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: SAME SAME, BUT DIFFERENT

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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

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

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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 the judgment in 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. The Court has consistently held that any measure which is capable of directly or indirectly, actually or potentially, 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 für 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 require-

ments 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. However, contrary to what has previously been decided, national provisions are 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), where 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 and sale of domestic products and of those from other Member States, that is to say, so long as the application of the national provision in question does not distort the competitive position of products from other Member States vis-a-vis that of domestic products, and does not prevent access to the market entirely.
17. Provided that those conditions are fulfilled, the application of such rules 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. In order to determine whether a national provision affects in the same manner, in law and in fact, the marketing of domestic products and those of other member states, the effects of the provision 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 are factors to be considered.
19. It follows that national rules that lay down requirements to be met by goods coming from other Member States where they are lawfully manufactured and marketed (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) are such as to hinder trade between Member States because, while they usually apply to all relevant traders operating within the national territory, they do not affect in the same manner in law and in fact the sale of domestic products and of those from other Member States. This is due to the fact that domestic producers will usually already comply with such national rules, whereas producers from other Member States will likely have to alter their products so as to comply with the rules of their state of origin, as well as with the rules in the state of import. This double burden is thus liable to significantly distort the competitive position of products from other Member States vis-a-vis that of domestic products. Thus, national rules that lay down requirements to be met by goods coming from other Member States where they are lawfully manufactured and marketed constitute measures of equivalent effect and are prohibited by Article 30 unless justified by a public-interest objective taking precedence over the free movement of goods.

20. In the case at hand, however, the national provision does not lay down requirements to be met by goods coming from other Member States, but rather regulates the conditions of sale, namely, it prohibits resale at a loss. In order to determine whether such a rule is such as to hinder, directly or indirectly, actually or potentially, trade between Member States, it must be established whether the national provision applies to all relevant traders in the territory, and affects, in the same manner, in law and in fact, the marketing and sale of domestic products and of those from other Member States, or whether it distorts the competitive position of goods from other Member States.
21. 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. While the national court has noted that the prohibition exempts from its scope manufacturers, such categorical distinction is not in itself such as to render the national provision incompatible with Article 30. What is decisive is whether the provision applies to all *relevant* traders in the territory. Where the national legislator has decided to regulate the activity of a specific class of traders (such as, in the provision at issue, retail traders), a provision that applies to all traders belonging to this class applies to all relevant traders in the territory.
22. It remains to be established whether national legislation prohibiting resale at a loss by retail traders affects in the same manner, in law and in fact, the marketing and sale of domestic products and of those from other Member States, or whether it is liable to distort the competitive position of products from other Member States, or to prevent market access entirely. As noted above, to determine this, the 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 are factors to be considered.
23. A general prohibition of resale at a loss, even if applicable to all relevant traders in the territory, may be liable to distort the competitive position of products from other Member States, in so far as it deprives traders of an effective marketing technique used to introduce domestic consumers to products which they may not yet be familiar with. It thus cannot be ruled out that an outright prohibition of resale at a loss may lead to traders of products from other Member States incurring cost they would not have absent the prohibition, since they may have to resort to other, potentially more costly methods of advertising in order to gain access to the market.
24. In that regard, however, it should be noted that the prohibition of resale at a loss merely forecloses one of several available strategies for the advertisement of products from other Member States, leaving open other avenues of promotion. Moreover, producers from other Member States wishing to promote their products by selling them at a loss are able to do so. Retailers buying these goods could thus

pass on that differential, enabling them to promote products from other Member States with low prices.

25. Therefore, a prohibition of resale at a loss cannot be considered to prevent market access. It follows that only where a prohibition of resale at a loss has the effect of distorting the competitive position of goods from other Member States, which is for the national court to ascertain, such a regulation is a measure having equivalent effect to quantitative restrictions on imports prohibited by Article 30 of the EEC Treaty.

26. Consequently, a prohibition of resale at a loss is not covered by Article 30 of the Treaty, unless it is shown that the prohibition does not affect in the same way, in law and in fact, the marketing and sale of national products and products from other Member States, thus distorting the competitive position of goods from other Member States.

Costs

27. 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 EEC Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss, unless it is shown that the prohibition does not affect in the same way, in law and in fact, the marketing and sale of national products and products from other Member States, thus distorting the competitive position of goods from other Member States.

