Judgment of the Court of Justice, Keck and Mithouard, Joined cases C-267/91 and C-268/91 (24 November 1993)

Caption: A precedent-setting judgment on the free movement of goods. The Court modifies its 'Cassis de Dijon' precedent, stating that national provisions restricting or prohibiting 'certain selling arrangements' are not covered by Article 30 (now Article 28 of the EC Treaty) 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.

Source: Reports of Cases before the Court. 1993. [s.l.].

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Joined Cases C-267/91 and C-268/91
Criminal proceedings against Bernard Keck and Daniel Mithouard

(References for a preliminary ruling from the Tribunal de Grande Instance, Strasbourg)

(Free movement of goods — Prohibition of resale at a loss)

[…]

Summary of the Judgment

Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Concept — Obstacles to trade resulting from disparities between national legislation laying down requirements to be met by goods — Included — Obstacles resulting from national provisions regulating selling arrangements in a non-discriminatory way — Inapplicability of Article 30 of the Treaty — Legislation prohibiting resale at a loss
(EEC Treaty, Art. 30)

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, prohibited between Member States by Article 30 of the Treaty.

That definition covers obstacles to the free movement of goods which, in the absence of harmonization of legislation, 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). 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.

By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder trade between Member States, within the meaning of that definition, 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. 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 of Article 30 of the Treaty.

It follows that Article 30 of the Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss.

REPORT FOR THE HEARING
in Joined Cases C-267/91 and C-268/91 *

I — Facts

A — Legislative background

1.Resale at a loss is prohibited under paragraphs I and II of Article 1 of Finance Law No 63-628 of 2 July 1963, as amended by Article 32 of Order No 86-1243 of 1 December 1986. The text of that provision is as follows:

‘Article One

I — Any trader reselling a product in an unaltered state at a price lower than its actual purchase price shall be liable to a fine of FF 5 000 to 100 000. The actual purchase price shall be presumed to be the price on the invoice, plus turnover tax, specific charges relating to the resale and, where appropriate, the cost of transport.

II — The above provisions shall not apply:

to perishable goods from the time when their condition may deteriorate;

to voluntary or enforced sales following the cessation or changing of a commercial activity;

to products whose sale is of a marked seasonal nature, towards the end of the selling season and during the period between two selling seasons;

to products which are no longer in public demand owing to changes in fashion or to the appearance of technical improvements;

to products which are restocked or which could be restocked at a reduced level, the actual purchase price then being replaced by the price on the new invoice or by the value of the new stock;

to products whose resale price is aligned on the price lawfully charged for the same products by another trader in the same area of activity.'

B — Background to the dispute

2. According to the orders for reference, towards the end of 1989 officials of the French Directorate for Competition and the Prevention of Fraud drew up a report in which they found that litre bottles of 'Picon Bière' (21 % vol) and 'Sati Rouge' coffee were being sold at a loss at 'Hypermarché CORA SA' at Mundolsheim (France) and 'Hypermarché Rond Point COOP' at Geispolsheim (France) respectively.

3. On the basis of those reports the Procureur de la Republique (Public Prosecutor) brought a prosecution against each of the managers of the two hypermarkets on the grounds that, at Mundolsheim, from 3 November 1989 to 10 November 1989 they resold in an unaltered state 1 264 bottles of 'Picon Bière' at the unit price of FF 44.35, namely a unit price which was lower than the actual purchase price of FF 48.27, including taxes, when the limit fixed for resale at a loss was FF 46.222, and from 15 to 17 December 1989 at Geispolsheim resold 544 kg of 'Sati Rouge' coffee in an unaltered state at a price lower than the actual purchase price by selling batches of four 250 gramme packets at FF 20 when the actual purchase price per kilogramme was FF 25.132.

4. Before the Tribunal de Grande Instance, Strasbourg, the accused stated, in particular, that the prohibition of resale at a loss is:

— contrary to Article 30 of the EEC Treaty,

— liable, under certain conditions, to fall within the scope of Article 85 of that treaty,

— incompatible with the principles of the free movement of persons, services, and capital, establishment of free competition, of non-discrimination and more particularly with Articles 3 and 7 of the Treaty,

because, firstly, the prohibition 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 and, secondly, it distorts competition, especially in a frontier zone, between traders on the basis of their nationality and place of establishment.

C — The preliminary questions

5. By the judgments of 27 June 1991 the Tribunal de Grande Instance decided to stay the proceedings and

refer the following two identical questions to the Court of Justice 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 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?’

