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# ECJ's Ruling in Beef Industry Case: Competition Law Must Be Observed at All Times

(Competition Authority ⁄. Beef Industry Development Society Ltd. & Barry Brothers (Carrigmore) Meats Ltd.,
ECJ of 20 November 2008, C-209/07)

## (1) Facts and Procedure

In 1998, a study commissioned by the Irish Government and representatives of the beef industry reported that there was ***high overcapacity in the beef processing industry*** and forecasted that the overcapacity would lead to a decline in the profitability of the processing industry as a whole. The main reason of such overcapacity was the fact that in the past, beef processing industry was subject to extreme seasonal variations, which meant that high volumes had to be processed within the short timetable. Due to these specifics, the construction of new and upgrading of old plants was encouraged irrespective of the actual demand for beef. After the cattle breeding had been deseasonalized, excess capacities accumulated over time became more apparent. The specified study suggested that over time the falling profitability of processors will lead players in the processing sector to leave the market. As a solution to the above problems it was suggested that the ***number of beef processors should be reduced*** and recommended that undertakings leaving the market (***«Goers»***) ***should be compensated by*** those remaining (***«Stayers»***). In 1999 a task force set up by the Minister for Agriculture and Food came to the similar conclusions. As a result, in 2002, ten principal beef processors, producing about 93% of all beef sold in Ireland, established Beef Industry Development Society (BIDS), which prepared a rationalization plan suggesting reducing processing capacity by 25% in one year. Likewise, BIDS prepared standard contracts to be concluded between Goers and Stayers. According to the terms of standard contracts, the Stayers agreed 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. Correspondingly, Goers undertook (1) to decommission or put beyond use their processing plants; (2) 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; and (3) not to compete with the Stayers in the beef and veal processing market in Ireland for two years.

Barry Brothers was one of the prospective Goers, which concluded the standard contract with BIDS. BIDS notified the Irish Competition Authority about the contract with Barry Brothers and the content of the standard contract. The ***Competition Authority*** considered BIDS' arrangements to be ***contrary to Article 81(1) EC*** and applied to the Irish High Court for an order restraining BIDS and Barry Brothers from giving effect to them. The ***High Court*** held that the BIDS' standard ***agreements did not fall under the prohibition laid down in Article 81(1) EC*** because they did not have as their object the restriction of competition since they were not aimed at fixing prices, sharing customers, or limiting production for the purposes of Article 81(1)(a) to (c) EC and dismissed the Competition Authority's application. Likewise the High Court held that BIDS' agreements did not have as their effect a restriction of competition. It stated that reduction of total capacity could restrict competition only in the event of capacity shortage, which could lead to higher prices. Since beef production in Ireland was not expected to increase in the future, but rather to continue to decline, even if total capacity would be reduced as planned by BIDS, all beef would be processed and prices would not rise. Notably, the High Court also found that the conditions of Article 81(3) EC were not satisfied. However, this did not change the final result, because the prohibition criteria contained in Article 81(1) were not satisfied either.

The ***Competition Authority*** disagreed with the High Court and ***appealed*** against that decision to the ***Supreme Court***, which decided to stay the proceedings and make a ***reference to the ECJ***. The Supreme Court asked the ECJ whether BIDS' standard contract had as its object, as distinct from effect, the prevention, restriction or distortion of competition within the common market and therefore, had to be declared incompatible with Article 81(1). Hence, by its ***question***, the Supreme Court inquired whether agreements with features such as those of the BIDS ***arrangements*** are to be regarded, ***by reason of their object alone***, as being anti-competi-

tive 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.

The ***Competition Authority*** supported by the Belgian Government and the Commission argued that the ***object*** of the BIDS agreements was ***obviously anti-competitive*** so that there was no need to analyze their actual effects and that those arrangements were concluded in breach of the prohibition laid down in Article 81(1) EC. In response, ***BIDS*** argued that its agreements did not fall into the category of infringements by object, but had to be analyzed in the light of their actual effects on the relevant market. It stated that the ***purpose*** of those agreements was not to affect competition or the welfare of consumers, but ***to rationalize the beef industry*** in order to make it more competitive by reducing, but not eliminating, production overcapacity. Furthermore, BIDS suggested that the ***concept of infringement by object should be interpreted narrowly***. More specifically, BIDS contended 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. It also pointed out that the existing case law in which a limitation on output has been held to be an infringement by object, mainly concerned agreements supplementary to horizontal price or production-fixing agreements, which was not the case with the BIDS arrangements. Thus, as AG *Trstenjak* observed in her Opinion,[1] BIDS equated «restrictions of competition by object» with ***hard-core restrictions*** and agreements which restrict competition *per se*, which encompasses only a limited number of serious restrictions of competition such as price-fixing agreements and agreements to limit output or to share markets or customers.

