



## Reports of Cases

### JUDGMENT OF THE GENERAL COURT (First Chamber)

17 May 2013 \*

(Competition — Agreements, decisions and concerted practices — European market for marine hoses — Decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement — Price-fixing, market-sharing and the exchange of commercially sensitive information — Concept of continuing or repeated infringement — Limitation period — Legal certainty — Equal treatment — Fines — Gravity and duration of the infringement)

In Joined Cases T-147/09 and T-148/09,

**Trelleborg Industrie SAS**, established in Clermont-Ferrand (France), represented by J. Joshua, Barrister, and E. Aliende Rodríguez, lawyer,

applicant in Case T-147/09,

**Trelleborg AB**, established in Trelleborg (Sweden), represented by J. Joshua, Barrister, and E. Aliende Rodríguez, lawyer,

applicant in Case T-148/09,

v

**European Commission**, represented by N. Khan, V. Bottka and S. Noë, acting as Agents,

defendant,

APPLICATION for partial annulment of 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), in so far as that decision concerns the applicants, and, in the alternative, for annulment or a substantial reduction in the fine imposed on them in that decision,

THE GENERAL COURT (First Chamber),

composed of J. Azizi, President, M. Prek and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: J. Weychert, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2012,

gives the following

\* Language of the case: English.

## Judgment

### Background to the dispute

#### *The marine oil and gas hoses sector*

- 1 Marine hoses are used to load sweet or processed crude oil and other petroleum products from offshore facilities (for example, buoys – normally anchored offshore and serving as a mooring point for tankers – or floating production, storage and offloading systems – which are floating tank systems used to take the oil or gas from a nearby platform, process it and store it until it is offloaded on to a tanker) on to vessels and then to offload those products from those vessels to offshore (for example buoys) or onshore facilities.
- 2 Marine hoses are used offshore – that is to say, in or near the water – while industrial or onshore hoses are used on land.
- 3 Each marine hose installation is composed, according to customers' specific needs, of a number of standard hoses, specific hoses with connections at both ends and ancillary equipment, such as valves, end gear or floating equipment. In the present case, the expression 'marine hoses' includes that ancillary equipment.
- 4 Marine hoses are used by petroleum companies, buoy manufacturers, port terminals, the oil industry and governments, and are purchased either for new projects or for replacement purposes.
- 5 With respect to new projects, oil terminals or other end users usually engage an engineering company (also known as an 'original equipment manufacturer' or 'OEM') to construct or install new oil distribution facilities, such as single buoy moorings or floating production, storage and offloading systems. For such projects, the manufacturer purchases an entire marine hoses installation from a producer.
- 6 When those marine hoses have been installed, the individual parts must be replaced within a period of between one and seven years. Purchases of marine hoses for replacement purposes (also referred to as 'spares business') are often made directly by end users. In some cases, however, end users outsource and centralise their purchases to subsidiaries or external companies. Replacement sales account for a greater proportion of the worldwide marine hoses market than sales of new products.
- 7 Demand for marine hoses largely depends on the development of the oil sector, and in particular on oil exploitation in areas remote from the place of consumption. Demand has expanded over time. It is cyclical and to a certain extent linked with the development of oil prices. It started to become significant in the late 1960s and rose in the early 1970s, in particular from oil-producing regions in the Persian Gulf, the North Sea and North Africa. During the 1980s demand from national oil companies in South America increased. In the late 1990s demand moved towards West Africa.
- 8 Marine hoses are manufactured by undertakings known for the manufacture of tyres and rubber or by one of their 'spin-offs'. They are produced on demand, according to the specific needs of customers. As demand for marine hoses is widely dispersed, most marine hose producers engage a significant number of agents who, for specific markets, provide general marketing services and offer their products in the context of published calls for tenders.

- 9 Marine hoses are marketed throughout the world and the main producers are active at worldwide level. The regulatory requirements for marine hoses are not fundamentally different from one country to another and while technical requirements differ according to the environment and conditions of use, that is not seen as an obstacle to the sale of marine hoses throughout the world.
- 10 Lastly, during the period under consideration, the participants in the cartel sold marine hoses produced in Japan, the United Kingdom, Italy and France to end users and also to OEMs established in different countries of the European Union and the European Economic Area (EEA). While the final destination of most marine hoses systems is in non-European regions, some of the main worldwide OEMs are based in different countries of the European Union and the EEA.

#### *Presentation of the applicants*

- 11 The marine hoses business was initially carried out by Michelin.
- 12 Within the Michelin group, the marine hoses business had been carried out by a group company called CMP. Then, on 28 July 1993, Michelin formed a company called SIRA, which performed no function until 31 March 1995, when CMP's marine hoses business was transferred to SIRA. On 26 April 1995 SIRA changed its name to CMPP. CMP was subsequently dissolved.
- 13 On 28 March 1996, one of the two applicants, Trelleborg AB entered into an agreement with Michelin whereby it undertook to acquire 100% of the shares in CMMP. CMMP subsequently had various names including the name Trelleborg and has, as of 2005, been called Trelleborg Industrie SAS.
- 14 Trelleborg is a company incorporated under Swedish law which has existed since 1905 with a global turnover of approximately 27 billion Swedish kronor (SEK) (around EUR 2.9 billion) in 2006.
- 15 The Trelleborg group has four business areas: Trelleborg Engineered Systems (which includes marine hoses), Trelleborg Automotive, Trelleborg Sealing Solutions and Trelleborg Wheel Systems.
- 16 Trelleborg is involved in the production and marketing of marine hoses through its subsidiary Trelleborg Industrie, the other applicant, which is a company incorporated under French law.

