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 — Attributability of unlawful conduct — Fines — 2006 Guidelines on the method of setting fines — Legal certainty — Ceiling of 10% — Mitigating circumstances — Cooperation)

In Case T-146/09,

Parker ITR Srl, established in Veniano (Italy),

Parker-Hannifin Corp., established in Mayfield Heights (Ohio, United States), represented by B. Amory, F. Marchini Càmia, and F. Amato, lawyers,

applicants,

v

European Commission, represented initially by N. Khan, V. Bottka and S. Noë, and subsequently by V. Bottka, S. Noë and R. Sauer, 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 27 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 One of the two applicants, Parker-Hannifin Corp. is active in the manufacture of motion and control systems and technologies, providing precision engineered solutions for a wide range of commercial, mobile, industrial and aerospace markets.

12 Parker-Hannifin is divided into eight groups: Aerospace, Hydraulics, Filtrations, Climate and Industrial Control, Fluid Connectors, Seal, Instrumentation and Automation/Pneumatics. The Fluid Connectors group is divided into four geographic regions (North America, South America, the European Union and Asia). Within the European Union, the Fluid Connectors group has four divisions and one business unit. The products of the business unit are sold on the global marine oil and gas market.

13 Parker-Hannifin is the parent company of Parker-Hannifin International Corp., which in turn is the parent company of Parker Italy Holding LLC. Parker Italy Holding LLC owns Parker Italy Holding Srl, the parent company of Parker ITR Srl.

14 Parker-Hannifin's worldwide consolidated turnover for all products during the business year 2006 was EUR 7 410 million.

15 Parker ITR manufactures and markets industrial and hydraulic hoses, marine oil and gas hoses and technical compounds. Its worldwide turnover in 2006 was EUR [*confidential*] [1]. It is based in Veniano (Italy).

16 The marine oil and gas hose business owned by Parker ITR was established in 1966 by Pirelli Treg SpA, a company belonging to the Pirelli group.

17 In December 1990 Pirelli Treg's business in the marine hose sector was taken over by ITR SpA, a company resulting from the merger of Pirelli Treg with Itala, another subsidiary of the Pirelli group. In 1993 ITR SpA was acquired by Saiag SpA.

18 After opening negotiations with Parker-Hannifin concerning the possible sale of, inter alia, its marine hose business, ITR created a subsidiary, ITR Rubber Srl, on 27 June 2001.

19 In that regard, first, on 5 December 2001 Parker-Hannifin Holding, a newly-formed subsidiary within the Parker group whose purpose was to buy the rubber hose business from ITR, and ITR entered into an agreement under which Parker-Hannifin Holding acquired 100% of the shares in ITR Rubber.

20 Secondly, the provisions in section (e) of the 'Premises' of the agreement state that the contribution of the rubber hose business from ITR to ITR Rubber was at the request of Parker-Hannifin Holding.

1 — Confidential data omitted.

21 Thirdly, section 3.1.3 of the agreement provides that '[t]he obligation of [Parker-Hannifin Holding] is … conditional upon [ITR] having carried out the Contribution'. [ITR] 'will keep [Parker-Hannifin Holding] constantly informed of the progress of the Contribution procedure and will agree with [Parker-Hannifin Holding] on every material change to the Contribution … that becomes necessary or [is] deemed to be opportune'.

22 Fourthly, section 7.1.2 of the agreement states that ITR Rubber, which was formed 'for the purposes of the Contribution and prior to the … [d]ate' thereof 'did not trade, file account or undertake any activity other than those necessary for the Contribution to be fully effective and since the Contribution Date it has carried on the Business in the ordinary course and carried out no other activity'.

23 On 19 December 2001, ITR transferred its rubber hose business (including the marine hose business) to ITR Rubber.

24 The transfer took effect on 1 January 2002.

25 On 31 January 2002 ITR Rubber was acquired by Parker-Hannifin Holding and a few months later ITR Rubber was renamed Parker ITR.

26 Parker-Hannifin Holding, and then Parker Italy Holding Srl, holds 100% of the shares in Parker ITR.

The administrative procedure

27 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*], 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) ('the Leniency Notice'), 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.

28 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, other producers concerned and also [*confidential*] and Mr P.W.

29 Manuli Rubber Industries, Parker ITR and Bridgestone submitted applications to the Commission for leniency on 4 May, 17 July and 7 December 2007 respectively.

30 On 28 April 2008 the Commission adopted a statement of objections, which it notified to the various companies concerned between 29 April and 1 May 2008.

31 All 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

32 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 follows, 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 11 June 1999 the cartel was less active and friction arose between its members. However, according to the Commission, 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 Manuli, which was wholly re-integrated in the cartel the following year). It must therefore be considered that the producers 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 period from 13 May 1997 until 11 June 1999 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:

  — Parker ITR: from 1 April 1986 until 2 May 2007;

  — Parker-Hannifin: from 31 January 2002 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 worldwide average annual sales of each of the companies during the period 2004 to 2006, with the exception of Yokohama Rubber, for which it took the period 2003 to 2005, and also 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 against Parker ITR and another company and rejected all mitigating circumstances for the other members of the cartel;

  — last, pursuant to the Leniency Notice, the Commission reduced the fines imposed on two companies, but rejected the applications for a reduction submitted by Parker ITR and another company.

33 As regards Parker ITR, the Commission considered that the value of its sales came to EUR [*confidential*] on the basis of a worldwide market share of [*confidential*], that Parker ITR had participated in the cartel for 19 years and 5 days, which gave a multiplier of 19, and Parker-Hannifin for 5 years, 3 months and 3 days, which gave a multiplier of 5.5, and, in application of the various factors set out in the preceding paragraph, set the basic amount of the fine at EUR 19 700 000 for Parker ITR and at EUR 6 400 000 for Parker-Hannifin.

34 In the light of the aggravating circumstances found against Parker ITR and Parker-Hannifin, the fines were then increased to EUR 25 610 000 for Parker ITR, for EUR 8 320 000 of which Parker-Hannifin is jointly and severally liable.

Procedure and forms of order sought

35 By application lodged at the Registry of the General Court on 9 April 2009, the applicants brought the present action.

36 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.

37 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.

38 By letter of 12 March 2012, the applicants submitted a request for a measure of organisation of procedure, seeking to lodge new documents.

39 The parties presented oral argument and replied to the questions put by the Court at the hearing on 27 April 2012.

40 The applicants withdrew their request for a measure of organisation of procedure on that occasion.

41 The applicants claim that the Court should:

— annul the contested decision in so far as it holds Parker ITR liable from 1 April 1986 until 9 June 2006 and Parker-Hannifin liable from 31 January 2002 until 9 June 2006;

— substantially reduce the fines imposed on the applicants;

— order the Commission to pay the costs.

42 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

The claims for annulment

43 The applicants put forward nine pleas in law in support of the action.

44 In the first plea, the applicants submit that, by incorrectly attributing liability for the infringement to Parker ITR for the period before 1 January 2002, the Commission infringed the principle of personal liability, engaged in an abuse of procedure and infringed the principle of non-discrimination and the obligation to state reasons.

45 The second plea alleges incorrect attribution to the applicants of liability for the infringement connected with the unlawful conduct of Mr P., who ran the marine hose business within the undertaking.

46 By the third plea, the applicants submit that Parker-Hannifin was wrongly considered to be jointly and severally liable for the infringement with Parker ITR.

47 The fourth plea alleges that the imposition of a fine on Parker ITR for the period before 11 June 1999 infringes 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) and the principle of non-discrimination and has no statement of reasons.

48 In the fifth plea, the applicants submit that the fine was wrongly increased on the ground that Parker ITR played the role of leader.

49 The sixth plea alleges infringement of the principle of individual responsibility and the obligation to state reasons with respect to the increase of the fine imposed on Parker-Hannifin for Parker ITR's role as leader.

50 By the seventh plea, the applicants submit that the principle of the protection of legitimate expectations was infringed owing to the application of an incorrect method of calculating the value of sales for the purposes of setting the fine.

51 The eighth plea alleges infringement of Article 23(2) of Regulation No 1/2003 and infringement of the principle of personal liability and of the obligation to state reasons in the calculation of the ceiling of 10% of turnover.

52 Lastly, the ninth plea alleges infringement of the principle of the protection of legitimate expectations and of the obligation to state reasons, owing to the Commission's refusal to apply a reduction of the fine for cooperation.

