Reports of Cases

OPINION OF ADVOCATE GENERAL WATHELET delivered on 4 September 2014[1]

Case C-434/13 P

European Commission
v
Parker Hannifin Manufacturing Srl, formerly Parker ITR Srl,

Parker-Hannifin Corp.

(Appeal — Competition — Agreements, decisions and concerted practices — European market for marine hoses — Succession of legal entities — Attributability of unlawful conduct — Reduction of the fine by the General Court)

1. In the present appeal, the European Commission comes before the Court of Justice to seek to have set aside the judgment in *Parker ITR and Parker–Hannifin* v *Commission*,[2] by which the General Court of the European Union partially annulled Commission Decision C(2009) 428 final[3] (relating to the 'marine hoses' cartel, one of the longest-running cartels ever punished)[4] and significantly reduced the fine imposed on Parker ITR, and the amount for which Parker-Hannifin Corp. was held jointly and severally liable, by that decision.

2. This case enables the Court of Justice to specify the principles of EU competition law applicable to cartels where an intra-group transfer of the infringing assets takes place for the purpose of the subsequent sale of the transferee legal entity (a subsidiary) to an independent third party, the transferred entity continuing, as before the transfer, to participate in the cartel (a situation of intra-group 'economic continuity or succession').

1 — Original language: French.

2 — T-146/09, EU:T:2013:258; 'the judgment under appeal'.

3 — Decision of 28 January 2009 relating to a proceeding under Article [101 TFEU] and Article 53 of the EEA Agreement (Case COMP/39406 — Marine hoses) ('the contested decision'). I will use the old numbering of the Treaty in this Opinion since the contested decision was taken under the EC Treaty. It is interesting to note that this cartel is the first in which a businessman from one Member State (Italy) has been extradited by another Member State (Germany) to the United States on the basis of an infringement of competition law. The businessman pleaded guilty, 'walked into court wearing glasses and dressed in a khaki jump suit, leg irons and handcuffs and accompanied by two US Marshals' and was sentenced by the US District Court in the Southern District of Florida to two years in prison and a fine of USD 50 000. The European Court of Human Rights recently dismissed his appeal against the decision by the German authorities (see, inter alia, mLex, 'Extradited marine hose executive pleads guilty, sentenced to 24 months', 24 April 2014, and 'Human-rights court rejects case of extradited Italian cartel executive', 29 May 2014).

4 — It is also interesting to note that the cartel covered the whole world and that the participating undertakings represented a very significant part of the marine hose business globally. It was a complex cartel, institutionalised to the point of having adopted 'articles of association' in the form of a memorandum of understanding, a formal 'Club' structure, code names, and of having used the services of external 'consultants' who coordinated and oversaw the cartel. It was also a resilient cartel. After experiencing a crisis between May 1997 and June 1999, it regained its former strength and continued its activities for a further eight years. The cartel was dismantled only following coordinated inspections carried out by various authorities concerned with global competition. Subsequently, a number of executives involved in the cartel were given custodial sentences in several countries.

3. At issue here are the principle of *personal responsibility*, according to which an infringement (in the present case, a cartel) must be attributed to the natural or legal person operating the undertaking participating in the cartel, [5] and the exception to that principle, namely, the principle of *economic continuity* (developed, in particular, in cases of restructuring or other changes within a group of undertakings), according to which it may be necessary, for the effective implementation of competition rules, to attribute a cartel not to the initial operator but to the new operator of the undertaking involved. [6]

I – **Background to the dispute**

4. The facts of the case are not disputed between the parties.

5. The activities in the marine hose business [7] at issue in the present case were established in 1966 by Pirelli Treg SpA, a company belonging to the Pirelli group. Following the merger of two subsidiaries within the Pirelli group, they were taken over in 1990 by ITR SpA.

6. In 1993, ITR was acquired by Saiag SpA.

7. In 2001, Parker-Hannifin Corp. — the ultimate parent company of the Parker-Hannifin group — and Saiag initiated discussions on the possible acquisition by Parker-Hannifin of ITR's marine hose business. In June 2001, in anticipation of that sale, ITR formed a subsidiary named ITR Rubber.

8. On 5 December 2001, Parker Hannifin Holding, a wholly-owned subsidiary of Parker-Hannifin, agreed with ITR to acquire 100% of the shares in ITR Rubber, an acquisition that was to take place at the request of Parker Hannifin Holding.

9. The agreement provided, in particular, that the transfer of the rubber hose business (including the marine hose business) from ITR to ITR Rubber was to take place at the request of Parker Hannifin Holding.

10. On 19 December 2001, ITR transferred its activities in the marine hose business to ITR Rubber.

11. The transfer took effect on 1 January 2002.

12. On 31 January 2002, Parker Hannifin Holding acquired from ITR the shares in ITR Rubber. ITR Rubber then became Parker ITR Srl. [8]

13. In 2007, the Commission initiated an investigation for infringement, on the marine hose market, of Article 81 EC and Article 53 of the EEA Agreement.

5 — See *KNP BT* v *Commission* (C-248/98 P, EU:C:2000:625, paragraph 71); *Cascades* v *Commission* (C-279/98 P, EU:C:2000:626, paragraph 78); *Stora Kopparbergs Bergslags* v *Commission* (C-286/98 P, EU:C:2000:630, paragraph 37); and *SCA Holding* v *Commission* (C-297/98 P, EU:C:2000:633, paragraph 27), as well as the Opinion of Advocate General Kokott in *ETI and Others* (C-280/06, EU:C:2007:404, point 71).

6 — See the judgments in *Aalborg Portland and Others* v *Commission* (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, EU:C:2004:6, paragraphs 356 to 359); *ETI and Others* (C-280/06, EU:C:2007:775); *Jungbunzlauer* v *Commission* (T-43/02, EU:T:2006:270); *ArcelorMittal Luxembourg and Others* v *Commission* (T-405/06, EU:T:2009:90); and, on appeal, *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* (C-201/09 P and C-216/09 P, EU:C:2011:190).

7 — Marine hoses are used to load gas and petroleum products from offshore facilities (for example, buoys anchored offshore or floating gas- or oil-production systems) on to vessels and later to offload those products to other offshore or onshore facilities.

8 — For the purposes of the present Opinion, I will use the name Parker ITR even for the periods when, since it belonged to the Saiag group and the intermediary parent company ITR, the undertaking was called ITR Rubber.

14. In the contested decision, the Commission noted that 11 companies — including Parker Hannifin Manufacturing (formerly Parker ITR) and Parker-Hannifin (collectively, 'the defendants') — had, in the marine hose business within the European Economic Area (EEA), committed a single and continuous infringement during various periods between 1 April 1986 and 2 May 2007, consisting in the allocation of tenders; price-fixing; quota-fixing; the fixing of sales conditions; the sharing of geographic markets; and the exchange of sensitive information on prices sales volumes and procurement tenders.

15. In that decision, the Commission noted that Parker ITR had participated in the cartel between 1 April 1986 and 2 May 2007 and Parker-Hannifin had participated between 31 January 2002 and 2 May 2007. A fine of EUR 25 610 000 was imposed on Parker ITR, of which Parker-Hannifin was held to be jointly and severally liable for EUR 8 320 000.

16. The Commission did not find Pirelli, ITR or Saiag (the former parent companies and/or predecessors of Parker ITR) liable as addressees of the decision and did not penalise them as the infringement was time-barred in their regard.

II – **The judgment under appeal**

17. On 9 April 2009, Parker ITR and Parker-Hannifin brought an action before the General Court seeking annulment of the contested decision in so far as it concerned them and, in the alternative, a reduction of the fine imposed. In support of their action, they put forward nine pleas in law.

18. On 17 May 2013, by the judgment under appeal, the General Court upheld the first part of the first plea, alleging breach of the principle of personal responsibility, and annulled Article 1(i) of the contested decision in so far as it found Parker ITR liable for the period before 1 January 2002 (paragraphs 83 to 130). Consequently, the General Court also upheld the fifth and sixth pleas, relating to the increase of the fine imposed on the defendants as a result of Parker ITR's role as leader for the period from June 1999 to September 2001 (paragraphs 139 and 140, 145, 146, 253 and 254 of the judgment under appeal).

19. The General Court rejected the other pleas in law.

20. Exercising its unlimited jurisdiction, the General Court reduced the fine imposed on Parker ITR from EUR 25 610 000 to EUR 6 400 000. As regards the amount in respect of which Parker-Hannifin was held jointly and severally liable, the General Court reduced it by EUR 100 000 (that is, to EUR 6 300 000).[9]

III – **The appeal**

21. The Commission relies on two grounds of appeal. In the event that the Court upholds the first ground of appeal, the respondents put forward in their response arguments relating to the calculation of the fine.

