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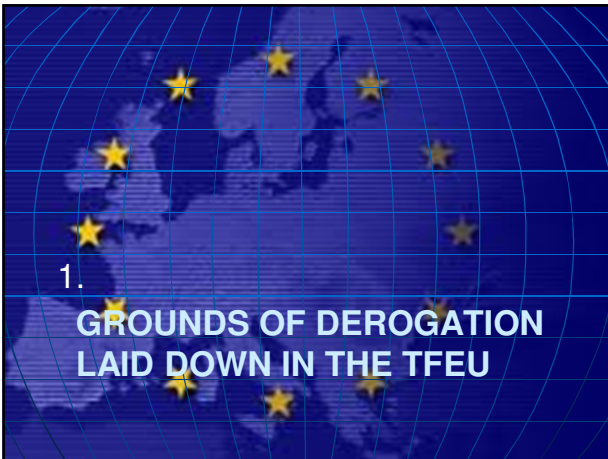
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1.  
**GROUNDINGS OF DEROGATION  
LAID DOWN IN THE TFEU**

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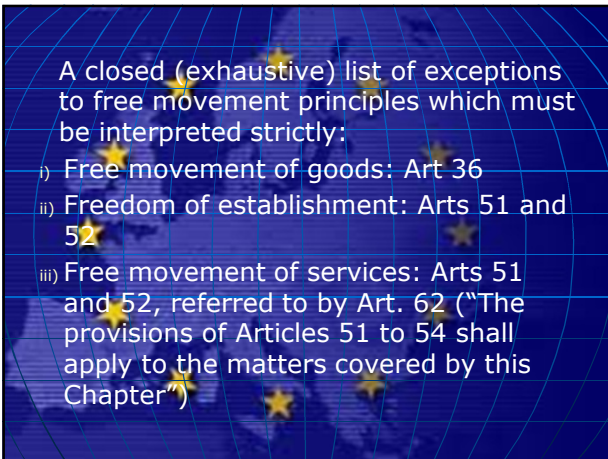
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A closed (exhaustive) list of exceptions to free movement principles which must be interpreted strictly:

- i) Free movement of goods: Art 36
- ii) Freedom of establishment: Arts 51 and 52
- iii) Free movement of services: Arts 51 and 52, referred to by Art. 62 ("The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter")

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**Conditions to be met**

- 1) Absence of harmonised rules at EU level (it is for each MS to determine its own standards of protection)
- 2) No arbitrary discrimination or disguised restriction on trade (Art 36, in fine: «Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between MSs»)
- 3) Necessity and proportionality (national measures are not justified if they are more restrictive on free trade than necessary)

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Free movement of goods (Art 36 TFEU)

**Quantitative restrictions** and **directly discriminatory measures** may **only** be justified on the following grounds:

- i) public morality, public policy or public security;
- ii) protection of health and life of humans, animals or plants;
- iii) protection of national treasures possessing artistic, historic or archaeological value;
- iv) protection of industrial and commercial property.

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Freedom of establishment  
Freedom to provide services

Those freedoms do not apply to **activities** which in a Member State «are **connected, even occasionally, with the exercise of official authority**» (Art 51 TFEU)

As an exception to fundamental freedoms, Art 51 must be interpreted strictly (see Lecture No 3, slides 22, 23)

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Art 52 TFEU

National provisions laid down by law, regulation or administrative action providing for **special treatment for foreign nationals (directly discriminatory measures)** may **only** be justified on the following grounds:

- i) public policy
- ii) public security or
- iii) public health

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2.  
 **GROUNDS OF JUSTIFICATION  
 ACCORDING TO THE CASE-LAW**

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- 
- ❖ Further grounds of justifications recognized by the ECJ's case-law: «**mandatory**» or «**imperative requirements**»; «**overriding reasons relating to the public interest**»
  - ❖ They can be invoked **only** to justify **indistinctly applicable measures**
  - ❖ They are an open, non-exhaustive list of categories

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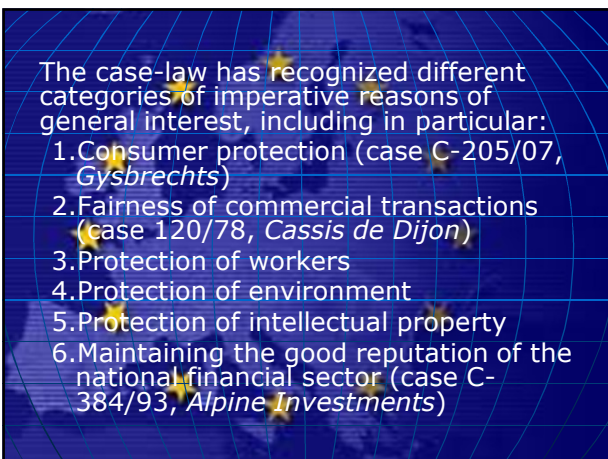
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- The case-law has recognized different categories of imperative reasons of general interest, including in particular:
1. Consumer protection (case C-205/07, *Gysbrechts*)
  2. Fairness of commercial transactions (case 120/78, *Cassis de Dijon*)
  3. Protection of workers
  4. Protection of environment
  5. Protection of intellectual property
  6. Maintaining the good reputation of the national financial sector (case C-384/93, *Alpine Investments*)

