Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

18 December 2014*

(Appeals — 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 — Unlimited jurisdiction)

In Case C-434/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 1 August 2013,

European Commission, represented by S. Noë, V. Bottka and R. Sauer, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Parker Hannifin Manufacturing Srl, formerly Parker ITR Srl, established in Corsico (Italy),

Parker-Hannifin Corp., established in Mayfield Heights (United States),

represented by F. Amato, F. Marchini Càmia and B. Amory, lawyers,

applicants at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin, E. Levits, M. Berger (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 5 June 2014,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2014,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, the European Commission asks the Court to 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, 'the judgment under appeal'), by which the General Court partially annulled Commission Decision C(2009) 428 final of 28 January 2009 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39406 — Marine hoses) ('the contested decision') and reduced the fine imposed by that decision on Parker ITR Srl ('Parker ITR') and the amount of that fine for which Parker-Hannifin Corp. ('Parker-Hannifin') was held jointly and severally liable.

Law

2 Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) provides:

'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 [EC] or Article 82 [EC] …

…

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…'

3 As regards the review by the EU judicature of the amount of a fine imposed under that provision, Article 31 of Regulation No 1/2003 provides that '[t]he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed'.

4 The Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2, 'the 2006 Guidelines') indicate in point 24 thereof that '[i]n order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales … will be multiplied by the number of years of participation in the infringement. Periods 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'.

5 Point 28 of the 2006 Guidelines indicate that the basic amount of the fine may be increased where the Commission finds that there are aggravating circumstances, such as the role of leader in, or instigator of, the infringement.

Background to the dispute and the contested decision

6 The activities in the marine hose business 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.

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

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

9 On 5 December 2001, Parker Hannifin Holding Srl, a wholly owned subsidiary of Parker-Hannifin, agreed with ITR SpA to acquire 100% of the shares in ITR Rubber.

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

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

12 The transfer took effect on 1 January 2002.

13 On 31 January 2002, Parker Hannifin Holding Srl acquired from ITR SpA the shares in ITR Rubber. ITR Rubber then became Parker ITR Srl.

14 In 2007, the Commission initiated an investigation for infringement, on the marine hose market, of Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

15 In Article 1 of the contested decision, the Commission found that 11 companies — including Parker ITR and Parker-Hannifin — had infringed Article 81 EC and Article 53 EEA, by participating in a single and continuous infringement in the marine hose business within the European Economic Area (EEA) 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.

16 As regards the respondents, the Commission found, in Article 1(i) and (j) of the contested decision, that Parker ITR had participated in the cartel between 1 April 1986 and 2 May 2007 and that Parker-Hannifin had participated between 31 January 2002 and 2 May 2007.

17 On that ground, in part (e) of the first subparagraph of Article 2 of the contested decision, the Commission imposed on Parker ITR a fine of EUR 25 610 000, of which Parker-Hannifin was held to be jointly and severally liable for EUR 8 320 000.

The judgment under appeal

18 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.

19 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. In that respect, the General Court held, in paragraphs 115 and 116 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 [SpA] 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. As ITR [SpA] sold all the shares in ITR Rubber to Parker-Hannifin, by an agreement concluded on 5 December 2001 and executed by the transfer of all the shares to the purchaser on 31 January 2002, it is common ground that the incorporation of the rubber hoses business into a subsidiary carried out by ITR [SpA] was clearly part of an objective of selling that subsidiary's shares to a third undertaking [...]

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 [SpA] and its parent company Saiag [SpA], 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 [SpA] and its subsidiary ITR [SpA], 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 [SpA] or ITR [SpA] and Parker-Hannifin.'

20 As regards the fifth and sixth pleas in law, relating to the increase of the fine imposed on Parker ITR and on Parker-Hannifin as a result of Parker ITR's role as leader for the period from June 1999 to September 2001, the General Court held that, '[s]ince the first plea [had] been upheld', '[c]onsequently', the fifth and sixth plea had to be upheld (paragraphs 139 and 140, 145 and 146, as well as 253 and 254 of the judgment under appeal).

