# OPINION OF ADVOCATE GENERAL MISCHO

delivered on 22 March 2001 [1]

## I — Facts and procedure

1. This matter has been referred to the Court of Justice by the Court of Appeal of England and Wales (Civil Division) in proceedings between Courage Ltd (hereinafter 'Courage'), the plaintiff in the main proceedings, and Mr Bernard Crehan, the defendant in the main proceedings. The Court of Appeal has referred four questions asking about the possibility for a party to an agreement prohibited under Article 81 EC to claim damages from his co-contractor.

2. In 1990, Courage, a brewery with a 19% share of the market in sales of beer, and Grand Metropolitan plc (hereinafter 'Grand Met'), a company with various catering and hotel interests, agreed to merge their estates of public houses. To this end, their respective estates were transferred to Inntrepreneur Estates Ltd (hereinafter 'IEL'), a company owned in equal shares by Courage and Grand Met.

3. An agreement concluded between IEL and Courage provided that all IEL tenants had to buy their beer exclusively from Courage. Courage was to supply the quantities of beer ordered at the prices specified in the price lists applicable in the establishments leased to IEL.

4. IEL provided a standard form of lease for its tenants. While the level of rent could be a point of negotiation between a prospective tenant and IEL, the exclusive purchase obligation and the other clauses of the contract were not negotiable.

5. In 1991, Mr Crehan concluded two 20-year leases with IEL imposing an obligation to purchase from Courage. The rent was subject to a five-year upward only rent review to the higher of the rent for the immediately preceding period or the best open market rent obtainable for the residue of the term on the other terms of the lease. The tenant had to purchase a fixed minimum quantity of specified beers and IEL agreed to procure the supply of specified beer to the tenant by Courage at the prices shown in the latter's price list.

1 — Original language: French.

6. In 1993, Courage brought an action for the recovery from Mr Crehan of the sum of more than GBP 15 000 for unpaid deliveries of beer.

7. Mr Crehan's defence was that the exclusive purchase obligation for certain specified types of beer ('the beer tie') in the lease was contrary to Article 81 EC and he counter-claimed for damages. The basis for Mr Crehan's claim was the fact that Courage sold its beers to clients who were not bound by the beer tie at substantially lower prices than those given in the price list imposed on its tied tenants. He contends that this price difference resulted in a reduction in the profitability of tied tenants, driving them out of business.

8. The considerations which led the Court of Appeal to refer questions to the Court of Justice for a preliminary ruling were as follows.

9. First, in an earlier judgment the Court of Appeal had held that Article 81(1) EC was designed to protect third-party competitors and not parties to the prohibited agreement. It was held that they are the cause, not the victims, of the restriction of competition.

10. Second, English law did not allow a party to an illegal agreement to claim damages from the other party. Even if Mr Crehan's claim that his lease infringed Article 81 EC were upheld, English law would bar his claim for damages. In contrast, it was clear from the judgment of the Supreme Court of the United States of America in *Perma Life Mufflers Inc.* v *International Parts Corp.* 392 U.S. 134 (1968) that where a party to an anti-competitive agreement is at an economic disadvantage, it may bring an action for damages.

11. It is against that background that the Court of Appeal referred the following questions to the Court of Justice.

## II — The questions referred for a preliminary ruling

'1. Is Article 81 EC to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?

2. If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the

agreement which is prohibited under Article 81?

3. Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with Community law?

4. If the answer to Question 3 is that in some circumstances such a rule may be inconsistent with Community law, what circumstances should the national court take into consideration?'

## III — Appraisal

*Preliminary observation*

12. It is clear from the order for reference that, for the purposes of the main proceedings and in an endeavour to settle first of all the issues of law, the Court of Appeal makes two assumptions. First, it assumes that the exclusive purchase obligation for certain types of beer laid down in the lease for a public house concluded by Mr Crehan is contrary to Article 81 EC. Second, it assumes that Mr Crehan was damaged 'by actions taken under the agreement by the other party'.

13. It follows that this Court must rule in the abstract on a situation where a breach of Article 81 EC has caused loss to one of the parties to the agreement. The question whether this abstract situation corresponds to the facts in this case is a question to be decided later by the referring court and does not concern this Court.