#### *The administrative procedure*

- 17 At the time when investigations were initiated in respect of similar facts by the United States Department of Justice and the Japanese and United Kingdom competition authorities, [confidential]<sup>1</sup>, relying on the leniency programme provided for in the Commission's Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17) applied to the Commission of the European Communities, on 20 December 2006, for immunity, reporting the existence of a cartel on the marine hoses market.
- 18 The Commission then initiated an investigation for infringement of Article 81 EC and Article 53 of the EEA Agreement and on 2 May 2007 carried out a series of inspections at the premises of Parker ITR, the applicants, other producers concerned and also of [confidential] and Mr W.
- 19 Manuli Rubber Industries SpA (MRI), Parker ITR and Bridgestone submitted applications to the Commission for leniency on 4 May, 17 July and 7 December 2007 respectively.

1 — Confidential data omitted.

- 20 On 28 April 2008 the Commission adopted a statement of objections, which it notified to the companies between 29 April and 1 May 2008.
- 21 All the companies replied to the statement of objections within the prescribed period and, with the exception of [confidential]/DOM, ContiTech AG and Continental AG, requested to be heard at an oral hearing, which was held on 23 July 2008.

*The contested decision*

- 22 On 28 January 2009, the Commission adopted Decision C(2009) 428 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39406 – Marine hoses) ('the contested decision'). It is apparent, in substance, from the contested decision that:
- it was addressed to 11 companies, including the applicants;
  - the companies to which it refers participated, sometimes in different ways, in a single, complex infringement with the objectives of 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;
  - the cartel began at least on 1 April 1986 (although it is likely that it dates from the early 1970s) and ended on 2 May 2007;
  - from 13 May 1997 until 21 June 1999 ('the intermediate period') the cartel was less active and friction arose between its members. However, that did not entail a real interruption of the infringement. The organised structure of the cartel was re-established in full from June 1999, according to the same procedures and with the same participants (apart from one undertaking, which was wholly re-integrated in the cartel the following year). The producers thus committed a single and continuous infringement which lasted from 1 April 1986 until 2 May 2007, or, at least, if in spite of everything it should be considered that there was an interruption, a single, repeated infringement. However, the intermediate period is not taken into consideration in the calculation of the fine, in view of the limited amount of evidence of the infringement for that period;
  - the applicants were held liable for the following periods:
    - Trelleborg Industrie: from 1 April 1986 until 2 May 2007;
    - Trelleborg: from 28 March 1996 until 2 May 2007;
  - in application of the criteria provided for in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2) ('the Guidelines'), the basic amount of the fine to be imposed on each of the companies was determined as follows:
    - the Commission took as its basis the average annual worldwide sales of each of the companies during the period 2004 to 2006 and took sales invoiced to purchasers established in the EEA;
    - it determined the relevant sales of each undertaking by applying their worldwide market share to aggregate sales within the EEA, in accordance with point 18 of the Guidelines;
    - it took 25% of that value (instead of the 30% maximum provided for in the Guidelines) in consideration of the gravity of the infringement;

- it multiplied the value thus obtained by the number of years of each company's participation in the infringement;
- last, in accordance with point 25 of the Guidelines, it applied an additional sum equal to 25% of the relevant sales for the purposes of deterrence;
- the Commission then applied aggravating circumstances in respect of two companies and rejected all mitigating circumstances for the other members of the cartel;
- last, it applied its Notice on immunity from fines and reduction of fines in cartel cases (see paragraph 17 above) in respect of two companies.

- 23 In the case of Trelleborg and Trelleborg Industrie, the Commission considered that the value of their sales came to EUR 4 909 332 on the basis of a worldwide market share of 15%, that Trelleborg Industrie had participated in the cartel for 18 years, 11 months and 23 days, which gave a multiplier of 19, and Trelleborg for 8 years, 11 months and 28 days, which gave a multiplier of 9, and, in application of the factors set out in the preceding paragraph, set the basic amount of the fine at EUR 24 500 000 for Trelleborg Industrie, for EUR 12 200 000 of which Trelleborg is jointly and severally liable.
- 24 As no aggravating or mitigating circumstance was applicable to them, those amounts constitute the final fine imposed on each of the two companies.

#### **Procedure and forms of order sought**

- 25 By applications lodged at the Registry of the General Court on 9 April 2009, the applicants brought the present actions.
- 26 As a Member of the First Chamber was unable to sit in the present case, the President of the Court designated another judge to complete the Chamber, pursuant to Article 32(3) of the Rules of Procedure of the General Court.
- 27 On hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, requested that the parties lodge certain documents and put questions to them in writing. The parties complied with that request.
- 28 By order of the President of the First Chamber of the General Court of 29 February 2012, Cases T-147/09 and T-148/09 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure.
- 29 By letter of 13 April 2012, the applicant in Case T-147/09 informed the Court that it was withdrawing its third plea put forward in the alternative.
- 30 By letter of 24 April 2012, the applicants submitted an application for the hearing to be held *in camera*.
- 31 The parties presented oral argument and replied to the questions put by the Court at the hearing on 26 April 2012.
- 32 The applicants withdrew their application for the hearing to be held *in camera* on that occasion.

