# OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 4 September 2008 [1]

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## I — Introduction

1. This reference for a preliminary ruling concerns the interpretation of the notion of restriction of competition by object contained in Article 81(1) EC. The economic background is the overcapacity noted by the referring court in the Irish beef processing industry ('the processing industry'). The processing industry purchases cattle from breeders, slaughters and de-bones them, and then sells the beef in Ireland and abroad. The processors wish to reduce the overcapacity through agreed arrangements.

2. With the question it has referred for a preliminary ruling, the national court is seeking to ascertain whether the notion of restriction of competition by object contained in Article 81(1) EC is to be interpreted as covering the processors' arrangements. The question is thus limited in two respects. First of all, it relates only to arrangements which have as their object the restriction of competition, but not those which have as their effect the restriction of competition. Secondly, it merely asks whether the arrangements come under the fundamental prohibition of agreements restricting competition contained in Article 81(1) EC; it is not to be examined whether the arrangements may nevertheless be compatible with the common market under Article 81(3) EC on account of their positive effects.

## II — Legal framework

3. Article 81(1) EC provides that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties,

thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

are prohibited as incompatible with the common market.

4. Under Article 81(3) EC, the provisions of Article 81(1) EC may, however, be declared inapplicable in the case of

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

5. Article 1(1) and (2) of Council Regulation (EC) 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 [2] provides:

2 — OJ 2003 L 1, p. 1.

'1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.

2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.'

**III — Facts, main proceedings and question referred for a preliminary ruling**

A — *Facts of the case*

6. The overcapacity which exists in the Irish processing industry according to the order for reference can be explained in particular by the following reasons. In the past the construction and upgrading of processing plants were heavily supported irrespective of actual demand for beef. Furthermore, the quantity of beef to be processed was formerly subject to extreme seasonal variation. This meant that a high processing volume had to be handled at seasonal peaks. Cattle breeding has now been deseasonalised. Seasonal fluctuations do still occur to a certain extent. However, the total capacity of processing plants now exceeds the processing volume by around 32% even at seasonal peaks.

7. Because the beef sector plays an important role in the Irish national economy, the Irish Government and representatives of the processing industry commissioned a firm of economic consultants to conduct a market study. The objective of the market study was to identify initiatives that would maximise the long-term profitability of all players in the Irish beef sector.

8. The market study, which was published in 1998, found that there was high overcapacity in the processing industry and forecasted that the overcapacity would lead to a decline in the profitability of the processing industry as a whole. That forecast was essentially based on the following consideration: a processor's profit is determined by the margin between the purchase price for the cattle and the processing costs, on the one hand, and

the selling price for the beef, on the other. A processor's profit level depends in particular on capacity utilisation in the processing plant and on overcapacity. Where there is higher utilisation of capacity, economies of scale are achieved, reducing processing costs. Overcapacity stimulates competition between processors in the sale of beef, resulting in falling prices. The study also forecasts that over time the falling profitability of processors will lead to players in the processing sector leaving the market.

9. The market study proposes the solution of reducing the number of processors in the processing industry. A compensation system would offer incentives to exit the market. The market study emphasised the cost benefits for the processing industry as a whole, which it estimated at IEP 18 million; accompanying efficiency measures could result in cost benefits of a further IEP 14 million.

10. A Beef Task Force, established by the Minister for Agriculture and Food, delivered a report in 1999. That report acknowledged the findings of the market study and called on the processing industry to implement the study.

11. In 2002 processors formed the Beef Industry Development Society Ltd (BIDS). The present members of BIDS produce about 93% of the beef sold in Ireland. The object of BIDS is to implement the market study produced by the firm of economic consultants and the report delivered by the Beef Task Force. To that end BIDS formulated an arrangement ('the BIDS arrangement'). The aim of the BIDS arrangement is to reduce the total capacity of the processing industry by 25% within one year. For that purpose the BIDS arrangement provides as follows.

12. Some of the processors which are members of BIDS ('goers') are to enter into agreements with BIDS in which they undertake to leave the processing industry, to decommission their processing plants and to respect a two-year non-compete clause ('exit agreements'). The exit agreements are also to include the obligations not to use land associated with the decommissioned plants for the purposes of beef processing for a period of five years ('restriction on use') and to sell the equipment used for primary beef processing to processors in Ireland only for use as back-up equipment or spare parts, or otherwise only outside Ireland ('restriction on disposal'). It is not possible to decommission individual processing plants of a processor. BIDS has already concluded an exit

agreement with the processor Barry Brothers (Carrigmore) Meats Ltd ('Barry Brothers').

13. In return, goers are to be compensated by BIDS. Internally, the compensation payments are to be financed by the members of BIDS which stay in the processing industry ('stayers').

14. Payments of the levies are staged. If the stayers do not exceed their traditional percentage kill, a levy of EUR 2 per head is incurred; if they exceed their traditional percentage kill, the levy rises to EUR 11 per head for each animal above the traditional percentage kill. The traditional percentage kill is based on a processor's average percentage kill in the last three years prior to the implementation of the BIDS arrangement.

B — *The procedure before the Irish Competition Authority and the main proceedings before the courts*

15. While the BIDS arrangement was being drafted, BIDS sought to reach agreement with the Irish Competition Authority ('the Competition Authority'). On 5 and 26 June 2003 the Competition Authority informed BIDS that it did not consider the BIDS arrangement and the exit agreement with Barry Brothers (hereinafter the BIDS arrangement and the exit agreement with Barry Brothers will be jointly referred to as 'the BIDS agreements') to be compatible with Irish competition law. On 30 June 2003 the Competition Authority made an application to the Irish High Court ('the High Court') for a declaration that the BIDS agreements infringed Article 81 EC.

16. By judgment of 27 July 2006, the High Court dismissed the Competition Authority's application. It held that the BIDS agreements did not fall under the prohibition contained in Article 81(1) EC. The BIDS agreements 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. The reduction of the total capacity was not to be regarded as a limitation of production. Furthermore, the BIDS arrangements did not have as their effect the restriction of competition. A 25% reduction of total capacity might restrict competition only if it led to a capacity shortage which caused rising prices. Because overall beef production in Ireland will not increase in future, but will tend to decline, even if total capacity were reduced by 25% it would be ensured that all beef would be processed. In addition, prices were not expected to increase. The levies would increase the processing costs incurred by processors.

However, a price increase could be ruled out, in particular because the reduction of total capacity would result in economies of scale among stayers and the processors' customers would have a strong negotiating power.

17. The restrictions on use and disposal were not a restriction of competition either. Under the present market conditions, it is not economically feasible to construct new processing plants. However, potential competitors could enter the market by purchasing other processing plants (from stayers or non-members of BIDS).