Explanatory note

What is at stake in the infamous *Keck* decision? Initially, *Keck* appears to be about what constitutes a restriction of the free movement of goods, that is to say, what national measures are subject to supranational judicial review. Of course, beneath the question of defining restrictions, fundamental choices concerning the aim of integration as well as the division of competence loom large. As I am primarily concerned with normative approaches to free movement and the Internal Market more generally, my contribution

focusses on the normative questions underlying *Keck*. More specifically, I will consider them from the vantage point of (social) justice.

I argue that from the perspective of justice, *Keck* was a sound decision, correcting earlier momentum towards an interpretation of the concept of a restriction which would have had decidedly unjust ramifications. My main improvement thus relates to the widely criticised categorisation approach adopted in the judgment, as well as to the nebulous quality of the Court's reasoning. I will explain below how I consider my version to improve upon the original in this respect. Firstly, however, I want to argue why the results of Keck were indeed good news from the vantage point of social justice.

Given the essentially contested nature of (social) justice,[1] one's characterisation of anything as (un)just depends decisively on the understanding of justice one subscribes to. My personal allegiance in this regard lies with the Capabilities Approach (CA) as pioneered by Sen and Nussbaum,[2] and my solution to the restriction-definition-dilemma is informed by this view.[3] I attempt to argue why it is preferable over purely procedural approaches to these normative questions, as well as to highlight where the capabilitiarian demands overlap with other substantive approaches to justice.

I highlight two normative question at stake in the *Keck* decision. The first concerns the division of competences between Member States and the EU (as well as between legislature and judiciary), the second the aim of the internal market, or of economic integration more broadly.[4]

Let us consider first the question of competence. In defining a restriction, the CJEU also defines the regulatory space remaining with Member States: a broad definition tends to reduce it, whereas a narrow one will usually afford national legislators greater discretion.[5] This affects two concerns relevant to justice: Democratic legitimacy, and the question of which level is better placed to deliver just results.

[1] WB Gallie, 'Essentially Contested Concepts' (1955-1956) 56 *Proceedings of the Aristotelian Society New Series* 167.

[2] See e.g. M Nussbaum, *Creating Capabilities* (Harvard University Press 2012); A Sen, 'Equality of What?' in *Tanner Lectures on Human Values* (Cambridge University Press 1982).

[3] I would argue, however, that it has much in common in its prescriptions for this specific case with human-rights based approaches and democratic constitutional approaches to the Internal Market.

[4] Pedro Caro de Sousa identifies three normative dimension inherent in the definition of a restriction of free movement rights, namely the axes between (1) centralisation and decentralisation, between (2) deregulation and economic agnosticism, and between (3) harmonisation and regulatory pluralism. My normative questions are those underlying axes (1) and (2). While the third dimension concerning the desirable degree of regulatory competition is certainly of great importance as well, considering it would go beyond the scope of this contribution, as it depends on several contingent factors such as the effectiveness of the Union legislature and the assumed equal mobility of all factors of production. See P Caro de Sousa, *The European Fundamental Freedoms* (Oxford University Press 2015) 129–135.

[5] See on this point S Weatherill, 'Surrendering the Right to Regulate' in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019). Of course, the interpretation of justificatory requirements is also at play in defin-

With regard to democratic legitimacy, we must ask in how far it is in the interest of justice to substitute the judgment of the CJEU for that of national (and presumably democratically legitimate) legislatures.

According to some procedural approaches, it is democracy-enhancing to allow judicial review of a broad spectre of national measures.[6] They argue that the operation of the market freedoms remedies an inherent defect of national democracies, namely that they are inherently limited to the pursuit of their own interest, and thus liable to exclude the legitimate interests of affected others (non-nationals) in their democratic processes. Supranational review of national measures thus serves as a tool for correcting this parochial bias by granting those outsiders "virtual representation" when considering their interests in the review of national measures.[7]

Substantive theories will usually include a commitment to democracy within the spectre of justice as well.[8] Thus, in so far as democratic representation is lacking at the national level, it will further justice to remedy this at the supranational level. However, in contrast to the virtual representation approach, substantive theories of justice suggest the EU legislature as better placed to remedy the national democratic defects,[9] or would in any case caution against the unfettered judicial review that could follow from a broad market access or obstacles to trade definition. This is due to their concern for outcomes: For example, following a CA would entail considering which institutional arrangement is best placed to ensure the provision of all relevant capabilities (at least) at a threshold. In the context of defining a restriction, this entails that the definition may only be so broad as to ensure the functioning of the Internal Market without curtailing Member States' right to regulate to such an extent as to diminish their capacity to effectively guarantee the protection of other social goods (and the capabilities affected thereby).