6. The grounds of the orders for reference shows that the Tribunal de Grande Instance has considered the question of the compatibility of the prohibition of resale at a loss with the provisions of the Treaty even though, prima facie, the prohibition of resale at a loss, laid down by the national legislature, may appear justified by the double aim of protecting the consumer and regulating healthy and fair competition.

II — Procedure

7. The orders for reference were received at the Court Registry on 16 October 1991.

8. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted:

— on behalf of D. Mithouard, accused in the main proceedings, by Martin Meyer, of the Strasbourg Bar,

— on behalf of B. Keck, accused in the main proceedings, by Jean-Paul Wachsmann, of the Strasbourg Bar,

— on behalf of the French Republic, by the Minister for Foreign Affairs, represented by Philippe Pouzoulet and Hélène Duchêne, acting respectively as Agent and Deputy Agent for the French Government,

— on behalf of the Hellenic Republic by the Minister for Foreign Affairs, represented by Fokiona P. Georgakopoulos, Member of the State Legal Service, acting as Agent,

— on behalf of the Commission of the European Communities by Richard Wainwright, Legal Adviser, and Virginia Melgar, national civil servant attached to the Legal Service of the Commission under the scheme for secondment of national experts, acting as Agents, assisted by Hervé Lehman, of the Paris Bar.

9. By decision of 1 July 1992, pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Second Chamber.

10. By order of 4 November 1992 the Court decided, pursuant to Article 43 of the Rules of Procedure, to join Cases C-267/91 and C-268/91 for the purposes of the written and oral procedure and the judgment.

11. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court

decided to open the oral procedure without any preparatory inquiry.

12. Following the hearing on 22 October 1992 and upon hearing the Opinion of the Advocate General delivered on 18 November 1992, the Second Chamber considered that Article 95(3) of the Rules of Procedure of 19 June 1991 should be applied and the case assigned to the full Court.

By order of 9 December 1992, after hearing the Advocate General, the Court decided to re-open the oral procedure.

Moreover, it was decided that the following questions should be put to the parties which submitted observations. The parties were requested to reply to those questions at the hearing before the full Court.

'l. What are the economic effects of resale at a loss on intra-Community trade on the national, regional and local retail markets, in particular on the behaviour of traders and consumers?

2. Are those effects "direct, indirect or purely speculative" (see the judgment in Case C-169/91, paragraph 15)? Do they impede the marketing of imported products more than the marketing of national products (ibid.)?

3. Does the prohibition of resale at a loss constitute an instrument for the suppression of a sales promotion method or does it, rather, form part of a national price control system?'

III — Summary of the written observations submitted to the Court

13. The *accused* in the main proceedings first of all describe the French legislation concerning the prohibition of resale at a loss, and then go on to observe that it is not applicable to operations carried out by manufacturers, industrialists or craftsmen on the products that they manufacture. They add that, since the offence of resale at a loss is committed when the selling price of the product is lower than the purchase price, those prices should be clearly defined. Those prices are difficult to define and French courts have not yet made all their components clear. Finally, the exemptions from the prohibition of resale at a loss are not readily ascertainable or easily applied. In conclusion, the accused in the main proceedings consider that the sanctions introduced by France are superficial, complicated, in places ambiguous and in any event unique in the Community.

14. The accused in the main proceedings then claim that the French legislation prohibiting resale at a loss constitutes a measure having equivalent effect within the meaning of Article 30 of the Treaty.

The first definition of a measure having an effect equivalent to a quantitative restriction was given by the Commission in Article 3 of Directive 70/50/EEC of 22 December 1969, based on the provisions of Article 33(7) of the Treaty, on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (Official Journal, English Special Edition 1970 (I), p. 17). In its case-law (see in particular the judgments in Cases 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, 120/78 *REWE* v *Bundesmonopolverwaltung fur Branntwein* ('*Cassis de Dijon*') [1979] ECR 649, 193/80 *Commission* v *Italy* [1981] ECR 3019, 174/82 *Sandoz* [1983] ECR 2445) the Court defined in broad terms the concept of a measure having equivalent effect by stating, firstly, that in the absence of common rules on the production and marketing of the product at issue to replace divergent national rules, Member States retain the power to regulate everything relating to the production, distribution and consumption of the product and, secondly, that the restrictions resulting from disparities between the national laws relating to the marketing of products, where the national measure is applied without distinction to domestic and imported products, must be accepted only in so far as those provisions may be recognized as being necessary in order to satisfy imperative requirements of consumer protection, the protection of public health and the environment and fair trading.

