THE SUPREME COURT

Murray C.J.
Denham J.
Fennelly J.
Kearns P.
Finnegan J.

[S.C. No. 394 of 2006]

BETWEEN

THE COMPETITION AUTHORITY

PLAINTIFF/APPELLANT

AND

BEEF INDUSTRY DEVELOPMENTS SOCIETY LIMITED
AND
BARRY BROS. (CARRIGMORE) MEATS LIMITED

DEFENDANTS/RESPONDENTS

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

Against a background of manifest over-capacity in the Irish beef processing industry it became apparent in the last decade of the century just expired that a radical rationalisation and restructuring of the processing industry was required. A study carried out in 1998 (the McKinsey Report) at the joint request of the Irish Government and

representatives of the beef industry concluded that there existed significant and substantial over-capacity in the industry and that such overhang had a serious cost factor attached to it. This was impeding the competitive nature of the industry in certain markets. The McKinsey Report recommended that an agreed plan from within the industry should be put in place with the objective of removing plants which had a current annual throughput in 1997 of 420,000 cattle. It was proposed that this scheme would be financed by those who would be in receipt of the resulting benefits. McKinsey concluded that it was necessary to reduce the number of processors from twenty to a figure between four and six. The report also recommended that the undertakings which were to remain in the sector *("the stayers")* should compensate those forced to withdraw *("the goers")*. In 1999, a taskforce set up by the Minister for Agriculture & Food came to similar conclusions and recommended that the processors should create a compensation fund. In accordance with those conclusions, the ten principal processors formed the Beef Industry Developments Society Limited (BIDS) in May, 2002. BIDS prepared a draft rationalisation plan which provided, *inter alia*, for a reduction in processing capacity of about 25%, the equivalent of an annual volume of about 420,000 head of cattle.

The present members of BIDS produce about 93% of the beef sold in Ireland. The object of BIDS is to implement the market study produced

by the economic consultants and the report delivered by the Beef Taskforce which had equally concluded in 1999 that there was significant under-used slaughtering capacity in the beef industry, that there were considerable benefits to be gained from a rationalisation process leading to better matching of capacity with actual requirements and that the processing industry should create a special buy-out fund to facilitate the removal of surplus or obsolete capacity with a view to expediting the rationalisation of the industry.

A processor's profit level depends on capacity utilisation in the processing plant. Where there is higher utilisation of capacity, economies of scale are achieved, reducing processing costs. McKinsey proposed a solution whereby a compensation system would offer incentives to certain processors to exit the market. The report concluded that the processing industry would achieve significant cost benefits from the implementation of such a scheme which it estimated at £18 million. It also concluded that accompanying efficiency measures could result in cost benefits of a further £14 million.

The main features of the scheme for which BIDS was formed were as follows:-

(a) Goers killing and processing 420,000 animals per annum, representing approximately 25% of active capacity, would

enter into an agreement with stayers to leave the industry and to abide by the following terms:-

(i) Goers would sign a two year non-compete clause in relation to the processing of cattle on the entire Island of Ireland.

(ii) The plants of goers would be decommissioned.

(iii) Land associated with the decommissioned plants would not be used for the purposes of beef processing for a period of five years.

(iv) Compensation would be paid to goers in stage payments by means of loans made by the stayers to the Society.

(v) 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.

(vi) The levy would be used to repay the stayers loans; levies would cease on repayment of the loans.

(vii) 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.

(viii) 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.

While the BIDS arrangements were being drafted, BIDS sought approval for the scheme from the Irish Competition Authority under the arrangements which existed prior to the introduction of Council Regulation (EC) No.1/2003. That Regulation, in conjunction with the provisions of the Competition Act, 2002, wrought a significant change in the applicable legal regime throughout the EC. The obligation now fell on BIDS to self-assess whether the scheme did or did not contravene competition law. In June, 2003 the Competition Authority informed BIDS that it did not consider the BIDS arrangements and the exit agreement which it had made with Barry Bros., the second named defendants, to be compatible with Irish competition law. On 30th June, 2003 the Competition Authority made an application to the High Court for a declaration that the BIDS agreements infringed Article 81 EC.

