

# EU Internal Market Law

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## Session No 7 “Justifications to restrictions on free movement”

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### Derogations from free movement

Grounds capable to justify obstacles to free movement

- 1) Public interest grounds expressly provided for by the TFEU
- 2) Further assets or interests recognized as grounds of justification by the CJEU (mandatory requirements in the general interest)

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## Grounds of derogation laid down in the TFEU

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## Relevant TFEU provisions

- i) Free movement of goods: Art 36
- ii) Free movement of workers: Arts 45(3) and (4)
- iii) Freedom of establishment & 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"*)
- iv) Free movement of capital & payments: Art 65

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## Free movement of goods (Art 36 TFEU)

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

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

Art 52 TFEU → Following grounds:

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

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Exceptions to the fundamental rule that all obstacles to free movement shall be abolished



- 1) The provisions above must be interpreted strictly
- 2) The list of exceptions is closed (exhaustive)
- 3) These grounds apply to any kind of restriction → they are the only available for quantitative restrictions (under Arts 34 and 35) and directly discriminatory measures

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Mandatory or imperative requirements in the general interest

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Further reasons relating to the public interest recognized by the CJEU's case-law as grounds of justifications



- 1) They are an open, non-exhaustive list
- 2) They are **only** available for **indistinctly applicable measures** → ex. Nationality requirement for notaries cannot be justified by the need to ensure legal certainty

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Some examples of different categories of imperative reasons of general interest recognized by the case-law

1. Consumer protection
2. Fairness of commercial transactions
3. Protection of workers
4. Protection of environment
5. Protection of intellectual property
6. Maintaining the good reputation of the national financial sector

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General conditions to be met  
Appropriateness and Proportionality test

A national restrictive measure, pursuing an objective of general interest, can be justified on one of the grounds above only if

- a) that measure is appropriate (suitable) for ensuring the achievement of the objectives pursued and
- b) does not go beyond what is necessary in order to attain it

Burden of proof upon the national authorities

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## Appropriateness test

- 1) In the absence of fully harmonising rules at EU level, it is for each Member State to determine its own standards of protection: i.e., to decide what degree of protection it wish to assure
- 2) What if rules pursuing the same objective in other Member States are less stringent?

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## Proportionality or Necessity test

A restrictive measure cannot be justified if the general interest relied on can be as effectively protected by measures that are less restrictive of trade within the European Union

- ▀ 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" (Alpine Investments case)

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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 CJEU'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 like the German rule 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 French market by credit institutions which are subsidiaries of companies from other Member States (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 for free (ex. issuing of cheques)

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## The CJEU'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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