WHAT... SHOULD HAVE SAID

REWRITING THE COURT OF JUSTICE'S LANDMARK JUDGMENT IN THE FREE MOVEMENT OF GOODS: *KECK AND MITHOUARD*

edited by Justin Lindeboom

INTRODUCTION: WHAT *KECK AND MITHOUARD* ACTUALLY SAID – AND ITS LEGACY

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The European Court of Justice's judgment in *Keck and Mithouard*[1] is – for better or for worse – one of the crucial judgments in the development of the free movement of goods, and EU internal market law more generally. It has, to quote Catherine Barnard, "received brickbats and bouquets in almost equal measure".[2] *Keck* generated a vast number of scholarly commentaries. Its legacy has continued to be widely debated following more recent judgments including *Commission v Italy (trailers)*[3] and *Deutsche Parkinson Vereinigung*.[4] This is not the appropriate place to provide a comprehensive overview of these debates.[5] This introduction aims to briefly revisit the developments leading to the *Keck* judgment, the central parts of the Court's reasoning, and its legacy in subsequent case law. It will conclude with a brief introduction to the four rewritings in this issue.

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[1] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*, ECLI:EU:C:1993:905.

[2] C Barnard, *The Substantive Law of the EU: The Four Freedoms* (7th edn, Oxford University Press 2022) 120.

[3] Case C-110/05 *Commission v Italy*, ECLI:EU:C:2009:66. See e.g. E Spaventa, 'Leaving *Keck* Behind? The Free Movement of Goods after the Rulings in *Commission v Italy* and *Mickelsson and Roos*' (2009) ELR 914; P Wennerås and K Boe Moen, 'Selling Arrangements, Keeping Keck' (2010) ELR 387; L Gormley, 'Free Movement of Goods and Their Use – What Is the Use of It?' (2011) FordhamIntlLJ 1589; I Lianos, 'Updating the EU Internal Market Concept' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of the European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 495.

[4] Case C-148/15 *Deutsche Parkinson Vereinigung*, ECLI:EU:C:2016:776. See e.g. S López Artetxe, 'Is Health Really the First Thing in Life?' (2017) 44 LIEI 211; B van Leeuwen, 'Vaste verkoopprijzen voor medicijnen beoordeeld onder artikel 34 VWEU' (2017) Nederlands tijdschrift voor Europees recht 62.

[5] For a useful overview of the reception and development of the *Keck* judgment, see e.g. C Barnard, *The Substantive Law of the EU* cit. 120-135.

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As is well known, the prelude to *Keck and Mithouard* involved a series of judgments in which the Court applied the *Dassonville* rule[6] defining the term "measure having equivalent effect" to a range of indistinctly applicable national laws, and found them to hinder trade within the sense of *Dassonville*.[7] These laws, consequently, required justification on the basis of either (what is now) art. 36 TFEU or "mandatory requirements" related to the public interest.

This need for justification forced the Court to "decide in an increasing number of cases on the reasonableness of policy decisions of Member States taken in the innumerable spheres where there is no question of direct or indirect, factual or legal discrimination against, or detriment to, imported products", as Advocate General Walter van Gerven noted in his Opinion in *Torfaen*.[8] On this view, the breadth of the *Dassonville* rule, which had fulfilled a crucial function as an "an all-out rallying cry against the ethos of protectionism" in the 1970s,[9] had become a burden for judicial decision-making.[10]

Apart from whether (now) art. 34 TFEU really should be construed so as to cover any indistinctly applicable national law which "although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products",[11] a second problem with the case law was its sheer inconsistency. Thus, in *Oosthoek*[12] and *Buet*[13] the Court interpreted the *Dassonville* rule literally and held that the indistinctly applicable nationals laws on advertising and marketing respectively required justification. By contrast, in other cases including *Blesgen*[14] and *Oebel*[15] the Court appeared to take a different approach by focusing on the purpose and lack of discriminatory effects of the national laws in question, concluding that they fell outside the scope of art. 34 TFEU all together. The confusion among commentators and national courts was amplified by the "Sunday trading" judgments including *Torfa-*

[6] Case C-8/74 *Dassonville* ECLI:EU:C:1974:82, para. 5.