9 — Paragraph 257 of the judgment under appeal is worded as follows: '[i]n view of all of the foregoing, it is necessary, first, to annul Article 1(i) of the contested decision, in so far as it relates to the infringement attributed to Parker ITR in respect of the period before January 2002, secondly, to set the amount of the fine imposed on Parker ITR at EUR 6 400 000, of which Parker-Hannifin is held to be jointly and severally liable for EUR 6 300 000, since Parker-Hannifin cannot be found jointly and severally liable for the period from 1 to 31 January 2002, and, thirdly, to dismiss the action as to the remainder'.

A – *First ground of appeal: misapplication of the case-law relating to economic continuity*

1. The judgment under appeal

22. After referring to the case-law relating to the principles of personal responsibility (paragraphs 85 to 88) and economic continuity (paragraphs 89 to 98), the General Court ruled as follows in paragraphs 115, 116 and 121 of the judgment under appeal:

‘115 It must be stated that, first, from 27 June 2001 to 31 January 2002, ITR Rubber was a wholly-owned subsidiary of ITR and, secondly, that the transfer of the rubber hose business to ITR Rubber took effect only as of 1 January 2002, there being nothing in the Commission’s file to show that ITR Rubber had any business activities, and, in particular, business activities in connection with marine hoses, prior to that date. ...

116 In those circumstances, it is for the legal person managing the undertaking in question when the infringement was committed, that is to say ITR and its parent company Saiag, to answer for that infringement, even if, at the date of the decision finding the infringement, the operation of the marine hose business was the responsibility of another undertaking, in the present case Parker-Hannifin. The principle of personal liability cannot be called into question by the principle of economic continuity in cases where, as in the present case, an undertaking involved in the cartel, namely Saiag and its subsidiary ITR, transfers a part of its business to an independent third party and there is no structural link between the transferor and the transferee — that is to say, in the present case, between Saiag or ITR and Parker-Hannifin.

121 ... since it is necessary to reject the premiss of the Commission’s reasoning concerning the application of the [principle] of economic continuity only to the transfer of ITR’s assets to ITR Rubber (and not to the transfer of the subsidiary ITR Rubber to Parker-Hannifin), ITR and Saiag’s responsibility cannot have been transferred to ITR Rubber pursuant to that [principle]. ...’

2. Arguments of the parties

23. The Commission submits that, in the present case, a distinction should be drawn between two transfers of assets: in the first place, an intra-group transfer, in the present case in the Saiag group, within which ITR assets were transferred to ITR Rubber and, in the second place, an inter-group transfer, in the present case between the Saiag and Parker-Hannifin groups, with the sale by Saiag to Parker-Hannifin of ITR Rubber, which later became ITR Parker.

24. According to the Commission, the General Court focussed, in the judgment under appeal, exclusively on the second transfer.

25. The Commission argues that the first transfer took place in the circumstances required by the case-law for it to be viewed as a case of economic continuity. The Commission points out that, according to that case-law, where two entities (here, ITR and ITR Rubber) constitute one economic entity, the fact that the entity that committed the infringement (ITR) still exists does not in itself preclude the imposition of a penalty on the entity to which its economic activities were transferred (ITR Rubber). According to the Commission, that way of applying penalties is permissible in particular where the entities have been under the control of the same person (here, Saiag) and accordingly, given the close economic and organisational links between them, have carried out, in all material respects, the same commercial instructions.

26. In the Commission's view, the relevant date for assessing whether a transfer of assets is within a group or between independent undertakings is the date of the asset transfer itself. In the present case, it was actually Saiag/ITR which formed ITR Rubber, the subsidiary to which the assets were transferred when it was under their control.

27. Although it is necessary for structural links to exist on that date, it is not necessary for those links to persist throughout the entire infringement period. The fact that ITR Rubber did not remain within the Saiag group and that only a brief period elapsed between its formation and its sale to the Parker-Hannifin group is irrelevant. Similarly, the fact that ITR Rubber was, from its formation, intended for sale is irrelevant: in order not to create legal uncertainty, application of the principle of economic continuity should be governed by objective and clear rules and must not depend on subjective intentions or events subsequent to the transfer.

28. The Commission adds that, contrary to the finding of the General Court, the Commission was not required to attribute responsibility for the unlawful conduct to Saiag and ITR, the parent companies. The fact that, in a previous case, it chose to attribute such responsibility to the transferor parent company and not to the subsidiary which was transferred is irrelevant, since its former decision-making practice does not create a binding legal framework against which to test the legality of acts which it adopts subsequently. In choosing, in the present case, to attribute responsibility for the infringement to ITR Rubber as the economic successor to ITR, the Commission used its discretion under the case-law. In that regard, it notes that, although the fact that a fine was imposed on Parker ITR might indeed have reduced the value of the investment made by Parker-Hannifin, that is a risk no different from the other risks attendant upon the acquisition of a company (for example, the risk of environmental liability) and against which the acquirer can protect itself by inserting appropriate indemnity clauses in the sale and purchase agreement.

29. Lastly, the Commission states that it was all the more justified in holding Parker ITR liable for the infringement in respect of the entire period in which the infringing assets had been involved in the cartel, as it was impossible — for reasons relating to the time-barring of action — to impose a penalty on the former owner of the assets, namely, Saiag/ITR. In that regard, being time-barred from imposing a fine on the former operator is no different from a situation in which that operator has ceased to exist in law, or has ceased all business activity, a category for which the Court of Justice has explicitly confirmed economic succession with a view to ensuring the effective enforcement of EU competition law. [10]

30. In response, Parker Hannifin Manufacturing and Parker-Hannifin contend that the Commission misinterprets the case-law on economic continuity. According to the respondents, and contrary to the assertions made by the Commission, the Court did not lay down, in the judgment in *ETI and Others* (EU:C:2007:775), a mechanical rule according to which the existence in the past merely of a structural link between the transferor and the transferee of the business involved in an infringement automatically renders the transferee liable for that infringement. The Court has expressly ruled that such a consequence was possible only if it was demonstrated that the transferor and the transferee were subject to effective control by the same person at the time of the structural link and had carried out, in all material respects, the same commercial instructions. Parker Hannifin Manufacturing and Parker-Hannifin add that their interpretation is borne out by the subsequent judgment in *ThyssenKrupp Nirosta* v *Commission* (C-352/09 P, EU:C:2011:191), in which neither the Commission nor the Court mentioned the structural link which originally existed between the transferor (Thyssen Stahl) and the transferee (ThyssenKrupp Nirosta) as a possible, let alone sufficient, ground for holding ThyssenKrupp Nirosta liable for Thyssen Stahl's unlawful conduct.

10 — The Commission refers to the judgment in *ETI and Others* (EU:C:2007:775, paragraph 41).

31. In the contested decision, however, the Commission wholly failed to assess whether, during the short period in which the structural link existed between ITR and ITR Rubber, those two entities had, as required by the judgment in *ETI and Others* (EU:C:2007:775), been subject to control by the same person and, given the close economic and organisational links between them, had carried out, in all material respects, the same commercial instructions. The contested decision refers only to the fact that, at the time of the transfer of the marine hose business by ITR to ITR Rubber, the latter was 'wholly owned' by the former. That decision makes no reference to the case-law under which a parent company may be presumed to exercise decisive influence over a wholly-owned subsidiary. If, moreover, the contested decision were, by implication, based on that presumption, it is the respondents' view that their rights of defence would be infringed, as the statement of objections made no clear reference to it.

32. Parker Hannifin Manufacturing and Parker-Hannifin infer from this that, since the Commission failed to assess, in the contested decision, whether ITR and ITR Rubber (which became Parker ITR) constituted one undertaking in the short period during which they had a structural link, the General Court did not err in law in concluding that Parker ITR could not be held liable for the conduct of ITR solely on the basis of such a past structural link.

33. The respondents point out, lastly, that the rules on time-barring are objective rules, which apply independently of the entities involved in an infringement. Although those entities might seek to evade liability by means of transfers of subsidiaries, they do not have any control over the application of time bar rules. It follows that the Commission conflates two issues when it asserts that a situation in which the imposition of a fine on an entity is time-barred is equivalent to a situation in which the former operator has ceased to exist in law or has ceased all business activity.

