What... Should Have Said

Rewriting the Court of Justice's Landmark Judgment in the Free Movement of Goods: *Keck and Mithouard*

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What *Keck and Mithouard* Should Have Said: Preventing Substantial Barriers to Market Access

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Judgment of the Court of 24 November 1993 in Joined Cases C-267/91 and C-268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard

In Joined Cases C-267/91 and C-268/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance (Regional Court), Strasbourg (France), for a preliminary ruling in the criminal proceedings pending before that court against

Bernard Keck and Daniel Mithouard,

on the interpretation of the rules of the EEC Treaty relating to competition and freedom of movement within the Community,

THE COURT,

[...]

gives the following

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Judgment

1. By two judgments of 27 June 1991, received at the Court on 16 October 1991, the Tribunal de Grande Instance, Strasbourg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the rules of the Treaty concerning competition and freedom of movement within the Community.
2. Those questions were raised in connection with criminal proceedings brought against Mr Keck and Mr Mithouard, who are being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at a loss'), contrary to Article 1 of French Law No 63-628 of 2 July 1963, as amended by Article 32 of Order No 86-1243 of 1 December 1986.
3. In their defence Mr Keck and Mr Mithouard contended that a general prohibition on resale at a loss, as laid down by those provisions, is incompatible with Article 30 of the Treaty and with the principles of the free movement of persons, services, capital and free competition within the Community.
4. The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of Community law, stayed both sets of proceedings and referred the following question to the Court for a preliminary ruling:

   “Is the prohibition in France of resale at a loss under Article 32 of Order No 86-1243 of 1 December 1986 compatible with the principles of the free movement of goods, services and capital, free competition in the Common Market and non-discrimination on grounds of nationality laid down in the Treaty of 25 March 1957 establishing the EEC, and more particularly in Articles 3 and 7 thereof, since the French legislation is liable to distort competition:

   (a) firstly, because it makes only resale at a loss an offence and exempts from the scope of the prohibition the manufacturer, who is free to sell on the market the product which he manufactures, processes or improves, even very slightly, at a price lower than his cost price;

   (b) secondly, in that it distorts competition, especially in frontier zones, between the various traders on the basis of their nationality and place of establishment?”
5. Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
6. It should be noted at the outset that the provisions of the Treaty relating to free movement of persons, services and capital within the Community have no bearing on a general prohibition of resale at a loss, which is concerned with the marketing

of goods. Those provisions are therefore of no relevance to the issue in the main proceedings.

7. Next, as regards the principle of non-discrimination laid down in Article 7 of the Treaty, it appears from the orders for reference that the national court questions the compatibility with that provision of the prohibition of resale at a loss, in that undertakings subject to it may be placed at a disadvantage vis-à-vis competitors in Member States where resale at a loss is permitted.
8. However, the fact that undertakings selling in different Member States are subject to different legislative provisions, some prohibiting and some permitting resale at a loss, does not constitute discrimination for the purposes of Article 7 of the Treaty. The national legislation at issue in the main proceedings applies to any sales activity carried out within the national territory, regardless of the nationality of those engaged in it (see Case 308/86 *Ministère Public v Lambert* [1988] ECR 4369).
9. Finally, it appears from the question submitted for a preliminary ruling that the national court seeks guidance as to the possible anti-competitive effects of the rules in question by reference exclusively to the foundations of the Community set out in Article 3 of the Treaty, without however making specific reference to any of the implementing rules of the Treaty in the field of competition.
10. In these circumstances, having regard to the written and oral argument presented to the Court, and with a view to giving a useful reply to the referring court, the appropriate course is to look at the prohibition of resale at a loss from the perspective of the free movement of goods.
11. By virtue of Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. It is settled case-law that any measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade is to be considered a measure having equivalent effect to a quantitative restriction (see Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5).
12. The Court has consistently held that, within or outside the scope of Article 7, Article 30 aims to prohibit all measures which, like quantitative restrictions on imports, disadvantage imported goods in relation to domestic goods, whether they apply distinctly to imported goods (see, for example, Case 181/82 *Roussel Laboratoria BV and Others v Netherlands* [1983] ECR 3849, paragraph 19) or indistinctly to imported and domestic goods alike (see, for example, Case 82/77 *Openbaar Ministerie of the Netherlands v van Tiggele* [1978] ECR 25, paragraph 18).
13. Furthermore, it is established by the case-law commencing with “Cassis de Dijon” (Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, Article 30 prohibits indistinctly applicable measures which impose a special burden on the importer by regu-

lating goods imported from other Member States where they were lawfully manufactured and marketed. This prohibition concerns measures which lay down physical requirements to be met by such products, such as those relating to designation, form, size, weight, composition, presentation, labelling or packaging.