21 The General Court rejected the other pleas in law. As regards, in particular, the eighth plea in law, alleging, inter alia, an infringement of Article 23(2) of Regulation No 1/2003 in the calculation of the ceiling of 10% of turnover applicable to the part of the fine for which Parker ITR was held solely responsible, the General Court held, in paragraphs 227 and 228 of the judgment under appeal:

'227 … according to settled case-law, the objective sought by the introduction of the 10% ceiling can be realised only if that ceiling is applied initially to each separate addressee of the decision imposing the fine. It is only if it subsequently transpires that several addressees constitute the "undertaking", that is the economic entity responsible for the infringement penalised, again at the date when the decision is adopted, that the ceiling can be calculated on the basis of the overall turnover of that undertaking, that is to say of all its constituent parts taken together (*Tokai Carbon and Others* v *Commission*, [T-71/03, T-74/03, T-87/03 and T-91/03, EU:T:2005:220], paragraph 390).

228 Since 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 [SpA], 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.'

22 Exercising its unlimited jurisdiction, the General Court, in paragraphs 246 to 255 of the judgment under appeal, recalculated the fine imposed on Parker ITR and reduced it to EUR 6 400 000. As regards the amount for which Parker-Hannifin is held jointly and severally liable, the General Court reduced it, in paragraph 257 of the judgment under appeal, to EUR 6 300 000 on the ground that Parker-Hannifin could not be found jointly and severally liable for the period from 1 to 31 January 2002.

Forms of order sought

23 The Commission claims that the Court should:

— Set aside the judgment under appeal in so far as, by that judgment, the General Court partially annulled the contested decision and reduced the fine imposed on Parker ITR and on Parker-Hannifin;

— dismiss the action brought before the General Court, and

— order the respondents to pay all of the costs.

24 Parker ITR and Parker-Hannifin contend that the Court should:

— dismiss the appeal, and

— order the Commission to pay all of the costs.

The request seeking the reopening of the oral part of the procedure

25 After the oral part of the procedure was closed on 4 September 2014 following the delivery of the Advocate General's Opinion, the respondents requested the reopening of the oral part of the procedure by letter of 14 October 2014, lodged at the Court Registry on 20 October 2014.

26 In support of that request, they submit, in essence, that the parties should be heard as regards the issue — which would arise if the judgment under appeal were set aside — of how, for the purpose of calculating the fine imposed on Parker ITR, the ceiling of 10% laid down in Article 23(2) of Regulation No 1/2003 should be applied in respect of the period during which that company did not form part of the Parker-Hannifin group. The respondents submit, in the first place, that the Court delivered, on the same day that the Opinion in the present case was delivered, a judgment of decisive importance as regards that issue (*YKK and Others* v *Commission*, C-408/12 P, EU:C:2014:2153). They submit, in the second place, that by taking the view that the General Court had examined the substance of the arguments they had made in that respect before rejecting them, the Advocate General misread the judgment under appeal. They add that they did not have the opportunity to express their views on the consequences, in the present proceedings, of the absence of a cross-appeal.

27 In that regard, it must be recalled that, under Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular where it considers that it lacks sufficient information, where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the persons referred to in Article 23 of the Statute of the Court of Justice of the European Union (judgment in *Buono and Others* v *Commission*, C-12/13 P and C-13/13 P, EU:C:2014:2284, paragraph 26 and the case-law cited).

28 In the present case, the Court considers, after hearing the Advocate General, that it has sufficient information to give a ruling, that the case does not need to be decided on the basis of arguments which have not been debated between the parties and that the judgment in *YKK and Others* v *Commission* (EU:C:2014:2153) is not a new fact of such a nature as to be a decisive factor for its decision.

29 In addition, pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require the Advocate General's involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment in *Buono and Others* v *Commission*, EU:C:2014:2284, paragraph 27 and the case-law cited).

30 Consequently, the request that the oral part of the procedure be reopened must be rejected.

The appeal

31 The Commission relies on two grounds of appeal.

The first ground of appeal, alleging misapplication of the case-law relating to economic continuity

Arguments of the parties

32 The Commission submits that, in holding, in paragraph 116 of the judgment under appeal, that 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 transfers a part of its business to an independent third party and there is no structural link between the transferor and the transferee, the General Court treated two distinct transactions as one and confused the applicable legal criteria. The General Court regarded as relevant only the second of those two transactions, relating to the sale of a subsidiary by one group to another, namely the sale of ITR Rubber by the Saiag group to the Parker-Hannifin group. However, it ignored the first transaction, prior to that sale, involving the transfer of activities between two entities of the same group, namely between ITR SpA and ITR Rubber, which both belonged to the Saiag group. According to the Commission, that transfer of activities took place in the circumstances required by the case-law for it to be viewed as a case of economic continuity since, at the date at which it took place, the two entities concerned were controlled by the same person within the group and had close economic and organisational links (see, inter alia, judgment in *ETI and Others*, C-280/06, EU:C:2007:775, paragraphs 48 and 49).

