aware of the agreement on commissions implemented by the other undertakings participating in the cartel, or that it could reasonably have foreseen that agreement. In consequence, the Commission could not lawfully find Coppens liable for the agreement on commissions and attribute to it liability in respect of all the forms of conduct comprising the single and continuous infringement. To that extent, the first part of the first plea raised by Coppens in support of its action is therefore well founded.

The second part of the first plea

68 Coppens submits in that regard that there is no proof that it participated in the infringement for the years 1994 and 1995. Consequently, the Commission was incorrect in finding, in recital 547 and Article 1(i) of the contested decision, that Coppens had participated in the infringement in question for 10 years and 9 months.

69 The Commission acknowledges that, for those two years, there is no evidence that Coppens participated in the implementation of the agreement on cover quotes. However, the Commission takes the view that this has no bearing on the duration of Coppens' participation in that agreement, since the

fact that there is no evidence that, during a given period, an undertaking has implemented an agreement does not support the inference that the undertaking committed no infringement during the period concerned.

70 In that connection, it should be borne in mind that the Court has held that, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 57, and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 94).

71 Such coincidences and indicia, when evaluated overall, may provide information not just about the mere existence of anti-competitive practices or agreements, but also about the duration of continuous anti-competitive practices or the period of application of anti-competitive agreements (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraphs 95 and 96).

72 As regards the lack of evidence that there was an agreement during certain specific periods or, at least, the lack of evidence of its implementation by an undertaking during a given period, it should be recalled that the fact that such evidence has not been produced in relation to certain specific periods does not preclude the infringement from being regarded as established during a longer overall period than those periods, provided that such a finding is supported by objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that the agreement is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the agreement, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraphs 97 and 98).

73 It is also apparent from the case-law that a party which tacitly approves of an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is capable of rendering the undertaking concerned liable (*Aalborg Portland and Others* v *Commission*, paragraph 84).

74 In addition, an undertaking cannot exempt itself from its liability by relying on the fact that it has not taken part in all aspects of an anti-competitive scheme or that its role in the aspects in which it did participate was limited, as those circumstances are not capable of calling into question its liability for the infringement. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (*Aalborg Portland and Others* v *Commission*, paragraph 86).

75 Accordingly, in the present case, even though the Commission concedes that it has not proved that Coppens actively participated in the agreement on cover quotes for the years 1994 and 1995, the fact remains that – in the light, first, of the lack of evidence that, during that period, Coppens had publicly distanced itself from the content of that agreement, in particular by informing its competitors in writing of its intention to cease participating in the agreement, and, second, of the numerous pieces of evidence (summarised, in particular, in recital 280 of the contested decision) that Coppens actively participated in the agreement after that period, a point which Coppens does not dispute – the Commission was justified in taking the view that Coppens could be found liable for participating in the agreement on cover quotes continuously throughout the entire period from 13 October 1992 to 29 July 2003.

76 The second part of the first plea relied on by Coppens in support of its action must therefore be rejected.

The third part of the first plea

77 As regards the alleged failure by the Commission to assess the relative weight of Coppens' participation in the agreement on cover quotes, it is sufficient to note that, as the Advocate General observed in point 55 of her Opinion, although that argument may be relevant for the purposes of assessing the amount of the fine imposed on Coppens, in accordance with the case-law referred to in paragraph 74 above, it is irrelevant, and must therefore be rejected as ineffective, in so far as it is intended, as in the present case, to challenge the finding that there was an infringement of Article 81 EC.

78 It follows from all of the foregoing that, since the first part of the first plea is well founded in part, given that the Commission failed to prove that, quite apart from the agreement on cover quotes, Coppens was liable for the single and continuous infringement, Article 1(i) of the contested decision must be annulled – without it being necessary to examine the other pleas raised by Coppens – in so far as, by that provision, beyond simply finding that Coppens had participated in the agreement on cover quotes from 13 October 1992 to 29 July 2003, the Commission finds Coppens liable for the agreement on commissions and attributes to it liability for the single and continuous infringement.

