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IN THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

WRITTEN OBSERVATIONS OF THE COMMISSION OF THE EUROPEAN COMMUNITIES

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CASE C-209/07

THE COMPETITION AUTHORITY

Vs

BEEF INDUSTRY DEVELOPMENT SOCIETY LIMITED AND BARRY BROTHERS (CARRIGMORE) MEATS LIMITED

A request for a preliminary ruling made by the Supreme Court of Ireland pursuant to Article 234 of the EC Treaty

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A. INTRODUCTION

1. This is a reference from the Supreme Court of Ireland ("the Supreme Court") about the interpretation of Article 81(1) EC. In particular, the Supreme Court seeks guidance on what is an agreement that has as its "object" the prevention, restriction or distortion of competition in the common market within the meaning of that provision.

2. The case before the Supreme Court is an appeal by the Irish Competition Authority against a decision of a lower court ("the High Court") of 27 July 2006[1]. The High Court had dismissed a claim by the Irish Competition Authority for orders restraining the Beef Industry Development Society ("BIDS"), the first defendant, from giving effect to a series of decisions aimed at the rationalisation of the beef processing industry in Ireland through a scheme for the removal of excess capacity ("the BIDS arrangements").

3. The High Court held that the BIDS arrangements do not fall within the prohibition in Article 81(1) EC. The High Court was also of the view that the BIDS arrangements did not qualify for an exemption under Article 81(3) EC as it did not satisfy all the conditions therein. The Irish Competition Authority appealed.

4. Both the High Court and the Supreme Court consider that the BIDS arrangements had an effect on trade between Member States as most beef produced in Ireland was exported.

5. In essence, the single question of the Supreme Court is the following:

   [where] *it is agreed that such an agreement is liable, for the purpose of application of Article 81(1) of the EC Treaty, to have an appreciable effect on trade between Member States, is such an arrangement to be regarded as having* ***its object, as distinct from effect,*** *the prevention, restriction or distortion of competition within the common market and therefore incompatible with Article 81(1) of the Treaty establishing the European Community."(emphasis added).*

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[1] [2006] IEHC 294.

6. The question posed by the Supreme Court is prefaced by first, its findings of fact and second, the main features of the arrangements. Before turning to examine the question posed by the referring court, both the findings of fact and the main features of the rationalisation arrangements are set out below.

B. THE BACKGROUND

7. The facts of the case are set out in the order for reference and also more fully in the judgment of the High Court by Mc Kechnie J.

8. The Irish Competition Authority is a statutory body entrusted with the power to enforce competition law under the Competition Act 2002. BIDS is an industrial and provident society established in 2002. BIDS currently has ten members. Each of its members is a limited liability company in the business of slaughtering and deboning cattle ("beef processing"). Each member is independent of each other. The membership of BIDS makes up 93% of the market for the supply of beef in Ireland.

9. The second defendant in the proceedings at national level, Barry Brothers (Carrigmore) Ltd, is one of the members of BIDS and entered into an agreement with BIDS in 2002. The validity of this agreement between BIDS and Barry Brothers (Carrigmore) Ltd is entirely dependent on the outcome of the proceedings in the national courts.

10. BIDS was formed with the objective of implementing the conclusions and recommendations of two reports in 1999 on the beef industry in Ireland

11. The first report was an independent report, the McKinsey Report and the second report, the Beef Task Force Report was the result of a government task force set up to examine the conclusions of the McKinsey Report.

12. Both reports describe the recent history of the beef industry in Ireland in the period following accession of Ireland to the EC in 1973. Both reports conclude that there is over capacity in the beef industry and put forward a variety of recommendations to address the overcapacity.

13. For present purposes, it is sufficient to note that it is not contested by the parties in the national proceedings that there is over capacity in the beef processing industry. Furthermore, according to the High Court judgment, it was acknowledged that "surplus capacity required removal...and that an industry driven and funded scheme was necessary in order to accomplish this...and that there were considerable gains to be achieved in so doing." What is in dispute is whether or not the action taken by the industry to remedy the overcapacity is, in principle, anti-competitive.

14. In the period between May 2002 and December 2002, BIDS held a series of meetings with their membership for which there are detailed minutes available. It was in the course of these meetings that the arrangements were arrived at. On 5 December 2002, BIDS adopted a "rationalisation plan." This plan sets out the BIDS rationalisation arrangements which are at the heart of this reference. Prior to adopting the rationalisation arrangements, BIDS consulted the Competition Authority at various points on the question of its compatibility with EC and national competition law.

