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Free Speech Meets Free Movement - How Fundamental really is ‘Fundamental’? The Impact of Fundamental Rights on Internal Market Law

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ZERP

Joanna Krzemińska

Free Speech Meets Free Movement – How Fundamental really is 'Fundamental'?

The Impact of Fundamental Rights on Internal Market Law

ZERP-Diskussionspapier 3/2005

Joanna Krzemińska is a doctoral candidate in Zentrum für Europäische Rechtspolitik at the University of Bremen, Germany. The paper presents results of the research conducted by her in the Research Training Network "Fundamental Rights and Private Law in the European Union", financed by the European Commission.

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Abstract

The fundamental freedoms, on which the common European market is based, have been present in the Community legal order since its very beginning. The fundamental rights, on the other hand, entered into this system later through general principles of law, mostly due to the judicial activism of the European Court of Justice. They have come a long way from not being considered at all to their full and explicit recognition in the Charter of Fundamental Rights, incorporated into the Constitutional Treaty.

This paper aims at exploring the impact of fundamental rights on the internal market law. It will be devoted to situations where there are clashes between the fundamental rights and fundamental freedoms. The thesis put forward is that the process of balancing conflicting interests has to be anchored in the concept of allowable restrictions which can be imposed on the fundamental right at issue.

The analysis focuses on the scope of the right to free speech in the Community legal order, most notably on the level of protection accorded to commercial speech.

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1. Introduction

The fundamental freedoms, on which the common European market is based, have been present in the Community legal order since its very beginning. The fundamental rights, on the other hand, entered into this system later through the general principles of law, mostly due to the judicial activism of the European Court of Justice. They have come a long way from not being considered at all to their full and explicit recognition in the Charter of Fundamental Rights, incorporated into the Constitutional Treaty.

This paper aims at exploring the impact of fundamental rights on the internal market; i.e. on fundamental freedoms. It will be devoted to situations where there are clashes between the fundamental rights and fundamental freedoms. The inquiry as to whether there is any order of rank will be based on the ECJ judgments in *Commission v France*,[1] *Schmidberger v Austria*[2] and *Omega*[3]. The question of the relationship between the fundamental rights and fundamental freedoms has already commanded considerable attention of the European Court of Justice.[4] As Advocate General Jacobs put it in the *Schmidberger* case, it is conceivable that the cases in which a Member State will invoke the necessity to protect fundamental rights to justify a restriction on the fundamental freedom, may become more frequent in the future, as many of the grounds of justification currently recognised by the Court could also be formulated as being based on fundamental rights considerations.[5]

The discussion will give due account of the relationship between the European Union and the European Convention on Human Rights and Fundamental

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1 *Commission v. France*, Case C-265/95, [1997] ECR I-6959.

2 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republic of Austria*, Case C-112/00, [2003] ECR I-5659.

3 *Omega Spielhallen- und Automatenaufstellung-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECJ Case C-36/02 [2005] 1 CMLR 5.

4 Outside the scope of this paper but relevant for the subject of the clash between fundamental rights and fundamental freedoms is the Court's judgment in *Bosman* (*Union Royale Belge des Societes de Football Association and Others v Bosman and Others*, Case C-415/93 [1995] ECR I-4921). Some commentators stress the clash between the freedom of movement of workers and the freedom of association and assembly. The latter was claimed by the sports organisation which laid down rules for the exercise of professional football. In this case the precedence was accorded to the right to free movement. For comments see: Stieglitz, Allgemeine Lehren im Grundrechtsverständnis nach der EMRK und der Rechtsjudikatur des EuGH (2001), p. 205; Gramlich, Grundfreiheiten contra Grundrechte im Gemeinschaftsrecht? (1996) Die Öffentliche Verwaltung (DÖV), 801.

5 Opinion of Advocate General Jacobs, *Schmidberger* (supra note 2), para 89.

Freedoms (ECHR). It is particularly important for two main reasons. First of all, the Convention served as a source of inspiration in developing the standards of protection of fundamental rights in the Union's legal order. Secondly, the Treaty Establishing a Constitution for Europe (TCE) explicitly recognises the role of the Convention in fleshing out the provisions concerning fundamental rights (Art. II-112 (3) TCE). In the light of the new explicit competence for the Union to accede to the European Convention on Human Rights (Art. I-9 (2) TCE), the question of the future relationship between these two distinct orders becomes all the more pressing.