33 Trelleborg Industrie claims that the Court should:

- annul Article 1 of the contested decision in part, in so far as it concerns it and in any event at least in so far as it finds that an infringement was committed before 21 June 1999;
- reduce the fine imposed on it in Article 2 in such a way as to correct the manifest errors in the contested decision;
- order the Commission to pay the costs.

34 Trelleborg claims that the Court should:

- annul Article 1 of the contested decision in part in so far as it concerns it and in any event at least in so far as it finds that an infringement was committed before 21 June 1999;
- reduce the fine imposed on it in Article 2 in such a way as to correct the manifest errors in the contested decision;
- order the Commission to pay the costs.

35 The Commission contends that the Court should:

- dismiss the applications;
- order the applicants to pay the costs.

## Law

### *The claims for annulment*

36 The applicants put forward jointly two pleas in law in support of their applications.

37 The first plea alleges (i) manifest error in the assessment of the facts, which led the Commission to consider that Trelleborg Industrie had participated in a continuous infringement between 1 April 1986 and 2 May 2007 and that Trelleborg had participated in a continuous infringement between 28 March 1996 and 2 May 2007 and (ii) infringement of Article 25(2) of Regulation No 1/2003.

38 The second plea alleges that the Commission had no legitimate interest in adopting a decision finding that an infringement existed before 1999.

*The first plea, alleging (i) manifest error in the assessment of the facts, leading the Commission to consider that Trelleborg Industrie had participated in a continuous infringement between 1 April 1986 and 2 May 2007 and that Trelleborg had participated in a continuous infringement between 28 March 1996 and 2 May 2007 and (ii) infringement of Article 25(2) of Regulation No 1/2003*

### The contested decision

39 It is apparent, in essence, from recital 148 to 187 of the contested decision that, between 13 May 1997 and 11 June 1999, for certain companies, and 21 June 1999, for other companies including the applicants, there was a slowdown in the activities of the cartel on account of dissension between its members. Many items of evidence however prove, according to the Commission, that, during that



period, the main protagonists in the cartel – Mr P, Mr W., Mr F. and Mr C., in particular – were regularly in contact with the aims, *inter alia* of exchanging commercial information and of attempting to re-start the cartel, which finally took place in June 1999.

- 40 Recitals 289 to 307 of the contested decision set out the reasons why the Commission considered the infringement to be continuous, or, in the alternative, repeated, despite its view that the cartel was less active during the intermediate period and that there was no need to impose a fine in respect of that period.
- 41 Moreover, it is apparent from Article 1(g) and (h) of the contested decision that the Commission took the view that a continuous infringement had been committed between 1 April 1986 and 2 May 2007 in which Trelleborg Industrie participated from 1 April 1986 to 2 May 2007 and in which Trelleborg participated from 28 March 1996 to 2 May 2007, and it is apparent from recitals 187, 201 to 208 and 466 to 448 of the contested decision that the intermediate period is considered, as regards the applicants, to be a period of reduced activity on the part of the cartel which does not warrant the imposition of a fine.

#### Arguments of the parties

- 42 The applicants submit, in essence, first, that the Commission, which must prove the duration of the infringement, has not proved that it continued during the intermediate period, as the evidence used by the Commission for that purpose was misinterpreted and, secondly, that in any event, it has no evidence that Trelleborg Industrie or Trelleborg participated in that infringement during that period. They dispute *inter alia* in that regard the Commission's analysis that the effects of the tenders awarded before the intermediate period continued until the end of 1997, which allows the period from September to December 1997 at the very least to be included in the period of the infringement.
- 43 Furthermore, the applicants take the view, in essence, that, accordingly, the Commission erred in characterising the infringement as continuing and in rejecting their arguments relating to the expiry of the limitation period in respect of the infringement for the period prior to the interruption of the cartel, in infringement of Article 25(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 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).
- 44 They dispute in that regard the possibility of using the concept of continuous infringement, as claimed by the Commission, where there is an interruption of almost two years of the cartel, and also the possibility of using, in the alternative, the concept of repeated infringement, which, according to the applicants, also includes an idea of continuity precluding its application if an interruption of the infringement is proved. The use of the categorisation of repeated infringement in such a case also runs counter to the principle of legal certainty since the limitation period could consequently be deferred indefinitely by the Commission. They submit that the categorisation of repeated infringement is not in any case referred to in the operative part of the contested decision.
- 45 Lastly, the applicants submit that the Commission failed to apply its previous decision-making practice and that they have been subject to discriminatory treatment as opposed to MRI, in respect of which the Commission took the view that a four-year gap, from August 1992 to September 1996, made it possible not to impose a fine for the acts committed by that company prior to 1 August 1992.
- 46 The Commission disputes those allegations and submits that the contested decision proves to the required legal standard that the infringement continued during the intermediate period even though the cartel had entered a phase of limited activity. It conceded however, in its written pleadings and when questioned on that subject at the hearing, that it has no proof that the applicants participated in contacts between cartel members during the intermediate period.

