C-209/07 - 1.

G.1. A.

SUPREME COURT

(No. 394 of 2006)

Thursday, the 8th day of March 2007

BEFORE

THE CHIEF JUSTICE

MRS JUSTICE DENHAM

MR JUSTICE FENNELLY

MR JUSTICE KEARNS

MR JUSTICE FINNEGAN

Registered at the
Court of Justice under No. 773314
Luxembourg 20 -04- 2007
For the Registrar
Lynn Hewlett
Principal Administrator

2003 No. 7764p

BETWEEN

THE COMPETITION AUTHORITY

PLAINTIFF

AND

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

DEFENDANT

The Motion on the part of the Plaintiff pursuant to Notice of Appeal dated the 20th day of October 2006 by way of appeal from the Judgment and Order of the High Court (Mr Justice McKechnie) given and made on the 3rd day of October 2006 dismissing the Plaintiff's claim against the Defendants and awarding the costs of the proceedings to the first named Defendant and for an Order setting aside the said Judgment and Order and in lieu thereof granting *inter alia* the following relief:-

1. A declaration that the BIDS Arrangements (as defined in paragraph 9 of the Amended Statement of Claim) and each decision forming part of those Arrangements are prohibited and void by virtue of Article 81(1) of the EC Treaty

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2. A declaration that the Exit Agreement (referred to in paragraph 8 of the Amended Statement of Claim) is prohibited and void by virtue of article 81(1) of the EC Treaty

on the grounds and as set forth in the said Notice of Appeal coming on for hearing before this Court on the 7th day of March 2007 and on this day together with the Notice to Vary on the part of the first named Defendant in respect of the finding of the trial judge that it had not been shown that consumers would receive a fair share of the benefits resulting from the BIDS Arrangements

Whereupon and on reading the said Notice of Appeal and Notice to Vary the said Order of the High Court the documents therein referred to the Judgment of the learned trial judge and the written submissions on behalf of the respective parties and on hearing what was offered by Counsel for the Plaintiff and Counsel for first named Defendant in relation to that part of this appeal as relates to Article 81(1) of the EC Treaty

And it appearing to the Court that this appeal raises a question concerning the interpretation of Article 81(1) of the Treaty Establishing the European Community and that it is necessary in order to give judgment herein that the Court of Justice of the European Communities be requested to make a preliminary ruling thereon

Accordingly the Court doth pursuant to Article 234 of the EC Treaty submit the question set forth in the Schedule hereto to the Court of Justice of the European Communities for a preliminary ruling thereon

And the Court doth adjourn the further hearing of this appeal pending the determination of the said question by the Court of Justice

The Supreme Court
A true copy which I attest

for Registrar

REGISTRAR

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SCHEDULE

Where it is established to the satisfaction of the court that:

a) *there is overcapacity in the industry for the processing of beef, which calculated at peak throughput, would be approximately 32%;*

b) *the effect of this excess capacity will have very serious consequences for the profitability of the industry as a whole over the medium term,*

c) *while, as reported, the effects of surplus requirements have not been felt to any significant degree as yet, independent consultants have advised that, in the near term, the overcapacity is unlikely to be eliminated by normal market measures, but over time the overcapacity will lead to very significant losses and ultimately to processors and plants leaving the industry;*

d) *processors of beef representing approximately 93% of the market for the supply of beef of that industry have agreed to take steps to eliminate the overcapacity and are willing to pay a levy in order to fund payments to processors willing to cease production, and*

the said processors, comprising ten companies, form a corporate body, ("the society") for the purpose of implementing an arrangement with the following features:

1. *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,*

and that it is agreed that such an agreement is liable, for the purpose of application of Article 81(1)EC, to have an appreciable effect on trade between Member States, is such arrangement to be regarded as having as 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?

THE SUPREME COURT

8th March 2007

RE:- Competition Authority

v

Beef Industry Development Society & Anor

Nature of Document:- Order

Entering Fee:-

.....4..... **Pages**

Solicitor:—

Address

THE SUPREME COURT

2006 No. 394

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

BETWEEN/

THE COMPETITION AUTHORITY

Plaintiff/Appellant

and

BEEF INDUSTRY DEVELOPMENT SOCIETY LIMITED and BARRY BROS. (CARRIGMORE) MEATS LIMITED

Defendants/Respondents

Decision dated 8th day of March, 2007 referring a question to the Court of Justice of the European Communities

1. The Supreme Court makes this reference to the Court of Justice in order to obtain an interpretation of Article 81(1) of the Treaty establishing the European Community (hereinafter "Article 81(1)EC"). The Court considers that the above entitled appeal raises a

question of interpretation of that provision and that a decision on that question is necessary to enable it to give judgment.