18. Consequently, the BIDS agreements were not objectionable in such a way that they could be regarded as a restriction of competition by object.

19. The High Court also took the view that the conditions laid down in Article 81(3) were not satisfied. BIDS had not shown that consumers would receive a fair share of the benefit. However, Article 81(3) EC is not relevant because the fundamental prohibition contained in Article 81(1) EC is not satisfied.

20. The Competition Authority has challenged the High Court's decision before the Irish Supreme Court ('the Supreme Court').

C — *The question referred for a preliminary ruling*

21. The Supreme Court takes the view that the case raises a question of interpretation regarding Article 81(1) EC which is relevant to its decision in the main proceedings. It has therefore referred the following question to the Court of Justice pursuant to Article 234 EC:

'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") [3] for the purpose of implementing an arrangement with the following features:

1. plants … [4] killing and processing 420 000 animals per annum, representing approximately 25% of active capacity would enter into an agreement with the remaining companies … [5] 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;

3 — BIDS.

4 — The addition '(called "goers")' has been omitted.

5 — The addition '(called "stayers")' has been omitted.

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 EUR 2 per head of the traditional percentage kill and EUR 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?'

## IV — Proceedings before the Court of Justice

22. The order for reference was lodged at the Court of Justice on 20 April 2007. In the written procedure, BIDS, the Competition Authority, the Belgian Government and the Commission submitted observations. At the hearing of 4 June 2008, the Competition Authority, BIDS and the Commission supplemented their submissions.

## V — Arguments of the parties

23. BIDS, the Competition Authority, the Kingdom of Belgium and the Commission agree on the following points: Article 81(1) EC draws a distinction between restrictions

of competition by object and by effect. In the case of restrictions of competition by object, there is no need to prove any effect. In examining whether there is a restriction of competition by object, regard must be had not only to the content of the agreement, but also to the legal and economic context.

24. The parties do not agree on the question of when a restriction of competition by object can be taken to exist and whether the BIDS agreements come under that definition, BIDS taking the view that the BIDS agreements are not a restriction of competition by object, whilst the Competition Authority, the Kingdom of Belgium and the Commission take the opposite view.

25. *BIDS* equates restrictions of competition by object with hard-core restrictions and agreements which restrict competition per se. This category of agreements is to be construed narrowly, in the view of BIDS, and 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. A restriction of competition by object exists only in the case of such obvious and damaging agreements.

26. BIDS takes the view that the BIDS agreements do not constitute a restriction of competition by object. In view of the legal and economic context of the BIDS agreements it is clear that they do not fall in the category of restrictions of competition by object. In this connection BIDS relies in particular on the findings of the High Court that total market output will not be reduced and prices will not be increased. According to the judgment in *GlaxoSmithKline Services* v *Commission*,[6] such circumstances should be taken into account. Furthermore, the stayers' freedom regarding their production quotas, market shares and prices is not restricted. It must also be taken into consideration that the BIDS agreements have the legitimate objective of eliminating overcapacity. The levies, the non-compete clause and the restrictions on use and disposal are necessary measures for achieving that aim. Furthermore, BIDS had not negotiated in secret.

27. In the view of BIDS, bearing these circumstances in mind, the BIDS agreements are not so obvious or so anti-competitive that they may be classified in the category of restrictions of competition by object.

28. In the view of the *Competition Authority*, a restriction of competition by object

6 — Case T-168/01 [2006] ECR II-2969.

exists where there are obvious restrictions of competition or hard-core restrictions. However, there is no definitive list of obvious restrictions of competition or hard-core restrictions. It is not necessary to establish the aims of the parties. No inferences can be drawn from the judgment in *GlaxoSmith-Kline Services* v *Commission*[7] for the present case.

29. It is clear from the content of the BIDS agreements that they have as their object the restriction of competition. The Competition Authority refers in this connection to the planned withdrawal of processors, representing around 25% of total capacity, from the processing industry. In its view, this constitutes a limitation of output, or at least a limitation of capacity which also restricts competition. The Competition Authority also refers to the higher prices as a result of the levies, the restrictions on use and disposal for goers, and the fact that the stayers are not necessarily the most efficient processors. These elements of the BIDS agreements are in its view also to be regarded as restrictions of competition by object.

30. The positive effects of the BIDS agreements are to be taken into account in the context of Article 81(3) EC.

31. In connection with the interpretation of the notion of restriction of competition by object, the *Kingdom of Belgium* relies on the scheme of Article 81 EC. Against the background of the fact that since the entry into force of Regulation No 1/2003 it has been the responsibility of undertakings to assess agreements themselves, it is appropriate to stress the distinction between Article 81(1) EC and Article 81(3) EC. In an examination under Article 81(1) EC it is only examined whether a restriction of competition exists. This must be distinguished from the question whether an agreement which comes under the fundamental prohibition laid down in Article 81(1) EC may be compatible with the common market under Article 81(3) EC.

32. In the view of the Kingdom of Belgium, an agreement which is intended to rationalise the processing industry and seeks to achieve this through the withdrawal of processors representing 25% of total capacity aims to influence the market conditions. The BIDS agreements are therefore a restriction of competition by object.

33. The *Commission* observes that in the earlier cases concerning the concept of restriction of competition by object the Community judicature examined cases which related to hard-core restrictions. However, since then the Community judicature has also regarded agreements which have a legitimate objective as restrictions of competition by object. Pursuit of a legitimate

7 — Cited in footnote 6.

objective does not therefore preclude the existence of a restriction of competition by object. Article 81(1) EC thus also applies to agreements which are aimed at addressing a crisis. Any different view is not compatible with the scheme of Article 81. Furthermore, the restriction of competition does not have to be obvious. Nor is it relevant whether the BIDS agreements were negotiated and concluded in secret or publicly.

34. With regard to the assessment of the BIDS agreements the Commission essentially shares the view taken by the Competition Authority.

## VI — Legal assessment

35. Since the parties have a different understanding of the notion of restriction of competition by object, I will examine this first (A) before I consider whether agreements like the BIDS agreements have as their object the restriction of competition (B). I will then examine how the individual elements of those agreements are to be assessed with regard to the category in Article 81(1)(b) EC and the general clause in Article 81(1) EC (C).

### A — *Notion of restriction of competition by object*

36. As I mentioned in the introduction, the question referred concerns only the interpretation of the notion of restriction of competition by object contained in Article 81(1) EC. However, that notion cannot be interpreted without taking account of its legal context. I will therefore begin by examining the content, the scheme and the application of Article 81 EC (1) and then consider the meaning of restriction of competition by object (2).