- 47 By contrast it submits that account must be taken, first, of the bids orchestrated before that period, the effects of which continued until November or December 1997 and, secondly, of the fact that the applicants did not distance themselves from the cartel at that time. That justifies, in the light of the case-law, their participation in the cartel being regarded as continuing between 1 April 1986 and 2 May 2007.
- 48 The Commission adds, in essence, that, in any event, if the Court were to take the view that the infringement is not continuous, it could be reclassified as a repeated infringement, a classification which the Commission referred to in the alternative in recital 307 of the contested decision. It follows, according to the Commission, that its power to impose a fine in respect of the period of infringement lasting from 1986 to 1997 was not time-barred at the time when the contested decision was adopted. Furthermore, it is therefore irrelevant that the operative part of the contested decision mentions only the existence of a continuous infringement.
- 49 When questioned by the Court at the hearing, the applicants conceded that they did not dispute their participation in the infringement either in respect of the period before 13 May 1997 or in respect of the period after 21 June 1999. They do however consider them to be separate infringements.

## Findings of the Court

### – Preliminary considerations

- 50 First of all, it is clear from the case-law that it is for the Commission to prove not only the existence of a cartel but also its duration (see Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 2802 and the case-law cited). In particular, as regards proof of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (see, to that effect, Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 58, and Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 86). Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding the infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment and/or amendment of a decision imposing a fine. In the latter situation, it is necessary to take account of the principle of the presumption of innocence, which is one of the fundamental rights which are protected in the European Union legal order and has been affirmed by Article 48(1) of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1). Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 215 and 216). It is accordingly necessary for the Commission to produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see *Groupe Danone v Commission*, and the case-law cited).
- 51 It has however also consistently been held that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, paragraph 180 and the case-law cited).



- 52 Furthermore, it is normal for the activities which anti-competitive agreements entail to take place clandestinely, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of meetings, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraphs 55 to 57, and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* [2007] ECR I-729, paragraph 51).
- 53 In addition, according to the case-law, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 79, and Case T-120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II-4441, paragraph 51 and the case-law cited).
- 54 It is common ground, in the present case, that the Commission does not have any evidence to prove that the applicants participated in the contacts between cartel members and in the reduced activity of the cartel during the intermediate period which is described in recitals 148 to 187 of the contested decision.
- 55 The Commission simply takes the view that the applicants' participation may be deduced from their not distancing themselves from the cartel in the course of the intermediate period and that, at the very least, that participation is proved until November or December 1997, on account of the continuation of the effects of the calls for tenders awarded as between members of the cartel prior to 13 May 1997 (see inter alia recitals 150, 162 and 187 of the contested decision).
- 56 It must therefore be assessed whether, on the basis of those findings, the Commission was entitled to categorise the infringement committed by Trelleborg Industrie between 1 April 1986 and 2 May 2007 and by Trelleborg between 28 March 1996 and 2 May 2007 as continuous and, consequently, take the view that the limitation period, under Article 25(2) of Regulation No 1/2003, began to run only as from the latter date.
- The existence of a continuous infringement
- 57 It should be borne in mind that, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. Such coincidences and indicia, when evaluated overall, may provide information not just about the mere existence of anti-competitive practices or agreements, but also about the duration of continuous anti-competitive practices or the period of application of anti-competitive agreements (see, to that effect, *Aalborg Portland and Others v Commission*, paragraph 52 above, paragraph 57, and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraphs 94 to 96 and the case-law cited).
- 58 Furthermore, such an infringement may be the consequence not only of an isolated act but also of a series of acts or indeed of continuous conduct. That interpretation cannot be challenged on the ground that one or more elements of that series of acts or of that continuous conduct might also constitute in themselves, and taken in isolation, an infringement of the competition rules. Where the various actions form part of an 'overall plan', owing to their identical object, which distorts

competition within the common market, the Commission is entitled to impute liability for those actions according to participation in the infringement considered as a whole (see *Aalborg Portland and Others v Commission*, paragraph 52 above, paragraph 258 and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, paragraph 57 above, paragraph 110).

