

# Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights

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*This article focuses on the debate surrounding the relationship between European economic freedoms and respect for fundamental individual rights in relation to Schmidberger v Austria. In this case the European Court of Justice (ECJ) had to strike a balance between free trade and free movement rules and fundamental values such as the right to protest and the right to free speech. The article outlines the political, legal, and historical development and importance of the four internal market freedoms and their construction as fundamental rights and contrasts these with the legal diversity of European constitutionalism. The decision in Keck is studied and placed into the context of the ECJ's reluctance to consider free trade a source of unlimited rights under Art.28 EC. The debate relating to the ERT, Grogan, and Familiapress decisions is briefly set out. The importance of the Schmidberger case as the first that pleaded the protection of fundamental rights as a specific justification for the restrictions on the free movement of goods is examined. The question whether a human rights defence should be subject to scrutiny and the intensity of any such scrutiny is addressed. The author assesses the extent to which the interplay between the ECHR, national constitutional law, and community law bears upon the decision in Schmidberger. It is suggested that the balancing approach adopted in Schmidberger shares greater similarities with a test of unreasonableness than that of proportionality with particular reference to R v Chief Constable of Sussex Ex p. International Trader's Ferry. The article contemplates the capability of the ECJ as a constitutional adjudicator in possible future disputes concerning the boundaries of application of different legal sources protecting human rights.*

## **Introduction**

For those lucky enough to spend a week skiing on the Austrian or Italian Alps, driving on the Brenner motorway is usually a happy experience as it means that holidays are very close indeed. For those driving for any other purpose, and especially for those living in the villages dissected by the motorway, it is a true nightmare. The Brenner motorway is in fact the main transit route between northern Italy and southern Germany—and generally acts as a gateway into northern Europe. Due to the mountainous nature of the region it is mainly used by heavy goods vehicles, with consequential effects on traffic and pollution. It has been calculated that a daily average of 18,800

automobiles and 7,500 lorries use the Brenner motorway.<sup>1</sup> Concerns about damage to the Alpine habitat have often been voiced by environmental associations.

A demonstration organised by one of these associations in fact sparked one of the most interesting cases on the relationship between European economic freedoms and respect for fundamental freedoms to date: *Schmidberger v Austria*.<sup>2</sup>

The Transitforum Austria Tirol decided to hold a demonstration blocking a stretch of the motorway, between 11 am on Friday June 12 and 3pm on Saturday June 13, 1998. This date was carefully chosen, as Thursday June 11 was a public holiday in Austria that year, and weekend restrictions were in force on Saturday June 13 and Sunday June 14. The Association gave notice of the demonstration and received approval from the competent Austrian authority. The demonstration was widely publicised, alternative (but longer) routes were suggested, and extra trains were provided.

The Eugen Schmidberger is a company whose main activity is the transport of timber from Germany to Italy and steel from Italy to Germany and whose vehicles generally use the Brenner motorway for that purpose. Following the demonstration it brought an action against the Austrian State in the Austrian courts alleging that the authorities had failed in their duty to guarantee the free movement of goods; thus incurring liability towards the firm as it was prevented from operating its vehicles on their normal transit route.

The case is one of those legal conundrums where the interests at stake lie in sharp contrast to one another. On the one hand there is the need to ensure the free flow of goods between Member States; on the other, fundamental values such as the right to protest and the right to free speech are in issue. It was left to the European Court of Justice (ECJ) to strike a balance. More generally, the judgment outlines how the human rights dimension is ever present, even in the classic areas of economic freedoms. While discussions continue about the legal status of the Charter of Fundamental Rights of the European Union ("the Charter"),<sup>3</sup> it is clear that the Court is rapidly developing a human rights discourse which is already implicitly incorporating the rights and values expressed in the Charter.<sup>4</sup> More interestingly, it is argued, the Court is reacting to the growing importance of fundamental rights protection by adapting a judicial policy which is typical of constitutional courts, in the presence of a written Bill of Rights, or of the European Court of Human Rights when referring to the Convention. In this

<sup>1</sup> See Civic Network of South Tyrol at [www.provinz.bz.it/overview/transport.htm](http://www.provinz.bz.it/overview/transport.htm). This particular route has been a continuous source of concern for Austrian and European institutions, and was addressed in the Alpine Convention which was approved by the Community in 1996. This agreement conferred on the Austrian Government powers to introduce measures to combat pollution from road transport, which has included a general ban on heavy goods traffic on weekends and tolls on vehicles exceeding certain noise limits. See Council Decision of February 26, 1996 concerning the conclusion of the Convention on the protection of the Alps (Alpine Convention) [1996] O.J. L61/31. The convention was signed in Salzburg on November 7, 1991 and entered into force on March 6, 1995.

