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IRISH SUPREME COURT REFERS A QUESTION ON THE INTERPRETATION OF ARTICLE 81(1) EC TO THE EUROPEAN COURT OF JUSTICE

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On 27th July, 2006, the High Court rejected a challenge brought by the Competition Authority in respect of a scheme to rationalise the beef processing industry in Ireland. The Competition Authority initiated proceedings against the Beef Industry Development Society Limited (“**BIDS**”) and another in June 2003 seeking a declaration that the BIDS rationalisation scheme infringed Section 4(1) of the Competition Act, 2002 (the “**Competition Act**”) ¹ and Article 81(1) of the EC Treaty ². The High Court held that the BIDS rationalisation scheme was not an infringement of Article 81(1) EC by object or effect ³.

The BIDS rationalisation scheme was encouraged by the Irish Government following the State-funded commissioning of two independent reports which demonstrated that there was

¹ Section 4(1) of the Competition Act, which is based by analogy on Article 81(1) of the EC Treaty, prohibits arrangements between undertakings and decisions by associations of undertakings that have as their object or effect the prevention, restriction or distortion of competition in trade in goods or services in Ireland or in any part of Ireland.

² The High Court considered the case under Article 81(1) of the EC Treaty only on the basis of Article 3(1) of Council Regulation (EC) 1/2003.

³ The High Court judgement went on to address Article 81(3) EC also but this aspect of the case is not considered here as the ECJ reference is in relation to Article 81(1) EC only.

substantial overcapacity in beef slaughtering facilities in Ireland and that this was leading to a lack of competitiveness in the industry. The State called for the BIDS rationalisation scheme, but left its implementation to the Irish beef industry.

This case is an example of circumstances where a national competition authority has sought to rely on EC competition law in national courts in order to block industry initiatives which are encouraged by government.

The Competition Authority appealed the High Court ruling to the Supreme Court. On the 8th March, 2007, the Supreme Court decided to make a reference to the European Court of Justice (“ECJ”) in order to obtain an interpretation of Article 81(1) EC. The Supreme Court is seeking a clarification as to whether or not an arrangement agreed between Irish beef processors to effect a once-off reduction of excess capacity is “...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)...”

The ECJ’s decision should be important for all courts and competition authorities throughout Europe as it will be the first time since the coming into force of Regulation (EC) 1/2003 that the ECJ will have been called upon to interpret the scope of that category of arrangements deemed to be incompatible with Article 81(1) EC by virtue of their object without the need to consider their effects.

To date, case law has established that so called “hard-core” restrictions of Article 81(1) EC such as agreements between competitors to fix prices, share markets, exchange confidential information and limit output are generally to be considered by their nature as restrictive of competition by object without the need to consider their effects. The question for the ECJ is essentially whether the BIDS rationalisation scheme which involves an agreed once-off reduction in excess capacity falls into this category of agreements.

In summary, the Competition Authority’s main argument is that the BIDS rationalisation scheme should be equated with an agreement to limit output and should, therefore, be considered as a restriction of competition by object without the need to consider effects on the markets in question. In summary, BIDS’ main argument is 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.

In the new era of “self assessment” of agreements for their compatibility with Article 81 EC, following the introduction of Regulation (EC) 1/2003, the clarification of the scope of Article 81(1) EC to be provided by the ECJ in this case will be important for firms and legal advisors across the EU. The case law on Article 81(1) is relatively under developed and is, in any event, case law established prior to Regulation (EC) 1/2003, at a time when national courts rarely handed down decisions applying Article 81(1) EC given the European Commission’s then exclusive jurisdiction to apply Article 81(3) EC.

The author, together with Richard Ryan of Arthur Cox, is acting for BIDS in relation to the ECJ reference and acted for BIDS in the Irish High Court and Supreme Court proceedings.