Seminar 4: Free Movement of Goods Rules and Article 36 Derogations (NB Intellectual Property Rights) and Justifications

Reading
- Barnard, Ch 6 pp150-158 & 164-186

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)

- The 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? Patents, trade-marks and copyrights
• Why does a conflict with the free movement of goods rule arise? Nature of IPRs ie property; exclusivity; territorial

• The distinction between the existence and exercise of IP rights –
  Centrafarm v Sterling, Case 15/74, [1974] ECR 1147 (patents)
  Centrafarm v Winthrop, Case 16/74, [1974] ECR 1183 (trade-marks)

• The exhaustion of rights doctrine (first marketing within EU)
  Consten v Grundig, Joined Cases 56 & 58/64, [1966] ECR 299;
  Ideal Standard Case, Case C-9/93, [1994] ECR I-2789T
  Silhouette, Case C-355/96 [1998] ECR I-4799 (first marketing outside EU)

• Specific issues:
  Hoffman-La-Roche v Centrafarm, Case 102/77, [1978] ECR 1139
  (repackaging)
  (repackaging and change of trade mark)

Further Reading which helps to understand the cases mentioned.
Gippini-Fournier, annotation Case C-355/96 Silhouette (1999) 36 CMLRev 807

JUSTIFICATIONS

Mandatory Requirements (Cassis)

One exemption to the mutual recognition principle is where the disparities result from national provisions which are recognised as being necessary in order to satisfy certain ‘mandatory requirements’ (rule of reason) (para. 8 of judgment)

Non-exhaustive list (contrast with Article 36 derogations)
- protection of public health
- effectiveness of fiscal supervision
- fairness of commercial transactions
- defence of the consumer
Additions: (of matters of overriding public interest)
Environment protection: Commission v Denmark, Case 302/86, [1988] ECR 4607

Cultural protection: Cinetheque, Joined Cases 60 & 61/84, [1985] ECR 2605
Fundamental rights: Schmidberger Case C-112/00 [2003] ECR I-5659

Improving working conditions: Oebel, Case 155/80, [1981] ECR 1993 (beyond the scope of Art 34

NB Where the defence is based on the Cassis rule of reason the genuineness of the justification as well as the proportionality of the measure will be closely assessed by CJEU in the light of the existing knowledge. See eg Commission v Germany (Beer purity laws), Case 178/84, [1987] ECR 1227 (consumer protection - content control)

NB Member States free to apply higher standards for domestic goods marketed at home.

CLASS PROBLEM SOLVING EXERCISE

For the second half of the class we will divide into groups and together solve a problem question