The accused in the main proceedings consider that the French legislation prohibiting resale at a loss constitutes a measure applicable without distinction to domestic and imported products and having disproportionate restrictive effects. The Court has not balked at bringing that type of commercial legislation within the scope of Article 30 of the Treaty. In that respect, the accused in the main proceedings refer to the judgments in Cases 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, 382/87 *Buet and Another* v *Ministère Public* [1989] ECR 1235, C-145/88 *Torfaen Borough Council* v *B&Q* [1989] ECR 3851 and 312/89 *Conforama and Others* [1991] ECR I-1021.

The fact that the events giving rise to the present cases took place in a frontier zone bordering on the Federal Republic of Germany, where resale at a loss is not prohibited, serves to demonstrate that a foreign trader hesitates to establish himself in France where he must renounce an efficient and proven marketing technique for acquiring and retaining new customers. That prohibition thus protects French traders from foreign competition on prices which would be of benefit to the consumer. The dissuasive nature of the prohibition of resale at a loss with respect to foreign producers is made all the more acute owing to the fact that it only applies to resale and that most foreign traders are resellers. Furthermore, a foreign trader must, if he were to establish himself in France, familiarize himself with the changes in French case-law relating to the prohibition of resale at a loss. Moreover, he could be discouraged by the subtleties of the legislation at issue and its application by the courts. The accused in the main proceedings conclude that the prohibition of the resale at a loss affects the marketing of a product and, therefore, comes within the scope of Article 30 the Treaty.

15. Finally, the accused in the main proceedings consider that the barriers to trade created by the prohibition of resale at a loss cannot be justified by imperative requirements. Among the imperative requirements laid down by the Court only consumer protection and fair trading can be invoked in the present cases.

It is difficult to see in what way the consumer, whose interest lies in obtaining the best price, is protected by the prohibition of resale at a loss. Such resale lowers prices. Consumer protection, if such were Judged necessary in relation to resale at a loss, could be achieved, for example, by means of suitable labelling. In that respect, to make the prohibition of resale at a loss an offence is disproportionate. In that context, the accused in the main proceedings refer to the judgments in Cases 94/82 *De Kikvorsch* [1983] ECR 947, 274/87 *Commission* v *Germany* [1989] ECR 229 and C-362/88 *GB-INNO-BM* [1990] ECR I-667.

Neither does fair trading justify prohibition of resale at a loss. Indeed, the trader cannot afford the luxury, at the risk of being forced out of the market, of reselling permanently and massively at a loss. Resale at a loss can only be seen as a specific commercial promotion strategy analogous to sale at cost, which is authorized in France. Fair trading would not be jeopardized by resale at a loss. On the contrary, the facts show that prohibition of this form of sale has led to reprehensible price-freezing practices arising from the contractually imposed obligation not to resell at a loss, breach of which entailed the loss of a rebate due at the end of the financial year, which was only definitively acquired at the end of the year and on condition that the distributor did not resell at a loss.

Finally, the accused in the main proceedings consider that the alleged imperative requirements justifying the prohibition of resale at a loss are already seriously put in doubt by the exceptions to that prohibition provided for by the French legislation. If resale at a loss were inimical to consumer protection, exception to the alignment would not be justified either. Fair trading is also called into question by the possibility of reselling at a loss where prices are aligned on the prices lawfully charged for the same products by another trader. The exceptions to the prohibition of resale at a loss imply that this type of resale has some positive points.

16. The accused in the main proceedings propose that the question put to the Court be answered as follows:

'Article 30 of the EEC Treaty is to be interpreted as meaning that it precludes legislation of a Member State which prohibits resale of goods at a loss'.

17. The *French Government* observes *in limine* that it is relevant to consider the French legislation prohibiting sales at a loss in the light of the Treaty and not to compare the regime applicable to resellers with that applicable to manufacturers. The fact that a regime is applied to a category of traders in a different situation does not constitute discrimination or a restriction on competition within the meaning of the Treaty. There is no competition between manufacturers and resellers since their economic activity is different.

Moreover, the argument to the effect that discrimination on grounds of nationality would be created has no legal basis. Even if other Member States do not prohibit resale at a loss, the fact remains that two traded established in France are subject to the same law irrespective of their nationality. Citing the judgments in Cases 229/83 *Leclerc* v *Au Blé Vert* [1985] ECR I and 231/83 *Cullet* v *Leclerc* [1985] ECR 305, and referring to Articles 3 and 7 of the EEC Treaty, mentioned in the preliminary questions, the French Government considers that the compatibility of the French legislation with Article 30 of the Treaty and with the rules of Community competition law should be examined.

