THE HIGH COURT
2003 No. 7764P

BETWEEN

THE COMPETITION AUTHORITY

PLAINTIFF

AND

THE BEEF INDUSTRY DEVELOPMENT SOCIETY LIMITED AND BARRY BROTHERS (CARRIGMORE) MEATS LIMITED

DEFENDANTS

OBSERVATIONS OF THE COMMISSION UNDER ARTICLE 15, PARAGRAPH 3, OF REGULATION NO 1/2003

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1. INTRODUCTION

(1) The present proceedings between the Competition Authority, on the one hand, and the Beef Industry Development Society Ltd ("*BIDS*") and Barry Brothers (Carrigmore) Meats Ltd, on the other, relates to decisions of BIDS rationalising the beef and veal sector in Ireland (the "*arrangement*"). Specifically, BIDS, which is comprised of the 10 principal beef and veal processors in Ireland, has developed a plan which is designed to address over-capacity in the industry by ensuring the withdrawal of processors ("*goers*") from the market in return for compensation paid by BIDS and funded by processors remaining in the sector ("*stayers*").

(2) On 20 November 2008, the Court of Justice of the European Union (the "*ECJ*") ruled that the kind of arrangement at issue is a restriction of competition by object within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union ("*TFEU*").[1] By decision of the Supreme Court of 3 November 2009, the case was remitted to the High Court in order to assess whether the arrangement fulfils the conditions of Article 101(3) TFEU.

(3) The Commission considers that this case raises issues on the coherent application of EU competition law and is therefore submitting these written observations (the "*Observations*") under Article 15, paragraph 3, of Regulation No 1/2003.[2]

2. ON THE APPLICATION OF ARTICLE 15, PARAGRAPH 3, OF REGULATION NO 1/2003

2.1. The purpose of the Observations

(4) In the context of the current economic downturn, a number of undertakings in various industries across Europe are seeking to justify agreements restricting competition by invoking overcapacity problems or economic crises in their

[1] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* (hereinafter "*Competition Authority v BIDS*") [2008] ECR I-8637.

[2] Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

respective sectors.[3] These cases raise a number of important questions with respect to the application of Article 101(3) TFEU. Moreover, there are limited precedents available on these issues since the adoption by the Commission of its Guidelines on the application of Article 101(3) TFEU (the "*Guidelines*").[4] The Commission therefore considers that there is a need to ensure a coherent application of the EU competition rules with respect to agreements to reduce capacity and as a result decided to intervene in the present case.

(5) With respect to its role under Article 15, paragraph 3, of Regulation No 1/2003, the Commission does not see itself as an "*intervening party*" in the sense of supporting the position of one of the parties to the case. Rather the Commission's role is to inform and assist, in an objective manner, the national court.[5] Accordingly, the Commission will attempt to assist the Honourable Court with respect to the application of the relevant legal provisions and precedents, while refraining from taking a position on what the actual outcome in this particular case should be.

(6) It is appropriate to note in this regard that the Commission has previously been involved in the present case. First of all, the Commission participated in the preliminary reference case before the ECJ, both providing written observations and participating in the oral hearing. In its written observations of 14 August 2007, the Commission clearly took the position that the BIDS arrangement should be characterised as comprising a "*restriction by object*" under Article 101(1) TFEU and tended to indicate that the arrangement would have effects on the market.[6] The Commission reiterated its position in this regard during the oral hearing before the ECJ on 4 June 2008.

(7) Separately, and since the case has been remitted to the High Court for assessment of the applicability of Article 101(3) TFEU, the Directorate

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3 The Commission has itself been dealing with such cases and is aware of similar cases being addressed by national competition authorities.

4 Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97; hereinafter the "*Guidelines*").

5 See the Notice on Cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.4.2004, p. 54).

6 Observations of 14 August 2007, paragraphs 69 *et seq.* and, in particular, paragraphs 77, 80-83 and 86.

General for Competition (DG COMP) and the Irish Competition Authority have had contacts with respect to issues arising in this case, in particular with respect to DG COMP's proposed policy in relation to crisis cartels.

(8) The Commission notes in this regard that Regulation No 1/2003 provides for broad cooperation between the Commission and the competition authorities of the Member States. In particular, Article 11, paragraph 1, states that "*The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation*" and Article 11, paragraph 5, provides that "*The competition authorities of the Member States may consult the Commission on any case involving the application of Community law*".[7] This may include the provision of assistance on cases pending before national courts.