Article 81(1) EC provides that the following shall be prohibited as incompatible with the common market: *"all agreements between undertakings, decisions by associations of undertakings and concerted practises 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:

(a) Directly or indirectly fix purchase or selling prices or any other trading conditions;

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

(c) Share markets or sources of supply;

(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) Make the conclusion of contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"

Under Article 81(3) EC, the provisions of Article 81(1) EC 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 practise or category of concerted practises,

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.

Article 1(1) and (2) of R. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty provides in the manner already indicated that:-

"(1) Agreements, decisions and concerted practises caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.

(2) Agreements, decisions and concerted practises caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required."

By judgment delivered on 27th July, 2006 the High Court (McKechnie J.) dismissed the Competition Authority's application. In the course of an extensive and detailed judgment, the learned trial judge concluded that the BIDS arrangements did not fall under the prohibition contained in Article 81(1) EC. He concluded that the BIDS arrangements did not have as their object the restriction of competition since they were not aimed at fixing prices, sharing customers, or limiting production. The reduction of the total capacity was not to be regarded as a limitation of production. He further concluded that the BIDS arrangements did not have as their effect the restriction of competition. A 25% reduction of total capacity might, in the view of the learned trial judge, restrict competition only if it led to a capacity shortage which caused rising prices. Because overall beef production in Ireland would not increase in future, but would tend to decline, even if total capacity were reduced by 25% it would ensure that all beef would be processed. In addition, prices were not expected to increase. The levies would increase the processing costs incurred by the processors but it was felt that a price increase could be ruled out because the reduction of total capacity would result in economies of scale among stayers and the processors' customers would have in any event strong negotiating power, consisting as they do to a large degree of multiples with undisputed bargaining power.

The learned trial judge also concluded that the restrictions on use and disposal were not a restriction of competition. While under present market conditions it was not economically feasible to construct new processing plants, potential competitors could enter the market by purchasing other processing plants, either from stayers or non-members of BIDS.

He thus concluded that the BIDS agreements were not objectionable in such a way that they could be regarded as a restriction of competition by object.

The learned trial judge also addressed to a certain degree issues arising under Article 81(3). Having regard to his findings under Article 81 (1) it is unsurprising that, McKechnie J. prefaced this latter portion of his judgment in the following manner:-

> *"Accordingly, as the Competition Authority has failed to demonstrate by credible evidence, that the objectionable features of the arrangements are likely, as a matter of probability, to have appreciable anti-competitive effects, this action must fail. In such circumstances it is not strictly necessary to proceed and consider the arguments advanced under Article 81(3). However as the parties have made submissions in this regard I propose to set out in brief terms my views on the four requirements under that Article of the Treaty. In so doing it must be appreciated that there is a*

certain degree of artificiality about this exercise as I have previously found that the agreements and decisions in question do not have anti-competitive effects."

There then followed an analysis of the four cumulative conditions of Article 81(3).

In relation to the first of those conditions, the learned trial judge expressed himself satisfied that the arrangements did offer economic benefits and gains and that the requirement that *"the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress"* had been met.

In relation to the second requirement of Article 81(3), namely that the consumer must receive a *"fair share"* of the resulting benefits, the learned trial judge concluded as follows:-

"... it would be necessary to know with precision the size of the efficiency gains generated by this scheme as otherwise it is impossible to know, or even to conduct an evaluation or review as to whether what is proposed to be passed on, is or is not "fair" to consumers. That when measured against anti-competitive effects. I therefore do not believe that the evidence given on behalf of the Society (i.e. BIDS) under this heading, when looked at in the context of the evidence furnished with regard to efficiency gains, is

sufficient to discharge the onus of proof which is upon it in this regard."

It will be recalled that, whereas the onus falls on a plaintiff to establish a breach of A. 81 (1), the onus of proof under A. 81 (3) falls on BIDS to establish that all four conditions therein have cumulatively been met. The finding by the learned trial judge in respect of one of these four conditions, namely, that BIDS had failed to establish *"with precision"* how consumers would derive a fair share of the benefit resulting from the BIDS arrangements, had the effect that, in the hypothetical situation which the court was dealing with having regard to its findings under Article 81(1), BIDS would have lost the case on this solitary ground only.

