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commercial + international

16 January 2023

The Director
Investigations 3
Anti-Dumping Commission
GPO Box 2013
Canberra
Australian Capital Territory 2600

By email

Dear Director

Nervacero S.A. Continuation Inquiry 601 - response to Infrabuild's late submission

As you know, we act for Nervacero S.A. ("Nervacero") in the above-referenced continuation inquiry ("this inquiry").

We refer to the submission made by Infrabuild (Newcastle) Pty Ltd ("Infrabuild") to the Commission, published on 3 January 2023 ("Infrabuild's late submission").¹

At the outset, we note that Infrabuild's late submission was made well outside the 20 day period allowed for interested parties to make submissions in response to the Statement of Essential Facts ("SEF"), which ended on 8 December 2022. To the extent that Infrabuild has attempted to introduce new and unverified information or argumentation in its late submission, we respectfully note that the Commission has no obligation to consider or otherwise *"have regard to"* any such information and argumentation, in line with Section 269ZHF(3) and (4) of the *Customs Act 1901* ("the Act").

More substantively, Nervacero takes issue with Infrabuild's criticism and assertions pertaining to the information presented by Nervacero in this inquiry, and is compelled to respond to those assertions.

Firstly, Infrabuild repeats its assertion that Celsa Huta Ostrowiec's membership of the Celsa Group is a basis for the Commissioner to decide to secure the continuation of the current measure. We recall that the Commissioner is required, under Section 269ZHF of the Act, to consider whether the Minister should take steps to secure the continuation of the measure with respect to Nervacero, an exporter from Spain,

¹ EPR601-29.

as well as those from Greece, Indonesia, Taiwan and Thailand. Celsa Huta Ostrowiec is a Polish-domiciled exporter and manufacturer. The subject of this inquiry is not exports from Poland, or exports by Celsa Huta Ostrowiec, or exports by the entire Celsa Group. Infrabuild's assertion that the measure should be continued as against Nervacero because there have been exports from countries not subject to the measure is plainly wrong and without any legal basis.

Secondly, Nervacero rejects Infrabuild's unfounded criticism of the information presented by Nervacero in its submission in response to the SEF ("Nervacero's SEF submission")². Infrabuild criticises Nervacero's submission as "*factually incorrect, misconceived*", and "*misleading*". Such criticisms are wrong and without merit.

Nervacero's SEF submission presented market information in a completely open and transparent manner. Contrary to Infrabuild's assertion. Nervacero not only referred to information that covered the inquiry period,³ but also to more contemporary information that was available to Nervacero that expanded well into 2022, as well as to forecast-based data from well-regarded sources, including the OECD, Euroconstrust, and Eurofer.⁴

By contrast, the "*industry publications*" contained in Infrabuild's late submission have been heavily redacted by Infrabuild – including the source of the information - with no apparent justification.⁵ This denies Nervacero and other interested parties the ability to scrutinise or to fully understand the information being presented. We respectfully request the Commission to dismiss Infrabuild's claims and submissions, in light of the lateness of the submission and the improper redaction of information from the public record version of its submission.

In any case, there does not appear to be anything in Infrabuild's late submission that challenges the reliability or correctness of the information presented by Nervacero. Nervacero's SEF submission demonstrates that the historically high prices and costs in the Spanish and European markets have started to ease recently, but continue to be at a very high level, and that the Spanish market is expected to experience continue growth. We repeat those aspects of Nervacero's timely SEF submission as follows:

Euroconstruct predicts a high level of domestic demand for construction materials such as rebar, with inertial effects from policies such as the Spanish Recovery Plan and Next Generation European Union funds increasing demand out to 2024 in subsectors such as roads, waterworks and energy works.

*Notwithstanding the Russian invasion of Ukraine, Euroconstruct's longer term growth predictions remain unchanged.*⁶

And:

² Nervacero's SEF submission, EPR601-27.

³ Infrabuild is critical that *one* of the many sets of data that Nervacero included in the submission covered information ending January 2022, even though the inquiry period is calendar year 2021.

⁴ For example, see Nervacero's SEF submission, pages 4 to 11.

