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: 'STEADY AS SHE GOES, LEFT HAND DOWN A BIT?'

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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 under Article 177 of the EEC Treaty two questions on the interpretation of the

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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 C-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. Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. It is settled law that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to quantitative restrictions (judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

12. Even though the national legislation concerned in this case imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States, if such legislation has the effect of directly or indirectly, actually or potentially, hindering intra-Community trade, it will constitute a measure having equivalent effect under Article 30.

13. The Court has held that national legislation which restricts or prohibits certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. To compel an economic operator either to adopt sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction (see the judgments in Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 15; Case 382/87 *Buet* [1989] ECR 1235, paragraph 7; Case C-362/88 *GB-INNO-BM* [1990] ECR I-667, paragraph 7; and

Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, paragraph 10).

14. A prohibition of the kind at issue in the main proceedings is thus capable of restricting imports of products from one Member State into another and therefore constitutes, in that respect, a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.

15. However, the Court has consistently held that in the absence of common rules relating to marketing, obstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be justified as being necessary in order to satisfy mandatory requirements relating inter alia to consumer protection or fair trading (see, in particular, *GB-INNO-BM*, cited above, paragraph 10).

16. It is undisputed that a prohibition of the kind at issue in the main proceedings applies both to domestic products and to imported products.

17. Since the protection of consumers and fair trading are legitimate objectives from the point of view of Community law, the Court must examine, in accordance with the settled case-law, whether the national provisions are suitable for attaining the aim pursued and do not go beyond what is necessary for that purpose.

18. The French government has stated that it views resale at a loss as primarily a strategy for eliminating competition at the retail level, so that higher prices can be charged once the aim of resale at a loss has been achieved. From the point of view of consumer protection, the prohibition of resale at a loss also prevents the use of "loss leaders" to entice customers into a store in the hope of them also purchasing other goods which have been marked at higher prices in order to compensate for the losses suffered on the "loss leaders". The national provisions concerned are suitable for attaining the aims of fair trading and consumer protection, and their application to these strategies is proportionate to those aims.

19. However, as the Advocate General observed in his Opinions, the prohibition of resale at a loss also prevents a resale at a loss from being used to promote the introduction of a new product, which is a market strategy which may be particularly attractive to importers, producers, wholesalers and retailers, and indeed consumers. Resale at a loss may also be used to dispose of excessive stocks or for other purposes, including the grounds permitted under para. II of Article 1 of the Law of 2 July 1963, such as sales of perishable products, sales relating to the change or cessation of a business, and sales of products which are out of season, out of fashion, or technically obsolete. Moreover, offering some products for resale at a loss does not necessarily involve the retailer increasing prices of some other products to compensate.

20. Thus to the extent that the general prohibition at the retail level of resale at a loss takes no account of why the product is offered for sale at a loss, it goes beyond what is necessary and proportionate to ensure fair trading and the protection of consumers. While it is for the national court to establish the circumstances in which the products concerned were offered for sale at a loss, it appears, as the Advocate General observed in point 12 of his second Opinion, that the resale at a loss of Picon Bière and Sati Rouge coffee in this case has nothing to do with the launch of a new product. If the national court concludes that the resale at a loss was for one of the purposes set out in paragraph 18 of this judgment, the prohibition would be necessary and proportionate to ensure fair trading and the protection of consumers; it would therefore not be precluded by Article 30 of the Treaty, there being no evidence of the measure being a means of arbitrary discrimination or a disguised restriction on trade between Member States.
21. Accordingly, the reply to the national court's question must be that Article 30 of the Treaty is to be interpreted as precluding the application of a rule of law imposing a general prohibition of resale at a loss which takes no account of the circumstances in which the product concerned is offered for retail sale at a loss.

Costs

22. 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 precluding the application of a rule of law imposing a general prohibition of resale at a loss which takes no account of the circumstances in which the product concerned is offered for sale at a loss.