<sup>2</sup> Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge and Republic of Austria* [2003] 2 C.M.L.R. 34.

<sup>3</sup> [2000] O.J. C364/1. On the specific problems of incorporating the Charter see the various contributions to this issue.

<sup>4</sup> Koen Lenaerts and Petra Foubert comment that "most of the social rights and freedoms guaranteed in the Charter of Fundamental Rights of the European Union have already been recognised by the Court of Justice . . .", in "Social Rights in the Case-Law of the European Court of Justice" [2001] L.I.E.I. 293.

sense, *Schmidberger* is a judgment which somehow pre-empts the full implementation of the Charter, sending a clear indication of how the Court will try to face the challenges posed by its incorporation in the Treaty. It also reaffirms the role of the ECJ as the supreme constitutional adjudicator in the European Union, a role which is by no means new to the Court but which will become more pronounced once the draft Constitution is ratified.

As *Schmidberger* is in many respects unique with certain issues being touched upon probably for the first time in more than 30 years of the jurisprudence of the ECJ, it is perhaps useful to outline the four corners of the debate: first the status of European economic freedoms and in particular of the free movement of goods, then the relationship between human rights and respect of those freedoms, and finally a discussion on the importance of the *Schmidberger* case.

### Economic freedoms or fundamental rights?

According to Petersmann's classic analysis carried out in the context of World Trade Organisation law, the principle of free trade can and should be translated into a quasi-constitutional order to be effective. As such, free movement rules become the sources of legitimation for market integration and non-discriminatory competition in that they increase individual autonomy, equality and responsibility, control abuses of government and maximise economic welfare.<sup>5</sup> Such an approach has been followed in the context of the European Union where the four internal market freedoms—goods, services, capital and workers—have been construed as fundamental rights. This should entail a guarantee to the *cives economicus* of the right to pursue economic activity within the borders of these freedoms and should shelter him from any undue interference by national regulatory power.<sup>6</sup>

Such a construction is however very limited and it diminishes the importance of the legal diversity of European constitutionalism, as has been pointed out by various commentators.<sup>7</sup> It also minimises the impact of the case law of the ECJ and its discourse. It is certainly true that, in several instances, the Court has referred to free movement principles as fundamental rights capable of limiting the powers of Member States to interfere with the aims of the Treaty. It is also equally true that the case law on free movement of workers, coupled with the provisions on European citizenship, stands out as bearing more and more resemblance to the jurisprudence of the Strasbourg Court. In this area the ECJ speaks directly of "fundamental rights".<sup>8</sup>

<sup>5</sup> Petersmann, "National Constitutions, Foreign Trade Policy and European Community Law" (1992) 5 E.J.I.L. 1 and "Constitutional Principles Governing then EEC's Commercial policy" in M. Marescau, ed., *The European Community Commercial Policy after 1992: the Legal Dimension* (Kluwer, 1992).

<sup>6</sup> Reich, "A European Constitutions for Citizens" (1997) 3 E.L.J. 131.

<sup>7</sup> See the comprehensive article by Poiares Maduro, "Reforming the Market or the State?: Article 30 and the European Constitution: Economic Freedom and Political Rights" (1997) 3 E.L.J. 55.

<sup>8</sup> See Case 22/86 *UNCTEF v Heylens* [1997] E.C.R. 2323; Case C-415/93 *Union Royale Belge des Societes de Football Association v Bosman* [1995] E.C.R. I-4921 and Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] E.C.R. I-4139.