53 It is appropriate to examine in turn the first, fourth, fifth, sixth, second, third, seventh, eighth and ninth pleas.

The first plea, alleging the incorrect attribution of liability for the infringement to Parker ITR for the period before 1 January 2002

Contested decision

54 It is apparent, in essence, from recitals 327 to 329 and 366 to 373 of the contested decision that the Commission took the view that, in accordance with the principle of economic continuity, Parker ITR, formerly ITR Rubber, had to be held liable for the whole of the infringement committed as from 1986, following the internal restructuring which took place within the Saiag group, the transfer of the rubber hose business from ITR to ITR Rubber and then the transfer of that subsidiary to Parker-Hannifin, and that the arguments concerning the principle of personal liability put forward by Parker ITR in the course of the administrative procedure had to be rejected.

55 The Commission also stated that the fact that it may not have relied in a similar way on the case-law in another case also concerning internal group reorganization was irrelevant and did not impede it in law from reaching a different conclusion in the present case on the basis of a different set of facts.

Arguments of the parties

56 The first plea put forward by the applicants consists of three parts.

57 The applicants maintain, in essence, in support of the first part of their plea, that Parker ITR cannot be held liable for the period before 1 January 2002, in so far as, in their submission, it follows from the case-law that it is for the legal person who ran the undertaking at the time when the infringement was committed to answer for it, even though, when the decision finding the infringement was adopted, a different person had assumed responsibility for operating the undertaking. In fact, Parker ITR became owner of the assets that contributed to the infringement only as from 31 January 2002.

58 In the applicants' submission, the Commission erred in treating the transfer of the assets from ITR to ITR Rubber as a type of internal reorganisation of the undertakings that justified the application of the economic succession theory and, therefore, a derogation from the principle of personal responsibility.

59 The applicants explain that recent case-law confirms that in cases of intra-group transfers of assets, the economic succession theory can apply only if the structural links between the transferor and the transferee of the assets still exist at the time of the adoption of the Commission's decision finding that there has been an infringement.

60 In the applicants' submission, between the time when it was formed, on 27 June 2001, and 1 January 2002, ITR Rubber carried out no economic activity. It was a vehicle formed only in order to effect the transfer of the rubber business to Parker-Hannifin. That object is clear, according to the applicants, from section 7.1.2 of the agreement signed between ITR and Parker-Hannifin.

61 The second part of the first plea alleges an abuse of procedure.

62 The applicants maintain, in essence, that the Commission declared Parker ITR liable for the period before 1 January 2002 with the sole aim of circumventing Article 25 of Regulation No 1/2003, which lays down limitation periods the application of which would have precluded ITR and Pirelli from being penalised. Accordingly, that constitutes an abuse of procedure.

63 The third part of the first plea alleges infringement of the principle of non-discrimination and of the obligation to state reasons.

64 In support of their argument, the applicants claim in essence that, in the statement of objections the Commission applied the economic continuity theory in the same way to them and to Dunlop Oil & Marine Ltd, which was in a very similar situation. In the contested decision, however, it abandoned the economic continuity theory only with respect to Dunlop Oil & Marine Ltd and not with respect to them, without providing the slightest explanation, although, in each case, the purchaser had acquired the seller's assets, that is to say, the marine hose business.

65 The applicants submit, moreover, that in making a finding of infringement for the period before 1 January 2002, first, the Commission departed from its previous practice without providing any logical explanation for having done so; secondly, it failed to answer the arguments which they put forward in their response to the statement of objections; and, thirdly, it did not explain the difference in treatment between them and Dunlop Oil & Marine Ltd.

66 The Commission disputes those arguments.

67 In the first place, the Commission submits, in essence, that there was no need to apply the principle of personal liability in the present case, in so far as there was an economic succession within the same group (recitals 370 to 373 of the contested decision). In the Commission's submission, the case-law distinguishes the consequences of a transfer of assets from those of a transfer of legal entities by providing that, if only assets involved in the infringement are transferred, liability follows those assets only in the exceptional circumstance where the legal person that owned those assets has ceased to exist in law or has ceased all economic activities. Where, on the other hand, a legal entity responsible for the unlawful conduct is sold, that same entity remains liable for its past infringements (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693).

68 In the Commission's view, it also follows from the case-law (Case C-280/06 *ETI and Others* [2007] ECR I-10893) that an economic succession depends on the circumstances prevailing at the time of a transfer of assets and that that economic succession is not affected by the subsequent sale of a subsidiary to a new undertaking. The consequences, as regards liability, of that subsequent sale of the subsidiary are governed by the case-law on the breaking up of the undertaking. In the Commission's submission, the fact that an undertaking liable for an infringement is broken up does not have the consequence that the liability for the various legal entities that previously formed the economic unit ceases to exist. On the contrary, those legal entities can still be held jointly and severally liable, even if some of them belong to a new group at the time of the adoption of the decision finding that there has been an infringement.

69 In the present case, according to the Commission, only the transfer of ITR's assets to ITR Rubber, companies between which, as is in any event established, there were structural and economic links when they were both parts of the Saiag group, is relevant with regard to the criterion of economic continuity, ITR's full and entire liability having been transferred to its subsidiary, ITR Rubber, including that in respect of the period prior to the latter's formation.

70 Subsequently, that liability became attached to the legal entity ITR Rubber and, when that legal entity became Parker ITR after its transfer to Parker-Hannifin, it remained liable for the past infringements of ITR Rubber's former parent company, in accordance with the case-law that a legal entity may be held liable for the infringement committed by the undertaking to which it belonged.

71 The Commission states that, as regards ITR Rubber's sale to Parker-Hannifin, there can be no question of a sale of assets to an unrelated undertaking, because the sale covered not only the assets but also an existing legal entity which carried its liability with it.

72 The sale of the assets in question within the Saiag group, from ITR to ITR Rubber, and the subsequent sale of the latter to a new group, namely the Parker-Hannifin group, must therefore be treated as separate events, as the sale of ITR Rubber cannot undo the previous economic succession.

73 Furthermore, in the Commission's submission, the only appropriate time to evaluate the factual situation and to determine whether a transfer of assets took place within a group or between independent undertakings is the time of the transfer itself. The date of adoption of the decision finding that there has been an infringement comes into play only for the purpose of establishing whether a company liable for the infringement has since been dissolved.

74 The Commission contends, moreover, that the duration of the period during which the structural links continue to exist after the economic succession has taken place is irrelevant for the finding of economic succession; thus, the subsidiary which was sold can still be held jointly and severally liable with the remaining entities of its former economic unit for the period of the infringement up to the sale of the subsidiary.

75 Furthermore, the Commission disagrees with the applicants' analysis of the judgment in Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, and contends, in essence, that the facts of that case are not comparable with the facts of the present case.

76 The Commission states in addition that ITR Rubber was formed and wholly owned by its parent company, ITR, and the ultimate parent, the Saiag group, until it was sold to Parker-Hannifin. The fact that for six months (from 27 June 2001 until 1 January 2002) ITR Rubber carried out little economic activity supports the finding that that subsidiary fulfilled the economic role which its parent company intended it to play and that it could not act autonomously, and that assessment is not called into question by what may have happened between 1 January 2002, the date on which the transfer of ITR's assets to ITR Rubber became effective, and 31 January 2002, the date on which all of the shares in ITR Rubber were acquired by Parker-Hannifin.

77 The Commission observes in that regard that the contractual prohibition on ITR's exercising influence on ITR Rubber applied following the transfer of assets (as from 1 January 2002), which means that the purchase agreement could not hinder the existence of an economic unit at the time of the transfer.

78 The Commission claims, last, that transfers within a group of companies normally take place between a number of legal entities controlled by a single parent company and in that case it is the parent company that is generally held liable if it has exercised a decisive influence over its subsidiaries. An economic succession within a group thus makes it possible to pursue the subsidiary which is the economic successor even if that subsidiary is no longer controlled by the former parent company. That possibility is useful, according to the Commission, for the purposes of applying competition law where the former parent company no longer exists or if it cannot be pursued for other reasons, like the fact that, in the present case, the infringement is time-barred as regards ITR and Saiag.

79 In the second place, the Commission submits that the case-law accords it a discretion which makes it possible for it to choose to whom to address its decision finding that there has been an infringement both in cases of economic succession and, more generally, as regards parent companies and their subsidiaries; it could therefore decide to address the contested decision only to the economic successor, namely Parker ITR, and not to the predecessor still in existence, namely ITR and/or Saiag.