14. However, I do not consider that the Court must refuse to answer the questions raised because they are hypothetical questions. It should be borne in mind that, according to settled case-law, [2] 'it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is

2 — See *inter alia* Case C-230/96 *Cabour* [1998] ECR I-2055, paragraph 21.

quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action'.

15. That is not the case here.

16. It is clear from the grounds stated by the Court of Appeal that, on the basis of English law alone, the action brought by Mr Crehan cannot succeed and that it is only if he can rely on rights derived from the EC Treaty that the national court would be obliged to consider his claims.

17. It is therefore clear that the requested interpretation of Community law bears a relation to the actual nature and the subject-matter of the main action.

*The first question*

18. By its first question the referring court is asking essentially whether a party to a prohibited agreement can rely on Article 81 EC before the courts to obtain compensation from the other contracting party.

19. Like the Commission, I think that this first question raises the general problem I mentioned in my preliminary observations, that is to say that 'a strict application of the illegality rule in English law would prevent a co-contractor from *seeking* [3] even a declaration that the agreement was prohibited by Article 81 EC and thus void under Article 81(2) EC'. It is therefore from that point of view that I will consider the question.

20. The Court of Appeal itself recognises that there is an argument in favour of the view that Article 81 EC confers on a party to a prohibited agreement rights which are protected by Community law. In that connection, it cites the *BRT* judgment. [4]

21. Reference can also be made to the *Delimitis* judgment, [5] from which it is clear that 'Articles 85(1) and 86 produce direct effect in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must safeguard' and that a national court 'may... declare the agreement void under Article 85(2) if it is certain that the

3 — Wording taken from the observations of the Commission, emphasis added.

4 — Case 127/73 [1974] ECR 51.

5 — Case C-234/89 [1991] ECR I-935.

agreement could not be the subject of an exemption decision under Article 85(3)'. [6]

22. Since, as the Commission rightly observes, the basic sanction provided for by Article 81(2) EC is that agreements prohibited by Article 81(1) EC are automatically void, any obstacle to that sanction, such as, in the present case, a prohibition on reliance on it by a co-contractor, would partially deprive that provision of its effect.

23. Since, according to the case-law of the Court, [7] Article 81 EC 'constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market', that cannot be permissible.

24. It should be noted, moreover, that the judgments in *BRT* and *Delimitis*, cited above, also concerned disputes between co-contracting parties. The *Delimitis* case concerned an exclusive supply contract between a brewery and the licensee of a public house. As the Commission has observed, in those cases the Court made no comment on the fact that it was a party to the agreement who was relying on Article 81 EC in order to evade the payment claimed.

25. An individual, even if he is a co-contractor, must thus be able to go before the national courts to seek the enforcement of all the consequences of the automatic nullity of contractual provisions which are incompatible with Article 81 EC. It should be borne in mind that, according to the case-law of the Court, that nullity is 'of retroactive effect'. [8]

26. Accordingly, if the application of the clause has had adverse effects for one of the co-contractors in the past, the question of compensation for such effects arises. In replying to the other questions, it will be necessary to specify the conditions under which that can be achieved through an action for damages.

27. For the time being, the answer to the first question must be that Article 81 EC is to be interpreted as meaning that a party to a prohibited lease of a public house containing an exclusive purchase clause may rely on the nullity of that lease before the courts.

*The second and third questions*

28. Second, the referring court raises the question whether the party claiming relief

6 — Ibid., paragraph 55.

7 — Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 36 to 39.

8 — Case 48/72 *Brasserie de Haecht* [1973] ECR 77, paragraph 27.

is entitled to be awarded compensation for damage alleged to arise as a result of his subjection to the clause in the agreement which is prohibited under Article 81 EC.

29. By its third question, the Court of Appeal asks whether a rule of national law which provides that courts should not allow a person to plead and/or rely upon his own illegal actions as a necessary step to recovery of damages should be allowed as consistent with Community law.