However such a process is fairly obvious in the field of workers' rights as these are "clearly individually conferred on each worker in the Community".<sup>9</sup>

In the area of free movement of goods and the other more naturally economic freedoms the Court has always resisted the temptation to build a hierarchy of constitutional rights. The language used is indicative. The Court usually refers to Art.28 of the Treaty—the key provision establishing that Member States cannot impose any barriers to trade in goods—as a "fundamental freedom"<sup>10</sup> or as one of "the fundamental Community provisions".<sup>11</sup> In reality the whole case law on Art.28 EC has been built on two general policy aims: the removal of barriers and protectionist national measures through harmonisation of trade standards and the maintenance of certain legitimate public interests capable of limiting the requirements of free trade. As is well observed by Weiler, the real revolution of the legendary free trade cases *Dassonville* and *Cassis de Dijon*<sup>12</sup> lay in the fact that they provided a justification for the Community legislator (through a finding of breach by Member States) to introduce harmonisation measures and thus realise the aim of European integration; while acknowledging also that Member States were still entitled to pursue policies to realise certain public interests, policies which could also involve a possible restriction on free movement of goods.<sup>13</sup> It is indeed easily forgotten that the broad and all-encompassing *Dassonville* formula—all national provisions "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" are to be considered as measures having equivalent effect to a quantitative restriction—was immediately coupled with the recognition that Member States were still entitled to take measures to pursue a public interest such as for instance, in the instant case, the prevention of unfair commercial practices.<sup>14</sup>

The leniency demonstrated by the Court in agreeing to examine virtually any public interest that a Member State raises shows once again the reluctance to consider free trade a source of unlimited rights. Of course, agreeing to examine possible justifications does not equate to finding them well-founded. The Court has, however, in rapid succession accepted not only traditional justifications such as environmental or consumer protection, but also the need to preserve press diversity, the protection of children, food safety, and the fight against alcoholism.<sup>15</sup>

The much vilified decision in *Keck*<sup>16</sup> is another excellent example of the responsible approach of the Court in the face of a precariously liberal interpretation of European integration. In that decision the Court held that that national provisions restricting or prohibiting certain selling arrangements are not liable to hinder intra-Community

<sup>9</sup> *Heylens, ibid.* at [174].

<sup>10</sup> See Case C-394/97 *Criminal Proceedings against Heinonen* [199] E.C.R. I-3599.

<sup>11</sup> Case C-194/94 *CIA Security v Signalson* [1996] E.C.R. I-2201.

<sup>12</sup> Respectively Case 8/74 *Procureur du Roi v Dassonville* [1974] E.C.R. 837 and Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] E.C.R. 649.

<sup>13</sup> Weiler, "The Constitution of the Common Market Place" in Craig and De Burca, *The Evolution of EU Law* (Oxford University Press, 1999), p.349.

<sup>14</sup> *Dassonville*, n.12 above, at [6].

<sup>15</sup> Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und Vertriebs GmbH v Bauer Verlag* [1997] E.C.R. I-3689; Joined Cases C 34-36/95 *KO v De Agostini* [1997] E.C.R. I-3843; Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass* [2000] E.C.R. I-151 and Case C-405/98 *KO v Gourmet International Products* [2001] E.C.R. I-1795.

<sup>16</sup> Joined Cases C 267 & 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] E.C.R. I-6097.

trade, so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Although the drafting of the judgment and the construction of the test outlined may be criticised, the motivation behind *Keck* is something to applaud. The Court indicated clearly that Art.28 EC could not have been used as a nuclear weapon for granting unlimited access to economic activities. Thus, in *Keck*, the Court implicitly replied to the very clear challenge posed by Advocate General Tesauero in the *Hunermund* case. In a passage often and deservedly quoted, the Advocate General questioned whether Art.28 EC was to be considered a provision intended to liberalise intra-Community trade or whether it was intended more generally to encourage the unhindered pursuit of commerce in individual Member States.<sup>17</sup> The Court replied that Art.28 could not be considered as a “free market” clause which traders can use to challenge “any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States”.<sup>18</sup> That the Court would find the test difficult to apply is not relevant. Rather, this is just the consequence of an unhappy formulation and certainly there are signs that the Court is abandoning the formal strictness of the *Keck* analysis. However the approach adopted in *Keck* is still constitutionally compelling.<sup>19</sup>