The proposition of this paper is to examine diverse predictions that were made about the role of human rights in the Community legal order in the past, to confront these predictions with the current state (most notably the Charter and the Union's accession to the ECHR), and finally to focus on the future developments, relating to the impact of values embodied in the Charter of Fundamental Rights on the internal market law, that is: fundamental freedoms. The analysis of the allowable restrictions on rights and freedoms will enable the answering of the main question concerning the order of rank. When a fundamental right meets a fundamental freedom – which one prevails? How fundamental really is 'fundamental'?

The above-mentioned cases, concerning the clash between the right to free speech and the freedom of movement of goods, raise questions as to the horizontal effect of fundamental rights and freedoms, when restrictions thereupon originate in actions of private persons. The principle of direct effect of the Treaty provisions is one of the pillars of the Community legal order. The ECJ judgments in *Angonesse*[6], *Bosman*[7], *Lehtonen*[8] or *Walrave*[9] resulted in a discussion on the horizontal effect of fundamental freedoms. Also the direct effect of the prohibition of discrimination has been established.[10] Despite the lack of

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6 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, Case C-281/98 [2000] ECR I-4139.

7 *Bosman* (supra note 4).

8 *Lehtonen and Castors Canada Dry namur-Braine ASBL v Federation Royale Belge des Societes de Basketball ASBL (FRBSB)*, Case C-176/96 [2000] ECR I-02681.

9 *Walrave v Union Cycliste Internationale*, Case 36/74 [1974] ECR 1405.

10 In *Defrenne v Sabena* the Court held that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (Case 43/75 [1976] ECR 455, para 31). And accordingly, that in relation to a provision of the Treaty which was mandatory in nature, the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals (para 39); see also Stieglitz (supra note 4), p. 172.

an established line of case law on the subject, the question of the horizontal effect of fundamental rights in the Union has already commanded considerable attention among legal scholars.[11] Some authors alternatively suggest that the private violations of fundamental rights should be analysed within the concept of the state protective duties.[12] In such a case, the judgments of the European Court of Justice discussed below would definitely be at the core of the discussion. Due to the limited scope of this paper, however, a closer investigation into the problem of horizontal effect of fundamental rights and freedoms will not be possible.

2. Protection of fundamental rights in the EU

When established in the 1950s, the European Communities were predominantly concerned with the creation and operation of the common market, based on the four fundamental freedoms (free movement of goods, services, capital and persons). This dominating emphasis has been gradually balanced by the growing concerns about the need to have recourse to the protection of fundamental rights, in order to legitimise the regulation of the common market. According to the well established case law, fundamental rights form an integral part of the general principles of law, the observance of which is ensured by the European Court of Justice. This practice has been codified in Art. 6 of the Treaty on the European Union, which reads as follows:

> "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the Member States , as general principles of Community law."

The Court draws inspiration from the constitutional traditions of the Member States and international human rights treaties on which the Member States have collaborated or to which they are signatories.[13] The ECHR has been accorded a special role in this respect. The TCE reinforces such an approach. Art. II-112 (4) TCE includes a reference to the constitutional traditions of the

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11 See in particular the Research Training Network "Fundamental Rights and Private Law in the European Union", materials available at <http://www.fundamentalrights.uni-bremen.de>; see also: Borchardt, in: Lenz, EG-Vertrag Kommentar (2. Aufl. 1999), Art. 220 EGV, Rn. 35; Stieglitz (supra note 4), p. 172 et seq.

12 Stieglitz (supra note 4), p. 172 et seq.; Kingreen, in: Calliess/Ruffert, Kommentar zum EU-/EG-Vertrag (2. Aufl. 2002), Art. 6 EUV, Rn. 63.

