The explanation for this, it is submitted, is as follows. Provisions of the kind considered in *Keck* do not either regulate access to the market (like product requirements), or bar such access, as in *Toolex*. Their effect is simply to deny traders certain sales opportunities for goods which are already on the market: see the discussion in Wyatt & Dashwood, p. 332. Such provisions can, therefore, only hinder trade in the *Dassonville* sense if they discriminate against imports, at least indirectly. On the other hand, measures like the legislation in *Toolex* actually prevent products circulating elsewhere in the single market from getting onto the market of one of the Member States. Such market-splitting measures are caught by Article 28 because they hinder intra-Community trade: the fact that (unlike most of the measures constituting MEEQRs) they may be wholly non-discriminatory makes no difference to their impact on the free movement of goods. Accordingly, they require justification, in order to escape prohibition. *Toolex* and *Generics* confirm that, on this point, the Court has not resiled from the position it took, before *Keck*, in Joined Cases 60 and 61/84 *Cinéthèque* [1985] E.C.R. 2605.

A further lesson of *Toolex* is that the two categories of national measures identified in the *Keck* judgement were not intended by the Court to be exhaustive. Otherwise, we should have expected to find in *Toolex* an anxious discussion as to whether a marketing prohibition amounts to a "product requirement" or a "selling arrangement"—whereas manifestly it is neither. How such a measure should be assessed under Article 28 depends on the Court's relevant case law, not including *Keck*.

ALAN DASHWOOD

## *COURAGE* V. *CREHAN*: JUDICIAL ACTIVISM OR CONSISTENT APPROACH?

IN Case C-453/99 *Courage Ltd.* v. *Crehan* (judgment of 20 September 2001, not yet reported), the European Court of Justice has been confronted once more with the difficult task of reconciling the effectiveness of Community rights with national rules on remedies. By virtue of a series of agreements between Inntrepreneur Estates Ltd. (IEL), a company which owned public house estates, and Courage Ltd., a brewery with a 19% share of the United Kingdom market in sales of beer, all IEL tenants were required to purchase the whole of their beer requirements exclusively from Courage Ltd. In 1993, Courage Ltd. brought an action for the recovery from Mr. Crehan, a tenant of IEL, of a sum of more than

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£15,000 for unpaid deliveries of beer. Mr. Crehan contended that the exclusive purchasing obligation was anti-competitive because Courage Ltd. sold its beers to independent tenants of public houses at substantially lower prices than those imposed on IEL tenants. He claimed that the beer tie was therefore contrary to Article 81(1) EC and sought damages for loss caused to him by the imposition of the beer tie. Carnwath J. dismissed the counter-claim and found in favour of Courage Ltd. (*Courage Ltd.* v. *Crehan* [1998] E.G.C.S. 171). Mr. Crehan appealed.

The case raised two important and contentious questions which the Court of Appeal decided to refer to the European Court (*Courage Ltd.* v. *Crehan* [1999] 2 E.G.L.R. 145). These were first, whether a party to an agreement prohibited under Article 81(1) EC might be given rights against the other party, and in particular, whether it could seek compensation for loss against its co-contractor. Secondly, the court asked whether the English rule which prevents a party to an illegal agreement from seeking damages from the other party (*Langton* v. *Hughes* (1813) 1 M. & S. 593, at 596, *per* Lord Ellenborough; *Boissevain* v. *Weil* (H.L.) [1950] A.C. 327) was compatible with EC law. The decision to make a reference can be contrasted with the approach followed in a previous case, *Gibbs Mews plc* v. *Graham Gemmell* [1999] 1 E.G.L.R. 43, where the Court of Appeal declined to refer and applied the rule in the context of a similar agreement. It is difficult to see on what grounds such a rule could be incompatible with EC law. After all, a bar to actions for damages brought by a party to an illegal contract not only can be found in several of the national legal systems but also seems a logical reflection of the "estoppel" principle (*nemo auditur propriam turpitudinem allegans*). The main issue was, however, as pointed out by Advocate General Mischo in his Opinion, whether the rule was so broadly framed as to gravely impair the effectiveness of the Community right enshrined in Article 81 EC.