80 In response to the second part of the first plea, the Commission disputes the applicants' allegations that it misused its powers. It explains that even if one reason for addressing the contested decision to Parker ITR was that any sanction against ITR or Saiag would be time-barred, that approach is justified, since, in the Commission's contention, the same assets, indeed the same undertaking, continued the infringement.

81 As regards the third part of the first plea, the Commission claims, in particular, in essence, that the statement of objections was based on incorrect facts so far as Dunlop Oil & Marine Ltd was concerned. In effect, it was Unipoly Ltd, the new owner of the assets involved in the infringement,

that formed Dunlop Oil & Marine Ltd, and not the seller of those assets, [*confidential*], which distinguishes the situation of that undertaking from the situation of the applicants, in whose case what happened was the sale of a legal entity and not just the sale of assets.

82 As for the complaint alleging infringement of the obligation to state reasons, the Commission contends, in essence, that it is a mere reformulation of the other complaints put forward in support of this plea.

Findings of the Court

83 It must be borne in mind that European Union competition law refers to the activities of undertakings (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59).

84 In competition law the term 'undertaking' must be understood as designating an economic unit – that is to say a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis – even if in law that unit consists of several persons, natural or legal – (see, to that effect, Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11; T-66/99 *Minoan Lines* v *Commission* [2003] ECR II-5515, paragraph 122; and Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85).

85 Furthermore, under the principle of personal responsibility, a punishable act can be attributed only to its author. In addition, under the principle of the personal nature of penalties, no punishment may be imposed other than on the guilty party. Those principles, which constitute fundamental guarantees deriving from criminal law, therefore preclude a natural or legal person who is not the author of an offence from being held responsible for it (see, to that effect, Opinion of Advocate General Cosmas in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4130, point 74; Opinion of Advocate General Colomer in *Aalborg Portland and Others* v *Commission*, paragraph 83 above, ECR I-133, points 63 and 64; Opinion of Advocate General Bot in Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission v ArcelorMittal Luxembourg* [2011] ECR I-2239, point 181; and Opinion of Advocate General Bot in Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, point 162).

86 According to settled case-law, those principles apply to European Union competition law. The Court of Justice has held that, given the nature of the infringement in question and the nature and degree of severity of the ensuing penalties, responsibility for committing an infringement of the competition rules is personal in nature (*Commission* v *Anic Partecipazioni*, paragraph 85 above, paragraph 78, and Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 77).

87 It is consequently for the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the date of the decision finding the infringement, the operation of the undertaking was no longer his responsibility (see *ThyssenKrupp Nirosta* v *Commission*, paragraph 85 above, paragraph 143 and the case-law cited).

88 Therefore, it is apparent from the case-law of the Court that responsibility for the undertaking's infringement – or that of the entities of which it consists – follows the legal or natural person managing the undertaking in question when the infringement was committed, even though the assets and personnel which contributed to the commission of the infringement have been transferred to a third person after the period of the infringement (see, to that effect, Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraphs 25 and 27).

89 A natural or legal person who has not committed the infringement may however be penalised for that infringement where the natural or legal person who has committed the infringement has ceased to exist, either in law or economically (see, to that effect, *ETI and Others*, paragraph 68 above, paragraph 40, and *ThyssenKrupp Nirosta* v *Commission*, paragraph 85 above, paragraph 144), in order to prevent an undertaking from being able to escape penalties by simply changing its identity through restructurings, sales or other legal or organisational changes (see, to that effect, *ETI and Others*, paragraph 68 above, paragraph 41 and the case-law cited). This is a question of the criterion of economic continuity.

90 Thus, it is apparent from settled case-law that a change in the legal form and name of an undertaking does not have the effect of creating a new undertaking free of liability for the anti-competitive behaviour of its predecessor when, from an economic point of view, the two undertakings are identical (*Compagnie royale asturienne des mines and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 9; *Aalborg Portland and Others* v *Commission*, paragraph 83 above, paragraphs 356 to 359; and *ETI and Others*, paragraph 68 above, paragraph 42).

91 Furthermore, the fact that a legal person continues to exist as a legal entity does not exclude the possibility that, with reference to European Union competition law, there may be a transfer of part of the activities of that legal person to another which becomes responsible for the acts of the former (*Aalborg Portland and Others* v *Commission*, paragraph 83 above, paragraphs 356 to 359; *ETI and Others*, paragraph 68 above, paragraph 48; and Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 132).

92 Applying penalties in this way is permissible where those legal persons 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 (*Aalborg Portland and Others* v *Commission*, paragraph 83 above, paragraphs 356 to 359, and *ETI and Others*, paragraph 68 above, paragraph 49).

93 By contrast, the Court of Justice has held, in the case of two existing and functioning undertakings one of which had transferred part of its activities to the other and where there was no structural link between them, that there can be economic continuity only where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 85 above, paragraph 145, and *Aalborg Portland and Others* v *Commission*, paragraph 83 above, paragraph 359).

94 Accordingly, the criterion of economic continuity makes it possible, in exceptional circumstances which are strictly defined by the case-law, to ensure that the principle of personal responsibility of the author of the infringement is effective and to penalise a legal person which is not the legal person which committed that infringement but with which it shares structural links.

95 In accordance with the criterion of economic continuity, the Commission is therefore allowed to penalise a legal person other than the person who committed the infringement, notwithstanding any legal structure intended, within one and the same undertaking, artificially to prevent the penalising of infringements of competition law which have been committed by one or more of the legal persons of which it consists.

96 The criterion of economic continuity is not however intended to allow the Commission to hold liable for an infringement an undertaking other than that which, as the case may be through the legal persons of which it consists, has committed that infringement (see, to that effect, *ThyssenKrupp Nirosta* v *Commission*, paragraph 85 above, paragraph 145), unless those two undertakings have structural links which link them economically and organisationally (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 83 above, paragraph 359, and *ETI and Others*, paragraph 68 above, paragraph 49) or the legal person which committed the infringement has been

transferred to a third party abusively, that is to say under conditions other than market conditions, with the intention of avoiding the antitrust law penalties (Opinion of Advocate General Kokott in *ETI and Others*, paragraph 68 above, points 82 and 83).

97 By contrast, an undertaking which has, under market conditions, transferred the legal person which committed the infringement to a third party with which it has no structural links, may, subject to the rules relating to limitation, still be penalised in accordance with the principle of personal responsibility for the period of the infringement prior to the transfer, even though it is no longer active in the commercial sector which was the subject-matter of that infringement.

98 In other words, where rules of law, such as those governing limitation, prevent an undertaking from being penalised for having committed an infringement of competition law, or where the undertaking which has transferred the legal person which committed the infringement to a third party has ceased to exist, the criterion of economic continuity is not intended to enable another undertaking to be found and rendered responsible retroactively for the acts committed by the first undertaking, unless the undertakings have structural links which link them economically and organisationally (see, to that effect, Opinion of Advocate General Colomer in *Aalborg Portland and Others* v *Commission*, paragraph 85 above, point 72) or the transfer of the legal person which committed the infringement was an abuse (see paragraph 96 above).

99 It is immaterial, in that regard, whether there is a transfer of assets or a transfer of a legal person to that third party and the Commission's argument on this point must be rejected.

100 It has been held that the principle of personal liability was not called into question by the criterion of economic continuity in a case where an undertaking had transferred a part of its business involved in the cartel to an independent third party by means of the transfer of a subsidiary set up for the purposes of that transfer and there was no structural link between the initial operator and the new operator, a situation which justified a penalty on the transferor undertaking for the period of the infringement prior to the transfer and a penalty on the transferee undertaking for the period of the infringement subsequent thereto (see, to that effect, *Hoechst* v *Commission*, paragraph 75 above, paragraphs 28 and 61).

101 It follows that, in accordance with the principle of personal responsibility, the legal person transferred may be penalised, as from the date when it was set up, for the period of the infringement during which it itself participated in the infringement (see, to that effect, *Hoechst* v *Commission*, paragraph 75 above, paragraphs 28, 61, 66 and 67) inasmuch as, as from that time, it may be individually held responsible for that infringement (see, to that effect, Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraphs 81 and 82).

102 It must be added that the effectiveness of the penalty may be undermined in a case of a subsequent repeated infringement if an infringement committed by the transferor undertaking is not found and, as appropriate, penalised.

103 In the present case, it is necessary first of all to bear in mind the following facts.

104 First, the marine oil and gas hose business now owned by Parker ITR was established in 1966 by Pirelli Treg SpA, whose business was taken over in December 1990 by ITR, which was acquired by Saiag in 1993.

