



## ARTICLES

# THE *NE BIS IN IDEM* PRINCIPLE AS A LIMIT TO THE RESUMPTION OF COMPETITION PROCEEDINGS: AN ANALYSIS OF THE *REBAR CARTEL* SAGA

ENRICO SALMINI STURLI\*

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\* Trainee Lawyer, Dentons Europe LLP, Fellow of European Union Law, University of Ferrara, [enrico.salministurli@unife.it](mailto:enrico.salministurli@unife.it). In 2016, the Author undertook an internship at one of the law firms involved in the litigation of the *Rebar cartel* case. In this capacity, he had the chance to work on the final part of the appeal case against the 2009 readopted Commission decision and follow the subsequent re-opening of the proceedings, after the judicial annulment of said Commission decision in 2017. Access to the case file was granted by courtesy of the law firm in question, in accordance with and within the limits of the legal professional privilege, which is binding upon the Author by virtue of a confidentiality agreement signed at the beginning of the internship. The Author wishes to acknowledge Paolo Borghi, Gabriele Donà, Alessandro Rosanò, Tommaso Pavone and the anonymous reviewer for their valuable contributions and comments on earlier versions of this *Article*. Furthermore, the Author is particularly indebted to Renato Nazzini, whose extensive work on the influence of fundamental rights and general principles in competition law most inspired the theoretical foundation supporting this analysis.

**ABSTRACT:** This *Article* analyses the risks posed by the ability of EU competition authorities to resume proceedings following the judicial annulment of an infringement decision on procedural grounds. After introducing the notion of *parallel proceedings* in EU competition public enforcement, a taxonomy of possible instances of parallel proceedings is presented, whose resumption following the judicial annulment of a decision on procedural grounds is categorized as *horizontal* parallel proceedings either *at the national level* or *at Union level*. It is argued that although the only viable way to limit the proliferation of parallel proceedings is a coherent and reliable application of the *ne bis in idem* principle, this approach is currently impaired by the principle's narrow construction by the CJEU in competition matters. After a critical review of the current *PVC II* case law, which enables an enforcer to resume proceedings and readopt a decision annulled on procedural grounds, the *Article* proposes a twofold test underlying a broader application of the *ne bis in idem* principle as a limit to this type of parallel proceedings. The test is then applied via a detailed case study of the *Rebar cartel* litigation, a concrete and ongoing instance of horizontal parallel proceedings at the Union level. The *Article* concludes that in the *Rebar cartel* case, the *ne bis in idem* principle should have prevented the Commission from resuming proceedings.

**KEYWORDS:** competition law – public enforcement – parallel proceedings – *ne bis in idem* – annulment on procedural grounds – *Rebar cartel*.

## I. INTRODUCTION

### I.1. THE PERILS OF PARALLEL PROCEEDINGS IN EU COMPETITION LAW

Under Arts 101 and 102 TFEU,<sup>1</sup> anti-competitive agreements, concerted practices and decisions of associations of undertakings, on the one hand, and abuses of a dominant position, on the other hand are prohibited.<sup>2</sup> The undertakings concerned are required to cease the infringement and to refrain from future anti-competitive behaviour. More importantly, they may also be subject to hefty fines to promote deterrence.<sup>3</sup>

The effectiveness of EU competition law is assured by a dual system of enforcement. On the one hand, public enforcement is carried out by the Commission and national competition authorities (NCAs) pursuant to their institutional mandates. On the other hand, private enforcement is triggered by actions for damages brought by claimants that have suffered concrete harm due to the infringement of EU antitrust rules.<sup>4</sup>

<sup>1</sup> These provisions correspond to Arts 53 and 54 of the Agreement on the European Economic Area (EEA Agreement).

<sup>2</sup> For a thorough analysis of the conditions under which concerted and unilateral practices are considered anti-competitive and thus prohibited, see the relevant chapters of A. JONES, B. SUFRIN, *EU Competition Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2016.

<sup>3</sup> Under Art. 23 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, as subsequently amended, fines should be based on the gravity and the duration of the infringement and cannot exceed 10 per cent of the overall annual turnover of each undertaking concerned.

<sup>4</sup> See Court of Justice, judgment of 20 September 2001, case C-453/99, *Courage and Crehan*, where the Court first acknowledged the right of any individual to full compensation for harm suffered, provided

This *Article* focuses exclusively on public enforcement. After all, this is the domain where the application of the *ne bis in idem* principle arises more frequently, as its current applicability in private enforcement disputes has hitherto been residual.<sup>5</sup>

The public enforcement of the competition rules laid down in the TFEU is governed by a set of EU secondary acts. First, Council Regulation 1/2003<sup>6</sup> provides the general framework applicable to all antitrust proceedings under Arts 101 and 102 of the TFEU. Second, Commission Regulation 773/2004<sup>7</sup> implements the latter Regulation with detailed rules as to the conduct of such proceedings. Third, Regulation 1/2003 empowers NCAs to apply Arts 101 and 102 alongside the Commission, thereby innovating the relationship between EU and national competition laws with respect to the former regime under Regulation 17/62.<sup>8</sup> Finally, Regulation 1/2003 created the European Competition Network (ECN) consisting of NCAs and the Commission itself, to enhance the cooperation between competition enforcers within the EU and provide an administrative mechanism to better allocate cases amongst the authorities concerned.<sup>9</sup>

Worryingly, the public enforcement regime enacted by Regulations 1/2003 and 773/2004, as interpreted by the case law of the CJEU, gives rise to a significant risk of *parallel proceedings*.<sup>10</sup> These may be defined – borrowing terminology that originated within criminal and civil law and adjusting it to competition matters – as simultaneous or succes-

that a causal relationship exists between that harm and an infringement of competition law. See also Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

<sup>5</sup> With regard to the *ne bis in idem* principle in EU competition public enforcement, see *infra* Section I.3. Nevertheless, national rules allowing for the award of punitive damages when the defendant has already been punished for the same antitrust violation by a public enforcement authority may also give rise to the applicability of the *ne bis in idem* principle in the context of private enforcement: see England and Wales Court of Appeal, judgment of 14 October 2008, *Devenish Nutrition Ltd*, [2008] EWCA Civ 1086.

<sup>6</sup> Regulation 1/2003, cit.

<sup>7</sup> Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, as subsequently amended.

<sup>8</sup> Council Regulation (EEC) 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 of the Treaty, as last amended by Regulation (EC) 1216/1999.

<sup>9</sup> See Recitals 15-18 of Regulation 1/2003, cit. With regard to the ECN and the case allocation mechanism, see the Commission Notice of 27 April 2004 on cooperation within the Network of Competition Authorities (Network Notice).

<sup>10</sup> See R. NAZZINI, *Fundamental Rights Beyond Legal Positivism: Rethinking the Ne Bis in Idem Principle in EU Competition Law*, in *Journal of Antitrust Enforcement*, 2014, p. 270 *et seq.*; R. NAZZINI, *Parallel Proceedings in EU Competition Law*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, Cambridge: Cambridge University Press, 2016, p. 133 *et seq.*

sive investigations, carried out by the same competition authority or different ones, against the same undertakings for infringements arising from a common set of facts.<sup>11</sup>

On a general level, it may be argued that such a duplication of proceedings and decisions by the Commission and/or NCAs is favoured by the broad prosecutorial discretion to which European competition authorities are entitled. They may autonomously define the scope and extent of their investigations, and they are free to join, divide, close, and re-open cases according to convenience and on grounds of supposed administrative efficiency. The parties to those cases may only challenge such administrative choices after the adoption of the related decisions, by means of *ex post* judicial review.

## 1.2. THE CLASSIFICATION OF PARALLEL PROCEEDINGS AND THE RESUMPTION OF PROCEEDINGS FOLLOWING THE ANNULMENT OF A DECISION ON PROCEDURAL GROUNDS AS AN INSTANCE OF HORIZONTAL PARALLEL PROCEEDINGS

Instances of parallel proceedings in competition matters may be classified according to the position that the authorities whose specific proceedings are at issue occupy within the EU public enforcement hierarchy.<sup>12</sup>

The first category under consideration concerns what may be referred to as *vertical* parallel proceedings: the simultaneous or successive opening of multiple investigations by the Commission and one or more NCAs involving the same allegedly anti-competitive conduct.

The second category under analysis may be referred to as *horizontal* parallel proceedings *at the Union level*: subsequent multiple investigations undertaken by the Commission against the same allegedly anti-competitive conduct.

The third category mirrors the previous one, as it also refers to *horizontal* parallel proceedings but *at the national level*: the simultaneous or successive opening of multiple investigations by the same or several NCAs involving the same allegedly anti-competitive conduct.

The fourth and last category refers to instances of parallel proceedings *within and outside the EU*, thus involving simultaneous or subsequent enforcement by European and third-country competition authorities for the same allegedly anti-competitive behaviour.

Providing actual cases for each of these categories falls outside the scope of this Article,<sup>13</sup> which focusses solely on a specific type of *horizontal* parallel proceedings: the re-

<sup>11</sup> See N. ERK, *Jurisdictional Disputes in Parallel Proceedings: A Comparative European Perspective on Parallel Proceedings Before National Courts and Arbitral Tribunals*, Alphen aan de Rijn: Kluwer Law International, 2014, p. 17 *et seq.*

<sup>12</sup> The classification suggested in the text was indirectly inspired by G. DONÀ, *Ne bis in idem et les pouvoirs d'imposer des amendes des autorités européennes et nationales de concurrence*, in *Proceedings of the XXX General Congress of the Union des Avocats Européens - Colloque de l'Union des Avocats Européens*, Bruxelles: Larcier, forthcoming.

sumption of proceedings following the judicial annulment of a decision on procedural grounds. Cases of this kind arise where the competition authority makes a procedural mistake or is responsible for a behavioural shortcoming severe enough to result *per se* in the annulment of the decision at issue.

As will be discussed in Section II, in such a case the relevant case law does not preclude an enforcer from resuming proceedings afresh and readopting a new decision which may be materially identical to the annulled one.<sup>14</sup> As a consequence, undertakings concerned by the resumption of proceedings may be declared in breach of competition rules, and thus heavily fined, even where the effective enforcement of EU competition law would not so require. More worryingly, that may also be the case where the procedural defect affecting the validity of the decision was objectively attributable to an enforcer who subjectively acted in bad faith or with gross negligence. This situation may arise, for instance, where the competition authority violates the rights of defence of the undertakings concerned by the proceedings in order to secure a finding of liability or simply speed up the adoption of a prohibition decision.<sup>15</sup>

From a theoretical standpoint, this type of *horizontal* parallel proceedings may fall either under the *Union-level* or the *national-level* categories, depending on whether the relevant competition authority happens to be the Commission or an NCA and, by extension, whether the court annulling the decision is the CJEU or a national court.<sup>16</sup> In this light, Section III presents the *Rebar cartel* litigation, an extraordinary case that has already lasted twenty years and is still ongoing, as a case study of *horizontal* parallel proceedings *at the Union level*.

### 1.3. THE INADEQUACY OF THE DISCRETIONARY PROSECUTORIAL RESTRAINT AND THE *NE BIS IN IDEM* PRINCIPLE AS A LIMIT TO PARALLEL PROCEEDINGS

Under Regulation 1/2003, the inevitable abuses deriving from such a potential proliferation of parallel proceedings in the public enforcement of EU competition law are meant to be prevented *physiologically* by making use of the competition authorities' power to

<sup>13</sup> For a number of concrete competition cases involving parallel proceedings, see R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 133 *et seq.*

<sup>14</sup> See *infra* Section II.1.

<sup>15</sup> See *infra* Section II.2.

<sup>16</sup> Even where an NCA adopts a decision applying EU competition rules under Regulation 1/2003, cit., national courts retain competence over the judicial review of that decision. Obviously, national courts may always refer a preliminary reference to the Court of Justice under Art. 267 TFEU, requesting it to interpret the relevant EU primary or secondary law, or to ascertain the validity of the applicable EU secondary law.

refrain from starting or continuing an investigation for material conducts which have been – or are being – dealt with by the same or another European enforcer.<sup>17</sup>

However, the broad discretionary nature characterising such prosecutorial restraint makes it an ineffective – and arguably inappropriate from a legal certainty standpoint – means to prevent multiple proceedings and decisions.<sup>18</sup> Besides calling *de lege ferenda* for a widely advocated reform of the current public enforcement regime,<sup>19</sup> the only viable way to adequately limit *de lege lata* the proliferation of parallel proceedings is a coherent and reliable application of the *ne bis in idem* principle.<sup>20</sup> Such an assertion builds upon a number of premises which are well known but are nevertheless worth discussing briefly here.

First, the principle of *ne bis in idem*, which may be defined at a general level as the prohibition to be prosecuted or punished twice for the same offence, is a fundamental right recognised by the EU legal order.<sup>21</sup> It is now enshrined in Art. 50 of the Charter of Fundamental Rights of the European Union (Charter), which applies to EU institutions as well as Member States when they are implementing Union law.<sup>22</sup> Yet even before the Charter acquired the same legal value as the Treaties,<sup>23</sup> the *ne bis in idem* principle was

<sup>17</sup> See Arts 3, 11 and 13 of Regulation 1/2003, cit., and paras 5 to 42 of the Network Notice, cit. See also R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 131 *et seq.*

<sup>18</sup> For a comprehensive analysis as to why this discretionary prosecutorial restraint, while theoretically designed to avoid the occurrence of parallel proceedings within the ECN, does not do so in practice, or in any case does not do so in a consistent and reliable manner, see R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 137 *et seq.*

<sup>19</sup> See J. KILLICK, P. BERGHE, *This Is Not the Time to Be Tinkering with Regulation 1/2003 – It Is Time for Fundamental Reform – Europe Should Have Change We Can Believe In*, in *Competition Law Review*, 2010, p. 259 *et seq.*; M. MEROLA, N. PETIT, J. RIVAS (eds), *10 Years of Regulation 1/2003*, in *GCLC Annual Conference Series*, Bruxelles: Bruylant, 2015; D. FOSSELD, G. CARNAZZA, *The Review of Regulation 1/2003: Any Lessons to Be Learnt from the NCAs' Procedural Rules?*, in *Concurrences Review*, no. 1, 2017, [www.concurrences.com](http://www.concurrences.com). See also Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive).