⁵ EPR601-29, pages 3 to 5.

⁶ Nervacero's SEF Submission, pages 4 and 5.

Further, the shortage of supply associated with the war, higher energy and freight costs, and the effects of a post-war recovery point towards continued demand for locally produced steel products at high price points in the short, medium and longer term. Recent forecasts may be less bullish, however it is still expected that the Spanish domestic market will outperform most other European markets and will exhibit continued growth. Nervacero's main EU market, France, is also expected to demonstrate a continued growth trend.⁷

Thirdly, with respect to Infrabuild's reference to determinations made by the Canada Border Services Agency ("CBSA"),⁸ Nervacero would like to point out the following facts for the Commission's better understanding of the specific details of that investigation and its preliminary outcomes:

- The Canadian expiry review concerns exports from Belarus, Taiwan, Hong Kong, Japan, Portugal and Spain. The subject countries/exports covered by the Canadian review are substantially different to the inquiry conducted by the Commission. In so far as Spain is concerned, this inquiry concerns only Nervacero.
- Obviously, for all concerned except apparently Infrabuild, the Canadian expiry review concerns the *Canadian industry in Canada*, and *market conditions in Canada*, and not Infrabuild and market conditions in Australia. Canada is commercially and geographically a different market to Australia. Compared to the Australian market, domestic industry and exporters are subject to different costs when competing in the Canadian market. There are entirely different competitive forces operating in Canada. The business settings and economic environment are not those of Australia.
- The Canadian expiry review received only one exporter questionnaire response, submitted by an exporter from Portugal.⁹ The analysis with respect to Spain was conducted based on information presented by the Canadian producers.¹⁰ By contrast, the Commission has the benefit of verified information provided directly by Nervacero.

Infrabuild's submission neglects these facts and argues that:

By their own assertion, Nervacero is a "higher cost/higher price exporter" which experiences significantly high freight costs due to its location. It has shown that it is not able to compete against other domestic or import sources in the Australian market at an undumped price due to its own location and high price of manufacture yet are seeking to have measures discontinued. It is these operating conditions that form the basis for why the Canadian authority did not discontinue the measures during their recently concluded expiry review in so far as it related to exporters from Spain, generally, and Nervacero, specifically.¹¹

⁷ Nervacero's SEF Submission, page 6

⁸ EPR601-29 Attachment 1 – CBSA Statement of Reasons RB2 2022 ER: *Certain concrete reinforcing bar. Concerning an expiry review determination under paragraph 76.03(7)(a) of the Special Import Measures Act regarding the dumping of certain concrete reinforcing bar originating in or exported from Belarus, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), the Hong Kong Special Administrative Region of the People's Republic of China, Japan, Portugal and Spain.*

⁹ EPR601-29 Attachment 1 – CBSA Statement of Reasons, page 3.

¹⁰ Ibid, page 35.

¹¹ EPR601-29, pages 10 and 11.

This is absurd. The Canadian authority neither made a decision with respect to Nervacero specifically, nor based on Nervacero's unlikely competitiveness in the Australian market against domestic and other import sources.¹² Naturally, the Canadian authority's decision was based on the information received from the interested parties in the Canadian review, and with respect to the Canadian market. Unlike the conditions in Australia, the Canadian domestic industry consists of five producers.¹³ There is no large scale domestic monopoly producer, such as Infrabuild in Australia, in the Canadian market. During the review period, the Canadian domestic producers enjoyed market shares between 52% to 57%,¹⁴ as compared to Infrabuild's domination in the Australian market, with its 88% market share, its presently almost-full capacity utilisation, and its historically very high prices and profits.¹⁵

Lastly, Nervacero notes that Infrabuild's late submission attempts to dispute Nervacero's characterisation of Infrabuild's "Advantage Program" scheme. Here, its objections are merely semantic, and lack any substance whatsoever. Infrabuild does not dispute that the nature and effect of its Advantage Program fits the ACCC's description of a loyalty scheme. Instead, it argues that the description should be limited to particular industry sectors. Infrabuild's view that "*manufacturer's volume based pricing*" is somehow exceptional and "*irrelevant*" to the concept of "customer loyalty scheme" as described by Australia's competition law authority is both baseless and concerning.