105 Secondly, Saiag created a subsidiary, ITR Rubber, on 27 June 2001 after opening negotiations with Parker-Hannifin concerning the possible sale of its marine hose business, to which it transferred, on 19 December 2001, its rubber hose business, including the marine hose business.

106 The transfer of the rubber hose business to ITR Rubber took effect on 1 January 2002 and, on 31 January 2002, the subsidiary ITR Rubber – renamed Parker ITR a few months later – was acquired by Parker-Hannifin.

107 Furthermore, it is apparent from recital 370 of the contested decision that, from December 1990 to 27 June 2001, the date on which ITR Rubber was created by Saiag, it was ITR which participated in the cartel and therefore committed the infringement penalised by that decision.

108 It is not moreover disputed that ITR continued to carry on Saiag's rubber hose business, and in particular the marine hose business, until the time when its assets were transferred to ITR Rubber on 19 December 2001, that transfer having taken effect as of 1 January 2002.

109 Furthermore, it is common ground that the infringement continued to be committed from 27 June to 31 December 2001.

110 It follows that it was also ITR which committed the infringement between 27 June 2001 and 31 December 2001.

111 In accordance with the principle of personal responsibility, it is therefore Saiag and ITR which should have been penalised for the infringement committed – at the very least – between December 1990 and 31 December 2001.

112 It is also common ground that the Commission did not penalise ITR and Saiag because it took the view, according to the information which it provided in that regard during the proceedings, that the infringement was time-barred as regards those undertakings.

113 Furthermore, the Commission stated at the hearing that it was to that extent that, in order to penalise the infringement committed by ITR from December 1990 to December 2001 and, before that, by Pirelli Treg from April 1986 to December 1990, it decided to attribute to Parker ITR, formerly ITR Rubber, responsibility for the entire duration of the infringement. It takes the view that it is possible to rely on the criterion of economic continuity in such a case in order to ensure that penalties in competition law are effective.

114 It must therefore be examined whether the conditions for applying the criterion of economic continuity were fulfilled in the present case, as claimed by the Commission.

115 It must be stated that, first, from 27 June 2001 to 31 January 2002, ITR Rubber was a wholly-owned subsidiary of ITR and, secondly, that the transfer of the rubber hose business to ITR Rubber took effect only as of 1 January 2002, there being nothing in the Commission's file to show that ITR Rubber had any business activities, and, in particular, business activities in connection with marine hoses, prior to that date. As ITR 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 was clearly part of an objective of selling that subsidiary's shares to a third undertaking (see, to that effect, *Hoechst* v *Commission*, paragraph 75 above, paragraph 61).

116 In those circumstances, it is for the legal person managing the undertaking in question when the infringement was committed, that is to say ITR and its parent company Saiag, to answer for that infringement, even if, at the date of the decision finding the infringement, the operation of the marine hose business was the responsibility of another undertaking, in the present case Parker-Hannifin. The principle of personal liability cannot be called into question by the principle of economic continuity in cases where, as in the present case, an undertaking involved in the cartel, namely Saiag and its

subsidiary ITR, transfers a part of its business to an independent third party and there is no structural link between the transferor and the transferee – that is to say, in the present case, between Saiag or ITR and Parker-Hannifin.

117 It must also be pointed out that the Commission concedes that it has no evidence to suggest that the sale took place abusively with the intention of allowing Saiag and ITR to avoid responsibility. Moreover, the Commission did not put that argument forward in the contested decision.

118 Consequently, it was for the Commission to find that Saiag and ITR were responsible for the infringement until 1 January 2002 and then, as the case may be, to find that that infringement was time-barred, as the settled case-law permits it to do (see, to that effect, Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraphs 60 and 61, and Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225, paragraph 72).

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

120 That is moreover the approach used by the Commission itself in the case which gave rise to the judgment in *Hoechst* v *Commission*, paragraph 75 above, pursuant to the principle of personal responsibility, an approach which was approved by the General Court.

121 Furthermore, since it is necessary to reject the premiss of the Commission's reasoning concerning the application of the criterion of economic continuity only to the transfer of ITR's assets to ITR Rubber (and not to the transfer of the subsidiary ITR Rubber to Parker-Hannifin), ITR and Saiag's responsibility cannot have been transferred to ITR Rubber pursuant to that criterion. It follows that the Court cannot uphold the Commission's argument that the responsibility attached, in accordance with the criterion of economic continuity, to the subsidiary formed with a view to its purchase by Parker-Hannifin was therefore transferred to the latter on that occasion.

122 It is also necessary to reject the Commission's argument that, in essence, it has, in any event, a discretion to choose the person responsible for the infringement both in cases of economic continuity and, more generally, as regards parent companies and their subsidiaries, and may thus penalise ITR Rubber for all of ITR and Saiag's past infringements.

123 First, it is indeed apparent from the case-law that, in certain circumstances, it is possible to attribute the unlawful conduct of a subsidiary to its parent company on account of the control which the parent company has over the subsidiary (Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007, paragraphs 41, 42, 45, 47 and 48, confirmed by the judgment in Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 73).

124 However, that case-law cannot apply here since, in the present case, the Commission intends to attribute to a subsidiary, ITR Rubber, the responsibility of its parent company, Saiag, for the unlawful conduct of another subsidiary of Saiag's, namely ITR.

125 Secondly, it has also been held that the Commission may choose to penalise either the subsidiary that participated in the infringement or the parent company that controlled it during that period (*Erste Group Bank and Others* v *Commission*, paragraph 101 above, paragraphs 81 to 84, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 331) or both of them jointly and severally (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 52 to 82, and Case T-384/06 *IBP and International Building Products France* v *Commission* [2011] ECR II-1177, paragraph 13).

126 It is however apparent from that case-law that, although the subsidiary may be penalised instead of the parent company, it is to the extent that it itself participated in the infringement and, therefore, for the duration of its participation, which in particular precludes it from being held retroactively responsible for an infringement committed by its parent company before it was formed.

127 The retroactive attribution of the responsibility for an infringement to a legal person other than that which committed it is possible only in the context of the application of the criterion of economic continuity, the application of which has however been excluded in the present case (see paragraphs 114 to 119 above).

128 As the transfer of the assets involved in the cartel from ITR to ITR Rubber took effect on 1 January 2002 and no evidence of ITR Rubber's involvement has been put forward by the Commission in respect of the period prior to 1 January 2002, it must be held that ITR Rubber personally committed the infringement from 1 January 2002 to 31 January 2002, the date on which all of the shares in ITR Rubber were acquired by Parker-Hannifin.

129 It also follows that, subject to the examination of the second and third pleas, Parker-Hannifin cannot be found responsible for the period prior to 31 January 2002, the date on which it acquired all the shares in ITR Rubber (now Parker ITR). The contested decision, inasmuch as it correctly finds Parker-Hannifin jointly and severally liable as from 31 January 2002, must therefore be upheld in that regard and subject to that reservation.

130 Without it being necessary to examine the second and third parts of the first plea, the first part of the first plea must therefore be upheld, inasmuch as Parker ITR cannot be found responsible for the period of the infringement prior to 1 January 2002.

The fourth plea, alleging that the imposition of a fine on Parker ITR for the period before 11 June 1999 is incorrect

The contested decision

131 In the contested decision, in recitals 148 to 187 and 289 to 307, the Commission refers to a series of facts which, in its view, make it possible to distinguish three periods in the cartel's existence: an initial period of 'fully-fledged' activity from 1986 to May 1997, a period of limited activity, stretching, depending on the cartel members, from May 1997 to June 1999 or June 2000, and, lastly, a further period of 'fully-fledged' activity from June 1999 or June 2000, depending on the cartel members, until May 2007. It takes the view, in essence, that, since it has been established that there were contacts between certain of the participants in the cartel, contacts which inter alia had the objective of reinstating the cartel, the infringement must be regarded as continuous, or at the very least repeated, but that there is no need to impose a fine for the cartel's period of limited activity.

Arguments of the parties

132 By their fourth plea, the applicants submit that the imposition of a fine on Parker ITR for the period before 11 June 1999 infringes, first, Article 25(2) of Regulation No 1/2003, since the infringement cannot be held to be a continuing or repeated infringement, and, secondly, the principle of non-discrimination. They take the view that the Commission also infringed the obligation to state reasons.