(2) **Judgment**

The Court rejected the argument of BIDS that the arrangements in question should be analyzed in the light of their actual effects on the market and clarified the conditions for the application of Article 81 EC. The Court pointed out that to come within the prohibition laid down in Art. 81(1) EC, an agreement must have as its ***object or effect*** the prevention, restriction or distortion of competition within the common market. Referring to the settled case law,[2] the Court emphasized that the ***alternative nature*** of that requirement, indicated by the conjunction «or», required a two-step application of Article 81(1) EC, the first step being the examination of the precise purpose of the agreement in the economic context in which it was to be applied.[3] Therefore, if the question regarding the anticompetitive object of the contract would be answered positively, there would be no need to consider the issue of competitive effects.

Turning to the examination of the purpose, the ECJ also did not accept BIDS' submission that the notion of infringement should be construed narrowly and encompass only those agreements that are expressly covered by the by Article 81(1)(a) to (e) EC. Concurring with the position of the AG *Trstenjak* the ECJ held that the notion of ***restriction of competition by object cannot be reduced to*** some kind of ***exhaustive list***. Notably, the words «in particular» in Article 81(1) EC imply that the restrictions of competition covered by Article 81(1) EC are not limited to the restrictions of competition mentioned in Article 81(1)(a) to (e) EC. Thus, the ECJ decided to examine whether agreements with features such as those drafted by BIDS had as their object the restriction of competition.

Likewise, the ECJ rejected BIDS' argument regarding the justifiable objective of the agreements. Referring to *General Motors ⁄. Commission*[4] it emphasized that an agreement may be regarded as having a ***restrictive object even if*** it does not have the restriction of competition as its sole aim but also pursues ***other legitimate objectives***. In relation to the object, the Court found that the BIDS arrangements were intended to improve the overall profitability of undertakings supplying more than 90% of the 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 pursued two main objectives: (1) to increase the degree of concentration in the sector concerned by reducing significantly the number of undertakings supplying processing services and (2) to eliminate almost 75% of excess production capacity. The ECJ held that while the ***competition rules*** of the EC Treaty are ***based on the concept of independence in decision-making*** exercised by market participants, the BIDS agreements in essence enabled 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.

The ECJ then conducted a detailed examination of the particular elements of the BIDS arrangements.

Assessing the effect of the ***levy of EUR 11 per head*** of cattle slaughtered ***beyond the usual volume*** of production of each of the Stayers the Court concluded that such a measure also constituted an obstacle to the natural development of market shares as regards some of the Stayers who, because of the ***dissuasive nature*** of that levy, would be deterred from exceeding their usual production volumes. Similarly, the Court found that the ***restrictions imposed on the Goers*** as regards the disposal and use of their processing plants were, by their very object, ***restrictions on competition*** since they were designed to avoid the possible use of those plants by possible new entrants who could then compete with the Stayers. In regards to the non-compete clauses imposed on Goers, ECJ noted that even though they were limited in time, this could not preclude the finding as to the anti-competitive nature of the object of the BIDS agreements.

ECJ concluded that an agreement with features such as those of the standard form of contract concluded between BIDS' members, 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.

(3) **Commentary**

The importance of the ECJ's *Beef Industry* judgment is at least two-fold: (1) in relation to application of the Article 81 EC the Court clarified that the concept of ***«agreements by object»*** is ***not limited to*** the ***hard-core restrictions*** listed in the Article 81(1) EC, and confirmed the step-by-step method for assessing the compatibility of an agreement with the specified legal rules; (2) the judgment also sent a more general message to undertakings, who following the decentralization of competition law enforcement brought about by Regulation 1/2003[5] appeared in a position where they have to make their own assessment of the compatibility of their agreements and common policies with the competition rules. In particular, the judgment gives a ***clear warning*** to distressed industries that ***hard economic times do not justify anti-competitive agreements and practices***.