15. The main features of the rationalisation arrangements, as set out in the question of the Supreme Court are the following:

    I. *plants (called "goers ") killing and processing 420,000 animals per annum, representing approximately 25% of active capacity would enter into an agreement with the remaining companies (called "stayers ") to leave the industry and to abide by the following terms;*
    2. *goers would sign a two year non-compete clause in relation to the processing of cattle on the entire island of Ireland;*
    3 *the plants of goers would be decommissioned;*
    4. *land associated with the decommissioned plants would not be used for the purposes of beef processing for a period of five years;*
    5. *compensation would be paid to goers in staged payments by means of loans made by the stayers to the society;*
    6. *a voluntary levy would be paid to the society by all stayers at the rate of €2 per head of the traditional percentage kill and €11 per head on cattle kill above that figure;*
    7. *the levy would be used to repay the stayers' loans; levies would cease on repayment of the loans;*

8. *the equipment of goers used for primary beef processing would be sold only to stayers for use as back-up equipment or spare parts or sold outside the island of Ireland;*
9. *the freedom of the stayers in matters of production, pricing, conditions of sale, imports and exports, increase in capacity and otherwise would not be affected,*

16. By letters of 5 and 26 June 2003, the Irish Competition Authority notified to BIDS its assessment that the rationalisation BIDS Arrangements were contrary to certain provisions of Irish competition law namely section 4(1) (b) of the Competition Act 2002.

17. In the event, the Irish Competition Authority brought an action against BIDS based on Article 81(1) EC and not under the Irish competition legislation. In particular, the Irish Competition Authority alleged that the object and/or effect of the BIDS arrangement is to limit and control production or capacity on the market for the supply of beef in Ireland and that the object or effect of such a limitation on production or capacity and/or production is ultimately to affect pricing and that it will have the object or effect that the retail price to consumers will rise. A further issue was the nature of the non-compete provisions, the use of land, the decommissioning and disposal of plant and/or the levy arrangements.

18. The main arguments of the Irish Competition Authority are that the BIDS arrangements should be viewed objectively, by reference to their terms and the legal and economic context in which they were concluded. In the view of the Irish Competition Authority, the BIDS arrangements "by their very nature" have the potential of restricting competition, and so should be regarded as having the object of a restriction of competition.

19. In particular the Irish Competition Authority considers that:

- the arrangements involve a reduction of output in the form of an agreement between the stayers and goers;
- the agreement to reduce production by at least 25% is itself a limitation on output;
- the imposition of the levy would result in an increase in prices and/or a reduction in output with a consequent increase in marginal costs of beef processors;

- insofar as it involves a restriction on capacity, that restriction is a restriction of output for the purposes of Article 81(1) EC.

20. BIDS, on the other hand, contested that the BIDS arrangements have either as their object or effect a restriction of competition within the meaning of Article 81(1). This is because, in the view of BIDS:

    - an agreement between undertakings to effect a one-off reduction in excess capacity cannot be regarded as, per se, an agreement to limit output;

    - the exit of a player from a market is not of itself an output limitation, if there is no output limitation in the market as a whole

    - the cost of the levy will be absorbed by the beef processors as the levy will not lead to an increase in prices: 90% of Irish beef is exported they cannot pass any increase in cost in the form of price; in relation to the remaining 10%, the supermarkets and other retailers exercise storing bargaining power in relation to prices;

    - if sufficient capacity remains in the market to meet all throughput, the stayers can increase capacity at will;

21. The High Court rejected the claim of the Irish Competition Authority and held that the BIDS arrangements did not have either as their object or their effect the prevention, restriction or distortion of competition. The High Court held that Article 81(1) EC did not apply to the BIDS arrangements because none of the three main features of the BIDS arrangements namely the reduction in capacity, the imposition of the levy an the restrictive covenants in the exit agreement for the goers constitute, in its view, a restriction, by object[2]:

    "the arrangements [cannot] in any way be described as plainly or evidently limiting output, sharing markets or prohibiting investment. In addition, there is no injunction on those who might remain in the industry to reduce output... Unless, therefore, a reduction per se in capacity must necessarily be equated with a limitation on output..."

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2 Paragraphs 98 et sec of the judgment of the High Court, McKechnie J.

22. The High Court also considered that in the light of its ruling on Article 81(1) EC, no ruling was necessary on Article 81(3). Nevertheless, the High Court undertook an assessment of Article 81(3), and found that the BIDS arrangements satisfied three of the conditions of Article 81(3) but that the benefits to consumers had not been demonstrated.

C. THE LAW

23. The Commission considers it apposite to explain the main features of Article 81 EC by reference in particular to the case law of the Court of First Instance and of the Court of Justice, as well as by reference to its own decisions and its notices. . Attention will be paid to the law as it relates to structural measures taken by particular industries in periods of crisis (so called "crisis cartels") in the area of both competition and state aids. The Commission will also describe the Commission's previous decisions on crisis cartels which deal with measures taken to limit output.

24. The Commission has published notices to assist with the interpretation of Article 81 EC, and of particular use in the present case are the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements (2001/C 3/02) ("the Commission Notice on Article 81 (1)") and the Guidelines on the application of Article 81(3) EC (2004/C 101/08) ("the Commission Notice on Article 81(3)").