33 In order to attribute to the transferee entity liability for unlawful conduct committed by the transferor entity, it is not necessary, according to the Commission, that the structural links between the two entities subsist throughout the infringement period. The fact that, in the present case, ITR Rubber did not remain within the Saiag group and that only a brief period elapsed between its creation and its sale to the Parker-Hannifin group is therefore irrelevant.

34 The Commission adds that, contrary to the General Court's conclusion in paragraph 116 of the judgment under appeal, the Commission was not required to attribute responsibility for the unlawful conduct to Saiag SpA and ITR SpA, the parent companies. In choosing, in the present case, to attribute responsibility for the infringement to ITR Rubber as the economic successor to those companies, the Commission used its discretion under the case-law.

35 In response, the respondents contend that, contrary to the assertions made by the Commission, the Court did not lay down, in its judgment in *ETI and Others* (EU:C:2007:775), a mechanical rule that the mere existence of a past structural link between the transferor and the transferee of an activity involved in an infringement automatically renders the transferee liable for that infringement. The Court ruled, more restrictively, that such a consequence was possible only if it was demonstrated that the transferor and the transferee were subject to real control by the same person at the time of the structural link and had carried out, in all material respects, the same commercial instructions.

36 In the contested decision, however, the Commission wholly failed to assess whether, during the short period in which the structural link existed between ITR SpA and ITR Rubber, those conditions were met. In that respect, the contested decision refers only to the fact that, at the time of the transfer of the marine hose business by ITR SpA 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 implicitly based on that presumption, the respondents submit that their rights of defence would be infringed, as the statement of objections made no clear reference to it.

37 The respondents infer from this that, since the Commission failed to assess, in the contested decision, whether ITR SpA and ITR Rubber 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 SpA solely on the basis of such a past structural link.

38 In addition, in the event that the first ground of appeal is upheld and the Court decides to recalculate the fine, the respondents submit that, since in its appeal the Commission has not challenged paragraphs 139 and 140, 145 and 146, or 253 and 254 of the judgment under appeal, in which the General Court upheld the fifth and sixth pleas in law raised in their action and held that the Commission erred in increasing the fine on the ground that Parker ITR had played the role of leader of the cartel from June 1999 to September 2001, the judgment under appeal has become final in that respect.

Findings of the Court

39 It is settled case-law that EU 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 (see, inter alia, *Versalis* v *Commission*, C-511/11, EU:C:2013:386, paragraph 51 and the case-law cited).

40 The Court has noted 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 entities are identical. If undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes, the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardised (judgment in *ETI and Other*, EU:C:2007:775, paragraphs 41 and 42 and the case-law cited).

41 The Court has thus 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 under the control of 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 (judgments in *ETI and Others*, EU:C:2007:775, paragraphs 48 and 49 and the case-law cited, and *Versalis* v *Commission*, EU:C:2013:386, paragraph 52).

42 In the present case, the first ground of appeal concerns whether, in accordance with the principles established in the case-law referred to in paragraphs 40 and 41 above, ITR Rubber may be held liable for the infringement penalised by the contested decision for the period prior to 1 January 2002.

43 According to the Commission, the General Court erred in law in holding that, since there were no structural links between the transferor and the transferee, the Commission was wrong to apply that case-law in the contested decision. The respondents contend, however, that the General Court correctly applied that case-law since the Commission had failed to prove that there were real links between the two entities in question.

– The assessment of the existence of structural links between the transferor entity and the transferee entity

44 As a preliminary point, it must be noted that the Commission found ITR Rubber liable for unlawful conduct extending over a period from 1 April 1986 until 2 May 2007, distinguishing between two distinct periods, the first from 1 April 1986 until 31 December 2001, and the second from January 2002 until 2 May 2007.