The Competition Authority did not allege or contend that the arrangements would afford to the undertakings involved the possibility of eliminating competition in respect of a substantial part of the products in question. That was therefore not an issue in the case.

The other requirement of Article 81(3) is that the restrictions complained of must be *"indispensable"* to the attainment of the pursued objectives. The learned trial judge concluded that this objective was satisfied and expressly accepted the evidence adduced by BIDS' economist in this regard.

The learned trial judge reached these particular conclusions having conducted a most detailed economic analysis which is apparent from a

reading of the judgment. He made numerous findings of fact which, under the existing jurisdiction of this Court as elaborated in *Hay v. O'Grady* [1992] 1 I.R. 210 are not open to challenge in this Court unless they are unsupported by the evidence or are findings unreasonably arrived at having regard to the evidence. That does not preclude this Court from considering whether a trial judge drew incorrect inferences from his primary findings. This Court, however, is slow to interfere with the findings of a court of first instance which is well qualified to assess cases arising in a specialised field, in this case competition law, and whose presiding judge has particular expertise in that subject. Accordingly great weight must attach to the primary findings of the trial judge, notably in relation to his economic analysis in the particular case.

THE APPEAL

An appeal having been brought by both sides from the findings of McKechnie J., this Court decided to make a reference to the European Court of Justice for a preliminary ruling under Article 234 EC on 8th March, 2007. By its question this Court asked, in essence, whether agreements with features such as those of the BIDS arrangements are to be regarded, by reason of their object alone, as being anti-competitive and thus prohibited by Article 81(1) EC or whether, on the other hand, it is

necessary, in order to reach such a conclusion, first to demonstrate that such agreements may have anti-competitive effects.

By its judgment, delivered on 20th November, 2008, the European Court of Justice (Third Chamber) ruled as follows:-

> *"An agreement with features such as those of the standard form of contract concluded between the 10 principal beef and veal processors in Ireland, who are members of Beef Industry Development Society Ltd, and requiring, among other things, a reduction of the order of 25 % in processing capacity, has as its object the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC."*

In so holding, the European Court of Justice nonetheless noted (at par. 39 of its judgment) the fact that the agreement contained certain restrictions on goers, while not such as to put in doubt the finding as to the anti-competitive nature of the object of the BIDS arrangements, might nonetheless remain relevant in the context and 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 by Article 81(1) EC.

The case was therefore returned to this Court for further consideration. Helpfully in this context, the parties to the litigation have agreed that the only issue now requiring determination is whether or not

the BIDS arrangements can benefit from exemption pursuant to Article 81(3) EC.

Only three of the four conditions already enumerated are in issue, as the Authority does not contend that the implementation of the BIDS arrangements would eliminate competition.

It will be recalled that the learned High Court judge held that the first, third and fourth of the Article 81(3) conditions were satisfied but held that the second condition had not been satisfied.

The High Court judge's findings in relation to the first and third requirements (contribution to improvement of production and indispensability respectively) are the subject of appeal by the Competition Authority. The learned judge's finding in relation to the second requirement (fair share of resulting benefit) is the subject of a Notice to Vary on behalf of BIDS.

It is appropriate at this point to set out the grounds upon which the respective parties now base their appeals. In this regard, the Competition Authority contend:-

(1) That the learned trial judge erred in law and in fact in coming to the conclusion that there was sufficient evidence of efficiency gains for the purposes of Article 81(3) and in particular that the learned trial judge erred in concluding that, for the purposes of Article 81(3), BIDS had established

on the balance of probability that cost savings will be achieved by the BIDS proposals in circumstances where:-

(a) No consistent evidence was adduced by BIDS to substantiate this claim.

(b) Such evidence as was adduced by BIDS in an attempt to substantiate this claim was inconsistent and inconclusive.

(c) Such evidence as was put before the court by BIDS was several years out of date.

