

JUDGMENT OF THE COURT (Third Chamber)

20 November 2008\*

In Case C-209/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Supreme Court (Ireland), made by decision of 8 March 2007, received at the Court on 20 April 2007, in the proceedings

**Competition Authority**

v

**Beef Industry Development Society Ltd,**

**Barry Brothers (Carrigmore) Meats Ltd,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues, U. Löhmus and P. Lindh (Rapporteur), Judges,

\* Language of the case: English.

Advocate General: V. Trstenjak,  
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2008,

after considering the observations submitted on behalf of:

- the Competition Authority, by V. Balaguer, acting as Agent, and D. McDonald SC, A. Collins SC and Ú. Tighe BL, instructed by D. McFadden, Solicitor,
  
- Beef Industry Development Society Ltd, by D. O'Donnell SC, M. Collins SC, D. Barniville SC and I. McGrath BL,
  
- the Belgian Government, by C. Pochet, acting as Agent,
  
- the Commission of the European Communities, by X. Lewis and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,

gives the following

## **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Article 81(1) EC.
  
- 2 The reference was made in proceedings between the Competition Authority, on the one hand, and Beef Industry Development Society Ltd ('BIDS') and Barry Brothers (Carrigmore) Meats Ltd ('Barry Brothers'), on the other, in respect of decisions of BIDS rationalising the beef and veal sector in Ireland.

### **The main proceedings and the question referred for a preliminary ruling**

- 3 It is apparent from the decision making the reference that the dispute before the Supreme Court arises in the context of overcapacity in the beef industry in Ireland and, more particularly, in the processing sector (slaughter and de-boning of meat).

- 4 A study carried out in 1998 at the joint request of the Irish Government and representatives of the beef industry concluded that it was necessary to reduce the number of processors from 20 to a figure between 4 and 6. The report also recommended that the undertakings which were to remain in the sector ('the stayers') should compensate those forced to withdraw ('the goers').
  
- 5 In 1999, a task force set up by the Minister for Agriculture and Food came to similar conclusions and recommended that the processors should create a compensation fund.
  
- 6 In accordance with those conclusions, the 10 principal processors formed BIDS on 2 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.
  
- 7 BIDS planned to implement that objective by means of agreements between the stayers and the goers, in the terms of a standard form of contract, the principal features of which are summarised in the following paragraph.
  
- 8 That standard form of contract provides that the stayers are to compensate the goers, the amount of that compensation to be determined by the parties. BIDS is to pay the compensation to the goers. The stayers are to repay BIDS by means of a levy of

EUR 2 per head of cattle up to their traditional cattle kill volume and EUR 11 above that volume. In return, the goers undertake:

- to decommission or put beyond use their processing plants or sell them only to persons established outside the island of Ireland, or, if necessary, to the stayers on condition that they be used as back-up equipment or spare parts;
- not to use the land on which those plants were situated for the purposes of beef or veal processing for a period of five years;
- not to compete with the stayers in the beef and veal processing market in Ireland for two years.

- 9 Barry Brothers is a beef and veal processing company. It made an agreement with BIDS complying with the features described in the previous paragraph.
- 10 BIDS notified the Competition Authority of that agreement and the standard form of contract ('the BIDS arrangements').
- 11 Having informed BIDS, on 5 and 26 June 2003, that it considered the BIDS arrangements contrary to Article 81(1) EC, the Competition Authority applied to the High Court, on 30 June 2003, for an order restraining BIDS and Barry Brothers from giving effect to them.

12 By judgment of 27 July 2006, the High Court dismissed that application. It held that the agreement between BIDS and Barry Brothers did not fall under the prohibition laid down in Article 81(1) EC but nor did it satisfy the requirements for exemption laid down in Article 81(3) EC.

13 The Competition Authority appealed against that decision to the Supreme Court, which decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘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 ... 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 10 companies, form a corporate body (“the society”) for the purpose of implementing an arrangement with the following features:

- [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;
  
- goers would sign a two year non-compete clause in relation to the processing of cattle on the entire 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 years;
  
- compensation would be paid to goers in staged payments by means of loans made by the stayers to the society;

- a voluntary levy would be paid to the society by all stayers at the rate of EUR 2 per head of the traditional percentage kill and EUR 11 per head on cattle kill above that figure;
  
- the levy would be used to repay the stayers' loans; levies would cease on repayment of the loans;
  
- 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;
  
- 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 question referred for a preliminary ruling

- 14 By its question, the national court asks, 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 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 have had anti-competitive effects.
- 15 It must be recalled that, to come within the prohibition laid down in Article 81(1) EC, an agreement must have ‘as [its] object or effect the prevention, restriction or distortion of competition within the common market’. It has, since the judgment in Case 56/65 *LTM* [1966] ECR 235, 249, been settled case-law that the alternative nature of that requirement, indicated by the conjunction ‘or’, leads, first, to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. Where, however, an analysis of the clauses of that agreement does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.
- 16 In deciding whether an agreement is prohibited by Article 81(1) EC, there is therefore no need to take account of its actual effects once it appears that its object is to prevent, restrict or distort competition within the common market (Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342, and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraph 125). That examination must be made in the light of the agreement’s content and economic context (Joined Cases 29/83 and 30/83 *Compagnie royale asturienne des mines and Rheinzink v Commission* [1984] ECR 1679, paragraph 26, and Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, paragraph 66).