- 59 As regards the lack of evidence that there was an agreement during certain specific periods or, at least, the lack of evidence of its implementation by an undertaking during a given period, it should be recalled that the fact that evidence of the infringement has not been produced in relation to certain specific periods does not preclude the infringement from being regarded as established during a longer overall period than those periods, provided that such a finding is supported by objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that a cartel is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the cartel, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, paragraph 57 above, paragraphs 97 and 98; see also, to that effect, *Aalborg Portland and Others v Commission*, paragraph 52 above, paragraph 260).
- 60 In that regard, several criteria have been identified by the case-law as relevant for assessing whether there is a single infringement, namely the identical nature of the objectives of the practices at issue (Case T-21/99 *Dansk Rørindustri v Commission* [2002] ECR II-1681, paragraph 67; see also, to that effect, Case C-113/04 P *Technische Unie v Commission* [2006] ECR I-8831, paragraphs 170 and 171; and Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435, paragraph 312), the identical nature of the goods or services concerned (see, to that effect, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*, not published in the ECR, paragraphs 118, 119 and 124, and *Jungbunzlauer v Commission*, paragraph 312), the identical nature of the undertakings which participated in the infringement (*Jungbunzlauer v Commission*, paragraph 312), and the identical nature of the detailed rules for its implementation (*Dansk Rørindustri v Commission*, paragraph 68). Furthermore, whether the natural persons involved on behalf of the undertakings are identical and whether the geographical scope of the practices at issue is identical are also factors which may be taken into consideration for the purposes of that examination.
- 61 The case-law therefore permits the Commission to assume that the infringement – or the participation of an undertaking in the infringement – has not been interrupted, even if it has no evidence of the infringement in relation to certain specific periods, provided that the various actions which form part of the infringement pursue a single purpose and are capable of falling within the framework of a single and continuous infringement; such a finding must be supported by objective and consistent indicia showing that an overall plan exists.
- 62 If those conditions are satisfied, the concept of continuous infringement therefore allows the Commission to impose a fine in respect of the whole of the period of infringement taken into consideration and establishes the date on which the limitation period begins to run, namely the date on which the continuous infringement ceased.
- 63 However, the undertakings accused of collusion may attempt to rebut that presumption by submitting indicia and evidence proving that, on the contrary, the infringement – or their participation in it – did not continue during those same periods.
- 64 In the present case, the applicants did not dispute, at the hearing, the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the principal detailed rules for its implementation, of the physical persons involved on behalf of the undertakings and, lastly, of the geographical scope of those practices prior to May 1997 and after June 1999.

- 65 Although such facts are capable of supporting the argument that there was an overall plan which was identifiable before and after the intermediate period, it must however also be noted that in the contested decision the Commission found, first, that the cartel went through a period of crisis in the course of which the way in which it operated was significantly altered and relations between its members were obviously loosened, with the result that its activities greatly slowed down during the intermediate period, and, secondly, that, in the course of that period, certain protagonists – in particular Mr P., Mr F., Mr C. and Mr W. – had taken advantage of their contacts to attempt to re-start cooperation between the undertakings concerned (see recitals 148 to 187 of the contested decision). That is the reason why the Commission was prompted not to impose a fine on any of the cartel members in respect of that intermediate period.
- 66 However, the fact remains that the Commission does not have any proof that the applicants were involved in multilateral contacts during that intermediate period, which lasted for more than two years, or that they took part in meetings which took place with the aim of re-starting the cartel, or even that they were aware of them.
- 67 Accordingly, the applicants' argument that they in fact interrupted their participation appears to be sufficiently substantiated and plausible to rebut the presumption, referred to in paragraph 61 above, that they continued, even if passively, to participate in the infringement despite the lack of evidence to that effect. Having regard to the fact that, during the intermediate period, the cartel's activity was reduced, or even non-existent, and to the lack of objective and consistent indicia that the applicants still intended to re-start that cartel or subscribe to its objectives, the Commission was not entitled to assume continued participation, even passive, on their part.
- 68 The Commission however relies, in its written pleadings, on the case-law (*Commission v Anic Partecipazioni*, point 50 above, paragraphs 83 et 84) according to which the undertaking must, in order to end its liability, distance itself openly and without equivocation from the cartel, so that the other participants are aware of the fact that it no longer supports the general objectives of the cartel. It concludes that, by not distancing themselves during the intermediate period, the applicants may nevertheless be found to have participated in that infringement period of lower intensity, but that that does not however result in the imposition of a fine for that period. According to that case-law, a party which tacitly approves of an initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery, which constitutes a passive mode of participation in the infringement which is capable of rendering the undertaking concerned liable. Given that (i) it is apparent from the contested decision that the normal functioning of the cartel was interrupted during the intermediate period, which lasted for more than two years, (ii) it has not been proved that the applicants took part in the contacts which took place in the course of the intermediate period with the aim of restarting the cartel or that they were aware of them, and (iii) even if the Commission's arguments as regards the continuation of the effects of the calls for tenders awarded prior to May 1997 were accepted, those effects continued at most until November or December 1997 – which in any event leaves a period of 18 months before the re-establishment of the cartel during which there were no objective and consistent indicia that the applicants were involved in the contacts which took place during the cartel's crisis period – the Commission cannot argue that the applicants did not distance themselves, during the intermediate period, from the action which certain cartel members took to revive it.
- 69 In the light of those circumstances, it is clear that the fact that the applicants did not publicly distance themselves from the other members of the cartel could not have caused the other members to gain the impression that the applicants were at least passively in collusion with them, with the result that the applicants' conduct could not be equated with tacit approval of an anti-competitive initiative. In the absence of indicia leading to the conclusion that the applicants were aware of the contacts between the other members of the cartel during the intermediate period with a view to re-starting the cartel, the normal functioning of which had been interrupted, the Commission was not therefore entitled to infer that they were both liable on the ground that they did not publicly distance themselves from the

cartel. That ground, on its own, cannot suffice to make up for the complete lack of objective and consistent indicia which could have proved, both from an objective and a subjective point of view, their plausible participation and continuous collusion in a single infringement during that period.