<sup>20</sup> See W. DEVROE, *How General Should General Principles Be? Ne Bis in Idem in EU Competition Law*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK (eds), *General Principles of EU Law and European Private Law*, Alphen aan de Rijn: Kluwer Law International, 2013, p. 401 *et seq.*; R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 270 *et seq.*

<sup>21</sup> For a broad contextualisation of the *ne bis in idem* principle in its European dimension, see B. VAN BOCKEL, *The 'European' Ne Bis in Idem Principle*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, cit., p. 13 *et seq.*; B. VAN BOCKEL, *The Ne Bis in Idem Principle in EU Law*, Alphen aan de Rijn: Kluwer Law International, 2010.

<sup>22</sup> See Art. 51, para. 1, of the Charter. With regard to the extensive scope of application given to the Charter, see also Court of Justice, judgment of 26 February 2013, case C-617/10, *Akerberg Fransson* [GC], paras 16-31.

<sup>23</sup> See Art. 6, para. 1, TEU.

already recognised as a general principle of Union law,<sup>24</sup> and should thus continue to be applicable as such alongside Art. 50 of the Charter.<sup>25</sup> The meaning and scope of the rights protected under the Charter must be interpreted in light of the corresponding rights guaranteed by the European Convention on Human Rights (ECHR), although Union law may provide more extensive protection.<sup>26</sup> Even prior to the entry into force of the Charter, the CJEU had always interpreted the general principle of *ne bis in idem* in line with the “right not to be tried or punished twice” provided for in Art. 4 of Protocol no. 7 to the ECHR and the related case law of the European Court of Human Rights.<sup>27</sup> Moreover, while other provisions dealing with the *ne bis in idem* principle in EU secondary law (such as Arts 54-58 of the Convention implementing the Schengen Agreement<sup>28</sup> and Art. 3, para. 2, of the Framework Decision on the European Arrest Warrant<sup>29</sup>) are not directly relevant to the competition domain, the CJEU’s case law concerning their interpretation may nonetheless serve as an indirect means to further qualify Art. 50 of the Charter and the aforementioned general principle of Union law.<sup>30</sup>

Secondly, the fines imposed by the Commission and NCAs to sanction competition infringements are *criminal in nature* for the purpose of applying *ne bis in idem* rules,<sup>31</sup> thus “[t]he *ne bis in idem* principle must be observed in proceedings for the imposition of fines under competition law”.<sup>32</sup> With regard to the European Convention on Human

<sup>24</sup> See Art. 6, para. 3, TEU. For a thorough reconstruction of the CJEU’s case law on the *ne bis in idem* principle, see also D. SARMIENTO, *Ne Bis in Idem in the Case Law of the European Court of Justice*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, cit., p. 103 *et seq.*

<sup>25</sup> However, its status as a general principle of law has arguably lost most of its autonomous significance after the entry into force of the Charter: cf. W.P.J. WILS, *EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention On Human Rights*, in *World Competition*, 2011, p. 207; D. SARMIENTO, *Ne Bis in Idem in the Case Law of the European Court of Justice*, cit., p. 111.

<sup>26</sup> See Art. 52, para. 3, of the Charter, also referred to as the “homogeneity clause”.

<sup>27</sup> For such an affirmation in a case dealing specifically with competition matters, see Court of Justice, judgment of 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others (PVC II)*, para. 59.

<sup>28</sup> Convention of 19 June 1990 implementing the Schengen Agreement, included in the “Schengen Acquis” as referred to in Art. 1, para. 2, of Council Decision 1999/435/EC of 20 May 1999 (the Convention implementing the Schengen Agreement, or CISA).

<sup>29</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as subsequently amended (the Framework Decision on the EAW).

<sup>30</sup> See R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 273.

<sup>31</sup> See Opinion of AG Kokott delivered on 8 September 2011, case C-17/10, *Toshiba Corporation and Others*, para. 101. For the limited relevance of the legal characterisation of the procedure concerned with regard to the applicability of the *ne bis in idem* principle, see also B. VAN BOCKEL, *The ‘European’ Ne Bis in Idem Principle*, cit., p. 39 *et seq.*

<sup>32</sup> Court of Justice, judgment of 14 February 2012, case C-17/10, *Toshiba Corporation and Others* [GC], para. 94.

Rights, this stems from the autonomous notions of “criminal charges” under Art. 6 of the ECHR and “criminal proceedings” under Art. 4 of Protocol no. 7 to the ECHR, a substantive threefold test developed by the European Court of Human Rights since its 1976 *Engel* judgment.<sup>33</sup> Competition proceedings – and in general administrative investigations which may result in the imposition of severe fines – are considered *criminal* within the meaning of these provisions, according to well established case law of both the European Court of Human Rights and the Court of Justice.<sup>34</sup> As to the Charter of Fundamental Rights, its “homogeneity clause” requires the notion of “criminal proceedings” under Art. 50 of the Charter to be interpreted in conformity with the broad meaning given to that same wording under Art. 4 of Protocol no. 7 to the ECHR. This assumption is confirmed by the Explanations of the Charter,<sup>35</sup> and it is implicitly followed by the case law of the Court of Justice<sup>36</sup> according to which “the application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as ‘criminal’ by national law, but extends regardless of such a classification to proceedings and penalties which must be considered to have a criminal nature”.<sup>37</sup>

Thirdly, with regard to the definition of “same offence” (*idem*) for the purpose of applying the *ne bis in idem* rules, the CJEU in competition matters continues to apply the *Aalborg Portland* threefold test, requiring identity of the facts, identity of the offender, and

<sup>33</sup> European Court of Human Rights, judgment of 8 June 1976, no. 5100/71, *Engel and Others v. The Netherlands*. For the consistent interpretation of the ECHR as a whole, the Court found that it was appropriate for the applicability of the *ne bis in idem* principle to be governed by the same *Engel criteria*: see European Court of Human Rights, judgment of 15 November 2016, nos 24130/11 and 29758/11, *A and B v. Norway*, paras 105-107.

<sup>34</sup> European Court of Human Rights: judgment of 21 February 1984, no. 8544/79, *Öztürk v. Germany*; judgment of 25 August 1987, no. 9912/82, *Lutz v. Germany*. Court of Justice: judgment of 8 July 1999, case C-235/92 P, *Montecatini*, paras 175-176; *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit., para. 59; judgment of 29 June 2006, case C-289/04 P, *Showa Denko*, para. 50. See also A. ROSANÒ, *The Concept of Criminal Law in the Opinions of the Advocates General: Justification of Punitive Powers and Human Rights*, in *New Journal of European Criminal Law*, 2016, p. 59 *et seq.*

<sup>35</sup> Explanations of 14 December 2007 relating to the Charter of Fundamental Rights (the Explanations of the Charter). The paragraph entitled “Explanation on Article 50” therein states that “[a]s regards the situations referred to by Article 4 of Protocol No 7, [...] the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR”.

<sup>36</sup> See *Åkerberg Fransson* [GC], cit., paras 33-36, providing three criteria for asserting whether administrative penalties are “criminal” in nature for the purpose of applying Art. 50 of the Charter. See also Court of Justice, judgments of 20 March 2018: joined cases C-596/16 and C-597/16, *Di Puma and Zecca* [GC], paras 38-40; case C-537/16, *Garlsson Real Estate and Others* [GC], paras 28-35; and case C-524/15, *Menci* [GC], paras 26-33, three recent cases where the Court found the administrative fines at issue to be punitive in character, and thus that the fines were of a *criminal nature* within the meaning of Art. 50 of the Charter.

<sup>37</sup> *Menci* [GC], cit., para. 30; *Garlsson Real Estate and Others* [GC], cit., para. 32.



identity of the legal interest protected.<sup>38</sup> The third requirement precludes the applicability of the *ne bis in idem* principle whenever the former and the subsequent offence at issue preserve different legal interests. Arguably no other offence under Union or national law protects the same interest guaranteed by Arts 101 and 102 TFEU, namely the prevention and punishment of behaviours distorting or eliminating competition within the internal market.<sup>39</sup> Consequently, the *ne bis in idem* principle is currently deemed to be applicable only when an undertaking is prosecuted or punished a second time on grounds of the same infringement of EU competition rules – and not of other EU rules or national competition rules – in respect of which that undertaking has already been penalised or declared not liable by a previous final decision on the merits adopted by the Commission or an NCA.<sup>40</sup> It is mostly due to this overly restrictive judicial interpretation as to the meaning of *idem*, in spite of the Court of Justice's more lenient jurisprudence on the point in areas of law other than competition,<sup>41</sup> that the ability of the *ne bis in idem* principle to effectively limit parallel proceedings in antitrust matters is impaired.<sup>42</sup>

The principle of *ne bis in idem* acts as a powerful incentive for competition authorities to thoroughly investigate alleged infringements. The bar it poses against further proceedings once parties concerned by an investigation have already been acquitted or convicted forces public enforcers to conduct their proceedings as efficiently and competently as they can, knowing that, in principle, they will not have a second opportunity to prosecute those parties for that same infringement. Thus, authorities are strongly encouraged not to leave any stone unturned in their investigations, as cases should be brought only where there is enough evidence for these to be upheld in the subsequent judicial appeal which parties are, in turn, likely to bring against them. It also means that resources are less likely

<sup>38</sup> Court of Justice, judgment of 7 January 2004, 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*, para. 338. See also *Toshiba Corporation and Others* [GC], cit., para. 97, where the Court expressly reaffirmed the three requirements referred to in the main text.

<sup>39</sup> See A. JONES, B. SUFRIN, *EU Competition Law: Text, Cases, and Materials*, cit., p. 91 *et seq.*

<sup>40</sup> See R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 275 *et seq.* See also Opinion of AG Kokott, *Toshiba Corporation and Others*, cit., para. 112.

<sup>41</sup> This is particularly true with regard to the Area of Freedom, Security and Justice (AFSJ) domain, where the CJEU applies a twofold conduct-based test to the *ne bis in idem* principle: see D. SARMIENTO, *Ne Bis in Idem in the Case Law of the European Court of Justice*, cit., p. 123 *et seq.*; B. VAN BOCKEL, *The 'European' Ne Bis in Idem Principle*, cit., p. 47; Opinion of AG Kokott, *Toshiba Corporation and Others*, cit., para. 116.

<sup>42</sup> See Opinion of AG Kokott, *Toshiba Corporation and Others*, cit., paras 111-124, suggesting that the Court should also adopt a conduct-based test for the definition of *idem* in competition matters. See also, among the many authors endorsing the approach suggested by AG Kokott, R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 285 *et seq.*; G. DI FEDERICO, *EU Competition Law and the Principle of Ne Bis in Idem*, in *European Public Law*, 2011, p. 254 *et seq.*; G. MONTI, *Managing Decentralized Antitrust Enforcement: Toshiba*, in *Common Market Law Review*, 2014, p. 277 *et seq.*; A. ROSANÒ, *Ne Bis Interpretatio In Idem? The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice*, in *German Law Journal*, 2017, p. 50 *et seq.*

to be wasted on investigations leading nowhere, thereby improving the enforcers' efficiency. Furthermore, provided that it is not construed as restrictively as it is at present, the *ne bis in idem* principle works as an *ex post* counterbalance to the lack of parties' involvement in the *ex ante* process of case allocation within the ECN, enabling parties to bring actions before the CJEU or national courts to regulate in retrospect cases of parallel proceedings impartially and in accordance with the law.<sup>43</sup>

The following section presents a twofold test conveying a broader way to construe the *ne bis in idem* principle, which is deemed capable of providing a better-balanced limit to the resumption of proceedings following the annulment of a decision on procedural grounds.<sup>44</sup> Furthermore, in Section IV that test is applied to the *Rebar cartel*, the case of *horizontal* parallel proceedings *at the Union level* which is the subject-matter of the case study discussed in Section III, the argument being that the *ne bis in idem* principle should have prevented the Commission from resuming proceedings.

## II. THE CURRENT FREEDOM TO RESUME PROCEEDINGS FOLLOWING THE ANNULMENT OF A DECISION ON PROCEDURAL GROUNDS VIS-À-VIS A BROADER WAY TO CONSTRUE THE *NE BIS IN IDEM* PRINCIPLE AS A LIMIT TO SUCH RESUMPTION

### II.1. THE CURRENT *PVC II* CASE LAW OR THE FREEDOM TO RESUME PROCEEDINGS FOLLOWING THE ANNULMENT OF A DECISION ON PROCEDURAL GROUNDS

Under Art. 263, para. 2, TFEU, for an annulment action to be well-founded on procedural grounds either there must have been a "lack of competence" of the institution to adopt the contested act in first place or the challenged defect must have entailed the "infringement of an essential procedural requirement". Thus, minor procedural defects do not affect *per se* the validity of a decision adopted pursuant to Regulation 1/2003.<sup>45</sup> As previously mentioned, under the current case law, the annulment of a Commission decision by the CJEU on grounds of a procedural defect does not preclude the Commission from resuming proceedings against the same undertaking for the same anti-competitive conduct already addressed by the annulled decision. Such freedom gives rise to an instance of what were previously defined as *horizontal* parallel proceedings *at the Union level*. The same case law should be applicable to NCAs whose decisions applying EU competition rules are annulled by national courts on procedural grounds, thus providing an example of *horizontal* parallel proceedings *at the national level*.<sup>46</sup>

<sup>43</sup> See R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 138 *et seq.*

<sup>44</sup> See *infra* Section II.2

<sup>45</sup> See K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2015, p. 253 *et seq.*

<sup>46</sup> See *supra* Section I.2.