(9) That said, it is important to emphasise that the Commission has not taken a position on the applicability of Article 101(3) TFEU to the BIDS arrangement and will not do so in these Observations. Rather the purpose of these Observations is to provide some enlightenment with respect to the Commission's view on how Article 101(3) TFEU applies to crisis cartels in general.

2.2. Procedure

(10) By e-mail of 16 December 2009 to the services of DG COMP, the Competition Authority requested the Commission to intervene in this case under Article 15, paragraph 3, of Regulation No 1/2003. This request was formalised in a letter to Commissioner Kroes of 23 December 2009.

(11) By letter of 9 February 2010, the Commission informed the High Court that it wished to submit written Observations in the present case and that it would be seeking a deadline within which it should make that submission.

(12) On 9 March 2010, the Commission formally appeared before McKechnie, J., at an adjourned directions hearing. During this hearing, the High Court

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7 Article 12, paragraph 1, states that "*For the purpose of applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information*".

confirmed that the Commission could submit written observations in this case and asked for those observations to be submitted by 31 March 2010.

3. THE CONDITIONS OF ARTICLE 101(3) TFEU

(13) According to the case-law of the EU Courts, any agreement which restricts competition, whether by its object or its effects, may in principle satisfy Article 101(3) TFEU.[8] However, the more severe the restriction of competition, the less likely it is that an exemption will be available.[9]

(14) The application of Article 101(3) is subject to the following four cumulative conditions:

(a) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;

(b) Consumers must receive a fair share of the resulting benefits;

(c) The restrictions must be indispensable to the attainment of these objectives; and

(d) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

(15) According to Article 2 of Regulation No 1/2003, the party claiming the benefit of Article 101(3) TFEU shall bear the burden of proving that the above four conditions are fulfilled. It is for the national court to determine whether those conditions are satisfied.

(16) In the following, the Commission will examine these conditions with a particular focus on capacity-reducing restructuring agreements and drawing on both the jurisprudence of the EU Courts and the principles underlying the Guidelines. The Commission will not address the condition relating to the elimination of competition.[10]

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[8] Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, pp. 342, 343 and 347, and Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, paragraph 85.

[9] Guidelines, paragraph 46.

[10] The Commission refers to the Guidelines for a comprehensive examination of each of the conditions.

3.1. The first condition – the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress

(17) This condition requires an assessment of the efficiencies which result from the agreement at issue.[11] As stated by the ECJ in its *GlaxoSmithKline* judgment of 6 October 2009, the agreement should lead to "*appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition*".[12] The ECJ added that:

"*As the Advocate General observed in point 193 of her Opinion, an exemption granted for a specified period may require a prospective analysis regarding the occurrence of the advantages associated with the agreement, and it is therefore sufficient for the Commission, on the basis of the arguments and evidence in its possession, to arrive at the conviction that the occurrence of the appreciable objective advantage is sufficiently likely in order to presume that the agreement entails such an advantage*".[13]

(18) In order to assess whether the pro-competitive effects flowing from an agreement being examined under Article 101(3) TFEU outweigh its anti-competitive effects, it is necessary to verify the following:

(a) The nature of the claimed efficiencies;

(b) The link between the agreement and the efficiencies;

(c) The likelihood and magnitude of each claimed efficiency; and

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[11] Guidelines, paragraph 50.

[12] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* (hereinafter "*GlaxoSmithKline*"), judgment of 6 October 2009, not yet reported, paragraph 92.

[13] *GlaxoSmithKline*, cited above, paragraph 93. In paragraph 193 of her opinion of 30 June 2009, Advocate General Trstenjak stated as follows: "*an exemption, which under Regulation No 17 is granted ex ante for a specified period, may require a prospective analysis regarding the occurrence of the advantages associated with the agreement, and thus contains a prognostic element. A prognosis can ultimately never be made with 100% certainty. It is therefore sufficient for a finding of an appreciable objective advantage for the Commission, on the basis of the arguments and evidence submitted, to arrive at the conviction that the occurrence of the appreciable objective advantage is sufficiently likely in the light of actual experience [...] The question of what degree of probability must exist for it to be considered that there is an appreciable objective advantage does, admittedly, arise in principle in this context. In my opinion, a high degree of probability must be set here. That is because, with infringements of Article 81(1) EC, the existence of losses in efficiency in the form of a restriction of competition must already be postulated.*"

(d) How and when each claimed efficiency would be achieved.[14]

(19) The Commission will focus on the nature of the efficiencies which may result from a capacity-reducing agreement (the other three elements listed above tend to relate to the factual assessment of the particular agreement at issue). It would appear that any possible efficiencies which would result from such a capacity-reducing agreement would generally fall into one of two categories.

