

THE SUPREME COURT

[S.C. No. 394 of 2006]

Murray C.J.

Kearns P.

Denham J.

Fennelly J.

Finnegan J.

BETWEEN

THE COMPETITION AUTHORITY

PLAINTIFF/APPELLANT

AND

BEEF INDUSTRY DEVELOPMENTS SOCIETY LIMITED

AND

BARRY BROS. (CARRIGMORE) MEATS LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Fennelly delivered the 3rd day of November, 2009.

1. I agree with Kearns P that this appeal must be remitted to the High Court for the purpose of enabling that court to consider whether it should hold the provisions of Article 81(1) of the EC Treaty inapplicable in the light of the provisions of Article 81(3) of the Treaty.

2. I am of opinion that it is both necessary and appropriate that the High Court consider the applicability of Article 81(3) in the light of the decision of the Court of Justice in its judgment of 20th November 2008, particularly by reason of the essentially hypothetical nature of the way in which the learned trial judge expressed his views "*in brief terms*" on compliance with the requirements of Article 81(3). As he put it there was "*a certain degree of artificiality about this exercise as [he had] previously found that the agreements and decisions in question [did] not have anti-competitive effects...*"

3. As I say, I fully agree with Kearns P that, in the light of the decision of the Court of Justice, the entire matter of compliance with the requirements of Article 81(3) must be determined by the High Court. I believe, however, that it is for the High Court to reconsider that matter, that is to consider it *de novo*, having regard, in particular, to the terms of the judgment of the Court of Justice. It is true that the latter court was responding only to the precise question which had been referred to it by this Court by way of reference for preliminary ruling. Nonetheless, it pronounced in its judgment on the very important question of the very object of the BIDS arrangements, which it found to conflict patently with the concept inherent in the Treaty regarding competition. Clearly, the learned trial judge will have to have regard to the terms of the Judgment in Case C-209/07. The key paragraphs which contain the court's reasoning upon the arrangements are as follows:

33 The BIDS arrangements are intended therefore, essentially, to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale.

34 That type of arrangement conflicts patently with the concept inherent in the EC Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article 81(1) EC is intended to prohibit any form of coordination which deliberately substitutes practical cooperation

between undertakings for the risks of competition.

35 In the context of competition, the undertakings which signed the BIDS arrangements would have, without such arrangements, no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations. With the BIDS arrangements it would be possible for them to avoid such a process and to share a large part of the costs involved in increasing the degree of market concentration as a result, in particular, of the levy of EUR 2 per head processed by each of the stayers.

36 In addition, the means put in place to attain the objective of the BIDS arrangements include restrictions whose object is anti-competitive.

37 As regards, in the first place, the levy of EUR 11 per head of cattle slaughtered beyond the usual volume of production of each of the stayers, it is, as BIDS submits, the price to be paid by the stayers to acquire the goers' clientele. However, it must be observed, as did the Advocate General in point 85 of her Opinion, that such a measure also constitutes an obstacle to the natural development of market shares as regards some of the stayers who, because of the dissuasive nature of that levy, are deterred from exceeding their usual volume of production. That measure is likely therefore to lead to certain operators freezing their production.

38 As regards, secondly, restrictions imposed on the goers as regards the disposal and use of their processing plants, the BIDS arrangements also contain, by their very object, restrictions on competition since they seek to avoid the possible use of those plants by new operators entering the market in order to compete with the stayers. As the Competition Authority pointed out in its written observations, since the investment necessary for the construction of a new processing plant is much greater than the costs of taking over an existing plant, those restrictions are obviously intended to dissuade any new entry of competitors throughout the island of Ireland.

39 Finally, the fact that those restrictions, as well as the non-competition clause imposed on the goers, are limited in time is not such as to put in doubt the finding as to the anti-competitive nature of the object of the BIDS arrangements. As the Advocate General observed in point 86 of her Opinion, such matters may, at the most, be relevant for the purposes of the examination of the four requirements which have to be met under Article 81(3) EC in order to escape the prohibition laid down in Article 81(1) EC.

4. It will be for the High Court to consider the matter in the light of these remarks as well as the relevant observations of the Advocate General.

5. I would like to add one observation regarding the application of Article 81(3)(b) of the Treaty. It is necessary for the Respondents, if they are to show that Article 81(1) is inapplicable, to prove that the arrangements do not:

“afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

6. It has been agreed that compliance with this requirement is not in issue on this appeal. This does not mean, however, that the arrangements do not restrict, as distinct from eliminating, competition.

7. Finally, compliance with Article 81(3)(a) requires it to be demonstrated that the restrictions imposed by any arrangements being examined under the provisions be *“indispensable to the attainment of these objectives,”* i.e., the objectives whose attainment enables them to survive Article 81(1). The appellant submits that the learned trial judge did not give consideration to the individual restrictions in the BIDS arrangements when reaching his conclusion on indispensability. The relevant paragraphs of the judgment are 132 to 134. It appears to me that these paragraphs do not address the question of whether the restrictions on use of land and plant and sale of equipment are indispensable. This is understandable in view of the conditional character of the learned judge’s findings on this issue. However, clearly these issues will now need to be addressed.