18. According to the French Government, the prohibition in France of resale at a loss does not constitute a measure having an effect equivalent to a quantitative restriction. In the light of the definition given of such a measure at paragraph 5 of the judgment in *Dassonville*, above, and having regard to Article 3 of Directive 70/50/EEC, above, the French Government points out that the prohibition on resale at a loss applies without distinction to domestic and imported products and does not prescribe a definite amount for the sale of a product but lays down only a principle applicable when the rice of the product is determined. Such legislation does not undermine the comparative advantage of an imported product which is cheaper than a domestic product; conversely, it does not fix maximum prices rendering it impossible to market in France a product imported at a high price or burdened with the cost of transport and packaging. Furthermore, the Court stated in its judgment in Case 82/77 *Openbaar Ministerie of the Netherlands* v *Van Tiggele* [1978] ECR 25 that legislation prohibiting resale at a loss was compatible with Article 30.

19. According to the French Government, the prohibition of resale at a loss does not conflict with the competition rules laid down in the Treaty despite the fact that, in the present state of Community law and in the absence of Community harmonization of commercial legislation, some distortion may occur within the limited area of frontier zones.

Although the competition rules laid down in the Treaty and in the measures implementing it are applicable to national legislation (see the judgment in Case 231/83, above), the prohibition of resale at a loss does not have as its aim or object to restrict competition. Rather, such a prohibition preserves fair trading by combatting an unfair competitive practice. Such a trading practice could enable a trader to corner a market and acquire artificially a body of customers and, once that objective was attained, to sell at the normal price or even higher. Moreover, the loss sustained by the trader would be compensated by the margins on other products.

As the present case before the Court shows, the prohibition of resale at a loss may create distortions in frontier zones between French distributors and the distributors of the neighbouring country where resale at a loss is permitted. Although it is difficult to quantify the detrimental effect, it does not seem to the French Government that such distortion can exert any influence on the patterns of infra-Community trade. The French Government points out that it is consistent case-law that there has to be an appreciable effect on intra-Community trade before the Court will, on the basis of the provisions of the Treaty concerning competition, find fault with a legislative provision.

20. In conclusion, the French Government requests the Court to state, in reply to the question referred by the national court, that legislation prohibiting resale at a loss is compatible with the principles laid down in the Treaty of Rome both as regards the provisions relating to competition within the Common Market and as regards those relating to the free movement of goods and to non-discrimination on grounds of nationality.

21. The *Hellenic Republic* states that national legislation which prohibits resale at a loss without introducing discrimination on the basis of the origin of the products or the nationality of the trader is compatible, in principle, with Article 3(f), the second paragraph of Article 5, Articles 7, 30 and 85 of the Treaty.

As regards Article 30 of the Treaty, the Court has already held that a national provision which prohibits without distinction the retail sale of domestic and imported products at prices below the purchase price paid by the retailer cannot adversely affect the marketing solely of imported products and cannot, consequently, constitute a measure having an effect equivalent to quantitative restrictions on imports (judgments in Case 65/75 *Tasca* [1976] ECR 291; *Van Tiggele*, above; Cases 16-20/79 *Joseph Danis* [1979] ECR 3327; Case 78/82 *Commission* v *Italy* [1983] ECR 1955).

As regards the principle of non-discrimination laid down in Article 7, the Court has recognized that that provision is not infringed by rules whose application is determined not by the nationality of traders but by their place of establishment. Nor may the application of national legislation regarded as contrary to the principle of non-discrimination merely because other Member States apply less stringent provisions or the legislation in point affects more generally the competitiveness of traders who are subject to it.

Moreover, Member States are under a duty not to prejudice by means of national legislation the practical effects of the competition rules applicable to undertakings (see the judgment in Case 231/83, above). A system of price control which does not fix a single minimum price for a product but takes account in general of the purchase price paid in each case by the retailer, according to the rules of the market and of competition, in order to fix the lowest permissible resale price cannot in itself be regarded as a measure which is intended or is liable to encourage, or actually encourages, agreements, decisions or concerted practices between undertakings in circumstances contrary to Article 85 of the Treaty.

22. The Government of the Hellenic Republic states, however, that legislation prohibiting resale at a loss may, under certain conditions, be incompatible with Community law by reason of the fact that it excludes manufacturers from its scope of application.

The question of the impact of the legislation in question on the Community legal system might arise if it were in fact capable of influencing the pattern of exports from other Member States. According to the orders for reference, it is established that the national legislation at issue distorts competition. However, it is not made clear in what way that distortion is created so as to make it possible to verify whether it concerns questions of Community interest and whether the measure in question is liable to distort competition or has an equivalent effect to a quantitative restriction. It is for the national court to find whether there is such an effect resulting from the application of the legislation referred to in the preliminary questions. Thus, under certain conditions, the national measure, which provides for differentiated treatment as between manufacturers and retailers in relation to the selling price of products, might possibly constitute a measure having an effect equivalent to a quantitative restriction.