Such a conclusion follows from the *PVC II* case law rendered by the Court of Justice in the final appeal case of the *PVC cartel* saga.<sup>47</sup> The case concerned a group of major petrochemical producers that had been fined by the Commission in 1988 by means of a first decision prohibiting collusive practices which amounted to a cartel in the polyvinylchloride (PVC) sector.<sup>48</sup> The undertakings concerned challenged the first PVC Decision and, in 1994, the Court of Justice set aside the judgment at first instance and annulled the decision as it considered the latter to be vitiated by essential procedural defects.<sup>49</sup> In that same year, the Commission readopted a second infringement decision in relation to the same undertakings which had already been the subject of the first PVC Decision, imposing fines of the same amount as those imposed by the first decision annulled by the Court on procedural grounds.<sup>50</sup> The undertakings concerned challenged the second PVC Decision too, claiming, *inter alia*, that the Commission could not readopt a fresh decision after the Court of Justice had annulled a previous decision materially identical to the readopted one, as such readoption amounted to a violation of the principle of *ne bis in idem*. Both the Court of First Instance and the Court of Justice on appeal dismissed the argument.<sup>51</sup>

The Court of Justice, in its judgment on appeal, reaffirmed that:

“the principle of *non bis in idem*, which is a fundamental principle of [Union] law also enshrined in Art. 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision”.<sup>52</sup>

However, the Court also stated that:

<sup>47</sup> *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit. See also R. WESSELING, *Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij NV (LVM) and Others*, in *Common Market Law Review*, 2004, p. 1141 *et seq.*

<sup>48</sup> Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty, Case IV/31.865 – *PVC* (first PVC Decision).

<sup>49</sup> Court of Justice, judgment of 15 June 1994, case C-137/92 P, *BASF and Others (PVC I)*, para. 78. The Court of Justice set aside the appealed judgment because it considered that the Court of First Instance had erred in law in declaring the decision at issue non-existent rather than annulling it on essential procedural grounds.

<sup>50</sup> Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty, Case IV/31.865 – *PVC* (second PVC Decision).

<sup>51</sup> *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit., paras 54-69. The Court of First Instance had reduced the fines imposed on some of the applicants but had dismissed the remainder of the action for annulment of the decision at issue. The Court of Justice on appeal partially set aside the judgment of first instance but also dismissed the remainder of the action for annulment.

<sup>52</sup> *Ibid.*, para. 59.

“[the *ne bis in idem* principle] does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an ‘acquittal’ within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them”.<sup>53</sup>

It follows from the above case law that the Commission may make serious procedural mistakes – including defects expressly qualified as violations of “essential procedural requirements” by the Court of Justice,<sup>54</sup> thereby affecting the validity of an infringement decision – without losing the power to resume proceedings after the decision has been annulled by the CJEU. Indeed, in practice, the Commission normally re-adopts infringement decisions which have been set aside solely on procedural grounds: that was the case in the aforementioned *PVC* case,<sup>55</sup> in the *Steel Beams* case,<sup>56</sup> in the *Alloy Surcharge* case,<sup>57</sup> in the *Gas Insulated Switchgear* case,<sup>58</sup> and in the *Rebar cartel* case, which is the subject-matter of the case study discussed *infra* in Sections III and IV.

There is no reason not to consider the abovementioned *PVC II* case law concerning Commission decisions as applicable to NCA decisions too, provided that they apply EU competition rules, and not exclusively national competition rules, to a given case. Hence, NCAs too may make serious procedural mistakes which affect the validity of an infringement decision without losing the power to resume proceedings after the decision has been annulled by a national court on procedural grounds.<sup>59</sup>

## II.2. A BROADER WAY TO CONSTRUE THE *NE BIS IN IDEM* PRINCIPLE AS A BETTER-BALANCED LIMIT TO FURTHER PROCEEDINGS FOLLOWING THE ANNULMENT OF A DECISION ON PROCEDURAL GROUNDS

The Court of Justice’s aforementioned *PVC II* case law can be further divided into two mutually dependent arguments. Firstly, the judicial annulment of a decision on proce-

<sup>53</sup> *Ibid.*, para. 62.

<sup>54</sup> See *BASF and Others (PVC I)*, cit., para. 78.

<sup>55</sup> Second *PVC* Decision, cit.

<sup>56</sup> Commission Decision C(2006) 5342 final of 8 November 2006 relating to a proceeding under Article 65 of the ECSC Treaty, Case COMP/C.38.907 – *Steel beams*.

<sup>57</sup> Commission Decision 2007/486/EC of 20 December 2006 relating to a proceeding under Article 65 of the ECSC Treaty, Case COMP/F/39.234 – *Alloy surcharge – Readoption*.

<sup>58</sup> Commission Decision C(2012) 4381 final of 27 June 2012 amending Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union) and Article 53 of the EEA Agreement to the extent that it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation, Case COMP/39.966 – *Gas Insulated Switchgear – Fines*.

<sup>59</sup> See R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 134.

dural grounds does not constitute a ruling on the merits of the facts alleged, thus “[...] the annulment decision cannot in such circumstances be regarded as an ‘acquittal’ within the meaning given to that expression in penal matters”.<sup>60</sup> Secondly, the fines imposed as a result of the second set of proceedings “[...] are not added to those imposed by the annulled decision but replace them”.<sup>61</sup> Both strands of reasoning appear not to be entirely convincing.<sup>62</sup>

With regard to the effect of a judgment annulling an infringement decision for procedural reasons, it is not apparent that the judgment is the only relevant decision for the purposes of applying the *ne bis in idem* principle. The relevant decision to that effect may indeed be intended as the annulled decision, which established the infringement and imposed a penalty in the first place and which, after the judicial annulment, is no longer amenable to appeal and, thus, is “final” for the purposes of *ne bis in idem*. The objection to this argument – which lays the theoretical foundations for the *PVC II* case law – is that, once a decision has been set aside, it ceases to exist as an act producing legally binding effects and it is, therefore, impossible to say that there still is a “final” acquittal or conviction within the meaning of Art. 50 of the Charter.<sup>63</sup> However, it could be reasonably replied that a conviction does not simply cease to exist because it has been annulled. While it is indisputable that its legal effects are set aside retroactively (*ex tunc*), its significance *per se* cannot be disregarded in all respects. The essential purpose of the *ne bis in idem* principle is to protect the right of a person not to be subjected to a second prosecution or conviction once he or she has already been the subject of proceedings on the merits resulting in a final decision. In the case of the procedural annulment of a conviction, the defendant has actually been placed in jeopardy and there has been a substantive assessment of the case in proceedings in which he (should have) had the opportunity to exercise his or her rights of defence.<sup>64</sup> It may thus be argued that a decision ascertaining an undertaking’s liability for the infringement of EU competition rules is “final” for the purposes of applying the *ne bis in idem* principle, and that the latter

<sup>60</sup> *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit., para. 62. See also Court of First Instance, judgment of 1 July 2009, case T-24/07, *ThyssenKrupp Stainless*, para. 190; upheld on appeal by the Court of Justice, judgment of 29 March 2011, case C-352/09 P, *ThyssenKrupp Nirosta*.

<sup>61</sup> *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit., para. 62.

<sup>62</sup> See R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 155 *et seq.*

<sup>63</sup> See R. WESSELING, *Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij NV (LVM) and Others*, cit., p. 1144 *et seq.*

<sup>64</sup> It should be noted that the defendant may not have had such an opportunity, as an annulment on procedural grounds may well depend on the violation of the parties’ rights of defence, which “constitutes infringement of an essential procedural requirement”: see Court of Justice, judgments of 21 September 2017, case C-85/15 P, *Feralpi*, para. 45; joined cases C-86/15 P and C-87/15 P, *Ferriera Valsabbia and Valsabbia Investimenti*, para. 48; case C-88/15 P, *Ferriere Nord*, para. 53; case C-89/15 P, *Riva Fire*, para. 47. The case that gave rise to these four judgments, *the Rebar cartel*, is thoroughly analysed *infra* in Section IV.

should consequently bar further proceedings concerning an infringement that has already been “finally” established.

It should also be noted that whether a decision has been annulled on procedural grounds or there has been a ruling on the merits may not be indisputable. In a recent case, an Italian oil and gas multinational challenged the Commission’s decision to reopen proceedings in the *Butadiene Rubber cartel*, a case concerning the fixing of prices and sharing of customers in the market for certain types of synthetic rubber, after the Commission’s previous prohibition decision had been partially set aside by the General Court.<sup>65</sup> In its application, the undertaking alleged, *inter alia*, the infringement of the *ne bis in idem* principle, claiming that the resumption of proceedings conflicted with the General Court’s ruling insofar as the latter did not merely establish a procedural defect of the Commission decision but, by exercising its unlimited jurisdiction under Art. 261 TFEU and Regulation 1/2003, it re-determined the amount of the fine and substituted the Commission’s original assessment with its own.<sup>66</sup> Eventually, the Commission decided to close the proceedings without readopting an infringement decision and the General Court declared that there was no longer any need to adjudicate on the action as it had become devoid of object.<sup>67</sup>

Similarly, in another case which is still pending as of this writing, a Spanish paper manufacturer challenged the Commission’s readoption of a settlement decision in the *Envelopes cartel*, a case involving five European companies which had coordinated prices and allocated customers in the market for certain types of paper envelopes. The Commission’s previous decision was partially annulled by the General Court insofar as it had imposed a fine on the Spanish undertaking, due to the lack of sufficient reasoning concerning the discretionary fine reductions applied to that company.<sup>68</sup> In its readopted decision, the Commission considered that the General Court’s partial annulment had not called into question the undertaking’s liability for the cartel and merely addressed the procedural error ascertained by the ruling, thereby re-imposing on the undertaking a new fine identical to the one imposed in the original decision.<sup>69</sup> In the pending case, the undertaking concerned by the readoption claimed before the General Court that the new decision amends the original one, despite the fact that the first decision has become final, with the sole exception of the fine originally imposed on the applicant, which was annulled by the General Court in the exercise of its unlimited jurisdiction as to the merits of the case. The undertaking thus alleged, *inter alia*, the violation of the *ne bis in idem* principle, claiming

<sup>65</sup> General Court, judgment of 13 July 2011, case T-39/07, *Eni*.

<sup>66</sup> See the summary of the application brought on 4 June 2012, case T-240/12, *Eni*.

<sup>67</sup> General Court, order of 7 March 2014, joined cases T-240/12 and T-211/13, *Eni*.

<sup>68</sup> General Court, judgment of 13 December 2016, case T-95/15, *Printeos and Others*.

<sup>69</sup> Commission Decision C(2017) 4112 final of 16 June 2017 amending Decision C(2014) 9295 final relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement, Case AT.39780 – *Envelopes*.

that, by re-imposing a fine equivalent to the one annulled by the General Court, the Commission had contravened the Court's ruling rendered on the first decision.<sup>70</sup>

As to the argument that the second penalty merely replaces the previously imposed one and is not added to it, it should be emphasised that the scope of protection granted by the *ne bis in idem* principle does not limit itself to the right not to be punished twice but encompasses likewise the right not to be prosecuted twice. This stems from the fact that the *ne bis in idem* rules are applicable not only where there has been a previous conviction, but also where the first decision amounts to a final acquittal, as is made apparent by the same wording of both Art. 4 of Protocol No. 7 to the ECHR and Art. 50 of the Charter. In the light of the twofold scope of applicability, the fact that, when the first decision is judicially annulled, the second fines are not added to the previous ones but only replace them, is irrelevant and based on an incorrect understanding of the *ne bis in idem* principle. From the viewpoint of the defendant, what matters is that the Union's *ius puniendi* has already been exercised in proceedings on the merits resulting in a decision that is no longer amenable to appeal. The fact that the *ius puniendi* was invalidly exercised should not detract from the protection afforded to the defendant, provided that the procedural error affecting the validity of the decision meets certain conditions discussed in the text below.

It has been recently suggested that the *PVC II* case law, in so far as it *does* currently prevent the reopening of proceedings where the CJEU has annulled a decision of the Commission by ruling on the substance of the case and not merely on procedural grounds, should be superseded as it would undermine the effective enforcement of EU competition law. According to this arguable opinion, the *ne bis in idem* principle should not impede the Commission from resuming proceedings in cases where the annulment of its decision was indeed grounded on a substantive error in the Commission's assessment of the infringement, but the Court did not exclude the violation of EU competition rules by the undertakings concerned.<sup>71</sup> By contrast, the opposite argument is made here: the *PVC II* case law blatantly clashes with the fundamental right rationale of the *ne bis in idem* principle, inasmuch as it does not preclude the Commission – or an NCA – from resuming proceedings where Union – or national – courts have annulled an infringement decision on procedural grounds, provided that the procedural defects affecting the validity of the decision meet the conditions hereafter. The *PVC II* case law should thus be replaced by a more nuanced approach.<sup>72</sup>

<sup>70</sup> See the summary of the application brought on 27 July 2017, case T-466/17, *Printeos and Others*, pending.