3. Assessment

a) Introduction

34. The present case shares a common theme with the case that led to the judgment in *ETI and Others* (EU:C:2007:775), in which the Court found that there was economic continuity in circumstances very similar to those of the present case. In *ETI and Others*, there had been an intra-group transfer of assets to a newly-formed subsidiary, created in order to be privatised and subsequently sold, as in the present case (with no indication of any wrongful intention). Both parties to the present appeal rely, moreover, on that judgment, albeit to support opposing arguments.

b) Case-law

35. It should be borne in mind that EU competition law applies to undertakings whose structure, method of financing, legal organisation and share ownership may vary over time. I believe (as does the Commission) that that fact, and the need to adapt the effective application of competition law to those changes, may justify accepting derogations from the principle of personal responsibility, particularly in situations such as that in the case which resulted in the judgment in *ETI and Others* (EU:C:2007:775) or that of the present case, in which the principle of economic continuity applies.

36. Clearly, if an undertaking acquires another by purchasing its shares, there will not normally be any problem because the *legal entity* remains the same (transfer of legal entity). Difficulties will arise, however, in situations in which the purchaser buys the 'business' from an undertaking involved in an infringement and where it is the *assets* that are transferred (transfer of assets).[11]

11 — See, for example, Jones, A., and Sufrin, B., *EC Competition Law*, Oxford, 2004, p. 121.

37. In *Commission* v *Anic Partecipazioni* (C-49/92 P, EU:C:1999:356, paragraph 145), the Court ruled, as regards the principle of economic continuity (which Anic claimed should be applied, given the transfer of its assets involved in the infringement), that '[i]n complaining that the Court of First Instance attributed responsibility for the infringement to it although it had transferred its polypropylene business to Monte, Anic is disregarding the principle of personal responsibility and neglecting the decisive factor, identifiable from the case-law of the Court of Justice (see, to that effect, *Suiker Unie and Others* v *Commission*, [40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174], paragraphs 80 and 84), that the "economic continuity" [principle] can only apply where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed. It also follows that the application of these tests is not contrary in any way to the principle of legal certainty'.

38. However, the mere fact that a legal entity involved in an infringement continues to exist does not necessarily mean that the Commission will not attribute responsibility to the entity to which the economic activities were transferred.

39. As the Court recently pointed out in *Versalis* v *Commission* (C-511/11 P, EU:C:2013:386), '[i]n accordance with settled case-law, European Union competition law refers to the activities of undertakings and … the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. When such an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement [[12]]. … The Court of Justice has already held that, *where two entities constitute one economic entity, the fact that the entity that committed the infringement still exists does not as such preclude imposing a penalty on the entity to which its economic activities were transferred*. In particular, applying penalties in this way is permissible where those entities *have been subject to control by the same person and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions*'[13] (emphasis added). In the judgment under appeal, the General Court refers, furthermore, to the same conditions for application of the principle of economic continuity (paragraphs 92 and 93).

40. I can understand the logic behind that case-law: given the lengthy duration of cartels and, sometimes, of the Commission's investigations, it is important — in situations of intra-group economic continuity (which could furthermore be used in order to escape responsibility) — to avoid a situation in which the infringement goes unpunished, in particular out of respect for the principle of the effectiveness of EU competition law.

41. In *HFB and Others* v *Commission* (T-9/99, EU:T:2002:70, paragraph 106), the General Court rightly ruled that '[i]t is true that in certain circumstances an infringement of the rules on competition may be imputed to the economic successor of the legal person responsible, even where the latter has not ceased to exist on the date of adoption of the decision finding the infringement, so that the effectiveness of those rules will not be compromised owing to the changes to, *inter alia*, the legal form of the undertakings concerned'.[14]

42. In its Grand Chamber judgment in *ETI and Others* (EU:C:2007:775, paragraphs 40, 41 and 44), the Court of Justice confirmed that application of the principle of economic continuity was justified by the need to ensure that penalties for failure to comply with competition law have a deterrent effect.

12 — The Court of Justice refers, in that regard, to the judgment in *ETI and Others* (EU:C:2007:775, paragraphs 38 and 39 and the case-law cited).

13 — The Court of Justice refers to the judgment in *ETI and Others* (EU:C:2007:775, paragraphs 48 and 49 as well as to the case-law cited, that is to say, to *Aalborg Portland and Others* v *Commission*, EU:C:2004:6, paragraphs 355 to 358).

14 — The General Court refers to *NMH Stahlwerke* v *Commission* (T-134/94, EU:T:1999:44, paragraph 127).

43. In paragraph 41 of that judgment, the Court pointed out that 'if no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties'.[15] The Court went on to state in paragraph 42 that 'when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical'.

44. Similarly, the General Court ruled, in paragraph 51 of its judgment in *Hoechst* v *Commission* (T-161/05, EU:T:2009:366) that '... for the effective enforcement of competition law it may become necessary, by way of exception, to attribute a cartel offence not to the initial operator but to the new operator of the undertaking which participated in the cartel if the new operator may in fact be regarded as the successor to the original operator, that is, if he continues to operate the undertaking which participated in the cartel'. The General Court went on to cite paragraph 41 of the judgment in *ETI and Others* (EU:C:2007:775).

c) The present case

i) General view

45. It is my view that, although the General Court did indeed consider (albeit without analysing it thoroughly) the correct case-law relating to intra-group economic continuity, it did not apply it properly to the present case.

46. As the Commission has rightly pointed out, it is necessary, in the present case, to draw a distinction between two transfers of assets (two separate transactions, each with its own legal consequences):[16] (i) an *intra-group* transfer, within the Saiag group, within which ITR assets were transferred to ITR Rubber; and, subsequently, (ii) an *inter-group* transfer, between the Saiag group and the Parker-Hannifin group, through the sale by Saiag to Parker-Hannifin of ITR Rubber, which later became ITR Parker.[17]

47. However, the judgment under appeal clearly focused only on the second transfer (see, for example, paragraphs 116 and 121 of that judgment), as that interpretation had been proposed by the applicants at first instance and endorsed by the General Court. In doing so, the General Court erred in law by incorrectly appraising the facts, which led it to misapply the principle of economic continuity. The General Court wrongly bases its considerations on the absence of structural links after the transfer of assets to Parker ITR — that is to say, between Saiag/ITR and Parker-Hannifin — even though such links had existed between ITR and its wholly-owned subsidiary, Parker ITR, since the first transfer of assets (intra-group) until the date of the second transfer (inter-group).

15 — The Court of Justice refers here, in that regard, to the following case-law: *ACF Chemiefarma* v *Commission* (41/69, EU:C:1970:71, paragraph 173); *Showa Denko* v *Commission* (C-289/04 P, EU:C:2006:431, paragraph 61); and *Britannia Alloys & Chemicals* v *Commission* (C-76/06 P, EU:C:2007:326, paragraph 22).

16 — Although two transactions may be economically interdependent, the first cannot be disregarded, nor can the legal liabilities arising from it be regarded as having disappeared, on the view that *ipso facto* it was absorbed into the second.

17 — It is my view (and that of the Commission) that the subject-matter of the present case is clearly not merely the sale of a legal entity that participated in the infringement; if ITR had been sold as a legal entity, the liability which would have continued to attach to that entity within the new group with regard to the past is clear from *Cascades* v *Commission* (EU:C:2000:626). Nor can the present case be presented as the sale of assets to an independent group.

48. In my view, the first transfer took place in the circumstances required by the case-law for the situation to be viewed as a case of economic continuity, allowing a derogation from the principle of personal responsibility.

49. According to the case-law,[18] where two entities (here, ITR and ITR Rubber) constitute a single economic entity, the fact that the entity which committed the infringement (ITR) still exists does not in itself preclude the imposition of a penalty on the entity to which its economic activities were transferred (ITR Rubber). Moreover, that way of applying penalties is permissible in particular where the entities have been under the control of the same person (here, Saiag) and accordingly, given the close economic and organisational links between them, have carried out, in all material respects, the same commercial instructions.