Explanatory note

My view of the judgment in *Keck* as an immaculate misconception (which, when I stated this in a lecture at Leuven shortly after *Keck* was handed down, had Walter van Gerven, who was the Advocate General in *Keck* and was in the audience, in a fit of giggles) is

well-known,[1] so I shall refrain from further rhetorical flourishes. In redrafting *Keck*, I decided to start with a fresh sheet of paper. I also decided to see just what the products concerned were. Two quick internet searches revealed products with quite a provenance. Sati Rouge Coffee is a brand of coffee, produced by an independent family company based in Strasbourg since 1926, and marketed particularly in the East of France.[2] Picon bière is not actually beer, but a type of bitters, nowadays frequently drunk with beer, although previously with Selz water; its present name dates from 1967.[3]

The Court could have decided that a prohibition of retail resale at a loss (save in the specific circumstances envisaged in the law) was too remote from inter-Member State trade (as happened, not uncontroversially, in, for example, *Blesgen* in relation to a Belgian law prohibiting the sale of strong alcoholic liquor in cafés).[4] That approach seems to have been inspired by a certain reluctance to categorise the relevant law as capable of hindering trade between Member States, even though it could have been justified on health grounds and/or on grounds of public policy (*ordre public*): restricting the opportunities for people to have access to strong alcoholic drinks in cafés, so as to combat at least to an extent, extreme drunkenness.[5] In *Prohibiting Restrictions on Trade within the EEC*,[6] I suggested that in *Blesgen* the Court was inspired by the American approach to non-discriminatory liquor licensing laws. However, while the result of the US Supreme Court's case-law, discussed by Tribe,[7] was to accept such measures as being a legitimate expression of the States' police powers, the starting point of the reasoning (if one reads the judgments themselves) was to accept that the State measures were capable of hindering intra-State commerce, not that retail prohibition or restrictions were too remote to have an impact on intra-State commerce. Admittedly, the "Integration merit" of the facts in *Blesgen* was thin, just as it is in *Keck*. While the *Blesgen* approach of remoteness, or viewing the link with free movement of goods too indirect or uncertain, has been followed in a very few cases, they remain exceptional instances, and are really confined to wholly misconceived and unmeritorious attempts to rely on free movement

[1] See LW Gormley, 'Reasoning Renounced – The Remarkable Judgment in *Keck & Mithouard*' (1994) European Business Law Review 63; LW Gormley, 'Two Years After *Keck*' (1996) FordhamIntlLJ 866; LW Gormley, 'Silver Threads among the Gold: 50 Years of the Free Movement of Goods' (2008) FordhamIntlLJ 1637.

[2] Cafés Sati, *Notre histoire* www.cafesati.com.

[3] Échappée Bière, *Picon, 200 ans d'histoire* www.echappee-biere.com.

[4] Case C-75/81 *Blesgen* ECLI:EU:C:1982:117.

[5] The *Loi Vandervelde*, as the relevant legislation was called, was adopted for the protection of the health of, in particular, young people; restricting the places where hard liquor could be sold. There were worries about how the press would present a judgment which found that there was a barrier to inter-State trade, even if it was a justified barrier.

[6] LW Gormley, *Prohibiting Restrictions on Trade within the EEC* (North Holland 1985) 56, 252.

[7] LH Tribe, *American Constitutional Law* (Foundation Press 1978) ch. 6.

law when it is manifestly irrelevant.[8] In view of Advocate General van Gerven's Opinions, which demonstrate that a prohibition on resale at a loss at retail level can act as a deterrent to an importer or foreign producer seeking to introduce a new product onto the market, it was certainly not a convincing route to take.

The Court could have also disposed of the case by saying that as the products were French products, and there was no element of intra-Community trade, no issue of Article 30 EEC arose. However, that would not be as simple as it might seem. It is true that already in *Oosthoek*,[9] the Court had noted that the application of Dutch legislation to the sale in the Netherlands of encyclopedias produced there was not linked to the importation or exportation of goods and therefore did not fall within the scope of Articles 30 and 34 of the EEC Treaty. Later (after *Keck*), in *Guimont*,[10] the Court observed that it was clear from its case law that a rule that applied without distinction to national and imported products and was designed to impose certain production conditions on producers in order to permit them to market their products under a certain designation, fell under Article 30 of the Treaty only in so far as it applied to situations that were linked to the importation of goods in intra-Community trade. Earlier (before *Keck*), in *Mathot*,[11] the Court recalled that "[w]ith regard to Article 30 of the EEC Treaty, it must be emphasized that the purpose of that provision is to eliminate obstacles to the importation of goods and not to ensure that goods of national origin always enjoy the same treatment as imported goods".[12] However, even though this was not the aim of Article 30, the French national legal system views equality before the law as a jewel in its constitutional crown.