(20) First, an agreement reducing capacity may achieve efficiencies by removing inefficient capacity from the industry. However, any such efficiencies would need to be properly substantiated by the party seeking the benefit of Article 101(3) TFEU. In particular, that party should be able to establish that the agreement in question ensures that inefficient capacity exits the market.

(21) As noted above, the precedents in this area are limited. However, in a series of decisions taken before the adoption of the Guidelines, the Commission exempted agreements under Article 101(3) TFEU where those agreements achieved efficiency gains by removing inefficient capacity from the market.[15] More recently, in its 2002 decision to initiate a state aid procedure concerning the rationalisation of pig slaughterhouses, the Commission expressed doubt about applying Article 101(3) TFEU where, *inter alia*, it could not be shown that "*the slaughterhouses which will be closed are (in all cases) the least efficient*".[16]

(22) If the restructuring agreement at issue does not ensure that inefficient plant is decommissioned, then any plant, including efficient plant, may exit the market. A situation where efficient plant, rather than inefficient plant, exits

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[14] Guidelines, paragraph 51.

[15] Commission decision of 4 July 1984 in Case IV/30.810 *Synthetic Fibres* (OJ 1984, L 207/17), paragraph 39 ("*The Agreement also ensures that the shake-out of capacity will eliminate the non-viable and obsolete plant that could only have survived at the expense of the profitable plant through external subsidies or loss financing within a group, and will leave the competitive plants and businesses in operation*"); Commission decision of 29 April 1994 in Case IV/34.456 *Stichting Baksteen* (Dutch Bricks) (OJ 1994, L 131/15), paragraph 26 ("*As the capacity closures concern production units that are the least suitable and least efficient because of obsolescence, limited size or outdated technology, production will in future be concentrated in more modern plants which will then be able to operate at higher capacity and productivity levels*") and paragraph 29. See also Commission decision of 21 December 1994 in Case IV/34.252 – *Philips/Osram* (OJ 1994, L 378, p. 37), paragraphs 25-26.

[16] See OJ C 37, 9.2.2002, p. 19.

the market would fly in the face of the normal competitive process.[17] Not only would this fail to achieve economic benefits, but it would in fact have to be seen as a further competitive disadvantage of the agreement.

(23) In order to permit an assessment of whether efficient or inefficient capacity will exit the market, the restructuring agreement should provide sufficient indication of what capacity will be removed. Depending on the circumstances, this may be done by actually specifying which firms are to reduce capacity or which firms are to leave the market altogether. Even if the restructuring agreement does not specifically identify exiting capacity or firms, it should set out the criteria under which an assessment can be made as to what capacity is to exit the market.

(24) Second, where a restructuring agreement cuts capacity by facilitating the complete exit of certain players from the market, those undertakings which remain on the market may be able to increase output in order to win market share previously held by the exiting players. In this scenario, there may be economic benefits through an increased capacity utilisation rate by the remaining players.[18]

(25) This kind of efficiency is premised on increases in output by the undertakings remaining on the market. If the restructuring agreement contains limitations on output increases, then serious questions arise as to whether these kinds of efficiency can be obtained. The effect of any output limitation needs to be examined on a case-by-case basis and would appear to depend on the precise nature of the output limitations, including their temporal scope.

(26) In the hypothetical where there is no output limitation, it is important to note the type of cost benefits which may arise from greater capacity utilisation in the present context.[19] The most obvious kind of cost benefits arising from

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[17] Indeed, it may in fact be that efficient undertakings, rather than inefficient undertakings, exit the market in question.

[18] Guidelines, paragraph 68 ("*Efficiencies in the form of cost reductions can also follow from agreements that allow for better planning of production, reducing the need to hold expensive inventory and allowing for better capacity utilisation*").