Regulation 1/2003

25. Under Article 5 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 EC[3] ("Regulation 1/2003"), national competition authorities have the power to apply Articles 81 and 82 EC in individual cases to agreements and practices which may affect trade between Member States.. Article 5 provides that national competition authorities are to take decisions that require that an infringement be brought to an end; order interim measures; impose fines or accept commitments. Under Article 6 of Regulation 1/2003, Member States have the power to apply Article 81 EC.

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3 OJ L1 January 2003 at p. 1.

Article 81 EC

26. Article 81 EC provides in its material parts :

"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

[...];

(b) limit or control production, markets, technical development, or investment;

[...]

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

27. It is well established that the assessment of an agreement under Article 81 is a two step process. The first step is to assess whether an agreement between undertakings which is capable of affecting trade between Member States, has an anti-competitive object or effect and is, therefore caught by the prohibition in Article 81(1) EC. The second step is to determine whether the four cumulative conditions of Article 81(3) apply in which case, the agreement is not prohibited.

28. From the outset it should be noted that "object" and "effect" are separate concepts[4]. An agreement which may affect trade is caught by the prohibition in Article 81(1), if either the object or the effect or both is the prevention, restriction, or distortion in the common market. The object to restrict competition must result from the agreement itself and it is unnecessary to prove any intention by the parties to restrict competition. Nor is it necessary, if the object of the agreement is to restrict competition, to demonstrate any actual effect on the market for the prohibition in Article 81 (1) EC to apply[5]. Thus, the rule prohibiting a restriction of competition by object has a preventive aspect.

29. Therefore, where an agreement is found to be restrictive of competition, by object, that is sufficient for the prohibition in Article 81(1) EC to apply. If an agreement is found not to be restrictive of competition by object, then the effect of the agreement, either actual or potential, has then to be assessed.

30. In the present case, the preliminary reference asks the Court only to consider if the agreement in question restricts competition by object, as distinct from effect.

31. The Commission Notice on Article 81(1) sets out the view of the Commission on the instances in which Article 81(1) EC will clearly apply. This is the case where an agreement has as its object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers. Such agreements are presumed to have a restrictive character and it is unnecessary to examine their actual effects on competition and the market in order to establish that they fall within Article 81(1) EC.[6]

32. It is important to note that the second step only comes into play when an agreement is first found to be restrictive of competition. As stated in the Commission Notice on Article 81(3):

> "The assessment of any countervailing benefits under Article 81(3) necessarily requires prior determination of the restrictive nature and impact of the agreement."

33. Article 81(3) EC allows an agreement which would otherwise be prohibited under Article 81(1) EC to be exempt from the prohibition if four conditions are satisfied. Firstly, the arrangement concerned should contribute to improving the production or

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4 See Commission guidelines 2004/C 101/08 on the application of Article 81(3), paragraph 20.
5 Case 19/77 *Miller International* [1978] ECR 131, paragraph 15.
6 See Commission Notice (2001/C 3/02), paragraphs 18 and 25.

distribution of the goods or services in question, or to promoting technical or economic progress; secondly, consumers must be allowed a fair share of the resulting benefit; third, it must not impose any non-essential restrictions on the participating undertakings; and fourth, it must not afford them the possibility of eliminating competition in respect of a substantial part of the products or services in question[7].

34. The burden of showing an agreement should be exempted under Article 81(3) EC lies with the party claiming the benefit of that section. It is for the national court to determine whether the four cumulative conditions laid down in Article 81(3) are satisfied.

35. For the sake of completeness and given that the BIDS arrangements concern an agricultural product, the Commission draws attention to Council Regulation 1184/2006 which applies the Community competition rules to the production of, and trade in, agricultural products ("Council Regulation 1184/2006").[8]

36. Article 1 of this Regulation states that Articles 81 to 86 of the EC Treaty shall apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 EC which relate to the production of, or trade in, products listed in Annex I to the Treaty. Annex I to the Treaty in turn refers to *"meat and edible meat offal"*[9] and also to *"preparations of meat, of fish, of crustaceans or molluscs"*.[10] The meat production facilities in the present case fall within the list and are therefore liable to the provisions of Articles 81 to 86 EC.

37. Article 2 of Regulation 1184/2006 provides for certain exceptions, whereby Article 81(1) EC shall not apply to agreements, decisions and practices referred to in Article 1 which are not of relevance to the present case. Therefore, there would appear to be no special provisions of Community law which exclude the application of competition rules to arrangements such as those in question in the present case.

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7 See to that effect, Joined Cases 43/82 and 63/82 VBVB and VBBB v Commission [1984] ECR 19 paragraph 61.

