

Derogation from the Free Movement of Goods in the EU: Article 30 and 'Cassis' Mandatory Requirements Doctrine

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Under the term “single market,” it is important to understand the interpretation of Articles 28, 29 and 30 of the European Union Treaty. While Articles 28 – 29 prohibit quantitative restrictions and measures of equivalent effects, Article 30 provides an exception by listing categories like public health, public security and public morality. In this way, it gives a freedom to import and export goods without restrictions. However, the European Court of Justice (ECJ) held that the list of grounds for derogation in Article 30 is exhaustive.¹ This means, new measures cannot be added to the scope of Article 30. On the other hand, the ECJ developed another exception list arising from the Cassis de Dijon² case under the term of mandatory requirements. In this case, the Court held that this list is not exhaustive; it can be, and has been, added to by the ECJ³. Consequently, both Article 30 and mandatory requirements constitute derogations from the principle of the free movements of goods. This essay argues the scope and limits of Member States' discretion under these listed categories.

Derogations under Article 30 and the *Cassis de Dijon* case are all non-economic and cannot be used for taxation or economic benefits. In light of this explanation, Member States can determine the scope of such derogations according to their own values. However, these derogations must be interpreted restrictively to prevent the extension of their effects for reasons other than the protection of public interest. For this reason, the ECJ can limit the scope of the effects under some of the requirements. There are three basic requirements for both mandatory requirements and Article 30 derogations:⁴

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¹ Woods, L. *Free Movement of Goods and Services within the European Community* (2004) pg. 109.

² Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (1979) ECR 649.

³ Craig, P. and de Burca, G. *EU LawText, Cases and Materials* (2003) pg. 638.

⁴ Woods, L. *Free Movement of Goods and Services within the European Community* (2004) pg. 111.

firstly, there should be no harmonizing legislation occupying the field; secondly, the national rule must fall within one of the categories of derogation or constitute a mandatory requirement; thirdly, the rule must, in effect, be proportional and not constitute arbitrary discrimination or a disguised restriction on trade. Moreover, if one Member State uses these measures, the burden of proof falls upon that Member State. Accordingly, Member States must prove the justification of these restrictions; they have to show that the measures are non-discriminatory and proportionate. In other words, a measure may not restrict trade between Member States more than is necessary to achieve its legitimate object.⁵

Derogations under Article 30

According to Article 30, under the listed categories Member States can restrict the importing or exporting of goods. As mentioned above, Member States can only use the listed measures and they must prove the proportionality by showing that the restrictions are not going to be used for economic gain or to protect internal market. These categories are public morality, public policy, public security, protection of the health and life, protection of national treasures, and protection of industrial and commercial property. Each of these categories is discussed further below.

Public Morality

When a Member State bans an importation of goods on grounds of public morality, this prohibition cannot be discriminatory. In many cases, the Court has held that Member States are free to set up their own standards of morality. However, there are limits to the freedom: a Member State must regard the public policy issue as sufficiently serious to justify an exception to one of the fundamental Treaty freedoms and ultimately the ECJ remains free to review the scope of the Member State action.⁶ This decision can be seen in the case of *Henn and Darby*.⁷ In this case, the United Kingdom Government banned the importation of pornographic materials by relying to Article 30. The ECJ found that this prohibition is justified under the public morality exception within the meaning of Article 30 and such prohibition can be justified if there is no lawful trade in such goods within the UK. In addition, the Court did not seek to define the boundaries of the concept of public morality.⁸ This means there are no standards to determine the scope of the Member State behavior in public morality.

On the other hand, in the *Conegate*⁹ case the Court made a different decision; the UK banned the importation of love dolls under the public morality measure in Article 30. However, this time the UK legislation did not prohibit

⁵ Oliver, P. *Free Movement of Goods in the European Community* (2003) pg.226.

⁶ Woods, L. *Free Movement of Goods and Services within the European Community* (2004) pg.115.

⁷ Case 34/79 R. v. *Henn and Darby* (1979) ECR I-3537.

⁸ Oliver, P. *Free Movement of Goods in the European Community* (2003) pg.243.