[7] See e.g. Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42; Case 286/81 *Oosthoek* ECLI:EU:C:1982:438; Case C-302/86 *Commission v Denmark* ECLI:EU:C:1988:421; Case C-145/88 *Torfaen Borough Council v B & Q plc* ECLI:EU:C:1989:593; Case C-312/89 *Union départementale des syndicats CGT de l'Aisne v SIDEF Conforama and Others* ECLI:EU:C:1991:93.

[8] Case C-145/88 *Torfaen Borough Council v B & Q plc.*, Opinion of AG Van Gerven, ECLI:EU:C:1989:279, para. 26.

[9] JHH Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, (1st edn, Oxford University Press 1999) 362.

[10] See on this point also J Lindeboom, 'Interpreting the EU Internal Market' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market* cit. 88-90.

[11] *Oosthoek* cit. para. 15.

[12] *Ibid.*

[13] Case C-382/87 *R. Buet and Others v Ministère public* ECLI:EU:C:1989:198, paras 7-9.

[14] Case C-75/81 *Blesgen* ECLI:EU:C:1982:117, paras 9-10.

[15] Case C-155/80 *Oebel* ECLI:EU:C:1981:177, paras 16, 20.

en[16] and *Conforama*,[17] which left obscure whether the Court considered Sunday trading rules as measures having equivalent effect that could be justified or as measures which need not be justified in the first place.[18]

The difficulties of applying art. 34 TFEU "reasonably" increasingly came to the attention of national courts and academics. Two proposals by Eric White and Kamiel Mortelmans specifically focused on excluding from the scope of art. 34 TFEU certain rules related to the circumstances under which goods were sold.[19] White suggested to distinguish between (1) rules on the characteristics of products, which would fall within the scope of art. 34 TFEU, and (2) rules on the circumstances in which products may be sold (by whom, where, when, how and at what price), which would fall outside the scope of art. 34 TFEU insofar as they were general and neutral.[20] Mortelmans offered a more specific proposal which distinguished between two types of this latter "market circumstances" category: *1*) rules on market circumstances with a territorial element (including the national measures at stake in *Oosthoek* and *Buet*), which would fall within the scope of art. 34 TFEU, and *2*) rules on market circumstances related to a fixed location (including the situations in *Torfaen* and *Oebel*), which would fall outside its scope.[21] Eric White's article in particular has been recognised as an important influence of the Court's judgment in *Keck*.[22]

In this context, the Court's judgment in *Keck* purported to provide clarity as to the limits of art. 34 TFEU, while disincentivising traders to challenge all sorts of national laws which may be captured by literal reading of the *Dassonville* rule, but had no plausible relationship to interstate trade. After the first ten introductory paragraphs, the Court famously held:

> "11. By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially,

[16] *Torfaen Borough Council* cit., paras 11-17.

[17] Case C-312/89 *Conforama* cit., paras 9-14.

[18] On the inconsistencies of the case law leading up to *Keck*, see e.g. E Sharpston, 'About that Sunday Trading Mess…' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market* cit. 150. These inconsistencies may be explained by the fact that the Court did not, or at least not consistently, distinguish between the question of whether a national law constituted a 'measure having equivalent effect' and whether it could be justified. See in this regard J Lindeboom, 'One-Stage Internal Market Law: Restriction and Justification in the Early Case Law on Free Movement' (2022) *Jean Monnet Working Papers* NYU School of Law (forthcoming).

[19] E White, 'In Search of the Limits to Article 30 of the EEC Treaty' (1989) 26 CMLRev 235; K Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?' (1991) CMLRev 115.

[20] E White, 'In Search of the Limits' cit. 259.

[21] K Mortelmans, 'Article 30 of the EEC Treaty' cit. 30.

