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

WHAT *KECK AND MITHOUARD* SHOULD HAVE SAID: IT COULD HAVE BEEN SO SIMPLE

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INTRODUCTION: *KECK* IN CONTEXT

The backdrop to the judgment in *Keck and Mithouard*[1] is the case law commonly referred to as the 'Sunday trading' cases. These were about the legality under European law of fines imposed on traders who had breached the prohibition in England and Wales of sales on a Sunday. The traders contended that the rules under which the fines were imposed were contrary to art. 34 TFEU, and hence unenforceable. They argued that during the remaining permissible opening hours, they could not make up for the sales that they lost on Sundays. As a consequence, they would also sell fewer products imported from other Member States.[2]

The Court dealt with this argument in accordance with the principles set out in *Cassis de Dijon.*[3] This is unconvincing in many respects.[4] Most importantly, the difference between the paradigm in *Cassis de Dijon* and in *Sunday trading,* respectively, is that in

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

[2] Case C-145/88 *Torfaen Borough Council v B & Q PLC* ECLI:EU:C:1989:593 paras 13-16. A similar argument was proferred in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía v Departamento de Sanidad y Seguridad Social de Cataluña* ECLI:EU:C:1991:327 para. 10: "legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect trade, be such as to restrict the volume of trade because it affects marketing opportunities".

[3] Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

[4] This, and the subsequent case law, is discussed in more detail in 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* (Oxford University Press 2021) 546, 561-566.

ISSN 2499-8249
doi: 10.15166/2499-8249/660

Cassis, the rules on minimum alcohol content and on trade designations, although applicable in law to all beverages of a particular type irrespective of the origin of the products, entailed adaptation costs for imported drinks that their domestic counterparts did not have to incur. By contrast, imports and domestic goods suffered in equal measure under the Sunday trading legislation in England and Wales.

In *Keck,* the Court revisited the question. In issue in that case were rules in France which forbade retail at a loss. Two managers of supermarkets were prosecuted under that legislation for having sold goods during sales promotion campaigns at prices lower than those at which they had procured them. The Court's clarification (para. 14 of the judgment) in paras 15-17 has divided opinions ever since. Especially unclear is the meaning and significance of "product requirements" (para. 15) and (rules relating to) "certain selling arrangements" (para. 16). Equally puzzling is the role of "market access" (para. 17). The rewrite seeks to avoid these difficulties.

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 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 na-

tional 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. That alone, however, does not mean that the legislation is exempt from scrutiny under Article 30.

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 the possibility that sales of domestic and imported products decrease to the same extent 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 have the same effect on all goods, regardless of their origin, 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 C-120/78 *Rewe-Zentral-AG v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42) that even rules that apply to domestic and imported products alike can create obstacles to free movement of goods, and thus amount to measures having equivalent effect to quantitative restrictions. This will be the case where despite the equal treatment in law, goods imported from other Member States in fact find it more difficult than domestic goods to comply with these rules. If imported goods, lawfully made or marketed in another Member State, must undergo adaptations to the rules in the Member State of importation regarding, for example, the goods' designation, form, size, weight,

composition, presentation, labelling, or packaging, such factual inequality is also caught by Article 30. Nevertheless, provided the rules apply equally in law to domestic and imported goods, unequal treatment in fact is not prohibited where the rules pursue a ground of justification from among those enumerated in Article 36. Beyond these grounds, Member States may also invoke any other public interest of their choice except the reservation of markets for the national competitors, administrative expedience, and the mere desire to raise revenue. Moreover, the Member States must prove that the rules are suitable and necessary for realising their aim. Recourse to such interests is precluded, however, to the extent that they have been the subject of Directives or Regulations pursuant to Article 189 of the Treaty.

16. By contrast, Member States need not justify rules that apply equally in law, and do not entail greater factual burdens for imported than for domestic goods. Such rules are not, safe as discussed in the next paragraph, prohibited by Article 30. This is contrary to what has previously been decided regarding, for instance, rules restricting or prohibiting shop opening hours and other arrangements for the promotion, distribution, display, or sale of goods. This case law no longer applies to any rule, of whatever content, that encompasses all goods, regardless of origin, and that merely reduces, to the same extent, turnover in domestic and imported products.

17. Member States must, however, justify even rules that apply equally in law to goods of any origin and that do not entail any factual inequality if they prohibit the marketing of a type or types of product altogether. The prohibition may be definitive, or pertain unless and until some condition is fulfilled. By doing so, a Member State raises a legislative 'frontier' to trade between itself and the other Member States. This is contrary to Article 8(a) of the Treaty which demands that the internal market be free from regulatory obstacles against access to the markets in the various Member States. Member States may justify such prohibitions in the way described in paragraph 15 of this judgment.