8 See Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of production of, and trade in, agricultural products (codified version) OJ 2006 L 214, p. 7.

9 See EC Treaty annex I, 'chapter 2' in the list.

10 See EC Treaty annex I, 'chapter 16' in the list.

Restriction by object

38. The question of what constitutes a restriction of competition by object has developed over time in the case law of the Court of Justice and the Court of First Instance ("the Community Courts"). In the earlier cases, the Community Courts examined restrictions that could be termed "hard core", such as export bans. Such a case was that of *Miller*[11] where an export ban was described as being, "by its very nature," a restriction of competition, as the purpose of such a restriction is to isolate a part of the common market.

39. The Court of Justice took the approach of *Miller* in a number of cases[12]. One such case was *ANSEAU-NAVEWA,* where it was claimed that an agreement on conformity of washing machines did not "exhibit the characteristics constituting an infringement of Article 85[1] EC". The Court of Justice rejected this argument in the following terms[13]:

> "*The purpose of the agreement, regard being had to its terms, the legal and economic context in which it was included and the conduct of the parties, is appreciably to restrict competition within the common market, notwithstanding the fact that it also pursues the objective of protecting public health and reducing the cost of conformity checks, that finding is not invalidated by the fact that it has not been established that it was the intention of all the parties to the agreement to restrict competition.*"

40. Increasingly, restrictions concerned agreements with a legitimate objective: it was argued that the purpose of the agreement in such cases could not be "by its very nature" a restriction of competition.

41. However, in such cases, the Court of Justice stressed the need to examine the purpose of the agreement by reference to the entire legal and economic context in which it had been concluded. This approach was further confirmed in *CRAM and Rheinzink*[14]

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11 Case 19/77 Miller v Commission [1978] ECR 131, paragraph 7.

12 Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342; IAZ, paragraph 25; Case C-235/92 P Montecatini v Commission [1999] ECR I-4539, paragraph 122; 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 v Commission [2002] ECR I-8375, paragraph 491).

13 Joined Cases 96/82 [1983] ECR 3369, paragraphs 32-35.

14 Joined Cases 29/83 and 30/83 [1984] ECR 1679, paragraph 26.

where the Court of Justice considered that the proper approach *"in order to determine whether an agreement has as its object the restriction of competition... is rather a question of examining the aims pursued by the agreement as such, in the light of the economic context in which the agreement has to be applied."*

42. More recently, the earlier case law of what constitutes a restriction by "object" was once again considered by the Court of Justice in *General Motors*.[15] In that case, General Motors brought an appeal against the finding of the Court of First Instance that, inter alia, the exclusion of export sales from General Motors's bonus system was, by its very nature, likely to inhibit export sales even without any restriction on supply. The Court of First Instance had held that the measure constituted an agreement with the object of restricting competition, having regard both to the nature of the measure and the aims which it pursued, and in the light of the economic context in which it was applied

43. The Court of Justice rejected the appeal and confirmed its earlier case law of *Miller, IAZ* and *CRAM* and the circumstances in which it applies. It reiterated that an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives. The Court of Justice rejected General Motors's argument that an agreement could be considered to have a restrictive object only, if at first sight, it *manifestly* (emphasis added) has the sole objective purpose or obvious consequence of appreciably restricting competition.

44. The Court of Justice was also of the view that it is settled case law that the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in question. Finally, as regards the intention of the parties, although it is not a necessary factor in determining the restrictive character of an agreement, it may, nevertheless, be taken into account. Importantly, the Court of Justice also stated that:

"...it is clear from the case- law...that account must be taken not only of the terms of an agreement but also of other factors, such as the aims pursued by the agreement as

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15 Case C-551/03 Judgement of the Court of 6 April 2006 (not yet reported).

such, in light of the economic and legal context, in order to determine whether an agreement has a restrictive object for the purposes of Article 81 EC".[16]

45. In *GlaxoSmithKline* in 2006, the Court of First Instance was very clear on the necessity of context when analysing agreements under Article 81(1) EC. In particular, it stated that:

"...the characterisation of a restriction of competition within the meaning of Article 81(1) EC must take account of the actual framework and, therefore, of the legal and economic context in which the agreement to which that restriction is imputed is deployed".[17]

46. The conclusion to be drawn from the case law on the concept of a restriction of competition by object within the meaning of Article 81(1) is as follows: the aim and purpose of an agreement may be, by its very nature, a restriction of competition by object, irrespective of whether the agreement pursues another legitimate objective. The intention of the parties may be taken into account but is not a decisive factor in determining the restrictive character of an agreement.

47. The Notice on the application of Article 81 (3) also reflects the case law:

'restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules'.

'The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be

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16 General Motors above, paragraph 66.

17 GlaxoSmithKline v Commission, T-168/01, judgment of the Court of First Instance of 27 September 2006, paragraph 110 (not yet reported).

necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition'[18].