Thus, even though, in *Keck*, all the facts were purely domestic, French lawyers well understood the possibilities inherent in this doctrine of national law. If a national court were to find that the French law could not be enforced against imports of goods from other Member States, it could not be enforced against traders dealing in French goods either. In *Guimont*, the Court finally made it clear that it too understood this.[13] This approach is not a misuse of Community law, but a pure recognition of how French domestic law operated. This compares interestingly with the situation in Germany, where, after the *Reinheitsgebot*

[8] Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* ECLI:EU:C:1990:97; Case C-93/92 *CMC Motorradcenter v Baskiciogullari* ECLI:EU:C:1993:838. Post *Keck*, see e.g. Case C-379/92 *Peralta* ECLI:EU:C:1994:296; Case C-96/94 *Centro Servizi Spediporto v Spedizioni Marittima del Golfo* ECLI:EU:C:1995:308; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and others v Comune di Bassano del Grappa and others* ECLI:EU:C:1995:330; and Case C-266/96 *Corsica Ferries France v Gruppo Antichi Ormeggiatori del porto di Genova and others* ECLI:EU:C:1998:306.

[9] Case C-286/81 *Oosthoek* ECLI:EU:C:1982:438 para. 9.

[10] Case C-448/98 *Guimont* ECLI:EU:C:2000:663 paras 3, 7-9.

[11] Case C-98/86 *Ministère public v Mathot* ECLI:EU:C:1987:89 para. 7.

[12] The Court correctly added that "a difference in treatment as between goods which is not capable of restricting imports or of prejudicing the marketing of imported goods does not fall within the prohibition contained in that article" (ibid. paras 7-8); see also *Guimont* cit. para. 15.

[13] See *Guimont* cit. paras 22-23.

judgment,[14] while the German government had to change the law to permit non-*Reinheitsgebot*-conform beers from other Member States to be sold in Germany, it was perfectly entitled to maintain the existing law for beer produced in Germany for consumption there (beer brewed there for export was not subject to the *Reinheitsgebot* conditions).

I also looked to see whether one could simply say that the arguments of prevention of unfair trading practices and consumer protection had been made out; it was necessary to protect such interests; they were appropriate and proportionate, and thus conclude that the French measures were not prohibited by Article 30. Relatively easy and straightforward, it might be thought. Unfortunately for that approach, that great jurist, Advocate General Walter van Gerven, had demonstrated that this was not possible. He pointed out two difficulties with such an easy approach. First, people might want to sell at a loss for entirely reasonable reasons, such as to launch a new product. Indeed, French law recognized certain exceptions under para. II of art. 1 of the Law of 2 July 1963, such as sales of perishable products, sales relating to the change or cessation of a business, and sales of products which are out of season, out of fashion, or technically obsolete. Van Gerven noted, however, that it was unclear whether the sale of Sati rouge coffee and Picon Bière fell within them.[15] Secondly, the French legislation was too generally drafted. He argued that if the French legislation were drafted sufficiently precisely, so as specifically to target resale at a loss being used for purposes which were unfair towards competitors or detrimental to consumers, it could be justified as necessary to ensure fair trading and, also, maintaining undistorted competition and/or protecting consumers. These grounds were recognized in Community law. Banning the use of resale at a loss as a method of sales promotion in trading situations which could not be regarded as unfair, anti-competitive, or detrimental to the consumer, went too far. Van Gerven was manifestly correct to observe that an argument that the measure was only actually applied to the resale at a loss designed to eliminate competitors or to draw in consumers while quietly raising other prices to compensate was unsatisfactory from the point of view of legal certainty; the French measure was far too broadly drawn, and should have enabled the reseller to adduce evidence that it had not acted in an anti-competitive manner or to the detriment of consumers.