13 See: *Nold KG v. Commission*, Case 4/73 [1974] ECR 491.

Member States. An explicit competence for the Union to accede to the European Convention on Human Rights has been incorporated in Art. II-9 (2) TCE.[14] According to Art. II-112 (3) TCE

> "[i]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

The relationship between the Charter and the ECHR has already been much discussed in the literature.[15] The Convention is also mentioned in Art. II-113 TCE, which deals with standards of protection existing under various international instruments and aims at safeguarding them (it resembles Art. 53 ECHR)[16]. Finally, the explanations emphasise the importance of the ECHR:

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14 For analysis of the problem of accession, in particular Opinion 2/94 (Opinion 2/94 on Accession of the Community to the ECHR [1996] ECR I-1759), see: Toth, The European Union and Human Rights: the Way Forward, 34 (1997) CML Rev. 491-529; De Burca, Human Rights: The Charter and Beyond, Jean Monnet Working Paper No.10/01, p. 8; Craig/de Burca, EU Law, Texts, Cases, Materials (3rd ed. 2003), chapter 8; Krueger, Reflections Concerning Accession of the European Communities to the European Convention on Human Rights, 21 (2002) Penn State International Law Review, 89-99; Imbert, Speech at the Judges' Symposium: The Council of Europe's European Convention on Human Rights and the European Union's Charter of Fundamental Rights, Luxembourg (16.09.2002), available at <http://www.coe.int>; Lemmens, The Relationship between the Charter of Fundamental Rights of the EU and the ECHR: Substantive Aspects, 8 (2001) MJ, 49; Krzeminska, Przystąpienie Unii Europejskiej do Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności, (2005) Radca Prawny, pp. 5-11; Wetzel, Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion between the Luxembourg and Strasbourg Courts, 71 (2003) Fordham Law Review, 2823; Andrej Victor Mykola Wasyl Busch, Die Bedeutung der Europäischen Menschenrechtskonvention für den Grundrechtsschutz in der Europäischen Union (2003).

15 Lemmens, The Relationship between the Charter of Fundamental Rights of the EU and the ECHR: Substantive Aspects, 8 (2001) MJ, 49; Lenaerts/de Smijter, The Charter and the Role of the European Courts, 8 (2001) MJ, 90; Lenaerts/de Smijter, A "Bill of Rights" for the European Union, 38 (2001) *CML Rev.*, 290 et seq.; Tulkens, Towards a Greater Normative Coherence in Europe: The Implications of the Draft Charter of Fundamental Rights of the European Union, 21 (2000) *HRLJ*, 329; Parmar, International Human Rights Law and the EU Charter, 8 (2001) *MJ*, 351; McCrudden, The Future of the EU Charter of Fundamental Rights, Jean Monnet Working Paper No.10/01, p. 17 et seq.; Andrej Victor Mykola Wasyl Busch, Die Bedeutung der Europäischen Menschenrechtskonvention für den Grundrechtsschutz in der Europäischen Union (2003).

16 Art. II-113 TCE: "*Nothing in this Charter shall be interpreted as restricting or*

> "[t]he level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR."[17]

2.1. When is a fundamental freedom also a fundamental right?

The fundamental freedoms have to be clearly distinguished from fundamental rights. In the Community law context the term 'fundamental freedoms' refers to the freedom of movement of goods, services, capital and labour, on which the common market is based. Also the commentators point out the difference:

> "There is a crucial difference between the basic freedoms case law and the human rights case law. The basic freedoms do not provide – with the exception of free movement of workers and their access to employment – fundamental rights and the jurisprudence of the ECJ on these issues is not one of human rights. In this context, the most important difference between the human rights case law and the basic freedoms case law is an often overlooked reservation the ECJ makes: the Court applies the basic freedoms only if there is no secondary instrument."[18]

The European Court of Justice has repeatedly recognised fundamental freedoms as subjective rights (according to the German legal terminology), which means that they are enforceable before the national courts.[19] Despite the

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adversely affecting human rights and fundamental freedoms as recognised, in their specific fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

Art. 53 ECHR: "*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.*"

17 Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, 11 October 2000, CHARTE 4473/00 CONVENT 49, p. 50.

18 Von Bogdandy, The European Union as a Human Rights Organization?, 37 (2000) CML Rev., 1326 and the referral to the ECJ's case law: *Bosman*, (supra note 4), para 129; *Nour Eddline El-Yassini*, Case C-416/96 [1999] ECR I-1209, para 45: "… as regards the application of the fundamental right of persons to move freely within the Community …".

