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Analysis: "Light at the end of the tunnel in the concrete-reinforcing bars cartel saga? (Competition law cases T-657/19 and T-667/19)" by Nora Lampecco

Introduction

On 9 November 2022, the General Court (GC) released its judgments in *Feralpi v European Commission* (T-657/19) and *Ferriere Nord v European Commission* (T-667/19) upholding the European Commission's decision imposing a fine on undertakings for participating in a cartel in the concrete-reinforcing bars market from 1989 to 2000. The GC firmly reaffirms principles already set out in its case-law and adds clarifications on the rights of the defence, the excessive duration of proceedings, and the *non bis in idem* principle.

In 2002, the Commission fined eight undertakings (including the applicants) for organising a cartel in the concrete-reinforcing bars market. The GC had annulled the 2002 decision due to the Commission relying on an improper legal basis, namely article 65 §4 and 5 CA not in force anymore at that time, and so the Commission adopted a second decision in 2009 based on Regulation 1/2003. The 2009 decision was also challenged before the GC, which upheld it in 2014. It was however annulled by the Court of Justice in 2017 further to an appeal against the General Court's judgment (C-85/15 P), on the grounds of procedural irregularities, namely the non-participation of national competition authorities in the hearings before the Commission. After remedying these irregularities, the Commission adopted a third infringement decision in 2019 that has been challenged by Feralpi and Ferriere (and others) before the GC.

The General Court's rulings

The judgments on that third 2019 decision address three main points: (i) the rights of the defence, (ii) the excessive duration of the proceedings, and (iii) the *non bis in idem* principle.

- *The rights of the defence*

The applicants alleged a violation of their rights of the defence and the existence of procedural irregularities due to some undertakings not being able to participate in hearings before the Commission although detaining important information and because it was in their view impossible for the Commission to remedy the procedural irregularities found by the Court of Justice in its 2017 judgment.

First, the GC listed the different categories of actors and the conditions under which they can participate in such hearings as laid down in Regulation 773/2004.

While the undertakings concerned by the Commission's decision can request to participate, it pointed out that none of them had made such request.

Additionally, although interested third parties can also make such a request, the GC ruled that, in any case, there was no irregularity in the Commission's behaviour. Indeed, regarding the undertakings concerned by the previously annulled Commission's decisions, either they had not made such a request, or they had made it under the wrong category as a concerned party. Moreover, concerning the sole undertaking not concerned by any of the Commission's decisions and having benefited from the interested third party status in the previous proceedings, the GC held that the Commission was under no obligation to announce the resumption of the proceedings publicly and that it had discretion about the maintaining of such status. Since this undertaking had stopped answering the Commission's requests, the GC found that the Commission did not err in considering it was no longer an interested party.

It also observed that other third parties (not considered as interested) may be invited by the Commission to participate in the hearings, but the Commission has significant discretion in the matter.

Second, the GC rejected the applicants' claim related to the impossibility of remedying the procedural irregularities by the Commission due to the changes in the market conditions and the structure of the undertakings concerned induced by the alleged excessive duration of the proceedings initiated in 2002. It stressed that such reasoning would deprive the Commission of its right to resume cartel-enforcement process and that the Commission was only under a duty to consider these changes in its assessment of the resumption adequacy – which it did, according to the GC.

- *Excessive duration of the proceedings*

The GC recalled the Commission's obligation to consider the length of the proceedings in assessing the possible readoption of a decision, as established in *PVC II* (C-238/99 P). The claim was however rejected as it found that the Commission *had* considered the duration of the proceedings, notably by reducing the fines it originally intended to impose. Furthermore, applying *Technische Unie* (C-113/04 P) and *PVC II* , requiring excessive duration in addition to its impact on the rights of the defence to be demonstrated, the GC ruled that the duration of the proceedings was neither excessive nor did the duration hinder the protection of such rights. First, the duration of each period and the proceedings as a whole were held not excessive given the complexity of the case due to the change in primary law, the parties' behaviours (there being no inactive period from the Commission and numerous the applicants), as well as the stakes of the case involving high fines. Second, no impediment to the exercise of the applicants' rights of the defence was found by the GC as they had participated in numerous hearings and the first plea concerning the rights of the defence had been rejected.

- *The non bis in idem principle*

Finally, following *PVC II*, the GC stressed that the *non bis in idem* principle prohibited a new assessment of the facts if it would lead to an additional sanction, but did not prohibit the resumption of the cartel-enforcement process following the annulment of the Commission's decision on purely procedural grounds if the new sanction was only a substitution of the previous one. Since the judgments rendered in the saga dealt exclusively with procedural irregularities, and the previous fines had been reimbursed, the GC declared the principle was not applicable to the case. In *Ferriere*, it emphasised that *res judicata* concerns the parties to the proceedings solely, as established in *Lucchini* (T-185/18). Hence, although the 2014 GC judgment containing an assessment of the facts was final for the undertakings that had not appealed it, that does not entail a common *res judicata* effect giving rise to the application of the *non bis in idem* principle for the undertakings that had appealed the GC´s judgment that had subsequently been annulled by the Court of Justice.

Conclusion

Although these judgments are entirely in line with well-established case-law regarding the excessive duration of the proceedings and the *non bis in idem* principle, some clarifications have been made by the GC. First, it refined the rules on the acquisition and loss of participation under the different categories of actors concerning hearings before the Commission, notably as an interested third party. Second, it made clear that time-induced changes must be considered in the Commission's assessment of the resumption suitability but do not impede the Commission's power to resume proceedings following an annulment of its decision by the EU courts.

With *Feralpi* and *Ferriere*, the GC closes the doors to attempts by undertakings to elude fines through judicial review proceedings, and strikes a balance between the protection of the general principles of law and protection of the proper functioning of necessarily time-consuming competition proceedings.

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