45 As regards the period from 1 April 1986 to 31 December 2001, the Commission, as can be seen from recitals 328 and 370 of the contested decision, first found that, on 1 January 2002, ITR SpA was liable for its own conduct as well as that of its predecessor Pirelli Treg SpA, which it had entirely absorbed in December 1990. The Commission then noted that, on the same date, 1 January 2002, ITR SpA transferred its activities in the marine hoses sector to its wholly owned subsidiary ITR Rubber as part of an internal reorganisation of the group. The Commission also found that, at the time of that transfer, ITR SpA and ITR Rubber were economically linked as a parent company and a wholly owned subsidiary and formed part of the same undertaking. The Commission considered that, in such a case, in accordance with the Court's case-law, liability for the past unlawful conduct of the transferor may pass to the transferee, even if the transferor continues to exist in law.

46 In that context, it must be pointed out that, by ruling out, in paragraph 116 of the judgment under appeal, the application of the principle of economic continuity where, as in the present case, there is no structural link between the transferor, namely Saiag SpA or its subsidiary ITR SpA, and the transferee, identified as Parker-Hannifin, the General Court, in its assessment, treated two distinct transactions as one. The General Court failed to take account of the fact that ITR SpA had first transferred its activities in the marine hoses sector to one of its subsidiaries and then transferred that subsidiary to Parker-Hannifin.

47 As regards the considerations that led it to ignore, in its reasoning, the transfer of activities by ITR SpA to its subsidiary ITR Rubber, the General Court indicated, in paragraph 115 of the judgment under appeal, that the subsidiary in question had been in existence for only seven months within the Saiag group and had only briefly — for one month — pursued activities in connection with marine hoses and, more generally, that it was formed solely with a view to its sale to a third-party undertaking. The General Court inferred from this, in paragraph 116 of that judgment, that, in those circumstances, it was the former operator of those activities, namely ITR SpA and its parent company Saiag SpA, which should have answered for the infringement for the period before 1 January 2002.

48 In order to examine the consistency of the General Court's reasoning, it is necessary, therefore, to examine whether those considerations relating to (i) the date on which structural links must have existed between the transferor and the transferee and the period during which those links must have existed, and (ii) the objective pursued by the transfer of activities, are relevant to the assessment of the existence of economic continuity. It must also be examined (iii) whether, in the present case, the Commission was required to attribute to the former operators liability for the infringement committed before that transfer.

49 As regards, in the first place, the date on which structural links must have existed between the transferor and the transferee and the period during which those links must have existed in order for economic continuity to be possible, it must be noted that the Court has accepted that there may be

economic continuity (i) in situations where the transfer of activities took place during the infringement period and structural links between the transferor and the transferee existed during that period (judgment in *ETI and Others*, EU:C:2007:775, paragraphs 45 and 50), and (ii) in situations where that transfer took place after the infringement had come to an end, provided that the structural links between the two entities existed at the time of that transfer (see, inter alia, judgment 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 59, 351, 356 and 357). The Court has never indicated that those links must subsist until the adoption of the decision penalising the infringement.

50 As the Advocate General pointed out in point 68 of his Opinion, it must be concluded that, for the purpose of establishing the existence of economic continuity, the relevant date for assessing whether the transfer of activities is within a group or between independent undertakings must be that of the transfer itself.

51 Whilst there must, on that date, be structural links between the transferor and the transferee on the basis of which it may be considered, in accordance with the principle of personal responsibility, that the two entities form a single undertaking, those links need not, in view of the purpose of the principle of economic continuity, subsist throughout the rest of the infringement period or until the adoption of a decision penalising the infringement. As noted in paragraph 40 above, the application of that principle is intended to ensure that the competition rules are not rendered ineffective by restructurings or sales relating to the undertakings concerned. It should also be pointed out that, in order to respect the principle of legal certainty, the attribution of liability must not depend upon the occurrence of an unforeseeable and uncertain event, such as a new organisational change decided on by the undertakings concerned.

52 Likewise, and for the same reasons, it is not necessary that the structural links on the basis of which economic continuity may be established subsist for a minimum period, a period which, in any event, could only be determined retroactively and on a case-by-case basis.