19 Ehlers (ed.), Europäische Grundrechte und Grundfreiheiten (2003), p. 150; Kadelbach/Petersen, Europäische Grundrechte als Schranken der Grundfreiheiten, (2003) EuGRZ, 693; see also: *Salgoil SpA v. Ministero peril Commercio con l'Estero*, Case-13/68 [1968] ECR 453, *Reyners v. Belgium*, Case-2/74 [1974] ECR 631, *Van Dyun v.*

primary function of accelerating the process of the European integration and laying foundations for the formation of the internal market, the fundamental freedoms were never reduced to a mere market-related instrumental character. This was due to the fact that the formation of the internal market had never been considered as an end in itself, independent from the rights of the European citizens.[20] In the landmark *van Gend & Loos* decision the ECJ ruled that the provisions of the EC Treaty are directly applicable.[21] The stipulations concerning the free movement of goods, persons, capital and labour aim therefore at offering individuals an effective and immediate protection in their cross-border commercial activities.

With reference to the Charter, it has been pointed out that from among the four freedoms only the freedom of movement and residence is mentioned in Art. II-105 TCE.[22] The ECJ has repeatedly referred to the freedom of movement of workers as their fundamental right.[23] Indeed some authors point out the existence of a fundamental right to freedom of trade.[24] In claiming the existence of this right a reference to the *ADBHU* judgment is made, where the ECJ ruled that:

> "the principle of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of law of which the Court ensures observance".[25]

Indeed the distinguishing line between the fundamental freedom of movement of workers and the fundamental right to free movement is somewhat blurred. In the *Bosman* case the Court kept referring to the right to free movement on the part of Bosman. In the context of the freedom of movement of persons the ECJ stated that nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin, enter the territory of another Member State and reside there in order to pursue an economic activity.[26] The distinction becomes all the more blurred in the light of

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Home Office Case-11/74 [1974] ECR 1337.

20 Kadelbach/Petersen (supra note 19), p. 693.

21 *NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen*, Case 26/62 [1963] ECR 1.

22 Von Bogdandy (supra note 18), p. 1327, footnote 98.

23 *Bosman* (supra note 4); see also: Oliver/Jarvis, Free Movement of Goods in the European Community (2003), p. 11.

24 Petersman, Constitutional Principles Governing the EEC's Commercial Policy, in: Maresceau (ed.), The European Community's Commercial Policy after 1992: The Legal Dimension (1993), p. 40-41.

25 *Procureur de la République v. ADBHU*, Case 240/83 [1985] ECR 531, 548.

26 *Bosman* (supra note 4), para 95; *Roux v Belgium* Case C-363/89 [1991] ECR I-273, para 9; *The Queen v Immigration Appeal Tribunal and Surinder Singh* Case C-370/90

Art. II-105 TCE, which embodies the freedom of movement and residence, in that it grants every citizen of the Union the right to move and reside freely within the territory of the Member States. Some commentators point out that the freedom of movement of workers encompasses broad areas of activities of an individual – not only the ability to work without being discriminated on grounds of nationality, but also their personal and family life.[27]

2.2. *Impact of fundamental rights on the internal market law*

The internal market law has been influenced by fundamental rights as enshrined in the ECHR and resulting from the constitutional traditions common to the Member States. It remains to be seen if the instinctive assumption that the EU Charter of Fundamental Rights will mark a watershed in the development of the internal market law, will prove to be true.[28] Some authors point out that despite the possible adoption of the Constitutional Treaty the debate on the position of human rights in the Union's legal order has not come to an end yet, that in fact – quite the opposite – "*the best is yet to come*" and that

> "the adoption of the EU Constitution will only be the stepping stone to a truly fascinating new phase in the on-going development of European human rights law".[29]

The impact of fundamental rights on the internal market law can be dual, in that it concerns either the process of approximation of laws or the limitations imposed on fundamental freedoms. The fundamental rights serve as signposts for the manner in which the process of approximation of law is being carried out, in that the new harmonising rules have to be scrutinised for their conformity with fundamental rights, underpinning the internal market. They serve as a yardstick by which to judge the legality of Community law. The impact of fundamental rights on a fundamental freedom may be dual, in that they may serve either as a limitation to a limitation of a fundamental freedom or a limitation to a fundamental freedom. The first aspect embraces situations in which a

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[1992] ECR I-4265, para 17.

27 Avbelj, European Court of Justice and the Question of Value Choices. Fundamental Human Rights and an Exception to the Freedom of Movement of Goods, Jean Monnet Working Paper 06/04, p. 55.

28 For a discussion on the impact of the Charter of Fundamental Rights on the internal market law see: Weatherill, The EU Charter of Fundamental Rights and the Internal Market, Francisco Lucas Pires Working Papers Series on European Constitutionalism, Working Paper 2003/03, Lisboa.

