At one level the problem in *Rutherford* is of historic interest only. The Age Discrimination Regulations repealed the statutory age bar and introduced, subject to justification, an express prohibition on direct and indirect discrimination on the grounds of age. The new definition of indirect discrimination in the Age Discrimination Regulations, which also applies to sex discrimination (as well as the other strands) in the employment context, asks the question whether the applicant suffers ''particular disadvantage'' which, according to the government, does not always require detailed statistical calculations. Most lawyers will heave a sigh of relief at that. But, in those circumstances (sex discrimination cases which do not concern employment issues, and employment and other cases where discrimination on the grounds of colour or nationality is alleged) where the old (''considerably higher'') formula continues to apply, statistics still need to be shown. Even where the new ''particular disadvantage'' formula applies, a pool will still have to be identified to determine whether a group has been particularly disadvantaged. So in both these situations the ruling in *Rutherford* remains relevant but unfortunately the House of Lords offers tribunals only ambiguous guidance.

CATHERINE BARNARD

RES JUDICATA OR SUPREMACY? THE BINDING FORCE OF ARTICLE 249 EC

THE House of Lords ruling in *Inntrepreneur* v. *Crehan* [2006] UKHL 38 brings to an unsuccessful end Bernard Crehan's thirteen-year campaign to recover damages for loss he claims to have suffered as a result of entering into an agreement falling foul of Article 81 EC. Inntrepreneur owns a number of public houses in the UK, some of which are leased to tenants who run them as their own business. In July 1991 Inntrepreneur leased Crehan two public houses for 20 years on condition that all beer sold on the premises be purchased from Courage. Crehan's business failed in 1993. Crehan claimed that (a) the condition in his lease requiring him to purchase exclusively from Courage (the beer-tie) was a breach of Article 81 EC, and (b) by preventing him from purchasing from cheaper suppliers the beer-tie caused him to suffer substantial losses. Crehan had already successfully resisted the claim that even if he were able to show an infringement of Article 81 EC he could not recover damages as he was *in pari delicto*, under which doctrine the courts refuse to aid those party to illegal action. In Case C-453/99 *Courage v Crehan* [2001] E.C.R. I 6297, [19]-[24] the ECJ ruled that the *in pari delicto* doctrine could not be blindly applied to bar recovery of damages suffered by

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co-contractors to agreements in breach of Article 81 EC. It thus remained for Crehan to show a breach of Article 81 EC.

Article 81 EC prohibits agreements which, *inter alia*, have the object or effect of restricting competition. One sense in which an agreement may be said to restrict competition is if it increases the difficulty which competitors of at least one of the agreement's parties face when seeking to enter the market (Case C-234/89 *Delimitis* [1991] E.C.R. 935). The result of this exclusionary effect is that incumbent operators are able to charge consumers more than would be charged absent the agreement. Crehan's complaint was that his agreement with Inntrepreneur contributed to an exclusionary effect on competition. In Case C-234/89 *Delimitis* [1991] E.C.R. 935, the ECJ ruled that an exclusionary effect can be proven by carrying out a two-stage enquiry. The first question to ask is whether the market is difficult to enter. If it is then it is necessary to assess the extent to which the agreements entered into by the parties contribute to the difficulty of entering the market.

Proving that an agreement has a restrictive effect on competition requires "a comprehensive investigation and evaluation of a complex economic situation" (*Crehan v Inntrepreneur* [2004] EWCA Civ 637, [76]). However, in cases involving other UK brewers the European Commission had decided that the UK market was difficult to enter at the time with which Crehan was concerned (e.g. *Whitbread* [1999] OJ L 88/26). Counsel for Crehan argued that the national court could not, or should not, deviate from the Commission's finding of fact; and so Crehan could satisfy the first limb of the *Delimitis* test. The question for the House of Lords was '[i]f a national court raises a question of fact which has already been decided by the Commission… is it free to reach a different conclusion?" ([2006] UKHL 38, [14], Lord Hoffmann).