53 As regards, in the second place, the taking into consideration, for the purpose of examining the existence of economic continuity, of the objective of the transfer of activities, the principle of legal certainty also provides grounds for dismissing as irrelevant the fact, referred to in paragraph 115 of the judgment under appeal, that the transferee entity was created and received the assets with a view to its subsequent sale to an independent third party. The taking into consideration of the economic reasons which led to the creation of a subsidiary, or the objective, in the long- or short-term, of transferring that subsidiary to a third-party undertaking, would introduce into the application of the principle of economic continuity subjective factors which are incompatible with a transparent and predictable application of that principle.

54 As regards, in the third place, the assertion in paragraph 116 of the judgment under appeal that, in the circumstances of the present case, the Commission should have attributed to the former operators liability for the infringement committed before the transfer of activities, that assertion forms part of the erroneous reasoning by which the General Court dismissed from the outset the existence of economic continuity. It is settled case-law that, where such a situation is established, 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 (see, inter alia, judgment in *Versalis* v *Commission*, EU:C:2013:386, points 52 to 54).

55 In view of the foregoing, it must be held that the General Court erred in law in so far as it held, in paragraphs 115 and 116 of the judgment under appeal, that a situation of economic continuity was precluded in the present case because of the absence of structural links between the transferor and the transferee, which it identified as Saiag SpA or ITR SpA and Parker-Hannifin, without taking into consideration the links between ITR SpA and ITR Rubber at the time of the transfer of activities between those two entities.

56 That error might nevertheless be irrelevant if, in any event, a situation of economic continuity must be precluded because of the absence of real links between ITR SpA and ITR Rubber. It is in that context that it is appropriate to assess the respondents' argument that the General Court was correct to dismiss the existence of a situation of economic continuity since the Commission had failed, in the contested decision, to examine whether ITR Rubber was indeed under the actual control of ITR SpA.

– The assessment of the existence of real links between the transferor entity and the transferee entity

57 In that regard, it must be noted that the Commission expressly found, in recital 370 of that decision, that those two companies, at the time of the transfer of activities between them, were economically linked as a parent company and a wholly owned subsidiary and formed part of the same undertaking.

58 According to settled case-law, in the particular case in which a parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the European Union competition rules, there is a rebuttable presumption that that parent company in fact exercises a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies (see, inter alia, judgments in *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraph 60; *Eni* v *Commission*, C-508/11 P, EU:C:2013:289, paragraph 47 and the case-law cited; and *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraphs 105 to 111).

59 The respondents cannot claim that the contested decision contains no reference to that case-law, since it is expressly referred to in recital 325 to that decision. Nor can they invoke, at the appeal stage, an infringement of their rights of the defence on the ground that that presumption was not discussed during the administrative procedure. Since they did not invoke such an infringement in the application initiating the proceedings before the General Court, in which they merely challenged the lawfulness of the application of that presumption in their case, that argument must, in any event, be rejected as new and therefore inadmissible (see, inter alia, *Gascogne Sack Deutschland*, C-40/12 P, EU:C:2013:768, paragraphs 51 and 52).

60 In so far as the respondents submit that, in *ETI and Others* (EU:C:2007:775, paragraphs 50 and 51), the Court, while noting the existence of a structural link between the two entities in question — 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' of that authority, it suffices to point out that it is natural, in the context of a reference for a preliminary ruling where the assessment of the facts is for the national court, that the Court left the responsibility of verifying the links between the entities at issue in that case, two of which were public bodies, to the national court.

61 The present case, however, concerns two commercial companies, one of which is wholly owned by the other, a situation similar to that in *Akzo Nobel and Others* v *Commission* (EU:C:2009:536). Contrary to the respondents' argument, the Commission was therefore entitled to rely on the presumption that the parent company, ITR SpA, exercised decisive influence over the commercial policy of its subsidiary, ITR Rubber.

62 However, it must be emphasised that the presumption of actual exercise of decisive influence is rebuttable and may be overturned by the production of sufficient evidence to show that the subsidiary acts independently on the market. In order to do so, it is for the entities concerned to adduce any factor relating to the economic, organisational and legal links between the subsidiary in question and the parent company that they consider to be capable of demonstrating that the subsidiary determined its conduct on the market independently and that those two entities therefore did not constitute a single economic entity (see, inter alia, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 56, 58 and 65 and the case-law cited).