30. Like the Commission, I take the view that those two questions should be considered together.

31. As stated in the order for reference, the Court of Appeal has ruled in the *Gibbs Mew* case[9] that 'English law does not allow a party to an illegal agreement to claim damages from the other party for loss caused to him by being a party to the illegal agreement. That is so whether the claim is for restitution or damages'.

9 — [1998] EuLR 588 at page 606.

32. The question on which this Court must rule is therefore whether Community law precludes that rule of English law.

33. All the parties, except Courage but including the United Kingdom of Great Britain and Northern Ireland, consider the rule of English law in question to be problematic in relation to Community law. However, neither their analyses nor the replies which they propose the Court should give are identical.

34. I have to say at the outset that I, too, consider the rule in question to be problematic. In particular, I take the view that Community law precludes it in so far as the rule in question prevents a party to a prohibited agreement from recovering damages from his co-contractor on the sole ground that he is a party to the agreement.

35. My reasoning in reaching that conclusion starts from an analysis of the implications, for the parties to an agreement, of the direct effect of Article 81 EC. I go on to examine the way in which it falls to the national courts to safeguard the rights to which Article 81 EC can give rise even for a party to an agreement.

36. I shall, therefore, first consider the implications of the direct effect of Article 81 EC for the parties to an agreement.

37. As I have mentioned above, it is settled case-law that Article 81 EC produces direct effects in relations between individuals and directly creates rights in respect of the individuals concerned which the national courts must safeguard. [10] That includes the right, for individuals, to be protected from the harmful effects which an agreement which is automatically void may create.

38. The individuals who can benefit from such protection are, of course, primarily third parties, that is to say consumers and competitors who are adversely affected by a prohibited agreement. [11]

39. On the other hand, as Courage rightly submits, the parties to the agreement cannot normally benefit from the same protection because they are the 'cause of the agreement'. This is by virtue of the application of a principle of law, recognised in most developed legal systems, including the Community system, according to which a party may not profit from its own wrong. [12] In the present case, this means that it may not rely on its own illegal actions to claim reparation for the adverse consequences those actions may have had on it.

40. However, we must consider whether the mere fact of being a party to an agreement amounts automatically in all circumstances to a 'wrong'. There are cases where it is not at all clear that there was such a 'wrong'. In that regard, the French Government mentions the unilateral practices of the party in a position of strength in a vertical agreement, such as the distribution of a circular imposing a minimum resale price by the supplier or imposing exclusivity in regard to a leasing business.

41. In my view, those examples demonstrate that the reasoning according to which the fact of being a party to an agreement automatically constitutes a wrong and thus excludes that party from the protection conferred by Article 81 EC is too formalistic and does not take account of the particular facts of individual cases. Of course, the cases in which the fact of being a party to an agreement does not amount to a wrong will be the exception, and indeed there will be no such cases in

10 — See *inter alia* the judgments in *BRT* and *Delimitis*, cited above.

11 — To that effect, see the Opinion of Advocate General Van Gerven in Case C-128/92 *Banks* [1994] ECR I-1209, points 43 et seq.

12 — For an example of the application of that principle in practice, see Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 10. See also, as regards the *nemo auditur propriam turpitudinem allegans* principle, the Opinion of Advocate General Cosmas in Joined Cases C-177/99 and C-181/99 *Ampafrance and Sanofi* [2000] ECR I-7013, points 49 and 83, and my Opinion in Case C-368/89 *Crispoltoni* [1991] ECR I-3695, point 46.

relation to horizontal agreements, but we cannot rule out their existence.

42. The criterion which I believe should be used to determine whether a party to the agreement is in a position of 'wrong doing' is the responsibility which that party bears for the distortion of competition. Where it genuinely bears such responsibility, that party cannot profit from his own 'wrong' by enjoying protection against the agreement as a third party can.

43. On the other hand, if the responsibility which one of the parties bears for the distortion of competition is not significant, in view of the background against which that party is operating — for example, as the United Kingdom suggests, where a party is too small to resist the economic pressure imposed on it by the more powerful undertaking — there is no reason to deny that party the protection of Article 81 EC. In such a case, the reality is that the party in question has the agreement imposed upon it rather than entering it freely. In the relation it bears to the agreement it has more in common with a third party than with the author of the agreement.