[19] This is of particular relevance in the assessment of whether consumers obtain a fair share of the benefits, as discussed at paragraphs (41)-(42) below.

increased capacity utilisation will relate to fixed costs (i.e. those costs which do not vary with the amount of goods produced). Specifically, the undertakings remaining on the market may be able to increase their output and thereby spread their (unchanged) fixed costs over a larger amount of output. This will lead to a reduction in total unit costs.

(27) It cannot be excluded that variable cost reductions could also result from a capacity reducing agreement. Variable costs are costs which vary with output. Where variable costs decrease with output, increasing output could cause a downward shift along the variable cost curve (i.e. in this case it could be said that the efficiency of production increases with output). This might occur in cases where higher levels of production enable the utilisation of more efficient production technology. It may also occur because an undertaking increasing output purchases more raw material and obtains better prices due to bulk purchases and thereby reduces input costs. It may be that these kinds of efficiencies can be gained in industries that lend themselves to learning economies – as experience is gained in using a particular production process or in performing particular tasks, productivity may increase because the process is made to run more efficiently or because the task is performed more quickly.[20]

(28) While it can not be excluded that industrial restructuring agreements reduce variable costs, it would appear that they are less likely to reduce variable costs than fixed costs because such agreements generally aim at closing of production plants which constitute fixed costs. Overall, the nature of the cost benefits needs to be assessed on a case-by-case basis.

3.2. The third condition – restrictions must be indispensable to the attainment of these objectives[21]

(29) As noted in the Guidelines, this condition triggers a two-pronged test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Second, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment

[20] Guidelines, paragraph 66.

[21] Using the approach adopted by the Guidelines, these Observations will deal with the third condition (indispensability) before addressing the second condition (pass-on to consumers).

of the efficiencies.[22] The Commission will comment only on the first of these conditions in the context of restructuring agreements designed to reduce capacity. The second condition relates to the specific restrictions in the arrangement at issue and therefore is beyond the scope of this submission.

(30) When assessing whether the restrictive agreement as such is reasonably necessary, it needs to be examined whether there are "*no other economically practicable and less restrictive means of achieving the efficiencies*".[23]

(31) It needs to be emphasised that the indispensability being considered under this heading is not indispensability to the existence of the agreement itself, but indispensability for the achievement of the benefits identified under the first condition of Article 101(3) TFEU.[24]

(32) One important question in the context of restructuring agreements is whether market forces could have solved the problem of over-capacity without the collective intervention of individual undertakings.

(33) The Commission wishes to emphasise that so-called "*crisis cartels*" which aim to reduce industry capacity cannot be justified by economic downturns and recession-induced falls in demand. As a general rule in a free market economy, market forces should remove unnecessary capacity from a market. Price should amortise the changing relationship between supply and demand. Indeed, when demand falls, it is only natural that price should follow. In such circumstances, it is for each undertaking to decide for itself whether, and at which point, overcapacity becomes economically unsustainable and to take the necessary steps to reduce it.[25] Indeed, as stated by the ECJ, "*the concept inherent in the Treaty provisions on competition... [is that] each trader must determine independently the policy which he intends to adopt on the common*

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22 Guidelines, paragraph 73.

23 Guidelines, paragraph 75.

24 Commission decision of 24 July 2002, *Visa International – Multilateral Interchange Fee* (OJ 2002, L 318, p. 17), paragraph 98 ("*it should be emphasised that the indispensability being considered under this heading is not indispensability to the existence of the Visa system, but indispensability for the achievement of the benefits identified under the first condition of Article 81(3)*").

25 Alternatively, in the case of a cyclical downturn, the undertakings on the market may decide to maintain capacity in anticipation of increasing output in the expected upturn.

market...".[26] Hence normally competition itself would correct overcapacity problems and would bring the market back to equilibrium, without any need for coordination between the undertakings on the market.