(d) No evidence was placed before the court by BIDS as to the likely identity of members of BIDS who were to exit the industry.

(e) No evidence was placed before the court by BIDS as to whether the plants which would be decommissioned were inefficient or efficient plants.

(f) There was no evidence that it was the least efficient plants which would be decommissioned.

The Competition Authority further contend that the learned trial judge erred in law in his approach to the issue of indispensability under Article 81(3) in that he failed to consider first, whether the BIDS arrangements were reasonably necessary to achieve the efficiencies contended for by the defendants/respondents, and secondly, whether each

individual restriction of competition contained in the BIDS arrangements was also reasonably necessary for the attainment of the said alleged efficiencies.

As already noted, the Notice to Vary by BIDS is confined to the single ground upon which the learned trial judge found against BIDS and is elaborated in the following terms:-

"1. The learned High Court judge erred in law or, alternatively, on a mixed question of law and fact and misdirected himself in finding that BIDS had not discharged the onus of proof of showing that consumers would receive a "fair share" of the benefits resulting from the BIDS arrangements (namely the significant economic gains which the judge found would result from the implementation of the BIDS arrangements).

2. The learned High Court judge erred in law or, alternatively, on a mixed question of law and fact and misdirected himself in holding that it was necessary for BIDS to demonstrate "with precision" the size of the benefits that would result from the BIDS arrangements and that this was a prerequisite to any assessment of whether a "fair share" of such benefits would pass to consumers as required by Article 81(3) of the Treaty.

3. *The learned High Court judge erred in law or, alternatively, on a mixed question of law and fact and misdirected himself in holding that Article 81(3) required BIDS to demonstrate "with precision" the size of the efficiency gains which would be generated by the BIDS arrangements in circumstances where it was not possible to do so and where, in any event, it was impossible precisely to quantify the proportion of the gains passing to consumers.*

4. *The learned High Court judge erred in law in imposing an excessively high standard of proof on BIDS to demonstrate that the BIDS arrangements complied with that part of Article 81(3) which requires that consumers be allowed a fair share of the resulting benefit of the impugned agreement, decision or alleged concerted practise and to that extent the learned High Court judge misconstrued and/or misapplied the provisions of Article 81(3).*

5. *The learned High Court judge erred in law or, alternatively, on a mixed question of law and fact and misdirected himself in failing to hold that the evidence as a whole established that a "fair share" of the benefit resulting from the BIDS arrangements would pass to consumers.*

6. *The learned High Court judge erred in law or, alternatively, on a mixed question of law and fact and misdirected himself in failing to have sufficient regard to the Commission's guidelines on the application of Article 81(3) (2004/C101/08) in his assessment of whether the requirement that a "fair share" of the benefit resulting from the BIDS arrangements should pass to consumers had been fulfilled."*

GENERAL OBSERVATIONS

It is important to lay emphasis on a number of features present in this case.

Firstly, and as so found by the learned trial judge, the initiative giving rise to the BIDS scheme was as far removed as one could imagine from objectionable cartel practises. The scheme was not one hatched in a smoke filled room by representatives of the various undertakings engaged in the processing industry, but rather was the end result of years of study and consideration by bodies which included Enterprise Ireland, The Minister for Agriculture & Food and the officials of his department, representatives from the beef industry, from IBEC, the Irish Farmers Association (IFA), the ICOS and the Irish Meat Association. Reports from multiple sources indicating a clear need to rationalise beef

processing in Ireland include the McKinsey Report in 1998 and the report of the Beef Taskforce set up by the Minister for Agriculture & Food in November, 1998 which reported to him in June, 1999. Other reports to similar effect produced in the years that followed included a report produced in March, 2000, headed "Irish Beef Processing, Trends, Market Structure and Value Chain Analysis" by a leading group of Irish economists, a report from the Agri Food 2010 Group comprised of senior members of industry as well as the Director of Consumer Affairs which reported to the Minister in March, 2000. A further report in 2002 prepared by Professor Sheehy from U.C.D. entitled "The Irish Cattle/Beef Industry 2002: Facing Reality" and a report in the same year from the Irish Meat Association all emphasised the difficulties affecting the efficient operation of the beef processing industry in Ireland.