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 prohibiting legislation of a Member State imposing a general prohibition on resale at a loss.

Costs

19. 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 prohibiting legislation of a Member State that applies in law to all goods regardless of their origin in one Member State or another, that is not in fact more difficult for imports to comply with than for domestic goods, and that does not prohibit the marketing of a type or types of products altogether, such as national legislation imposing a general prohibition on resale at a loss.

Explanatory note

The re-write keeps the substance of the judgment but dispenses with the Court's confusing terminology and generally somewhat cryptic formulations. This is possible because a closer reading of paras 15 and 16 reveals that the Court asks the same two questions twice.

These regard, firstly, the applicability of the rules in issue, i.e. whether there is one set of rules for all goods regardless of their origin in one Member State or another (so-called indistinctly applicable measures), or a separate and more burdensome set specifically for imports (distinctly applicable measures). The latter can only be justified on the grounds exhaustively listed in art. 36 TFEU. Such rules were not in issue in *Keck* but, for instance, in *Dassonville.*[5]

The second question arises only if the answer to the first is that the rules are indistinctly applicable. In that case, the Court goes on to ask what their factual repercussions are. In the *Cassis* paradigm, these were not the same for domestic goods and imports. The rules entailed burdens (adaptation costs) for imports which domestic goods were spared. In situations such as those in *Sunday trading* and in *Keck,* by contrast, the resulting burden was the same for all goods, irrespective of their origin. If unequal burdens to the detriment of imports are found, the Member State can justify their legislation on the grounds found in art. 36. They may also invoke any other public interest except mere protectionism (the reservation of markets to the national incumbents), administrative expedience, and the desire to raise revenue. Whichever interest they invoke, the Member States must also pursue it by proportionate means.

[5] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* ECLI:EU:C:1974:82.

These two questions together constitute an assessment whether discrimination is present, that is, unequal treatment in law or in fact without justification.[6] That leaves one issue, which the Court tackles in para. 17. If a Member State prohibits a type of product altogether, wherever it is made, products of this type will not come onto its markets. Those made in other Member States will be kept out, and any made domestically may not be marketed there, either. There is no unequal treatment here: the prohibition applies across the board, and no one suffers more from it than anybody else.

Nevertheless, art. 26(2) TFEU describes the internal market as an "area without internal frontiers" in which free movement of goods, persons, services, and capital is ensured. This means movement specifically between Member States, in other words, free access to the markets in each and all of them. Universal bans amount to legislative frontiers between Member States. For the given product, the Member State that bans it opts out of the internal market, so to say, even if it is the last Member State in which the product can lawfully be produced or marketed. For this reason, universal bans too require a justification. By definition, they are indistinctly applicable. The same possibilities of justification are therefore open to the Member States as for other indistinctly applicable measures.

The most conspicuous difference between the re-write and the original is the absence of the terms "product requirements" and "(rules relating to certain) selling arrangements". From the above discussion, it will be seen that the two terms are not part of the one, uniform test, but merely stand for two different results. Even if they were part of the test, after the initial categorisation the salient questions would be identical. The first step, identifying a national rule as one or the other, would therefore not add anything. There is no indication in *Keck,* and there is also no reason in principle to think that presumptions of legality or illegality attach to either category: it is the inequality in law or in fact (or the erection of a frontier in the internal market) that calls for a justification, no matter what sort of rule caused the obstacle. After all, art. 34 prohibits measures having "equivalent effect", not "equivalent cause/form/category" or whatever else.[7]

One might consider retaining the terms as shorthand, or convenient labels, for rules that neither stipulate (in law) or entail (in fact) unequal treatment between domestic and imported products ("selling arrangements"), and for rules that create factual inequality despite their even-handedness in law ("product requirements"). This might still be understood to mean they are test criteria. To put this controversy to rest, the rewrite dispenses with the Court's original phrasing on this point.

[6] On the centrality of the concept of discrimination in the Treaty, see S Enchelmaier, 'Free Movement of Goods' cit. 547-550.

[7] More details in S Enchelmaier, 'Free Movement of Goods' cit. 568-572, and in S Enchelmaier, 'The Development of the Free Movement Principles over Time' in S Garben and I Govaere (eds), *Internal Market 2.0* (Hart Publishing 2020) 25, 49.