2. The case before this Court is an appeal from the judgment of the High Court (McKechnie J) delivered on 27th July 2006. By that judgment, the High Court dismissed the application of the Competition Authority (hereinafter "the Authority") for orders restraining the Defendants from giving effect to a series of decisions (hereinafter "the arrangements") providing for the rationalisation of the beef processing industry in Ireland through a scheme for the removal of excess capacity.

3. The Authority is a statutory body established pursuant to the Competition Acts 1991 and 2002. Section 14 of the Act of 2002 authorises the Authority to bring legal proceedings for the enforcement of competition law in Ireland, including the provisions of Articles 81 and 82 of the Treaty establishing the European Community.

4. The first named Defendant (hereinafter "BIDS") is an industrial and provident society. BIDS was formed in May 2002 for the purpose of implementing the arrangements. Its membership consists of fifteen limited companies carrying on the business of processing beef, comprising slaughtering and de-boning of cattle. Those original fifteen members represent approximately 93% of the market for the supply of beef in the State. The second-named defendant is a beef-processing company which entered into an agreement with BIDS, but has taken no active part in the proceedings.

Background to Beef Industry

5. The BIDS arrangements are intended to address a problem of structural over-capacity in the industry.

6. The High Court judgment explains the historic causes of this over-capacity. Following accession to the Community and to the Common Agricultural Policy (CAP), Irish farmers and, in turn, the beef industry enjoyed the benefits of three basic supports: intervention

pricing; private storage aids; export refunds. In addition, very substantial government grants or subsidies (50% or up to 75%) were provided in less developed areas for the construction of meat factories. Following CAP reform in 1992, financial supports were no longer channelled through the processors. The industry was artificially supported: supply was uncoupled from demand: there was a mismatch between throughput and capacity.

7. Concern at industry and government level led to the commissioning of McKinsey Consultants, whose report, *Preparing the Irish Beef Sector for the Twenty First Century,* was presented in September 1998. That report is the origin of the arrangements.

8. The objective of the study was to identify "*initiatives that would maximise the long term value (that is profitability) of all players in the Irish beef sector - processors, beef farmers and calf suppliers.*" The report is based on figures for the period up to 1997.

9. There are up to 100,000 farmers involved in cattle production in the State. The annual throughput of animals through all plants is approximately 1.6 to 1.7 million (up from 1.27 million in 1994). This annual throughput is likely to decrease by 300,000 to 400,000 per annum, due, *inter alia,* to removal of price supports as a result of CAP reform and increases in live animal exports. Some 90% of Irish beef production is exported, with more than 85% going to other Member States. There are 22 processors owning 38 plants, six of which have not been used for some time. Prior to 1992, levels of processing were subject to extreme seasonal variation. There was an average weekly kill of 29,000 and a peak of 60,000. A deseasonalisation premium introduced in 1992, as part of CAP reform, had the effect of levelling out production. Now the weekly average is 32,000 and the peak 45,000. The highest weekly level in 2005 was 40,000. It has so remained in spite of the phasing out of the premium, which has been effectively discontinued since 1999/2000.

10. Partly though not wholly as a consequence of the former high seasonal peak, there is a substantial overhang of over-capacity in the industry.