#### 1. Content, scheme and application of Article 81 EC

##### (a) Scheme of Article 81 EC

37. Under Article 81(1) EC, all agreements between undertakings which have as their object or effect an appreciable restriction

of competition are prohibited in principle. [8] Having the restriction of competition as an object or as an effect are two alternative criteria. [9] If it is clear that an agreement has as its object the restriction of competition, it does not matter whether it actually has as its effect the restriction of competition. [10] It is thus sufficient for the purposes of the fundamental prohibition under Article 81(1) EC that an agreement has as its object the restriction of competition.

38. The fundamental prohibition in Article 81(1) EC may be declared inapplicable, however, under Article 81(3) EC. To that end it is necessary to satisfy four cumulative conditions which include, first of all, that the agreement helps to produce a benefit by contributing to improving the production or distribution of goods or to promoting technical or economic progress and, secondly, that consumers are allowed a fair share of that benefit. Other conditions are, thirdly, that no restrictions may be imposed on the undertakings concerned which are not indispensable to the attainment of these objectives and, fourthly, that such undertakings may not be afforded the possibility of eliminating competition in respect of a substantial part of the products in question.

39. Article 81 EC thus provides for a *two-stage 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. The finding that an agreement has as its object the restriction of competition and thus comes under the fundamental prohibition under Article 81(1) EC is not therefore the last word on whether that agreement is compatible with the common market. Account must be taken of this distinction between Article 81(1) EC and Article 81(3) EC in examining when a restriction of competition by object exists for the purposes of Article 81(1) EC.

(b) Application of Article 81 EC

40. Before 1 May 2004 the distinction between Article 81(1) EC and Article 81(3) EC played an important procedural role. Under Article 4(1) of Council Regulation No 17 of 6 February 1962 implementing Articles 85 (now Article 81 EC) and 86 (now Article 82 EC) of the Treaty, [11] a system of prohibition with exemptions applied. An agreement which came under the fundamental prohibition laid down in Article 81(1) EC and was not covered by a block-exemption regulation had to be notified to the Commission. The Commission alone could

8 — See the full wording of Article 81(1) EC in point 3 of this Opinion.

9 — Case 56/65 *LTM* [1966] ECR 235, 249.

10 — *LTM* (cited in footnote 9, p. 249), and Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342.

11 — OJ, English Special Edition: Series I, 1959-1962, p. 87.

exempt such an agreement from the fundamental prohibition under Article 81(1) EC.

41. With the entry into force of Regulation No 1/2003, [12] that system was replaced by a system of self-assessment. Agreements which come under the fundamental prohibition under Article 81(1) EC but satisfy the conditions of Article 81(3) EC are not prohibited, no prior decision by the Commission to that effect being required. [13] In principle it is now for the undertakings concerned — if necessary with the assistance of a legal advisor — to examine whether the conditions under Article 81(1) EC and Article 81(3) EC are satisfied. [14]

2. Restriction of competition by object

42. The object of the agreement must be a *restriction of competition*. That criterion is difficult to grasp. [15] Article 81 EC protects competition in particular in regard to its function of forming a single market with conditions akin to an internal market and its function of supplying consumers as well as possible. [16] In examining whether an agreement encroaches upon that projected interest, the Community judicature considers whether the agreement limits the freedom of one or more undertakings to determine their policy on the market independently (requirement of independence) and whether that limitation of freedom has an appreciable effect on market conditions. [17]

43. The Community judicature has consistently held that, in order to assess whether an agreement has *as its object* the restriction of competition, regard must be had to the content of the agreement in the light of its legal and economic context. [18] I will consider, first of all, the criterion on the basis of which it is to be assessed whether an agreement has as its object the restriction of competition

12 — Regulation No 1/2003 entered into force on 1 May 2004.

13 — Article 1(1) and (2) of Regulation No 1/2003.

14 — The two-stage structure of the examination under Article 81 EC plays a role, however, in the allocation of the burden of proof. Under Article 2 of Regulation No 1/2003 the party or the authority relying on the fundamental prohibition under Article 81(1) EC bears the burden of proving that its conditions are fulfilled, whilst the party claiming the inapplicability of that fundamental prohibition must prove that the conditions of Article 81(3) EC are fulfilled.

15 — With regard to the notion of restriction of competition, see Bellamy & Child, *European Community Law of Competition*, Oxford, 6th edition, 2008, No 2.062 to 2.120; Wish, R., *Competition Law*, London, 5th edition, 2003, pp. 106 to 128; Faull, J., and Nikpay, A., *The EC Law of Competition*, Oxford, 1999, paragraphs 2.56 to 2.99.

16 — Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875, paragraph 20; Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 117; and Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 52; with regard to the aspect of consumer welfare in particular, see Leupold, H., and Weidenbach, G., 'Neues zum Verhältnis zwischen Art. 81 Abs. 1 und Art. 81 Abs. 3 EG-Vertrag?', *Wirtschaft und Wettbewerb*, 2006, pp. 1003 and 1008, footnote 28 with further references.

17 — *Commission* v *Anic Partecipazioni* (cited in footnote 16, paragraph 117), and *Asnef-Equifax and Administración del Estado* (cited in footnote 16, paragraph 52). For a fundamental treatment of appreciable nature, see Case 5/69 *Völk* v *Vervake* [1969] ECR 295, paragraphs 5 to 7.

18 — *LTM* (cited in footnote 9, p. 249); Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraphs 25 to 28, paragraph 26; and *GlaxoSmithKline Services* v *Commission* (cited in footnote 6, paragraph 110).

(a). I will then examine whether the notion is limited to obvious restrictions of competition (b) and whether there is a definite list of restrictions of competition by object (c). Lastly, I will explain which elements of the legal and economic context may be relevant to the existence of a restriction of competition and which are not (d).

45. However, it is not to be inferred from that case-law that the intentions of the parties cannot be taken into account. It merely expresses the idea that when acting rationally undertakings will expect the agreement to have the effects which can reasonably be assumed according to the circumstances, with the result that they intended those effects at least to some extent. [21]

(a) Relevant criterion

44. From its wording it is clear that the notion of restriction of competition by object refers primarily to the object of the agreement. The Community judicature has found an anti-competitive aim or tendency of an agreement to exist in particular where the necessary consequence of the agreement was the restriction of competition. [19] In such a case in principle the parties may not argue that they did not intend any restriction of competition or that their agreement also pursued a different aim. [20]

46. It follows from the alternative relationship between the object and the effect of restrictions of competition in Article 81(1) EC [22] and from the fact that Article 81(1) EC, as regards the alternative of restriction of competition by object, is designed as a form of inchoate offence [23] that regard is to be had not solely to the necessary consequences of an agreement. The intentions of the parties to an agreement may also be taken into account. [24] Inferences as to the intentions of

19 — Case 19/77 *Miller International Schallplatten* v *Commission* [1978] ECR 131, paragraph 7, and *CRAM and Rheinzink* v *Commission* (cited in footnote 18, paragraphs 25 to 28).