(34) Competition in periods of crises may force the least efficient undertakings to exit a market. This is part and parcel of the competitive process. Indeed, the General Court of the European Union has accepted that "*it is impossible to distinguish between normal competition and ruinous competition. Potentially, any competition is ruinous for the least efficient undertakings*".[27] Similarly that court has accepted that the Commission is not required to grant attenuating circumstances when fixing fines due to the financial difficulties encountered by a sector and has noted in that regard that "*as a general rule cartels come into being when a sector encounters problems*".[28] In *FNCBV*, the General Court stated expressly that the fact that there is a crisis in a particular industry may be a factor which mitigates the penalty to be imposed but does not suffice to exclude the application of Article 101 TFEU.[29]

(35) However, there may be situations where problems of overcapacity are not likely to be remedied by market forces alone within a reasonable period of time which would imply that the overcapacity is of a structural nature (as opposed to the result of a cyclical downturn). The Commission explained in its annual report on competition policy for 1982 that "*structural overcapacity exists where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilization*

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26 Case C-7/95 P *John Deere Ltd v Commission* [1998] ECR I-3111, paragraph 86. See also *Competition Authority v BIDS* (ECJ), cited above, paragraph 34.

27 See Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO)* [1995] ECR II-289, paragraph 294.

28 See Case T-16/99 *Lögstör Rör v Commission* [2002] ECR II-1633, paragraphs 319-320; Joined Cases T-236/01, T-239/01, T-244/01 à T-246/01, T-251/01 et T-252/01 *Tokai Carbon e.a./Commission* [2004] ECR II-1181, paragraph 345; and Case T-30/05 *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission* [2007] ECR II-107, paragraphs 207-208. The EU Courts have also repeatedly accepted that, in imposing fines on undertakings, the Commission is not obliged to take account of their poor financial situation because recognition of such an obligation "*would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to market conditions*" (see, for example, Case C-308/04 P *SGL Carbon AG v Commission* [2006] ECR I-5977, paragraph 105 (and the case-law cited therein)).

29 Joined Cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles and Others v Commission* [2006] ECR II-4987, paragraph 90.

and a drop in output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium-term".[30] It may not be necessary in all circumstances for the firms to have incurred substantial operating losses. However, it would seem atypical in cases of structural over-capacity that firms would make sustained profits.

(36) Economic theory can help to illustrate why the problem of structural overcapacity cannot always be remedied within a reasonable time period by the free interplay of market forces and the mechanisms of competition. This can be well explained by a kind of "*war of attrition*" analysis in the context of game theory where the aim is to induce the rival(s) to exit the market, but where, in order to achieve this aim, firms are willing to suffer economic losses for some time. Specifically, in certain circumstances, firms will not want to release unutilised capacity because they anticipate that, sooner or later, other firms will leave the market, thus presenting an opportunity to increase capacity and gain market share. In such situations, even though reducing overcapacity would be beneficial for everyone in the industry, firms prefer not to make the first move of reducing their own capacity. Instead, they would prefer to wait for another player on the market to reduce capacity in order to benefit from the overall fall in capacity in the industry, without incurring the costs of reducing it themselves. In essence, this is a type of "*prisoner's dilemma*" in game theory.

(37) It would appear that situations where structural over-capacity cannot be remedied by market forces are most likely where:

(a) Giving up capacity is costly for the firms. This can occur in increasing returns industries where firms have large fixed costs and/or marginal costs which decrease with output.[31] For these firms, surrendering capacity is costly because it means a lost opportunity to gain market share and

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30 XIIth Report on Competition Policy (1982), paragraph 38.

31 See, for example, in the decision to open State aid proceedings with respect to the rationalisation of pig slaughterhouses (OJ C 37, 9.2.2002, p. 19), it is stated that: "*It has not been shown that the production process is characterised by high fixed costs, which was one of the reasons to accept that the market was not capable of bringing about the capacity reduction in the decision 'Stichting Baksteen*''.

thereby reduce costs of production. It can also occur in industries with significant sunk costs as these would also contribute to the costs of surrendering capacity.

(b) Stable, transparent and symmetric market structures. Firms are unlikely to participate in a costly war of attrition unless they perceive a chance of winning. Therefore the war will tend to take place between firms of similar sizes and cost structures and in relatively stable and transparent environments where their interests (and perceptions thereof) are sufficiently aligned to maintain capacity at an excess level.[32] On the contrary, in heterogeneous market structures some firms would normally suffer more than others from over-capacity and would have a higher incentive to reduce capacity and would be more likely to move first and release capacity.

(38) It is typically in these types of market environments that market forces alone may not be able to solve the overcapacity problem. However, the Commission cannot exclude that there would be other situations of markets failing to solve over-capacity problems.

(39) In looking at the first limb of the indispensability condition, it would also need to be assessed whether the excess capacity could not be reduced by way of mergers. This would also constitute a structural consolidation of the industry but would normally cover a small share of the market than a full scale restructuring agreement.