[22] L Gormley, 'Silver Threads Among the Gold… 50 Years of the Free Movement of Goods' (2007) FordhamIntlLJ 1637, 1654; D Edward, 'What Was *Keck* Really About?' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market* cit. 166.

hindering intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction.

12. National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States.

13. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the question remains whether such a possibility is sufficient to characterize the legislation in question as a measure having equivalent effect to a quantitative restriction on imports.

14. In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.

15. It is established by the case-law beginning with "Cassis de Dijon" (Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung fuer Branntwein [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

16. By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), 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 of those from other Member States.

17. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.

18. Accordingly, the reply to be given to the national court is that Article 30 of the EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss".[23]

The key analytical move occurs in paras 16 and 17, where the Court introduced a legal presumption that national measures restricting or prohibiting certain selling arrange-

[23] *Keck and Mithouard* cit. paras 11-18.

ments are not measures having equivalent effect if they meet the two conditions in the same paragraph (and according to some scholars, provided also that they do not involve universal bans[24]). Among the numerous complexities and quarrels surrounding these two paragraphs, I want to highlight two: whether paras 16 and 17 introduced a rebuttable or irrebuttable presumption of legality, and to what types of national measures it applies.

Whether para. 16 introduces a rebuttable or an irrebuttable presumption still seems unclear, especially after the Court's judgment in *Italian Trailers*.[25] In that case, the Court elevated the market access criterion from para. 17 of *Keck* to an overarching legal principle delineating the general scope of art. 34 TFEU.[26] According to some scholars, this may imply that a national law on certain selling arrangements, even if it meets the two para. 16 conditions, can still be a measure having equivalent effect if it turns out to hinder market access.[27] In that case the *Keck* exception would be a rebuttable presumption, which raises the subsequent question of *how* the presumption can be rebutted. Recent case law suggests that rebuttal would require either a universal ban or a substantial restriction of certain selling arrangements.[28]

On an alternative reading of *Keck* and *Italian Trailers*, the general market access test does not pre-empt the para. 16 conditions for national measures relating to certain selling arrangements. A national measure restricting or prohibiting certain selling arrangements which meets those conditions is irrebuttably presumed *not* to hinder market access.[29] This may have been the initial purpose of *Keck*, although the Court in later case law increasingly seemed to substitute this categorical approach with a "unitary doctrinal framework".[30]

A second, persistent question has been to what types of rules the *Keck* exception applies in the first place. The term "selling arrangements" has led to widespread confusion, since the Court's judgment provides no definition or even an explanation. In sub-

[24] See S Enchelmaier, 'What *Keck and Mithouard* Should Have Said: It Could Have Been so Simple' (2023) European Papers www.europeanpapers.eu 385; and also S Enchelmaier, 'Free Movement of Goods: Evolution and Intelligent Design in the Foundations of the European Union', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021).

[25] *Commission v Italy* cit.

[26] *Ibid.* para. 37.

[27] See e.g. I Lianos, '*In Memoriam Keck*: The Reformation of the EU Law on the Free Movement of Goods' (2015) ELR 225, 238; E Spaventa, 'Leaving *Keck* Behind?' cit. 921-923.

[28] For discussion, see C Barnard, *The Substantive Law of the EU* cit. 135-138. Support for a 'substantial restriction' threshold can be derived from Case C-518/06 *Commission of the European Communities v Italian Republic*, EU:C:2009:270, para. 66-70, concerning the compatibility of a legal obligation to provide coverage for third-party motor vehicle liability insurance with the freedom of establishment and the free movement of services.

[29] On this reading, Case C-110/05 *Italian Trailers* cit., para. 37 does not extend to the situation described in para. 36 (recalling the *Keck* exception).