<sup>71</sup> The *revirement* of the current *PVC II* case law in the restrictive sense mentioned in the text was recently suggested by A.P. BIOLAN, *Reopening EU Competition Investigations after Judicial Annulment: Beyond Procedural Errors*, in *Journal of European Competition Law & Practice*, 2017, p. 83 *et seq.*.

<sup>72</sup> See R. NAZZINI, *Parallel Proceedings in EU Competition Law*, *cit.*, p. 157.

It is indisputable that the need to ensure the effective enforcement of EU competition law may indeed justify the limitation of the protection granted by the *ne bis in idem* principle when the first decision has been annulled on procedural grounds. An enforcement of competition rules that is truly effective requires a rule according to which procedural errors done by the enforcer do not necessarily preclude the possibility of establishing the merits of an alleged infringement. Where these procedural errors affect the validity of a decision, in principle, the reopening of the case should not be barred, provided that the defect can be remedied. The undertaking concerned has the right to proceedings conducted in accordance with the law and, where the undertaking reckons that the authority has breached the law governing the procedure, that right may be enforced by challenging before a court of law the decision that closed said proceedings. In these circumstances, if an action brought on procedural grounds is successful, the *ne bis in idem* guarantee must yield to the public interest in effective competition enforcement. However, even if this sensible line of reasoning were to be embraced, an unlimited – and almost indefinite –<sup>73</sup> possibility of resuming proceedings following the annulment of a decision on procedural grounds seems to be an excessive sacrifice of the *ne bis in idem* fundamental right on the altar of effective enforcement. Furthermore, it may also be argued that allowing the enforcer to reopen a case time and again notwithstanding serious procedural defects in the proceedings is likewise not desirable from a public interest point of view, taking into account the disciplinary and efficiency considerations presented *supra* in Section I.

An alternative approach to the (non-)preclusive effect of the setting aside of a decision on procedural grounds, one which would possibly answer the significant concerns raised by the current *PVC II* case law, may be to frame a test capable of better balancing the three conflicting interests: the protection of the concerned undertaking's fundamental right not to be tried again, the need to safeguard the effective enforcement of EU competition law, and the requirement that competition authorities conduct their proceedings abiding by the law which governs the latter in the most efficient way possi-

<sup>73</sup> Under Art. 25 of Regulation 1/2003, the power to impose penalties in respect of substantive infringements of EU competition rules is subject to a double limitation period: a five-year period (so-called "short limitation period") and a ten-year period (so-called "long limitation period") both running from the day of the end of the infringement. On the one hand, any action taken by the Commission or NCAs for the purpose of investigating an infringement interrupts the short limitation period with regard to all undertakings that have participated in the infringement, making it start afresh. This short limitation period is also suspended for the entire duration of judicial proceedings before the Union Courts. On the other hand, the long limitation period is not subject to any interruption; however, as is the case for the short limitation period, it is suspended for the entire duration of judicial proceedings before the Union Courts. Hence, in the case of a judicial annulment on procedural grounds, the *PVC II* case law ensures that the Commission's (or NCA's) *ius puniendi* is not time-barred. Even more so in the case of subsequent annulment on procedural grounds of multiple decisions, as happened in the context of the *Rebar cartel*, the subject-matter of the case study analysed *infra* in Section III.



ble. It is here proposed that a twofold test would be suitable. The resumption of proceedings following the judicial annulment of a decision on procedural grounds should only be allowed, on a strict case-by-case basis, provided that: *a)* the effective enforcement of EU competition law requires such resumption, and *b)* the procedural defect affecting the validity of the decision is not objectively attributable to the prosecuting authority or, if it is so attributable, the prosecuting authority did not subjectively act in bad faith or with gross negligence. Failing to meet either of these two cumulative conditions should bar the prosecuting authority from resuming the proceedings.<sup>74</sup>

The first requirement implies that whenever a fresh prosecution of the specific infringement at issue would be objectively ineffective or inefficient, the prosecuting authority should be barred from reopening proceedings. This might be the case where the timeframe between the adoption of the decision and its judicial annulment has been particularly prolonged,<sup>75</sup> and the anti-competitive conduct had already ceased before the start of the investigation or during the proceedings leading to the adoption of the decision. In such circumstances, the enforcer has already achieved both its primary objective, the restoration of undistorted competition, and its secondary function of deterring future anti-competitive restrictions on the same relevant market, with the result that only the imposition of penalties, its retributive function, would be compromised by the preclusive effect of the *ne bis in idem* principle.<sup>76</sup> A similar approach would also be appropriate where the theory of harm on which the authority has grounded its case is particularly feeble, or the evidence it has gathered in support of that theory is particularly weak, and the Court, despite annulling the decision for procedural defects and hence having absorbed the pleas in law (or grounds of appeal) on the merits without examination,<sup>77</sup> nonetheless in *obiter dicta* suggests that it does not share the substantive conclusions of the enforcer as to the existence of the infringement in the first place.

<sup>74</sup> The test referred to in the main text is a refined version of the one first suggested by R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 297.

<sup>75</sup> This is usually the case where the decision is upheld at first instance and annulled on appeal. Even more so in the context of the *Rebar cartel*, the facts of which are further analysed *infra* in Section III, where the first infringement decision was adopted by the Commission in 2002 and annulled on procedural grounds by the Court of First Instance in 2007. The Commission readopted a second decision in 2009 which was first upheld by the General Court in 2014 and subsequently annulled also on procedural grounds by the Court of Justice at the end of 2017, almost 18 years after the case was originally brought by the Commission.

<sup>76</sup> As argued *supra* in Section I, this *Article* does not focus on the private enforcement of EU competition law. In any case, while a decision establishing an infringement significantly simplifies the burden of proof when bringing actions for damages against parties to an alleged infringement, it is also true that the claimant is always required to prove the damage it has suffered, potentially using the same evidence relied on by the public enforcer whose decision was annulled on procedural grounds.

<sup>77</sup> See, e.g., *Ferriere Nord*, cit., para. 56. The latter judgment is among those discussed *infra* in the context of the *Rebar cartel* case, in Section III.

The second requirement – which is additional and not alternative to the first one – implies that where the procedural defect, which must be serious enough *per se* to affect the validity of the decision,<sup>78</sup> is indeed objectively attributable to the prosecuting authority, who erred intentionally or with gross negligence, the resumption of proceedings should be likewise precluded. Up until now, the case of an enforcer willingly tweaking the procedure to cover its shortcomings has never occurred. However, if that regrettable situation were to occur, there is no apparent reason not to punish the authority's lack of discipline and violation of good faith by re-expanding the scope of the *ne bis in idem* protection.<sup>79</sup> As to procedural defects caused by an enforcer's gross negligence, that might be the case where the error at issue amounts to a macroscopic violation of the procedure that hinders substantially the rights of defence of the undertaking concerned by the proceedings, or – as implausible as it may seem – where the authority has made a first procedural error which led to a first annulment of the decision, and, in the context of the proceedings for the re-adoption of that decision, it makes a second procedural error closely connected to the first one which leads to a second annulment of the readopted decision.<sup>80</sup>

In Section IV, this twofold test is applied to the *Rebar cartel*, arguing that the *ne bis in idem* principle should have prevented the Commission from resuming proceedings a third time, on grounds that such further reopening of the case fails to meet both abovementioned cumulative requirements.<sup>81</sup>

### III. THE COMMISSION'S *REBAR CARTEL*: AN ENDLESS SAGA

#### III.1. CONSIDERATIONS ON THE CASE SELECTION

Following a qualitative approach based on the case study methodology,<sup>82</sup> the limits to further proceedings arising from the extensive way to construe the *ne bis in idem* principle which were presented in the previous section are here applied to the *Rebar cartel*. The case concerns a group of Italian steelmakers who allegedly participated in a cartel on the market for reinforcing bars (so-called “rebars”),<sup>83</sup> thereby violating a provision

<sup>78</sup> With regard to procedural defects affecting the validity of a decision, see *supra* Section II.1.

<sup>79</sup> Cases falling within this category may be limited in number, as it is likely that, in most instances where the shortcomings are attributable to the Commission's bad faith, the re-adoption of the decision would not be necessary to pursue the objective of effective enforcement, so that the re-adoption would be barred by the first limb of the proposed test.

<sup>80</sup> This latter example of procedural defect, which is deemed grossly negligent, is inspired by the *Rebar cartel*: for a deeper analysis of the facts of the case, see *infra* Section III.2.

<sup>81</sup> With regard to the application of the test suggested in the text to the *Rebar cartel*, see *infra* Section IV.

<sup>82</sup> See D. COLLIER, *Understanding Process Tracing*, in *PS: Political Science & Politics*, 2011, p. 823 *et seq.*; G. KING, R.O. KEOHANE, S. VERBA, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton: Princeton University Press, 1994.

<sup>83</sup> With regard to what “rebar” is, see *infra* note 88.

which has been subsequently replaced by Art. 101 TFEU. Proceedings were originally brought by the Commission in the early 2000s and – as astonishing as it may seem – the case is still pending at the time of writing, almost 19 years later. The Commission's first infringement decision was adopted in 2002 and annulled by the Court of First Instance on procedural grounds in 2007. A second Commission decision was readopted in 2009 but was subsequently annulled by the Court of Justice also on procedural grounds in 2017. At the start of 2018, the Commission resumed proceedings once again and a third infringement decision was adopted in July 2019. The relevant details of this case spanning almost two decades are presented in the following sub-sections, whereas in Section IV, applying the test developed in Section II.2, it is argued that the Commission should have been barred from resuming proceedings a third time, let alone adopting a third infringement decision.

Several instances where the Commission readopted a decision which had been annulled by the CJEU on procedural grounds were provided in Section II.1. The choice to focus this qualitative analysis on the *Rebar cartel* rests on a number of reasons. First and foremost, the present analysis takes advantage of a direct knowledge of the facts and privileged access to the case file of the *Rebar cartel*.<sup>84</sup> Admittedly, this means that the critical distance from the case might be less than if its process-tracing were to be done by means of purely external observance. However, the great benefit of such an extensive and direct knowledge of the circumstances of the case outweighs the cost of said lack of detachment.

In any case, irrespective of the extensive access to the case file and direct knowledge of the related facts, the selection of the *Rebar cartel* as the subject-matter of this case study follows the logic of the most likely scenario. It does so in a twofold sense. On the one hand, assuming a prescriptive approach, this case involves precisely the kind of situation that calls for the limits to further proceedings that were advocated in Section II.2. As will be discussed below, the Commission's shortcomings during this procedure did not limit themselves to the first set of proceedings, thereby resulting in the annulment of the first decision – a fact which would arguably be *per se* enough in order to consider said limits applicable to the case at issue. In fact, the Commission's shortcomings were furthermore repeated in the second set of proceedings, which also resulted in an annulment of the second decision. Hence, the *Rebar cartel* is indeed the appropriate subject-matter of a case study to show why the need for the aforementioned limits is concretely relevant and their applicability is not consigned to merely hypothetical situations, regardless of whether the CJEU actually ends up following them in the case in question.

<sup>84</sup> As disclosed *supra*, in the first footnote, in 2016 the Author undertook an internship at one of the law firms involved in the litigation of the *Rebar cartel* case.

On the other hand, the facts of the *Rebar cartel* appear to be so glaring that, if any case is most likely to prompt the CJEU to change its jurisprudence in the direction here advocated, it is this case or a closely similar one. As the well-known legal maxim in common law jurisdictions goes, “hard cases make bad law”.<sup>85</sup> Thus, if the Court of Justice were to actually reconsider its case law concerning annulments on procedural grounds, it would be advisable to do so in the *Rebar cartel*, as it is a case to which the aforementioned limits to further proceedings should apply beyond doubt.

Lastly, as a further confirmation of the relevance of the case selection, it should be noted that the *Rebar cartel* case was nominated by *Global Competition Review* for its 2018 *GCR Awards*, in the category *Behavioural matter of the year – Europe*.<sup>86</sup>

### III.2. THE 2002 INFRINGEMENT DECISION AND ITS FIRST ANNULMENT

From October to December 2000, the European Commission carried out a number of surprise inspections at the offices of all of the main Italian steel producers and at the premises of the main Italian steelmakers’ association, *Federacciai*. In 2002, the Commission formally commenced proceedings against 11 Italian steel producers and *Federacciai*, pursuant to Art. 65, para. 4, of the Treaty establishing the European Coal and Steel Community (ECSC Treaty).<sup>87</sup> On the basis of the information gathered during the dawn raids and the firms’ answers to some requests for information, the Commission became convinced that the undertakings concerned by the investigation had used the regular meetings of their main trade association to set up between 1989 and 2000 a cartel with the object of fixing prices and limiting or controlling output or sales on the Italian market for concrete reinforcing bars.<sup>88</sup> Among the 15 States that were Members of the EU at that time, the country with the largest production of rebar was indeed Italy. The Steelmakers concerned accounted for almost 80 per cent of the relevant market and their turnover for reinforcing bar totalled some EUR 900 million in 2000-2001.

<sup>85</sup> The maxim was probably first referred to in UK House of Lords, judgment of 14 March 1837, *Hodgens v. Hodgens*, [1837] 7 ER 124 (HL) [378] (Lord Wynford), but it is best known for its appearance in the US Supreme Court judgment of 14 March 1904, *Northern Securities Co v. United States*, 193 US 197, 400 (1904) (Holmes, J, dissenting), a landmark case dealing with the application of the Sherman Antitrust Act of 1890 (26 Stat. 209, 15 USC §§ 1–7) which resulted in the dissolution of the appellant securities company and set a precedent for future antitrust rulings.

