

Treaty Derogations and Mandatory Requirements

Mandatory Requirements already considered. This lecture focus on Article 36 TFEU and, IP rights in particular

Structure of today's Lecture



- Art 36 – an express Treaty derogation
- Intellectual property rights

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.”

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

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: *Commission v Italy (95/81)*
- ◆ Public Security *Campus Oil* 72/83 [1984]; *Omega* (C-36/02)
- ◆ Public health: *Commission v UK* (French turkeys) 40/82 [1982] & *Commission v UK* (UHT) 124/81
- ◆ Protection of national treasures
- ◆ Protection of industrial & commercial property

Necessity and 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)

What are IP rights?

- ◆ Patents
- ◆ Trade Marks
- ◆ Copyright

- ◆ Know – How protected by confidentiality but closely linked to patents

Why do IP rights conflict with FMG rules?

- ◆ Territorial rights
- ◆ Property rights
- ◆ Conferred by sovereign states
- ◆ International conventions

The CJEU solution

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

Problems that have arisen in EU case law (1)

◆ Exhaustion doctrine:

- Re copyright: The *Coditel Cases*
- Importance of "consent": *Silhouette and Levi Cases*

Problems that have arisen in EU case law (2)

◆ Existence of rights re trade marks

- The problem of repackaging/re-labelling

Hoffman-La-Roche, American Home Products & Bristol-Myers Squibb

- The common origin principle

HAG I and HAG II

Solutions

◆ Harmonisation

- Trade Mark Directive & extension of copyright term

◆ Community-wide rights

- Design Rights Regulation (EU Design Right)
- Trade Mark Regulation (EU Trade Mark)
- Unified European Patent

The Patent Package Proposal

- ◆ Regulation 1257/2012 creating a European Patent (Unitary Patent)
- ◆ Regulation 1260/2012 establishing a language regime for the Unitary Patent
- ◆ Agreement on a Unified Patent Court (signed 19 Feb 2013)

Next seminars

The next 3 Seminars will be grouped together and they are on the TFEU's provisions on the Free Movement of Persons and the Freedom to provide Cross-Border Services

- Friday 27/02 – Free Movement of Workers (14.15-16.00)
- Monday 02/03 – Right of Establishment (08.15-10.00)
- Tuesday 07/04 – Cross-Border Services (16.15-18.00)