29 Lawson, Human Rights: the Best is Yet to Come, 1 (2005) European Constitutional Law Review, 27-28.

Member State is imposing a restriction on the freedom of movement and this restriction is claimed to run counter to the requirements of the protection of fundamental rights. The second aspect covers cases in which the Member States rely on the fundamental rights when they justify the exceptions to the fundamental freedoms. The fundamental rights must serve as signposts for the Member States when they rely on exceptions to fundamental freedoms.[30]

According to the ERT judgment,

> "when a Member State relies on an overriding requirement relating to the public interest or on ground for justification stipulated in the Treaty in order to justify a national rule which is likely to obstruct the exercise of a fundamental freedom arising from the Treaty, such justification must be interpreted in the light of the general principles of law and in particular of fundamental rights."[31]

In this particular case the freedom to provide services had to be interpreted "in the light of the general principle of freedom of expression embodied in Art. 10 of the European Convention on Human Rights".[32] Greece granted a television monopoly to a single company, which held exclusive rights for broadcasting of foreign programs. In the implementation of their Treaty obligations Member States are bound by freedom of expression as general principle of law.[33] Thus, the restriction on broadcasting activities imposed by the Greek law had to pass the test of conformity with the right to free speech as incorporated in Art. 10 ECHR. The fundamental right works here as a limitation to a Member State's limitation to the fundamental freedom.

3. Free speech meets free movement

"*Art. 10 ECHR is no stranger to the European Court's case law on free movement.*"[34] Although not explicitly codified, the right to free speech as provided for in Art. II-71 TCE, is not a novelty and has long been present in the Community legal order. Just as any other fundamental right recognised by the

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30 Craig/de Burca (supra note 14), pp. 210 et seq.; de Burca, Human Rights: The Charter and Beyond, Jean Monnet Working Paper No.10/01, p. 10 et seq.; Clapham, A Human Rights Policy for the European Community 10 (1990) YBEL, 309.

31 *ERT v. Dimotiki Case* C-260/89 [1991] ECR I-2925; [1994] 4 CMLR 546, para 42 et seq.; see also: *Familiapress* Case C-368/95 [1997] ECR I-3689, [1997] 3 CMLR 1329, para 24.

32 *ERT* (supra note 31), para 45.

33 Wyatt, Freedom of Expression in the EU Legal Order and in EU Relations with Third Countries, in: Beatson/Cripps (eds.), Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams (2000), p. 209.

34 Weatherill, The EU Charter of Fundamental Rights (supra note 28), p. 32.

Union, the freedom of expression has been guaranteed as a general principle of law and binding upon the Community institutions and the Member States when implementing Community law.[35] Art. II-71 TCE reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Determination of the exact scope of the exceptions to the provisions of the Treaty on free movements in the light of the freedom of expression as a general principle of law may raise complex questions, as the case *Familiapress v. Heinrich Bauer Verlag*[36] indicates.[37] A German magazine granted its readers a prize for solving a crossword puzzle. Such practice was not permitted in Austria where the publisher intended to sell the magazine. The relevant Austrian unfair competition law provision was said to protect smaller publishers. The Austrian government submitted that through offering free gifts large publishers were in a better position to attract consumers and eliminate smaller publishers unable to finance this expensive promotion method. The restriction on cross-border trade was therefore justified as serving the objective of maintaining press diversity, which in turn was considered as a means to safeguard freedom of expression. Clearly, the protection of fundamental rights adversely affected intra-Community trade. The ECJ held that Member States could uphold restrictions on cross-border trade, by appealing to the requirements of safeguarding the protection of fundamental rights. Interestingly, although the ECJ was rather sceptical of the positive effects of upholding the Austrian rule, nevertheless it left it for the national court to balance the competing interests.[38]

The *Schmidberger* case raised the question of the need to reconcile the requirements for the protection of fundamental rights in the Community with fundamental freedoms enshrined in the EC Treaty. It regarded the question of the scope of freedom of expression and assembly, as guaranteed by Art. 10 and 11 ECHR, and the free movement of goods, in circumstances when the former are relied upon as a justification for the restriction of the latter.[39] Schmidberger was a German transport undertaking, essentially involved in transporting steel

35 Wyatt, Freedom of Expression … (supra note 33), p. 209.

36 *Vereinigte Familiapress Zeitungs- und Vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95 [1997] ECR I-3689.