This question is important, first because it affects the ease with which private parties can establish a breach of the EC competition rules, and thus their incentive to bring damages actions, and second, because parties need to know the extent to which structuring their business arrangements to achieve conformity with Community decisions to which they are not party immunises their arrangements from challenge. In order to resolve this question the House of Lords considered the binding nature of Commission decisions under Community law. It might be thought that this question should be determined by the ECJ, but the House of Lords decided the issue by drawing on previous ECJ rulings and the opinions of Advocates General.

First, it is clear that a national court is bound by a Community decision as to both law and fact that involves (a) the same parties and

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(b) the same measure or factual matrix as previously scrutinised at the Community level ([2006] UKHL 38, [11], Lord Bingham). Such decisions are binding because Article 249 EC states that decisions are binding upon those to whom they are addressed and Article 16(1) of Regulation 1/2003 [2003] OJ L 1/1 prevents the national court from reconsidering the issues decided at the Community level ([2006] UKHL 38, [6], [63]-[64]).

Secondly, it is also clear that a national court should refrain from taking a decision that would involve (a) the same parties and (b) the same measure or factual matrix as is currently being, or is imminently to be, scrutinised at the Community level ([2006] UKHL 38, [11] Lord Bingham). If a decision is likely or contemplated at the Community level then *Delimitis* strongly suggests that the national proceedings are stayed. Whilst having concurrent jurisdiction, the national court should show restraint and allow the decision to be taken at the Community level. Once the decision is taken at Community level, this second situation becomes equivalent to the first.

The dispute between Crehan and Inntrepreneur could not be resolved on either the first or second basis, as in October 1997, at the request of the Commission, Inntrepreneur withdrew the notification of the original form of agreement and the Commission decided not to act on a formal complaint made, *inter alia*, by Crehan. Consequently there was no Community ruling on the agreement and no prospect of a Community ruling ([2006] UKHL 38, [25]-[33]). It was thus necessary to argue that, thirdly, a pre-existing Community decision that involves (a) different parties but (b) the same measure or factual matrix, is binding on the national court as to the facts decided.

It had been argued that since Article 10 EC requires national courts to avoid taking decisions conflicting with those taken at the Community level, the national court must adopt the findings of fact reached in the previous Community decisions; to do otherwise would be to breach the duty of avoiding conflicting decisions ([2004] EWCA Civ 637, [79]-[82], and [98]). Whilst accepting the duty to avoid conflict, the House of Lords considered that "the question of what counts as a conflicting decision" had been left unanswered ([2006] UKHL 38, [44]). The House of Lords held that the national court is not required to adopt findings of fact reached in Community decisions to which the parties before the national court are not party; to hold otherwise would deny third parties an opportunity to challenge findings of fact affecting them ([2006] UKHL 38, [67] Lord Hoffmann). Evidence relied on at the Community level, as well as the Commission's specialist assessment of it can be invoked and relied on in the national court, and "given the expertise of the Commission" it is likely to be regarded "as highly persuasive" ([2006] UKHL 38,

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[69]). The prior finding of fact thus shifts the burden of persuasion to the party contesting that assessment, but it does not bind the national court:

> If, upon an assessment of all the evidence, the [national] judge comes to the conclusion that the [prior Community assessment of facts] was wrong, I do not see how, consistently with his judicial oath, he can say that as a matter of deference he proposes nevertheless to follow the [Community assessment]. ([2006] UKHL 38, [69], Lord Hoffmann)