Secondly, BIDS had an open and transparent relationship with the plaintiffs in this case and at all stages sought to work collaboratively with the Competition Authority to achieve a just and fair solution to the problems affecting the industry.

Thirdly, and accepting in this context that the situation of the Irish processing industry may appropriately be described as being in crisis, I am satisfied, as indeed was confirmed to the Court by both parties to this appeal, that there are no specific rules on crisis cartels in the EC Treaties. As pointed out in Power's *Competition Law & Practice* (Butterworths,

2001)at par. 23.42 the attitude of the Commission may be encapsulated in the following:-

"Instead, the Commission has formulated a policy. It has been written:

"The policy followed by the Commission is that if exceptions are to be permitted, it is only when the principal objective of the agreement is to provide a direct solution to the structural adjustment problem by means of orderly reduction of capacity, which may be backed up by contractual penalties for violation of the agreement."

The Commission is willing to clear severe and chronic structural over-capacity provided the cartel's rules are reasonable, justifiable, necessary, non-discriminatory and do not involve co-ordinating prices or output. The Commission has put aside its strong opposition to some anti-competitive practises (such as price fixing) where the participants are involved in a crisis situation. The exemption will be only for a limited period of time."

Lastly, but importantly in the present case, both sides to this appeal have refrained from disputing the key elements in the economic analysis conducted by the learned trial judge. However, both sides strongly contend that the learned trial judge drew incorrect inferences from his

analysis. BIDS contends that the learned trial judge was in error in holding that the efficiency gains to consumers had to be demonstrated *"with precision"*. The plaintiffs, on the other hand, contend that it is well established under the Commission's guidelines that precise and measurable efficiencies must be demonstrated and further contend that the learned trial judge's findings on this issue were correct.

On the remaining issues, the Competition Authority argues, it would seem to me somewhat illogically, that while the learned trial judge correctly decided that benefits flowing from the arrangements could not be accurately or objectively quantified, he incorrectly determined the issues arising in the context of the first and third conditions respectively of Article 81(3).

DISPOSAL OF THE PRESENT APPEAL

This Court must ask itself at the outset, having regard to the ruling delivered by the European Court of Justice in relation to the anti-competitive object of the BIDS arrangements under Article 81(1), whether it can itself, acting in effect as a court of first instance, conduct the economic analysis required under Article 81(3). The learned trial judge himself conceded that the *"belt and braces"* type analysis conducted by him under Article 81(3) was a somewhat *"artificial"* exercise having regard to his findings that the arrangements were in

compliance with the requirements of Article 81(1), both as to object and effect. The findings of the learned trial judge, for example, in relation to the requirement of indispensability are alleged on behalf of the Competition Authority to have been stated in summary terms only. Thus it is clear that both parties in this case feel that the analysis, while detailed and comprehensive, was not one specifically undertaken in the context of the different requirements and different onus of proof arising under Article 81 (3).

I have come to the conclusion that the proper course in these circumstances is to refer the matter back to the High Court so that the appropriate analysis under Article 81(3) can be carried out as soon as may be possible by the judge who saw and heard the various witnesses. He is thus the arbitrator best qualified to assess the credibility and weight of their evidence. Given that a detailed analysis has already been conducted under Article 81 (1), it would be my hope and expectation that the burden thereby placed on the trial judge would not be an onerous one. A further reason for referring back lies in the fact that counsel for the Authority contended that Commission decisions in *Synthetic Fibres* (OJ 1984 L 207/17 p. 0017 – 0025) and *Stichting Baksteen* (the 'Dutch Bricks' case) (OJ 1994 L 131/15 p. 0015 – 0022) must now to seen as superseded by the Guidelines in question. This particular contention was not the subject of any adjudication in the High Court.

However I propose to express a view on some general legal points which were canvassed in this appeal in the hope that it may be of assistance to the learned trial judge when conducting this exercise.