The second normative question concerns the purpose of economic integration itself. In deciding what is considered a restriction on the free movement of goods, the Court shapes the direction of economic integration. Whether any measure liable to

ing the Member States' remaining regulatory space, however, if that is presumed to remain the same, the definition of a restriction will have the impacts described above.

[6] Most notably M Poiares Maduro, *We the Court* (Hart Publishing 1998), drawing on C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Processes: The Constitutionalisation of Comitology '(1997) 3 ELJ 273, and arguably inspired by Ely's theory of judicial review: JH Ely, *Democracy and Distrust* (Harvard University Press 1980).

[7] Poiares Maduro, *We the Court*, cit.167 ff.

[8] Consider the capability to control one's material environment in the context of the CA, but see also e.g. Schiek or Garben's commitment to democracy in their normative approaches to the internal market: see e.g. See e.g. D Schiek, *Economic and Social Integration* (Edward Elgar 2012); S Garben, 'The "Fundamental Freedoms" and (Other) Fundamental Rights: Towards an Integrated Democratic Interpretation Framework' in S Garben and I Govaere (eds), *The Internal Market 2.0* (Hart Publishing 2020).

[9] As indeed, critics of the virtual representation argument have previously noted, see e.g. A Somek, 'The Argument from Transnational Effects I '16 ELJ 315; R Schütze, 'Judicial Majoritarianism Revisited ' (2018) 43 ELJ 269; S Garben, 'The "Fundamental Freedoms" and (Other) Fundamental Rights' cit.

render commercial activity more onerous is caught, or only those which distort competition or partition the market influences the nature of the Internal Market. A very broad definition is prone to instating a deregulatory bias unless the Union legislature is extremely effective as well as competent to re-regulate. Conversely, an overly narrow conception may prove ineffective in identifying covertly protectionist measures and thus impede the development of an efficient Internal Market.

Procedural theories will not provide explicit guidance with regard to this second question, as they are concerned with a just procedure, rather than just outcomes. While some may regard this 'neutrality' as the greatest strength of procedural theories, one may wonder about the usefulness of a theory of justice that is unconcerned with outcomes. To use Nussbaum's analogy, proceduralists resemble a cook with 'a fancy, sophisticated pasta-maker' who 'assures her guests that the pasta made in this machine will be by definition good, since it is the best machine on the market. But surely, the outcome theorist says, the guests want to taste the pasta and see for themselves'.[10]

However, also with a view to just outcomes, there are good reasons to allow oversight by the CJEU over the national legislative process. For once, the establishment of a functioning Internal Market requires the abolition of such restrictions, certainly where they are protectionist in nature or effect, and the Internal Market, by allowing greater economies of scale and efficient trade has the potential of significantly improving the economic position of the individual. For substantive theories of justice, such material outcomes are far from irrelevant. Indeed, the capabilities approach has in common with many other theories that it requires a minimum level of material well-being,[11] and insofar as the establishment of an internal market can and place these capabilities above the required threshold level, its operation is not only tolerated but required by capabilitarian justice. Seeing as it is uncontroversial that some level of judicial review is necessary to achieve the establishment of the Internal Market, it follows that the definition of a restriction adopted to determine when judicial intervention is permissible cannot be so narrow as to render this process ineffective.

On the other hand, many substantive theories of justice, and in particular the Capabilities Approach, are committed to a plurality of valuable goods. The result is that not only one good (such as an efficient internal market) can be taken into account in evaluating whether a given definition of a restriction is just. Rather, the effects of such a definition on all relevant goods (or capabilities) must be taken into account. Thus, if we consider the deregulatory bias that is likely to arise from an overly broad definition of restrictions, it becomes clear that justice requires some room for legitimate legislative action which aims to protect other values. Given the Union's weak ability (certainly at the time of *Keck*) to legislate on, for example, social and environmental protection, ca-

[10] M Nussbaum, *Frontiers of Justice* (Harvard University Press 2006), 83.