70 Consequently, it must be held that the Commission could not lawfully find that the infringement committed by the applicants was a single and continuous infringement. That error does not however necessarily mean that the Commission infringed Article 25(2) of Regulation No 1/2003.

71 Having regard to the fact that the infringement cannot, in the present case, be categorised as continuing, it therefore remains to be ascertained, in order to establish whether the limitation period has expired pursuant to Article 25(2) of Regulation No 1/2003, whether the infringement must be categorised as repeated, which the applicants dispute.

– The existence of a repeated infringement

72 As the interpretation of the concept of a repeated infringement is a matter of debate between the parties, the Court must first define its meaning in relation to that of a continuing infringement within the meaning of Article 25(2) of Regulation No 1/2003.

73 When carrying out a literal interpretation of a provision of European Union law, it must be borne in mind that European Union legislation is drafted in a number of languages and that the various language versions are all equally authentic. An interpretation of such a provision thus involves a comparison of the language versions (Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 18). The need for a uniform application and interpretation of the provisions of European Union law means that the text of a provision must not be considered in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages (see Case C-63/06 *Profisa* [2007] ECR I-3239, paragraph 13 and the case-law cited). Furthermore, where there is divergence between the various language versions of a European Union text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see *Profisa*, paragraph 14 and the case-law cited).

74 More generally, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (Case 292/82 *Merck* [1983] ECR 3781, paragraph 12), and also the provisions of European Union law as a whole (*CILFIT*, paragraph 73 above, paragraph 20).

75 First, it must be pointed out that in Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), on which the provisions relating to limitation periods in Regulation No 1/2003 are based, Article 1(2) referred to ‘continuing or repeated infringements’, the French version referring to ‘infractions continues ou continuées’ (‘continuing or continued’).

76 It must be borne in mind, in that connection, that, as regards ‘continuées’ within the meaning of Article 1 of Regulation No 2988/74, the Court of Justice has held that, although that concept has different meanings in the legal orders of the Member States, in any event it comprises a pattern of unlawful conduct united by a common subjective element (Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, paragraph 195).

77 The French language version of Article 25(2) of Regulation No 1/2003 replaced the concept of ‘continue ou continuée’ by that of ‘continue ou répétée’ (‘continuing or repeated’).

78 However, not all the language versions of that provision were amended in that way.



- 79 The words ‘continuing or repeated infringements’ were already used in Article 1(2) of Regulation No 2988/74 in the English language version of that regulation and that terminology was retained in the English language version of Article 25(2) of Regulation No 1/2003.
- 80 Furthermore, when adopting Regulation No 1/2003, the legislature retained, in most of the language versions, the terminology which previously appeared in Regulation No 2988/74 (they were, in this instance, the Spanish, Danish, German, Greek, Dutch, Finnish and Swedish language versions), whereas the other language versions were also amended in order to include the concept of a repeated infringement instead of an ‘infraction continuée’ (this concerned the Italian and Portuguese language versions).
- 81 Moreover, recital 31 in the preamble to Regulation No 1/2003 states that:
- ‘The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation ... No 2988/74, which also concerns penalties in the field of transport ... To clarify the legal framework, Regulation ... No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.’
- 82 It must therefore be held that it was not the legislature’s intention to amend the meaning of the earlier provision when it recast Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), in spite of the change in terminology which took place in certain language versions, but, on the contrary, it intended to put an end to the possible confusion to which the use of the concept of ‘infraction continuée’ had given rise.
- 83 Secondly, the concept of a repeated infringement is different from that of a continuing infringement (see, to that effect, Case T-18/05 *IMI and Others v Commission* [2010] ECR II-1769, paragraphs 96 and 97) and that distinction is moreover borne out by the use of the conjunction ‘or’ in Article 25(2) of Regulation No 1/2003.
- 84 The applicants’ argument that it is necessary to distinguish a ‘classic’ infringement from a ‘continuing and repeated’ infringement must therefore be rejected.
- 85 Thirdly, the notion of a single infringement covers a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was intended to distort competition and also individual infringements linked to one another by the same object and the same undertakings (see, to that effect, Case T-53/03 *BPB v Commission* [2008] ECR II-1333, paragraph 257, and Case T-446/05 *Amann & Söhne and Cousin Filterie v Commission* [2010] ECR II-1255, paragraph 89).
- 86 In other words, the way in which the infringement was committed determines whether it may be categorised as a single, continuing infringement or a single, repeated infringement.
- 87 Furthermore, it must be borne in mind, as regards a continuing infringement, that the notion of an overall plan means that the Commission may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in that infringement, provided that that undertaking participated in the infringement prior to and after that period and provided that there is no proof or indicia that the infringement was interrupted so far as concerns that undertaking. In that case, it will be able to impose a fine in respect of the whole of the period of infringement, including the period in respect of which it does not have evidence of the participation of the undertaking concerned (see paragraphs 60 to 62 above).