20 — Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraph 24; *Miller International Schallplatten* v *Commission* (cited in footnote 19, paragraph 7); and *CRAM and Rheinzink* v *Commission* (cited in footnote 18, paragraphs 25 to 28).

21 — As Advocate General Tizzano rightly states in point 77 of his Opinion in Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, parties also cannot rely on the fact that they were not aware of the prohibition in Article 81(1) EC *(ignorantia legis non excusat)*. See also Emmerich, V. in: Immenga/Mestmäcker, *Wettbewerbsrecht*, Vol. 1, Munich, 4th edition 2007.

22 — See point 37 of this Opinion.

23 — '*abstraktes Gefährdungsdelikt*'. See p. 945 of the Opinion of Judge Vesterdorf, designated Advocate General in Joined Cases T-1/89 to T-4/89 and T-6/89 to T-15/89 *Rhône-Poulenc and Others* v *Commission* [1991] ECR II-867.

24 — See point 78 of the Opinion of Advocate General Tizzano in *General Motors* v *Commission* (cited in footnote 21); Odudu, O., 'Interpreting Article 81(1): object as subjective intention', *European Law Review*, 2001, pp. 61 and 62.

the parties can be drawn in particular from the 'genesis' of the agreement. [25]

(b) Obvious restrictions of competition?

47. In the light of the foregoing, it is clear that the category of restrictions of competition by object cannot be reduced to agreements which obviously restrict competition. If not only the content of an agreement but also its legal and economic context must be taken into account, classification as a restriction of competition by object cannot depend on whether that object is clear at first sight or becomes evident only on closer examination of the circumstances and the intentions of the parties. [26]

(c) Exhaustive list?

48. In my view, the notion of restriction of competition by object cannot be reduced to an exhaustive list either. The words 'in particular' in Article 81(1) EC make clear 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. Therefore, the notion of restriction of competition by object cannot be limited to the examples cited in Article 81(1)(a) to (c) EC either. [27]

49. Nor can the notion of restriction of competition by object be reduced to price-fixing, market-sharing or the control of outlets. The fact that the Community judicature has dealt with these types of restrictions of competition in many decisions does not mean that agreements with another purpose

25 — Point 78 of the Opinion of Advocate General Tizzano (cited in footnote 24).

26 — See paragraph 24 of the judgment in *IAZ International Belgium and Others* v *Commission* (cited in footnote 20), in which the Court looked at the system of checks involving the use of conformity labels. It can also be seen from paragraphs 60, 64 and 65 of the judgment in *General Motors* v *Commission* (cited in footnote 21) that the restriction does not have to be obvious. The same conclusion follows from paragraph 136 of the judgment in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141. In so far as the Court of First Instance held in that judgment that in the case of obvious restrictions such as price-fixing, market-sharing or the control of outlets there is no need to examine the legal and economic context, this merely shows that consideration of the legal and economic context may be summary. However, it cannot be inferred from this that the notion of restriction of competition by object is limited to such obvious cases.

27 — See also Aicher, J., and Schuhmacher, F., in: Grabitz/Hilf, *Das Recht der Europäischen Union*, Vol. 2, Munich, Supplement 34, January 2008, Article 81, paragraph 1; Bellamy & Child, loc. cit. (footnote 15), footnote 402 at paragraph 2.097, where it is rightly pointed out that other agreements can also have as their object the restriction of competition. Also in Wish, R., loc. cit. (footnote 15), p. 106, it is pointed out that the list is illustrative.

cannot have as their object the restriction of competition. [28]

(d) Legal and economic context

50. As has already been mentioned, in order to assess whether an agreement has as its object the restriction of competition, account must be taken of not only its content, but also its legal and economic context. [29] This requirement must be taken seriously. However, it is not to be seen as a gateway for any factor which suggests that an agreement is compatible with the common market. Rather, it follows from the scheme of Article 81 EC that account is to be taken under Article 81(1) EC only of the elements of the legal and economic context which could cast doubt on the existence of a restriction of competition. [30]

51. I now wish to set out three categories in which the assumption of a restriction of competition may be rejected or at least doubtful on the basis of the factual or legal context. [31]

52. The *first category* concerns cases in which a limitation of the freedom of undertakings to determine their policy on the market independently has no effects in relation to competition. This may be the case where it is doubtful whether the undertakings party to the agreement are competing among themselves. [32] A further example is cases in which it is doubtful whether there is

28 — See Wish, R., loc. cit. (footnote 15), pp. 112 to 114. Although a very restrictive interpretation of the notion of restriction of competition by object is adopted there (it is doubtful whether there is a category of restrictions of competition per se under Article 81(1) EC (ibid., pp. 116 and 117)), it is made clear that the list of such agreements is not definitive. The relationship between Article 81(1) EC and Article 81(3) EC also suggests that the notion is not limited to these kinds of restrictions of competition. In Article 81(1) EC it is merely examined whether the object or effect is the restriction of competition. The finding that an agreement has as its object or its effect the restriction of competition is not therefore the last word on the agreement's compatibility with the common market. Rather, an agreement may be compatible with the common market under Article 81(3) EC. Agreements which are aimed at price-fixing, market-sharing or the control of outlets are particularly harmful, however. As a general rule they are not therefore compatible with the common market. However, anyone who limits the notion of restriction of competition by object to these particularly harmful kinds fails to recognise that restrictions of competition by object may also be compatible with the common market under Article 81(3) EC. In my view, such an approach is not compatible with the structure of Article 81 EC. See also Bellamy & Child, loc. cit. (footnote 15), footnote 291 at paragraph 2.069.

29 — See point 43 of this Opinion.

30 — See in particular Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 114 to 128.

31 — These categories are not so clearly defined that each individual case can be assigned precisely to just one of the three categories. However, for the purposes of the present proceedings, it is sufficient to examine whether an agreement can be classified in at least one of the three categories.

32 — *European Night Services and Others* v *Commission* (cited in footnote 26): potential competition not proven.

actually sufficient competition which can be restricted by the agreement. [33]

53. The *second category* concerns cases in which an agreement is ambivalent in terms of its effects on competition. If the object of an agreement is to promote competition, for example by strengthening competition on a market, opening up a market or allowing a new competitor access to a market, the necessary restriction of the requirement of independence can, when matters are viewed as a whole, give way to the aim of promoting competition. [34]

54. The *third category* concerns ancillary arrangements which are necessary in order to pursue a primary objective. [35] For the purposes of the present reference for a preliminary ruling, the following distinction should be made within this category: if the primary objective pursued does not come under the fundamental prohibition contained in Article 81(1) EC because it is neutral as regards competition or it promotes competition, the ancillary arrangements which are necessary to achieve that objective do not come under the fundamental prohibition in Article 81(1) EC either. [36] A restriction of competition cannot be taken to exist in such cases. If, on the other hand, the primary objective pursued comes under the fundamental prohibition laid down in Article 81(1) EC, there is a restriction of competition. [37]

55. Factors which are not capable of casting doubt on the existence of a restriction of competition, such as improvements in the production of goods as a result of economies of scale, may not be taken into account in the context of Article 81(1) EC, but only in the context of Article 81(3) EC, even where they are ultimately to be assessed positively

33 — *GlaxoSmithKline Services* v *Commission* (cited in footnote 6, paragraphs 114 to 147): doubts regarding the effects on price competition, because prices charged to final consumers are largely removed from the play of supply and demand by virtue of statutory provisions. I will be considering that judgment more closely in points 74 and 75 of this Opinion.