63 In the present case, it can be seen from the documents before the Court that, in their application initiating proceedings before the General Court, the respondents argued that the economic, organisational and legal links between ITR SpA and ITR Rubber from the latter's creation, on 27 June 2001, until its sale to Parker-Hannifin, on 31 January 2002, were not such as to allow ITR SpA to exercise a decisive influence over its subsidiary. They submitted, in that regard, that, from the time of its creation until 1 January 2002, ITR Rubber did not exercise any economic activity. From the conclusion, on 5 December 2001, between ITR SpA and Parker-Hannifin of the contract concerning the sale and acquisition of ITR Rubber, the relationship between ITR SpA and ITR Rubber was governed by that contract — which was produced before the General Court — the provisions of which prevented ITR SpA from exercising any influence over ITR Rubber. However, the Commission contested those arguments.

64 Since the General Court excluded from the outset the existence of economic continuity, it did not examine the arguments or the evidence put forward by Parker ITR and Parker-Hannifin, or the Commission's objections.

65 It follows from the foregoing that the General Court erred in law by failing to examine, for the purpose of verifying whether the Commission had correctly applied the principle of economic continuity, the evidence submitted to it by the parties concerning the existence or absence of real links in the form of a decisive influence exercised by ITR SpA over ITR Rubber.

66 It follows that the first ground of appeal must be upheld and the judgment under appeal must be set aside in so far as the General Court thereby held, for the reasons indicated in paragraphs 115 and 116 of that judgment, that Parker ITR could not be held liable for the infringement period prior to 1 January 2002.

67 For the sake of consistency, and in the interests of legal certainty, it must be noted that, contrary to what is claimed by the respondents, the judgment under appeal must also be set aside in so far as, consequently and without any substantive examination, the General Court annulled, in paragraphs 139 and 140, 145 and 146, and 253 and 254 of that judgment, the increase of the fine imposed in the contested decision because of the role of leader played by Parker ITR in the infringement during the period from June 1999 to September 2001.

The second ground of appeal, alleging that the General Court ruled ultra petita and infringed the principle of non-discrimination

Arguments of the parties

68 The Commission submits that, by reducing by EUR 100 000 the amount of the fine imposed on Parker ITR for which the parent company, Parker-Hannifin, must be held jointly and severally liable, the General Court ruled *ultra petita*. Parker-Hannifin had not challenged either the actual duration of its participation in the infringement — which, moreover, the General Court confirmed in paragraphs 129 and 256 of its judgment — or the corresponding duration factor applied in the calculation of the fine.

69 The Commission submits that the statement of reasons given in paragraph 257 of the judgment under appeal to justify that reduction, according to which '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.

70 To the extent that the General Court wished to refer to the fact that, as held in the judgment under appeal, the subsidiary Parker ITR had participated in the infringement for one month longer than Parker-Hannifin, the Commission submits that that circumstance cannot justify a reduction. A difference of one month in the duration of the infringement cannot, having regard the rounding

method set out in the second sentence of point 24 of the 2006 Guidelines — which were applied to all the addressees of the contested decision and to which the General Court referred in the judgment under appeal — be taken into account for the purposes of determining the basic amount of the fine. By nevertheless reducing the fine on that ground, the General Court infringed the principle of non-discrimination.

71 According to the Commission, the General Court should, at the very least, have stated why it deviated from that method.

72 The respondents first of all submit 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.

73 By reducing the part of the fine imposed on Parker ITR for which Parker-Hannifin is held jointly and severally liable, the General Court correctly took 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 its subsidiary. In the respondents' view, any other approach would have constituted discrimination against Parker-Hannifin.

Findings of the Court

74 As regards judicial review of Commission decisions imposing a fine for infringement of the competition rules, the review of legality is supplemented by the unlimited jurisdiction which Article 31 of Regulation No 1/2003 confers on the Courts of the European Union. Under that jurisdiction, the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, may substitute their own appraisal for the Commission's and, consequently, cancel, reduce or increase the fine or penalty payment imposed (see, inter alia, judgment in *KME Germany and Others* v *Commission*, C-389/10 P, EU:C:2011:816, paragraph 130 and the case-law cited).