- 88 By contrast, if the participation of an undertaking in the infringement may be regarded as having been interrupted and the undertaking may be regarded as having participated in the infringement prior to and after that interruption, that infringement may be categorised as repeated if – as in the case of a continuing infringement (see paragraph 60 above) – there is a single objective which it pursued both before and after the interruption, a circumstance which may be deduced from the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings and, lastly, of the geographical scope of those practices. The infringement is then single and repeated and, although the Commission may impose a fine in respect of the whole of the period of the infringement, it may not do so for the period during which the infringement was interrupted.
- 89 Consequently, separate periods of infringement in which the same undertaking takes part, but in respect of which a common objective cannot be established, cannot be categorised as a single infringement – continuing or repeated – and constitute separate infringements.
- 90 In the present case, the Commission admits that it does not have evidence of the applicants' involvement during the intermediate period, which lasted for more than two years. That period did not moreover give rise to the imposition of any fine.
- 91 By contrast, the applicants have admitted that they participated in an infringement prior to and after the intermediate period and they conceded, at the hearing, that they do not dispute the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings and, lastly, of the geographical scope of those practices prior to May 1997 and after June 1999.
- 92 The Court must therefore hold that Trelleborg Industrie committed a single, repeated infringement from April 1986 to 13 May 1997 and from 21 June 1999 to May 2007 and that Trelleborg committed a single, repeated infringement from 28 March 1996 to 13 May 1997 and from 21 June 1999 to May 2007. The Commission's incorrect categorisation of the infringement as continuous does not prevent the Court from re-categorising it as repeated in the light of the facts in the administrative file which form the basis for the contested decision (see, by analogy, *IMI and Others v Commission*, paragraph 83 above, paragraphs 96 and 97; see also, by analogy, Joined Cases T-427/04 and T-17/05 *France and France Télécom v Commission* [2009] ECR II-4315, paragraphs 322 to 325, confirmed on appeal by the judgment in Case C-81/10 P *France Télécom v Commission* [2011] ECR I-12899, paragraph 80 et seq.).
- 93 That finding cannot be called in question by the applicants' argument that, by relying on the theory of the repeated infringement, which the Commission did in the alternative in the contested decision (see paragraphs 22 and 40 above), it could indefinitely defer the limitation period and therefore render it worthless, which would be contrary to the principle of legal certainty.
- 94 That argument must be rejected on the ground that, first, if the conditions for finding that there is a repeated infringement are satisfied, it follows from Article 25(2) of Regulation No 1/2003 that the limitation period is deferred. Secondly, the possible abuse of the theory of the repeated infringement cannot be assessed *in abstracto*. It essentially depends on the circumstances of each specific case and, in particular, on the Commission's ability to establish that there is a single infringement over the various periods under consideration.

– The effect of the existence of a repeated infringement on the limitation period

95 Since Trelleborg Industrie committed a single, repeated infringement from April 1986 to May 1997 and from June 1999 to May 2007 and Trelleborg committed a single, repeated infringement from March 1996 to May 1997 and from June 1999 to May 2007, it must be held that the period of infringement prior to 13 May 1997 is not time-barred.

– The other heads of claim

96 Furthermore, as regards the head of claim alleging infringement of the principle of legal certainty, it must be borne in mind that that principle is a fundamental principle of European Union law which requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly. However, where a degree of uncertainty regarding the meaning and scope of a rule of law is inherent in that rule, it is necessary to examine whether the rule at issue displays such ambiguity as to make it difficult for individuals to resolve with sufficient certainty any doubts as to its scope or meaning (see, to that effect, Case C-110/03 *Belgium v Commission* [2005] ECR I-2801, paragraphs 30 and 31).

97 Since the criteria for finding that there is a repeated infringement are clear and precise and do not involve any ambiguity which makes it difficult for individuals to resolve with sufficient certainty any doubts they may have as to the scope or meaning of that rule, it must be held that the foreseeable nature of legal situations is guaranteed and the head of claim alleging infringement of the principle of legal certainty must be rejected.

98 As regards the head of claim relating to equal treatment, it should be recalled that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-485/08 P *Gualtieri v Commission* [2010] ECR I-3009, paragraph 70).

99 In the present case, the Commission maintains that it did indeed find that MRI had committed an infringement from 1 April 1986 to 1 August 1992 and from 3 September 1996 to 2 May 2007, but that it did not however apply to it the theory of the repeated infringement and that, furthermore, it did not impose a fine on it for the period of infringement prior to 1 August 1992, in view of its discretion not to impose a penalty for the period preceding the interruption of MRI's participation in the cartel, even though it could have found that the infringement was repeated.

100 First, it must be held that the Commission was right in maintaining that, pursuant to the provisions of Article 23(2) of Regulation No 1/2003, it has a discretion as regards the decision to impose a fine on the perpetrator of an infringement of Article 81 EC. That power must however be exercised in compliance with the principle of equal treatment.

101 Secondly, it must be held that the situations of MRI and of the applicants are not comparable.

102 MRI was not penalised for its participation in the cartel in respect of the period prior to 1 August 1992, as the interruption taken into consideration by the Commission for that purpose extended from that date to 3 September 1996, whereas the interruption on which the applicants rely concerns only the intermediate period.