### Economic freedoms and human rights

The turbulent relationship between European law and respect for fundamental rights is well known and well discussed.<sup>20</sup> For our purposes it is therefore sufficient to recall the consistent case law of the Court that the requirements flowing from the protection of fundamental rights bind both Community institutions and also the Member States, when they implement Community rules. The *ERT* judgment confirmed the applicability of fundamental rights, as laid out in the general principles of Community law, to national rules when those rules fall within the scope of Community law.<sup>21</sup> Therefore if a Member State relies on one of the accepted justifications (such as grounds of public policy, public security or public health) for restricting a fundamental freedom, it must also comply with the fundamental rights recognised in Community law. This particular line of case law has been severely criticised as an attempt by the Court to use human rights as an instrument to enforce the economic freedoms, subordinating them to the demand of market integration.<sup>22</sup> Certainly, it seems pretty odd that, once it has been established that a restriction is to be justified from the perspective of Community law, the restriction can still be subject to another degree of scrutiny as to respect of

<sup>17</sup> Case C-292/92 *Hunermund v Landesapothekerkammer Baden-Württemberg* [1994] E.C.R. I-6787.

<sup>18</sup> *Keck*, n.16 above.

<sup>19</sup> See on this point A.G. Fennelly's Opinion in Case C-190/98 *Graf v Filzmoser Maschinenbau GmbH* [2000] E.C.R. I-493.

<sup>20</sup> For an excellent overview see S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, 2002), Ch.13.

<sup>21</sup> Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis (DEP)* [1991] E.C.R. I-2925.

<sup>22</sup> See e.g. Coppel and O'Neill, “The European Court of Justice: Taking Rights Seriously?” (1992) 29 C.M.L.Rev. 689.

fundamental rights. As Advocate General Jacobs has recently observed extra-judicially, "if the restriction proves to be permissible under Community law, then it must still applied with respect for human rights But that is no longer at that stage a question of Community law", but a matter for national law or maybe the European Convention on Human Rights (ECHR).<sup>23</sup>

This debate is not directly relevant, however, for our purposes as it is limited to the questions concerning derogations laid out in the Treaty or in the case law of the Court. The *ERT* principle does not address the situation where an economic freedom conflicts directly with a fundamental right. In that scenario, there are very few indications which can be drawn from the ECJ case law. The only clear-cut example is the *Grogan* decision.<sup>24</sup> As is well known, in that case an action was brought against an Irish students' union which distributed publications containing information about abortion clinics in the United Kingdom. This was thought to be contrary to the fundamental right to life of the unborn, recognised in the Irish Constitution. The students' union tried to defend itself, claiming that a ban on the distribution of information amounted to a violation of the EC right to provide a service. Although the Court found that abortion should have been considered a service, as it was a medical treatment normally provided for remuneration, the Court evaded the difficult question posed. It held simply that Community law did not apply, as the link between the students and the British clinics providing that service was too tenuous and remote. Another example often referred to is the *Familiapress* case, a rather odd decision.<sup>25</sup> *Familiapress*, a German publisher, had one of its magazines banned in Austria because it contained very tempting prize competitions. Austrian legislation prohibited the sale of these kind of publications in order to protect local press which would have been unable to offer the same standards of prizes. The Court, in agreeing to examine the argument advanced by the Austrian Government, also held that, in considering the justification based on the need to preserve press diversity, it was necessary to take into account of fundamental rights, in particular the freedom of expression. The Court, also perhaps realising that in this case freedom of the press could also be invoked by the German publisher as it had the right to distribute its publication, and even by the Austrian reader who in theory should have been entitled to choose what to read, decided to leave the decision to the Austrian court. It also attempted to direct such a decision by formulating a series of conditions that should have been complied with in order to decide whether the justifications were acceptable. These conditions required such a sophisticated analysis of market behaviour that the Austrian court decided simply to ignore the ECJ instruction.<sup>26</sup> However, once again human rights were used here not directly as a possible justification but as an interpretative tool to decide whether the public policy claimed by the government—press diversity—was well-founded.

<sup>23</sup> Jacobs, "Human rights in the European Union: the role of the Court of Justice" (2001) 26 E.L.R. 331 at 337.

<sup>24</sup> Case C-159/90 *SPUC v Grogan* [1991] E.C.R. I-4685.

<sup>25</sup> *Familiapress v Bauer Verlag*, n.15 above.