<sup>86</sup> See Global Competition Review, *GCR Awards 2018*, 7 February 2018, [globalcompetitionreview.com](http://globalcompetitionreview.com).

<sup>87</sup> Under its Art. 97, the ECSC Treaty was concluded for a period of fifty years from the date of its entry into force, which occurred on 23 July 1952. Thus, the ECSC expired on 23 July 2002 and its former competences are now exercised within the framework of the current TEU and TFEU. Under Art. 65(4) of the ECSC Treaty – which was still in force when the case was initiated – the Commission had exclusive competence in applying (what were then) Community competition rules to the coal and steel sectors.

<sup>88</sup> Reinforcing bars (rebar) are a long hot-rolled steel product in coils or bars of 5 mm and over, 6 m, 12 m, 14 m or, more rarely, 18 m long, with a smooth, crenelated or ribbed surface. Rebar is used principally in the construction industry to strengthen concrete.

In March 2002, the Commission notified to the undertakings concerned a Statement of Objections (SO) expressly referring to Art. 36 of the ECSC Treaty,<sup>89</sup> following which the undertakings were heard in a first oral hearing before the Hearing Officer in June 2002,<sup>90</sup> without the participation of the representatives of the national competition authorities. In August 2002, the Commission issued an additional SO explaining its position concerning how the procedure would continue following the expiry of the ECSC Treaty,<sup>91</sup> stating explicitly that it had initiated proceedings under Regulation 17/62 – the secondary act regulating the public enforcement system of EU competition rules before the enactment of Regulation 1/2003. A second oral hearing before the Hearing Officer took place in September 2002, this time in the presence of NCAs' representatives, however the undertakings were only allowed to express themselves in relation to the expiry of the ECSC Treaty and not on the merits of the case. The proceedings culminated in December 2002, with the adoption of a decision establishing the infringement of Art. 65, para. 1, of the ECSC Treaty.<sup>92</sup> In the infringement decision, the Commission took the view that the 11 undertakings concerned by the proceedings had engaged in a single, complex and continuing infringement amounting to a cartel. As a consequence, it imposed on the undertakings penalties amounting to EUR 83.25 million and ordered them as well as their trade association *Federacciai* to put an end to, and refrain from repeating, the anti-competitive conduct.

The undertakings concerned challenged the Commission decision before the (back then) Court of First Instance. All the applications relied on a common plea in law, the Commission's lack of competence to establish an infringement of Art. 65 of the ECSC Treaty at the time of the adoption of the contested decision. Italy itself intervened in

<sup>89</sup> A Statement of Objections is adopted by the Commission at the end of the investigative phase and represents the opening of the formal procedure to assert violations of the EU antitrust rules. The SO is notified to the parties so that they can exercise their rights of defence. Its adoption does not bind the Commission as to the outcome of the case. For coal and steel cases the SO was provided for in Art. 36 of the former ECSC Treaty, while under the current EU Treaties, it is provided for in Art. 10 of Regulation 773/2004, cit. See A. JONES, B. SUFRIN, *EU Competition Law*, cit., p. 931 *et seq.*

<sup>90</sup> The right to be heard before the Hearing Officer is one of the main procedural rights to which undertakings involved in competition proceedings are entitled. For further reference to the role and functions of the Hearing Officer as the guardian of the procedural rights of parties to competition proceedings, see A. JONES, B. SUFRIN, *EU Competition Law*, cit., p. 930 *et seq.*

<sup>91</sup> As mentioned *supra*, the ECSC Treaty, upon which the Commission based its case, had expired just a month before, on 23 July 2002. The Commission also issued a notice to explain how the (then) EC competition rules would apply in the future to the coal and steel sectors following the expiry of the ECSC Treaty: see Commission Communication of 26 June 2002 concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (Communication on the expiry of the ECSC Treaty).

<sup>92</sup> Commission Decision C(2002) 5807 final of 17 December 2002 relating to a proceeding under Article 65 of the ECSC Treaty, Case COMP/37.956 – *Reinforcing bars*, ("2002 Decision" or "first decision"). Art. 65, para. 1, of the ECSC Treaty was the provision prohibiting concerted anti-competitive conduct in the coal and steel sectors and corresponds to what is now Art. 101 TFEU.

each case, supporting the applicants' contentions against the Commission,<sup>93</sup> and a joint hearing common to all the cases was held on 19 September 2006.

By its judgments of 25 October 2007, the Court of First Instance upheld all of the undertakings' applications and quashed the 2002 infringement decision in its entirety.<sup>94</sup> The Court preliminarily noted that the contested decision, which only contained references to provisions of the ECSC Treaty, was adopted after the ECSC Treaty had expired. It explained that the Commission's decision finding an infringement of Art. 65, para. 1, of the ECSC Treaty and imposing a fine on undertakings alleged to have participated in a cartel was expressly based solely on Art. 65, paras 4 and 5 of that Treaty and contained no reference to any legal basis under Regulation 17/62. The fact that, in the second SO sent to the undertakings, the Commission stated that it had opened new proceedings on the basis of Regulation 17/62 and referred explicitly to Art. 3 of that Regulation was not in itself sufficient to justify a finding that the legal basis of the decision was constituted by Regulation 17/62.<sup>95</sup>

The Court further held that, although the principles governing the succession of legal rules may lead to the application of substantive provisions which are no longer in force at the time of the adoption of a measure by a Community institution, the Commission was no longer able, after the expiry of the ECSC Treaty, to derive competence from Art. 65, paras 4 and 5, of the ECSC Treaty in order to establish an infringement of Art. 65, para. 1, of that Treaty and to impose fines on the undertakings which had participated in the infringement, since the provision constituting the legal basis of a measure must be in force at the time that it is adopted. The Commission's competence in that respect was not affected by the fact that the ECSC Treaty constituted a *lex specialis* in relation to the EC Treaty (as the TFEU then was) in accordance with Art. 305, para. 1, of the EC Treaty.<sup>96</sup> Nor was the Commission's competence affected by the indivisibility of the Community (now Union) legal order resulting from the Merger Treaty and the need for coherence in the interpretation of the substantive provisions contained in the

<sup>93</sup> See, e.g., Court of First Instance, order of 27 July 2004, case T-94/03, *Ferriere Nord*, by which the Italian Republic was allowed to intervene in support of the form of order sought by the applicant.

<sup>94</sup> Court of First Instance, judgments of 25 October 2007, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, *SP and Others*; case T-45/03, *Riva Acciaio*; case T-77/03, *Feralpi Siderurgica*; case T-94/03, *Ferriere Nord*.

<sup>95</sup> *SP and Others*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, cit., paras 76-101.

<sup>96</sup> Art. 305 of the EC Treaty was repealed by the Treaty of Lisbon of 2007. Para. 1 of Art. 305 provided as follows: "The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel".

various Community (now Union) Treaties, or by the principles governing the succession of substantive and procedural legal rules.<sup>97</sup>

### III.3. THE 2009 READOPTED DECISION AND ITS SECOND ANNULMENT

By letter of June 2008, the Commission informed the undertakings concerned of its intention to readopt the decision based on a different legal basis. The Commission considered that, given the limited scope of the annulment, the new decision would be based on the evidence presented in the two SOs sent to the undertakings concerned in the course of the original procedure in 2002. In their observations, the undertakings requested the Commission to hold a new oral hearing in order to develop their defence in front of the Hearing Officer. However, the Commission decided not to grant the new hearing, as it took the view that, since the undertakings concerned had already been heard twice in 2002 following the adoption of each of the two SOs, their right to be heard had already been fulfilled in the course of the original procedure, which admittedly was not affected by the annulment of the 2002 Decision.

On 30 September 2009, the Commission readopted a prohibition decision identical to the one originally adopted in 2002, with the difference that the new decision explicitly identified its procedural legal basis in Regulation 17/62.<sup>98</sup> In that decision, the Commission re-established a substantive infringement of Art. 65, para. 1, of the ECSC Treaty and imposed on the undertakings concerned the same EUR 83.25 million penalty which had been imposed by the annulled 2002 Decision.

The undertakings concerned also challenged the second decision before the General Court. All the applications relied on a common plea in law, namely that the Commission had infringed an essential procedural requirement insofar as the decision had not been preceded by a fresh SO or by a new oral hearing before the Hearing Officer. The applicants claimed that, as these procedural steps were not carried out after the resumption of proceedings, the entire procedure followed by the Commission was incomplete and unlawful as the parties' rights of defence had been seriously breached.

On 9 December 2014, the General Court upheld the 2009 Decision, dismissing in whole or in large part all of the undertakings' actions for annulment.<sup>99</sup>

<sup>97</sup> *SP and Others*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, cit., paras 113-120.

<sup>98</sup> Commission Decision C(2009) 7492 final of 30 September 2009 relating to a proceeding under Article 65 of the ECSC Treaty, Case COMP/37.956 — *Reinforcing bars, re-adoption*, as amended by Decision C(2009) 9912 final of 8 December 2009 ("2009 Decision" or "second decision").

<sup>99</sup> General Court, judgment of 9 December 2014: joined cases T-472/09 and T-55/10, *SP*; joined cases T-489/09, T-490/09 and T-56/10, *Leali and Acciaierie e Ferriere Leali Luigi*; case T-69/10, *IRO*; case T-70/10, *Feralpi*; case T-83/10, *Riva Fire*; case T-85/10, *Alfa Acciai*; case T-90/10, *Ferriere Nord*; case T-91/10, *Lucchini*; case T-92/10, *Ferriera Valsabbia and Valsabbia Investimenti*.

Six of the original 12 applicants appealed the judgments at first instance before the Court of Justice. All the appellants shared a common complaint: the General Court had erred in law in holding that the Commission was entitled to readopt the contested decision without issuing a new SO, and in assessing that the procedural rules laid down in Regulation 773/2004 and the appellant's rights of the defence had not been infringed. Furthermore, several of the appellants argued that the General Court had infringed Arts 41 and 47 of the Charter, as interpreted in the light of Art. 6 of the ECHR, when it found that the length of the administrative procedure was not excessive for the purposes of those provisions. The Commission's proceedings took, in total, almost 54 months, including the initial procedure and the subsequent readoption procedure. In addition, the two or more years which were necessary for the Commission to readopt the contested decision appeared excessive *per se*. The oral procedure was closed on 8 December 2016, following delivery of the Advocate General's Opinion.<sup>100</sup> In that Opinion, AG Wahl held that the common ground of appeal concerning the Commission's violation of the appellants' rights of defence and the improper conduct of the administrative procedure was to be regarded as well founded. He argued that the Commission did not fully follow the procedure set out in Regulations 1/2003 and 773/2004 before readopting the contested decision. Several key procedural steps had indeed been validly taken pursuant to the provisions in force under the ECSC Treaty. Yet, even though those provisions were similar, they were not identical to the ones laid down in application of Arts 101 and 102 TFEU. As a result, the procedure followed by the Commission in the present cases has adversely affected the possibility for NCAs to participate in it. That participation is important and the failure by the Commission to ensure it could not be overlooked.<sup>101</sup> To this effect, AG Wahl concluded by suggesting to the Court of Justice that the judgments under appeal should be set aside and the contested decision annulled.<sup>102</sup>

By judgments of 21 September 2017, the Court of Justice set aside the judgments at first instance and annulled the 2009 Decision, insofar as it concerned the six appellants.<sup>103</sup> Following the AG's Opinion, the Court held that where, after the annulment of a decision which was adopted on the basis of provisions of the ECSC Treaty for the breach of Art. 65, para. 1, of that Treaty, the Commission readopts, after the expiry of the Treaty, the annulled decision on the legal basis of Regulation 1/2003, the procedure leading to that new decision must comply with the rules laid down by that Regulation, even if the procedure began before it entered into force. Given that the annulment of an EU measure does not

<sup>100</sup> Opinion of AG Wahl delivered on 8 December 2016, case C-85/15 P, joined cases C-86/15 P and C-87/15 P, Cases C-88/15 P and C-89/15 P, *Feralpi and Others*.

<sup>101</sup> *Ibid.*, paras 26-29.

<sup>102</sup> *Ibid.*, paras 62, 131 and 140.