103 It follows that the head of claim alleging infringement of the principle of equal treatment must be rejected.

104 Furthermore, and for the sake of completeness, even if the Commission misapplied the criteria governing limitation in respect of MRI, in any event such unlawfulness, which is not the subject of proceedings in the present case, would not mean that the applicants' application for annulment is well founded. In this respect, it is appropriate to recall that the principle of equal treatment must be reconciled with the principle of legality and thus a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party. An unlawful act committed with regard to another undertaking, which is not party to the present proceedings, cannot lead the Court to find that it is discriminatory and, therefore, unlawful with regard to the applicants. Such an approach would be tantamount to laying down a principle of 'equal treatment in illegality', solely on the ground that another undertaking which may find itself in a comparable situation has unlawfully escaped being penalised (see *Peróxidos Orgánicos v Commission*, paragraph 53 above, paragraph 77 and the case-law cited).

105 The contested decision must accordingly be annulled in so far as it finds that Trelleborg Industrie committed a continuous infringement from 1 April 1986 to 2 May 2007 and that Trelleborg committed a continuous infringement from 28 March 1996 to 2 May 2007, but, as to the remainder, the plea alleging that the limitation period has expired must be rejected.

*The second plea, alleging that the Commission had no legitimate interest in adopting a decision finding that an infringement existed before 1999*

#### Arguments of the parties

106 The applicants maintain in substance that the Commission is in principle entitled to find that there has been an infringement even if it is time-barred. In accordance with the case-law, however, it ought to have demonstrated in this case that it had a legitimate interest in making such a finding, that is to say, it ought to have explained how the circumstances had made it necessary to adopt a decision finding infringements that had ended at least 12 years before the adoption of the contested decision.

107 The Commission disputes that argument.

#### Findings of the Court

108 Since it has been held in the context of the first plea that the infringement committed by the applicants must be categorised as a single, repeated infringement (see paragraph 92 above) and that the infringement period prior to 13 May 1997 is not time-barred (see paragraph 95 above), the second plea must be rejected.

#### *The claim for amendment*

109 The applicants claim that the contested decision should be amended and that the fine should be reduced.

110 It must be borne in mind that, in accordance with Article 261 TFEU, regulations adopted jointly by the European Parliament and the Council of the European Union, pursuant to the provisions of the FEU Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations. Such jurisdiction was conferred on the Courts of the European Union by Article 31 of Regulation No 1/2003. The Courts of the European Union are therefore empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. It follows that the Courts of the European Union are empowered to exercise their

unlimited jurisdiction where the question of the amount of the fine is before them and that that jurisdiction may be exercised to reduce that amount as well as to increase it (see Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, paragraphs 60 to 62 and the case-law cited).

- 111 Furthermore, under Article 23(3) of Regulation No 1/2003, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.
- 112 The Court of Justice has held that, in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Union (see Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085, paragraph 56 and the case-law cited).
- 113 The Court of Justice has also stated that objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements (*Chalkor v Commission*, paragraph 112 above, paragraph 57).
- 114 In that regard, it must be borne in mind that, by its nature, the fixing of a fine by the 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 (judgment of 14 September 2004 in Case T-156/94 *Aristrain v Commission*, not published in the ECR, paragraph 43).
- 115 In the present case, it must be borne in mind that although the infringement committed by the applicants cannot be categorised as continuing (see paragraph 71 above), the fact nonetheless remains that it is a repeated infringement (see paragraph 95 above). Furthermore, it must be stated that the Commission did not impose a fine on the applicants for the intermediate period. The error made by the Commission as regards the continuing nature of the infringement for which the applicants were found liable did not therefore have any effect on the duration of the infringement taken into consideration by the Commission in calculating the amount of the fine.
- 116 In the present case, it must be pointed out that the seriousness of the cartel is indisputable, in the light of the fact that the infringing conduct, in which the applicants fully participated, was characterised by 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. Furthermore it is a worldwide cartel.
- 117 What is more, the infringement was committed by Trelleborg Industrie for a particularly long period of 18 years and 11 months and Trelleborg was jointly and severally liable for the conduct of its subsidiary for a period of eight years and 11 months.
- 118 The General Court therefore finds that there is no need to reduce the fine which was imposed on the applicants.
- 119 The claim for amendment submitted by the parties must therefore be rejected.
- 120 Consequently, the contested decision must be annulled in part and the actions must be dismissed as to the remainder.

## Costs

- <sup>121</sup> Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, order that the costs be shared or that each party bear its own costs.
- <sup>122</sup> In the present case, it must be held that the applicants were right in claiming that the Commission erroneously found that they had committed a continuous infringement from 1 April 1986 to 2 May 2007. That unlawful act however has no effect as regards the calculation of the fine. To that extent, a fair assessment of all the circumstances in the case will be made by holding that each of the parties is to bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Annuls Article 1(g) and (h) of 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), in so far as it applies to the period from 13 May 1997 to 21 June 1999;**
- 2. Dismisses the actions as to the remainder;**
- 3. Orders each party to bear its own costs.**

Azizi

Prek

Frimodt Nielsen

Delivered in open court in Luxembourg on 17 May 2013.

[Signatures]

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