50. It is important to point out that, in ITR's case, the assets were transferred to an entity (ITR Rubber) formed within the actual undertaking which was the author of the infringement (ITR) during the period of that infringement and, as such, the conditions for intra-group economic continuity were met. Later, it was not the assets but the legal entity (ITR Rubber) that was transferred from the Saiag/ITR group to the Parker-Hannifin group before being renamed Parker ITR. I would add that the Commission *has not, in the light of the principle of economic continuity, attributed responsibility to Parker-Hannifin, for the period before its acquisition of shares in ITR Rubber.*

51. The only point at issue is therefore the *responsibility of ITR Rubber (or Parker ITR) itself*, which, before its sale to Parker-Hannifin, had received the infringing assets from its own parent company, ITR, a member of the Saiag/ITR group. I consider the Commission's view to be correct, in so far as it finds that that intra-group transfer of assets before the sale of the subsidiary makes it possible, in accordance with the case-law, to attribute responsibility to ITR Rubber (or Parker ITR), as the intra-group economic successor, for the unlawful conduct of ITR. Whatever the ultimate objectives pursued by Saiag/ITR in forming ITR Rubber, the transfer constituted an internal constitutional change[19] by means of which the business involved in the cartel was transferred to ITR Rubber, which — initially under that name and subsequently under the name Parker ITR — *continued that business and its participation in the cartel for not less than six years*. In other words, ITR Rubber (which became Parker ITR) remained responsible, creating a new responsibility for its new owner as a result of the continued participation in the infringement. Furthermore, contrary to what the General Court appears to believe, the sale of the legal entity cannot suffice to interrupt the earlier economic continuity.[20]

ii) Detailed analysis of the General Court's reasoning

52. Returning to the judgment under appeal, it may be noted that the General Court devotes no fewer than 48 paragraphs to the principle of economic continuity (paragraphs 83 to 130 of that judgment). Nevertheless, the grounds on which the General Court excluded the liability of ITR Rubber (which later became Parker ITR following the transfer to the Parker-Hannifin group) as the economic successor to ITR are not, in my view, made clear in the judgment under appeal.

18 — See the judgments in *Aalborg Portland and Others* v *Commission* (EU:C:2004:6, paragraphs 356 to 359) and *ETI and Others* (EU:C:2007:775, paragraphs 48 and 49). Paragraph 359 of *Aalborg Portland and Others* v *Commission* (EU:C:2004:6) is particularly relevant in the present case: '[i]n that regard, it is true that in *Commission* v *Anic* (paragraph 145) the Court held that there can be economic continuity only where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed. *However, that case concerned two existing and functioning undertakings one of which had simply transferred part of its activities to the other and where there was no structural link between them. As is apparent from paragraph 344 of this judgment, that is not the position in this case*' (emphasis added).

19 — See the judgment in *ETI and Others* (EU:C:2007:775, paragraphs 41, 42 and 44).

20 — The sale of the contested assets within the Saiag group and the subsequent sale of the legal entity Parker ITR to a new group must be treated, conceptually, as distinct events.

53. The paragraphs of the judgment under appeal cited in point 22 above suggest that the General Court reasoned as follows: (i) ITR Rubber had been in existence for only seven months within the Saiag group and had only briefly (one month) pursued activities in connection with marine hoses (paragraph 115); (ii) ITR Rubber was formed within the Saiag group solely with a view to its sale to a third-party undertaking (namely, the Parker group) (paragraph 115); (iii) 'in those circumstances', it is the former operator of the activities at issue (ITR and its parent company, Saiag) which should have answered for the infringement for the period before 1 January 2002, the date of transfer to ITR Rubber of the business involved in the cartel (first sentence of paragraph 116, as well as paragraphs 118 [21] and 119 [22]); and (iv) the transfer, by Saiag, of ITR to Parker-Hannifin cannot therefore be regarded as a case of economic continuity (second sentence of paragraph 116).

54. I will analyse below the factors and circumstances on which the General Court based its reasoning in order to reject application of the principle of economic continuity.

– When must the structural links between the transferor and transferee have existed? Must the transferor have ceased to exist in law?

55. It is true that the judgment in *ETI and Others* (EU:C:2007:775, paragraph 50) refers to the structural links between the transferor and the transferee 'at the time of their infringing conduct'.

56. However, in judgments under appeal, the Court of Justice has confirmed the existence of economic continuity even where the transfer of assets had taken place after the cessation of the infringement (which, to my mind, supports the view that there is no requirement for structural links to exist throughout the infringement period), but where the structural links between both the transferor and transferee entities existed *at the date of the Commission's decision*.

57. In *Cimenteries CBR and Others* v *Commission*, [23] the General Court confirmed the economic succession of Aalborg, which had received the assets which were the subject of the infringement committed by Aktieselskabet Aalborg Portland-Cement Fabrik (AAPCF) at its formation in 1990 (with retroactive effect as from 1 January 1990), although the infringement lasted from January 1983 to December 1988. While Aalborg submitted that the company which had committed the infringement 'had not ceased to exist in law, as it had become a holding company owning, under a new name, 50% of Aalborg's shares' (paragraph 1334), the General Court rejected that argument on the ground that those changes took place as part of the reorganisation of the group, which made it possible to view Aalborg and the author of the infringement as constituting the same economic entity within the meaning of Article 81 EC and, in consequence, for the Commission to 'hold Aalborg liable for the activities of the company' at issue (paragraph 1335).

58. At the appeal stage, the Court of Justice approved the judgment of the General Court on that point. [24]

21 — 'Consequently, it was for the Commission to find that Saiag and ITR were responsible for the infringement until 1 January 2002 and then, as the case may be, to find that that infringement was time-barred, as the settled case-law permits it to do ...'.

22 — 'In such circumstances, the Commission could not, by contrast, hold ITR Rubber responsible for the period prior to 1 January 2002, the date on which the assets involved in the cartel were transferred to it'.

23 — T 25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraphs 1334 and 1335 of the grounds and paragraph 15 of the operative part.

24 — *Aalborg Portland and Others* v *Commission* (EU:C:2004:6, paragraphs 344 to 359).

59. Aalborg had also submitted that it ‘could not be held accountable for the activities of a cartel during the period in the past to which the Cement Decision, unlike the [statement of objections], ascribes that infringement. Since [it] had not yet been formed when the meetings in question took place, its representatives were indisputably absent from the meetings regarded as fundamental to the cartel whose existence was established in the Cement Decision’ (paragraph 351 of that judgment of the Court of Justice).

60. However, after stating that the point of law related to whether the fact that the company that had committed the infringement ‘still exist[ed][,] wholly and necessarily preclude[d] the Commission from proceeding against Aalborg as being, from an economic and organisational point of view, the author of the infringement’, the Court of Justice responded in the negative, stating that, given the economic identity of the undertaking before and after the changes which took place, the continued existence of that company as a legal entity ‘did not therefore in itself constitute a ground for annulling the ... Decision’ (paragraph 358). While acknowledging that it held in *Commission* v *Anic Partecipazioni* (EU:C:1999:356) that there could be economic continuity only where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed, the Court pointed out that the case which gave rise to that judgment involved ‘two existing and functioning undertakings one of which had simply transferred part of its activities to the other and where there was no structural link between them’ (paragraph 359), [25] while that was not the position in the present case.

61. That was also the approach taken by the General Court in *Jungbunzlauer* v *Commission* (EU:T:2006:270, paragraphs 131 and 132): ‘[s]o far as the period prior [to the restructuring of the Jungbunzlauer group in 1993] is concerned, the Court must find ... that until 1993 Jungbunzlauer GmbH was responsible not only for the group’s operations on the citric acid market, but also for managing the entire business of the group. The latter function, which consisted in conducting the group’s business, including in the citric acid market, *was however transferred in 1993 to Jungbunzlauer, which therefore became the economic successor of Jungbunzlauer GmbH with respect to the management of the group business*’ (emphasis added), but ‘[t]he fact that a company continues to exist as a legal entity does not exclude the possibility that, with reference to [EU] competition law, there may be a transfer of part of the activities of that company to another which becomes responsible for the acts of the former’.

62. Similarly, in *ArcelorMittal Luxembourg and Others* v *Commission*, [26] the finding of economic continuity was confirmed even though the transfer of assets to ProfilARBED had taken place in 1992, that is to say, after the cessation of the infringement in 1991.

63. The General Court rightly pointed out in that judgment (in paragraphs 36 and 111, respectively) that ‘[i]n the words of Article 1 of the contested decision: “The undertaking composed of [ARBED, TradeARBED and ProfilARBED] participated, in breach of Article 65(1) [CS], in a series of agreements and concerted practices having the object or effect of fixing prices, allocating quotas and exchanging, on a large scale, information on the Community market for beams. The participation of the undertaking thus composed in those infringements is established between *1 July 1988 and 16 January 1991*”’ and ‘[i]n the present case, the formation of ProfilARBED, *in 1992*, as a wholly-owned subsidiary of ARBED, in order to carry out the economic and industrial activities of ARBED in the beams sector constitutes a circumstance comparable to those in *Aalborg Portland and Others* v *Commission* and *Jungbunzlauer* v *Commission*’ (emphasis added).

25 — See point 39 above.

26 — EU:T:2009:90.