Those points address first the supposed requirement that a party claiming the benefit of Article 81(3) is obliged to demonstrate efficiency gains *"with precision"* and, secondly, the extent to which restrictions on competition be justified as being indispensable to an agreement designed to reduce capacity in a particular market

(A) <u>Requirement to Identify Economic Efficiencies *"with precision"*</u>

Counsel for the Competition Authority argued that, as per the Commission Guidelines on the application of Article 81(3) (2004/C101/08), only objective benefits can be taken into account and efficiencies are not to be assessed from the subjective point of view of the parties. Counsel contended that par. 50 of the Guidelines explicitly states that for Article 81(3) to apply, the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects. In that context, it fell to the party invoking Article 81(3) to verify the link between the agreement and the claimed efficiencies and further to demonstrate the value of those efficiencies. Par. 51 of the Guidelines provides:-

"All efficiency claims must therefore be substantiated so that the following can be verified:

(a) The nature of the claimed efficiencies;

(b) The link between the agreement and the efficiencies;

(c) The likelihood and magnitude of each claimed efficiency; and

(d) How and when each claimed efficiency would be achieved." (Emphasis added)

Counsel further pointed to par. 56 of the Guidelines as requiring BIDS to:-

"... accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed."

The agreement in the present case is executory in nature and that fact alone suggests that precise estimates or calculations of the value of any efficiencies may be extremely difficult. However, it is not the case that Article 81(3) requires that net efficiency gains from the implementation of the arrangements be felt immediately. Par. 59 of the Commission guidelines states:-

"The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective economic efficiencies."

Par. 94 of the Guidelines further provides:-

"In the application of the principles set out below the Commission will have regard to the fact that in many cases it is difficult to accurately calculate the consumer pass-on rate and other types of consumer pass-on. Undertakings are only required to substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case"

I am also mindful of the fact that, in neither the *Dutch Bricks* nor *Synthetic Fibres* cases was any precise figure for savings offered. This is a case where estimates of substantial economic efficiencies was offered and accepted by the trial judge. Furthermore it was drawn to the attention of this Court that not a single downstream consumer has protested to the Authority about the BIDS arrangements or suggested they would have anything like the draconian consequences for consumers contended for by the Authority. It will be recalled also that multiples such as Tesco are among the downstream consumers affected by the proposed BIDS arrangements and it is common case that these multiples have formidable bargaining power and are unlikely to tolerate the passing on of any price increases. If the trial judge is satisfied therefore that the arrangements will allow consumers a fair share of the resulting benefits, it would not appear to be necessary in the particular circumstances of this case to establish

with precision what the exact value or magnitude of that benefit might ultimately be. It will suffice if BIDS can demonstrate positive gains or at least a state of neutrality from the point of view of the consumer.

(B) Indispensability of Restrictions in BIDS Arrangements

I am satisfied that the incorporation of restrictive covenants in an agreement designed to rationalise an industry by means of a reduction in capacity may be justified as indispensable if the reduction in capacity is a valid objective of the arrangements and if the means of reducing capacity are proportionate to the aims being sought. A non-compete clause is entirely appropriate to secure such arrangements and to prevent players who are paid to leave the industry from re-entering and acquiring capacity from non-licensed producers. The necessity of restrictive covenants to underpin a reduction in capacity has been acknowledged by the Commission itself in the *Dutch Bricks* case.

While stage levies are undoubtedly capable of being seen as anti-competitive, it must be remembered that the plaintiff in this case does not contend that the BIDS arrangements would offend Article 81(3)(b), that is to say, that the arrangements would substantially restrict competition. Furthermore, the levy is only enforceable for between two and three years and will end when the loans provided for under the arrangements are paid back. In those circumstances, the levy may be seen as ensuring that

processors will absorb additional costs given that the levy is short-term in nature. Furthermore, stayers are not restricted from competing with each other and the scheme itself is entirely voluntary in nature.

CONCLUSION

For all the reasons outlined above, I would favour remitting this matter back to the High Court for the purpose of permitting the learned High Court judge to conclude a somewhat fuller analysis under Article 81(3). I would stress he had no obligation to conduct such an exercise at the time of writing his judgment in the light of the findings he was making under Article 81 (1).