
**Reading**

- Barnard, Ch 6

I **Article 36 Derogation** (ex-Art 30)

**Article 36** (ex-Art 30)

‘The provisions of Articles 34 and 35 (ex Arts 28 & 29) shall not preclude prohibitions or restrictions in imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’

**Article 36** (ex-Art 30) can be relied on in the absence of Community legislation in the relevant field.

- **Public morality**
  - Henn and Darby, Case 34/79, [1979] ECR 3795
  - Conegate, Case 121/85, [1986] ECR 1007

- **Public policy or public security**
  - Campus Oil, Cases 72/83, [1984] ECR 2727

- **Public health**
  - Commission v UK (French Turkeys), Case 40/82, [1982] ECR 2793
  - Eyssen, Case 53/80, [1981] ECR 409

- Artistic, historic or archaeological value

- Industrial and commercial property


**NB:** Construed narrowly: measure must be *necessary* and no more than is necessary to achieve objective i.e. must satisfy the principle of *proportionality*. The burden of proof is on the national authorities.
II Article 36 Derogation re Industrial and Commercial Property (ex-Art 30)
Article 345 (ex-Art 295)
- What are intellectual property rights?
- Why does a conflict with the free movement of goods rule arise?
- The distinction between the existence and exercise of IP rights
  i Patents
  - Centrafarm v Sterling, Case 15/74, [1974] ECR 1147
  - Pharmon v Hoechst, Case 19/84, [1985] ECR 2281
  ii Trade Marks
  (a) Specific Subject Matter
  - Consten v Grundig, Joined Cases 56 & 58/64, [1966] ECR 299
  - Centrafarm v Winthrop, Case 16/74, [1974] ECR 1183
  - Centrafarm v American Home Products, Case 3/78, [1978] ECR 1823 (repackaging and change of trade mark)
  (b) Common Origin Principle
  - Van Zuylen v Hag (Café Hag I), Case 192/73, [1974] ECR 731
  - CNL-Sucal v Hag (Café Hag II), Case C-10/89, [1990] ECRI-3711
  (See Cornish (1991) CLJ 223)
  - Ideal Standard Case, Case C-9/93, [1994] ECR I-2789
  iii Copyright
  - Deutsche Grammophon v Metro Musik-Vertrieb Membran v GEMA, Joined Cases 55 & 57/80, [1981] ECR 147
- Harmonisation
  - Convention on Community Patent (1975)
  - Directive 89/104 on Trade Marks -OJ 1989 L40/1
  - Regulation 40/94 on the Community Trade Mark – 1994 OJ L11/1
  - Directive 91/250 on Protection of Computer Programmes
  - Databases
  - Directive 92/100 on Lending Rights

Further Reading
- Gippini-Fournier, annotation Case C-355/96 Silhouette (1999) 36 CMLRev 807