64. That judgment of the General Court was subsequently confirmed by the Court of Justice, which, in paragraph 104 of *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* (EU:C:2011:190) states that, '[a]s to ARBED's argument that the attribution of the unlawful conduct to a sister company by virtue of the concept of an economic entity is inconsistent because it leads to stricter rules on liability being imposed on that company than on the parent company, it suffices to note that in the present case *the Commission attributed that conduct to the sister company because it had taken over the commercial activities of the parent company*, and that, since the liability of the sister company depended on that of the parent company, the rules on liability imposed on the sister company are consequently no stricter than those applied to the parent company' (emphasis added).

65. It is my view (and that of the Commission) that to take a different stance would lead to arbitrary results, as the ability to attribute to the transferee entity liability for the unlawful conduct during the period preceding the transfer would depend on whether structural links with the transferor were maintained, with radically different results depending on whether those links were broken shortly before or after the cessation of the infringement.

66. Furthermore, it should be pointed out that the Court of Justice has accepted that a transferee entity may be regarded as the economic successor to the transferor entity, even if the structural links which existed between them *for the entire infringement period* (and, accordingly, at the date of the transfer of activities) had disappeared by the date of the decision. [27]

67. It is clear from the case-law mentioned above that application of the principle of intra-group economic continuity does not require the transferor to have ceased to exist in law or the structural links between the transferor and the transferee to have lasted throughout the entire infringement period.

68. In my view, the relevant date for assessing whether the transfer of assets is within a group or between independent undertakings must be that of the transfer of assets itself. [28] In the present case, it can be seen from the file that it is indeed the Saiag/ITR group which formed ITR Rubber, the subsidiary to which the assets were transferred, when the latter was still under the former's control.

69. It should also be noted here that it appears that, contrary to their position at first instance, the respondents now acknowledge [29] that it is possible to make a finding of economic continuity when structural links no longer exist at the time when the Commission decision is adopted. [30]

– Duration of the structural links

70. It is true that the structural links between ITR and ITR Rubber existed for seven months at most — from 27 June 2001 to 31 January 2002 — while the infringement period covered by the contested decision ran from 1986 to 2007 and that decision was adopted in 2009. That said, it remains the case that the conditions laid down in the case-law for attributing to ITR Rubber (which became Parker ITR) liability, as intra-group economic successor, for the past actions of ITR and

27 — See, in that regard, the judgment in *ETI and Others* (EU:C:2007:775, paragraph 50), in which the Court did not adopt the contrary view suggested by Advocate General Kokott in paragraph 96 of her Opinion (EU:C:2007:404), according to which structural links must still exist *at the date of the decision*.

28 — See *Aalborg Portland and Others* v *Commission* (EU:C:2004:6, paragraphs 356 and 357) and the judgment in *ETI and Others* (EU:C:2007:775, paragraphs 48 to 52).

29 — See paragraph 35 of their response before the Court of Justice.

30 — See paragraphs 28, 29, 35 and 41 of their response before the Court of Justice and paragraph 59 of the judgment under appeal, according to which '[t]he applicants explain that recent case-law confirms that in cases of intra-group transfers of assets, the economic succession theory can apply only if the structural links between the transferor and the transferee of the assets still exist at the time of the adoption of the Commission's decision finding that there has been an infringement'.

Pirelli Treg after 1986 are met in the present case.[31] The liability of its legal and economic predecessor, Pirelli Treg, was transferred to ITR following its merger with that entity in 1990. On 27 June 2001, ITR subsequently formed ITR Rubber (which became Parker ITR) as a wholly-owned subsidiary and then, on 1 January 2002, transferred the infringing assets to that subsidiary. I would add that the legal entity ITR Rubber was formed by Saiag/ITR and not by the purchaser, Parker-Hannifin, the assets being transferred to ITR Rubber when it was still under the control of Saiag/ITR.[32] From 27 June 2001 until the sale of Parker ITR on 31 January 2002, ITR (the transferor of the assets) and ITR Rubber (which became Parker ITR) (the transferee) were connected by the structural links that exist between a parent company and its wholly-owned subsidiary, and were part of the same undertaking (Saiag). The transfer of assets which took effect on 1 January 2002 therefore took place at a time when those structural links existed.

71. While it is necessary for those structural links to exist at the date of the transfer, it should not, however, be necessary for them to last for a long time or throughout the entire infringement period[33] in order for two entities to constitute one economic entity for the purposes of EU competition law.[34] The fact that ITR Rubber did not remain in the Saiag group and that there was only a brief period between its formation and its sale to the Parker-Hannifin group should therefore be irrelevant, particularly because once the contested assets had been transferred, Parker ITR continued its participation in the cartel.[35] Relying on events subsequent to the transfer of assets (and having to examine them) would clearly create legal uncertainty.

72. Although the case-law does not provide a great deal of specific information about the required duration of structural links (here it is seven months and not one month, as contended by the respondents), I would point out that, in the case which gave rise to the judgment in *Areva and Others* v *Commission* (T-117/07 and T-121/07, EU:T:2011:69) and, on appeal, *Areva* v *Commission* (C-247/11 P and C-253/11 P, EU:C:2014:257),[36] the parent company (Areva Group) had been the owner of a subsidiary during a period of four months, which was regarded as sufficient for it to be given a considerable fine, in respect of which the parent company was held jointly and severally liable.

– What about the fact that ITR Rubber was, from its formation, intended for sale and was sold shortly afterwards?

73. I do not believe that those facts need to be taken into account. The taking into consideration of a subjective factor such as the purpose of the formation of a subsidiary (paragraph 115 of the judgment under appeal) would result in legal uncertainty, as the application of the principle of economic continuity must be governed by objective and clear rules and cannot depend on subjective intentions.

31 — See recitals 370 to 373 to the contested decision.

32 — It is therefore that control exercised by the Saiag/ITR group over the business in question within that group which justifies attributing to ITR Rubber (which became Parker ITR) liability on grounds of economic continuity, by way of derogation from the principle of personal responsibility.

33 — In that regard, the Commission relies on *Aalborg Portland and Others* v *Commission* (EU:C:2004:6) and *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* (EU:C:2011:190, paragraph 104), in which the Court of Justice, at the appeal stage, approved the analysis undertaken by the General Court, which had acknowledged the existence of economic continuity even though the transfer of assets occurred after the cessation of the infringement.

34 — See, for example, the judgment in *ETI and Others* (EU:C:2007:775, paragraph 48 et seq.).

35 — According to the Commission, when the new parent company, Parker-Hannifin, became aware of the infringement, it nevertheless decided to conceal the cartel, in the hope that it would remain undiscovered.

36 — The judgment of the General Court was partially set aside by the Court of Justice, but not on that point.

74. The taking into consideration of the economic objective pursued by the transfer on a longer- or shorter-term basis is also contrary to the approach adopted in the judgment in *ETI and Others* (EU:C:2007:775), in which the Grand Chamber of the Court did not take into account: (i) the fact that the transfer of business to ETI from the Ammistrazione autonoma dei monopoli di Stato (AAMS) had been made with a view to its subsequent privatisation, as that did not exclude economic continuity, or ii) the fact that the economic predecessor had not disappeared.

75. Thus, the fact that ITR Rubber was specifically formed to receive the assets in question does not preclude a finding that there was economic continuity and provides no reasonable grounds for excluding Parker ITR's responsibility as ITR's economic successor. The situation is no different from that of ETI, which was formed specifically to continue the activities of AAMS, the national legislation which formed ETI providing, at the same time, for the commercial activities of AAMS in the tobacco sector to be transferred to ETI.

76. The Court also noted in the judgment in *ETI and Others* (EU:C:2007:775, paragraph 44)[37] that '[t]he fact that the decision to transfer an activity is taken not by individuals, but by the legislature in view of a privatisation, is equally irrelevant. *Measures to restructure or reorganise undertakings adopted by the authorities of a Member State cannot have the effect, lawfully, of compromising the effectiveness of Community competition law*' (emphasis added).

77. Similarly, the structural links between the transferor and the transferee of the assets in question — in particular, within the undertaking which is the author of the infringement — must be assessed independently of events subsequent to the transfer, such as the dissolution of the undertaking or the sale of its transferee subsidiary.

iii) Another argument put forward by the respondents: what type of structural link?

78. The respondents contend that the Court of Justice did not, in the judgment in *ETI and Others* (EU:C:2007:775), lay down a mechanical rule according to which the existence in the past merely of a structural link between the transferor and the transferee of the business involved in an infringement automatically renders the transferee liable for the infringement. The Court of Justice expressly ruled that such a consequence was possible only if it was demonstrated that the transferor and the transferee were subject to effective control by the same person at the time of the structural link and had carried out, in all material respects, the same commercial instructions.[38]

79. The respondents rely on the fact that, in that judgment, the Court — while noting the existence of a structural link between the two entities at issue (namely, that they were owned by the same public authority) — nevertheless left it to the national court to determine whether those entities had been 'subject to the control'[39] of that authority, which the national court, moreover, did not find to be the case.