34 — *LTM* (cited in footnote 9, p. 250): exclusive right of sale for market penetration, Case 258/78 *Nungesser and Eisele* v *Commission* [1982] ECR 2015, paragraphs 44 to 58: grant of an open licence for the distribution of a new technology, *Metro SB-Großmärkte* v *Commission* (cited in footnote 16 paragraphs 20 to 22): channels of distribution which are adapted to high-quality and technically advanced products.

35 — Example of ancillary arrangements are no-competition clauses without which a transfer of a business would not be possible (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraphs 19 and 20), prohibitions on participation or restrictions on activities, in so far as these are necessary to ensure the functioning of a company with a purpose which is unobjectionable in terms of competition (Case C-250/92 *DLG* [1994] ECR I-5641, paragraphs 30 to 45), and restrictions on activities which are necessary for determining professional ethics (Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 97), or eliminating doping in sport (Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991, paragraphs 42 to 44).

36 — Relevant comments in Bellamy & Child, loc. cit. (footnote 15), paragraph 2.112.

37 — There is no need to decide for the purposes of the present proceedings whether the concept of ancillary arrangement also applies in such cases (see Bellamy & Child, loc. cit.) or only Article 81(3) EC.

in terms of an agreement's compatibility with Article 81 EC. [38]

56. This distinction is apparent already from the wording of Article 81(3) EC, which makes clear that these kinds of effects of an agreement are to be taken into account under Article 81(3) EC. The distinction is based on the following idea: the general conception of Article 81 EC is to ensure the optimal supply of consumers. [39] However, *different aspects* of consumer welfare are taken into account under Article 81(1) EC and under Article 81(3) EC. Under Article 81(1) EC, agreements which restrict competition between market participants and thus its function of supplying consumers optimally with a product at the lowest possible price [40] or with innovative products [41] are prohibited in principle. [42] Such agreements directly affect consumer welfare and as such are prohibited in principle.

57. Nevertheless, Article 81(3) EC recognises that agreements which restrict competition between market participants result in particular in a reduction in production costs, and the reduction in production costs can contribute indirectly to consumer welfare. [43] However, because first and foremost the reduction in production costs directly benefits producers, [44] the compatibility of such an agreement with the common market under Article 81(3) EC is subject in particular to the condition that consumers are allowed a share of the resulting benefit. The Community legislature implemented this idea in the rules on evidence by providing that it is for the parties to an anti-competitive agreement to prove that the conditions under Article 81(3) EC are satisfied, in particular that consumers share in the benefit. [45]

58. For these reasons, factors which are not capable of casting doubt on the existence of a restriction of competition, in particular efficiencies in production as a result of economies of scale, may not be taken into account in the context of Article 81(1) EC, but only in the context of Article 81(3) EC, even where they ultimately have to be assessed positively

38 — Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 265; Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109; and Case T-112/99 *M6 and Others* v *Commission* [2001] ECR II-2459, paragraphs 72 to 74.

39 — Leupold, H., and Weidenbach, G., loc. cit. (footnote 16), p. 1008, footnote 28 with further references.

40 — This function of competition can be affected in particular by agreements on pricing, on limitation of output or production (Article 81(1)(a) EC) and on market-sharing (Article 81(1)(c) EC).

41 — This function of competition can be affected in particular by agreements by which investment is restricted (Article 81(1)(a) EC).

42 — Leupold, H., and Weidenbach, G., loc. cit. (footnote 16), p. 1008 and 1009, who describe these functions as allocative and dynamic efficiencies; Odudu, O., 'Article 81(3), Discretion and Direct Effect', *European Competition Law Review 2002*, p. 20.

43 — Leupold, H., and Weidenbach, G., loc. cit. (footnote 16), pp. 1008 and 1009, describe these as productive efficiencies; Odudu, O., 'Article 81(3), Discretion and Direct Effect', loc. cit. (footnote 42), p. 20.

44 — Odudu, O., 'Article 81(3), Discretion and Direct Effect', loc. cit. (footnote 42), p. 20.

45 — See the second sentence of Article 2 of Regulation No 1/2003.

in terms of an agreement's compatibility with Article 81 EC. [46]

3. Conclusion

59. Consequently, it is not possible to concur with the restrictive interpretation proposed by BIDS. No obvious restriction of competition is required for the existence of a restriction of competition by object. Nor is there an exhaustive list of restrictions of competition by object. The legal and economic context is to be taken into account only in so far as it can cast doubt on the existence of a restriction of competition. Other factors are to be taken into account only in the context of Article 81(3) EC, even where they have to be assessed positively in terms of the common market.

B — *Do agreements like the BIDS agreements have as their object the restriction of competition?*

60. It should be stated, first of all, that Article 81(1) EC is applicable to the activity and the products of the processing industry. [47] As explained above, [48] in examining whether agreements like the BIDS agreements have as their object the restriction of competition, the following approach is to be taken. First of all, it must be considered whether such agreements have restrictions of competition as their necessary consequence or are aimed at limiting the freedom of the parties to determine their policy on the market independently (1) and thereby at affecting market conditions (2). Subsequently it must be examined as part of an overall assessment whether the restrictive elements are necessary in order to achieve a pro-competitive object or a primary objective which does not come under the fundamental prohibition contained in Article 81(1) EC (3).

1. Restriction of the freedom to determine policy on the market independently

61. Agreements like the BIDS agreements are intended to limit the freedom of goers

46 — *Montedipe* v *Commission* (cited in footnote 38, paragraph 265); *Tréfilunion* v *Commission* (cited in footnote 38, paragraph 109); and *M6 and Others* v *Commission* (cited in footnote 38, paragraphs 72 to 74).