Crisis cartels

48. The Community courts have only, on a few occasions, had the opportunity to consider the situation of arrangements in a market suffering from a structural crisis. The link between the existence of a crisis on the market and the assessment of competition concerns has been considered both under both under Article 81 and also under the provisions of the Treaty that deal with state aid.

49. One case is *Weyl Beef Products BV v Commission*[19] which concerned a crisis cartel similar to the present case.

50. The *Weyl* judgment concerned over-capacity, restructuring and exit from the market in the Netherlands, with the owners of the plants being compensated for this by means of a government levy The state aid was authorised by the Commission but another undertaking brought an action before the Court of First Instance seeking a finding, inter alia, that the arrangements underlying the aid in question including the private agreements concluded between undertakings relating to the restructuring of the Netherlands cattle slaughtering sector infringed Article 85(1) (now Article 81(1)EC.

51. The decision of the Court of First Instance focussed primarily on the question of the Commission's obligations to ensure that Article 92 (now Article 87) and Article 93 (now Article 88) of Treaty were applied consistently with other provisions of the Treaty. The underlying private arrangements were held to be inextricably linked to the state aid and therefore had no separate purpose except as part of the statutory

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18 Paragraphs 21 and 22 of Commission Notice on the application of Article 81(3)

19 Joined cases T-197/97 and T-198/97 ECR [2001 0303.

restructuring programme, so their compatibility with other provisions of the Treaty could not be construed separately.

52. . The Court of First Instance stated:

> *"it must therefore be concluded that, even if it is accepted that some of the measures for restructuring the cattle slaughtering sector may fall within the scope of Article 85 of the Treaty, they are so indissolubly linked to the purpose of the aid that they cannot be separately evaluated."*

53. The *Weyl* judgment is of some relevance albeit limited. The conclusion to be drawn from the Court of First Instance is that the fact the restructuring arrangements were concluded in the context of a crisis cartel was not, in itself, sufficient to exclude the application of Article 85 (1) (now Article 81 (1)) EC.

54. Another case is *Federation Nationale de la cooperation betail et viande (FNCBV) v Commission*[20] which although not a case which concerned a crisis cartel aimed at restructuring as such, did nevertheless concern arrangements taken by an association in what was perceived to be a crisis.

55. In *FNCBV*, the Court of First Instance stated expressly that the fact that there is a crisis in a particular industry may be a factor which mitigates the application of the penalty for an agreement prohibited under Article 81(1) EC but in itself it does not suffice to exclude the application of the prohibition in Article 81(1) at paragraph 90:

> *"Les requérantes ne sauraient non plus se prévaloir, pour justifier l'accord litigieux, de la crise dans laquelle se trouvait le secteur bovin au moment des faits de l'espèce, laquelle aurait particulièrement touché les éleveurs français de gros bovins. En effet, cette circonstance ne saurait, à elle seule, conduire à la conclusion que les conditions d'application de l'article 81, paragraphe 1, CE, n'étaient pas remplies (voir, en ce sens, arrêt Limburgse Vinyl Maatschappij e.a./Commission, précité, point 740). En tout état de cause, il convient d'observer que la Commission n'a pas ignoré, dans son appréciation, la crise que traversait le secteur..."*

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[20] Joined Cases T-217/03 and T-245/03 judgement of the Court of First Instance of 13 December 2006 (not yet reported).

56. The Commission has had cause to examine crisis cartels on several occasions[21].

57. Two such decisions of the Commission are the *Synthetic Fibres Decision*[22] and the *Dutch Bricks Decision*[23]. Both decisions demonstrate that the assessment of such arrangements especially as regards over capacity has first to be assessed, consistent with the two step approach of Article 81 EC, first as to whether the objector effect is a restriction of competition and if it is, second, as to whether it fulfils the conditions in Article 81(3).

58. In *Synthetic Fibres*, an agreement between pan-European textile producers was notified to the Commission. The agreement sought to address significant over-capacity in the industry by agreeing a compulsory reduction of production capacity among the signatories, overseen by an independent trustee body and enforced by penalties.

59. The Commission concluded that by both object and effect this agreement restricted competition within the common market. However, no separate analysis of object and effect was made by the Commission. At recital 26, of its Decision the Commission stated:

> *"By committing themselves to reduce capacity, the parties accept restrictions on the scale of their production facilities and hence on their investment."*

60. After finding that the agreement was also liable to affect trade between Member States, (at recital 27), the Commission concluded that the agreement was prohibited under Article 85(1) (now Article 81(1)) EC.

61. However, the Commission went on to decide that the conditions of Article 85(3) (now Article 81(3) were satisfied. The agreement was found to contribute to improving production and promoting economic and technical progress (recital 38) and consumers stood to gain from the improvement in production (recital 39). It further found that the planned arrangements for effecting the capacity cutbacks were indispensable to that end (recitals 42 to 47) and that the agreement did not afford the undertakings the possibility of eliminating competition for a substantial part of the products in question (recitals 48 to 52).