37 Wyatt, Freedom of Expression … (supra note 33), p. 210.

38 Weatherill, The EU Charter of Fundamental Rights and the Internal Market, Francisco Lucas Pires Working Papers Series on European Constitutionalism 2003, p. 35.

39 *Schmidberger* (supra note 2), para 77.

and timber between southern Germany and northern Italy, using the Brenner motorway in Austria. The Transitforum Austria Tirol, an environmental protection association, gave notice to the Austrian authorities of an intention to hold a demonstration, principally against the pollution caused by the heavy transport in the Tirol region. It would involve a blockade on this route. The competent authorities granted permission. The demonstration had been widely publicised and alternative routes were suggested. Schmidberger brought proceedings against Austria claiming that the authorities failed to guarantee the freedom of movement of goods in accordance with the EC Treaty, and claimed damages in respect of standstill periods, loss of earnings and additional related expenses.[40]

The comparison between the following case – *Commission v. France*[41] – and *Schmidberger* is symptomatic of the need to weigh up the competing interests in the context of the actual circumstances of the case. The Court emphasised that the circumstances characterising the *Schmidberger* case were clearly distinguishable from the situation *Commission v. France*. In the latter the Commission brought an action against France for failing to guarantee the freedom of movement of goods on the grounds that the government had not taken appropriate measures to protect importers of agricultural products from Spain against the demonstrations of French farmers. The demonstration in *Schmidberger* took place after permission was granted by the competent authorities. It blocked the traffic on a single route and on a single occasion. The demonstrators were undoubtedly exercising their fundamental right by manifesting in public an opinion on a subject of public concern. They did not intend to restrict trade in goods of a particular type or origin. By contrast, the French demonstrators in *Commission v. France* were preventing the free trade of a particular type of goods originating from Member States other than France, not only by obstructing the transport thereof, but also by destroying the products in transit and those put on display in shops.[42] Consequently, in *Schmidberger* the Court held that the Austrian authorities were entitled to consider that the outright ban on the demonstration would have constituted unacceptable interference with the fundamental right to freedom of expression and assembly.

Another case in which the Court was required to reconcile the conflict between fundamental rights and fundamental freedoms was *Omega Spielhallen- und Automatenaufstellung-GmbH v. Oberbürgermeisterin der Bundes-*

40 *Ibid*., para 6 et seq.

41 *Commission v. France* (supra note 1).

42 *Schmidberger* (supra note 2), para 82-90.

stadt Bonn[43]. In this case, Advocate General Stix-Hackl was dealing with the question concerning the order of precedence that is to be afforded to fundamental rights as general principles of Community law and pointed out that it is particularly questionable whether there is in fact an order of rank between the fundamental rights and fundamental freedoms enshrined in the EC Treaty.[44] She concluded by stating:

> "It appears to me to be significant that in cases such as this the necessary weighing-up of the interests involved ultimately takes place in the context of the actual circumstances in which in particular fundamental rights are restricted. The need 'to reconcile' the requirements of the protection of fundamental rights cannot therefore mean weighing up fundamental freedoms against fundamental rights per se, which would imply that the protection of fundamental rights is negotiable."[45]

Omega was a German company operating a laser installation known as a "laserdrome", inspired by the movie Star Wars. Some protests were directed against the operation of the facility. The mayor of the city of Bonn asked Omega for a detailed description of the game, warning that a prohibition order would be issued if the game involved 'playing at killing people'. Omega replied that the game involved only hitting fixed sensory tags installed in the firing corridors. Having established that the game involved also hitting sensory tags placed on the jackets of players in the chest area and at the back, the police authority issued an order prohibiting the operation of games involving firing at human targets. On appeal, the *Bundesverwaltungsgericht* (Federal Administrative Court) held that the lower courts were right to hold that the commercial exploitation of a game involving 'playing at killing people' constituted an affront to human dignity as guaranteed in Article 1 (1) of the German Constitution. Therefore, under national law, the appeal had to be dismissed. The *Bundesverwaltungsgericht* was, however, uncertain whether the prohibition was compatible with the freedom to provide services and the freedom of movement of goods as guaranteed in the EC Treaty. The question referred to the European Court of Justice was as follows:

> "Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity – in this case the operation of a so-called "laserdrome" involving simulated killing action – to be prohibited under national law because it offends the values enshrined in the constitution?"[46]

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43 *Omega* (supra note 3).