47 — The question referred seeks an interpretation of the notion of restriction of competition by object in Article 81(1) EC. However, agreements like the BIDS agreements can constitute a restriction of competition by object under Article 81(1) EC only where Article 81 EC is applicable to such agreements. The applicability of Article 81 EC in the present case follows from Article 1 of Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition, Series I, 1959–1962 p. 129) as amended by Regulation No 49 of the Council of 29 June 1962 amending the date on which certain instruments relating to the common agricultural policy are to enter into force (OJ, English Special Edition, Series I, 1959-1962 p. 201) and Article 2 of Regulation No 26 as amended by Regulation No 49. In this respect the legal situation did not change with the entry into force of Council Regulation No 1184/2006 of 24 July 2006.

48 — See points 42 and 59 of this Opinion.

or of stayers to determine their policy on the market independently. Goers are to undertake in the exit agreement in particular to withdraw from the market, to comply with a non-compete clause and to observe the restrictions on use and disposal in relation to the decommissioned plants. [49] Under the BIDS arrangement stayers are to undertake to pay levies.

2. Effect on market conditions

62. The restrictions on the requirement of independence must affect market conditions. It should be pointed out in this connection that in principle it is not the task of the Court of Justice in preliminary ruling proceedings to review the factual findings of the national courts. Nor is it the task of the Court of Justice to examine whether the Supreme Court is bound by the findings of the High Court. However, it is the task of the Court of Justice to interpret Community law in such a way that the referring national court is able to apply Community law correctly. This includes assessing which factual circumstances are relevant to the application of Community law and which are irrelevant.

63. The question whether an agreement affects market conditions should be determined through a comparison of two hypothetical situations. [50]

64. The *first hypothetical situation* is the situation as it would appear without the BIDS agreements. This can be inferred in particular from letters (a) to (d) of the question referred for a preliminary ruling. I infer from letter (c) of the question referred and from the documents before the Court that there have been no withdrawals on a notable scale from the market previously and that without the BIDS arrangement withdrawals from the market would not amount to 25% of the production capacity of the processing industry as a whole, at least in the short term.

65. The *second hypothetical situation* is the situation as it would appear if the BIDS agreements were applied. In this case, it is necessary to examine whether the BIDS agreements have as their object the restriction of

49 — In this respect the BIDS agreements are to be distinguished from a scenario where undertakings decide unilaterally to leave the market.

50 — *LTM* (cited in footnote 9, p. 249).

competition. As has been explained above, [51] in this second hypothetical situation account must be taken of the effects which are the necessary consequence of the provisions described in points 1 to 9 of the question, and the effects which the parties intend to achieve through those provisions.

66. It must be noted, first of all, that the BIDS arrangement is a horizontal agreement, an agreement between competitors at the same level on the market. The exit agreement also constitutes a horizontal agreement between a processor and an association of processors, BIDS.

(a) 25% reduction of the production capacity of the processing industry as a whole

67. Under the BIDS agreements the production capacity of the processing industry as a whole is to be reduced by 25% as a result of processors leaving the market. I consider that the withdrawal of the processors from the market and the agreement not to use their processing plants are capable in principle of restricting competition between the stayers on the market. [52]

68. Competition takes place not only where producers are able fully to utilise their capacities, but also where producers have overcapacity. A producer incurs fixed costs for keeping and maintaining production plants. In the case of lower utilisation of the production plant capacity, these fixed costs have a greater effect on the per-unit production costs than where there is high capacity utilisation, as the proportion represented by fixed costs in the per-unit production costs is proportionally lower in the case of high capacity utilisation (economies of scale). There is generally therefore an incentive for a producer to achieve economies of scale by utilising its production plants. [53]

69. BIDS challenges this. In that connection it relies on the following arguments: a

51 — See points 42 and 59 of this Opinion.

52 — See Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, paragraph 56; see also Jürgens, R., *Strukturkrisenkartelle im deutschen und europäischen Kartellrecht*, Peter Lang, Frankfurt am Main, 2007, p. 95.

53 — With regard to the relationship between overcapacity, economies of scale and increased competition, see Schulz, N., *Wettbewerbspolitik*, Tübingen, 2003, pp. 84 to 86.

reduction in total capacity does not lead to a fall in overall production; the price of the processors' products does not increase; it is a one-off reduction of the production capacity of the market as a whole. Before examining these points, I would like to reiterate that at this stage only factors which can cast doubt on the existence of a restriction of competition may be taken into account. [54]

70. *First*, it seems to me that, logically, with overall production remaining constant, [55] greater competition would exist between participants in a market with high overcapacity than in a market with lower (or with no) overcapacity. In a market with high overcapacity, it is more difficult for the average producer to achieve the same capacity utilisation for its production plants than in a market with low overcapacity. Because economies of scale fall in line with the utilisation rate, the average producer is subject to greater competitive pressure in a market with high overcapacity than in a market with only low overcapacity. In economic science, there is a recognised interdependence between overcapacity, economies of scale and competitive pressure. [56]

71. I do not see anything in the present case to suggest that there is no such interdependence. In particular, it does not seem to me that the existence of this interdependence depends on whether the overcapacity arose because of a fall in demand or, as in the present case, through support for the construction and expansion of processing plants and through the more even distribution of the primary product to be processed. This is also suggested by the fact that the interdependence was also observed in the market study. The fact that overall production is not falling is not therefore capable in itself of ruling out the existence of a restriction of competition. [57]

72. *Secondly,* the fact that prices will not increase is not capable either, in my view, of ruling out a restriction of competition. The present case concerns only the question whether agreements like the BIDS agreements have as their object the restriction of competition. The existence of a restriction of competition and the possible effects of a restriction of competition on prices are two separate questions. This is shown by the fact that prices can be influenced by a number of factors. Not all those factors are capable of ruling out the existence of a restriction of competition.

54 — See points 50 to 58 of this Opinion.

55 — The High Court took the view that overall production would not change substantially.

56 — With regard to the relationship between overcapacity, economies of scale and increased competition, see Schulz, N., loc. cit. (footnote 53), pp. 84 to 86.

57 — BIDS' view can be reduced *ad absurdum* with an example: if, on a market with a duopoly, there is high overcapacity on the supply side and if one of the two suppliers ceases production, by agreement with the other supplier, without there being any limitation of overall production, such an agreement would not, in the view of BIDS, have as its object the restriction of competition. However, such a modification of the market structure would in fact largely rule out competition, as the remaining supplier, having a monopoly, would only be exposed to potential competition.

73. In the present case, price increases are said to be ruled out on account of the economies of scale achieved through higher capacity utilisation and on account of the power of the other side of the market. Economies of scale may possibly be the consequence of reducing the production capacity of the processing industry as a whole. However, they are not capable of ruling out the existence of the restriction of competition under Article 81(1) EC. In fact, economies of scale are to be taken into account as direct benefits primarily for processors in the context of Article 81(3) EC. [58] Nor can the negotiating power of the other side of the market cast doubt in principle on the existence of a restriction of competition, even if it were to rule out an increase in prices; it must therefore be taken into account under Article 81(3) EC. [59]

74. The present situation is also not comparable with the circumstances underlying the judgment in *GlaxoSmithKline Services* v *Commission*. [60] In that case — which by the way concerns vertical price regulation — prices were determined largely by statutory rules at the stage of sale to the end consumer and were thus largely removed from the effects of supply and demand. [61] In such a case, there may be doubts as to whether vertical price regulation can restrict competition within the meaning of Article 81(1) EC. [62] However, the present case is not comparable because there are no statutory provisions which might prevent benefits stemming from competition between stayers being passed on to consumers.