Infrabuild's comments that the program is "*flexible*" and that "*customers are free to participate to the extent that suits their requirements*" shed little light on the commercial reality and effect of the Advantage Program in influencing customer and market behaviours. Infrabuild's comments in no way negate Nervacero's characterisation of the effect of the scheme as per its SEF submission:¹⁶

In other words, the objective and the effect of the Advantage Program is to incentivise the targeted customer by offering a "differentiated net price outcome" in exchange for a commitment to purchase "higher volumes", in order to "optimis[e] volumes" manufactured and sold by Infrabuild's production facilities. Infrabuild does not dispute Nervacero's understanding that such scheme, regardless of its name and nature, is designed to and has the effect of locking-in and optimising supply of the goods under consideration to large scale "Tier One" customers who can buy directly from Infrabuild. The customer's desire to purchase from an alternative source is removed or blunted by the volume and pricing structure agreed with Infrabuild, and the "differentiated net price outcomes" that result therefrom.

Clearly, this scheme has allowed Infrabuild to significantly improve its sales and revenue performances and has had a significant impact on the competition dynamics in the Australian market. Infrabuild dominates the steel long products market in Australia. Its market power is an unmissable feature of that dominance. The differentiated net price outcomes of its Advantage Program "lock in" that dominance. The success of its Advantage Program and its role in achieving that dominance is not discussed in SEF 601. We respectfully request the Commission to take the effect of the Advantage Program into account. In our view, the Advantage Program

¹² Further, the CBSA report does not in itself decide if the measure will continue or discontinue. The outcome is pending further expiry review regarding the likelihood of injury by the Canadian International Trade Tribunal. See, EPR601-29 Attachment 1 – CBSA Statement of Reasons, page 38.

¹³ Ibid, page 8.

¹⁴ EPR601-29 Attachment 1 – CBSA Statement of Reasons, Table 1, page 10.

¹⁵ Nervacero's SEF submission, pages 14 and 19

¹⁶ Ibid, page 16.

insulates Infrabuild against price competition from small higher cost/higher price exporters such as Nervacero. To maintain the overall rebated price level, a customer must maintain high levels of supply from Infrabuild. Nervacero cannot compete against the currently incumbent exporters from Turkiye and other Asian countries. If a local customer is going to risk upsetting Infrabuild, and thereafter being denied supply or losing rebates, it is certainly not going to do so by buying from Nervacero at higher prices than are available from the incumbent exporters.

The strength of Infrabuild's marketing and supply/price structures, in circumstances of capacity utilisation figures that are at the highest they have been for five years, is another changed condition that is being enjoyed by the Australian industry, and which makes it much less likely to be materially injured by future competition, if any, from Nervacero, as a result of the expiry of the measure.

Infrabuild is curiously obsessed in securing restrictions against Nervacero. It appears to be blind to the transformation of Australian market conditions and of Infrabuild's position in the market during the prolonged term the measures have been in place. Export sources not subject to measures have entered the market and compete with the Australian industry without inhibition. Infrabuild's trade and business strategies, in buoyant conditions, have been rewarded by strong financial performance.

Meanwhile, Nervacero is solidly engaged in the high cost and high price Spanish and European markets. Should it have any interest in exporting to Australia, it faces the obstacles of high production and logistic costs, competition from geographically proximate Asian suppliers, and Infrabuild's locked-in customer loyalty scheme. Indeed, maintaining the measures against Nervacero S.A would be nothing more than an Australian trade ban against a single Spanish exporter with no logical or legal justification.

Nervacero categorically rejects Infrabuild's late submission. The criticisms of Nervacero's SEF submission are non-transparent and factually flawed, and have no dispositive force. Their only utility is to demonstrate InfraBuild's false ignorance of the commercial realities of the Australian market, and yet again expose the barren nature of its application for continuation of the dumping measures against our client.

Yours sincerely


Charles Zhan
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