The case law of the European Court on national remedies for breaches of EC law has been plagued by the tension between the principles of procedural autonomy and effectiveness. In Case 33/76 *Rewe-Zentralfinanz* v. *Landwirtschaftskammer für das Saarland* [1976] E.C.R. 1989 the Court held that, in the absence of Community harmonisation, it was for the national legal systems to lay down the procedural rules governing actions to safeguard EC rights. This principle, however, would apply subject to two limitations. First, national rules should not be less favourable than those governing similar domestic claims (principle of equivalence). Second, they should not render excessively difficult or impossible

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the exercise of a Community right (principle of effectiveness). Since then, national courts have on numerous occasions asked the European Court to rule on the compatibility of national rules on remedies with EC law. These references provided the backdrop for judgments as controversial and well known as those delivered in Case C-213/89 *Factortame (I)* [1990] E.C.R. I-2433 and in Case C-271/91 *Marshall II* [1993] E.C.R. I-4367, where the Court set aside national principles that compromised the effectiveness of Community rights.

The judgment in *Courage* was deeply progressive. The Court first held that Article 81 EC conferred rights on any individual *even* where he is a party to an anti-competitive agreement. This would include the right to compensation for loss suffered as a result of that agreement because any other conclusion would undermine the full effect of that provision. Significantly, the Court added that actions for damages between co-contractors could contribute effectively to the maintenance of healthy competition. This policy argument largely coincides with the approach followed by the US Supreme Court in *Perma Life Mufflers Inc.* v. *International Parts Corp.* (1968) 392 U.S. 134, where emphasis was laid on the threat that private actions could pose to anyone contemplating the conclusion of an anti-competitive agreement. The Court, however, did not seize the opportunity to create a centralised action for damages for horizontal situations and confirmed that the configuration of a right to compensation in these cases was a matter for national law. The Court then struck down the English rule, but only in so far as it was an *absolute* one and prevented a private party from seeking compensation for loss suffered as a result of an anti-competitive agreement *solely* on the ground that it was a party to it. Finally, the Court considered in which circumstances the rule would be compatible with EC law. It held that Community law did not preclude it where the claimant is found to "bear significant responsibility for the distortion of competition" (at paragraph 31 of the judgment). The Court went on to lay down the criteria that a national court should apply in deciding whether a party to an illegal agreement did or did not bear such a responsibility. These were the economic and legal context of the agreement and the respective bargaining power of the parties. The first was relevant in cases where an agreement that has no anti-competitive object is found to be contrary to Article 81(1) EC solely for being part of a network of agreements that cumulatively have a harmful effect on competition (Case C-234/89 *Delimitis* [1991] E.C.R. I-935). In these cases, only the party controlling the network bears significant responsibility for the

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breach of that provision. The second criterion had a wider application and referred to cases where one of the parties is in a markedly weaker position than the other, so as to compromise its freedom to negotiate the contractual terms or its capacity to avoid the loss.

It is suggested that the decision in *Courage* is consistent with the case law on national remedies and procedural rules. By narrowing the English bar, the Court struck a balance between the need to ensure the uniform and effective protection of Community rights and the respect for a soundly principled rule of national law. In *Courage*, the Court had a clear opportunity to extend the *Francovich* principle (Joined Cases C-6 and 9/90 [1991] E.C.R. I-5357) to actions between private parties (see the Opinion of Advocate General Van Gerven in Case C-128/92 *Banks* v. *British Coal Corporation* [1994] E.C.R. I-1209, which strongly supported such an extension). However, instead of framing a Community right to damages against private parties, the Court preferred to guarantee a minimum level of effectiveness for Community rights while preserving the application of national rules.

More importantly, the judgment can be construed as an endorsement from the Court of two strands of the Commission's competition policy. First, it explicitly upholds the view that actions for damages between co-contractors can be used as valuable instruments of public policy to promote competition. Secondly, it implicitly favours the achievement of the main objective pursued by the recent proposals for the reform of the current system of enforcement of the EC Competition rules, namely the fully decentralised application of Article 81 EC. It is from this point of view that the judgment can be seen as having an evident teleological slant.

ALBERTINA ALBORS-LLORENS

## THE 'BABY-DRY' CASE: THE MODERNISATION OF TRADE MARKS?

WHEN is a monopoly not a monopoly? Following the decision of the European Court of Justice in Case C-383/99 P *Procter & Gamble* v. *Office for Harmonisation of the Internal Market (OHIM)* [2002] E.T.M.R. 3, the answer appears to be when it is a registered trade mark.

The facts of the case are these. In 1996, Procter & Gamble applied to the OHIM to register BABY-DRY as a Community Trade Mark for "disposable diapers made out of paper or

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