<sup>26</sup> Oberster Gerichtshof, order of March 23, 1999, 4 Ob 249/98s, *Vereinigte Familiapress Zeitungsverlagsund Vertriebs GmbH v Heinrich Bauer Verlag*, *Wirtschaftsrechtliche Blätter* 1999, p.378.

### Human rights as a specific derogation to the free movement of goods

Human rights pleaded as a specific justification for restrictions on the free movements of goods was exactly the question posed in the *Schmidberger* case. This case presents a very important new element: the Government in its submission decided to rely exclusively on the protection of fundamental rights. The Government considered that it had to allow the demonstration to go ahead because the demonstrators were exercising their fundamental rights of freedom of expression and freedom of assembly under the Austrian Constitution. As noted by Advocate General Jacobs in his Opinion, this appears to be the first case in which a Member State has invoked the necessity to protect fundamental rights directly to justify a restriction of one of the fundamental freedoms of the Treaty.

It is interesting to note, as a preliminary point, that the Member State concerned did not resort to what would have appeared to be the most logical solution: to rely directly on public policy as one of the justifications provided in Art.30 EC. There are very few cases in which public policy has been invoked, as national governments tend to rely on the grounds in Art.30 EC which are more specific and arguably easier to prove. However, the well-recited case of *Commission v France* should be mentioned.<sup>27</sup> In that judgment the Court found that France breached its obligations under the Treaty as it failed to react to a long series of violent acts committed by private individuals and by protest movements of French farmers directed against agricultural products from other Member States, in particular Spain. Such a judgment raised fears as to the extent of such a state obligation. In particular a certain amount of uncertainty remained as to the types of private acts which would necessitate state action and also whether the obligation on the state would extend to a possible interference with the exercise of a fundamental right (such as the right to strike or free speech). These fears were partially dispelled by the intervention of the Community legislator. The Council adopted Regulation 2679/98, which clarified that a breach of Art.28 would occur only if the failure to act would lead to serious disruption of the free movement of goods. Moreover, the Regulation specified that this "may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike".<sup>28</sup>

As noted above, the Austrian Government in *Schmidberger* could have simply relied on a public policy argument, stressing the differences between *Commission v France* and the present case and outlining that its actions were firmly within the boundaries delimited by Regulation 2679/98. Its choice to make free speech itself the justification

<sup>27</sup> Case C-265/95 *Commission v France* [1997] E.C.R. I-6959. See also Case 231/83 *Cullet v Centre Leclerc Toulouse* [1983] E.C.R. 1013.

<sup>28</sup> Reg.2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] O.J. L337/8. In particular the Regulation provides that a breach would occur if the failure to act would (a) lead to serious disruption of the free movement of goods by physically or otherwise preventing, delaying or diverting their import into, export from or transport across a Member State, (b) cause serious loss to the individuals affected, and (c) require immediate action in order to prevent any continuation, increase or intensification of the disruption or loss in question. When such an obstacle occurs, the Member State concerned must take all necessary and proportionate measures to assure the free movement of goods within its territory in accordance with the Treaty, and must keep the Commission informed.

did radicalise the case and made it impossible for the Court to avoid a decision on the relationship between human rights and economic freedoms.

The Court judgment in *Schmidberger* is at the same time a classic one and an innovative one. It is certainly a classic one as the Court used the traditional two-step approach developed in years of internal market case law: first it found that a violation of Art.28 EC had occurred and secondly it moved to the examination of possible justifications.

On the possible breach of Art.28 EC, the Court relied on the *Commission v French* rule that where the competent national authorities are faced with restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty, such as the free movement of goods, which result from actions taken by individuals, "they are required to take adequate steps to ensure that freedom in the Member State concerned even if, as in the main proceedings, those goods merely pass through Austria en route for Italy or Germany".<sup>29</sup> This is a very strong statement which reaffirms the centrality of Art.28 EC in the context of European integration. It restates that any measure or omission which has the effect of disrupting trade would be sanctioned. It is interesting to note that such an approach is certainly tougher than, if not in open contrast with, what the Community legislator provided for in Regulation 2679/98, which seems to suggest that a serious disruption would need to be proved to trigger the application of Art.28 EC. However, this tough stance is softened in the second part of the judgment. The Court, having recalled the importance of fundamental rights as a general principle of law and having reiterated that both Community institutions and the Member States are required to respect fundamental rights, stated that "the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods".<sup>30</sup>

