THE DISCRIMINATING DOCTOR

In its seminal judgment in Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] E.C.R. I-6097 the Court of Justice drew a distinction between rules concerning product requirements and rules concerning certain selling arrangements. While the former are caught by the *Dassonville* formula (Case 8/74 *Procureur du Roi* v. *Dassonville* [1974] E.C.R. 837, para. 5) and so breach Article 28, the latter do not, provided that they apply to all affected traders operating in the territory and have the same burden in law and in fact on the domestic goods and imported goods (*i.e.* they are non-discriminatory). By implication, selling arrangements which are discriminatory will breach Article 28 unless they can be justified by the defendant State by reference to one of the mandatory requirements or one of the Article 30 derogations, a view supported by paragraph 17 of *Keck* where the Court suggested that Article 28 would be triggered only where national rules impeded access to the market for foreign goods more than they impeded access for domestic products.

Although the Court took a while to reach this logical conclusion to its own judgment in *Keck* (see, for example, its much criticised decisions in Case C-412/93 *Leclerc-Siplec* v. *TF1 Publicité SA* [1995] E.C.R. I-179 and Case C-391/92 *Commission* v. *Greece* [1995] E.C.R. I-1621 (infant milk)), it finally recognised the point in Joined Cases C-34–36/95 *De Agostini* [1997] E.C.R. I-3843, a case concerning (*inter alia*) a Swedish ban on television advertising directed at children under 12. In that case the Court said that an outright ban on a type of promotion for a product which is lawfully sold might have "a greater impact on products from other Member States" (para. 42). It continued that while the efficacy of various types of promotion was a question of fact to be determined by the national court, "in its observations De Agostini stated that television advertising was *the only effective form* of promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents" (para. 43, emphasis added). These paragraphs contain a strong hint that the Court thought that the Swedish measure had the same burden in law but a different burden in fact and so breached Article 28 unless justified.

Case C-254/98 *Heimdienst* [2000] E.C.R. I-151 extended the ruling in *De Agostini* to a discriminatory selling arrangement which, while not actually preventing market access, did *hinder or impede* that access. It concerned an Austrian rule permitting bakers, butchers and grocers to sell their produce door-to-door using a

delivery van but only if they also traded from a shop in that or an adjacent area. The Court found that the legislation did not "affect in the same manner the marketing of domestic products and that of products from other Member States" (para. 25) because the legislation obliged traders with a shop in another Member State to buy a shop in the locality (with the additional costs this entails) before they could sell their goods door-to-door. Since traders established in other Member States suffered a disadvantage in comparison with local economic operators who already met the requirement of having a shop in the area, the Austrian rule breached Article 28 and needed to be justified. On the facts, the Court found the requirement of having a shop in the locality to be disproportionate.

Heimdienst influenced the Court's judgment in Case C-322/01 *Deutscher Apothekerverband eV* v. *0800 DocMorris NV, Jacques Waterval*, judgment of 11 December 2003. DocMorris had a pharmacy in the Netherlands and also offered medicines for sale over the internet; both activities were licensed in the Netherlands. In Germany medicinal products could be sold, but only in pharmacists' shops; sales by mail order were prohibited. The German pharmacists' association therefore tried to prevent DocMorris selling medicines to German consumers over the internet. The Court of Justice found that the prohibition of internet sales was "more of an obstacle to the pharmacies outside Germany than to those within it". While German pharmacies also could not sell their products over the internet, for them this was an "extra or alternative method" of gaining access to the German market: they could still sell their products in their dispensaries. However, for pharmacies not established in Germany, the Court noted, that "the internet provides a more significant way to gain direct access to the German market". It concluded that "[a] prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products" (para. 74). Because the prohibition did not affect the sale of domestic medicines in the same way as it affected the sale of those coming from other Member States, the German rule breached Article 28 (paras. 75–76). On the question of justification, the Court said that while the breach could not be justified on public health grounds in respect of non-prescription medicines, it could be justified in respect of prescription medicines.

The interest in *DocMorris* lies first in its clear confirmation of the post-*De Agostini* case law and the assertion that discriminatory certain selling arrangements can constitute measures having

equivalent effect to quantitative restrictions (para. 76, although see the confusing wording in para. 68).

