

Expressed Treaty Derogation

Art 36 TFEU

- ◆ Unusual since no expressed derogation re abolition of customs duties
- ◆ Realisation that difficult to have total free movement of goods

Article 36 TFEU

“The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on 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, historical 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.”

Elements of the derogation

- ◆ Narrow interpretation
- ◆ Must be justified
- ◆ List of derogations exhaustive
- ◆ Applies to distinctly & indistinctly applicable measures
- ◆ Last sentence important

List of derogations

- ◆ Public morality: *Henn & Derby* but *Conegate* 121/85 [1986]
- ◆ Public policy: *Cullet v Centre Leclerc* (231/83)
- ◆ Public Security *Campus Oil* 72/83 [1984]
- ◆ Public health: *Commission v UK* (French turkeys) 40/82 [1982] & *Eyssen* C53/80
- ◆ Protection of national treasures
- ◆ Protection of industrial & commercial property

Proportionality Limitation

National rules adopted in order to achieve one of the objectives referred to in Article 36 TFEU are compatible with the Treaty only in so far as they do not exceed the limits of what is appropriate and necessary in order to achieve the desired objective
(*Comission v. Italy*, 128/89)

Intellectual property derogation

- ◆ What are IP rights?
- ◆ Why do they conflict with FMG Rules?
- ◆ Distinction between “existence” and “exercise” – *Parker Davis Case 24/67* [1968] & *Consten & Grundig Joined Cases 56 & 58/64* [1966]
- ◆ The exhaustion of rights doctrine (internal/external)
- ◆ Specific subject matter of patents & trade marks – the *Centrafarm Cases*

Copyright

- ◆ *Deutsche Grammophon v Metro*
- ◆ *The Coditel Cases*

Solutions

◆ Harmonisation

- Trade Mark Directive & extension of copyright term

◆ Community-wide rights

- Design Rights Regulation (EU Design Right)
- Trade Mark Regulation (EU Trade Mark)
- Proposal for a EU Patent