11. McKinsey's principal conclusions in respect of the processing industry may be summarised as follows (it also dealt with beef producers, improvement in quality, productivity and export markets):

- In 1997, with 32 plants operating, the industry was highly fragmented;
- The industry had an estimated capacity to kill 66,000 head of cattle per week (in currently active plants); this compares with an actual maximum throughput of 45,000 and an average throughput of 32,000 per week;
- Processors are largely indifferent to the absolute level of prices, as long as they can make an acceptable buy-sell margin on high levels of throughput; this margin is largely independent of general levels of consumer beef prices;
- The buy-sell spread is closely related to the level of capacity in factories: if there is a lot of excess capacity, competition for supplies should increase and the buy-sell spread should narrow and vice-versa, if capacity is tight;
- Producers (farmers) push for higher prices to improve their profitability; processors push for lower prices to allow them to sell their beef and earn their buy-sell spread;
- There is evidence of decline in processor profitability driven by the increasing level of year-round over-capacity;
- The waste created by excess processing capacity and the inability of a large number of small players to build sustainable markets highlights the need for rationalisation of players and plants;
- Both producers and processors alike "*face potentially catastrophic outcomes over the medium term*;"

- So far as processors are concerned, this is related to the "*huge amount of year round overcapacity in the industry - twice as much as needed*;"
- This overcapacity is likely to increase to three times what is required, with the result, that if such trends should continue the profitability of the sector, as currently structured, would be eliminated;
- As a consequence of this problem, there should be increased competition amongst the processors for cattle with the buy/sell spread, which largely determines profit margins, being narrowed; this will "*have devastating consequences for processor profitability moving the average plant into a significant loss making situation*;"
- The effects of surplus requirements have not been felt to any significant degree as yet, but this level of overcapacity, which will result in significant losses, will ultimately lead to players and plants leaving the industry over time;
- In most industries where there is significant overcapacity, the least efficient players are squeezed out of the market; it would be expected that plant closures would have occurred; however, this had not happened in this industry;
- If the subsidy support system is dismantled or substantially reformed, the low level of underlying profitability will be exposed;
- "*In the long run the fundamental threat to the sector is that, in the absence of subsidies, it is not competitive in international markets*;"
- Rationalisation should take place, whereby the number of processors would be reduced from 20 to between 4 and 6: to achieve this, a "*buy-out scheme*" is required which would be funded by remaining processors ("*stayers*") so that

those ceasing production ("*goers*") could be compensated for exiting the market;

- While these objectives have widespread acceptance within the industry, concerted action has not yet followed: perhaps the reason is that "*sufficient financial pain*" has not as yet been felt by the processors who have not to date proactively pursued rationalisation;
- Processors "*face the severe threat of a sharp reduction in throughput combined with increasing overcapacity*;"
- Significant losses will be incurred amongst the processors and, over the long term, a large number of players will withdraw from the industry or decide to mothball plants;
- Removing plants with a throughput of 420,000 animals (representing 32% of then active capacity) would result in saving of IR £18 million per annum: this is calculated by subtracting the sum of IR £21 million, being the marginal cost to the stayers of slaughtering the additional 420,000 animals, from the sum of £39 million which is calculated as being the current cost of processing such numbers; hence a net saving per annum of £18 million.

12. The Minister for Agriculture and Food established a *Beef Task Force,* which reported in June 1999. It accepted the McKinsey recommendations. It stated:

"The Task Force accepts that there is at present underused slaughtering capacity in the beef industry and that there are considerable benefits to be gained from a rationalisation process leading to better matching of capacity with actual requirements. The Task Force recommends that the processing industry should

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create a special buy out fund to facilitate the removal of the surplus/obsolete capacity to expedite this rationalisation process."

13. From these and other reports commissioned at about that time the High Court, in the present action, concluded:

"……all sectors of industry who signed up to these reports, did so with a firm belief that, firstly, there was extensive overcapacity in the beef slaughtering sector, secondly, that such surplus capacity required removal, thirdly, that an industry driven and funded scheme was necessary in order to accomplish this, and fourthly, that there were considerable gains to be achieved by so doing."

14. The McKinsey recommendations contain the essence of the arrangements subsequently adopted, which are the subject of the action brought by the Authority and of this appeal.

Establishment of BIDS

15. The Beef Industry Development Society Limited ("BIDS" or "The Society") was registered on 2nd May, 2002. The objects of the Society, as outlined in its rules include:

"4(a) To provide funding from the beef industry to implement the conclusions and recommendations of the September 1999 McKinsey and Company report titled "Preparing the Irish Beef Sector for the 21st Century" and the "report of the Beef Task Force" dated June 1999 and any other reports commissioned by the Society."