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21 See the 12th Competition Report of 1982, paragraphs 38-41.

22 Commission Decision of 29 April 1994 (94/296 EC)OJ L131 26 May 1994, p.15

23 Commission decision of 4 July 1984 (84/ 380/ EEC Commission) OJ L 207 2 August 1984, p. 17.

62. It cited in particular the fact that the agreement would lead to specialisation in the industry which should increase efficiency (recital 35). Furthermore, there was to be no interference with parties' freedom to determine output or deliveries (recital 43) and the duration of the agreement was entirely uniform (recital 44). Lastly, the Commission found that there remained external competition from other producers not party to the agreement as well as from different natural fibres (recitals 50 and 51).

63. As in *Synthetic Fibres* the decision in *Dutch Bricks* concerned another crisis cartel which had been notified to the Commission. This time, sixteen producers had agreed in the face of massive over-capacity to rationalise production and eliminate that over-capacity. The agreement they arrived at fixed production quotas and imposed fines for breaching these.

64. Four Dutch brick producers undertook to close down seven production units definitively. Stringent non-compete obligations were also imposed meaning that decommissioned sites could not be used for brick production for thirty years following decommissioning and dismantled plant was not to be sold to any producer who would use it to increase production capacity within a 500 kilometre radius of the Dutch border for a period of 30 years. A compensation fund was established into which all parties to the agreement paid (a fixed rate per thousand bricks produced) and this money was then used to compensate those firms which had definitively dismantled capacity.

65. In *Dutch Bricks,* the Commission identified separately the object and the effect at recital 16 of its Decision, where it found the agreement infringed Article 85(1) (now Article 81 (1)) EC (emphasis added):

> *"The principal* ***object*** *of the agreement is to achieve a larger cut in capacity and stockpiles than could be obtained by a unilateral restructuring operation. The notified plan constitutes concerned action between competitors aimed at closing plants and limiting capacity, backed by a system of fines in the event of failure to comply with obligations, and financially supported by a compensation fund.* ***It therefore has a direct effect*** *on competition inasmuch as it restricts the means of production, and therefore the investments and competitive strategies of the parties."*

66. However, as in the *Synthetic Fibres* Decision, the Commission found that Article 85(1) (now Article 81(1) EC) should not apply to the agreement, since it satisfied the four conditions of Article 85(3) (now Article 81(3)) EC. At recitals 28 and 29, the Commission found that the agreement would improve production and promote technical and economic progress, while giving a fair share of the benefit to consumers. In particular, it balanced the potential short-term rise in prices with the likely long-term price drop due to the elimination of the need to finance stockpiles of bricks, which had accumulated through years of over-production. At recitals 37 and 38, the Commission further concluded that the agreement was indispensable to achieving its aims and that there was no possibility of the elimination of competition for a substantial part of the products in question.

67. In relation to another restructuring agreement in the case of *BPCL/ICI,*[24] the Commission also held that the agreements '*had as its object and effect the restriction of competition*'. One of the Commission's considerations in this respect concerned the fact that the agreements brought about an immediate specialization in the production of LDPE by BPCL 'by stopping production of PVC which at least in the short term would not otherwise have taken place.

68. Finally, in its state aid decision concerning the rationalization of pig slaughterhouses[25] the Commission also *prima facie* rejected arguments that a restructuring arrangement for the Dutch pig slaughtering sector did not fall under Article 81 EC. The Commission considered, *inter alia*, that the production process could not be characterized by very high fixed costs and that it could not be established that the slaughter houses to be closed were the least efficient. Although this reasoning concerns the applicability of Article 81 (1) in general and not the question whether the arrangement is a restriction by object, it would seem that on the basis of considerations of this nature the Commission would tend to hold that the agreement has a restrictive object.

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24 OJ L 212, 8/8/1984, p. 1

25 OJ 2002 C 37, p. 17

D. The Commission's answer

69. The Commission submits that the BIDS arrangements should be characterised as comprising a "restriction by object" within the meaning of Article 81 (1) EC.

70. The reference from the national court is concerned only with the first step of Article 81(1) EC; Article 81(3) does not form part of the reference from the Supreme Court. The question whether the arrangement may fall under Article 81 (3) EC because it generates efficiencies which outweigh its restrictive effects will thus not be addressed. The balancing of anticompetitive and pro-competitive effects is conducted exclusively within Article 81 (3) EC.

71. Nevertheless, if in the light of the reply of the Court of Justice to its question, the Referring Court finds that the BIDS arrangements constitute a restriction of competition within the meaning of Article 81(1), it will be necessary for the Supreme Court to carry out an analysis by reference to Article 81(3) EC in order to resolve the dispute before it. This is acknowledged at paragraph 38 of the order for reference.