75 In order to satisfy the requirements, for the purpose of Article 47 of the Charter of Fundamental Rights of the European Union, of conducting a review exercising its powers of unlimited jurisdiction with regard to the fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 TFEU and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 200).

76 However, the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and proceedings are *inter partes*. It is, in principle, for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (see, inter alia, *Telefónica and Telefónica de España* v *Commission*, EU:C:2014:2062, paragraph 213 and the case-law cited).

77 In addition, as the Advocate General pointed out in point 113 of his Opinion, the General Court is bound, when exercising its unlimited jurisdiction, by certain requirements. Those requirements include the duty to state reasons, by which it is bound in accordance with Article 36 of the Statute of the Court, applicable to the General Court under the first paragraph of Article 53 of the Statute, and the principle of equal treatment. When the amount of the fine imposed on them is determined, the exercise of unlimited jurisdiction cannot result in discrimination between undertakings which have participated in an infringement of the competition rules (*Sarrió* v *Commission*, C-291/98 P, EU:C:2000:631, paragraph 97).

78 In the present case, the Commission, in the contested decision, found that Parker ITR had participated in the cartel from 1 April 1986 to 2 May 2007 and Parker Hannifin from 31 January 2002 to 2 May 2007. For that reason, it imposed on Parker ITR a fine of EUR 25 610 000, specifying that, of this amount, Parker-Hannifin was jointly and severally liable for the sum of EUR 8 320 000. As can be seen from recital 448 of the contested decision, the fact that Parker-Hannifin was held jointly and severally liable for only a part of the total fine imposed on Parker ITR is attributable to, inter alia, the application, in accordance with the first sentence of paragraph 24 of the 2006 Guidelines, of a multiplier equal to the number of years of participation in the infringement, which was different for each of the two companies.

79 In the application initiating proceedings, Parker ITR and Parker Hannifin contested the duration of the infringement for which they were found to be liable in the contested decision and requested the Court to reduce, on that ground, the fine imposed on them in that decision.

80 After examining the pleas in law and evidence relied on by Parker ITR and Parker-Hannifin, the General Court first held that Parker ITR could not be held liable for any infringement in respect of the period prior to 1 January 2002. Consequently, it also annulled the increase applied in the contested decision to the fine imposed on Parker ITR and on Parker-Hannifin because of the role of leader played by Parker ITR in the cartel during the period from June 1999 to September 2001.

81 Next, exercising its unlimited jurisdiction, it reduced the fine imposed on Parker ITR to EUR 6 400 000, an amount whose adequacy is not contested by the Commission.

82 At that stage, it was therefore for the General Court, in accordance with the form of order sought by Parker-Hannifin, to recalculate, as regards the new amount of the fine imposed on Parker ITR, the amount for which Parker-Hannifin should be held jointly and severally liable.

83 To that end, the General Court relied, in paragraph 257 of the judgment under appeal, on the fact, uncontested in the action before it and confirmed in the judgment under appeal, that the parent company Parker-Hannifin could not be held jointly and severally liable for the period from 1 to 31 January 2002. To that extent, and contrary to what is claimed by the Commission, the General Court did not rule *ultra petita*.

84 However, it must be noted that, in setting at EUR 6 300 000 the amount of the fine imposed on Parker ITR for which Parker-Hannifin should be held jointly and severally liable, the General Court did not refer to any other factors that might serve as a statement of reasons.

85 In those circumstances, it must be held that the General Court failed to provide the information necessary to enable the parties concerned to understand why it had set at that level the amount of the fine attributable to Parker-Hannifin, and, moreover, to enable the Court to review the lawfulness of that reduction, in the light, inter alia, of the principle of equal treatment as invoked by the Commission.

86 The Commission's second ground of appeal must therefore be upheld in so far as it alleges a breach of the obligation to state reasons.

87 Accordingly, the judgment under appeal must be set aside in so far as, in paragraph 257 of that judgment, the General Court, without stating any reasons, reduced by EUR 100 000 the amount of the fine imposed on Parker ITR for which the parent company, Parker-Hannifin, must be held jointly and severally liable.

The respondents' argument alleging infringement of Article 23(2) of Regulation No 1/2003

Arguments of the parties

88 In their response, the respondents submit that, in the event that the first ground of appeal is upheld, the part of the fine for which Parker ITR may be held solely liable cannot, in accordance with Article 23(2) of Regulation No 1/2003, exceed 10% of its turnover during the business year prior to the adoption of the contested decision.