The House of Lords' ruling makes it clear that Community decisions bind only those to whom they are addressed as to both law and fact. However, the origin of the binding effect remains unclear (Nazzini, *Concurrent Proceedings in Competition Law*, (OUP, 2004) [7.01]-[7.73]). The binding nature derives from Article 249 EC, which says that decisions "shall be binding in [their] entirety upon those to whom [they are] addressed." In Case 9/70 *Franz Grad* [1970] E.C.R. 825, it was held that this meant decisions have direct effect, hence can be relied on and enforced in the national court. Further, it is clear from Case 6/64 *Costa* v. *ENEL* [1964] E.C.R. 585 that in order for Community law to be uniformly applied in all Member States, it has primacy over national law. However, if the binding nature of the decision results from the operation of direct effect and supremacy, it is difficult to see how the decision does not bind third parties as to the findings of fact therein. Since the Community findings of fact are only binding on the national court when the parties, the law, and the facts being contested are identical ([2006] UKHL 38, [49]-[52] and Case C-344/98, *Masterfoods* [2000] E.C.R.-I 11369, AG Opinion [16]) it seems clear that the binding force of Article 249 EC decisions stems from the operation of *res judicata* rather than through the operation of direct effect and supremacy (Nazzini, *Concurrent Proceedings in Competition Law*, [5.08]-[5.13] considers that *res judicata* does not extend to Commission decisions as they are not judicial proceedings). For the national court to reconsider the findings of fact would be to undermine the rationale of *res judicata* that a single definitive decision be rendered on the matter and Article 16(1) of Regulation 1/2003 [2003] OJ L 1/1 can be seen to codify this logic. This interpretation of Article 249 EC is consistent with Article I-33 of the Draft Constitutional Treaty, which categorises such decisions as non-legislative acts. Additionally, when a Community decision is contemplated or imminent, the national court shows deference, presumably on the basis that there is greater experience, expertise, and evidence, available at the Community level (the Court of Appeal offered this rationale to justify the binding nature of findings of facts on third

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parties: [2004] EWCA Civ 637, [156]). Though Lord Hoffmann found talk of deference unhelpful, his unease can be restricted to the binding nature of findings of fact on third parties ([2006] UKHL 38, [69]).

OKEOGHENE ODUDU

SEEKING HEALTHCARE ELSEWHERE

THE case law of the European Court of Justice (ECJ) has been a driving force behind the extension of cross-border rights to healthcare in recent years. In Cases C-120/95 *Decker* [1998] E.C.R. I-1831 and C-158/96 *Kohll* [1998] E.C.R. I-1931, the ECJ decided that the fact that the national rules at issue are social security rules does not remove medical treatment from the scope of Articles 49 and 50 of the EC-Treaty. Consequently, national procedures which require patients, in line with secondary Community legislation, to seek prior authorisation for medical treatment in another member state can still fall foul of primary Community law if they create unjustifiable impediments to the free movement of goods and services.

Secondary European legislation regulates access to healthcare as an ancillary issue arising from the free movement of persons. Under Articles 22 (1) (c) (i) and 22a of Council Regulation No 1408/71 as subsequently amended, any EU national insured under the legislation of one of the member states can receive medical treatment in another member state "on behalf of" his or her insurance-providing institution, provided that the patient has (except in cases of emergency treatment) been given prior authorisation from his insuring institution to receive the treatment he needs in another member state. According to Article 22 (2), this authorisation must be granted when the treatment cannot be given locally "within the time normally necessary for obtaining the treatment"; this was interpreted by the ECJ in Case C-56/01 *Inizan* [2003] E.C.R. I-12403 to mean that the patient ought not to face any "undue delay". The notion of "undue delay" also demarcates the outer limit for lawful refusals of prior authorisation where such requirements are still compatible with Articles 49 and 50 of the EC-Treaty (Case C-157/99 *Smits and Peerbooms* [2001] E.C.R. I-5473). Where authorisation was requested by the patient and wrongfully refused, the patient can recover the costs of treatment undergone elsewhere (Case C-368/98 *Vanbraekel* [2001] E.C.R. I-5363). This case law applies to reimbursement models and health insurance systems which offer benefits in kind alike (Case C-385/99 *Müller-Fauré and van Riet* [2003] E.C.R. I-4509).

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