133 The Commission disputes those arguments.

Findings of the Court

134 The fourth plea, which seeks a finding from the General Court that the limitation period has expired in respect of a period of infringement prior to 11 June 1999, is logically in the alternative to the first plea, which implies that it should be examined only if the first plea has been rejected.

135 As the first plea has been upheld, there is therefore no need to examine the fourth plea.

The fifth plea, alleging that the fine was wrongly increased on the ground that Parker ITR played the role of leader

The contested decision

136 It is apparent from recitals 457 to 463 of the contested decision that, having regard to the involvement in the cartel of Mr P., who played the role of leader as attested by various items of evidence, the Commission decided to increase the basic amounts of the fine by virtue of aggravating circumstances and to reject Parker ITR and Parker-Hannifin's arguments concerning the attribution of liability for the infringement to Mr P.

Arguments of the parties

137 In support of their fifth plea, the applicants submit it was wrong to increase the fine on the ground that Parker ITR played the role of leader in respect of the period from 11 June 1999 to 30 September 2001.

138 The Commission disputes that argument.

Findings of the Court

139 Since the first plea has been upheld, the role of leader of the cartel cannot be attributed to Parker ITR in respect of the period from 11 June 1999 to 30 September 2001.

140 Consequently, the fifth plea must be upheld, inasmuch as it alleges that the fine imposed was wrongly increased in respect of conduct which cannot be attributed to the applicants.

The sixth plea, alleging infringement of the principle of individual responsibility and the obligation to state reasons with respect to the increase of the fine imposed on Parker-Hannifin for Parker ITR's role as leader

Arguments of the parties

141 The sixth plea put forward by the applicants alleges infringement of the principle of individual responsibility and the obligation to state reasons with respect to the increase of the fine imposed on Parker-Hannifin for Parker ITR's role as leader.

142 The applicants submit in that regard that the Commission did not find Parker-Hannifin liable for the period of the infringement before 31 January 2002, but it took account of the role as leader which ITR is alleged to have played between June 1999 and September 2001 in order to increase the fine imposed on Parker ITR and to increase the part of the fine for which Parker-Hannifin is held jointly

and severally liable. In fact the Commission holds Parker-Hannifin liable for events that took place before it acquired Parker ITR on 31 January 2002, in infringement of the principle of personal responsibility.

143 The applicants also submit in essence that the reasoning in the contested decision is contradictory and insufficient.

144 The Commission disputes those arguments.

Findings of the Court

145 Since the first plea has been upheld, Parker-Hannifin cannot be found jointly and severally liable, as regards the role of its subsidiary Parker ITR as leader, for the period of the infringement from 11 June 1999 to 30 September 2001, which cannot be attributed to Parker ITR.

146 Accordingly, the sixth plea must be upheld.

The second plea, alleging incorrect attribution to the applicants of liability for the infringement related to the unlawful conduct of Mr P., manager of the Oil & Gas unit

The contested decision

147 It is apparent in essence from recitals 374 to 381 of the contested decision that the Commission rejected the arguments put forward by the applicants that it was necessary to take into account, first, the personal liability of Mr P., the manager of ITR Rubber's Oil & Gas unit both before ITR Rubber was acquired by Parker-Hannifin and after that acquisition, who acted without the knowledge of his employer, by putting in place a vast mechanism with the intention of participating in the cartel for his personal benefit and that of the companies with which he was linked, and, secondly, the fact that those actions were carried out to the detriment of and in contradiction with the internal policy of the undertaking, causing it significant damage and not bringing it any advantage.

Arguments of the parties

148 The applicants dispute, in essence, that the conduct of Mr P., the manager of ITR Rubber's (now Parker ITR) Oil & Gas unit is attributable to them, on account of the fact, first, that he hid the truth, by devising a fraudulent scheme designed to allow him, and various companies which he controlled or to which he was linked, to benefit from the illegal gains arising from the cartel, secondly, that he opposed by all means Parker-Hannifin's intervention in the commercial management of the marine hose business which he ran in complete autonomy, and, thirdly and lastly, that they were the first ones harmed by the actions of Mr P., who acted only for his personal benefit and for that of his companies, and infringed Parker-Hannifin's ethical rules. They submit that, following the example of United States case-law, an undertaking should not be held liable for the conduct of its employee if that employee's illegal activities were carried out with the intention of benefiting persons other than his employer.

149 Furthermore, the applicants claim that they did not enter into any agreement with the cartel members during the period when Mr P. was employed by the undertaking and they dispute that they concealed the cartel from the Commission when they had suspicions in that regard, as those suspicions were not sufficient, in their opinion, to justify measures being taken with a view, in particular, to the submission of a leniency application.

150 The Commission disputes those claims.

Findings of the Court

151 It must be borne in mind that, according to settled case-law, for an infringement of Article 85 EC to be attributed to an undertaking it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned by that infringement; action by a person who is authorised to act on behalf of the undertaking suffices (see, as regards the EC Treaty, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 97, and Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraph 58).

152 It must be pointed out that Mr P. worked continuously from 1981 to 2006 successively for Pirelli Treg, Saiag (ITR) and Parker ITR. Furthermore, after his alleged resignation, on 9 June 2006, Parker ITR entered into a consultancy agreement with him in order to ensure the continuation of the marine hose business.

153 Mr P.'s involvement in the cartel and also the role of leader which he played in the cartel, which have moreover not been formally disputed by the applicants, are detailed at length in recitals 94, 122 (table 9), 144, 145, 151, 154, 155, 156, 158, 163, 172, 177, 185, 189 (table 10), 190, 196, 241, 302, 349, 379, 383, 384, 386, 459, and 461 of the contested decision.

154 Furthermore, the applicants conceded, at the hearing, that Mr P. was authorised to act on behalf of the undertaking, as was pointed out by the Commission in recital 383 of the contested decision. It is apparent from that recital that the applicants submitted 'a copy of a power to act … which shows that he was authorised to sign a broad range of business transactions', which shows that, although it is true that Mr P. enjoyed a broad discretion in connection with his activities, that was because that power had been expressly conferred on him by the applicants.

155 The applicants' liability is therefore apparent, without there being any need to ascertain whether Mr P. acted without their knowledge.

156 The applicants' argument that they did not themselves enter into any agreement with the other members of the cartel is therefore also ineffective, since they were legally bound by Mr P.

157 The same is true of the claims relating to the infringement of the internal ethical rules of the Parker group and of those concerning the fact that Mr P. acted with the aim of defrauding that group. The fact remains that there appears to be no basis for those claims, which are moreover belied by the fact that the Parker group never lodged a complaint or took any steps against its former employee.

158 Lastly, as regards the damage allegedly caused to Parker-Hannifin, the Commission is correct in stating that, in participating in the cartel, the undertaking, contrary to what it claims, derived benefits resulting, in particular, from the price fixing and the market sharing between the various members of the cartel, which it could not have attained if there had not been an agreement between them.

159 The second plea must therefore be rejected.

The third plea, alleging that Parker-Hannifin was wrongly considered to be jointly and severally liable for the infringement with Parker ITR

The contested decision

160 It is apparent in essence from recitals 382 to 389 of the contested decision that the Commission found that it could be presumed that Parker-Hannifin exercised a decisive influence over Parker ITR since the parent company held 100% of the capital in its subsidiary and there were also factual indicia that Parker-Hannifin had exercised control over Parker ITR, in particular a power to act given to Mr P. which shows that he was authorised to sign a broad range of business transactions.

161 The Commission also rejected the arguments put forward by the applicants in response to the statement of objections.

162 The Commission therefore first rejected an argument according to which it was sufficient to show that Parker-Hannifin had not exercised a decisive influence over Parker ITR's marine hoses business alone, and that it was not necessary to take account of the situation with regard to other business areas of that subsidiary. It took the view that it is apparent from the case-law that it refers to the conduct of the subsidiary as a whole.

163 Secondly, the Commission found that the documents which the applicants refer to in order to prove Parker ITR's autonomy do not demonstrate that the subsidiary acted fully independently from its parent company, but merely possibly showed divergences of views and problems of cooperation. However, according to the Commission, the exercise of a decisive influence over the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation.

164 Thirdly, the Commission rejected the applicants' argument that the cartel was concealed from the parent company and found in particular that it is apparent from the case-law that the Commission is not required to show that an undertaking's senior management was aware of an infringement, as long as the individual contributing to the infringement was authorised to act for the undertaking.