(a) Application of Article 81 EC

One of the essential arguments advanced by the BIDS in this case was the proposition that since the BIDS arrangement did not fit into the list of hard-core restrictions provided by Article 81(1) EC, the assessment of compatibility should be focused on the effects on competition. By rejecting this argument the ECJ emphasized the step-by-step application of Article 81 EC. Generally, Article 81 EC provides for a ***two-step examination***. An agreement is compatible with the common market if either it does not come under the fundamental ***prohibition laid down in Article 81(1) EC*** or it does come under that prohibition, but satisfies the ***conditions in Article 81(3) EC***. It is important to note that Article 81(1) EC prohibits agreements which have the object «or» effect of preventing, restricting or distorting competition. According to the case law of the Community Courts confirmed in the present case, the ***object and effect*** of an agreement have ***to be analyzed separately*** when determining whether Article 81(1) EC applies. If an agreement is found to have an anti-competitive object, then there is no need to establish whether it also has an anti-competitive effect. By its ruling, the ECJ made it clear that no obvious restriction of competition is required for the existence of a restriction of competition by object. Likewise, the Court emphasized that there is no exhaustive list of restrictions of competition by object. Naturally, undertakings reviewing the compatibility of their agreements with Article 81 EC should keep in mind that the «object» is only one part of the Article 81(1) EC analysis, and when assessing whether an agreement or arrangement is anti-competitive, they may also need to consider the «effects» of the agreement on competition.

The present case also demonstrated that an approach whereby an agreement is compared with examples of the typical restrictions might not always be suitable and might finally fail to address the issue of whether a restriction of competition by object exists. The preceding case law related to the limitation of output seemed to support BIDS' contention because previous infringements usually concerned agreements supplementary to horizontal price or production-fixing, which was not the situation in the present case.[6] This again emphasized the ***need for close consideration of the economic circumstances*** in which the agreements or common policy are to be applied. In this regard AG *Trstenjak* provided an illustrative example comparing this case to the judgment in *GlaxoSmithKline*.[7] In that case, which concerned vertical price regulation, the prices were determined by the statutory rules and were largely unaffected by the interplay between supply and demand. According to AG *Trstenjak* in such a case there could be doubts as to whether vertical price regulation can restrict competition in the meaning of Article 81(1) EC. However, in the present case the economic context was very different because

there were no statutory provisions, which might prevent benefits stemming from competition between Stayers from being passed onto consumers. Additionally, BIDS' arrangements concerned agreements among competitors, which attempted to reduce the number of market players by means of a common policy, which would produce results potentially unattainable under competitive conditions.

Despite the above considerations, the Commission although applauding the ECJ's ruling in the present case, seems to understand its significance in a somewhat different light. It should be reminded that in the written observations submitted to the ECJ the Commission, joined on this point by the Irish Competition Authority and the Belgian Government, argued that the object of the BIDS arrangements is ***obviously anti-competitive*** so that there is no need to analyze their actual effects and that those arrangements were concluded in breach of the prohibition laid down in Article 81(1) EC. Following the delivery of the judgment, the Commission in its press release stated that «*the ECJ ruling is important because it confirms that agreements between competitors to restrict capacity or production are hardcore restrictions of competition which very often harm consumers*».[8] Thus, the Commission appears to underestimate the importance of the ECJ's assessment of the «restriction by object» carried out in the particular economic context of the present case, as well as the explicit statement by the Court that there should not be an exhaustive list of restrictions of competition by object and the conclusion of AG *Trstenjak* that «*Article 81(1) EC does not involve an examination of whether the restriction of competition is so obvious or objectionable that it may be compared with a typical cartel*».[9] In light of the ongoing decentralization and privatization of competition law enforcement, when the national competition authorities and courts apply Article 81(1) and (3) EC directly, such an approach could provide additional legal certainty by labeling all kinds of capacity restrictions as hard-core anticompetitive agreements. This however, seems to divert attention away from the detailed assessment of the challenged agreements in the given economic context as well as the possible necessity to evaluate the competitive effects of the specified agreements, which might require a detailed economic analysis of the competitive conditions on the given market.