72. It is further acknowledged by the Supreme Court that the arrangements in question are such as to affect trade between Member States, it being demonstrated to the satisfaction of both the High Court and the Supreme Court that the majority of beef produced in Ireland is exported to the United Kingdom

73. In sum, the Supreme Court considers that the points which have arisen in argument which are germane to the assessment are the following:

    (a) whether the prohibition in Article 81(1)(b) EC, which refers to measures which "limit or control production", includes agreements which effect a one-off reduction in capacity where there is no agreement to limit or control capacity;

    (b) whether the prohibition in Article 81(1) EC includes the agreement by individual processors to cease production;

    (c) whether an agreement that covers 93% of the market to effect the one-off reduction is a restriction, by object;

    (d) whether the ancillary restrictions on competition, the imposition of the levy and the restrictive covenants in the exit agreement for the goers all fall foul of Article 81(1) EC.

74. The issues raised by the Supreme Court at (a) to (d) above form part of the entire legal and economic context of the BIDS arrangement from which the purpose should be derived and will be dealt with in turn.

75. In the Commission's view, the question that the Supreme Court has posed of what constitutes a restriction by object can only be properly answered by conducting an analysis of the purpose of the agreement, regard being had to its terms, the legal and economic context in which it was concluded and the conduct of the parties.

76. The aim of the BIDS arrangements is to reduce capacity. That is evidenced by the terms of the agreement which are set out as the preface to the question from the Referring Court i.e. the three main features of the BIDS arrangements, namely the reduction in capacity, the imposition of the levy and the restrictive covenants in the exit agreement for the goers. The economic context in which the BIDS arrangements have been concluded is one of over capacity in the industry. In concluding the arrangements, a variety of legal obligations are undertaken by the members of BIDS, both stayers and goers, to give effect to the reduction in capacity.

77. The Commission would tend to agree with the Irish Competition Authority that the arrangements which are a reduction of capacity would necessarily entail a reduction of output. The Commission further agrees that as the BIDS arrangements reduce production by at least 25%, by committing themselves to reducing capacity, the parties accept restrictions on the scale of their production facilities and hence on their investment. This is an agreement between competitors on the basis of which production capacity will be reduced. This reduction, which involves a restriction on capacity, is itself a limitation on output for the purposes of Article 81(1) EC. The fact that the arrangements are perceived to be a one-off reduction does not alter or detract from the nature of the restriction to limit output.

78. Turning to the question of whether a reduction in capacity is *per se* a restriction by object of competition, Community competition law does not apply a doctrine of "*per se*" illegality of restrictions[26]: this approach categorises certain restrictions which

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26 This is a doctrine which is found in United States Federal law and stems from a judgment of the United States which held that when a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output" rather than one designed to 'increase economic efficiency and render markets more, rather than less competitive'", it is considered "per se illegal" and may be condemned without further analysis, *see* Broadcast Music Inc v CBS, 441 US 1, 19-20 (1979).

may have no redeeming features. Rather, an examination of the case law described above illustrates that the Community courts tend to analyse restrictions to assess whether "by their very nature" they can restrict competition for the purposes of Article 81(1).

79. Such restrictions may be what are termed "hard core" restrictions and include for example export bans. The case law often refers to such restrictions as "manifest". However, as *General Motors* demonstrates, a restriction can still be anticompetitive, by object without necessarily being manifest. As the Court of First Instance held in *General Motors* an agreement does not have to *manifestly* (emphasis added) have the sole objective purpose or obvious consequence of appreciably restricting competition in order to fall foul of Article 81(1) EC.

80. An agreement with competitors on the basis of which parties leave the market does limit output. Moreover, the competitors who stay in the market will jointly share the costs of compensating those who leave the market for their loss. This is an agreement which by its object restricts competition, in that it restricts the parties' freedom to decide about investments and competitive strategies and does not leave it up to the individual participants to decide whether, given the prevailing market circumstances, they want to leave the market.

81. The fact that the freedom of stayers in matters of production, pricing, conditions of sale, imports and exports, and increase in capacity would not be affected does not change this assessment: although it is not clear why the stayers would agree on the compensation levy without the guarantee that their competitors do not, for their part, engage in capacity extension it would seem likely that the agreements will discourage capacity expansion.

82. It can be concluded that the object of the BIDS arrangements is to ensure a larger cut in over capacity than could be achieved by unilateral action on the part of each member acting independently.

83. The goers in particular leave the market definitively. In addition, the capacity that is currently in use by the plants of the goers will be lost to the industry. The permanent exit of the goers including the restrictive covenants accepted by them in the form of non-compete obligations, the decommissioning of the plants and the compensation

levies on the stayers cannot be ignored, as they form a necessary part of the context of the agreement.