16. BIDS established a committee which produced a number of drafts of its rationalisation plan. It also engaged in consultation with the Authority. The final version of the arrangements, as adopted on 5th December 2002 is:

"THE PROPOSALS UNDER THE RATIONALISATION PROGRAMME"

Definitions

"Decommission" means placing the premises in a state that they can no longer be used for the slaughter and de-boning of cattle and, without prejudice to the generality of the foregoing, the action or acts required by the Goer to achieve Decommissioning are set out in Schedule 6 to the Exit agreement (a copy of which is attached) and "Decommissioned" shall be construed accordingly.

"Goers" means the members of BIDS who would voluntarily agree to exit the beef industry under the Programme.

"Programme" means the proposed rationalisation programme of BIDS.

"Stayers" means the members of BIDS who would not exit the beef industry under the Programme.

The proposals under the Programme

The proposals under the Programme are as follows:

- *The Programme would be once-off and would be implemented (in terms of plant closures) within a twelve (12) month period.*
- *Under the Programme, plants processing at a maximum 420,000 cattle per year (in total) would leave the beef industry.*

- *Goers would sign a two (2) year non-compete clause in relation to the processing of cattle in the island of Ireland.*
- *The plants of goers would be Decommissioned.*
- *Land associated with the Decommissioned plants would not be used for the purposes of beef processing for a period of five (5) years.*
- *A voluntary fund would be set up to compensate goers, subject to receiving agreed payments from stayers. The fund would operate as follow*
- *Following the resolution of the proceedings, the industry would meet, as in the period June to December 2002, to identify goers and stayers, and to agree the compensation to be paid to goers. The meeting would decide on an acceptable minimum of capacity to be decommissioned (not exceeding a total capacity of 420,000 cattle per year).*
- *Exit agreements would be signed with goers with the compensation paid in staged payments as per the Exit agreements provided to the Competition Authority on 20 December, 2002.*
- *Loan agreements would be signed with stayers to provide the funding for the payments to goers.*
- *A levy system would be established under which stayers would pay BIDS levies based upon an agreed formula in relation to stayers' existing traditional (percentage) cattle kill and cattle killed in excess of this traditional (percentage) kill. The formula would apply a £2 levy on the traditional (percentage) cattle kill level of stayers and a £11 levy on cattle kill above the traditional (percentage) cattle kill level.*

- *The levies paid to BIDS would be used to repay the stayers' loans under the Loan agreements. The levies would cease when the stayers' loans under the Loan agreements were repaid.*
- *The equipment of goers used for primary beef processing would only be sold (within three months) to stayers for use as back-up equipment or spare parts or sold outside of the island of Ireland.*
- *The freedom of stayers in matters of production, pricing, conditions of sale, imports and exports, deliveries, mergers and acquisitions and other commercial activity would not be affected by the Programme. In particular, no plant would be prohibited from increasing capacity and there would be no understanding that animals previously slaughtered by a Decommissioned plant would be secured or slaughtered by any given stayer.*

SCHEDULE 5

Terms and conditions under which the Assets are to be utilised or sold to existing persons

The Assets are to be sold (i) within three months from the date of this agreement (ii) to either a member (or members) of the Society or to persons who are located outside the 32 counties of Ireland. Assets which are not so sold shall be scrapped and put beyond use. Evidence satisfactory to the Society shall be provided at the Second Stage Completion that the said Assets have been so sold or scrapped and put beyond use as the case may be.

The provisions of clauses 11.3, 11.4 and 11.5 shall apply to this schedule as if they were set out in full herein (mutatis mutandis).

SCHEDULE 6

Acts or action required by the Existing Party to achieve Decommissioning

1. *The Exiting Party will disconnect, take down and remove from the Premises the Fixtures and Fittings and the Plant including without limitation:*
   - *pens, troughs, water piping and all other equipment from the lairage;*
   - *the slaughter box, the slaughter line and all equipment from the abattoir including stands, conveyors, scales and sterilising equipment, etc.;*
   - *all equipment for handling and packing offals and by products;*
   - *all the rails from the slaughter area, corridors and chills;*
   - *the main refrigeration plant and all the coolers and condensers;*
   - *the boning hall's rail system, boning line and tables and all other related and ancillary equipment including conveyors, scales, sterilisers etc.;*
   - *the rail system and all related and ancillary equipment in the marshalling and loading area;*
   - *all equipment from the plant room; the boiler;*
   - *all water storage tanks;*
   - *truck wash; and*
   - *all tanks and related and ancillary equipment from the effluent treatment plant.*

2. *The Exiting Party will move off site the items listed in paragraph 1 above and dispose of them in accordance with the criteria set-out in Schedule 5.*
3. *The Exiting Party will provide a certificate (in a form acceptable to the Society) at the Second Stage Completion from the Secretary to the Society".*

The Proceedings

17. The Authority commenced this action on 30th June 2003. Initially, it sought orders pursuant to the Competition Acts, but later amended its pleadings so that the action is now based on Article 81(1)EC.