44 Opinion of Advocate General Stix-Hackl, *Omega* (supra note 3), para 48.

45 *Ibid.*, para 53.

46 *Omega* (supra note 3), para 17.

Art. 46 TEC, applying by virtue of Art. 55 TEC, allows for restrictions upon the freedom to provide services on grounds of public policy, public security and public health. The Court referred to its judgment in *Schmidberger* and confirmed that the protection of fundamental rights justifies, in principle, a restriction upon fundamental freedoms. The Court shared the opinion of the Advocate General, that "*the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law*".[47] Therefore, by prohibiting only one variant of the game, namely the one including 'playing at killing people', the national authorities did not go beyond what was necessary to attain the objective pursued.[48] Consequently, the ECJ held that the Community law did not preclude a prohibition of an economic activity exploiting games simulating acts of homicide on the grounds of protecting public policy by reason of the fact that the activity in question constituted an affront to human dignity.[49]

4. Degrees of fundamentality. Is there an order of rank between fundamental rights and fundamental freedoms?

Despite their importance for the achievement of the internal market, fundamental freedoms are not absolute. The free movement of goods can, in certain circumstances, be subject to restrictions in accordance with Art. 30 TEC or for overriding requirements relating to the public interest, in accordance with the ECJ's consistent case law since the judgment in *Cassis de Dijon*.[50] In the *Schmidberger* case the ECJ held that:

> "since the Community and its Member States are required to respect fundamental rights, 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".[51]

There exists a disparity in opinions with regard to the interpretation of the Court's statement. Some commentators present the view that the Court acknowledged in explicit terms the equality of fundamental freedoms and fundamental rights, thereby opposing at the same time that fundamental rights pre-

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47 *Ibid.*, para 34; Opinion of Advocate General Stix-Hackl, *Omega* (supra note 3), 74 et seq.

48 *Omega* (supra note 3), para 36-39.

49 *Ibid.*, para 41.

50 *Rewe-Zentral* Case 120/78 (1979) ECR 649.

51 *Schmidberger* (supra note 2), para 74 (in relation to the free movement of goods); also *Omega* (supra note 3), para 35 (in relation to freedom to provide services).

vail over fundamental freedoms in abstract terms and as a matter of rule.[52] According to some commentators, by this statement the Court established a general principle that in a great majority of cases (i.e. in principle) the fundamental rights prevail over fundamental freedoms.[53] Such a definite thesis seems to be unfounded. The Court merely stated that the need to protect fundamental rights can in principle be invoked as a justification for restriction upon one of the fundamental freedoms. The conflicting values and interests have to be reconciled, however. As the ECJ puts it:

> "The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and the free movement of goods, where the former are relied upon as justification for a restriction of the latter."[54]

And further that:

> "the interests involved must be weighted having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests".[55]

By any means, does the 'need to reconcile' implicate that fundamental rights, as a matter of rule, prevail over fundamental freedoms. The 'need to reconcile' means that the conflicting interests have to be balanced so as to make it possible for them to exist together without being opposed to each other. The statement of Advocate General Stix-Hackl in the *Omega* case has been so far the most direct statement questioning the existence of an order of rank between fundamental rights applicable as general principles of law and fundamental freedoms enshrined in the Treaty.[56] The Advocate General referred to the phrase 'need to reconcile' and concluded that if there exxisted any order of rank between the fundamental rights and fundamental freedoms, there would have been no need to 'reconcile' between them.[57] Indeed, such a conclusion

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52 Kadelbach/Petersen, Europäische Grundrechte … (supra note 19), p. 696.

53 Avbelj, European Court of Justice and the Question of Value Choices (supra note 27), p. 49-50; in Avbelj's view the Court did not want to state that explicitly, probably because of the prudent reliance on the principle of judicial economy, and did not want to engage in a discussion about the potential existence of some fundamental human rights in the national legal orders the pursuance of which could be contrary to the objectives that the Community recognizes as legitimate.

54 *Schmidberger* (supra note 2), para 77.

55 *Ibid.*, para 81.

56 *Omega* (supra note 3), para 48.