165 The Commission concluded by finding that, in addition to holding Parker ITR liable for the infringement committed as of 1986, Parker-Hannifin and Parker ITR should be held jointly and severally liable for the conduct of Parker ITR between 31 January 2002 and 2 May 2007.

Arguments of the parties

166 In the first place, the applicants maintain, in essence, that Parker-Hannifin did not exercise the slightest influence – and, *a fortiori*, exercised no decisive influence – over Parker ITR's Oil and Gas unit during Mr P.'s tenure as the manager of that unit. In support of that argument, they claim that Mr P. systematically refused to comply with Parker-Hannifin's instructions and commercial policy, successfully rebuffed Parker-Hannifin's attempts to intervene in the operation of the marine hoses business and deliberately ignored the Parker group's code of ethics. They maintain that the Oil and Gas unit, which Mr P. managed, therefore acted autonomously on the market. They submit that they have thus rebutted the presumption of decisive influence.

167 Moreover, in the applicants' submission, apart from some alleged indicia, the Commission's file contains no evidence that Parker-Hannifin exercised a decisive influence over Parker ITR during the period from 31 January 2002 to 9 June 2006.

168 In the second place, the applicants submit in essence that they are required to rebut the presumption of decisive influence only with respect to the products affected by the cartel, namely those coming within the remit of the Oil & Gas unit. It would therefore be manifestly disproportionate and contrary

to the rationale of the presumption if the applicants were required to show that Parker-Hannifin did not exercise a decisive influence over all the activities in which Parker ITR was involved. A parent company may decide to exercise a decisive influence over certain of its subsidiaries' spheres of activity and to leave them complete independence with respect to other spheres. It must therefore be considered in the present case that the evidence in the file shows that Parker-Hannifin and Parker ITR did not constitute a single undertaking for the purposes of Article 81 EC with respect to the marine oil and gas hoses activity.

169 In the third place, the applicants dispute the Commission's assertion that the exercise of decisive influence does not require involvement in the day-to-day management of the subsidiary.

170 In the fourth place, the applicants submit in essence that they do not have to disprove that Parker-Hannifin imposed objectives and policies which influenced the performance and coherence of the group and disciplined any behaviour that might depart from those objectives and policies, as maintained by the Commission in recital 386 of the contested decision.

171 In the fifth place and lastly, the applicants dispute in essence the scope and the interpretation given by the Commission to certain items of evidence which it referred to in recitals 383 to 386 of the contested decision to show that Parker-Hannifin intended to exercise control over its subsidiary.

172 The Commission disputes those claims.

Findings of the Court

173 It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (*Akzo Nobel and Others* v *Commission*, paragraph 86 above, paragraph 58 and the case-law cited).

174 That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement (see *Akzo Nobel and Others* v *Commission*, paragraph 86 above, paragraph 59 and the case-law cited).

175 In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the European Union competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see *Akzo Nobel and Others* v *Commission*, paragraph 86 above, paragraph 60 and the case-law cited).

176 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see *Akzo Nobel and Others* v *Commission*, paragraph 86 above, paragraph 61 and the case-law cited).

177 Furthermore, the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit (*Akzo Nobel and Others* v *Commission*, paragraph 86 above, paragraph 73).

178 Consequently, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must also be taken of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list (*Akzo Nobel and Others* v *Commission*, paragraph 86 above, paragraph 74).

179 In the present case, it is common ground that Parker-Hannifin had, through its various subsidiaries, a 100% shareholding in ITR Rubber (now Parker ITR). As the parent company, it is therefore presumed to have exercised a decisive influence over the conduct of its subsidiary.

180 It is against that background that the items of evidence adduced by the applicants for the purposes of rebutting that presumption must be analysed.

181 In connection with that analysis, it must be borne in mind at the outset that it is apparent from *Akzo Nobel and Others* v *Commission*, paragraph 86 above, that independence must be established for the whole subsidiary and not merely a business unit active on the market which is the subject-matter of the cartel, since the objective of showing that the subsidiary's conduct is independent is ultimately to establish that the parent company and the subsidiary do not form an economic unit, which may provide a basis for not finding the parent company liable for the infringement committed by its subsidiary (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 86 above, paragraphs 55, 56 and 59).

182 The applicants' argument in that regard must therefore be rejected.

183 Furthermore, the applicants submit that the parties concerned are not required to adduce direct and irrefutable evidence of the subsidiary's autonomy on the market, but only to provide evidence capable of demonstrating that autonomy.

184 Since it is required, according to the case-law of the Court referred to above (see paragraph 176 above), for 'sufficient evidence to show that [the] subsidiary acts independently on the market' to be adduced, the applicants are not required to adduce direct and irrefutable evidence of the subsidiary's independent conduct on the market, but, failing that, they must submit a body of precise and consistent evidence showing that the subsidiary acted independently, despite the parent company's 100% shareholding in it.

185 Furthermore, in support of their argument that the parent company did not exercise the slightest influence or, *a fortiori*, exercised no decisive influence over its subsidiary, the applicants submit that Mr P. systematically refused to comply with Parker-Hannifin's instructions and commercial policy, successfully rebuffed Parker-Hannifin's attempts to intervene in the operation of the marine hoses business, which the Commission admits in the contested decision (recital 384 of the contested decision) and that he also deliberately ignored the Parker group's code of ethics, which prohibited its employees from taking part in collusive activities.

186 The applicants thus take the view that they have proved that Parker-Hannifin was not involved in the day-to-day management of Parker ITR's Oil & Gas unit.

187 It must however be pointed out that the applicants claim simultaneously, in essence, that Parker-Hannifin did not exercise a decisive influence over Parker ITR, but that it did not cease to intervene in the management of that company, and that it is only on account of Mr P.'s machinations that it did not succeed in doing so.

188 The applicants do not adduce any evidence capable of establishing the reasons why Parker-Hannifin was legitimately prevented from exercising a decisive influence over Parker ITR for many years, as it claims.

189 It must be borne in mind that Parker-Hannifin is the ultimate parent company of a global group, which, at the beginning of 2002, acquired a business which was new for it, namely ITR Rubber's (now Parker ITR) rubber hoses business.

190 The applicants claim that Mr P. prevented the Parker group from participating in Parker ITR's activities, with the result that the ultimate parent company of that group was totally unaware of what was happening with regard to those activities for more than four years until that person's departure in 2006.

191 In addition to the scarcely credible nature of those claims, the fact remains that there was nothing legally and economically to prevent Parker-Hannifin from exercising its control over Parker ITR.

192 Furthermore, there was nothing to prevent Parker-Hannifin from dismissing Mr P. or terminating his contract, as he was only one of its employees, if the applicants took the view, as they now claim, that he constituted a restriction on Parker-Hannifin's control over Parker ITR.

193 What is more, the evidence which must be adduced by the parent company must be sufficient to show that the subsidiary was objectively independent having regard to the economic, organisational and legal links between them. The subsidiary's intentions in that regard, even if proved, are irrelevant. To hold otherwise would be tantamount to supporting the parent company's inertia and negligence in managing subsidiaries which are engaged in unlawful conduct.

194 The applicants do not therefore put forward any evidence capable of rebutting either the presumption of decisive influence of the parent company over the subsidiary or the additional evidence used by the Commission.

195 Consequently, the third plea must be rejected.

The seventh plea, alleging infringement of the principle of the protection of legitimate expectations owing to the application of an incorrect method of calculating the value of sales for the purposes of setting the fine

The contested decision

196 It is apparent in essence from recitals 422 to 428 of the contested decision that the Commission, first, used, for the purpose of ascertaining the sales concerned, the average sales of the last three years before the end of the infringement in order to take account of the volatility of annual sales and, secondly, considered that the EEA market was composed of all sales invoiced to a purchaser located in the EEA, stating that it considered that it was the most reliable criterion to determine where the competition affected by the infringement took place, and not the place of end use, which may actually be outside of the EEA.

197 Furthermore, the Commission points out that its assessment is confirmed by the fact that the majority of companies, in their replies to the Commission's requests for information, made a geographic allocation of customers or turnover on the basis of the place of invoice, and not of the place of delivery or end use of the goods.

198 Lastly, the Commission states that such an assessment does not conflict with the Guidelines, as they do not set out the criteria according to which sales are considered to be within the EEA.

Arguments of the parties

199 The applicants maintain, in essence, that the Commission infringed the principle of the protection of legitimate expectations in taking into account, for the purposes of calculating aggregate sales within the EEA, not only sales of marine hoses delivered within the EEA but also sales of products invoiced to companies established within the EEA, in order, they claim, to increase artificially the amount of the fine.