80. In the respondents' view, in the contested decision, the Commission entirely failed to assess whether, during the short duration of the structural link which existed between ITR and ITR Rubber, those two entities had been, as required by the judgment in *ETI and Others* (EU:C:2007:775), under the control of the same person and had, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions. The contested decision

37 — See, also, point 95 of the Opinion of Advocate General Kokott in that case (EU:C:2007:404).

38 — Paragraph 49 of that judgment.

39 — It should be noted that, in their response before the Court of Justice, the respondents state that 'the Court left the Italian Consiglio di Stato with the task of assessing, on the basis of the "*actual control*" test laid down in its judgment, whether ETI could be held liable for AAMS's conduct' (emphasis added). Although the English term used in the original of their pleading is 'actual control', that expression does not appear as such in the English translation of the judgment in *ETI and Others*. Paragraph 51 of that judgment refers to AAMS and ETI being 'sous la tutelle' ('subject to the control') of the public entity concerned, which in English has been rendered as 'AAMS and ETI were subject to the control of that public entity'.

refers only to the fact that, at the time of the transfer of the marine hose business by ITR to ITR Rubber, the latter was 'wholly owned' by the former. That decision makes no reference to the case-law under which a parent company may be presumed to exercise decisive influence over a wholly-owned subsidiary. The respondents infer from this that, since the Commission failed, in the contested decision, to assess whether ITR and ITR Rubber (which became Parker ITR) constituted a single undertaking during the short period of time during which they had a structural link, the General Court did not err in law by finding that Parker ITR could not be held liable for the conduct of ITR solely on the basis of such a past structural link.

81. In addition to the fact that, in *ETI and Others*, it was reasonable for the Court to leave it to the national court to determine whether AAMS (which transferred its activities) and ETI (which was the transferee of those activities), owned by the same public entity, had indeed been subject to the control of that entity (a problem which does not arise here, where the structural link connects only ITR and ITR Rubber), the respondents' argument is not convincing since the Court clearly ruled in *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraph 60) that '[i]n the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary [[40]], and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary [[41]]'.

82. The Court of Justice went on to state in paragraph 61 of that judgment that '[i]n those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market [[42]]'.

83. The respondents also rely on *ThyssenKrupp Nirosta* v *Commission* (EU:C:2011:191), in which neither the Commission nor the Court of Justice mentioned the structural link which originally existed between the transferor (Thyssen Stahl) and the transferee (ThyssenKrupp Nirosta) as a possible, let alone sufficient, ground for holding the latter entity liable for the unlawful conduct of the former.[43]

84. In my view, that judgment is not relevant in the present case in so far as, in the case which gave rise on appeal to the judgment in *ThyssenKrupp Nirosta* v *Commission* (EU:C:2011:191), the issue before the Court of Justice was not whether economic continuity could result from a single transfer of assets, but from a simple statement by the purchaser of assets to accept liability for the unlawful conduct linked to those assets. In the context of the appeal, the Court of Justice was able to rule only on whether or not the General Court's assessment (which related only to that statement) was correct.

40 — The Court of Justice refers, in that regard, to *Imperial Chemical Industries* v *Commission* (48/69, EU:C:1972:70, paragraphs 136 and 137).

41 — The Court of Justice refers, in that regard, to *AEG-Telefunken* v *Commission* (107/82, EU:C:1983:293, paragraph 50) and *Stora Kopparbergs Bergslags* v *Commission* (EU:C:2000:630, paragraph 29).

42 — The Court of Justice refers, in that regard, to *Stora Kopparbergs Bergslags* v *Commission* (EU:C:2000:630, paragraph 29).

43 — Paragraph 153 of that judgment.

d) Conclusion with regard to the first ground of appeal

85. It is clear from the foregoing that, in a case such as that currently under consideration, economic continuity, within the meaning of the case-law of the Court of Justice, may exist between two legal entities which have had structural links, even if only for a short period. Accordingly, the Commission was entitled to rely on the presumption that the parent company (ITR) which wholly owns a subsidiary (ITR Rubber) exercises actual decisive influence over the conduct of its subsidiary, in order to establish that the transferor and the transferee of the assets were 'under the control of the same person' and had carried out, 'in all material respects, the same commercial instructions'.[44]

86. That is what the Commission did in recital 370 to the contested decision, by pointing out that '[a]t the time of the transfer ITR SpA and ITR Rubber Srl shared the economic links of a parent and a wholly owned subsidiary' and that they 'belonged to the same undertaking'.[45]

87. ITR owned all the shares in ITR Rubber for the period from 27 June 2001 to 31 January 2002, that is to say, for seven months. According to settled case-law, a legal presumption therefore arose to the effect that ITR exercised a decisive influence over ITR Rubber.[46]

88. As is clear from *Akzo Nobel and Others* v *Commission* (EU:C:2009:536) (see points 81 and 82 above), the Commission's argument, based on the presumption of 100% in the present case, was therefore correct.

89. I would add that the respondents were entitled to rebut the presumption of decisive influence arising from the ownership of 100% of the capital, and it appears that they attempted to do so in their pleadings before the General Court. They relied, inter alia, on the provisions of the agreement concluded in December 2001 between Parker-Hannifin and ITR for the purposes of transferring ITR Rubber.

90. The respondents also contend, at the appeal stage, that a number of those provisions prohibited ITR, with effect from the conclusion of that agreement, from exercising any influence whatsoever over ITR Rubber.

91. The agreement in question (a 64-page document containing 12 chapters divided into multiple sections) was actually produced before the General Court as an annex to the application,[47] but, as the General Court excluded from the outset the existence of economic continuity between ITR and ITR Rubber, it did not examine the (contradictory) arguments based on that document by the respondents and the Commission.

92. Moreover, I take the view that, contrary to the finding of the General Court, the Commission was not required to attribute responsibility for the unlawful conduct to the parent companies, Saiag and ITR.

44 — It is interesting to note that, in the investigation into the marine hose cartel in the United States, Parker ITR was accused of and pleaded guilty to unlawful conduct dating back to 1999, that is to say, three years before the acquisition of the assets by Parker. See DOJ Press Release, Italian Subsidiary of U.S.-Based Company Agrees to Plead Guilty for Participating in International Price-Fixing Conspiracy (16 February 2010), http://www.justice.gov/atr/public/press_releases/2010/255258.htm. In the United States, the concept of succession of liability does not even include the condition of economic continuity. In principle, liability (criminal, moreover) does not diminish at the point of merger or acquisition of assets, but passes, at the time of the merger, from the preceding entity to the following entity. See, in that regard, 'EU Court Decision Significantly Reduces Cartel Fines in Marine Hose Investigation', King & Spalding, 22 May 2013, which refers to the American case-law in question.

45 — See, also, regarding the structural links, recital 373 to the contested decision.

46 — That was acknowledged by ITR itself in the 'Act of transfer of marine hose assets by ITR to ITR Rubber' (Annex 2 to Parker's response to the statement of objections), p. 420 of the application initiating proceedings at first instance, which refers to ITR as the 'attuale unico socio controllante'.

47 — That agreement was also produced during the administrative procedure as an annex to the response to the statement of objections.

93. First, it is clear from the case-law of the European Union [48] that the Commission could choose to hold either the economic predecessor or the economic successor liable for the unlawful conduct, or to hold both of them jointly and severally liable. [49]

94. Secondly, the fact that, in a previous case, the Commission chose to attribute responsibility to the transferor parent company and not to the subsidiary that was transferred is irrelevant, since its former decision-making practice does not create a binding legal framework for assessing the legality of acts which it adopts subsequently. [50]

95. As the Commission has rightly pointed out, in choosing, in the present case, to attribute responsibility for the infringement to ITR Rubber, as the economic successor to ITR, the Commission used its discretion recognised by the case-law. [51]

96. It follows that the judgment under appeal must be set aside in so far as it ruled out the possibility of applying the principle of economic continuity in the present case. Consequently, the case must be referred back to the General Court for it to examine whether the evidence presented by the respondents is sufficient to rebut the presumption that ITR — as a parent company which holds 100% of the capital in ITR Rubber and belongs, like the latter, to the same group — exercised a decisive influence over the conduct of its subsidiary; and also the argument, presented in the alternative by the respondents, that, in the event that the contested decision relied, by implication, on that presumption, their rights of defence were infringed, since the statement of objections made no clear reference to it. [52]

97. Lastly, it is necessary to comment on one last point in the context of this ground of appeal. The respondents observe that, in its appeal, the Commission has not disputed the paragraphs of the judgment under appeal in which the General Court upheld their fifth and sixth pleas in law and ruled that the increase in the fine on the ground that they had played the role of leader had been wrong (paragraphs 139 and 140, 145 and 146 as well as 253 and 254). The respondents infer from this that, on that point, the judgment under appeal has become final. That view is manifestly incorrect. In the paragraphs referred to, the General Court did not in any way examine the merits of the arguments put forward to contest the role of leader played by Parker ITR. It simply drew the inferences automatically from its findings relating to the absence of economic continuity. The setting aside of the judgment which I propose covers the paragraphs at issue.