[30] See R Schütze, 'Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?' (2016) ELR 826.

sequent case law, the Court limited the scope of the *Keck* exception either by distinguishing certain borderline cases from the factual situation in *Keck*,[31] or by qualifying certain national measures as relating to selling arrangements but finding them to discriminate against imports.[32]

In *Italian Trailers* and *Mickelsson and Roos*,[33] the Court held – contrary to the Opinion of Advocate General Kokott in the latter case[34] – that restrictions on the use of products are not equivalent to rules on certain selling arrangements, and should be assessed under the market access test.[35]

Recent case law, including *Colruyt*[36] and *DocMorris NV v Apothekerkammer Nordrhein*,[37] confirms that the *Keck* exception is still good law. At the same time, other judgments such as *Scotch Whisky Association*[38] and *Deutsche Parkinson Vereinigung*[39] suggest that the Court is eager not to emphasise categorisation and might prefer to ignore the *Keck* case law where possible. Advocate General Szpunar's Opinion in *Deutsche Parkinson Vereinigung* expressly assessed the German law fixing prices of prescription-only medicines under the *Keck* standard. He concluded that the law indirectly discriminated against internet pharmacies – which were typically foreign – selling such medicines to German customers. The law therefore did not meet the second condition in para. 16.[40] While the Court followed the Opinion in substance, it did so without even mentioning *Keck* or the two para. 16 conditions.[41] Similarly, in *Scotch Whisky Association* the Court was quick to conclude that the minimum price per unit for alcoholic beverages was a measure having equivalent effect in the sense of the *Dassonville* rule, without any elaboration on the technical categorisation of the measure.[42]

[31] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, ECLI:EU:C:1997:325; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* ECLI:EU:C:1995:224; Joined Case C-158/04 and C-159/04 *Carrefour – Marinopoulos* ECLI:EU:C:2006:562; Case C-244/06 *Dynamic Medien* ECLI:EU:C:2008:85.

[32] Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, ECLI:EU:C:1997:344; Case C-254/98 *TK-Heimdienst* ECLI:EU:C:2000:12; Case C-405/98 *Gourmet International Products* ECLI:EU:C:2001:135; Case C-416/00 *Morellato* ECLI:EU:C:2003:475; Case C-322/01 *Deutscher Apothekerverband* ECLI:EU:C:2003:664; Case C-531/07 *Fachverband der Buch- und Medienwirtschaft* ECLI:EU:C:2009:276.

[33] Case C-142/05 *Mickelsson and Roos*, ECLI:EU:C:2009:336.

[34] Case C-142/05 *Mickelsson and Roos* ECLI:EU:C:2006:782, Opinion of AG Kokott, paras 42-69.

[35] *Commission v Italy* cit., paras 49-58; *Mickelsson and Roos* cit., paras 25-28.

[36] Case C-221/15 *Etablissements Fr. Colruyt* ECLI:EU:C:2016:704, para. 35.

[37] Case C-190/20 *DocMorris* ECLI:EU:C:2021:609, para. 35.

[38] Case C-333/14 *The Scotch Whisky Association* ECLI:EU:C:2015:845.

[39] Case C-148/15 *Deutsche Parkinson Vereinigung* ECLI:EU:C:2016:776.

[40] Case C-148/15 *Deutsche Parkinson Vereinigung* ECLI:EU:C:2016:394, Opinion of AG Szpunar, paras 32-37.

[41] *Deutsche Parkinson Vereinigung* cit. paras 23-27.

[42] *Scotch Whisky Association* cit., paras 31-32. In this sense the Court's approach was similar to the one in Case C-82/77 *van Tiggele* ECLI:EU:C:1978:10.

Regardless of the merits of limiting the scope of art. 34 TFEU, it is fair to say that *Keck* created ample confusion, which forced the Court to further elaborate what is and what is not covered by the *Keck* exception.