84. The Court of Justice stated in *General Motors* that the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in question. A consideration of the situation in relation to the BIDS arrangements leads to the conclusion that the members of BIDS, hitherto competitors, abandon the ability to act independently in the market, by virtue of the BIDS arrangements. As the Commission stated in *Synthetic Fibres:*

> *"In a free market economy it ought to be principally a matter for the individual undertaking to judge the point at which overcapacity becomes economically unsustainable and to take the necessary steps to reduce it"*

85. In *Dutch Bricks*, the Commission puts it this way:

> *"The principal object of the agreement is to achieve a larger cut in capacity and stockpiles than could be obtained by a unilateral restructuring operation. The notified plan constitutes concerned action between competitors aimed at closing plants and limiting capacity"*

86. The High Court in its ruling that Article 81(1) did not apply to the arrangements considered that neither *Synthetic Fibres* nor *Dutch Bricks* were relevant to the assessment of the BIDS arrangements. There are a number of differences between the arrangement regarding the Dutch brick market and that regarding the Irish beef sector: In particular, in the Dutch case, the parties were strictly prohibited from bringing on stream new capacity during the period of the agreement. Replacement investments were only authorized to the extent that they would not entail any increase in production. However, this does not fundamentally change the analysis since the financial engagements to be entered into by the Irish beef processors would probably also have a discouraging effect on capacity expansion

87. The Commission respectfully submits that the learned judge, at first instance, has misconstrued both Commission Decisions and the case law on which it is based. Contrary to what the High Court states, there is nothing to suggest that the BIDS arrangements insofar as they aim to reduce over capacity differ from the arrangements

in *Synthetic Fibres* and *Dutch Bricks* in the light of the aim and purpose of the BIDS arrangements, regard being had to the economic context in which they have been concluded.

88. The fact that the stayers retain freedom in relation to their output is irrelevant to the assessment under Article 81(1) EC. This is also the case in both *Synthetic Fibres* and *Dutch Bricks* where the fact that the agreement did not interfere with the parties' freedom to determine their output was a consideration that the Commission took into account under Article 85(3) (now Article 81 (3)) EC. This was also the case in *Dutch Bricks* where, although the parties sought to enforce the agreement by way of a penalty to reduce overcapacity and also prohibited capacity increases, nevertheless they retained freedom in relation to production.

89. It is consistent case law that the fact that an agreement such as the BIDS arrangements may have a legitimate objective such as addressing a crisis in an industry does not mean that it is not, of itself, restrictive of competition. This was recently confirmed in *FNBCV* that the fact that there is a crisis in a given industry does not suffice to exclude the application of Article 81(1) EC.

90. In this regard, it is instructive to examine the consequences of deciding otherwise. If the existence of legitimate objective or the presence of a provision which, at first sight, may not appear a restriction because it is not so objectionable is sufficient to exclude Article 81(1), then the internal balance within Article 81 EC would be upset. Demonstrating that an agreement brings particular benefits by virtue of, for example, a legitimate aim is an analysis that properly belongs under Article 81 (3) and not under Article 81 (1) of Treaty.

91. For the above reasons, the Commission considers that the BIDS arrangements, although entered into to address a crisis, have the object of restricting competition, insofar as an agreement to reduce capacity, such as the one at stake, can be considered by its very nature a limitation or output and to that extent is an agreement which has as its object the restriction, prevention or distortion of competition. The question of whether the BIDS arrangements have the effect of restricting competition does not need to be addressed by the Commission. If it can be said without a full fledged

examination of the effects that the agreement tends to restrict one form or aspect of competition, it constitutes a restriction by object.

92. Finally, as the Supreme Court recognises at paragraph 38 of the order for reference, only if the referring court finds that the BIDS arrangements constitute a restriction of competition within the meaning of Article 81(1) EC, will it be necessary to carry out an analysis by reference to Article 81(3) EC. The Commission would like to point out that possible efficiencies generated by the arrangements should be taken into consideration in the assessment of their lawfulness. Current practice and case-law in the application of Article 81(3) confirms that the influence of factors not directly relevant to the preservation of the competitive process in the market appears at most insignificant. Where arguments not related to the ultimate goal of preserving economic efficiency have been raised by defendants, they have not carried much weight. This should be done exclusively on the basis of Article 81 (3) EC. However, this is not an issue in the present reference.

E. CONCLUSION

93. For the above reasons, the Commission submits that the Court should answer the question referred by the Supreme Court, as follows:

"Article 81(1) EC should be interpreted as meaning that where the purpose of an agreement which has an effect on trade between Member States is to limit or control production by a reduction in capacity in a particular industry, such as the arrangements concluded by undertakings in the beef industry such as described in the order for reference, such an agreement has as its object the restriction, prevention or distortion of competition and is therefore prohibited by Article 81(1) EC."

[redacted]

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