44. I therefore take the view that it can be considered that Article 81 EC protects not only third parties from the effects of an agreement but also, in exceptional circumstances, a party to the agreement where that party bears no significant responsibility for the distortion of competition.

45. The second stage in my reasoning leads me to examine the way in which it falls to national courts to safeguard the right which Article 81 EC creates for a party to an agreement in certain circumstances.

46. As is clear from the judgments in *BRT* and *Delimitis*, cited above, it falls to the national courts to safeguard the rights created for individuals by Article 81 EC. It is settled case-law that, pursuant to the principle of cooperation laid down in Article 10 EC, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law. [13]

47. In that regard, in actions based on Community law, the conditions as to both substance and form laid down by the various national laws may not be less favourable than those relating to similar domestic claims (principle of equivalence), nor, as is the issue here, may they be so framed as to render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [14]

13 — See, for example, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19.

14 — See *inter alia* Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 43; and Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR I-4263, paragraph 45.

48. How should this case-law be applied in the present case?

49. The English legal system, like many other legal systems, allows for actions for damages between individuals.

50. As the Commission states in its observations, the English courts have allowed such actions to make good loss caused to third parties by conduct which infringes Community law.

51. However, such an action for damages is not open in English law to those who are parties to a prohibited agreement. There is, admittedly, no discrimination as regards the rights derived from the Community legal order in that, as I understand it, a party to an unlawful agreement can never recover damages from the other party in respect of loss caused to him by the fact of being a party to that illegal agreement, whether that illegality derives from national law or Community law.

52. However, we must examine whether the absolute bar to reliance on an action for damages might constitute, within the meaning of the case-law cited, the framing of conditions as to both substance and form, for the action in question, that render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

53. It must be borne in mind that, for the party to the agreement who bears only a negligible degree of responsibility for the distortion of competition, Article 81 EC gives rise, as I see it, to a right to protection from the adverse effects on it of that agreement. I believe that the rule of English law in question impedes the effective protection of that right.

54. No one disputes that an action for damages is an effective means of protecting the rights of an individual. Whilst the nullity provided for by Article 81(2) EC is a fundamental sanction, it is not always sufficient to make good the loss caused. As the United Kingdom points out, if a party who bears no significant responsibility for the distortion of competition is debarred from seeking damages, the other party would gain an unjustified advantage from its unlawful conduct at the expense of its co-contractor.

55. I therefore take the view that the rule of national law in question is such as to render virtually impossible the protection to which a party to an unlawful agreement is entitled under certain conditions and that it must

therefore be considered that Community law precludes such a rule.

56. I would add that the parties to the main proceedings and several of the governments which submitted observations in these proceedings discussed the question whether the possibility for a party to a prohibited agreement to bring an action for damages would decrease or increase the effectiveness of Community law.

57. Courage submits that if the possibility of compensation were conceded, it would make participation in an illegal act more attractive. Individuals would know that they could always be released from an unlawful contract and seek damages if the contract did not deliver the benefits anticipated. However, I share the view of the United Kingdom and the Commission that not only would the prospect of being able to recover damages constitute an incentive for weaker parties to denounce agreements infringing Article 81 EC but also, and perhaps more importantly, it would be an effective means of deterring the party in a position of strength from imposing an agreement restricting competition.

58. However, I must make clear that I do not believe it is a matter of inflicting some sort of penalty on the other party similar to the fine which the Commission can impose under Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty [15] in order to safeguard the effectiveness of Community law. It is simply a matter of accepting the implications of the direct effect of Article 81 EC.

59. I therefore agree with the United Kingdom Government when it states that it 'does not advocate that the party to the unlawful agreement should obtain *more* than it has lost by reason of the unlawful agreement. In certain cases the claimant, even if in a weaker bargaining position, may have obtained benefits from the unlawful provisions of the agreement, and, to avoid unjust enrichment and the imposition of penal damages on the defendant, such benefits should in principle be taken into account in the assessment of damages. The precise quantification of the damages is, of course, a matter for national courts.'