75. Furthermore, the fact that prices will not increase does not exclude any possibility of effective competition. Rather, on a market with high overcapacity and constant overall production the *reduction of prices* is a typical competition measure. Thus, a producer can attempt to concentrate a larger proportion of demand on itself and thereby increase its utilisation rate and achieve economies of scale. [63] The fact that prices will not increase is not therefore capable in itself of ruling out the existence of a restriction of competition.

58 — See points 53 to 56 of this Opinion; Bellamy & Child, loc. cit. (footnote 15), paragraph 3.029; Odudu, O., 'Article 81(3), Discretion and Direct Effect', loc. cit. (footnote 42), p. 19; Leupold, H., and Weidenbach, G., loc. cit. (footnote 16), pp. 1008 and 1009.

59 — With regard to the negotiating power of the other side of the market, see paragraphs 114 to 128 of the judgment in *Montecatini* v *Commission* (cited in footnote 30). According to paragraph 116 of that judgment, the appellant had claimed in particular that the Court of Justice had failed to take into consideration the superior contractual power of the party on the other side of the market. In paragraph 127 of the judgment, the Court held that such circumstances may be relevant only where the economic context excluded any possibility of effective competition.

60 — Cited in footnote 6.

61 — Ibid., paragraphs 114 to 134.

62 — In such a case it must be examined precisely whether the function of competition of supplying consumers optimally with a product at the lowest possible price (see point 52 of this Opinion) is affected.

63 — Schulz, N., loc. cit. (footnote 53), pp. 84 to 86.

76. *Thirdly*, I cannot see how the fact that the reduction in total capacity is 'one-off' can rule out a restriction of competition through the reduction of total capacity. It should also be pointed out that the effects of the exit agreements and the BIDS arrangement are not limited to a single moment. For example, the non-compete clause for goers applies for two years and the restrictions on use and disposal for five years.

77. *In conclusion*, I cannot see any reason, either in the factors put forward by BIDS or in other circumstances in the main proceedings, for doubting the connection between a 25% reduction in the production capacity of the processing industry as a whole through individual processors leaving the market and a restriction of competition. Instead, the arrangement represents the 'buying off' of competition. In the case of a 25% reduction in total capacity, I have no serious doubts that such a measure is appreciable with regard to competition. Subject to the overall assessment still to be conducted in section 3, the 25% reduction of the production capacity of the processing industry as a whole appears to be aimed at an appreciable restriction of competition. [64]

(b) Withdrawal of goers from the market

78. As mentioned above, [65] I infer from letter (c) of the question referred and from the documents before the Court that there have not yet been any withdrawals on a notable scale from the market and that without the BIDS arrangement withdrawals from the market would not amount to 25% of the production capacity of the processing industry as a whole, at least in the short term.

79. For the sake of completeness, I will now also examine whether a restriction of competition could also be taken to exist if in the first hypothetical situation (without agreements like the BIDS agreements), there was a withdrawal from the market on a comparable scale as a result of market mechanisms.

80. Under Article 81(1) EC, any restriction of the requirement of independence is prohibited if it gives rise to conditions of competition which do not correspond to the normal

64 — See also Jürgens, R., loc. cit. (footnote 52), p. 95.

65 — See point 64 of this Opinion.

conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and also the volume of the market in question. [66]

81. In the first hypothetical situation (without the BIDS agreements), the selection function of competition would generally mean that the most efficient processors on the market stay, or the processors who best meet the demands of their customers and ultimately of consumers. If the stayers are selected in the second hypothetical situation (with BIDS agreements) not through the market mechanisms, but through an arrangement between the processors, this affects the selection function of competition. In the present case this is suggested in particular by the fact that the BIDS arrangement makes no provision for the possibility of decommissioning individual processing plants. Under the BIDS arrangement, a processor cannot therefore decommission its inefficient processing plants and remain on the market with the efficient processing plants.

82. Subject to the overall assessment still to be conducted in section 3, this interference with the selection function of competition appears to be aimed at a restriction of competition. [67]

(c) Levies

83. It should be stated, first of all, that the payment of levies means that the stayers cannot freely dispose of the amount levied and that they increase their processing costs. With the increased processing costs, the stayers reach a loss-making situation earlier. This can result in a restriction of competition if the levies were to have an appreciable effect on the market behaviour of stayers. [68] A national court must thus examine whether the levies can have an appreciable effect on the market behaviour of stayers irrespective of their level.

84. Furthermore, the staging of the levies according to traditional percentage kill is capable of resulting in the restriction of competition between stayers. BIDS has argued that the levy is merely intended to represent a 'price' for the acquisition by the stayers of the market shares of goers. The stayers would have to fight to capture those market shares. Each processor bears the cost of EUR 11. The competition between stayers is not therefore restricted.

66 — *Commission* v *Anic Partecipazioni* (cited in footnote 16, paragraphs 116 and 117).

67 — See also Jürgens, R., loc. cit. (footnote 52), p. 95.

68 — Case C-180/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 90 to 97.

85. At this point it is sufficient to state that the necessary consequence of such a provision is that stayers are protected with respect to their traditional market share. If a stayer who has already achieved its traditional percentage kill (out-performer) is in competition with a stayer which has not yet achieved its traditional percentage kill (low-performer), the out-performer has a cost disadvantage of EUR 9 until the low-performer has achieved its traditional percentage kill. The staging therefore tends to protect any stayer within the scope of its traditional percentage kill. However, stayers are competing not only with regard to the market share released by the goers, but also within the scope of their traditional percentage kill. The staging of levies thus also restricts competition with regard to the traditional percentage kill. If a processor can assume, on the basis of the market conditions, that overall production will stagnate or fall in future, [69] it can predict very precisely from what point it will exceed its traditional percentage kill.

86. For the abovementioned reasons, [70] it is irrelevant that overall production is not reduced as a result of the levies and prices are not increased. In addition, the fact that the levies are to be limited to one year cannot in general rule out the existence of a restriction of competition. Such circumstances may possibly be taken into account under Article 81(3) EC.