200 The applicants maintain that only sales of goods delivered within the EEA reflect the competitive impact of potentially illegal behaviour in the EEA. The sale of goods delivered outside the EEA cannot 'affect trade between Member States' or 'between Contracting Parties' within the meaning of Article 81 EC and Article 53 of the EEA Agreement; trade in the EEA is affected only where the goods affected by the cartel are delivered within the EEA territory, regardless of the location of the legal entity to which those sales are invoiced.

201 The applicants also refer, in that regard to paragraph 197 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1) ('the Notice on concentrations'), according to which 'the delivery is in general the characteristic action for the sale of goods …', which confirms their analysis of point 18 of the Guidelines.

202 Furthermore the applicants contend that recital 55 of the contested decision – in which the Commission states that '[r]eplacement sales [that is to say, sales to end users] account for a greater proportion of the worldwide marine hoses market than sales of new products [that is to say, sales to OEM manufacturers]' – contradicts recital 427 of the contested decision – according to which 'a considerable amount of marine hoses is purchased by OEM manufacturers'.

203 In addition, the applicants maintain in essence that the Commission cannot contend that the criterion of invoicing is a common criterion used by businesses themselves, just because many of the undertakings concerned have identified their internal geographic allocation of turnover on the basis of the place of invoicing and not the place of delivery, and even though Parker-Hannifin drew its attention to the fact that the calculation of those figures might not reflect EEA turnovers for the purposes of this case.

204 The Commission disputes those claims.

Findings of the Court

205 Point 13 of the Guidelines states:

'In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement …'.

206 Point 18 of the Guidelines provides:

'Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.'

207 The applicants do not dispute that the marine hoses market is a worldwide market.

208 It is therefore necessary to examine the wording of point 18 of the Guidelines, which is applicable in the present case.

209 It must be stated that point 18 of the Guidelines does not – any more than does point 13 thereof – refer to 'sales delivered' or 'sales invoiced' within the EEA.

210 It follows that the Guidelines, just as they do not require account to be taken of sales delivered in the EEA, do not preclude the Commission from using the sales invoiced in the EEA to calculate the value of each undertaking's sales within the EEA.

211 To be able to use the sales invoiced in the EEA, it is necessary, however, for that criterion to reflect the reality of the market, that is to say for it to be the best criterion for ascertaining the effects of the cartel on competition in the EEA.

212 It is not disputed by the applicants that, while the end use location of most marine hoses systems is outside Europe, some of the main worldwide OEM manufacturers are based in the various Member States of the European Union and Contracting Parties to the EEA Agreement (see recital 59 of the contested decision). Consequently, the effect on competition within the EEA of the marine hoses cartel appears to be correctly reflected by taking into consideration the sales invoiced in the EEA and the applicants' argument that only sales delivered in the EEA enable the effects of the cartel in the EEA to be assessed must be rejected.

213 By contrast, it is irrelevant that in its Notice on concentrations the Commission may favour the place of delivery when determining the turnover to be taken into consideration. Assessing the effects of a concentration on the market is not comparable to determining the amount of a fine to be imposed on an undertaking as a result of an infringement of Article 81 EC, even if the determination of the value of the market were identical in the Notice on concentrations and the Guidelines.

214 Furthermore, the fact that the Commission imposes a limit on itself in one field of competition law does not require it to impose a limit on itself in the same way in another field, nor does it result *ipso facto* in an identical limitation in that field.

215 Moreover, the fact that it was found in the contested decision that replacement sales to end-users – who are indeed to a large extent situated outside of the EEA – account for a greater proportion of the worldwide marine hoses market than sales of new products (recital 55 of the contested decision) does not contradict the Commission's assessment that, in the present case, the location where the entity to which the sales are invoiced is based is the most adequate criterion to assess whether sales take place within the EEA (recital 427 of the contested decision), which means that only the sales invoiced to customers based in the EEA – irrespective of the location of the end-users – were taken into consideration by the Commission.

216 It must therefore be examined whether, in the light of the foregoing considerations, the Commission made use of the data which the undertakings provided regarding sales, namely the data relating to the sales invoiced, in a manner which those undertakings did not expect and in such a way as to infringe their legitimate expectations.

217 According to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration, by giving him precise assurances, led him to entertain legitimate expectations (Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70, and Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 74). Regardless of the form in which it is communicated, precise, unconditional and consistent information which comes from authorised and reliable sources constitutes such assurances (see, to that effect, Case C-82/98 P *Kögler* v *Court of Justice* [2000] ECR I-3855, paragraph 33). However, a person may not plead infringement of that principle unless he has been given precise assurances by the authorities (judgment of 24 November 2005 in Case C-506/03 *Germany* v *Commission*, not published in the ECR, paragraph 58, and judgment in Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147). Moreover, only assurances which comply with the applicable rules may give rise to legitimate expectations (Case T-347/03 *Branco* v *Commission* [2005] ECR II-2555, paragraph 102; Case T-282/02 *Cementbouw Handel & Industrie* v *Commission* [2006] ECR II-319, paragraph 77; and Case T-334/07 *Denka International* v *Commission* [2009] ECR II-4205, paragraph 132).

218 The fact remains that, in the present case, the Commission did not give the applicants any assurances, within the meaning of that case-law, that the data concerning the sales invoiced in the EEA, which they had initially provided of their own free will and then at the request of the Commission, would not be used to calculate the fine which would be imposed on them.

219 The applicants cannot therefore rely on any infringement of the principle of the protection of legitimate expectations as regards the taking into consideration, for the purposes of the calculation of the fine imposed on them, of the information concerning the sales invoiced in the EEA with which they provided the Commission on their own initiative.

220 Accordingly, the seventh plea must be rejected.

The eighth plea, alleging infringement of Article 23(2) of Regulation No 1/2003 and infringement of the principle of personal liability and of the obligation to state reasons in the calculation of the ceiling of 10% of turnover

Arguments of the parties

221 First, the applicants claim that the Commission ought to have taken Parker ITR's turnover, and not Parker-Hannifin's consolidated turnover, into account when calculating the ceiling of 10% for the fine imposed on Parker ITR and that the Commission thus infringed Article 23(2) of Regulation No 1/2003. In their view, it follows from the case-law that where two legal entities belonged to the same undertaking at the time of infringement, but no longer belonged to that undertaking at the time of the Commission decision, the 10% ceiling must be calculated on the basis of their respective separate turnovers. The same reasoning ought to have been applied by analogy in the present case, since Saiag and ITR, which, for the greater part of the duration of the infringement, were the owners of the assets which took part in the infringement, constituted an undertaking which was independent of the undertaking Parker-Hannifin.

222 The applicants claim that any other interpretation would contravene the principle of legal certainty and lead to disproportionate results.

223 Secondly, the applicants maintain that the contested decision also infringes the principle of personal liability since, between 1 April 1986 and 31 January 2002, Parker ITR's marine hose assets belonged to different undertakings.

224 Thirdly, the applicants contend that the Commission failed to address the arguments which they put forward during the administrative procedure concerning the interpretation of Article 23(2) of Regulation No 1/2003. In their submission, the contested decision merely states that the adjusted basic amounts taken for the fines do not exceed the 10% ceiling, which does not enable the applicants to understand the justification for the Commission's decision to calculate the 10% ceiling on the basis of Parker-Hannifin's turnover for the part of the fine for which Parker ITR was held solely liable.

225 The Commission disputes those claims.

Findings of the Court

226 It must be borne in mind, first, that the first plea must be upheld and that, consequently, the period of the infringement in respect of which Parker ITR must be held liable runs from 1 January 2002 to 2 May 2007 and, secondly, that the third plea must be rejected, which leads this Court to take the view that, during the whole of the period of the infringement, with the exception of the period from 1 January 2002 to 31 January 2002, Parker ITR was a wholly-owned subsidiary of Parker-Hannifin over which the latter company exercised a decisive influence.

227 Furthermore, 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*, paragraph 125 above, 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, 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.

229 Since the first plea has been upheld, it is not also necessary to examine the other heads of claim, alleging infringement of the principles of personal liability and of proportionality and of the obligation to state reasons, inasmuch as they relate to the effect of the taking into account, in the contested decision, of the period prior to 1 January 2002.