18. The Authority claims that the arrangements constitute a series of decisions of an association of undertakings and that they and each decision comprising them are prohibited by virtue of Article 81(1)EC and void. It is alleged that the object and/or effect of the BIDS arrangements is to limit and control production and capacity on the market for the supply of beef in the State 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 is likely to rise.

19. This claim was fully contested by BIDS, which said that the arrangements did not have, either as their object or effect the prevention, restriction or distortion of competition. It was accepted, for the purposes of the application of Article 81(1)EC, that the arrangements are liable to have an appreciable effect on trade between Member States.

20. The High Court heard the action over eleven days. It examined reports and heard witnesses both as to fact and as to the economic effects of the arrangements. It had the assistance of an independent expert economist.

21. The High Court dismissed the claim of the Authority. It held that the arrangements did not have either as their object or their effect the prevention, restriction or distortion of competition. It considered that no provision of the arrangements could be described as plainly or evidently limiting output, sharing markets or prohibiting investment. Consequently, it was not necessary for the High Court to consider whether the arrangements should be declared inapplicable by virtue of Article 81(3)EC. Nonetheless, the High Court went on to consider the applicability of that provision. The High Court accepted that there was overcapacity in the

industry which was not short-term or cyclical, but long-term and structural. The High Court found that the arrangements satisfied three of the requirements of Article 81(3)EC: firstly, that they would contribute *"to improving the production or distribution of goods or contribute to promoting technical or economic progress;"* secondly, that they were *indispensable to the attainment* of their objectives, and; that, thirdly, they did not afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the products in question. On the other hand, the learned High Court judge held that BIDS had not discharged the burden of proving that the arrangements allowed a fair share of the resulting benefits to consumers. By reason of his first conclusion (that the arrangements did not infringe Article 81(1), he did not need to rule on the applicability of Article 81(3)EC.

The Appeal

22. The Authority has appealed the decision of the High Court in respect of the findings that the arrangements do not amount to decisions having as their object or effect the prevention, restriction or distortion of competition. The Authority also appealed the findings, insofar as they were made by the High Court, that Article 81(1)EC should be held inapplicable by virtue of Article 81(3)EC. BIDS has cross-appealed the finding that it had not been shown that consumers would have a fair share of the benefits.

23. The Supreme Court informed the parties during the hearing of the appeal that it considered the arguments it had heard from them raised an issue of interpretation of Article 81(1)EC and that it proposed, without entering on the questions that might arise in relation to Article 81(3)EC, to refer a question or questions to the Court of Justice.

24. It is sufficient for the purposes of the present order for reference to refer to the appeal only insofar as it concerns whether the arrangements constituted a series of decisions having as their *object,* as distinct from their effect, the prevention, restriction or distortion of

competition.

Contentions of the Authority

25. The Authority argues that the arrangements, viewed objectively by reference to their terms, were restrictive by object by reference to the combined effect of the conditions and restrictions imposed:

- in that they involved a reduction of output through the agreement among those electing to remain in the beef industry ("the stayers") and those electing to exit it ("the goers") that the goers would decommission their plants and cease production;
- the agreement of processors representing at least 25% of existing production to cease is itself a limitation on output, regardless of whether the production so eliminated is then distributed among remaining producers;
- in that they involved a reduction of output and/or increase in prices through the imposition of a levy and consequent increase in marginal costs of beef processors;
- insofar as they involved a restriction of capacity, that restriction is a restriction of output for the purposes of Article 81(1)EC;
- in that a reduction of capacity should be considered to be a restriction which is anti-competitive by object regardless of whether there or is not a restriction of output.

26. The Authority further contends that if the arrangements are to be treated as restrictions on capacity rather than of output, a reduction of capacity should itself be regarded as a restriction by object.