Today, the living legacy of *Keck* is hard to distinguish from the remoteness test.[43] The Court has not been willing to extend the *Keck* philosophy to a more general "disparate market access test".[44] At the same time, the Court has remained committed to exclude from the scope of art. 34 TFEU national measures which do not plausibly affect imports more than domestic products, and which also do not unreasonably hinder trade in general. Non-discriminatory national measures relating to certain selling arrangements do not hinder trade in the sense of *Dassonville*, unless they involve universal bans or otherwise clearly restrict trade, for instance because they substantially affect consumer behaviour.[45]

The fact that the number of preliminary references on art. 34 TFEU has steadily declined may suggest that the law is clear enough for national courts.[46] It is also important to note that for many non-discriminatory national measures reflecting sensible policy choices it does not matter much whether they fall outside the scope of art. 34 TFEU or will survive scrutiny under art. 34 TFEU at the justification stage. The Court indeed seems to have become more deferential to Member States in this regard.[47]

Even though *Keck* may be less relevant in day-to-day legal practice, its reasoning, outcome, and overall role in the development of free movement principles still remain salient. For two decades, it defined judicial development and academic debates pertaining to art. 34 TFEU. Its lasting legacy is that it provided a crucial watershed in how the Court imagined the EU internal market – and the vertical distribution of powers more generally.

For that reason, *Keck* remains worthy of legal and legal-historical study, and whether the Court could have done a better job remains a salient question. Before turning to the real substance of this issue – the four integral rewritings of *Keck* – this introduction will conclude with a brief overview of the different roads that the contributors have taken.

The first rewriting is by Niklas Nachtnebel, Antoine Langrée and Fraser Rodger, students at Edinburgh Law School, supervised by Niamh Nic Shuibhne. Their judgment is based on three categories of measures having equivalent effect: *1*) national measures which disadvantage imported goods, *2*) product requirements and *3*) indistinctly appli-

[43] Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* ECLI:EU:C:1990:97, para. 11; Case C-190/98 *Graf* ECLI:EU:C:2000:49, para. 25.

[44] For such proposals, see e.g. G Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International 2003); I Lianos, 'In Memoriam *Keck*' cit.

[45] *Commission v Italy* cit., para. 56.

[46] See J Zglinski, 'The End of Negative Market Integration: 60 Years of Free Movement of Goods Litigation in the EU (1961–2020)' (2023) Journal of European Public Policy.

[47] *Ibid.*; see generally J Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020).

cable measures capable of substantially impeding the access of goods to a Member State market. Thus, instead of the category of national measures relating to certain selling arrangements, their judgment emphasises that national measures which do not discriminate directly or indirectly, and which do not qualify as 'product requirements' in the sense of *Cassis de Dijon*, must substantially impede market access in order to qualify as measures having equivalent effect.

Their proposal roughly follows the approach of Advocate General Jacobs in *Leclerc-Siplec*.[48] Interestingly, the judgment explains when a national measure "substantially impedes market access", namely if "in hindering the flow and the effective marketing of goods, it undermines the flourishing of a competitive and dynamic Community market".[49] Also noteworthy in my view is the judgment's deference to the national referring court as to whether the French prohibition of sale at a loss "substantially impedes market access" and, if it does, whether it is proportionate. In this regard, the judgment contrasts particularly to Laurence Gormley's rewriting.

The second rewriting is by Elisabeth Schøyen, and essentially aims to retain the "spirit" of *Keck* without resorting to categorising national measures into "product requirements" and "certain selling arrangements". In her explanatory note, Schøyen explains how her judgment is informed by Senn and Nussbaum's capability approach and a social justice perspective on the free movement of goods.

To this effect, Schøyen's judgment construes the previous case law as a "narrow market access approach": only national measures which either negatively impact the competitive position of goods from other Member States or prevent their market access altogether require justification. Thus, the judgment clarifies that product requirements in the sense of *Cassis de Dijon* are measures having equivalent effect because they impose a double burden on foreign producers. The Sunday trading case law, by contrast, is overturned, like in *Keck* itself.

Schøyen's judgment also clarifies that whether a national measure disadvantages imported goods must be ascertained in view of its effects on "both the producers, importers and traders of products from other Member States, as well as on the behaviour of consumers in the domestic market", leaving considerable flexibility in the application of art. 34 TFEU. Indeed, the final verdict is left to the national court.