<sup>103</sup> Court of Justice, judgments of 21 September 2017, case C-85/15 P, *Feralpi*; joined cases C-86/15 P and C-87/15 P, *Ferriera Valsabbia and Valsabbia Investimenti*; case C-88/15 P, *Ferriere Nord*; case C-89/15 P, *Riva Fire*.



necessarily affect the preparatory acts, and the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred, the Commission is not obligated to adopt a new SO before readopting a decision establishing an infringement of Art. 65, para. 1, of the ECSC Treaty which was annulled on the ground that the Commission did not have power to adopt it on the basis of that Treaty, as it was no longer in force at the date of adoption of the said decision.<sup>104</sup>

However, further following the AG's Opinion, the Court also noted that, under the procedural rules established by Regulations 1/2003 and 773/2004, it is provided that NCAs are to be invited to participate in the oral hearing which, upon the request of the addressees of the SO, is to follow the issuing of that SO. It follows that the Commission was required, in application of Arts 12 and 14 of Regulation 773/2004, to give the parties the opportunity to develop their arguments during a hearing to which the NCAs were invited. Having regard to the importance of holding such a hearing, at the request of the parties concerned and in accordance with the latter Regulation, the failure to do so constituted an infringement of an essential procedural requirement. Insofar as the right to such a hearing was not respected, it was not necessary for the undertakings the rights of which have been infringed in this way to demonstrate that such infringement might have influenced the course of the proceedings and the content of the decision at issue to their detriment. Accordingly, the procedure was necessarily vitiated, regardless of any possible detrimental consequences for the undertaking concerned that could result from the infringement.<sup>105</sup>

As it found the appeals to be well-founded, the Court of Justice quashed the judgments under appeal without examining the other grounds of appeal, including the alleged breach of Arts 41 and 47 of the Charter on account of the excessive duration of the Commission's administrative procedure. The Court also stated it had the necessary information to give final judgment on the original action for annulment of the 2009 Decision brought at first instance. It thus annulled the decision at issue, to the extent that it concerned the appellants, for infringement of essential procedural requirements.<sup>106</sup>

<sup>104</sup> *Feralpi*, cit., paras 27-40; *Ferriera Valsabbia and Valsabbia Investimenti*, cit., paras 27-40; *Ferriere Nord*, cit., paras 33-44; *Riva Fire*, cit., paras 24-38; all referring to the *PVC II* case law (*Limburgse Vinyl Maatschappij and Others (PVC II)*, cit.).

<sup>105</sup> *Feralpi*, cit., paras 42-48; *Ferriera Valsabbia and Valsabbia Investimenti*, cit., paras 41-51; *Ferriere Nord*, cit., paras 45-56; *Riva Fire*, cit., paras 39-50.

<sup>106</sup> *Feralpi*, cit., paras 56-58; *Ferriera Valsabbia and Valsabbia Investimenti*, cit., paras 61-63; *Ferriere Nord*, cit., paras 57-59; *Riva Fire*, cit., paras 56-58. The decision was not annulled with regard to the original applicants who had not appealed the rulings at first instance. For these parties, the said rulings became *res iudicata* and the 2009 Decision became final for them following the expiry of the time limit to bring appeal.

### III.4. THE 2018 RESUMPTION OF PROCEEDINGS

At the start of 2018, the Commission resumed proceedings once again against the undertakings concerned by the annulment of the 2009 readopted decision, in order to take a final position on the *Rebar cartel* case.<sup>107</sup> It is reasonable to assume that in the letter sent to the undertakings, as the defect affecting the validity of the decision was merely procedural, the Commission might have noted that, pursuant to the *PVC II* case law,<sup>108</sup> it was not barred from re-opening proceedings in the case at hand. In fact, as held by the Court of Justice under that case law, an annulment on procedural grounds does not affect the administrative acts perfected before the essential procedural defect occurred, provided that the resumption of proceedings occurs at the time in the proceedings when such defect has occurred, this moment having occurred in the case at hand when the undertakings were not permitted to be heard on the merits of the case following the first resumption of proceedings in 2008, thereby violating Regulations 1/2003 and 773/2004. Thus, it is also reasonable to assume that the Commission might have considered that it was lawful to rely once again on the evidence gathered during the original investigation in 2000 and that the two 2002 SOs were not affected by the annulment, as the essential procedural defect occurred at a later stage.

Following such a reasoning, the Commission must have taken the view that, for proceedings to be resumed in accordance with the Court of Justice's latest ruling, a new hearing before the Hearing Officer had to be organised, this time to be held in conformity with the requirements of Regulations 1/2003 and 773/2004. To that effect, the Commission must have ensured that this time the NCAs would be invited to participate in the new hearing, unlike what happened in the first hearing held in June 2002.<sup>109</sup> The undertakings would be allowed to exercise their right to be heard in full, without any limitation as to their ability to develop their defence on the merits of the case at hand, unlike what happened during the second hearing in September 2002, where they were only heard in relation to the change of procedural legal basis following the expiry of the ECSC Treaty.

It is equally safe to assume that the Commission might have noted that its power to impose a penalty on the undertakings was not time-barred. It should be pointed out in

<sup>107</sup> The further resumption of proceedings was first revealed by a report published by MLex on 24 April 2018 (available at [www.mlex.com](http://www.mlex.com)), and it is further apparent in General Court, judgment of 8 May 2019, case T-185/18, *Lucchini*, an action brought by one of the undertakings who had not appealed the judgment at first instance that challenged before the General Court the Commission's refusal to extend to the applicant the proceedings in Case COMP/37.956 which have meanwhile been reopened against the undertakings concerned by the annulment of the 2009 Decision. The action was dismissed by the General Court on the ground that the 2009 Decision had become *res iudicata* with regard to the applicant.

<sup>108</sup> *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit.

<sup>109</sup> It is worth noting that the participation of NCAs should not be seen as a purely formalistic requirement. Indeed, it should be recalled that Italy had intervened in the action for annulment against the 2002 Decision in support of the undertakings' conclusions and against the Commission's defence: see *supra* Section III.2.

this regard that, after the annulment of the 2002 Decision, the Commission adopted several acts which interrupted the five-year limitation period provided for in Arts 25, paras 3 and 5 of Regulation 1/2003. Furthermore, under Art. 25, para. 6, of that Regulation, the five-year limitation period was suspended while the court proceedings were pending, so that the time effectively passed cannot have triggered the short limitation period. Similarly, with respect to the ten-year limitation period provided for in Art. 25, para. 5, of Regulation 1/2003, while the Commission may not interrupt that period, the aforementioned suspension pending judicial proceedings prescribed by Art. 25, para. 6, of that Regulation nevertheless applies to the long limitation period too, so that the time effectively passed cannot have triggered the second limitation period either.<sup>110</sup>

At the new oral hearing before the Hearing Officer, which was held on 23 April 2018,<sup>111</sup> the undertakings probably argued that if the Commission were to readopt an infringement decision, the decision should be subsequently annulled by the Union Courts a third time, as such re-adoption would be contrary to a number of fundamental rights and principles enshrined in both the Charter and the ECHR, including the *ne bis in idem* principle.<sup>112</sup> In that perspective, if the Commission were to adopt a fresh decision, such decision would concretely risk being annulled by the CJEU once again, thereby exposing the Commission to a historic fiasco, not only from a legal standpoint, but also in terms of political and administrative image. Hence, it is likely that the undertakings invited the Commission to close the *Rebar cartel* case once and for all, having account also to the extremely prolonged duration of the procedure (19 years to date), with the evident erosion of any need for sanctioning conduct belonging to a past so far away – and having regard to the precarious situation currently facing the European steel market.<sup>113</sup>

### III.5. THE ADOPTION OF A THIRD DECISION AND FURTHER CONSIDERATIONS ON THE OUTCOME OF THE CASE

From the Commission's standpoint, the outcome of the second litigation was already by itself a resounding defeat, as its prohibition decisions had never been annulled twice on similar grounds.<sup>114</sup> If the CJEU were to annul a third decision on whatsoever ground, the

<sup>110</sup> With regard to the limitation periods provided for in Art. 25 of Regulation 1/2003, see *supra* n. 73.

<sup>111</sup> See L. CROFTS, M. NEWMAN, *Italian concrete-bar makers face EU charges yet again in 18-year cartel saga*, in *MLex*, 24 April 2018, [www.mlex.com](http://www.mlex.com).

<sup>112</sup> This assumption is based on the pleas raised by the applicant in *Lucchini*, case T-185/18, *cit.*

<sup>113</sup> See J. WIŚNIEWSKA, *The European Steel Sector in a Crisis*, in *Central Europe Energy Partners*, 28 May 2016, [www.ceep.be](http://www.ceep.be); A. TOVEY, *Steel Industry Faces Crisis as 'Safeguards Will Take Too Long to Arrive'*, in *The Telegraph*, 7 June 2018, [www.telegraph.co.uk](http://www.telegraph.co.uk); EUROFER, *Annual Report on the Steel Market 2018*, [www.eurofer.org](http://www.eurofer.org).

<sup>114</sup> The Author was present at the Court of Justice's hearing of 20 October 2016, in which all the appeals seeking the annulment of the 2009 Decision were jointly heard. The Author remembers quite distinctly the firm words with which both the Advocate General and the Judge-Rapporteur addressed the

consequent debacle would be excruciating for the Commission, an institution which prides itself on – and is indeed widely known for – its technical competence and proficient administrative action. Even more so if the CJEU were to actually reconsider its *PVC II* case law in the sense envisaged in this *Article* and, thus, annul the decision on the ground that severe procedural defects may indeed bar subsequent proceedings, where those defects affecting the validity of the decision are attributable to the enforcer's gross negligence or malice.<sup>115</sup> Such a *revirement* by the Court of Justice would indeed mean that the Commission could no longer rely on the current assumption that, even if it were to commit a severe procedural error capable of affecting the validity of a decision, it would not be barred from readopting a fresh decision. Bearing in mind that in recent years the Commission has imposed fines for billions of euros in a number of high-profile cases – all of which are still pending before the Union Courts at the time of writing –<sup>116</sup> the Commission might consider that it is wiser to give up on the *Rebar cartel* (a case where in the end the amount of the fine is *only* 83.25 million euros) than to risk losing the considerable edge that it enjoys under the *PVC II* case law.

From the undertakings' viewpoint, attaining a further judicial annulment of a third decision seems far from guaranteed. Firstly, it is safe to assume that this time the Commission in adopting such third decision will certainly follow the procedure with due diligence, given that its reputation – which was already tarnished by its past mistakes – is on the line, so that the chances the CJEU will find another “infringement of an essential procedural requirement” by the Commission and thus annul the decision once again are rather narrow. Besides, the limits to further proceedings after an annulment on procedural grounds here advocated are reasonable and, as was argued previously,<sup>117</sup> the *Rebar cartel* would be the appropriate case for the Court to embrace such a reversal of its *PVC II* case law – proving indeed that “easy cases make good law”. Yet, whoever has engaged in repeated litigation against the Commission before the CJEU is well aware of the inherent *favor communitatis* that seems to characterise most rulings in

two agents and the external lawyer representing the Commission regarding their endeavours to justify the Commission's shortcomings in the proceedings of the case at hand.

<sup>115</sup> With regard to the test developed in order to limit the resumption of proceedings following the annulment of a decision on procedural grounds, see *supra* Section II.2. For the application of the test to the facts of the *Rebar cartel*, see *infra* Section IV.

<sup>116</sup> See the *Intel* case (Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, Case COMP/C-3/37.990 – *Intel*), the *Google Shopping* case (Commission Decision C(2017) 4444 final of 27 June 2017 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, Case AT.39740 – *Google Search (Shopping)*) and the *Google Android* case (Commission Decision of 18 July 2018, Case AT.40099 – *Google Android*, not published, referred to in Commission Press release IP/18/4581 of 18 July 2018), all of which are still pending before the CJEU (e.g., Court of Justice, judgment of 6 September 2017, case C-413/14 P, *Intel*, setting aside the judgment at first instance and referring the case back to the General Court), where the Commission imposed penalties for 1.06 billion, 2.42 billion and EUR 4.34 billion euros, respectively.

<sup>117</sup> See *supra* Section III.1.

cases to which other Union institutions are parties.<sup>118</sup> The Court would have to show remarkable courage in order to hand the Commission, the guardian of the Treaties, a defeat for the third time in a row. Even more so if the Court were to deprive the Commission of the aforementioned advantage under the *PVC II* case law.

On 4 July 2019, the Commission readopted a new infringement decision, imposing total fines of EUR 16 million on the undertakings concerned by the annulment of the 2009 Decision.<sup>119</sup> In recognition of the long duration of the proceedings, the Commission applied an unprecedented 50 per cent fine reduction to all of the addressees. It is the fourth time that the Commission has granted such an exceptional discount, but it is the first on this scale.<sup>120</sup> It seems reasonable to assume that at least some of the undertakings concerned will again challenge the third decision before the CJEU, on the ground that the Commission's further resumption of proceedings was unlawful and that they should face no fine whatsoever, given that the contested facts date back 30 years.<sup>121</sup>

#### IV. THE *NE BIS IN IDEM* AS A LIMIT TO FURTHER PROCEEDINGS IN THE *REBAR CARTEL* CASE

As discussed in Section II, under the current *PVC II* case law,<sup>122</sup> the annulment of a Commission decision by the CJEU on grounds of a procedural defect does not preclude the Commission from resuming proceedings against the same undertaking, for the same anti-competitive conduct already addressed by the annulled decision. It was argued that the reasoning behind that case law appears not to be convincing and that its rigid preclusion of the applicability of the *ne bis in idem* principle in case of annulments on procedural grounds should thus be replaced by a more nuanced approach.<sup>123</sup>

Under the proposed test, the resumption of proceedings following the judicial annulment of a decision on procedural grounds should only be allowed, on a strict case-by-case basis, provided that: *a*) the effective enforcement of EU competition law requires such resumption and *b*) the procedural defect affecting the validity of the decision is not objectively attributable to the prosecuting authority or, if it is so attributable,

<sup>118</sup> See F. FONTANELLI, *La Corte di Giustizia e il "favor communitatis" – Il percorso della giurisprudenza della Corte di Giustizia delle Comunità Europee sul fondamento normativo degli atti della Comunità e dell'Unione*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2010, p. 177 *et seq.*

<sup>119</sup> See Commission Press release MEX/19/3709 of 4 July 2019. The adoption of the third infringement decision occurred during the publishing of the present *Article* and no public version is yet available.

<sup>120</sup> A cartel of smart-chip card makers was given a 10 per cent discount in fines in 2014 to compensate for the length of the probe. A cartel between makers of heat stabilizers received a one per cent discount when fined in 2009, while colluding makers of seatbelt systems got a five per cent reduction in 2019.