- 17 The distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.
- 18 In their written observations submitted to the Court, the Competition Authority, the Belgian Government and the Commission of the European Communities all submit that the object of the BIDS arrangements is obviously anti-competitive so that there is no need to analyse their actual effects and that those arrangements were concluded in breach of the prohibition laid down in Article 81(1) EC.
- 19 On the other hand, BIDS submits that those arrangements do not come within the category of infringements by object, but should, on the contrary, be analysed in the light of their actual effects on the market. It argues that the BIDS arrangements, first, are not anti-competitive in purpose and, second, do not entail injurious consequences for consumers or, more generally, for competition. It states that the purpose of those arrangements is not adversely to affect competition or the welfare of consumers, but to rationalise the beef industry in order to make it more competitive by reducing, but not eliminating, production overcapacity.
- 20 That argument cannot be accepted.
- 21 In fact, to determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain. In that regard, even supposing it to be

established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed, 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 (*General Motors v Commission*, paragraph 64 and the case-law cited). It is only in connection with Article 81(3) EC that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article 81(1) EC.

22 BIDS argues, in addition, that the concept of infringement by object should be interpreted narrowly. Only agreements as to horizontal price-fixing, or to limit output or share markets, agreements whose anti-competitive effects are so obvious as not to require an economic analysis come within that category. The BIDS arrangements cannot be assimilated to that type of agreement or to other forms of complex cartels. BIDS maintains that an agreement on the reduction of excess capacity in a sector cannot be assimilated to an agreement to 'limit production' within the meaning of Article 81(1)(b) EC. That concept must be understood as referring to a limitation of total market output rather than a limitation of the output of certain operators who voluntarily withdraw from the market, without causing a lowering of output.

23 However, as the Advocate General pointed out in point 48 of her Opinion, the types of agreements covered by Article 81(1)(a) to (e) EC do not constitute an exhaustive list of prohibited collusion.

24 Therefore, it must be examined whether agreements with features such as those described by the national court have as their object the restriction of competition.

- 25 In BIDS' submission, if an agreement does not affect the total output on a market or obstruct operators' freedom to act independently, any anti-competitive effect can be excluded. In the main proceedings, the withdrawal of certain operators from the market is irrelevant, because the stayers are in a position to satisfy demand.
- 26 BIDS adds that the structure of the market does not allow the processors to influence it, since up to 90% of demand is from outside Ireland. On the Irish market, the power of the processors is largely counteracted by the purchasing power of the four major retailers. Account must also be taken of the competition which new operators entering the market concerned could bring about.
- 27 BIDS observes that the cases in which a limitation on output has been held to be infringement by object concerned agreements supplemental to horizontal price or production-fixing agreements (Commission Decision 80/1334/EEC of 17 December 1980 relating to a proceeding under Article [81] of the EEC Treaty (IV/29.869 — Italian cast glass) (OJ 1980 L 383, p. 19) and Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article [81] of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1)), to which the BIDS arrangements are not comparable.
- 28 BIDS submits that the Commission's decision-making practice and the case-law do not permit the conclusion that there is a restriction by object (see, in particular, Commission Decision 84/380/EEC of 4 July 1984 relating to a proceeding under Article [81] of the EEC Treaty (IV/30.810 — Synthetic fibres) (OJ 1984 L 207, p. 17)

and Commission Decision 94/296/EC of 29 April 1994 relating to a proceeding under Article [81] of the EC Treaty (IV/34.456 — Stichting Baksteen) (OJ 1994 L 131, p. 15) and Joined Cases T-197/97 and T-198/97 *Weyl Beef Products and Others v Commission* [2001] ECR II-303).

- 29 The BIDS arrangements cannot be compared to the freezing of capacities proposed by the liner conferences in Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1), since the freezing was not sufficient to eliminate over-capacities in the sector.
- 30 Finally, the BIDS arrangements provide for neither the freezing nor the non-use of capacity, nor exchange of information, nor quotas or other measures intended to preserve the stayers' market shares.
- 31 In that regard, it is apparent from the documents before the Court and from the information provided by the national court that the object of the BIDS arrangements is to change, appreciably, the structure of the market through a mechanism intended to encourage the withdrawal of competitors.
- 32 The matters brought to the Court's attention show that the BIDS arrangements are intended to improve the overall profitability of undertakings supplying more than 90% of the beef and veal processing services on the Irish market by enabling them

to approach, or even attain, their minimum efficient scale. In order to do so, those arrangements pursue two main objectives: first, to increase the degree of concentration in the sector concerned by reducing significantly the number of undertakings supplying processing services and, second, to eliminate almost 75% of excess production capacity.

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> 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.

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

<sup>37</sup> 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.

<sup>38</sup> 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.

40 In the light of the foregoing considerations, the reply to the question referred must be that 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 BIDS, 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.

## **Costs**

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**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.**

[Signatures]