### **The standard of review on human rights derogations**

Such a statement is certainly of the utmost importance once protection of human rights is recognised as being an accepted justification. The question then becomes whether a human rights defence should be subject to any scrutiny and, if the answer is yes, what intensity of scrutiny should be exercised. This is a particularly delicate point. It could be argued that subjecting the human rights defence to any scrutiny at all would be an intolerable interference with Members States' constitutional values which would subordinate them to the necessity of economic integration. Such a difficulty is illustrated well in the opinion of Advocate General Jacobs. He proposed that the justification put forward by the Austrian Government should be subject to the same analysis given to the traditional grounds of justification such as public policy or public security. It must therefore be established (a) whether reliance on the fundamental rights recognised in Austrian law was, as a matter of Community law, seen as a legitimate objective in the public interest capable of justifying a restriction on a fundamental Treaty freedom; and (b) if so, whether the restriction in issue was proportionate to the objective pursued.

<sup>29</sup> *Schmidberger*, n.2 above, at [62].

<sup>30</sup> *ibid.* at [74].

His suggestion implied that it would still be up to the Court to decide whether a fundamental right was in conformity with the Community legal order. He used the example of a national legal order which might expressly recognise the fundamental right to be protected against unfair competition from other firms and, in particular, from firms established abroad; or national case law under which a similar right is recognised as a facet of the fundamental right of free economic activity or the fundamental right of property. In those cases "it cannot therefore be automatically ruled out that a Member State which invokes the necessity to protect a right recognised by national law as fundamental nevertheless pursues an objective which as a matter of Community law must be regarded as illegitimate".<sup>31</sup> The implication is that in a situation where a certain right is not universally recognised as fundamental (as in the *Grogan* case), or is a right that may be in conflict with the fundamental Community values, the conflict should be solved in favour of Community law.

The Court preferred not to dwell on this point as in reality the *Schmidberger* case did not present such a difficult situation: free speech is a fundamental right recognised in all constitutional traditions and expressly recognised by the ECHR and therefore the question did not have to be answered. As for the intensity of scrutiny, the test that the Court applied in the internal market case is that of proportionality, namely that a national measure would be incompatible with EC law "if its adverse effects on legally protected interests or rights, go further than can be justified in order to achieve the legitimate aim of the decision".<sup>32</sup> It is clear that, in *Schmidberger*, the version of the proportionality assessment is slightly different and more accommodating towards the Member States. The Court did not resort to testing whether the course of action taken by Austria was the only possible one and the least restrictive of free movement of goods. Drawing inspiration from the ECHR, the Court referred to the fact that, unlike other fundamental rights enshrined in that Convention such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment that admit no restriction, neither freedom of expression nor the freedom of assembly guaranteed by the ECHR are absolute and that they must therefore be viewed in relation to their social purpose. Thus the exercise of those rights may be restricted, and "the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests".<sup>33</sup>

The Court undertook such a balancing exercise, taking into account the following considerations: that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it; that the road was obstructed on a single route, on a single occasion and during a period of almost 30 hours; that the obstacle to the free movement of goods resulting from that demonstration was limited; that the aim of that demonstration was not to disrupt trade but was rather the exercise of fundamental rights by citizens—manifestation in public of an opinion which they considered to be of importance to society; that the national authorities tried to attenuate

<sup>31</sup> Opinion of A.G. Jacobs, *ibid.* at [98].

<sup>32</sup> De Burca, "Proportionality and the Wednesbury principle, The influence of EC law" [1997] E.P.L. 561.

<sup>33</sup> *Schmidberger*, n.2 above, at [81].

the possible disruption by adopting measures to limit, as far as possible, the disruption to road traffic; and, finally and significantly, the Court, revealing a marked sensitivity towards the individual rights concerned, held that the imposition of stricter conditions concerning the demonstration were not appropriate as this could have "been perceived as an excessive restriction, depriving the action of a substantial part of its scope".<sup>34</sup> In conclusion, the Austrian authorities were therefore reasonably entitled to decide that the legitimate objective pursued by that demonstration could not be achieved by measures less restrictive of Community trade.

