The Irish beef case: Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats (C-209/07), European Court of Justice.

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Case: Competition Authority v Beef Industry Development Society Ltd (C-209/07) Unreported November 20, 2008 (ECJ)

*E.C.L.R. 198 Introduction

This case concerns the beef processing sector in Ireland. In this industry cattle is slaughtered and de-boned before it is sold on. Following a sharp downturn in overall demand for these services, industry representatives agreed on a limitation of the existing overcapacity. The question before the Court was whether these agreements have an anti-competitive object.

Facts

In 1998 McKinsey published a report that concluded that the Irish beef processing industry was in a dire state. The McKinsey study observed that the sector's profitability was under pressure due to lower demand and the resulting overcapacity. A 1999 report by the so-called “beef task force” (set up by the Irish Ministry for Agriculture and Food) accepted these findings and concluded that there would be considerable benefits if a rationalisation scheme were to be adopted leading to a better matching of capacity and actual requirements. One of the recommendations of this report was that the industry should create a special buyout fund to facilitate the removal of excess capacity.

In 2002 the 10 biggest meat processors in Ireland created the Beef Industry Development Society (BIDS). The BIDS agreed on a scheme which envisaged that plants processing up to 25 per cent of all cattle per year would leave the industry by agreement. The processors which were to leave the market (the so-called “Goers”) would be compensated by the “Stayers” through the BIDS. The Stayers would pay a levy to BIDS of ? ?2 per head of cattle up to their traditional processing volume and ? ?11 above that level. In return, the Goers agreed to decommission their processing plants and accept restrictions on the sale and future use of their equipment and land for a period of five years. In addition, the Goers consented not to compete with the Stayers in the beef and veal processing market in Ireland for a period of two years.

Irish High Court

In 2003, after having examined this scheme, the Irish Competition Authority made an application to the Irish High Court for an order restraining BIDS from giving effect to the arrangements. The High Court rejected the application.[1] It concluded that the three main features of the rationalisation scheme objected to by the competition authority (concerning the capacity reduction, the imposition of a levy on the Stayers, and the restrictive covenants on the Goers) did not have the object of restricting competition:

“As appears from its rules […] the fundamental purpose for establishing the society was to implement the conclusions and recommendations of both the McKinsey report and the report of the Beef Task Force. Having carefully considered its proposals to achieve this end, I cannot see any provision or clause which could be said to fix prices or share customers. Nor do I believe that the arrangements

can in any way be described as plainly or evidently limiting output, sharing markets or prohibiting investment."[2]

Moreover, the Irish High Court seemed to be convinced there was still a sufficient level of competition in the market:

" […] there is no injunction on those who might remain in the industry to reduce output or indeed even to freeze it at a certain level. […] Such players and each one of them, would be entirely free to increase production within their plants if they so wished. Unless therefore, a reduction *per se* in capacity must necessarily be equated with a ***E.C.L.R. 199** limitation on output, which in my view is unlikely, […] then I cannot see how the arrangement is objectionable in this regard; which is of course the major suggested violation by object restriction".[3]

The Irish High Court concluded that, on a balance of probabilities, the arrangements did not merit a finding of an anti-competitive object.[4] Following this decision the Competition Authority appealed to the Irish Supreme Court, which subsequently made a reference for a preliminary ruling to the European Court of Justice (ECJ). In essence, the question referred was whether arrangements such as those proposed in the BIDS scheme are to be regarded as having an anti-competitive object.

Trstenjak A.G.'s opinion

In September 2008, Trstenjak A.G. submitted her opinion in which she reached a diametrically opposed conclusion to that of the Irish High Court.[5] She disagreed with the narrow way in which the Irish High Court dealt with art.81(1) of the EC Treaty prohibition, recalling that "the notion of restriction of competition by object cannot be reduced to an exhaustive list".[6] Indeed, the fact that this list of conduct is preceded by the words "in particular" leaves little room for any other conclusion. So not just "price fixing, market sharing or the control of outlets" can be considered as object restrictions, even though these may be the first that spring to mind.[7] The Advocate General points out that there is no need to decide whether or not the BIDS arrangements are a "limitation of production" for the purposes of art.81(1)(b) of the EC Treaty; in any case they may be dealt with under the general prohibition of art.81(1) of the EC Treaty.[8]

The Advocate General's economic analysis of the situation is quite different from the Irish High Court as well. She emphasises that per unit productions costs could be lowered in individual plants by increasing the capacity utilisation rate.[9] So even in a sector where overall demand is going down:

"… a producer can attempt to concentrate a larger proportion of demands on itself and thereby increase its utilization rate and achieve economies of scale".[10]

The industry's overall state is not considered as particularly relevant; "the fact that their sector is experiencing a cyclical or structural crisis does not mean […] that Article 81(1) does not apply".[11]

The Advocate General concluded that the BIDS agreements were anti-competitive by object. In particular, the staging of the levies and the restrictions on use and disposal are very likely to deter a Stayer from increasing its production, thereby limiting output.[12]

European Court of Justice

The European Court of Justice (ECJ) laid down its decision on November 25, 2008, less than three months after the Advocate General published her opinion.[13] The six-page judgment is impressive both in its succinctness and its clarity. Like the Advocate General, the ECJ is sceptical about the arrangements. In assessing the goal of the scheme, the ECJ deems the subjective intention of the parties as "irrelevant".[14] It restates the principle that an object restriction can be found even if the agreement does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.[15]

Not surprisingly, the ECJ rejected BIDS' submission that the arrangements were not covered by art.81(1)(b) of the EC Treaty, which prohibits the limiting of production. Just like the Advocate General, the ECJ firmly stated that the types of agreements listed in art.81(1)(a)-(e) "do not constitute an exhaustive list of prohibited collusion".[16]

Crucially, the ECJ was convinced that:

"… the object of the BIDS arrangements is to change, appreciably, the structure of the market through

a ***E.C.L.R. 200** mechanism intended to encourage the withdrawal of competitors".[17]

Such a scheme "conflicts patently" with the principles underpinning the EC Treaty that "each economic operator must determine independently the policy which it intends to adopt on the common market".[18]

Apart from these observations concerning the purpose of the arrangements, the ECJ also ruled that the means put in place to attain the objectives of the scheme also had an anti-competitive object.[19] This was mainly due to two reasons. First, the levies that the Stayers were to pay to the Goers are likely to dissuade Stayers from exceeding their usual volumes, since the marginal charge due would in such an event be increased from ? ?2 to ? ?11 per head of cattle.[20] Secondly, the obligations on Goers to decommission their processing plants will prevent new operators from using these plants to enter into the market and compete with the Stayers.[21]

Competition law analysis of a "crisis cartel"

As the ECJ noted on the object restriction:

"… certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition".[22]

Any agreement between competitors that aims to reduce (excess) capacity is highly likely to fall under this prohibition. Unlike the approach by the Irish High Court, the ECJ stressed that the art.81(1) of the EC Treaty prohibition should not be interpreted in a formalistic and narrow way. The ECJ, quite rightly, focused on how the arrangements were likely to work in practice. It seems undeniable that the agreement under review was expressly intended to change the structure of the market, not least because it enabled arbitrary top-down choices as to who was to go and who was to stay. In addition, the arrangements were very likely to dissuade expansion of production, even by efficient firms, and block any entry by new competitors.

The most important feature of the judgment is the way in which the ECJ interprets the object restriction. Even though the art.81(1) assessment of an agreement must be always made in the light of its "economic context",[23] the existence of an industry-wide crisis seems to have little influence on the application of the cartel prohibition. This includes crises that are structural in nature. The "economic context" lens through which one must observe the relevant behaviour thus appears to largely exclude general market conditions.

Although this approach may sound harsh, the ECJ deserves praise for keeping the art.81(1) of the EC Treaty analysis as "pure" as possible. This seems sensible, as the existence of art.81(3) makes it unnecessary to adopt a rule of reason-like approach as to art.81(1) of the EC Treaty. Moreover, this approach keeps courts from making decisions which should preferably be left to either the market or policymakers at best.

This judgment may serve as an important warning in these times of economic turmoil. As businesses face tougher times, some may be tempted to consider competition law as a possible obstacle for the economy's recovery. They should be advised that the ECJ will apply the cartel rules even if a sector is in crisis. Presumably the conciseness of the judgment, as well as the short drafting period, are additional indications of the ECJ's willingness to set a strong precedent in these difficult times.

Effects of the BIDS arrangements

Even though this case was decided on the basis of the object restriction, which made it unnecessary to look into the effects of the agreement,[24] it is interesting to have a closer look at the possible consequences of the BIDS scheme.

