

JUDGMENT OF THE COURT
24 November 1993

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

REFERENCE to the Court under [Article 267 TFEU] 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 Treaty [on the Functioning of the European Union] relating to competition and freedom of movement within the [Union],

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodriguez Iglesias, F. Grevisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: W. Van Gerven,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- D. Mithouard, by M. Meyer, of the Strasbourg Bar,

- B. Keck, by J.-P. Wachsmann, of the Strasbourg Bar,
- the French Government, by P. Pouzoulet, *Sous-Directeur* in the Directorate for Legal Affairs in the Ministry of Foreign Affairs, and by H. Duchene, Secretary for Foreign Affairs in the Legal Directorate of the same Ministry, acting as Agents,
- the Greek Government, by F. P. Georgakopoulos, Deputy Legal Adviser in the State Legal Service, acting as Agent,
- the Commission of the European [Union], by R. Wainwright, Legal Adviser, and V. Melgar, national official seconded to the Commission's Legal Service, acting as Agents, assisted by H. Lehman, of the Paris Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of D. Mithouard, represented by Mr Meyer and Mr Huet, of the Strasbourg Bar, the French Government and the Commission, at the hearing on 9 March 1993,

after hearing the Opinion of the Advocate General at the sitting on 28 April 1993,

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 [Article 267 TFEU] two questions on the interpretation of the rules of the Treaty concerning competition and

freedom of movement within the [Union].

- 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 34 TFEU] and with the principles of the free movement of persons, services, capital and free competition within the [Union].
- 4 The Tribunal de Grande Instance, taking the view that it required an interpretation of certain provisions of [Union] 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 E[U], and more particularly in [Article 3 TEU] and [Article 18 TFEU] 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 [Union] 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 18 TFEU], 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-a-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 18 TFEU]. 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 [Union] set out in [Article 3 TEU], 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 34 TFEU], 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-[Union] 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 34 TFEU] 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 requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by [Article 34 TFEU]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

- 16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
- 17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of [Article 34 TFEU].
- 18 Accordingly, the reply to be given to the national court is that [Article 34 TFEU] is to be interpreted as not applying to 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 [Union], 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 34 TFEU] is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.

Due	Mancini	Moitinho de Almeida
	Diez de Velasco	Edward Kakouris
	Joliet Schockweiler	Rodriguez Iglesias
Grevisse	Zuleeg	Kapteyn Murray

Delivered in open court in Luxembourg on 24 November 1993.

J.-G. Giraud

Registrar

O. Due

President