60. On the basis of all the foregoing considerations, I propose that the answer to the second and third questions should be that Community law precludes a rule of national law which prevents a party subject to a clause in a contract which infringes Article 81 EC from recovering damages for the loss suffered by it on the sole ground that it is a party to that contract.

15 — OJ, English Special Edition, 1959-1962, p. 87.

*The fourth question*

61. By its fourth question, the Court of Appeal asks what circumstances the national court should take into consideration if, in some circumstances, such a rule may be inconsistent with Community law.

62. In that connection, various suggestions have been made in the present proceedings as to the circumstances to be taken into consideration by the national court.

63. Whilst pointing out the danger of upsetting the balance of normal commercial risk, Courage submits that the factors to be taken into account are the circumstances surrounding the conclusion of the agreement, transparency, the responsibility of the defendant and plaintiff and the legal analysis of the clause in issue.

64. Mr Crehan considers that the criterion should be the responsibility of the contracting party for the distortion of competition. A party should be allowed to recover damages if it cannot be held equally responsible for the distortion of competition.

65. The Commission essentially shares that view. It states that the circumstances in which a person's own illegal actions can be invoked to bar his right to seek damages should be limited to cases where the party seeking relief is indeed *in pari delicto* in having at least equal responsibility for the restriction of competition from which it seeks relief.

66. The Italian Government takes the view that an action for damages should be open to an injured party who was in a markedly weaker position in relation to the other party and thus did not enjoy real freedom of choice as regards contracting party and contractual conditions.

67. The United Kingdom Government considers that the national court should have regard predominantly to the increased effectiveness of Community law that such actions would be likely to promote. In that context, the national court could take into account, in particular, the respective bargaining power of each of the parties, and their respective responsibility and conduct.

68. As I stated above, the principle of *nemo auditur propriam turpitudinem allegans* also exists in Community law.

69. It follows that Community law does not prevent a party who has been found to bear responsibility for the distortion of competition from being barred by national law from recovering damages from his co-contractor.

70. My view is that the protection conferred by Article 81 EC ceases if that party bears significant responsibility for the distortion of competition.

71. The responsibility to be borne is clearly significant if that party is *in pari delicto* in relation to the other party, that is to say if it is equally responsible for the distortion of competition.

72. On the other hand, the responsibility borne is negligible in the case cited by the Italian Government of an injured party in a markedly weaker position than his co-contractor.

73. In order to assess the responsibility borne by the party seeking damages, account must be taken of the economic and legal background against which the parties are operating and, as the United Kingdom Government proposes, the respective bargaining power and conduct of the two parties.

74. In particular it should be ascertained whether one party was in a markedly weaker position than the other. That weaker position must be such that it seriously calls into question the freedom of that party to choose the terms of the contract.

75. Finally, it must be added that the fact that a party bears negligible responsibility does not preclude its being required to provide evidence of reasonable diligence to limit the extent of its loss.

76. As Courage rightly points out, there is such a principle in Community law. [16] Community law can therefore hardly oppose such a principle in national law.

16 — Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33, and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 85.

77. However, the fact of not having declined to enter the agreement cannot on its own be considered to be a failure to show such diligence. I share the view of the Commission that 'this principle cannot be applied to bar a claim *ab initio*; it may only limit the damages actually recoverable'.

78. The answer to the fourth question should therefore be that Community law does not preclude a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages, provided that it is established that this person bears more than negligible responsibility for the distortion of competition. The responsibility borne is negligible if the party is in a weaker position than the other party such that it was not genuinely free to choose the terms of the contract.

## IV — Conclusion

79. I propose that the Court should give the following answers to the questions referred by the Court of Appeal:

(1) Article 81 EC must be interpreted as meaning that a party to a prohibited lease of a public house containing an exclusive purchase clause may rely on the nullity of that lease before a Member State's courts.

(2) Community law precludes a rule of national law which prevents a party subject to a clause in a contract which infringes Article 81 EC from recovering damages for the loss suffered by it on the sole ground that it is a party to that contract.

(3) Community law does not preclude a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages, provided that it is established that this person bears more than negligible responsibility for the distortion of competition. The responsibility borne is negligible if the party is in a weaker position than the other party such that it was not genuinely free to choose the terms of the contract.