⁹ Case 121/85 *Conegate Ltd. v. Commissioners of Customs and Excise* (1986) ECR 1007.

the manufacturing and marketing of such products in its territory. For this reason, the ECJ held that this prohibition was discriminatory and not justified under Article 30. Consequently, while Member States are free to determine the sense of public morality which should pertain within their own territory, they cannot place markedly stricter burdens on goods coming in from outside than those which are applied to equivalent domestic goods.¹⁰

Public Policy

Public policy is broader than the other measures in Article 30. Therefore, it is only used when no alternative derogations could be applied. Because of this reason, there are only a few cases that rely on the public policy exception; in *Bouchereau*¹¹ the ECJ held that reliance on that exception presupposed the existence of a genuine and sufficiently serious threat to the requirements of public policy that affects one of the fundamental interests of society.¹² As earlier mentioned, Member States cannot rely on economic benefits when using any measures in Article 30. In fact, in *R. v. Thompson*¹³ the Court drew a distinction between public policy and economic interest. In this case, the UK prohibited the importation and exportation of certain coins by relying on the public policy provision. The judgment was based on the assertion that the State enjoyed a right akin to a property right in the coins;¹⁴ protection of a property right does not reflect protection of the economy. Consequently, the ECJ held that “A ban on exporting such coins with a view to preventing their being melted down or destroyed in another Member State is justified on grounds of public policy within the meaning of Article 30 of the Treaty, because it stems from the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the State.”

Public Security

The third exception, public security, covers both internal and external security. This measure is exemplified in the *Campus Oil*¹⁵ decision. In this case, Irish law requested that petrol importers buy 35 % of their requirements from state-owned refinery and the prices of that oil would be determined by the Irish government. The Irish government argued that this rule is important for the country to protect its own oil capacity. The ECJ held that this rule could be justified under public security because oil is an important energy source for public services even though it is also important for the country's economy.

Protection of the Health and Life of the Humans, Animals or Plants

¹⁰ Craig, P. and de Burca, G. *EU LawText, Cases and Materials* (2003) pg.628.

¹¹ Case 30/77 *R. v. Bouchereau* (1977) ECR 1999.

¹² Woods, L. *Free Movement of Goods and Services within the European Community* (2004) pg.119.

¹³ Case 7/78 *R. v. Thompson, Johnson and Woodiwiss* (1978) ECR 2247.

¹⁴ Oliver, P. *Free Movement of Goods in the European Community* (2003) pg.248.

¹⁵ Case 72/83 *Campus Oil Ltd. v. Minister for Industry and Energy* (1984) ECR 2727.

Protection of the health and life of humans, animals or plants is another important derogation in Article 30. According to several decisions of the ECJ, human life and health come before other public interests. In addition, each Member State can decide the strictness of both the protection and checking process. However, this authorization can be used at a number of stages; first of all, the real aim of the restriction must be the protection of public health. That is to say, the Member State must not intend to improve its internal market by using this measure. This can be exemplified in the *Commission v. UK*¹⁶ case; the UK banned poultry meat importation from other Member States in order to prevent New Castle disease by relying on the protection of public health, but the Court decided that this prohibition was actually made to block the importation of poultry meat, especially French meat. This situation protected the domestic producers.

According to the second stage, this derogation can only use if it is sustainable where there is no perfect consensus on the scientific or medical impact of particular substances.¹⁷ In other words, this restriction must be necessary for achieving the protection of public health. In fact, in *De Peijper*,¹⁸ the ECJ held that the public health measure can only be used when there is no other regulation protecting human life and health, and also does not restrict trade in Community; “national rules or practices do not fall within the exception specified in Article 30 if the health and life of humans can be as effectively protected by measures which do not restrict intra-Community trade so.”¹⁹ This decision refers to the proportionality rule, which is also last stage of applying the public health measure.

As mentioned before, proportionality shows that the restriction cannot be strict more than is required. In the *Commission v. Italy*²⁰ case, Italy prohibited the marketing of energy drinks contain caffeine, claiming high caffeine may threat human health. However, Italian authorities did not show that the restriction was necessary and proportionate for public health. Moreover, the scientific evidence that Italy based their claims on did not consider that this prohibition is valid. In fact, the latest research had proven that energy drinks containing high doses of caffeine did not show any risk to health. As a result, in paragraph 36, the ECJ stated that “by applying to drinks produced and marketed in other Member States a rule prohibiting the marketing in Italy of energy drinks containing caffeine in excess of a certain limit, without showing that that limit is necessary and proportionate for the protection of public health” was not consistent with Article 30.