230 Consequently, the eighth plea must be rejected.

The ninth plea, alleging infringement of the principle of the protection of legitimate expectations and of the obligation to state reasons, owing to the Commission's refusal to apply a reduction of the fine for cooperation

The contested decision

231 It is apparent in essence from recitals 489 to 493 of the contested decision that Parker ITR submitted to the Commission, under the leniency programme, documents regarding which the Commission took the view, first, that they had little added value as regards the period from 1986 to 2007 and, secondly, that they did indeed contain evidence proving the existence of the cartel from 1972 until the early 1980s. The Commission however found that that period had to be regarded as being time-barred. It concluded from that that the applicants should not be granted any reduction in the fine.

Arguments of the parties

232 The applicants claim that they meticulously compiled and submitted, in their leniency application, substantial evidence of facts, [*confidential*], previously unknown to the Commission and having a direct bearing on [*confidential*] of the infringement. In the applicants' submission, the Commission considered that that evidence, which relates to the period between [*confidential*], provided no added value since [*confidential*]. However, such an analysis conflicts with [*confidential*]. Nor has the Commission provided any argument to explain why [*confidential*].

233 The applicants maintain, moreover, that if the Commission had considered that the evidence adduced by the applicants had significant added value, Parker ITR could not have been held liable for [*confidential*] of the cartel based on that evidence, and that partial immunity would have been added to the leniency reduction granted for cooperation, in accordance with the last paragraph of point 26 of the Leniency Notice.

234 Lastly, the applicants deny having concealed the cartel when they were aware of it.

235 The Commission disputes those claims.

Findings of the Court

236 Point 26 of the Leniency Notice provides:

'The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

— first undertaking to provide significant added value: a reduction of 30-50%,

— second undertaking to provide significant added value: a reduction of 20-30%,

— subsequent undertakings that provide significant added value: a reduction of up to 20%.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which it represents added value.

If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.'

237 Point 36 of the Leniency Notice provides:

'The Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose.'

238 In the present case, the evidence in respect of which the applicants consider that they should have benefitted from a reduction in the fine pursuant to the Leniency Notice relates to the period [*confidential*].

239 Even if it were significant, that evidence relates to a period [*confidential*].

240 As the Commission correctly points out, that infringement period, even if it were sufficiently proved as a result of that evidence, would have been considered to be subject to limitation.

241 The Commission also maintains, in recital 491 of the contested decision, that the evidence provided for the period [*confidential*] is too insubstantial to prove an infringement.

242 Since the Commission found that it did not have sufficient evidence of collusive activity to prove that there was an infringement during the period [*confidential*], it had to conclude that the period to which the evidence submitted by the applicants [*confidential*] and the Commission was right to refuse to reduce the applicants' fine in the light of that evidence's lack of any added value.

243 It must therefore be held that the contested decision contains a detailed statement of reasons in that regard, which is set out in recitals 489 to 493 of that decision.

244 The ninth plea must therefore be rejected in its entirety.

245 In the light of all of the foregoing considerations, Article 1 of the contested decision must be annulled in so far as it found that Parker ITR had taken part in the infringement in respect of the period prior to 1 January 2002. Consequently, Article 2 of the contested decision must also be annulled in so far as it concerns the applicants.

The claim for amendment, the exercise by the Court of its unlimited jurisdiction and the determination of the final amount of the fine

246 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 Community judicature 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).

247 Furthermore, under Article 23 of Council Regulation (EC) 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.

248 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 Community (see Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 56 and the case-law cited).

249 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 248 above, paragraph 57).

250 In that regard, it must be borne in mind that, by its nature, the fixing of a fine by the General Court, in the exercise of its unlimited jurisdiction, is not an arithmetically precise exercise. Moreover, the Court is not bound by the Commission's calculations, but must carry out its own assessment, taking all the circumstances of the case into account (judgment of 14 September 2004 in Case T-156/94 *Aristrain* v *Commission*, not published in the ECR, paragraph 161).

251 In the present case, having regard to the Court's assessment in the context, first, of the first part of the first plea and, secondly, of the fifth and sixth pleas and to the errors found to exist on that occasion (see paragraphs 130, 140 and 146 above), the Court considers it appropriate to exercise the unlimited jurisdiction conferred upon it by Article 31 of Regulation No 1/2003 and to substitute its own appraisal for the Commission's as regards the amount of the fine which must be imposed on the applicants.

252 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.

253 However, the duration of the infringement, in view of the fact that the first plea has been upheld, must be reduced to 5 and a half years instead of 19 years as regards Parker ITR, which cannot be held liable for the infringements committed between 1986 and December 2001 by ITR and Saiag and their predecessors.

254 Furthermore, it follows that the applicants do not have to answer for the role of leader played by ITR between 1999 and 2001.

255 In the light of the foregoing considerations and having regard in particular to the cumulative effect of the unlawful acts previously held to have been committed, the Court holds that a fair assessment of all the circumstances in the case will be made by setting the final amount of the fine imposed on Parker ITR at EUR 6 400 000. A fine of such an amount makes it possible effectively to penalise the applicants' unlawful conduct, in a manner which is proportionate to the gravity of the infringement and is sufficiently deterrent.

256 Furthermore, regard must be had to the fact that Parker-Hannifin acquired all the shares in ITR Rubber on 31 January 2002 and to the fact that the amount of the fine which the parent company must be ordered to pay jointly and severally has to be established in respect of the period from that date to 2 May 2007.

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

Costs

258 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. 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, order costs to be shared.

259 In the present case, it must be borne in mind that the applicants have applied for a substantial reduction in the fine, which has been granted to them. The Commission is therefore ordered to bear its own costs and to pay those incurred by the applicants.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Annuls Article 1(i) 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 in that decision the European Commission found that Parker ITR Srl had participated in the infringement in respect of the period before 1 January 2002;**

2. **Annuls Article 2(e) of Decision C(2009) 428 final;**

3. **Sets the amount of the fine imposed on Parker ITR at EUR 6 400 000, of which Parker-Hannifin Corp. is jointly and severally liable for EUR 6 300 000;**

4. **Dismisses the action as to the remainder;**

5. **Orders the Commission to bear its own costs and to pay those incurred by Parker ITR and Parker-Hannifin.**

Azizi Prek Frimodt Nielsen

Delivered in open court in Luxembourg on 17 May 2013.

[Signatures]

Table of contents

Background to the dispute 1

The marine oil and gas hoses sector 2

Presentation of the applicants 3

The administrative procedure 4

The contested decision 4

Procedure and forms of order sought 6

Law 7

The claims for annulment 7

The first plea, alleging the incorrect attribution of liability for the infringement to Parker ITR for the period before 1 January 2002 8

Contested decision 8

Arguments of the parties 8

Findings of the Court 11

The fourth plea, alleging that the imposition of a fine on Parker ITR for the period before 11 June 1999 is incorrect 16

The contested decision 16

Arguments of the parties 16

Findings of the Court 17

The fifth plea, alleging that the fine was wrongly increased on the ground that Parker ITR played the role of leader 17

The contested decision 17

Arguments of the parties 17

Findings of the Court 17

The sixth plea, alleging infringement of the principle of individual responsibility and the obligation to state reasons with respect to the increase of the fine imposed on Parker-Hannifin for Parker ITR's role as leader 17

Arguments of the parties 17

Findings of the Court 18

The second plea, alleging incorrect attribution to the applicants of liability for the infringement related to the unlawful conduct of Mr P., manager of the Oil & Gas unit 18

The contested decision 18

Arguments of the parties 18

Findings of the Court 19

The third plea, alleging that Parker-Hannifin was wrongly considered to be jointly and severally liable for the infringement with Parker ITR 20

The contested decision 20

Arguments of the parties 20

Findings of the Court 21

The seventh plea, alleging infringement of the principle of the protection of legitimate expectations owing to the application of an incorrect method of calculating the value of sales for the purposes of setting the fine 23

The contested decision 23

Arguments of the parties 24

Findings of the Court 24

The eighth plea, alleging infringement of Article 23(2) of Regulation No 1/2003 and infringement of the principle of personal liability and of the obligation to state reasons in the calculation of the ceiling of 10% of turnover 26

Arguments of the parties 26

Findings of the Court 27

The ninth plea, alleging infringement of the principle of the protection of legitimate expectations and of the obligation to state reasons, owing to the Commission's refusal to apply a reduction of the fine for cooperation 28

The contested decision 28

Arguments of the parties 28

Findings of the Court 28

The claim for amendment, the exercise by the Court of its unlimited jurisdiction and the determination of the final amount of the fine 29

Costs 31