(b) Application of Competition Rules in General

On a more general note, the ECJ's judgment makes a strong statement for the applicability of competition law regardless of the underlying economic situation on the particular market. According to the ECJ, the pursuit of a legitimate objective does not preclude the existence of a restriction of competition by object.[10] ***Article 81(1) EC*** thus also ***applies to agreements*** which are ***aimed at addressing a crisis*** or financial hardships in times of economic recession. Any different view is not compatible with the purpose of Article 81 EC. As noted by the AG *Trstenjak* in her Opinion, «*[i]t must be borne in mind that the fact that a sector is experiencing a cyclical or structural crisis does not mean, according to settled case-law, that Article 81(1) EC does not apply*».[11]

Although based on particularities of the Irish beef processing industry, the judgment sends a clear message to the companies and governments that even in times of economic difficulties and recession, the competition rules have to be observed and the legitimate goals should be pursued by the appropriate means that do not undermine the core principles of the free market competition embedded in the EC Treaty. It is especially relevant today when various industries might experience the effects of the global financial crisis, which might equally cause overcapacities and decrease in profitability. The judgment calls on the companies to be very careful in formulating potential common policies remedying overcapacity. Naturally, ***Article 81(3) EC provides an opportunity for exemption*** and the ECJ ruling did not expressly exclude the possibility that reduction of excess capacities could lead to economies of scale by the Stayers. It remains left to the Irish courts to conduct an assessment under Article 81(3) of whether the positive effects outweigh the negatives ones. However, while the Article 81(3) conditions are generally difficult to satisfy, such common policies should be designed under close scrutiny for potential anticompetitive objects and effects.

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1 Opinion of AG *Trstenjak* of 4 September 2008, C-209/07 *Competition Authority ⁄. Beef Industry Development Society Ltd. & Barry Brothers (Carrigmore) Meats Ltd.*

2 CJ [1966] ECR 235, 249 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.).*

3 The ECJ referred to ECJ [1984] ECR 1679 *Compagnie royale asturienne des mines and Rheinzink ⁄. Commission*, para 26, and ECJ [2006] ECR I-3173 *General Motors ⁄. Commission*, para 66.

4 ECJ [2006] ECR I-3173 *General Motors ⁄. Commission.*

5 Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, last amended by Council Regulation No 1419/2006 [2006] OJ L 269/1.

[6] Commission Decision 80/1334/EEC of 17 December 1980 (IV/29.869 – *Italian cast glass*) (OJ 1980 L 383, p. 19) and Commission Decision 94/601/EC of 13 July 1994 (IV/C/33.833 – *Cartonboard*) (OJ 1994 L 243, p. 1).

[7] CFI [2006] ECR II-2969 *GlaxoSmithKline Services ⁄ Commission*.

[8] Antitrust: Commission welcomes Court ruling in Irish beef case, Brussels, 20 November 2008, MEMO 08/728.

[9] Opinion, para 97.

[10] ECJ [1983] ECR 3369 *IAZ International Belgium and Others ⁄ Commission*, paras 22-25.

[11] Opinion, para 98, referring to CFI [2006] ECR II-4987 *FNCBV ⁄ Commission*, para 90, and CFI [1999] ECR II-931 *Limburgse Vinyl Maatschappij and Others ⁄ Commission*, para 740.

## I. 2

## Kurzinformation

## Commission publishes Guidance on Application of Article 82 to Exclusionary Conduct by Dominant Undertakings

*On 3 December 2008, the Commission has published a draft «Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings». The draft is the latest step in the Commission's reflection process concerning the application of Article 82 which begun in 2005. According to the Commission's website, the guidance paper «sets out an economic and effects-based approach to exclusionary conduct under EC antitrust law [...as it] has already been used in recent Article 82 cases, including Wanadoo, Microsoft and Télefonica».*

*The final text is still subject to legal linguistic revision and will be published in the Official Journal. The draft paper is accessible on the website of DG Comp at http://ec.europa.eu/competition/antitrust/art82/guidance.pdf (mae)*