¹⁶ 40/82 *Commission v. UK* (1982) 3 CMLR 497.

¹⁷ Craig, P. and de Burca, G. *EU LawText, Cases and Materials* (2003) pg. 632.

¹⁸ Case 16-74, *Centrafarm BV et Adriaan de Peijper v Winthrop B*, ECR. 1183.

¹⁹ Philipson, A. *Guide to the Concept and Practical Application of Articles 28-30 EC* (2001) pg.20.

²⁰ Case C-420/01 *Commission v. Italy* (2003) ECR I-6445.

Questions arising from the principle of scientific evidence and answers are laid down in the *Sandoz*²¹ and *Re UHT Milk*²² cases. First, the problem is about the uncertainty of the scientific evidence; according to the *Sandoz* case, *Sandoz* wanted to sell muesli bars in Holland. However, Dutch authorities did not allow this on grounds that the vitamins in muesli bars are dangerous to public health. Scientific evidence was not certain whether the vitamins were excessive. The Court held that if there is uncertainty about the medical implications of some substance it would be for the Member State to decide upon the appropriate degree of protection for citizens under the proportionality rule.²³

Another problem arises from “double checking.” The exporting Member State controls and tests goods before exportation. The importing Member State should not duplicate these controls; they can only make spot checks to ascertain any damage. In the UHT milk case, the UK limited importation of French UHT milk and argued that milk can only be marketed in approved dairies. This regulation brought about a second control, repacking and a new importation license. In fact, the ECJ held that this limitation couldn’t be justified under Article 30 because evidence showed that all Member States apply the same controls on milk, so milk has a similar quality in all Member States; this situation did not cause any important danger. To sum up, “the importing Member States must take account of tests or controls carried out in the exporting Member States providing equivalent guarantees. The importing Member States may not systematically duplicate those controls, but may carry out spot checks as well as tests designed to detect damage or disease which might have occurred after the inspection in the exporting State.”²⁴

Another important aspect to the public health provision is the precautionary principle. This principle was explained in the case of the *United Kingdom v. Commission*.²⁵ In this case, the Commission banned the exportation of UK-origin beef in order to prevent the spread of BSE (mad cow disease). At that time, there were still uncertainties about the mechanism for transmission of BSE but the number of the BSE cases was dropping. On the other hand, there were still doubts about its effectiveness. Consequently, the ECJ held that where there is uncertainty as to the existence or extent of risks to human health, institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.²⁶ According to this decision, the precautionary principle permits restrictions when there may be an unproven but postulated existence of high risk to public health consistent with scientific evidence.

²¹ Case 174/82 *Officer van Justice v. Sandoz BV* (1983) ECR 2445.

²² Case 124/81 *Commission v. United Kingdom* (1983) ECR 203.

²³ Craig, P. and de Burca, G. *EU LawText, Cases and Materials* (2003) pg. 633.

²⁴ Philipson, A. *Guide to the Concept and Practical Application of Articles 28-30 EC* (2001) pg. 20.

²⁵ Case C-180/96 *United Kingdom v. Commission* (1998) ECR I-2265.

²⁶ Oliver, P. *Free Movement of Goods in the European Community* (2003) pg. 256.

The second part of that measure encompasses the protection of animal life and health. This principle is same as the protection of human life and health. The only one exception is that human life is more important than animal life. There are three main themes that run through the case law in this area;²⁷ first is the need to protect the health of the animals and plants from the diseases; the second one is animal welfare and the third is the protection of rare and endangered species.

Protection of National Treasures Possessing Artistic, Historic or Archaeological Value

There is no case law concerning this area because of secondary legislation in Community: Regulation 3911/92 and Directive 93/7.

The Protection of Industrial and Commercial Property

There are two principles that case law use regarding the application of this measure under Article 30: the existence and the exercise of the right. On the existence of the right, national legislation on the acquisition, transfers and extinction of such rights is lawful.²⁸ The exercise of the right is known as the exhaustion of the right; after the first marketing of the product, the owner cannot object to the importation into another Member State.