<sup>121</sup> See A. YAÏCHE, N. HIRST, *Comment: Italian Steelmakers' fine two decades on could prompt human-rights appeal*, in *MLex*, 8 July 2019, [www.mlex.com](http://www.mlex.com).

<sup>122</sup> *Limburgse Vinyl Maatschappij and Others (PVC II)*, *cit.*

<sup>123</sup> See *supra* Section II.2.

the prosecuting authority did not subjectively act in bad faith or with gross negligence. Failing to meet either of these two cumulative conditions should bar the prosecuting authority from resuming the proceedings.<sup>124</sup>

Applying this twofold test to the *Rebar cartel* described in Section III, it is submitted that the *ne bis in idem* principle should have barred the Commission from resuming proceedings a third time in that case, on the ground that such further reopening fails to meet both of the aforementioned cumulative requirements.

#### IV.1. THE FAILURE TO MEET THE FIRST REQUIREMENT: THE EFFECTIVE ENFORCEMENT OF EU COMPETITION LAW DOES NOT REQUIRE A FURTHER RESUMPTION OF THE *REBAR CARTEL* CASE

With regard to the requirement that the resumption be demanded by the effective enforcement of EU competition law, this seems not to be the case in the *Rebar cartel*. The Commission started investigating the case in late 2000 and formally opened proceedings in 2002, adopting the first infringement decision at the end of that same year.<sup>125</sup> After the Court of First Instance annulled the 2002 Decision in 2007,<sup>126</sup> the Commission adopted a second decision in 2009, which, after being initially upheld by the General Court in 2014,<sup>127</sup> was ultimately also annulled by the Court of Justice on appeal in 2017.<sup>128</sup> The decision to prosecute the case afresh, almost 20 years after it was commenced, appears difficult to reconcile with an efficient use of the Commission's administrative resources.

Furthermore, having specific regard to the effectiveness of the enforcement action, the Commission itself reckons that the conduct at issue ceased at the latest in July 2000,<sup>129</sup> before its first dawn raids even took place. This means that the Commission has indeed already achieved its primary objective, which is for the alleged restriction to be removed and thus for undistorted competition to be restored. The Commission also seems to have achieved the secondary objective of enforcement, the deterring of future restrictions of competition on the internal market.<sup>130</sup> It follows that the only objective

<sup>124</sup> *Ibid.*

<sup>125</sup> See *supra* Section III.2.

<sup>126</sup> *SP and Others*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, cit.; *Riva Acciaio*, case T-45/03, cit.; *Feralpi Siderurgica*, case T-77/03, cit.; *Ferriere Nord*, case T-94/03, cit.

<sup>127</sup> *SP*, joined cases T-472/09 and T-55/10, cit.; *Leali and Acciaierie e Ferriere Leali Luigi*, joined cases T-489/09, T-490/09 and T-56/10, cit.; *IRO*, Case T-69/10, cit.; *Feralpi*, case T-70/10, cit.; *Riva Fire*, case T-83/10, cit.; *Alfa Acciai*, case T-85/10, cit.; *Ferriere Nord*, case T-90/10, cit.; *Lucchini*, case T-91/10, cit.; *Ferriera Valsabbia and Valsabbia Investimenti*, case T-92/10, cit.

<sup>128</sup> *Feralpi*, case C-85/15 P, cit.; *Ferriera Valsabbia and Valsabbia Investimenti*, joined cases C-86/15 P and C-87/15 P, cit.; *Ferriere Nord*, case C-88/15 P, cit.; *Riva Fire*, case C-89/15 P, cit.

<sup>129</sup> See Art. 1 of both the 2002 Decision, cit., and the 2009 Decision, cit., according to which the alleged cartel lasted from 6 December 1989 to 4 July 2000.

<sup>130</sup> In 2017, Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, ICA) adopted a decision establishing an alleged cartel that also concerned the Italian market for reinforcing

which the Commission has not yet accomplished is the definitive imposition of penalties on the undertakings concerned. It is undeniable that if the preclusive effect of the *ne bis in idem* principle were to be recognised in the *Rebar cartel*, such a “retributive” function of public enforcement would not be fully attained in the case at issue.

However, it should be noted that the Commission did indeed collect the fines imposed on the undertaking first by the 2002 Decision and then by the 2009 Decision, albeit provisionally, while the respective annulment actions were pending before the CJEU. This means that, even if the undertakings were refunded after each annulment, the Commission would have held onto the 83.25 million euros in penalties for the better part of the last 15 years, so that it may be argued that the retributive objective was also substantively achieved. The adoption of a third decision in order to definitively impose the penalties, on the basis of an investigation carried out almost 20 years ago, in a market structure that has in the meantime changed substantially – where some of the undertakings concerned have been liquidated, while others have merged into or were acquired by competitors – certainly does not appear to be required by the effectiveness of EU competition law, but rather seems grounded on the Commission’s own retaliation for its stained image.

Consequently, with regard to the first requirement of the test here suggested, it would have been a fair compromise between the aforementioned conflicting interests for the *ne bis in idem* principle to preclude the Commission from resuming the proceedings once again in 2018. This follows from the fact that the institutional objectives pursued by the public interest to effective enforcement had already been materially accomplished in the case at hand either with the original 2002 Decision or, at the latest, with the readopted 2009 Decision. The only reason why the retributive function of enforcement could not be officially attained in the *Rebar cartel* – even if it may be argued that essentially it was – is to be found in the errors which the Commission repeatedly committed in the course of the proceedings. Therefore, the CJEU upon appeal should reconsider its *PVC II* case law and conclude that the Commission’s third decision is barred by the preclusive effect of the *ne bis in idem* principle as extensively construed above, since the effective enforcement of EU competition law did not require the further resumption of proceedings in 2018.

#### IV.2. THE FAILURE TO MEET THE SECOND REQUIREMENT: THE PROCEDURAL DEFECT AFFECTING THE VALIDITY OF THE 2009 DECISION WAS OBJECTIVELY

bars, in which several of the undertakings involved in the *Rebar cartel* were implicated (ICA, decision no. 26686 of 19 July 2017, case I742 – *Tondini per cemento armato*, published in ICA Bulletin no. 30/2017). However, that decision was annulled by the Regional Administrative Court of Lazio (TAR Lazio) on the merits of the case, as the Court did not accept the theory of harm on which the ICA had built its case (TAR Lazio, judgments of 12 June 2018, nos 6516, 6518, 6519, 6521, 6522, 6523, 6525; appeals pending before the Italian Council of State).

ATTRIBUTABLE TO THE COMMISSION AND WAS SUBJECTIVELY CAUSED IN BAD FAITH OR WITH GROSS NEGLIGENCE

Taking a view different from the one just discussed above, it might be counterargued that the effective enforcement of EU competition law nonetheless requires proceedings to be resumed in the specific context of the *Rebar cartel*. Not doing so would mean that market players who have allegedly engaged in serious anti-competitive conduct – to which “hardcore” cartels involving price fixing such as the one at issue unquestionably belong –<sup>131</sup> would end up not being duly punished, as a consequence of a procedural defect that either did not depend on the enforcer or, if it did depend on the enforcer’s behaviour, amounted to a guiltless mistake. If that line of reasoning were accepted, it would still be necessary to consider the second requirement of the test, which is additional and not alternative to the first one. In order for proceedings not to be barred by the *ne bis in idem* preclusive effect, the second requirement demands that the procedural defect affecting the validity of the decision must not be attributable to the prosecuting authority or, if it is so attributable, the prosecuting authority must not have acted in bad faith or with gross negligence.

In the context of the *Rebar cartel*, it is not debatable that both the annulment of the 2002 Decision and that of the 2009 Decision were grounded on procedural errors that the CJEU clearly attributed to the Commission. As to the annulment of the first decision, the Court of First Instance, in its 2007 judgments, held that:

“the Commission confused the provision of substantive law addressed to the undertakings, that is Article 65(1) [ECSC Treaty], with the legal basis for Commission action, that is Article 65(4) and (5) [ECSC Treaty]. It inferred automatically from the applicable provision of substantive law that it has competence to adopt a decision on the basis of a provision which had in the meantime expired. [...] Since, however, it follows from the case-law [...] that the provision constituting the legal basis of a measure must be in force at the time of its adoption, and that, in accordance with Article 97 [ECSC Treaty], Article 65(4) and (5) [ECSC Treaty] had expired on 23 July 2002, the Commission could no longer derive competence from those expired provisions in order to establish an infringement of Article 65(1) [ECSC Treaty] and to impose fines on the undertakings which had allegedly participated in the infringement”.<sup>132</sup>

As to the annulment of the second decision, the Court of Justice, in its 2017 judgments rendered on appeal, held that:

<sup>131</sup> For further reference to “hardcore” cartels, see A. JONES, B. SUFRIN, *EU Competition Law*, cit., p. 662 *et seq.*

<sup>132</sup> *SP and Others*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, cit., paras 119-120. See also – albeit in Italian or French only – *Riva Acciaio*, case T-45/03, cit., paras 95-96; *Ferropi Siderurgica*, case T-77/03, cit., paras 95-96; *Ferriere Nord*, case T-94/03, cit., paras 97-98.



“before adopting the decision at issue, the Commission was required, in application of Articles 12 and 14 of Regulation No 773/2004, to give the parties the opportunity to develop their arguments during a hearing to which the competition authorities of the Member States were invited. [...] As a result, the General Court made an error in law in holding [...] that the Commission was not obligated to organise a new hearing before adopting the decision at issue, on the ground that the undertakings concerned had already had the opportunity to be heard orally at the hearings of 13 June and 30 September 2002. As the Advocate General pointed out in [...] his Opinion, [...] failure to hold such a hearing constitutes infringement of an essential procedural requirement. In so far as the right to such a hearing, provided for by Regulation No 773/2004, was not respected [by the Commission], it is not necessary for the undertaking, the rights of which have been infringed in this way, to demonstrate that such infringement might have influenced the course of the proceedings and the content of the decision at issue to its detriment”.<sup>133</sup>

Once it is established that the defects affecting the validity of both the 2002 Decision and the 2009 Decision are objectively attributable to the Commission, for the *ne bis in idem* preclusion to bar further proceedings it is also necessary to ascertain whether in causing either of those defects the Commission has acted intentionally or with gross negligence. With regard to the 2002 Decision, if it were to be found that the lack of competence which resulted in its annulment was caused by the Commission’s wilful or gross negligent conduct, this would mean that the Commission’s *ius puniendi* extinguished with the adoption of the first decision, despite its invalidity. Thus, this would inevitably mean that the resumption of proceedings in 2008 was already barred by the preclusive effect of the *ne bis in idem* principle and that the consequent 2009 Decision was adopted unlawfully, regardless of the procedural error which in the end resulted in its actual annulment. Furthermore, this would necessarily imply that the Commission was also barred from resuming proceedings in 2018.

However, arguing that the procedural error which led to the annulment of the 2002 Decision was intentional or the result of serious negligence by the Commission would be rather arduous. The defect in this case occurred as a consequence of an exceptional occurrence: the expiry of the ECSC Treaty, the only Treaty among those establishing the European Communities which was concluded for a definite amount of time.<sup>134</sup> The Commission, right before the expiry of the ECSC Treaty, had indeed issued a notice to explain how the EC (as they then were) competition rules would apply to the coal and steel sectors in the future.<sup>135</sup>

<sup>133</sup> *Feralpi*, case C-85/15 P, cit., paras 43-46; *Ferriera Valsabbia and Valsabbia Investimenti*, joined cases C-86/15 P and C-87/15 P, cit., paras 46-49; *Ferriere Nord*, case C-88/15 P, cit., paras 51-54; *Riva Fire*, case C-89/15 P, cit., paras 45-48.

<sup>134</sup> With regard to the expiry of the ECSC, which occurred on 23 July 2002, see *supra* n. 87.

<sup>135</sup> Communication on the expiry of the ECSC Treaty, cit.

When the *Rebar cartel* case was first opened, the ECSC Treaty was still in force, so that both the substantive and procedural competition rules applicable to the case were provided for in that Treaty. As a consequence, the Commission grounded the first SO solely on the ECSC Treaty, both with regard to its substantive legal basis and its procedural legal basis. Shortly after the expiry of the ECSC Treaty, the Commission issued to the undertakings concerned a supplementary SO which it expressly based on Regulation 17/62. By doing so, the Commission followed the way it said it would handle cases opened under the ECSC Treaty which were still pending after the expiry of that Treaty:

“If the Commission, when applying the Community [now Union] competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC [now EU] law”.<sup>136</sup>

Nonetheless, when the Commission finally adopted the 2002 Decision, instead of adopting it under Regulation 17/62 as it had done for the supplementary SO, it ran counter to its own communication by grounding the decision both substantively and procedurally only on ECSC rules, which had meanwhile expired several months before. This was the reason why in its 2007 judgments the Court of First Instance ascertained that the Commission lacked the competence to adopt the 2002 Decision, annulling it as a result.<sup>137</sup> It is apparent that the Commission did not mistake the procedural legal basis of the 2002 Decision intentionally, but rather it did so out of negligence. Yet, arguing in the case at hand that the Commission's negligence was gross would mean not taking account of the peculiar circumstances described above. The balance between the conflicting interests that this test tries to strike is a delicate one. The reason why only gross negligence is considered adequate in order for undertakings to see their *ne bis in idem* right prevail over the public interest in effective enforcement, is that only such high degree of culpability is deemed capable of justifying violations of competition rules not being thoroughly punished. An enforcer who mistakes the legal basis of an act out of simple negligence should surely face the annulment of that act, especially in the EU legal order which is inherently based on the principle of conferral.<sup>138</sup> However, prohibit-

<sup>136</sup> *Ibid.*, para. 31.