One could argue, like BIDS did, that the restriction of overcapacity does not have anti-competitive effects, as this part of capacity is not in use anyway. Indeed, one could even say that this agreement *enhances* economic efficiency, since slashing unused capacity improves the utilisation rates of the remaining processing plant. In addition this may even lead to lower consumer prices as overall costs are trimmed down.

Even though these arguments may appear convincing at first sight, the obvious counterclaim would be that collusion (such as in the BIDS scheme) is simply the wrong means to achieve a more efficient outcome. The overcapacity should have meant that relatively inefficient firms would go out of

business, while efficient firms would remain on the market. These latter firms may ***E.C.L.R. 201** even, with fewer competitors in the business, be able to increase production notwithstanding the overall decline in demand. This would eventually have provided the most efficient result for the economy as a whole. The BIDS scheme, however, was unable to ensure that the most efficient firms would be able to get the largest slice of production. And even if it were, a top-down approach should not be preferred if the market_s invisible hand is able to deal with the case anyway.

The Government's involvement

The case is also interesting because of the high level of government involvement in this agreement. It seems clear from the facts that the Irish Government was a strong and active supporter of the BIDS scheme. The Government was involved in the adoption of the McKinsey report as one of the representatives at the steering committee. The beef task force, which brought forward the other major report, was actually set up by the Ministry for Agriculture and Food. These reports laid down the strategic thinking underpinning the BIDS scheme.

As will be obvious from the final outcome of the case, the involvement of the Government does not in itself preclude, or indeed influence, the application and interpretation of art.81(1) of the EC Treaty. The Irish Competition Authority deserves praise for taking an independent line from its own Government. One could wonder, however, if a tough line on competition law is maintainable in the future if the economic crisis will continue to exert pressure on governments and competition authorities alike.

Conclusion

This ruling is worthy of note in these times of economic turbulence. With consumer spending falling rapidly, the economic crisis is likely to lead to overcapacity in many industries. Companies are to be advised that the crisis as such will not preclude their agreements from falling within the scope of the object restriction of art.81(1) of the EC Treaty.

Any limitation of capacity by agreement, even if it concerns excess capacity, is very likely to be considered anti-competitive by object. This not only means that the competent competition authority does not have to prove the actual effects of such an agreement, but also that it will be particularly difficult to successfully put forward a justification under art.81(3) of the EC Treaty.

Tjarda van der Vijver is reading for a Specialist Master in Competition Law and Economics at King's College London.

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2. *Beef Industry Development Society Ltd* [2006] I.E.H.C. 294 at [98].
3. *Beef Industry Development Society Ltd* [2006] I.E.H.C. 294 at [98].
4. *Beef Industry Development Society Ltd* [2006] I.E.H.C. 294 at [98].
5. *Competition Authority v Beef Industry Development Society* (C-209/07) [2009] 4 C.M.L.R. 6, per Trstenjak A.G.
6. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6, per Trstenjak A.G. at [48].
7. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6, per Trstenjak A.G. at [49].
8. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6, per Trstenjak A.G. at [106].
9. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6, per Trstenjak A.G. at [68].
10. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6, per Trstenjak A.G. at [75].
11. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6, per Trstenjak A.G. at [98]. The Advocate General refers to *Federation Nationale de la Cooperation Betail et Viande* (*FNCBV) v Commission* of the European Communities (T-217/03 & T-245/03) [2006] E.C.R. II-239, at [90] and *Limburgse Vinyl Maatschappij v Commission of the European Communities* (T 305, 313-316, 318, 325, 328 and 335/94) [1999] E.C.R. II-931 at [740].
12. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6, per Trstenjak A.G. at [107]-[108].
13. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6.
14. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6 at [21].
15. The Court refers to *General Motors BV (formerly General Motors Nederland BV) v Commission of the European Communities* (C-551/03 P) [2006] E.C.R. I-3173 at [64].

16. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6 at [23].
17. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6 at [31].
18. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6 at [34].
19. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6 at [36].
20. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6 at [37].
21. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6 at [38].
22. *Beef Industry Development Society* [2009] 4 C.M.L.R. 6 at [17].
23. *Compagnie Royale Asturienne des Mines v Commission of the European Communities* (29/83) [1984] E.C.R. 1679; sub nom. *Rheinzink v Commission of the European Communities* (30/83) [2006] E.C.R. I-3173 at [26] and *General Motors* [2006] E.C.R. I-3173 at [66].
24. *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* (C-105/04 P) [2006] E.C.R. I-8725 at [125].