14. The prohibition of resale at a loss in question in the present proceedings does not disadvantage imported goods; nor does it establish a product requirement within the meaning of the 'Cassis de Dijon' ruling. However, the claimant may nevertheless show that it is a measure having equivalent effect to a quantitative restriction by showing that the restrictive effects of the prohibition of resale at a loss amount to a substantial barrier to market access between Member States.
15. Any indistinctly applicable measure which is capable of substantially impeding the access of goods to a Member State market, *inter alia* by regulating the circumstances of marketing, must be considered to be capable of hindering intra-Community trade within the meaning of the ruling in *Dassonville*.
16. In assessing whether the restrictive effects amount to a substantial barrier to market access, the national court must first have regard to the nature of the measure in question. A national provision which does not regulate trade in goods and whose restrictive effects are remote and merely speculative is both too uncertain and indirect to have an effect equivalent to that of a quantitative restriction (see, to that effect, Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* [1990] ECR I-583, paragraphs 10 and 11).
17. Where a measure does not fall outside the scope of Article 30 for those reasons, it can only be considered to amount to a substantial barrier if, in hindering the flow and the effective marketing of goods, it undermines the flourishing of a competitive and dynamic Community market.
18. A measure may do so, *inter alia*, by, directly or indirectly, actually or potentially, frustrating the market viability of business models on which economic actors rely to enter and compete within Member State markets.
19. The Court observes that the prohibition of resale at a loss does not, in principle, preclude business from entering a new market and competing effectively with established market participants in the way that a prohibition on advertising might. Yet, the prohibition at hand is capable of frustrating the viability of business models which rely on resale at a loss to introduce new categories of products to markets or new alternatives to established products within markets.
20. Within these parameters, it is for the national court to determine whether the prohibition of resale at a loss amounts to a substantial barrier to market access between Member States. It should be noted in this regard that proof of a reduction in the volume of sales cannot be sufficient for this purpose, since a sales reduction does not automatically frustrate the market viability of the underlying business

model. Inversely, the flourishing of a competitive and dynamic Community market may well be undermined by provisions hindering the growth and development of trade across borders without reducing the revenue of economic operators.

21. Should the measure in question be found by the national court to amount to a substantial barrier to market access between Member States, the measure must nevertheless be accepted insofar as it may be necessary in order to satisfy mandatory requirements relating to the public interest, and it is also proportionate to the aim in view (see, to that effect, Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 14; Case 382/87 *Buet* [1989] ECR 1235, paragraph 10; and Case C-269/89 *Bonfait* [1990] ECR I-4169, paragraph 11).
22. In assessing the proportionality of a restriction on trade, the national court may additionally consider whether the restrictive effects intrinsic to the nature of such national provisions whose legitimate aim is in accordance with Community law are not excessive in relation to the aim pursued by the regulatory authority (see, to that effect, Case C-312/89 *Union Départementale des Syndicats CGT de l'Aisne v Conforama* [1991] ECR I-997, paragraphs 11 and 12; Case C-332/89 *Marchandise* [1991] ECR I-1027, paragraphs 12 and 13; and Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B&Q* [1992] ECR I-6635, paragraph 15).
23. Accordingly, the reply to be given to the national court is that Article 30 of the Treaty is to be interpreted as meaning that the prohibition which it lays down applies to national rules prohibiting the resale of products at a loss where the restrictive effects on trade amount to a substantial barrier to market access between Member States. Nevertheless, those national rules must be accepted insofar as they may be necessary in order to satisfy mandatory requirements relating to the public interest, and they are proportionate to the aim in view.

Costs

24. The costs incurred by the French and Greek Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Grande Instance, Strasbourg, by two judgments of 27 June 1991, hereby rules:

Article 30 of the Treaty is to be interpreted as meaning that the prohibition which it lays down applies to national rules prohibiting the resale of products at a loss where

the restrictive effects on trade amount to a substantial barrier to market access between Member States. Nevertheless, those national rules must be accepted insofar as they may be necessary in order to satisfy mandatory requirements relating to the public interest, and they are proportionate to the aim in view.

Explanatory note*

It became clear early on that there was a fundamental problem with the *Keck* ruling. While it partially signalled the right path forward by excluding sales modalities from the scope of art. 34 TFEU, *Keck* also engaged in unwarranted formalism which obscured rather than clarified the actual, practical process of how and why the Court strikes down a measure under that provision.

Our task, therefore, was to spell out that process in an intelligible and workable test. We entertained multiple possible approaches such as a presumption of legality for residual measures, or a relaxed balancing exercise in a dynamic system of evaluating substantiality, remoteness, and potentiality etc. After thorough deliberation, we roughly followed Advocate General Jacobs' Opinion in *Leclerc-Siplec*,[1] while at the same time stressing the utility of a flexible and wide scope for the free movement rules.