Following van Gerven's approach, I felt it appropriate to indicate to the national court how it should proceed depending on the factual information that it is best placed to ascertain; I have sought to assist the national court, without usurping its function as sole judge of the facts of the case. I prefer the formulation of advice in the first Opinion, even though the formulation in the second was more direct, as I felt that the national court should be encouraged to consider the motivation: the French authorities clearly

[14] Case C-178/84 *Commission v Germany* ECLI:EU:C:1987:126.

[15] See Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* ECLI:EU:C:1992:448, opinion of AG Van Gerven of 18 November 1992, para. 9 and fn. 13.

thought that the supermarket managers involved had acted either to shaft the competition or to entice consumers into the supermarkets while quietly raising prices of other products. But had they done this? Clearly, the products were not new products being launched, but was there another innocent explanation?

I found van Gerven's Opinions a more convincing line to follow than the line advanced by Advocate General Tesauro in Case C-292/92 *Hünermund v Landesapothekerkammer Baden-Württemberg*[16] which seems to have inspired the Court's approach in *Keck*. In Hünermund, I would have followed the alternative analysis suggested by Tesauro in paras 30-31 of his Opinion, finding the prohibition unjustified: the arguments of the Landesapothekerkammer that the prohibition of advertising of parapharmaceutical products was essential to ensure a proper supply of medicinal products and to avoid the image of pharmacists no longer reflecting their traditional activity were manifestly rubbish and, as he observed, disproportionate.

One of the great functions of *Festschriften* is that they should also provoke the honoree into thinking and rethinking. David Edward's discussion[17] of the expression in para. 16 of *Keck* "contrary to what has previously been decided" is very illuminating. He observed that this phrase, for a common lawyer, implies that previous judgments are being overruled because they were wrongly decided – the wrong result was reached. In *Keck*, he explains, the Court's change of direction was not overruling the previous cases because the result was erroneous; "the departure was from the approach, irrespective of whether the end result was correct or not".[18]

Edward also eloquently argued that

> *[e]ssentially,* the purpose of *Keck* was to emphasise that Article 30 is not about free trade. It is about fair trade. In the absence of harmonizing measures, Member States are at liberty to make such rules as they think appropriate to their own conditions. These rules may be thought to be inept, even ridiculous. But the Treaty has nothing to say about them on condition that everyone has equal and fair access to the market. In a sense, to use the jargon of later years, *Keck* was really about subsidiarity.[19]

These observations induce some more general reflections. The concept of fair trade is the result of the Court developing already in *Dassonville* the justification of the prevention

[16] Case C-292/92 *Hünermund and others v Landesapothekerkammer Baden-Württemberg* ECLI:EU:C:1993:863, opinion of AG Tesauro.

[17] See D Edward, 'What Was *Keck* really About?' in F Amtenbrink and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019) 173-174. All the authors wrote such wonderful contributions that I have learned a great deal from reading this book.

[18] *Ibid.* 174.

[19] *Ibid.* 175.

of unfair commercial practices.[20] The case-law-based justifications can only be invoked in respect of measures which apply equally, in law and in fact to domestic and imported products; if there is a difference, only justification under the heads recognized in the Treaty will be available. This is still true, and indeed was specifically reaffirmed in the *Walloon waste* judgment[21] in which the Court notoriously claimed (or to put it expressively and deservedly devastatingly in french: "*La Cour croyait conclure que*...") that a manifestly discriminatory measure was not discriminatory because of the nature of the product concerned. I suggest, therefore that the basic right is to free trade, the basic duty on the Member States to facilitate trade, the power is to retain obstacles which can be justified,[22] having taken into account the necessity to protect the recognized interest or value concerned, appropriateness / suitability for purpose, and the proportionality of the measure. Art. 30 EEC was about free trade; *Dassonville* was about free trade, and about recognizing legitimate justifications in the absence of Community measures occupying the field: free trade should indeed be fair trade. *Keck* too can be firmly placed in that line.