27. The Authority notes that the stated purpose of the closure of a sufficient number of companies to represent a throughput of 420,000 cattle: those processors as well as their plants will leave the industry. The "goers" will not necessarily be the least efficient processors. The levy will necessarily increase the marginal production cost of the "stayers." It is inherent that the arrangements will tend to limit production and drive up prices. In addition, the restrictions on the use, by the goers of their plant and equipment, on the sale of that equipment (so that domestic abattoirs will not be allowed to buy it) and on the use of their land are, in themselves and independently, restrictions on competition. In fact, the Authority contends that the reason that processors and plants have not left the industry is that they continue to be profitable.

28. Such restrictions are, the Authority contends, such as *"by their very nature have the potential of restricting competition..."*[1] It is necessary to examine the aims pursued by the agreement.[2] The purpose of the agreement is to be ascertained by reference to *"its terms, the legal and economic context in which it was concluded and the conduct of the parties..."*[3]

29. This is a set of agreements decisions or arrangements that is regarded as restrictive *by object.*[4] There is no definitive or exhaustive list of agreements or decisions regarded as restrictive *per se.* Reference was made to two decisions in which the Commission approved rationalisation arrangements pursuant to Article 81(3)EC: decision of 4th July, 1984, in *Synthetic Fibres*[5]; decision of the 29th April, 1994, in *Stichting Baksteen* (the "Dutch Bricks" case).[6] Although the Commission assessed each of the cases pursuant to Article 81(3)EC and

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[1] Commission Guidelines on the Application of Article 81(3), 2004 OJ C 101/97, para. 21.
[2] Joined cases 29 and 30/83 *Compagnie Royale Asturienne des Mines SA and another v Commission* [1984] 1679, para. 26.
[3] Joined cases 96 to 102 etc *NV IAZ International Belgium and others v Commission* [1983[ECR 3369.
[4] Commission notice on applicability of Article 81 to horizontal agreements (2001/C3/), paras. 18 and 25.
[5] OJ 1984 L 207/17 p. 0017 – 0025.
[6] OJ 1994 L 131/15 p. 0015 – 0022;

did not conduct a detailed analysis of the applicability of Article 81(1)EC, it is implicit that the arrangements involved were considered to be *prima facie* incompatible with the latter provision.

Contentions by BIDS

30. BIDS describes the Authority's interpretation of Article 81(1)EC as technical, dogmatic and artificial.

31. BIDS contends that an agreement between undertakings to effect a once-off reduction of excess capacity in an industry cannot be regarded *per se* in every case as an agreement to limit output and, as a consequence, a restriction of competition by object which is prohibited by Article 81(1)EC without the necessity to analyse the factual, economic and legal context of the agreement and the effects on the market concerned

32. The argument that output is limited *per se* when a player exits a market without consideration of whether there is output limitation in the market as a whole is erroneous and involves a misinterpretation of the concept of output limitation. If there is no limitation of output on a market-wide level (i.e. if sufficient capacity remains in the market to meet all throughput and there is no agreement between competitors to limit or control output to the market), there will be no limitation of output within the meaning of Article 81(1)EC. Under the BIDS arrangements, the stayers can increase capacity/production at will and the High Court found on the evidence that the exit of the goers would not limit overall industry output.

33. According to BIDS, a reduction in capacity cannot be equated with a limitation on output. This is particularly so when the capacity being reduced is excess capacity. A reduction in capacity is not anti-competitive unless the remaining capacity is insufficient and leads to resulting shortages. The arrangements seek to reduce excess capacity to achieve a more efficient allocation of resources in the Irish beef industry and to make it more competitive on

international markets. The arrangements would not result in a capacity shortage as was accepted by the High Court.

34. The Authority are criticised for failing to place the arrangements in their legal and especially their economic context. The arrangements can only be assessed in their economic context. BIDS contends that a reduction in capacity is not a "hardcore" restriction which absolves the Authority from conducting an assessment of the reduction of capacity in its legal and economic context. The list of "hardcore" restrictions depends upon the economic context in which an agreement is to be applied. BIDS argues that the legal commentary and case-law demonstrate that only a very limited class of agreements have been characterised as restrictive by object of their very nature, and those agreements involve pernicious restrictions on competition such as agreements as to price fixing, to limit output or share markets, which are so obvious as not to require consideration of their effect.