89 In that regard, they note that, until 31 January 2002, Parker ITR and Parker-Hannifin were two separate undertakings. On that ground, they claimed before the General Court, in their eighth plea in law, that in order to determine the ceiling of 10% applicable to the amount of the fine for which Parker ITR could be held solely liable in respect of the period prior to 31 January 2002, it was necessary, contrary to the approach taken by the Commission in the contested decision, to take into consideration only Parker ITR's turnover in 2008, and not the Parker-Hannifin group's consolidated turnover for that year. The respondents add that Advocate General Wathelet came to a similar conclusion in his Opinion in *YKK and Others* v *Commission* (C-408/12 P, EU:C:2014:66, points 96 to 145).

90 At the hearing, the Commission claimed that the respondents' argument must be rejected as inadmissible, since it was not put forward in a cross-appeal. The respondents replied that the General Court did not rule on that question in the judgment under appeal.

Findings of the Court

91 Pursuant to Article 172 of the Rules of Procedure, which came 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. In addition, Article 176(1) of those rules state that parties referred to in Article 172 may submit a cross-appeal within the same time-limit as that prescribed for the submission of a response. In that respect, Article 176(2) of those rules states that the cross-appeal is to be introduced by a document separate from the response.

92 In order to establish whether that latter provision is applicable in the present context, it is first necessary to ascertain whether the General Court, in the judgment under appeal, examined and dealt with the point of law raised by Parker ITR and Parker-Hannifin.

93 In that regard, it must be pointed out that, in paragraph 227 of the judgment under appeal, the General Court first referred to its judgment in *Tokai Carbon and Others* v *Commission* (EU:T:2005:220). It should be noted that the General Court also relied on that judgment in order to deal with a similar point of law in its judgment in *YKK and Others* v *Commission* (T-448/07, EU:T:2012:322, paragraph 193), which was the subject of the appeal proceedings to which the respondents referred in their response.

94 In paragraph 228 of the judgment under appeal, the General Court then held that the eighth plea in law put forward in the application was unfounded in so far as it related to the infringement period subsequent to 1 January 2002, including the period from 1 to 31 January 2002 during which ITR Rubber was not yet owned by the Parker-Hannifin group.

95 The assessment carried out by the General Court is reflected in the calculation method that it used to recalculate the amount of the fine imposed on Parker ITR and in paragraph 3 of the operative part of the judgment under appeal, where it did not distinguish between the period from 1 to 31 January 2002 and the period subsequent to that date.

96 Accordingly, it must be held that the General Court indeed examined and dealt with the point of law raised by Parker ITR and by Parker-Hannifin, by rejecting their argument.

97 In those circumstances, since the respondents have not, as required under Article 176(2) of the Rules of Procedure, submitted a cross-appeal by a separate document, distinct from their response, directed against the General Court's assessment of the eighth plea in law put forward in their action, their argument relating to the application of Article 23(1) of Regulation No 1/2003 must be rejected as inadmissible.

98 In the light of all the foregoing considerations, in particular paragraphs 55, 66, 67 and 87 of the present judgment, paragraphs 1, 2 and 3 of the operative part of the judgment under appeal must be set aside.

The action before the General Court

99 In accordance with the first paragraph of Article 61 of the Statute of the Court, the latter may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

100 In the present case, the Court takes the view that the state of the proceedings does not permit it to give final judgment since, in order to assess whether or not the Commission was entitled to apply the principle of economic continuity in the contested decision to the respondents, it is first necessary to examine whether the evidence produced by the respondents in their action before the General Court is sufficient to rebut the presumption that ITR SpA, as a parent company holding 100% of the capital of ITR Rubber, exercised a decisive influence over the conduct of its subsidiary.

101 The case must therefore be referred back to the General Court for a ruling on the merits.

Costs

102 Since the case has been referred back to the General Court, the costs relating to the present appeal must be reserved.

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

1. **Sets aside paragraphs 1, 2 and 3 of the operative part of 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);**

2. **Refers the case back to the General Court of the European Union for a ruling on the merits of the action;**

3. **Reserves the costs.**

[Signatures]