[11] As reflected in the capabilities for life and bodily integrity, see M Nussbaum, *Creating Capabilities* cit.

pabilitarian justice requires some regulatory space to remain with the Member States, as they were (and perhaps still are) better placed to protect these other goods.

Therefore, following my rendition of the *Keck* judgment, only those measures which do in fact alter the competitive position of foreign goods, or which prevent their access to national markets altogether are subject to judicial review.

My version thus does not go so far as to allow for review of openly discriminatory measures only,[12] as this might undermine the establishment of the internal market (also) through negative integration. However, my version, like the original, does not permit the review of any measure liable to render more costly the pursuit of economic activities either. In doing so, it (re)opens regulatory space for Member States to legislate without the need to justify their action in terms of EU law.

Thus far, I have explained why I consider the result of the *Keck* judgment (that is, the taming of the overly broad definition of a restriction, thereby correcting potential deregulatory bias and reinstating a degree of Member States' legislative discretion) to have been fortuitous as a matter of social justice.

My main changes relate to the form by which the Court has arrived at this result. By classifying the measure at hand as a 'certain selling arrangement' (CSA), the Court introduced a new legal category, similar to that of product requirements established in *Cassis*, with the difference that whereas product requirements are presumed to be restrictions contravening Article 30, CSA's benefit from the inverse presumption, and are considered to fall outside the scope of the free movement of goods. While producing the results outlined above, this categorisation approach also engendered much confusion in subsequent case law. For the distinction between product requirements and CSA's, or CSA's and other measures (such as regulations on use) is far from clear, necessitating constant clarification and refinement. Moreover, due to the extremely sparse reasoning of the Court, it remained unclear after *Keck* what (if any) vision informed this choice of categories. Indeed, some argue that the later (re)turn to a broad market access approach (which, for the reasons explained above I consider less than ideal) is at least partially a result of the unworkable *Keck* categorisation.

Instead, my version introduces what Lianos terms a 'narrow market access approach',[13] under which only those national measures which either negatively impact on the competitive position of goods from other member states or prevent their market access altogether are in need of justification.

This approach does not change the *Cassis* presumption, as product requirements will normally alter the competitive position of goods from other Member States. Conversely,

[12] As Garben argues the argument from transnational effects, if properly construed, would prescribe: S Garben, 'The Fundamental Freedoms' cit. 350.

[13] I Lianos, 'Shifting Narratives in the Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration' (2010) 21 European Business Law Review 705; I Lianos, 'In Memoriam *Keck*' (2015) 40 ELR 225.

rules such as those at issue in the Sunday Trading saga fall outside of the scope of Article 30, as will the measure in *Keck*, since it seems implausible that the prohibition of resale at a loss deprives traders of a promotion strategy that is of such central importance to their ability to enter the market that it will alter the competitive position of imported goods.

A complete ban of all advertising, however, would certainly be caught, given the reliance of traders of imported goods on advertising to gain recognition in domestic markets. Similarly, bans or complete prohibitions of use would be suspect under this approach, because, while there will usually not be a domestic production to serve as a comparator of competitive position, such bans prevent market access entirely.

Rules merely restricting use or certain forms of advertising would have to be evaluated in their effects on producers, traders and consumers to ascertain whether they have the effect of altering the competitive position of goods from other Member States.

There is an obvious drawback to this, more principled, approach compared to one which employs categories: It necessitates courts (and ultimately, national legislatures intending to legislate in conformity with EU law) to assess for each measure its impact on the competitive position of goods from other Member States. This is likely to entail greater procedural cost, and requires at least some economic expertise. Legal categories, by contrast, allow for relatively uncomplicated *prima facie* assessment of rules. However, as the CSA category has demonstrated, this is not necessarily the case in practice. More importantly, the approach put forward here is not inimical to categorisation per se. As shown by the product requirement example, it allows for a typology, or categories of measures to be integrated within it. Thus, following my *Keck* judgment, the Court could still have introduced further categories of rules, such as those discussed above, and in this way guided national courts and legislators in applying the narrow market access approach in practice. The upside of my approach is that it allows for such categories to form part of a coherent guiding rule which can be relied upon where a national measure does not neatly fit any existing category, and which moreover provides a clear vision as to the form of the Internal Market and the purpose of economic integration at large.

Besides achieving the result required by the demands of capabilitarian social justice, my version thus avoids, or at least reduces, the legal uncertainty that followed the original, which further contributes to justice.