48 — See *ArcelorMittal Luxembourg and Others* v *Commission* (EU:T:2009:90, paragraphs 112 to 117 and the case-law cited, which was confirmed by the Court of Justice on appeal in *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*); see also *Hoechst* v *Commission* (EU:T:2009:366, paragraph 64, 'the power to impute to the new operator an infringement committed by the former operator is a power granted to the Commission, under certain circumstances, by the case-law, and not an obligation').

49 — The Court recently pointed out in *Dow Chemical and Others* v *Commission* (C-499/11 P, EU:C:2013:482, paragraph 49 and the case-law cited) that 'there is no "order of priority" when the Commission is imposing a fine on one or other of those companies', that is to say, on the parent company or its subsidiary.

50 — See, also, point 95 of Advocate General Kokott's Opinion in *ETI and Others* (EU:C:2007:404).

51 — See the judgments in *Erste Group Bank and Others* v *Commission* (C-125/07 P, C-133/07 P and C-37/07 P, EU:C:2009:576, paragraph 82) and *Team Relocations and Others* v *Commission* (C-444/11 P, EU:C:2013:464, paragraphs 159 and 160).

52 — See, in that context, for example, *Ballast Nedam* v *Commission* (C-612/12 P, EU:C:2014:193).

B – *Second ground of appeal: breach of the principle of ne ultra petita and the principle of non-discrimination*

1. The judgment under appeal

98. At the end of its analysis of the action, the General Court, exercising its unlimited jurisdiction, ruled on the final amount of the fine as follows:

'250 In that regard, it must be borne in mind that, by its nature, the fixing of a fine by the General Court, in the exercise of its unlimited jurisdiction, is not an arithmetically precise exercise. Moreover, the Court is not bound by the Commission's calculations, but must carry out its own assessment, taking all the circumstances of the case into account ...

…

257 In view of all of the foregoing, it is necessary, first, to annul Article 1(i) of the contested decision, in so far as it relates to the infringement attributed to Parker ITR in respect of the period before January 2002, secondly, to set the amount of the fine imposed on Parker ITR at EUR 6 400 000, of which Parker-Hannifin is held to be jointly and severally liable for EUR 6 300 000, since Parker-Hannifin cannot be found jointly and severally liable for the period from 1 to 31 January 2002, and, thirdly, to dismiss the action as to the remainder.'

2. Arguments of the parties

99. The Commission submits that, by reducing by EUR 100 000 the increase applied, on grounds of duration, to the amount of the fine that the parent company, Parker–Hannifin, is jointly and severally liable to pay, the General Court ruled *ultra petita*. Parker–Hannifin had not challenged either the actual duration of its participation in the infringement (which the General Court confirmed, furthermore, in paragraphs 129 and 256 of its judgment) or the corresponding duration factor applied in the calculation of the fine. In that regard, the Commission recalls that, in *KME Germany and Others* v *Commission* and *Chalkor* v *Commission*,[53] the Court of Justice points out that 'the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion' and that 'it is for the applicant to raise pleas in law against [the contested decision] and to adduce evidence in support of those pleas'.

100. The Commission notes that the statement of reasons given in paragraph 257 of the judgment under appeal to justify that reduction ('since Parker-Hannifin cannot be found jointly and severally liable for the period from 1 to 31 January 2002') is irrelevant, since, in the contested decision, Parker-Hannifin was not held liable for the period in question. To the extent that the General Court wished to refer to the fact that, as was held in the judgment under appeal, the subsidiary Parker ITR had participated in the infringement for one month longer (from 1 January 2002) than Parker-Hannifin (from 31 January 2002), it should not have reduced the amount in respect of which Parker-Hannifin is held jointly and severally liable: rather, it should have increased the fine imposed on Parker ITR.

53 — C-389/10 P, EU:C:2011:816, paragraph 131, and C-386/10 P, EU:C:2011:815, paragraph 64.

101. The Commission points out that, according to the guidelines that it applied with regard to the method of setting fines [54] and to which the General Court referred in the judgment under appeal, that difference of one month in the duration of the infringement cannot — having regard to the rounding method [55] applied to all the addressees of the contested decision — justify a reduction of the fine for only one of those addressees. The General Court thus acted in breach of the principle of non-discrimination. At the very least, it should have stated why, in the case of Parker-Hannifin, it deviated from the guidelines; and that it did not do.

102. The respondents first of all point out that, as the judgment under appeal was delivered in the context of a procedure which relates only to the respondents, the General Court was not in principle bound, when exercising its unlimited jurisdiction, by the method used by the Commission to calculate the fine. [56] Moreover, the General Court followed the guidelines when recalculating the fine imposed on Parker ITR.

103. As regards the part of Parker ITR's fine in respect of which Parker-Hannifin could be held jointly and severally liable, the General Court decided to grant the latter a reduction in order to take into account the fact that its participation (as Parker ITR's parent company) in the infringement had been one month shorter than the direct participation of Parker ITR. In the respondents' view, that is the only approach consistent with the principle of non-discrimination. Increasing the fine imposed on Parker ITR, as proposed by the Commission, would have constituted discrimination against Parker ITR as compared with the other addressees of the contested decision. Holding Parker-Hannifin liable for the same amount as that of the fine imposed on Parker ITR would have constituted discrimination against Parker-Hannifin since its participation in the infringement was shorter than that of Parker ITR.

3. Assessment

104. In my view, in reducing by EUR 100 000 the increase applied, on grounds of duration, to the fine that the parent company Parker-Hannifin is jointly and severally liable to pay, the General Court ruled *ultra petita*.

105. First, I considered in detail, in my Opinion in *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2013:619), the importance and the scope of the General Court's unlimited jurisdiction, as the General Court was required to carry out a detailed examination of the calculation of the fine. The General Court may not, when reviewing the legality of a measure, rely on the discretion that accrues to the Commission alone, as a basis for dispensing with an in-depth review of the fine imposed, in terms both of law and of fact, or for failing to require the Commission to explain the changes in its policy regarding fines in a specific case.

106. Secondly, it is nevertheless true that, according to the case-law, 'since it would be *ultra vires* for the [EU] judicature to rule *ultra petita* ..., the scope of the annulment which it pronounces may not go further than that sought by the applicant'. [57]

54 — 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).

55 — In accordance with point 24 of the Guidelines, '[p]eriods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year'.

56 — *Volkswagen* v *Commission* (C-338/00 P, EU:C:2003:473, paragraph 147).

57 — *Commission* v *AssiDomän Kraft Products and Others* (C-310/97 P, EU:C:1999:407, paragraph 52 and the case-law cited). See, also, for example, *Commission* v *Aktionsgemeinschaft Recht und Eigentum* (C-78/03 P, EU:C:2005:761, paragraphs 44 to 50), *ENI* v *Commission* (C-508/11 P, EU:C:2013:289, paragraph 103) and *Arkema* v *Commission* (C-520/09 P, EU:C:2011:619, paragraph 61 and the case-law cited).

107. However, it is clear that, in the present case, Parker-Hannifin challenged neither the actual duration of its participation in the infringement (which, as stated by the Commission, the General Court confirmed in paragraphs 129 and 256 of the judgment under appeal, that is to say, from 31 January 2002 to 2 May 2007), nor the corresponding factor in the calculation of the fine (the factor linked to duration).

108. Furthermore, in *KME Germany and Others* v *Commission* and *Chalkor* v *Commission*,[58] the Court points out that 'the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas'.

109. Admittedly, the respondents successfully challenged the role of leader attributed to them as an aggravating circumstance, whereupon the General Court adjusted the fine (see paragraphs 145, 146 and 254 of the judgment under appeal). However, it is my view that the General Court cannot, even in the exercise of its unlimited jurisdiction, use that as an opportunity to modify other aspects of the fine (in the present case, the factor linked to duration) *against which the applicant at first instance has not raised any plea*.

110. The statement of reasons given in paragraph 257 of the judgment under appeal[59] to justify that reduction ('since Parker-Hannifin cannot be found jointly and severally liable for the period from 1 to 31 January 2002') is also irrelevant since, in the contested decision, Parker-Hannifin was not found liable for the period in question.