The dangers with the approach in which the Court took in *Keck* are twofold. First, claiming that equally-applicable selling arrangements are not hindrances to trade within the meaning of *Dassonville* misunderstands the nature of justifications: a hindrance does not cease to be a hindrance because it is justified, it is a hindrance which is acceptable in the absence of EU-level measures protecting the interest or value concerned.[23] Secondly, stating that certain selling arrangements fall outside the scope of art. 30 EEC, effectively removes the jurisdiction of the Court to look at them at all; the Court loses its controlling function, its ability to look behind the face of measures, and its ability to see what is really going on. A measure may provide for equal misery for all, but that is not reason for concluding that it is not caught by art. 30 EEC (now, of course, art. 34 TFEU). Equally-applicable measures can be justified on wider grounds than those specified in art. 36, as was first made clear in *Dassonville*. The great merit of the wide application of the basic principle in *Dassonville*, accompanied by Treaty-based and case-law-based justifications, is that it permits the Court to take a view on national measures. This is not a mechanical application of *Dassonville*, but an opening up to ensure the protection of legitimate interests not envisaged in the late 1950's, pending action at, now, Union level. The *Dassonville* approach

[20] "In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals" (Case C-8/74 *Dassonville* ECLI:EU:C:1974:82 para. 6). Very quickly the reference to "all Community nationals" was dropped (as the benefit of the free movement of goods is not restricted to Community nationals).

[21] Case C-2/90 *Commission v Belgium* ECLI:EU:C:1992:310 para. 34.

[22] Like a trust for sale: the duty is to sell, the power to postpone.

[23] See LW Gormley, *Prohibiting Restrictions on Trade within the EEC* cit. 51-58, 71; LW Gormley, 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2008) ELR 925, 927.

actually helps Member States, economic operators, and consumers, and promotes rational market measures, as opposed to irrational ones.

Edward's further observation that "[i]n the absence of harmonizing measures, Member States are at liberty to make such rules as they think appropriate to their own conditions" is a point often raised by the Member States, but it is well-parried by the Court with expressions such as "within the limits imposed by the Treaty".[24] In other words the justifications recognized by EU law (whether Treaty-based or case-law-based) are not simply a *carte blanche* for the Member States to do whatever they want, no matter how inept or even ridiculous the measures may seem, as long as it is equal misery for all. Access to the market on equal terms gets us a long way, but it insufficient to cope with measures which, even though equally applicable, in practice hinder the exercise of fundamental freedoms without a justification known to EU law.

Finally, Edward's challenging observation that in a sense *Keck* was about subsidiarity. The judgment in *Keck* was handed down on 24 November 1993, some three weeks after the entry into force of the Treaty on European Union; the notion of subsidiarity had been in the air for some time (the final negotiations on the Treaty on European Union were concluded at the Maastricht European Council on 9-11 December 1991 and the Treaty been signed at Maastricht on 7 February, 1992; the Edinburgh European Council in December 1992[25] started to flesh out how the principle would work in practice; the *spirit of Edinburgh* was in vogue). But the principle of subsidiarity is clearly intended to be taken into account in the work of the political institutions in proposing or adopting legislation in areas where the Union does not enjoy sole competence to act, and in the control of that work by the Court; it is not an instruction to the centralized or decentralized judiciary of the Union to be taken into account when deciding cases involving action by the Member State, and indeed Timmermans has rightly observed that the Court itself is not obliged to respect the principle, as its jurisdiction is always exclusive in nature.[26] Subsidiarity, I submit, is irrelevant in deciding on the compatibility of *national* action with EU law.

I have very much enjoyed this exercise, and congratulate and thank Justin Lindeboom for initiating it!

[24] E.g. Case C-104/75 *De Peijper* ECLI:EU:C:1976:67 para. 15; Case C-40/82 *Commission v United Kingdom* ECLI:EU:C:1984:33 paras 33-34; 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. 16. This is also true post *Keck*, see e.g. Case C-170/04 *Rosengren and others* ECLI:EU:C:2007:313 para. 39; Case C-421/09 *Humanplasma* ECLI:EU:C:2010:760 para. 32; Case C-333/14 *The Scotch Whisky Association* ECLI:EU:C:2015:845 para. 35.

[25] European Council Conclusions of 12 December 1992, Overall approach to the application by the Council of the subsidiarity principle and article 3b of the Treaty of European Union, points I.4 and 1.15.

[26] CWA Timmermans, 'The Genesis and Historical Development of the European Communities and the European Union' in PJ Kuijper and others (eds), *The Law of the European Union* (Wolters Kluwer 2018) 83.