35. BIDS argues that the purpose of the levy is to provide financing which acts as an incentive for players to exit the market. Taking, in particular the argument that the levy will increase marginal costs and, therefore, prices, it was established in evidence that 90% of Irish beef is exported. Irish suppliers are "*price takers*" on the export market. They cannot pass on any increase in cost in the form of price. Thus, the levy can have no effect on prices for that 90% of production. The greater part of domestic sales (the remaining 10% of production) goes predominantly to a small number of supermarkets or multiples which notoriously have and exercise extremely strong bargaining power. The processors will, consequently, be compelled to absorb the cost of the levy. On the basis of a detailed assessment of the evidence, the High Court concluded that no significant increase in price and/or reduction in output, either in domestic or foreign markets, was likely to result from the arrangements. No conclusion as to likely price rises could be reached on the basis of a *per se* analysis.

36. Bids argues that, although specific rationalisation arrangements were found to come within the scope of Article 81(1)EC in the *Dutch Bricks* and *Synthetic Fibres* cases, there were

fundamental differences between those arrangements and the BIDS arrangements. In both *Dutch Bricks* and *Synthetic Fibres* the parties remaining in the industry undertook not to increase capacity and to limit production in the future. The position in both those cases was fundamentally different from the BIDS arrangements, which impose no restrictions on stayers' increasing production and/or capacity. T hose cases concerned limitation of output on a market-wide basis. Under the BIDS arrangements, overall market output will not decrease.

37. The category of restrictions deemed to be incompatible by object with Article 81(1)EC, sometimes called *per se* restrictions, is small and narrow.

Decision of Supreme Court

38. This reference is concerned only with the interpretation of Article 81(1)EC and then only insofar as that provision is concerned with arrangements or decisions which are restrictive *by object.* If Article 81(1)EC applies, the Court will be obliged, at a second stage, to consider the appeal insofar as it concerns the applicability of Article 81(3)EC.

39. The Court has not been referred to any sufficiently clear decision of the Court of Justice or other legal authority interpreting that provision for the purposes of the present appeal, although the attention of the Court has been drawn to the judgment dated 26th September 2006 of the Court of First Instance in Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission.*

40. The matters which have particularly arisen in argument are:

- whether the general prohibition of Article 81(1)EC and/or the specific prohibition in Article 81(1), paragraph (b) of measures which *"limit or control production"* should be interpreted as referring to or encompassing agreements to effect a once-off reduction in the capacity of an industry where there is no agreement to limit or control capacity or output;

- whether that paragraph should be interpreting as encompassing the provisions of the arrangements insofar as individual producers (processors) agree to cease production;
- whether an agreement between undertakings representing 93% of the producers to effect such a once-off reduction in capacity must be regarded as constituting a restriction by object of competition for the purpose of Article 81(1)EC;
- whether the ancillary restrictions on competition, and the use of land, the decommissioning and disposal of plant and/or the levy arrangements amount, independently, to restrictions by object for the purposes of that provision.

41. In these circumstances, the Court has decided to refer to the Court of Justice the following single question as sufficiently comprising the various arguments advanced.

"Where it is established to the satisfaction of the court that:

a) there is overcapacity in the industry for the processing of beef, which calculated at peak throughput, would be approximately 32%;

b) the effect of this excess capacity will have very serious consequences for the profitability of the industry as a whole over the medium term,

c) while, as reported, the effects of surplus requirements have not been felt to any significant degree as yet, independent consultants have advised that, in the near term, the overcapacity is unlikely to be eliminated by normal market measures, but over time the overcapacity will lead to very significant losses and ultimately to processors and plants leaving the industry;

d) processors of beef representing approximately 93% of the market for the supply of beef of that industry have agreed to take steps to eliminate the overcapacity and are willing to pay a levy in order to fund payments to processors willing to cease production, and

the said processors, comprising ten companies, form a corporate body, ("the society") for the purpose of implementing an arrangement with the following features:

1. *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,*

and that it is agreed that such an agreement is liable, for the purpose of application of Article 81(1)EC, to have an appreciable effect on trade between Member States, is such arrangement to be regarded as having as 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?