The House of Lords has reversed an unfortunate decision of the Court of Appeal, and has restored to the protection of the Housing Act those tenants who live in ill-equipped bed-sits and exist on fast food and little else. This must be right, and it is good that any past ambiguities or uncertainties have been laid to rest. There is however a niggling worry about the future implications of the decision. Recently, the House of Lords has shown itself to be the robust protector of the tenant, even to the extent of finding a tenancy in a novel, non-proprietary context in *Bruton* v. *London & Quadrant Housing Trust* [2000] 1 A.C. 406. The cause for concern is whether this legislative protection will rebound to the disadvantage of the tenants themselves. Mrs. Thatcher's Government certainly thought that the Rent Acts had been largely responsible for the marked decline in the private-rented sector during the last century, and indeed passed the landlord-friendly Housing Act to address the problem. One hopes that the Housing Act is considered sufficiently user-friendly by potential landlords—such as the owners of private hotels—not to deter them from conducting their business in the future. It is a fine line that the conservationist has to draw, between providing adequate protection on the one hand, and over-protection on the other. The lack of any protection can prove very dangerous to a vulnerable species, but so unfortunately can over-protection. Let us hope that the Housing Act as presently drawn is about right.

LOUISE TEE

NON-DISCRIMINATORY TRADE RESTRICTIONS AFTER *KECK*

IN its *Keck* judgment—famous or notorious according to taste—the Court of Justice drew a distinction, for the purposes of the application of the prohibition in Article 28 EC against measures having equivalent effect to quantitative restrictions ("MEEQRs"), between two categories of national measures. On the one hand were "product requirements": measures specifying requirements to be met, in order to obtain access to the market of a Member State, by products coming from other Member States where they are lawfully manufactured and marketed, like the minimum alcohol requirement for fruit liqueurs in *Cassis de Dijon* (Case 120/78 [1997] E.C.R. 649). Such product requirements are liable to constitute MEEQRs, and therefore require specific justification, in order to escape prohibition, on one of the public interest grounds recognised by Community law. On the other hand was the category of measures

https://doi.org/10.1017/S0008197302331507 Published online by Cambridge University Press

described in the judgment as "provisions restricting or prohibiting certain selling arrangements". An example was the legislation at issue in the main proceedings in *Keck*, which prohibited the resale of products below their purchase price, thereby depriving retailers of a form of sales promotion. Other examples, attested by the case law post-*Keck*, are measures regulating advertising methods, the kind of shop in which goods of a certain description can be sold, shops' opening hours and Sunday trading. National provisions in this latter category are not normally such as to hinder trade between Member States under the test formulated by the Court in *Dassonville* (Case 8/74 [1974] E.C.R. 837, at para. 5), and so do not call for justification; not, that is, "so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States": see Joined Cases C-267 and 268/9 [1993] E.C.R. I-6097, at paras. 15–17.

One of the questions which has been debated since *Keck* is how the reasoning adopted in the judgment might affect the assessment under Article 28 of measures which are capable of restricting the free movement of goods, while being neither directly nor indirectly discriminatory. A particularly clear example of such a measure came under the Court's scrutiny in Case C-473/98 *Kemiekalieinspektionen* v. *Toolex Alpha AB*, not yet reported in the E.C.R. The case has not attracted much attention so far (though it is mentioned in a footnote on page 330 of Wyatt & Dashwood, *European Union Law*, 4th ed.) perhaps because it is interesting not so much for what the Court had to say in its judgment, or Advocate General Mischo in his Opinion, as for what is passed over in silence.

The question put to the ECJ, in a reference for a preliminary ruling under Article 234 EC from a court in Sweden, concerned legislation prohibiting the marketing or use for industrial purposes of a chemical solvent, trichloroethylene, which was believed to be carcinogenic. The Court was asked, in effect, to rule as to whether such legislation, if caught by the prohibition of Article 28 EC, would qualify for exemption under Article 30 EC. (The order for reference having been made before the entry into force of the Amsterdam Treaty, the provisions there mentioned were, respectively, Article 30 and Article 36.)

A preliminary issue for the Court was whether existing EC legislation relating to dangerous substances covered the same ground as the Swedish legislation under challenge in the national proceedings. That was because Article 30 ceases to be available as

https://doi.org/10.1017/S0008197302331507 Published online by Cambridge University Press

an escape route from the prohibition in Article 28, once the measures for securing the public interest objective it is sought to rely on (here, protection of human health against risks from the industrial use of trichloroethylene) have been harmonised at Community level: among many authorities, see Case C-5/94, *Hedley Lomas* [1996] E.C.R. I-2553, at para. 18. After briefly examining the three relevant Community measures in force, the Court found, as the Advocate General had done, that these did not present a bar to the action taken by the Swedish authorities.

Both the Court and the Advocate General specifically considered whether national legislation such as that in issue constituted a MEEQR within the meaning of Article 28, and found that it did. That was so because the general prohibition on the industrial use of trichloroethylene in Sweden was likely to bring about a reduction in the volume of imports of that product; and, although exemption could be obtained on an individual basis from the competent national authority, "the concept of a measure having an effect equivalent to a quantitative restriction also applies to the obligation imposed upon economic operators to apply for exemption ..." (paras. 36 and 37 of the judgment). However, the Court, again following the Advocate General, held that a complete ban (as opposed to the imposition of a time limit on exposure to the substance) was justifiable, owing to the difficulty of determining a safety threshold; and also that the system of individual exemptions appeared to be "appropriate and proportionate" (paras. 45 and 46 of the judgment). The conditions for the application of Article 30 were, accordingly, satisfied.

The wider significance of the case lies in the fact that not a word was said about *Keck* by the Court, nor by the Advocate General nor, seemingly, those who submitted observations, including the Commission. That this was not simply an oversight is strongly suggested by the similar silence of the Court and of Advocate General Jacobs in a case decided back in 1997, Case C-316/95 *Generics BV* v. *Smith, Kline and French Laboratories Ltd.* [1997] E.C.R. I-3129. One of the questions in that case was whether a rule of patent law prohibiting the submission of samples of a product manufactured by a patented process, before the expiry of the patent, for the purposes of an application for marketing authorisation following such expiry, amounted to a MEEQR. The Court, following the Advocate General, was satisfied this was so, but went on to find the restriction justified under Article 30. The Court evidently regards *Keck* as simply having no relevance in such cases, to the point where it does not even need to be explicitly distinguished. See also Case C-189/75 Frantzèn [1997] E.C.R. I-5909.

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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

https://doi.org/10.1017/S0008197302331507 Published online by Cambridge University Press