Second, *DocMorris* is of interest because the Court appears to suggest that potential—rather than actual—disparate impact of the national rule is enough to trigger Article 28. As we have seen, at paragraph 74 the Court talks of the prohibition which "could" impede access to the market. While this sits comfortably with the Court's traditional analysis of indirectly discriminatory measures (see, *e.g.*, Case C-237/94 *O'Flynn* [1996] E.C.R. I-2617) and comes closer to the basic *Dassonville* formula ("all trading rules which are capable of ... hindering, directly or indirectly, actually or potentially, intra-Community trade") it seems to run counter to the principle apparently established in *De Agostini* of the need to show actual disparate impact. Further, in *DocMorris* the Court also appears to have overlooked the presumption of legality which it also seemed to have laid down in *De Agostini*: while product requirements are presumed to impede market access and so breach Article 28 (the *per se* illegal approach), certain selling arrangements are presumed not to hinder access to the market and so do not breach Article 28—the *per se* legal approach. In the certain selling arrangement situation the trader will need to work hard to rebut the presumption of legality, possibly by producing statistical or other evidence (as in *De Agostini*) to prove actual, rather than merely potential, disadvantage.

However, in *DocMorris* the Court did not expressly engage with these issues and any shift in approach must be read subject to its own (re-?)analysis in paragraph 71 of the pre-*De Agostini* cases such as *Leclerc-Siplec* where, it observed, on the facts of *Leclerc-Siplec* the prohibition on broadcasting the advertisements was not extensive (since it covered only one particular form of promotion (television advertising) of one particular method of marketing products (distribution) and so the ban did not have a different burden in fact on the imported goods). This tends to suggest that any "potential" disparate impact must be pretty concrete—coming very close to actual.

Finally, all this talk of discriminatory certain selling arrangements should not divert attention away from the fact that genuinely non-discriminatory certain selling arrangements continue to fall outside Article 28. This was most recently confirmed in Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH* v. *Troostwijk GmbH*, judgment of 25 March 2004, where the Court found that a national rule prohibiting any reference to the fact that goods originated from an insolvent estate, where those goods no longer constituted part of the insolvent estate, satisfied the two *Keck*

criteria: the rule applied to all the operators concerned who carried on their business on Austrian territory and the rule was not discriminatory. For good measure the Court added that "In any event, there is no evidence in the file forwarded to the Court by the national court to permit a finding that the prohibition *has had* such a [discriminatory] effect" (para. 42 emphasis added). This reinforces the view that the national rule must have actual, rather than potential, disparate impact.

CATHERINE BARNARD

DAMAGES FOR NON-ECONOMIC HARM IN UNFAIR DISMISSAL CASES

IN *Dunnachie* v. *Kingston-upon-Hull City Council* [2004] EWCA Civ 84, the Court of Appeal (Sedley L.J. and Evans-Lombe J., Brooke L.J. dissenting) established that a compensatory award for unfair dismissal under the Employment Rights Act 1996 can include damages for non-economic harm.

One of the remedies for unfair dismissal under the Employment Rights Act 1996 is an award of damages, which includes a "compensatory" element that should be "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant ... in so far as that loss is attributable to action by the employer" (section 123(1)), but which is currently subject an overall limit of £55,000. The issue in *Dunnachie* was whether the "compensatory" element covers only quantifiable pecuniary losses.

Ever since the Industrial Relations Act 1971 introduced a right not to be unfairly dismissed, compensation for unfair dismissal has been required by law to be such amount as the tribunal considers just and equitable in all the circumstances. Until recently, the orthodox view established in *Norton Tool Co. Ltd.* v. *Tewson* [1973] 1 W.L.R. 45 was that the statutory formula for compensation is not wide enough to include damages for non-economic harm in unfair dismissal cases. However, in *Johnson* v. *Unisys* [2001] UKHL 13, [2003] 1 A.C. 518 Lord Hoffmann expressed the view that this was wrong, and stated that he could "see no reason why in an appropriate case ... [the tribunal should not award] compensation for distress, humiliation, damage to reputation in the community or to family life".

In *Dunnachie*, Sedley L.J. held that Lord Hoffmann's view was part of the ratio of *Johnson*, and therefore of binding authority, since Lord Bingham and Lord Millett had both expressed their