(d) Restrictions on use and disposal

87. In so far as the restrictions on use and disposal are intended to prevent goers re-entering the market, they are a measure which secures withdrawal from the market and thus reinforces the effects of the goers' withdrawal from the market. In this respect I refer to my arguments above. [71]

88. Furthermore, the restrictions on use and disposal may also be aimed at deterring potential third-party competitors which are not members of BIDS. If it is clear that the construction of new processing plants is not economically feasible under present market

69 — The High Court had made this finding.

70 — See points 70 to 75 of this Opinion.

71 — See points 67 to 77 of this Opinion.

conditions,[72] I consider that restrictions on use and disposal, as are laid down in the BIDS agreements, are capable in principle of restricting competition by potential third-party competitors.

89. Potential competition is also protected by Article 81(1) EC.[73] If it is clear that new competitors have successfully entered the market in the past,[74] this would not appear to be merely a purely theoretical possibility in the future. There is therefore much to suggest that access to the market by potential competitors is restricted by the provisions on use and disposal.

90. The question whether third-party competitors also have other possibilities for access to the market can, in my view, be relevant only in relation to the appreciable nature of the restriction of competition. Since around 25% of the total production capacity is to be subject to a prohibition on use and disposal, there is much to suggest that the restriction of competition is appreciable.

91. A national court must therefore examine whether there are potential competitors for entry to the market and whether they might be interested in entering the market using the processing plants of goers.

92. Furthermore, stayers may not use the decommissioned plants in order to expand their capacity. This too is a restriction of competition, in particular when the construction of new processing plants is not economically feasible under present market conditions.[75]

93. For the abovementioned reasons,[76] it is irrelevant that overall production is not reduced as a result of the restrictions on use and disposal and prices are not increased.

72 — The High Court had made this finding.

73 — Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 21.

74 — The High Court had pointed out that Exel Meats Limited had entered the market.

75 — The High Court had made this finding.

76 — See points 70 to 75 of this Opinion.

(e) Conclusion

94. Subject to consideration of a pro-competitive object or a primary objective of the BIDS agreements which is unobjectionable from a competition point of view, I therefore reach the following interim conclusion: at least the planned 25% reduction in the production capacity of the processing industry as a whole as a result of processors leaving the market, the staging of levies and the restrictions on use and disposal are elements of the agreement which have, as a necessary consequence, the restriction of competition.

95. In this connection, I would like to point out, for the sake of completeness, that BIDS has not acted under State compulsion. [77] The fact that the market study was financed by the Irish Government and the Beef Task Force called on the processing industry to implement the market study does not constitute State compulsion.

77 — In principle, such a circumstance is to be examined only if the undertaking in question relies on it; see *Montecatini* v *Commission* (cited in footnote 30, paragraph 128).

3. Consideration of the aims pursued through the BIDS agreements

96. BIDS claims that the aim of the BIDS agreements is to limit overcapacity and to achieve economies of scale. In particular, it claims, the collection of levies and the restrictions on use and disposal are justified having regard to this legitimate objective.

97. *First*, I would like to reiterate at this point that the present examination concerns only whether an agreement has as its object the restriction of competition. 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.

98. *Secondly*, it 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. [78]

78 — Joined Cases T-217/03 and T-245/03 *FNCBV* v *Commission* [2006] ECR II-4987, paragraph 90, and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 740.

99. *Thirdly*, the Court has consistently held that the fact that the parties pursue a legitimate objective with an agreement does not rule out the existence of a restriction of competition by object. [79]

100. According to the case-law of the Court of Justice described above, [80] the situation is different only where an agreement pursues either a pro-competitive object or an object which is neutral from a competition point of view. That cannot be assumed to be the case here. Instead, the aim of increasing the profitability of the processing industry as a whole by reducing the overcapacity by 25% inevitably results in a restriction of competition. [81]

101. *Fourthly*, the aim of BIDS is to create production benefits through economies of scale. However, it is clear from the connection between Article 81(1) EC and Article 81(3) EC that such an aim can only be taken into account under Article 81(3) EC. [82]

79 — *IAZ International Belgium and Others* v *Commission* (cited in footnote 20, paragraphs 22 to 25).

80 — See points 52 to 55 of this Opinion.

81 — See points 67 to 77 of this Opinion.

82 — See points 55 to 57 of this Opinion.

4. Conclusion

102. Consequently, an agreement like the BIDS agreements has as its object the restriction of competition.

C — *Final assessment of the elements of an agreement like the BIDS agreements*

103. I will now explain how the individual elements of agreements like the BIDS agreements are to be assessed with respect to Article 81(1)(b) EC and the general clause in Article 81(1) EC.

104. I have reservations regarding the excessive categorisation of restrictions of competition. The content of an agreement must always be examined against the background of its legal and economic context. In my view, the present case shows that an approach whereby an agreement is compared with typical serious restrictions of competition is not always pertinent and may fail to address the question of when a restriction

of competition by object exists. Moreover, because the examples set out in Article 81(1)(a) to (e) EC are in a non-exhaustive list of examples, such categorisation is not absolutely necessary either. Rather, from a legal point of view it is sufficient that they are subsumed under the general wording of Article 81(1).

105. However, it may be helpful for undertakings and their legal advisors to form categories, in particular against the background of the self-assessment system which now applies. I therefore propose that the Court categorise the restrictions of competition by object identified above as follows.

106. The reduction of total capacity is in itself a restriction of competition which comes under the general clause in Article 81(1) EC. There is no need to decide here whether it is also a limitation of production for the purposes of Article 81(1)(b) EC. [83] In so far as the restriction of total capacity is achieved — as in the present case — by individual processors leaving the market and thus ceasing production, there is also a limitation of production under Article 81(1)(b) EC. First of all, it can not be inferred from the wording of Article 81(1)(b) EC that overall production is the crucial point. Secondly, a comparison with the other examples suggests that simply the limitation of the production of one market participant is sufficient. Thirdly, on the basis of the purpose of the provision, I also do not think that it is justified to take production on the market as a whole as the basis. Rather, the protective purpose of Article 81(1) EC applies to competition, in its function of supplying consumers optimally with a product at the lowest possible price, already in a situation where a market participant limits or entirely ceases its production.

107. The staging of levies is likely to deter a stayer from expanding its market share at the expense of the traditional market share of another stayer. It also therefore constitutes a limitation of production.

108. The restrictions on use and disposal are also likely to restrict a producer from expanding production through increases in its capacity, and are thus also to be regarded as a limitation of production.

83 — See paragraph 56 in *Atlantic Container Line and Others* v *Commission* (cited in footnote 52).

## VII — Conclusion

109. On the basis of the above considerations, I propose that the Court reply as follows to the question referred by the Supreme Court:

'An agreement with the content and under the circumstances described in the question referred has as its object the restriction of competition and is not therefore compatible with Article 81(1) EC in so far as the other conditions laid down in that provision are satisfied.'