In our chosen approach to identify a measure of equivalent effect within the meaning of art. 34, the *Dassonville* formula (para. 11) functions as the general rule and as the guiding principle for developing our approach, namely by providing the basic framework the new *Keck* rule must work within: (1) When identifying a measure having equivalent effect, *Dassonville* tells us to examine the measure's effect, i.e. *any* impediment to trade between Member States, whether this is so intended by a regulatory authority or completely coincidental. (2) Although this establishes objective review – instead of subjective review in which the Court would examine legislative intentions –, it suffices if a measure is capable of having that effect – crucially, both difficult as well as time-consuming data analysis is not needed. Instead, national courts must evaluate a measure's inherent potential, its abstract suitability to effect unwanted trade impediments. (3) Lastly, the location of the measure in the causal chain of trade restriction is irrelevant, i.e. it does not matter whether the measure hinders trade directly or indirectly (if not in combination with other factors, like in the *Krantz* jurisprudence; para.16).

After mentioning the anti-discrimination (para. 12) and the *Cassis de Dijon* approaches (para. 13), which we regard as *lex specialis* tests in relation to the *lex generalis* test of *Dassonville* – if those tests are triggered, their own idiosyncratic rules apply –, we introduce the proposed new test, in lieu of the *modalités de vente* approach, for residual

* This section is authored by Niklas Nachtnebel, Antoine Langrée and Fraser Rodger. The authors acknowledge the support of Ella Freeman, Pierre Valette and Aimee West.

[1] Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*, opinion of AG Jacobs, EU:C:1994:393.

measures not caught by the two prior limbs: Art. 34 is triggered by a substantial barrier to market access (para. 15). This seems to delimit the breadth of *Dassonville* in a twofold way. First, it does in fact introduce a *de minimis* principle of sorts which was (very possibly deliberately) left out of the adoption of the competition law test the original formula was borrowed from; and secondly, it seems to target not any trade restriction whatsoever but only impediments to market access.

It is true that the substantiality criterion we introduce in para. 15 limits *which* trade restrictions are caught by art. 34. Contrary to the *de minimis* rule in competition law that *Dassonville* did not adopt, however, this is not to be understood in the mostly quantitative sense in which art. 101 TFEU is applied in practice. This means that art. 34, in contrast to art. 101, does not ignore measures which have only a small impact on competition and the internal market's structures. For instance, while it might be true that the provisions in question in the original *Dassonville* case did not matter much in the great scheme of (Community-market-related) things, it is a rule that inherently limits the individual trader in engaging in dynamic and competitive behaviour. It is in this sense that we ought to picture the proposed substantiality criterion. As for the difference between the broader seeming "trade" and the narrower "market access", it suffices to say that this narrower conception aims at more precisely pinning down what actually constitutes an unwanted trade impediment within the meaning of *Dassonville* and art. 34 – since it is mostly agreed upon that art. 34 does not preclude rules affecting trade per se. We therefore understand "substantial barrier to market access between Member States" as a synonymous but clarified description of measures of equivalent effect to "hindrance to intra-[Union] trade".

Like earlier case-law, our rule aims at breaking up red-tape barriers erected by the Member States which, though possibly somehow justifiable, endanger the efficacy of an internal market. This is what we mean by "market access". To better communicate the qualitative nature of substantiality in conjunction with market access, we introduce the regulative idea of the "dynamic and competitive [internal] market" (para. 17). It is the flourishing of this market structure which is at stake when Member States implement trade restrictions that amount to substantial access barriers. Specifically, in our understanding, access is substantially impeded when a measure renders business models on which traders rely to access and penetrate markets – and which potentially could be engaged to market goods across the internal market as a whole – unviable from an economic perspective (para. 18). While we entertained the idea of excluding substantiality in the event of an accessible alternative to the business model whose market viability has been frustrated by the provision in question, we abandoned that idea, first because this might weaken the protection of new and dynamic business models in favour of established market practice, and secondly because the balancing effect of available equal-utility business models may, at any rate, be factored into the proportionality review of the national court.

Finally, importing the *Cassis de Dijon* case-law and some proportionality considerations from the Sunday trading saga, we leave open the possibility of justifying measures falling within the scope of the new test (paras 21–22).

We believe that a flexible test of this sort is a more honest formulation of the jurisprudence the Court has engaged in already; and that it is, in a cosmos of complex economic phenomena and a wide variety of regulatory activity, more appropriate to the resolution of conflicts within the realm of free movement rules than a possibly more precise but equally more rigid test.