It is clear that the test of proportionality has assumed different meanings over the years. Nonetheless the Court has generally applied it consistently and rather strictly to national measures derogating from the principles of free movement. The approach in *Schmidberger* is markedly different, although it reflects dicta in *Commission v France* where the Court stressed that Member States can engage in a balancing exercise on what course of action should be taken where there are public disturbances. In this respect *Schmidberger* can be compared to cases where the Court dealt with the compatibility of Community measures with human rights. In *Bosphorus*, for instance, which concerned a Yugoslavian airplane impounded by the Irish authorities in compliance with a Community regulation designed to implement the UN sanctions against Yugoslavia, the Court clearly stated that, although such a measure involved an interference with the right of property, this should be balanced against the aim pursued by the regulation. Thus, "as compared with an objective of general interest so fundamental for the international community which consists in putting an end to the state of war in the region and the massive violations of human rights and humanitarian international law", the impounding of the aircraft could not be considered as disproportionate.<sup>35</sup>

In fact the balancing approach adopted in *Schmidberger* bears perhaps more resemblance to a test of unreasonableness than to that of proportionality. Without wanting to reopen the intense debate whether the two principles should only be considered as two sides of the same coins or instead as inherently different (our view is actually the latter),<sup>36</sup> it is sufficient to remind the reader of a very similar case decided by the House of Lords, *R v Chief Constable of Sussex Ex p. International Trader's Ferry*.<sup>37</sup> This case concerned the use of police resources during a period of protests at live animal exports. The Chief Constable, since the level of policing required was significantly impacting upon his ability to deliver police services to the remainder of the community in Sussex, decided to limit the days on which police resources were provided. The export company challenged this decision, arguing that the Chief Constable's decision had to be considered as violation of free movement of goods principle as it impeded export towards other Member States. The House of Lords rejected the company's arguments.

<sup>34</sup> *ibid.* at [91].

<sup>35</sup> Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications Ireland* [1996] E.C.R. I-3953 at [26].

<sup>36</sup> See *inter alia* De Burca, *op.cit.* n.32 above and Hoffman, "A Sense of Proportion" in Andenas and Jacobs, *European Community Law in the English Courts* (Oxford University Press, 1998), p.149. See also Biondi, "In & Out of the Internal market" (1999/2000) 19 Y.E.L. 469.

<sup>37</sup> *R v Chief Constable of Sussex Ex p. International Trader's Ferry Limited* [1999] 2 A.C. 418, HL. See further the case comment by Szyszczak, "Fundamental values in the House of Lords" [2000] E.L.R. 313.

The House of Lords did undertake a very fine balancing act of protecting conflicting interests, at least three of them in fact: the right of the economic operators to export their products; the right of the local residents to obtain from the national authorities protection against crime and disorder; and the right of animal rights groups to protest peacefully. Lord Slynn, in the leading opinion, recognised that the Chief Constable had a certain margin of appreciation and that it was within his discretion to decide how to allocate the resources allotted to him. The measures adopted had to be considered reasonable with respect to that peculiar situation.

In this sense the *Schmidberger* decision is also a useful indication for national courts. The question of who is in charge of deciding proportionality has not been dealt with too clearly by the Court. It seems clear that in scrutinising whether a justification based on respect for fundamental human rights is proportional, it is imperative that this is assessed against claims based on national law. For instance, in the United Kingdom, any justification would be assessed against the principles contained in the Human Rights Act. It seems then that in this situation the national court is best placed to examine the conflict between an economic freedom and fundamental values.

#### **A brief conclusion**

The *Schmidberger* case was not a tough one as it involved possible violation of a well-accepted fundamental right. However, the Court also indicated in its judgment the way in which contradictions between an economic freedom and the protection of human rights should be dealt with in the future. In doing so it—not unexpectedly—underlined the need to ensure full and uniform application of Community law. However, it also made clear that the economic freedoms are subordinated to other overriding needs of society. *Schmidberger* also reaffirmed that the Court will be perfectly capable of acting as a constitutional adjudicator in possible future disputes over the boundaries of the application of different legal sources for the protection of human rights, namely national constitutions, the ECHR and, in the near future, the Charter of Fundamental Rights of the European Union.