<sup>137</sup> *SP*, joined cases T-472/09 and T-55/10, cit.; *Leali and Acciaierie e Ferriere Leali Luigi*, joined cases T-489/09, T-490/09 and T-56/10, cit.; *IRO*, Case T-69/10, cit.; *Feralpi*, case T-70/10, cit.; *Riva Fire*, case T-83/10, cit.; *Alfa Acciai*, case T-85/10, cit.; *Ferriere Nord*, case T-90/10, cit.; *Lucchini*, case T-91/10, cit.; *Ferriera Valsabbia and Valsabbia Investimenti*, case T-92/10, cit.

<sup>138</sup> For further reference to the principle of conferral, which is a fundamental doctrine of EU law laid down in Art. 5 of the TEU, see C. CHALMERS, G. DAVIES, G. MONTI, *European Union Law: Text and Materials*, Cambridge: Cambridge University Press, 2014, p. 199 *et seq.*

ing the readoption of said act *tout court*, as the result of that simple error alone, appears to be a too severe consequence.

Having established that the defect affecting the validity of the 2002 Decision was indeed objectively attributable to the Commission but that the Commission did not subjectively cause the defect in bad faith or with gross negligence, it follows that the Commission's *ius puniendi* was not extinguished with the adoption of that first decision, so the Commission could lawfully resume proceedings in 2008 and readopt a second decision. It now remains to be established whether the further defect leading to the annulment of the 2009 Decision, which the Court of Justice also objectively attributed to the Commission's behaviour, was subjectively caused by the Commission intentionally or by gross negligence. In that regard, it should be recalled that, in 2008, the Commission informed the undertakings concerned of its intention to readopt a decision on the basis of Regulation 1/2003 – which in the meantime had repealed Regulation 17/62 becoming the only procedural legal basis applicable to the enforcement of EU competition rules. On that occasion, the Commission also stated that, given the limited scope of the annulment of the first decision, the new decision would be based on the evidence presented in the two original 2002 SOs, the first of which had been adopted under the ECSC Treaty before its expiry, whereas the supplementary one had been adopted after that Treaty expired and was thus based on Regulation 17/62 – at that time the procedural legal basis applicable to the enforcement of the EC (as they then were) competition rules.

It is not in question whether the Commission could legitimately base a new decision on the original SOs and the evidence acquired pursuant to ECSC rules while these were still in force. Once again, in doing so the Commission was merely following the way it said it would handle cases opened under the ECSC Treaty which were still pending after the expiry of that Treaty:

“With regard to procedural law, the basic principle [...] is that the rules applicable are those in force at the time of taking the procedural step in question. This means that as from 24 July 2002 [the date of expiry of the ECSC Treaty] on, the Commission will exclusively apply the EC [now EU] procedural rules in all pending and new cases. [...] [P]rocedural steps validly taken under the ECSC rules before expiry of the ECSC Treaty will after the expiry be taken to have fulfilled the requirements of the equivalent procedural step under the EC [now EU] rules”.<sup>139</sup>

However, the Commission ran counter to its own communication again, this time arguably in a more severe way. It adopted the 2009 Decision – correctly grounding it on

<sup>139</sup> Communication on the expiry of the ECSC Treaty, cit., para. 26. In this regard, see also Court of Justice, judgment of 6 July 1993, joined cases C-121/91 and C-122/91, *CT Control (Rotterdam) and JCT Benelux*, para. 22; judgment of 12 November 1981, joined cases 212 to 217/80, *Meridionale Industria Salumi and Others*, para. 9.

Regulation 1/2003 – without first holding a new oral hearing, in spite of the fact that several of the undertakings had expressly requested it to do so. The Commission justified its refusal by referring to the fact that the undertakings concerned had already been heard twice in 2002, following the adoption of each of the two SOs, thus taking the view that the undertakings' right to develop their defence in an oral hearing before the Hearing Officer had already been fulfilled in the course of the original procedure, which admittedly had not been affected by the annulment of the 2002 Decision.<sup>140</sup> Yet, by resuming the proceedings in 2008, the Commission was bound to act in accordance with the procedural requirements of Regulations 1/2003 and 773/2004, which in the meantime had become the only procedural legal basis in force in order to find any violation of substantive ECSC/EC/EU competition rules. Under Arts 12 and 14 of Regulation 773/2004, the national competition authorities are to be invited to participate in the oral hearing requested by the addressees of an SO, so that they may contribute to the discussion and express their viewpoint on the merits of the case.

In respect of the two oral hearings that took place before the Hearing Officer in 2002, the first one was held after the original SO was issued, in accordance with the ECSC rules, just a month before the expiry of the ECSC Treaty and before the Commission had actually published its aforementioned Communication providing guidance on the treatment of competition cases resulting from the expiry of that Treaty.<sup>141</sup> Furthermore, national competition authorities' representatives did not participate in that hearing, since such participation was not provided for in the ECSC Treaty. As a consequence, it is reasonable to assume that during the first hearing the imminent expiry of the ECSC Treaty, combined with the lack of guidance on how the Commission would deal with pending cases once that Treaty expired, were the main issues of concern to the undertakings, even if they were formally given the chance to develop their arguments on the merits of the case. With regard to the second hearing following the supplementary SO, which was issued specifically to address the legal consequences of the expiry of the ECSC Treaty for the continuation of the proceedings, while it was conducted in accordance with EC rules and NCAs' representatives were duly invited, the undertakings were asked only to discuss the consequences of the expiry of the ECSC Treaty, which had occurred shortly before,<sup>142</sup> and neither the facts nor the evidence forming the subject-matter of the proceedings were discussed. As a result, the NCAs' representatives did not participate in a hearing in which the full substance of the case was discussed.

By adopting the 2009 Decision without previously organising a fresh oral hearing in which the undertakings concerned by the resumption of proceedings could exercise

<sup>140</sup> See para. 382 of the 2009 Decision, *cit.*

<sup>141</sup> The first hearing before the Hearing Officer was held on 13 June 2002, while the Commission Communication on the expiry of the ECSC Treaty, *cit.*, was published only on 26 June 2002.

<sup>142</sup> The second hearing before the Hearing Officer was held on 30 September 2002.

their right to be heard in full, without any limitation as to the ability to develop their arguments on the merits of the case at hand, the Commission infringed Arts 12 and 14 of Regulation 773/2004, thereby violating the undertakings' rights of defence. This is the reason why the Court of Justice in its 2017 appellate judgments set aside the General Court's 2014 judgments at first instance and, considering that this infringement constituted an essential procedural infringement, annulled the 2009 Decision too.<sup>143</sup>

The reasons behind the Commission's behaviour cannot be assessed objectively.<sup>144</sup> Even though holding a new hearing after the resumption of the proceedings in 2008 would have cost no more than some extra months in terms of duration of the procedure and the Commission was not pressured by limitation periods,<sup>145</sup> it deliberately chose not to play it safe. The Commission might have taken the view that, as Italy had already intervened in the course of the first judicial proceedings seeking the annulment of the 2002 Decision,<sup>146</sup> by organising a new hearing before the Hearing Officer in which the Italian Competition Authority would also be present, there was the risk that the latter would use the hearing to criticise the merits of the case or the choice to resume the proceedings, thereby lending to the undertakings concerned valuable substantive grounds for challenging once again the readopted decision. Moreover, as the 2009 Decision was adopted right before the quinquennial renewal of the College of Commissioners,<sup>147</sup> the Commission's services might also have been pressured to close as many pending cases as possible, before the Commissioner in charge of Competition changed.<sup>148</sup>

In any case, as much as it would be far-fetched to consider severe in nature the Commission's negligence that led to the annulment of the 2002 Decision, it would likewise be too generous not to consider grossly negligent – if not plainly malicious – the Commission's blatant violation of the parties' rights of defence, which ultimately led to the annulment of the 2009 Decision. Whereas, in the context of the first annulment, the aforementioned balance between conflicting interests leans towards ensuring the public interest in effective enforcement, in the context of the second annulment, it is only

<sup>143</sup> See *Feralpi*, case C-85/15 P, cit.; *Ferriera Valsabbia and Valsabbia Investimenti*, joined cases C-86/15 P and C-87/15 P, cit.; *Ferriere Nord*, case C-88/15 P, cit.; *Riva Fire*, case C-89/15 P, cit.

<sup>144</sup> In order to better understand the Commission's motivations when it adopted the 2009 Decision, the Author tried to interview several case handlers of DG Competition and agents of the Commission's Legal Service whose names appear in the *Rebar cartel* case file, assuring them anonymity. However, all the requests for interviews were expressly or implicitly declined on the reasonable ground that the case is still not closed.

<sup>145</sup> With regard to the limitation periods provided for in Art. 25 of Regulation 1/2003, see *supra* n. 73. See also the relevant considerations discussed *supra* in Section III.4.

<sup>146</sup> See *supra* n. 93.

<sup>147</sup> Due to the entry into force of the Treaty of Lisbon on 1 December 2009, the second Barroso Commission took office only in early 2010, after the European Parliament approved the College of Commissioners, in accordance with the new Art. 17, para. 7, TEU.

<sup>148</sup> Between the first (2004-2009) and the second (2010-2014) Barroso Commission, the competence over the Directorate-General for Competition passed from Neelie Kroes (NL) to Joaquín Almunia (ES).

fair for the equilibrium to shift in favour of the defendants' right not to be prosecuted again. The sanction for an enforcer who, after having already made a first mistake affecting the validity of an act, perseveres in behaving negligently to the extent that it infringes the parties' right to be heard on the substance of the case, with the result that the validity of the readopted act is affected too, should not be limited to the necessary annulment of the readopted act. In these circumstances, such an enforcer should also be barred from resuming the proceedings a third time, irrespective of the fact that the second decision was annulled merely on procedural grounds, as the invalidity stems from the enforcer's grossly negligent (if not deliberate) conduct pursued in the course of the resumed proceedings.

Having established that the defect affecting the validity of the 2009 Decision was objectively attributable to the Commission and that subjectively the Commission acted either in bad faith or – at the very least – with gross negligence, it follows that the Commission's *ius puniendi* was effectively extinguished with the adoption of the second decision. Therefore, the CJEU upon appeal should reconsider its *PVC II* case law and conclude that the Commission's third decision is unlawful with regard to the second requirement of the test here suggested, as the *ne bis in idem* principle construed in the extensive way proposed above should have precluded the Commission from resuming proceedings once again in 2018.

## V. CONCLUSIONS

This *Article* has argued that the *PVC II* case law, which currently grants to the Commission (and, by extension, national competition authorities applying EU competition rules) the freedom to resume proceedings despite the annulment of their enforcement decision on procedural grounds, is unconvincing. It inadequately addresses the risk of what were defined as *horizontal* parallel proceedings either *at the Union level* (repeated enforcement by the Commission) or *at the national level* (repeated or multiple enforcement by the same or several NCAs).<sup>149</sup> To illustrate this risk, this *Article* analysed a concrete example of this type of *horizontal* parallel proceedings *at the Union level*, the *Rebar cartel*. The case encompasses an extraordinary twenty-year saga that is still ongoing as of this writing, concerning a group of Italian steelmakers who allegedly participated in a cartel on the market for reinforcing bars or “rebar”.<sup>150</sup>

It was argued that, beside calling *de lege ferenda* for a widely advocated reform of the current public enforcement regime, the only way to adequately limit *de lege lata* the proliferation of parallel proceedings in competition law which is both judicially enforceable by parties and more respectful of legal certainty is a coherent and reliable applica-

<sup>149</sup> See *supra* Sections I and II.1.

<sup>150</sup> See *supra* Section III.

tion of the *ne bis in idem* principle. However, the application of the *ne bis in idem* principle to that effect is currently impaired by the narrow way in which the CJEU construes it in competition matters, in contradistinction to the Court's more flexible jurisprudence in other areas of law.<sup>151</sup>

It is further argued that the narrow approach to the *ne bis in idem* principle under the *PVC II* case law in the case of annulments on procedural grounds should be replaced by a more nuanced approach. To that effect, a twofold test is proposed which is deemed capable of better balancing the three conflicting interests at stake: the protection of the concerned undertaking's right not to be tried again, the need to safeguard the effective enforcement of EU competition law, and the requirement that competition authorities conduct their proceedings abiding by the law which governs them in the most efficient way possible. Under the proposed test, the resumption of proceedings following the judicial annulment of a decision on procedural grounds should only be allowed, on a strict case-by-case basis, provided that: (a) the effective enforcement of EU competition law requires such resumption and (b) the procedural defect affecting the validity of the decision is not objectively attributable to the prosecuting authority or, if it is so attributable, the prosecuting authority did not subjectively act in bad faith or with gross negligence. Failing to meet either of these two necessary conditions should bar the prosecuting authority from resuming the proceedings.<sup>152</sup>

Finally, this *Article* applied the proposed twofold test to the *Rebar cartel* case. It was argued, in conclusion, that the *ne bis in idem* principle should have barred the Commission from resuming proceedings for a third time, on the ground that such further reopening fails to meet both of the aforementioned cumulative requirements.<sup>153</sup>

<sup>151</sup> See *supra* Section I.3.

<sup>152</sup> See *supra* Section II.2.

<sup>153</sup> See *supra* Section IV.