23. In conclusion, the Hellenic Republic proposes that the questions referred for a preliminary ruling be answered as follows:

‘National legislation such as that described by the national court may be considered incompatible with the provisions of Article 30 of the Treaty concerning quantitative restrictions and, possibly, with the rules on competition in Article 85 in so far as in a particular case it is found that the conditions for the application of the Community provisions in question are satisfied. It is for the national court to find whether those conditions are met.’

4. The *Commission* observes, first of all, that the articles of the Treaty relating to freedom of movement for workers, freedom of establishment and freedom to provide services within the Community do not fall to be applied in any form in the context of the prohibition of resale at a loss. Nor is that prohibition liable to favour agreements between undertakings and Articles 85 and 86 do not, as a result, preclude the application of such a prohibition. The disparities existing in frontier zones as a result of different national legal systems likewise cannot be reviewed from the point of view of the prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty.

25. The Commission then points out that the Court has jurisdiction to furnish the national court with all

factors relating to the interpretation of Community law which may prove to be useful for the purpose of deciding the dispute, and thus to take into account provisions of Community law to which the national court has not referred in its question.

26. In this respect the Commission considers that, in the light of the case-law of the Court (see the judgments in Case C-362/88, Case 382/87, Case 286/81 and 8/74, above), prohibition of resale at a loss may constitute an obstacle to the importation of goods from other Member States, in so far as a trader wishing to use that marketing strategy to publicize or promote a product will find himself obliged to renounce a method which he considers to be effective.

27. The Commission adds that the prohibition of resale at a loss, as a measure applicable without distinction to domestic and imported products, may be justified, in the absence of Community rules, if it is necessary in order to satisfy imperative requirements in conformity with public-interest objectives pursued by the Treaty and where the barriers to trade do not appear excessive in relation to the objective which it is sought to attain. The fact that the prohibition does not apply at the stage of manufacture does not mean that that legislation is not applied without distinction since it concerns two different situations at two successive stages of the economic process, and since that differentiated treatment is not based on the origin of the product or the trader, but on the difference which exists between the production stage and the marketing stage.

One of the reasons for the prohibition of resale at a loss is its incompatibility with the establishment of healthy competition and the absence of any real advantage for consumers as a whole, as the loss is offset by the margins on other products.

28. However, in the opinion of the Commission, neither consumer protection nor fair trading may justify the prohibition of resale at a loss.

It is indeed not certain that the trader would recover the loss by the margins on other products. On the other hand, the consumer could find an obvious economic advantage in profiting from such sales at low prices, and it is not established that the consumer is misled by the fact that the fall in price of one product could possibly be offset by an increase in the prices of other products, as the consumer is in a position to compare the price of products charged by different traders. In any event, if such a risk were established, an answer to it could be found by means less restrictive of the free movement of goods, and consisting in an obligation to give the consumer sufficient information about the conditions of resale at a loss.

Nor would fair trading be jeopardized by resale at a loss. Thus, a trader could choose, on logical economic grounds, to penetrate a given market by charging temporarily prices with no profit margin, but which would allow him to publicize himself and from which he would reap long-term benefits to compensate for the early losses. Likewise, a distributor could choose to base his strategy on the sale of a product at a low price, if that would allow him to make an overall profit. Resale at a loss is only contrary to fair trading if it is carried out in the context of anti-competitive practices.

29. In conclusion, the Commission proposes that the Court give the following answers to the questions raised:

‘(1) Articles 3(f), 7, 48, 52, 58, 59, 60, 85 and 86 of the EEC Treaty must be interpreted as meaning that they do not preclude the application of national legislation prohibiting traders from reselling a product in an unaltered state at a price lower than its purchase price.

(2) Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that they preclude the application to goods imported from another Member State of national legislation prohibiting traders from reselling a product in an unaltered state at a price lower than its purchase price.’

G. F. Mancini
Judge-Rapporteur

[…]

JUDGMENT OF THE COURT
24 November 1993 *

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,

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. Rodríguez Iglesias, F. Grévisse, 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. Duchêne, 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 Communities, 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 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 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 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 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 30 of the Treaty.

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 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 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.

Due
Mancini
Moitinho de Almeida
Diez de Velasco
Edward
Kakouris
Joliet
Schockweiler
Rodíguez Iglesias
Grévisse
Zuleeg
Kapteyn
Murray

Delivered in open court in Luxembourg on 24 November 1993.

J.-G. Giraud
Registrar

O. Due
President

* Language of the case: French.