The opportunity to rewrite *Keck* represented a chance to participate in an ongoing academic discussion, and in a way, to become peers with the authors we had been citing in our university papers. However, it also represented a significant challenge, as our writing group is composed of undergraduate students having taken EU law courses mostly as electives. Taking on the role of the Court felt like walking a tightrope: finding a balance between creating a clearer test and doctrine, while avoiding an overly academic or analytical tone. Matching the Court's style took some practice. Nevertheless, we approached the *Keck* conundrum with an inquisitive attitude toward the case-law, deliberated on our solutions as a judicial chamber, and, hopefully, settled on a nuanced solution – like the Court would.

Note on observing the rewriting of *Keck* from a supervisory distance*

One of the joys of teaching in the Scottish university system is the Honours programme structure, where students in their third and fourth years of undergraduate studies take courses that build on foundational learning, in smaller seminar-style groups. Niklas, Antoine, and Fraser, supported by Ella, Pierre, and Amy (in effect, the *référendaires* for this project) illustrate the curiosity, commitment, and calibre of the EU Law Honours II: Substantive students that I am fortunate to be able to teach. That is why I suggested a student-led contribution, I knew that any students who volunteered to take part could, and would, do it brilliantly.

First, and most importantly, all credit goes to the students: I have stayed relatively "hands off" overall in this project, encouraging the "chamber" to reach their own conclusions about *Keck* and about how they might do it differently, and sending more editorial than substantive comments. Students are the thinkers of now and the practitioners of the future, and they therefore deserve their say on a judgment and topic with which we teachers drive them to distraction every year.

Second, what these students produced has impressed me in several respects. They managed to create their "substantial barrier to market access" test by using case law already "available" to the Court at the time of *Keck*; they start with yet build on *Dassonville*,

* This section is authored by Niamh Nic Shuibhne.

managing to put some limits around the scope of that ruling and therefore around the scope of art. 34 TFEU itself; they avoid the formalism for which *Keck* has been criticised, focusing on a rule's effects rather than on its type; and they align their thinking about markets with the competition law origins of the *Dassonville* test while finding a way, at the same time, to avoid the quantitative approach to restrictions that competition law demands.

Third, the process of rewriting was interesting to "watch" from the sidelines. I had the sense, overall, that reaching the agreed ideas was the relatively "easy" part; expressing those ideas in the style of a judgment of the Court was much more difficult. One of the points that I kept coming back to on reading earlier drafts was "flow" – how the paragraphs worked together, how each idea led to the next. The students were also extremely lucky to have input from former Court members David Edward and Eleanor Sharpston, who so enthusiastically and generously sent their comments to the students on an earlier draft. Independently, their shared emphasis was on the national judge: how would the proposed test be applied, what criteria should the judge use? The students worked hard on sharpening these paragraphs of their ruling in particular. They never complained, but I did wonder what the reactions actually were when they received yet *another* "yes, great, but could you just..." email from me with comments and suggestions for tweaking things, yet again, or how they felt when they learned who the other two readers of one of their drafts were (not daunting at all for an undergraduate student to have a former judge and advocate general critiquing their ideas...). On the other hand, the process that they have now been through marks a transition from submitting work for assessment and only getting comments afterwards as feedback, with no opportunity for revision, to the reality of intensive to-and-fro exchanges: welcome to the world of academic writing, (former) students!

Finally, has the rewritten *Keck* judgment "solved" the criticisms of the art. 34 case law? I can sense the *Scotch Whisky* case being resolved more easily on the basis of the students' judgment, for example – and certainly more rigorously than ignoring *Keck* altogether and suggesting a proportionality approach that was simply impossible for the Scottish Parliament to adopt in terms of its competence (eloquently discussed by Niamh Dunne in her *Modern Law Review* annotation of that ruling). I paused more on the implications for the use of goods case law. For example, in para. 17, the students write about "hindering the flow and the effective marketing of goods", and I wondered if "or" rather than "and" might loosen rules from an apparently required impact on "effective marketing". But then, and perhaps also under the surface of both *Scotch Whisky* and the use of goods rulings, "flow" and "marketing" are arguably inherently tied when the focus overall is placed on the idea of a "competitive and dynamic internal market" (also para. 17).

While the students have emphasised that they were alert to enabling more objective than subjective assessment through the test and criteria they have suggested, I am not sure that we can ever fully avoid some subjectivity around concepts like "dynamic" and "competitive" markets and even "substantial" hindrances to market "access". At the

same time, with the art. 34 TFEU starting point of "all measures having equivalent effect", I am not sure we can ever avoid either some divergence in national decision-making – and thus, that these exceptional students should feel compelled to have "fixed" something that neither the Court nor the Treaty writers ever have.