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Conditions to be satisfied for a national rule to be justified

- 1) Absence of harmonised rules at EU level;
- 2) Principle of proportionality (case C-288/89, *Gouda*; case C-442/02, *CaixaBank*; case C-205/07, *Gysbrechts*): the restrictive measure
  - (a) must be suitable for ensuring the achievement of the objectives pursued and
  - (b) must not go beyond what is necessary in order to achieve those objectives

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Principle of proportionality

- ❖ The restrictive measure cannot be deemed to be proportionate to the aim in view if it is possible to obtain the same result by less restrictive rules (case C-288/89, *Gouda*)
- ❖ Restriction resulting from double burden -> test of equivalence: the application of Host MS's rules is not justified if the aim pursued is already satisfied by the rules of the MS of origin
- ❖ "The fact that one MS imposes less strict rules than another MS does not mean that the latter's rules are disproportionate" (case C-384/93, *Alpine Investments*)

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Case-study

Case 178/84, *Commission v Germany*

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**The case**

Under Art 9 of the Biersteuergesetz (Law on beer duty), which apply only to breweries in Germany, beers may be manufactured only from malted barley, while in other MSs other ingredients may be added, in particular rice and maize.

Under Art 10 of the Biersteuergesetz, which apply both to beer brewed in Germany and to imported beer, only beverages satisfying the requirements set out in Art 9 may be marketed in Germany under the designation "Bier". It entails, de facto, that beers imported from other MSs have to comply with German standards of manufacture, i.e. to use malted barley as the sole ingredient.

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It is not contested that the application of Art 10 to beers from other MSs in whose manufacture raw materials other than malted barley have been lawfully used, in particular rice and maize, is liable to constitute an obstacle to their importation in Germany.

German Government argues that Art 10 may be justified by **imperative requirements relating to consumer protection**, since it is «essential in order to protect German consumers because, in their minds, the designation 'Bier' is inseparably linked to the beverage manufactured solely from» malted barley (German tradition).

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**The EU Court of Justice's ruling**

The German rule may not be justified on consumer protection grounds

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### First argument (para. 32)

- Consumers' conceptions which vary from one MS to the other are also likely to evolve in the course of time within a MS
- The establishment of the common market is one of the factors that may play a major contributory role in that development
- Legislation of the kind contained in Art 10 of the Biersteuergesetz prevents such a development from taking place
- National law must not «*crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them*».

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### Second argument (para. 35)

- It is legitimate to seek to enable consumers who attribute specific qualities to beers manufactured from particular raw materials to make their choice in the light of that consideration.
- However, that possibility may be ensured by means which do not prevent the importation of products which have been lawfully manufactured and marketed in other MSs
- In particular, the **compulsory affixing of suitable labels giving the nature of the product sold** – by indicating the raw materials utilized in the manufacture of beer – would enable the consumer to make his choice in full knowledge of the facts and would guarantee transparency in trading and in offers to the public

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### Case-study

Case C-442/02, *Caixa-Bank France*

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### The case

- ❖ Measure in question: a French rule prohibiting credit institutions from remunerating sight bank accounts in euros
- ❖ It is a restriction on freedom of establishment: it makes more difficult access to the Host MS' market by credit institutions which are subsidiaries of foreign companies (paras 12-14)
- ❖ May the restriction be justified?

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### The question about justification

French Government's argument: prohibition on remuneration of sight accounts is justified on consumer protection grounds (paras 19-20)

- > If banks must remunerate sight accounts, their operating costs would substantially increase
- > To recover those costs, banks would increase charges and introduce charges for the various banking services currently provided free (ex. Issuing of cheques)

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### The ECJ's ruling (paras 21-22)

The prohibition on remuneration of sight bank accounts, even supposing that it ultimately presents certain benefits for the consumer, constitutes a measure **which goes beyond what is necessary to attain that objective.**

Other measures might be envisaged which

- > Are suitable for ensuring the achievement of the objective of consumer protection but
- > Have no restrictive effects on the freedom of establishment of banks from other MSs

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Other suitably protective  
but less restrictive measures

- > Even supposing that removing the prohibition necessarily entails for consumers an increase in the cost of basic banking services or a charge for cheques
- > the possibility might be envisaged inter alia of allowing consumers to choose between
  - (A) an unremunerated sight account with certain basic banking services free of charge and
  - (B) a remunerated sight account with the credit institution being able to make charges for banking services previously provided free

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