3.3. The second condition – consumers must receive a fair share of the resulting benefits

3.3.1. Pass-on and the sliding scale

(40) The party seeking to obtain the benefit of Article 101(3) TFEU needs to show that consumers would receive a fair share of any efficiencies resulting from an agreement between undertakings to reduce overcapacity. The concept of a "*fair share*" implies that the pass-on of benefits must at least compensate for

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32 Similar factors are relevant to the assessment of potential coordination in the merger context. See the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p.5) at paragraphs 48 and 49.

any actual or likely negative impact caused to consumers by the restriction of competition found under Article 101(1) TFEU.[33] Thus, under the sliding scale envisaged by the Guidelines, the greater the restriction of competition found under Article 101(3) TFEU, the greater must be the pass-on of efficiencies to consumers.[34]

3.3.2. The nature of the cost benefits

(41) It is also important to note that consumers are more likely to receive a fair share of cost efficiencies in the case of reductions of variable costs than in the case of reductions of fixed costs.[35] This is because profit maximising firms price at a point where marginal revenue equals marginal costs. Marginal revenue is the revenue gained by selling an additional unit of output. Marginal cost is the incremental cost of producing that unit and is a function only of variable costs (fixed costs are not affected by output). Therefore, as a general rule, output and pricing decisions of a profit maximising firm are not determined by fixed costs but by its variable costs.

(42) As discussed above (see paragraphs (26)-(28)), agreements between undertakings to reduce overcapacity are less likely to reduce variable (marginal) costs, and will generally tend to reduce the fixed cost component of unit costs. This needs to be examined on a case-by-case basis.

3.3.3. The degree of competitive constraint

(43) The degree of competitive constraint on the market players is a central element in the assessment of pass-on. When the agreement in question "*causes a substantial reduction in the competitive constraint facing the parties, extraordinarily large costs efficiencies are normally required for sufficient pass-on to occur*".[36]

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[33] Guidelines, paragraph 85.

[34] Guidelines, paragraph 90.

[35] Guidelines, paragraph 98.

[36] Guidelines, paragraph 101. See also Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p 2), paragraph 34.

(44) In assessing competitive constraints, it is important to consider actual competition, potential competition and buyer power.

(45) First, with respect to actual competition on the market, the Commission notes that a restructuring agreement may go beyond simply reducing capacity on the relevant market and may also lead directly to the withdrawal of certain undertakings. Depending on the facts of the case, this reduction in the number of independent operators on the market has the potential to significantly alleviate competitive pressures on the undertakings which remain.

(46) Second, with respect to potential competition, where entry barriers are increased as a result of a restructuring agreement, particularly in an industry with high sunk costs, the impact of potential competition on the behaviour of undertakings already on the market will be reduced.

(47) Third, buyer power is obviously an important competitive constraint. As a general rule, undertakings with excess capacity tend to be subject to greater competitive pressure from purchasers than undertakings on markets with low overcapacity.[37] Specifically, an agreement between undertakings to reduce capacity would generally strengthen their hand against the buyers of their product because of the decrease in supply on the market.[38] However, this of course depends on the nature of the market in question.[39]

4. THE POSSIBILITY FOR THE HIGH COURT TO MAKE A PRELIMINARY REFERENCE TO THE ECJ

(48) Opinions of the Commission under Article 15, paragraph 3, of Regulation No 1/2003 are not binding on national courts. Only the ECJ itself can give the national court a binding interpretation of the competition rules in the context of the preliminary reference procedure. Article 267 TFEU provides that if a question of interpretation of the Treaties is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on

37 See Case C-209/07, *Competition Authority v BIDS*, opinion of Advocate General Trstenjak of 4 September 2008, paragraph 70.

38 This is also a relevant factor when assessing the effects of the agreement in question.

39 See Guidelines, paragraph 97.

the question is necessary to enable it to give judgment, request the ECJ to give a ruling thereon. Therefore, if the Honourable Court has doubts on the interpretation of the EU competition rules applicable in the present case, the Commission would respectfully suggest to the Court that it make a preliminary reference to the ECJ.

5. CONCLUSIONS

(49) The Commission appreciates the opportunity to submit these Observations to the Honourable Court and remains at the disposition of the Court should it have any questions with respect to these Observations or any other issue in the case.