

Seminar 5: Free Movement of Goods Rules and Article 36 Derogations (NB Intellectual Property Rights) and Justifications

Reading

- Barnard, Ch 6

I Article 36 Derogation

Article 36

‘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 can be relied on in the absence of EU secondary legislation in the relevant field. It contains an exhaustive list of derogations at Member States disposal

- **NB** Article 36 TFEU applies to distinctly and indistinctly applicable measures (whereas Cassis ‘rule of reason’ only applies to indistinctly applicable measures)
- Court construes the derogations narrowly: measure must be *necessary* and no more than is necessary to achieve objective ie must satisfy the principle of *proportionality* ie the national measure must be proportionate. The burden of proof is on the national authorities.
- Conditions for exemption: No arbitrary discrimination (ie genuineness) (C-40/82 Commission v UK “poultry imports”).

How has Article 36 TFEU been used/interpreted?

- Public morality
Henn and Darby, Case 34/79, [1979] ECR 3795
Conegate, Case 121/85, [1986] ECR 1007
- Public policy or public security
R v Thompson (C-7/78); **Campus Oil**, Cases 72/83, [1984] ECR 2727
- Public health
Commission v UK (French Turkeys), Case 40/82, [1982] ECR 2793;
Sandoz (C-174/82),
Commission v UK “UHT Milk” (C-124/81)
Eyssen, Case 53/80, [1981] ECR 409

- Artistic, historic, cultural or archaeological value
- Industrial and commercial property

II Article 36 Derogation re Industrial and Commercial Property Article 345

- 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
- The exhaustion of rights doctrine (first marketing within EU) –
 - 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
 - **Hoffman-La-Roche v Centrafarm**, Case 102/77, [1978] ECR 1139 (repackaging)
 - **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
 - **Coditel v Cine Vog Film**, Case 62/79, [1980] ECR 881
- The exhaustion of rights doctrine (first marketing outside the EU) **Silhouette**, Case C-355/96 [1998] ECR I-4799; **Davidoff & Levi Strauss** Joined Cases C-414/99 to C-416/99 [2001] ECR I-8691

Further Reading

O’Keeffe & Keans, annotation on *Davidoff & Levi Strauss* (2002) 39 CMLRev 591
Dyrberg & Petursson, “What is consent? A note on *Davidoff & Levi Strauss*” (2002) 27 ELRev 464
Gippini-Fournier, annotation Case C-355/96 *Silhouette* (1999) 36 CMLRev 807