The third rewriting by Stefan Enchelmaier also keeps the basic underlying philosophy of the *Keck* judgment and dispenses with the terminology of 'certain selling arrangements'. While his judgment takes a similar approach to Schøyen's, there are nonetheless interesting and important differences in reasoning and phrasing. Enchelmaier's

[48] C-412/93 *Leclerc-Siplec v TF1 and M6* ECLI:EU:C:1994:393, Opinion of AG Jacobs.

[49] N Nachtnebel, A Langrée and F Rodger with N Nic Shuibhne, 'What *Keck and Mithouard* Should Have Said: Preventing Substantial Barriers to Market Access' (2023) European Papers www.europeanpapers.eu para. 22.

judgment squarely overturns the Sunday trading case law by stating that Member States 'need not justify rules that apply equally in law, and do not entail greater factual burdens for imported than for domestic goods'.[50] Enchelmaier allows for only one exception to this rule, namely that "universal bans" – i.e. national measures prohibiting the marketing of a type or types of product altogether – must be justified because they raise a legislative frontier to trade contrary to art. 26(2) TFEU (then art. 8a of the EEC Treaty, introduced by the Single European Act).

Enchelmaier's judgment is closest to the actual judgment in *Keck* in style and substance, and perhaps reflects what the judges of the Court *had wanted to say*.

The final rewriting is Laurence Gormley's, perhaps *Keck and Mithouard*'s most longstanding critic. Gormley's judgment is the only one which unequivocally asserts that the French prohibition on sale at a loss is a measure having equivalent effect, and relies to this effect on the *Oosthoek* line of case law, also briefly recalled above. A particularly interesting aspect of this rewriting is how it aims to closely follow the logic of earlier case law, including the Sunday trading case law. At the same time, it also aims to clarify this jurisprudence, albeit with a radically different result than the other rewritings.

In Gormley's rewriting, the judgment also concludes that a *general* prohibition of sale at a loss is contrary to art. 34 TFEU. Insofar as such a general prohibition takes no account of the reason why the products are offered at a loss, it goes beyond what is necessary and proportionate to ensure fair trading and the protection of consumers.[51] Also in regard to proportionality, the judgment aims to strictly follow the 1980s case law, starting with *Cassis de Dijon*.

A few final words on what a combined reading of these four rewritings of *Keck and Mithouard* may teach us. The reasoning of all four contributions is distinct and extremely interesting, both compared to the original judgment of the Court and to each other. I would prefer to compare the rewritings in three different ways.

First, there is the sheer *outcome* of the case. Enchelmaier, Schøyen and "Team Edinburgh" mostly follow the outcome of the actual judgment, though the latter two leave the national court more room for flexibility. By contrast, Gormley's judgment reaches an outcome very different from both the other rewritings and *Keck* itself.

Second, there are important differences in legal reasoning. Here, Enchelmaier and Schøyen take roughly similar approaches focusing on disparate market access effects and universal bans. Nachtnebel, Langrée and Rodger, instead, choose to focus on the notion of a "substantial impediment to trade". Gormley sticks to the reasoning of *Cassis de Dijon* and *Oosthoek*.

[50] S Enchelmaier, 'What *Keck and Mithouard* Should Have Said' cit. para. 16.

[51] L Gormley, 'What *Keck and Mithouard* Should Have Said: 'Steady as She Goes, Left Hand down a Bit?' (2023) European Papers www.europeanpapers.eu para. 21.

Third, there is an interesting divergence, as I see it, between judgments emphasising the *continuity* of the case law and those emphasising a *change* in the Court's approach. In this regard, Nachtnebel, Langrée and Rodger's judgment is similar to Gormley's, to the extent that they both aim to really *clarify*, rather than amend, the Court's previous case law. In contrast, Schøyen and Enchelmaier emphasise the change in the Court's approach which was also inherent to the actual judgment in *Keck* (notwithstanding its suggestion that it merely "clarified" the case law[52]).

The wealth of literature on *Keck and Mithouard* had already demonstrated the many ways to think about the judgment. These four rewritings demonstrate the many alternative roads not taken.

[52] *Keck and Mithouard* cit. para. 14.