111. Like the Commission, and to the extent that the General Court wished to refer to the fact that, as was noted in the judgment under appeal, Parker ITR had participated in the infringement for one month longer (from 1 January 2002) than Parker-Hannifin (from 31 January 2002), I think that the General Court should not have reduced the amount in respect of which Parker-Hannifin was held jointly and severally liable, but increased the fine imposed on Parker ITR. It is incorrect to reduce the *uncontested part* of the fine imposed on the parent company — instead of increasing the *contested part of the fine* imposed on Parker ITR.

112. As regards the Commission's argument that the General Court should have explained the reasons why it deviated from the guidelines in the case of only one of the addressees of the contested decision — namely, Parker-Hannifin — it seems clear to me, from paragraph 250 of the judgment under appeal, that the General Court wished to 'carry out its own assessment' and did not feel bound by the guidelines.

113. However, as was pointed out by Advocate General Maduro, 'the [EU] Courts, when exercising their unlimited jurisdiction, are bound by the same legal requirements that apply to the Commission when it imposes a sanction'. Those requirements include the duty to state reasons.[60]

58 — EU:C:2011:816, paragraph 131 and EU:C:2011:815, paragraph 64.

59 — See footnote 9 above.

60 — *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (C-397/03 P, EU:C:2006:328, paragraph 60). The Court of Justice refers, in that regard, to *Aalborg Portland and Others* v *Commission* (EU:C:2004:6, paragraph 372). See, also, for example, *Acerinox* v *Commission* (C-57/02 P, EU:C:2005:453), by which the Court partially set aside the judgment of the General Court for failure to state adequate reasons. See, also, Article 36 of the Statute of the Court of Justice, which provides that '[j]udgments shall state the reasons on which they are based'. See, inter alia, *Council* v *de Nil and Impens* (C-259/96 P, EU:C:1998:224, paragraph 32) and the orders in *Meyer* v *Commission* (C-151/03 P, EU:C:2004:381, paragraph 72) and *L* v *Commission* (C-230/05 P, EU:C:2006:270, paragraph 83).

114. Against that background, it is my view that the reduction of the fine imposed on Parker-Hannifin solely on the ground that 'Parker-Hannifin cannot be found jointly and severally liable for the period from 1 to 31 January 2002' (paragraph 257 of the judgment under appeal) is not supported by an adequate statement of reasons.

115. It follows that, for those reasons, the second ground of appeal must be upheld.

C – *The calculation of the fine in the event that the first ground of appeal is upheld*

116. In the event that the Court of Justice should decide to recalculate the fine, the respondents contend, in the first place, that no increase for aggravating circumstances can be applied.

117. In the second place, the respondents contend that the fine for which Parker ITR may, in the event of a recalculation, be considered solely liable, cannot, in accordance with Article 23(2) of Regulation (EC) No 1/2003,[61] exceed 10% of its turnover. They point out that, until 31 January 2002, Parker ITR (then ITR Rubber) and Parker-Hannifin were two separate undertakings. That is why the contested decision found Parker-Hannifin jointly and severally liable for only part (EUR 8 320 000) of the whole fine imposed on Parker ITR (EUR 17 290 000). For the same reason, for the purposes of determining the 10% upper limit for the amount of the fine for which Parker ITR is held solely liable, the contested decision should have taken into consideration Parker ITR's turnover in 2008 (EUR 9 304 570) and not the consolidated turnover of the Parker group.

118. The respondents' argument is the same as that of their eighth plea at first instance, which the General Court examined and rejected (see paragraphs 227 and 228 of the judgment under appeal). According to paragraph 228, '[s]ince the first plea has been upheld, the eighth plea, in so far as it relates to the period of the infringement prior to 1 January 2002 during which the infringement was committed by ITR, is ineffective. Moreover, it is unfounded, in so far as it relates to the period of the infringement after 1 January 2002, since, during the whole of that period, with the exception of one month, Parker ITR and Parker-Hannifin constituted an economic entity which was liable for the infringement penalised. The ceiling for the fine could therefore be calculated on the basis of the overall turnover of that undertaking, that is to say of all its constituent parts taken together'.

119. It is true that, in my Opinion in *YKK and Others* v *Commission* (C-408/12 P, EU:C:2014:66, points 96 to 145), I concluded after a detailed analysis that 'the General Court [had] infringed Article 23(2) of Regulation No 1/2003 because only the subsidiary (YKK Stocko) ought to have been considered to be the "undertaking participating in the infringement" for the first period and, therefore, its turnover and not that of the group should have been taken into account when calculating the 10% upper limit'. In her Opinion in *Gascogne Sack Deutschland* v *Commission* (C-40/12 P, EU:C:2013:361, points 71 to 90), Advocate General Sharpston reached the same conclusion.

120. The fact remains that, in the present case, the respondents cannot rely on that argument, given that they have not brought an appeal, even a cross-appeal, against paragraphs 227 and 228 of the judgment under appeal, in which the General Court resolved that point.

61 — Council Regulation 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).

121. In that regard, it should be recalled that, in accordance with Article 172 of the Rules of Procedure, which entered into force on 1 November 2012, any party to the relevant case before the General Court having an interest in the appeal being allowed or dismissed may submit a response within two months after service on him of the appeal. Article 176(1) of those Rules further provides that the parties referred to in Article 172 may submit a cross-appeal within the same period as that prescribed for the submission of a response. Lastly, Article 176(2) of those Rules provides that the cross-appeal must be introduced by a document separate from the response.

122. At the hearing, the Court of Justice questioned the respondents as to the reasons why they did not bring a cross-appeal: because, they replied, none of the findings in the judgment of the General Court could be contested since the General Court had not taken any decision on the turnover to be taken into consideration when calculating the fine in so far as, in paragraph 229 of the judgment under appeal, the General Court ruled that '[s]ince the first plea has been upheld, it is not also necessary to examine the other heads of claim, alleging infringement of the principles of personal liability and of proportionality and of the obligation to state reasons, inasmuch as they relate to the effect of the taking into account, in the contested decision, of the period prior to 1 January 2002'.

123. However, that view is obviously not correct. It is quite clear from point 120 above that the General Court did indeed take a position on the issue in question, which is reflected, furthermore, in the operative part of the judgment under appeal.

124. In any event, in their response, the respondents allocated 15 paragraphs (83 to 97) to the argument that '[i]f, notwithstanding the arguments submitted in Section II above, the first ground of appeal is upheld, and the Court decides to recalculate the amount of the fine, the respondents submit that: (i) no increase for aggravating circumstances could be applied when setting such an amount for the reasons explained below, and (ii) the fine for which Parker ITR is held solely liable cannot exceed 10% of its turnover'. This clearly shows that, on reading the Commission's appeal in the present case, they realised that there was a possibility that that appeal might be upheld by the Court of Justice and that, therefore, the General Court's assessment of the first plea put forward at first instance might be annulled. That is why they put forward all those arguments in paragraphs 83 to 97 of their response. However, as I explained above, if the respondents wished to breathe new life into their plea, the Rules of Procedure provide that they could do so only in a cross-appeal, and could not merely put forward their arguments in their response.

125. Since the respondents did not introduce a cross-appeal by a document separate from their response, their arguments set out above must be rejected as inadmissible.[62]

IV – **Conclusion**

126. I therefore propose that the Court should:

— set aside the judgment of the General Court of the European Union in *Parker ITR and Parker-Hannifin* v *Commission* (T-146/09, EU:T:2013:258), to the extent that it ruled that application of the principle of economic continuity was excluded in the present case and disregarded the increase that the European Commission had applied to the fine imposed on Parker ITR Srl on grounds of its role as leader within the cartel;

62 — In any event, the respondents did not even contest paragraphs 227 and 228 of the judgment under appeal.

— refer the case back to the General Court for it to examine whether the evidence presented by Parker Hannifin Manufacturing Srl and Parker-Hannifin Corp. is sufficient to rebut the presumption that ITR SpA, as the parent company which holds 100% of the capital in ITR Rubber and belongs, like the latter, to the same group, exercised a decisive influence on the conduct of its subsidiary;

— find that, in reducing by EUR 100 000 the increase applied in respect of duration to the fine that the parent company, Parker-Hannifin, was jointly and severally liable to pay, the General Court ruled *ultra petita*;

— find that the reduction in the fine imposed on Parker-Hannifin solely on the ground that 'Parker-Hannifin cannot be found jointly and severally liable for the period from 1 [January] to 31 January 2002' is not supported by an adequate statement of reasons by the General Court; and

— reserve the costs.