The fine

79 Lastly, it should be observed, first, that by reason of the setting aside of the judgment under appeal and pursuant to Article 31 of Regulation No 1/2003, the Court has unlimited jurisdiction for the purposes of Article 261 TFEU (see, by analogy, *Commission* v *Anic Partecipazioni*, paragraph 218).

80 Secondly, although it is for the Court, in the exercise of its unlimited jurisdiction in this regard, to assess for itself the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111), the exercise of unlimited jurisdiction cannot result, when the amount of the fines to be imposed is determined, in discrimination between undertakings which have participated in an agreement or concerted practice, contrary to Article 81(1) EC. Accordingly, the guidance which can be drawn from the Guidelines is, as a general rule, capable of guiding the Courts of the European Union in their exercise of that jurisdiction where the Commission has applied those guidelines for the purposes of calculating the fines imposed on the other undertakings penalised by the decision which those Courts are asked to examine (see, to that effect, Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 97 and 98, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 337).

81 Thirdly, Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement. In addition, it is apparent from the second paragraph of Article 23(2) of that regulation that, for each undertaking participating in the infringement, the fine may not exceed 10% of its total turnover in the preceding business year.

82 Accordingly, the Court considers that the amount of the fine imposed on Coppens under Article 2(k) of the contested decision must be reduced to EUR 35 000 in the light of all the circumstances of the case and, in particular, the following: (i) Coppens' turnover in 2002 on the international removal services market in Belgium amounted to EUR 58 338; (ii) the agreement on cover quotes in which Coppens participated, while capable of seriously distorting competition and increasing prices for the services concerned, to the detriment of the consumers, and of being categorised as a horizontal price-fixing and market-sharing agreement – thereby constituting by its very nature one of the most serious restrictions of competition – could not be regarded as forming part of the overall plan

pursued, according to the contested decision, by the other participants in the cartel in question; (iii) 67 documented cases of Coppens' participation in the agreement on cover quotes have been established by the Commission and remain unchallenged; (iv) although Coppens' role in that agreement may be described as limited between 1994 and 1995, Coppens may be considered to have participated in the agreement for a period of 10 years and 9 months; and, lastly, (v) Coppens' total turnover in 2006 amounted to EUR 1 046 318.

Costs

83 Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

84 Under Article 138(1) of the Rules of Procedure of the Court, applicable to the procedure on appeal pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 138(3) of those rules states that where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, under Article 138(3), if it appears justified in the circumstances of the case, the Court may order one party, in addition to bearing its own costs, to pay a proportion of the other party's costs.

85 In the present case, Coppens has been unsuccessful in the appeal and the Commission has been partly unsuccessful at first instance. However, in the light of the circumstances of the case, the Court considers that the Commission must be ordered, in addition to bearing its own costs at first instance and on appeal, to pay two thirds of the costs incurred by Coppens in both sets of proceedings. Coppens must bear a third of its own costs incurred at first instance and on appeal.

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

1. **Sets aside the judgment of the General Court of the European Union of 16 June 2011 in Case T-210/08 *Verhuizingen Coppens* v *Commission;***

2. **Annuls Article 1(i) of Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services) in so far as, by that provision, the European Commission does not simply find that Verhuizingen Coppens NV had participated in the agreement on a system of false quotes, known as 'cover quotes', from 13 October 1992 to 29 July 2003, but finds that company liable for the agreement on a system of financial compensation for rejected offers or for not quoting at all, known as 'commissions', and attributes to it liability for the single and continuous infringement;**

3. **Sets the amount of the fine imposed on Verhuizingen Coppens NV under Article 2(k) of Decision C(2008) 926 final at EUR 35 000;**

4. **Orders the European Commission, in addition to bearing its own costs at first instance and on appeal, to pay two thirds of the costs incurred by Coppens in both those sets of proceedings;**

5. **Orders Coppens to bear one third of its own costs at first instance and on appeal.**

[Signatures]