Mandatory Requirements

Besides the derogations contained in Article 30, the ECJ mentioned mandatory requirements in the *Cassis de Dijon* case. In this case, Germany did not allow the importation of a French liqueur called Cassis de Dijon on the grounds that its alcohol content was too low. Germany relied on three arguments: public health, consumer protection and unfair commercial practices. The ECJ held that prohibiting the importation of such goods is a breach of Article 28, because Cassis passed the French standards, and this situation established a barrier to trade. Although the Court recognized that certain measures might be necessary for the protection of public health, the effectiveness of fiscal supervision, the fairness of commercial transactions and consumer protection, this particular measure could not be justified on these grounds.²⁹ In opposition to Article 30, the list of mandatory requirements is not exhaustive. In fact the ECJ has added other objective justifications, which might have been difficult to fit within the framework of Article 30.³⁰ Some of the important mandatory requirements are discussed below.

Consumer Protection

²⁷ Woods, L. *Free Movement of Goods and Services within the European Community* (2004) pg. 127.

²⁸ Philipson, A. *Guide to the Concept and Practical Application of Articles 28-30 EC* (2001) pg. 21.

²⁹ Kaczorowska, A. *150 Leading Cases on the Law of the European Union* (2004) pg. 339.

³⁰ Craig, P. and de Burca, G. *EU LawText, Cases and Materials* (2003) pg. 659.

Consumer protection claims can be based on different phrases such as labeling, language requirements or consumer understanding. This measure must be necessary and proportionate for applicability. The general rule from the *Cassis de Dijon* case, which is called “golden rule,” is that the sale of a product should not be prohibited when the consumer can be sufficiently protected by adequate labeling requirements.³¹ In light of this rule, in the case of *Rau v. De Smedt*³² Belgium sold margarine with a cube shape packaging in order to prevent consumer confusion between margarine and butter. Because of this rule, if a Member State wanted to export margarine, they had to package it in a cube shape, which resulted in extra cost. The ECJ held that this regulation was not justified; distinguishing margarine and butter with adequate labeling would be enough.

Public Health

As can be seen, public health provisions are contained both in Article 30 and mandatory requirements. There are many cases that exemplified the public health measure under these different categories. One of them is explained in *Aragonesa de Publicidad*³³ In this case, there was a restriction of the high rate of alcohol advertisement on streets, in public transport and in cinemas in order to protect public health. The ECJ stated in paragraph 18³⁴, that this prohibition is justified because the restriction is only made in specific places on the grounds of the special importance of preventing alcoholism in drivers and young persons.

Protection of Environment

The ECJ adopted this measure as a mandatory requirement in the *Danish Bottles*³⁵ case. According to this case, beer and soft drinks manufacturers can be forced to market with reusable containers; the Court found this regulation was necessary and proportionate for protecting the environment. On the other hand, the Court rejected the requirement, which stated that only approved containers could be used for sales. This situation gave rise to extra costs for providing special containers and was not proportionate.

In conclusion, derogation provides the counterbalance by permitting some, albeit limited, retention of Member State sovereignty.³⁶ Both Article 30 and mandatory requirements allow derogations on grounds of protecting public

³¹ Philipson, A. *Guide to the Concept and Practical Application of Articles 28-30 EC* (2001) pg. 22.

³² Case 261/81 *Walter Rau v. De Smedt* (1983) 2 CMLR 469.

³³ Case C -1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publvía v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151.

³⁴ Paragraph 18: “On the other hand, the measure at issue does not prohibit all advertising of such beverages but merely prohibits it in specified places some of which, such as public highways and cinemas, are particularly frequented by motorists and young persons, two categories of the population in regard to which the campaign against alcoholism is of quite special importance. It thus cannot in any event be criticized for being disproportionate to its stated objective.”

³⁵ Case 302/86 *Commission v. Denmark* (1988) ECR 4607.

³⁶ Woods, L. *Free Movement of Goods and Services within the European Community* (2004) pg.109.

interests. The concept of public interest may result in allowable differences in each Member State. In fact, Member States determine the scope of the derogations with their own values, but they can only cite the listed measures. However, by reason of the broad scope of measures in the listed categories, it is easy to extend the aim of public interest. Because of this, derogations must be interpreted strictly; rules such as proportionality and non-discrimination must be applied in every case, whether the restriction is based on Article 30 or mandatory requirements. By the same token, the ECJ does not prefer to use broad measures, like public policy. It is only applied if there is no alternative area that could be used. On the other hand, the ECJ gives more importance to some derogation like public health, public morality and public security.