57 Opinion of Advocate General Stix-Hackl, *Omega* (supra note 3), para 49 and footnote 19.

seems to stem from the following remarks in the *Schmidberger* case, in which the Court emphasised that the freedom of expression and freedom of assembly are subject to certain limitations justified by objectives of public interest. In accordance with Art. 10 (2) of the European Convention on Human Rights, the freedom of expression is subject to limitations, which are prescribed by law and necessary in a democratic society to achieve one of the objectives specified in this provision (i.e. public security, morals, health etc.). The last prerequisite means that the existence of a pressing social need has to be proved and that the restriction has to be proportionate to the legitimate aim pursued. The Court referred to a problem of hierarchy of Convention rights by stating that unlike other Convention rights, like the right to life, prohibition of torture and inhuman or degrading treatment which allow no restrictions, freedom of expression and freedom of assembly may be subject to some limitations.[58] The debate about whether there is a hierarchy of Convention rights has already commanded considerable attention in legal scholarship.[59] Anchored within the concept of a margin of appreciation that is left to states signatories to the Convention, which – narrower or wider – justifies a stricter or a less strict scrutiny standard, the debate at issue raises questions as to whether this concept legitimises a theory of a hierarchy between the Convention rights.[60]

Advocate General Jacobs suggested in the *Schmidberger* case that, in scrutinising the justification invoked by the Member States in restricting one of the fundamental freedoms, the Court should follow the same two-step approach as applied with regard to traditional grounds for justification. That is: (1) whether in relying on the particular fundamental right, the Member State is, as a matter of Community law, pursuing a legitimate objective in the public interest capable of justifying a restriction on a fundamental Treaty freedom, and (2) whether the restriction is proportionate to the objective pursued.[61] The Court stressed first that the competent authorities enjoy a wide margin of discretion, but that it is nevertheless necessary to establish whether a restriction placed upon intra-Community trade is proportionate to the legitimate aim pursued – which in this case is the protection of fundamental rights.[62] Having taken into account all the relevant circumstances of the case at hand (most notably that the motorway was to be closed for a relatively short period of time), the national authorities came to the conclusion that the prohibition of the demonstration would have constituted too

58 *Schmidberger* (supra note 2), para 80.
59 Stieglitz (supra note 4), p. 27.
60 *Ibid.*, p. 127.
61 Opinion of Advocate General Jacobs, *Schmidberger* (supra note 2), para 95.
62 *Schmidberger* (supra note 2), para 82.

much of a restriction of the demonstrators' right to free speech and assembly.[63]

5. Restrictions on the free movement of goods

Art. 28 and 29 TEC prohibit, as between Member States, the quantitative restrictions on imports and measures having equivalent effect. The ECJ has granted a broad interpretation to the term 'measures having equivalent effect'. In its most seminal decision on the subject – *Dassonville* – it held that

> "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[64]

Yet, the freedom of movement of goods and the prohibition of restrictions on imports and exports are not absolute and might be subject to exceptions, set out primarily in Art. 30 TEC, which reads as follows:

> "The provisions of Art. 28 and 29 shall not preclude prohibitions or restrictions on 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."

In the landmark decision of *Cassis de Dijon*, the ECJ has developed a list of so-called mandatory requirements with regard to the indistinctly applicable rules (non-discriminatory rules).[65] The list includes such considerations as the protection of consumers or fairness of commercial transactions and is not exhaustive.[66]

The Member States are not, however, granted an absolute autonomy in deciding what considerations might constitute a justification for imposing a restriction upon the free movement. In departing from the rules established in the Treaty, the actions of Member States are subject to scrutiny by the Euro-

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63 For comments see: Krist, Rechtliche Aspekte der Brenner-Blockade – Versammlungsfreiheit contra Freiheit des Warenverkehrs, (1999) Österreichische Juristen-Zeitung, 250.

64 *Procureur du Roi v. Dassonville*, Case 8/74 [1974] ECR 837.

65 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78 [1979] ECR 649.

66 Craig/de Burca (supra note 14), p. 659.

pean Court of Justice. The Court applies the test of proportionality and balances the competing values: the freedom of movement on the one hand and the values invoked by the Member States, which, in their opinion, should take priority over the free movement, on the other.

6. Human rights considerations in applying Community law

With regard to the human rights considerations in applying Community law, three seminal principles established by the European Court of Justice have to be mentioned.

First of all, Member States are precluded from striking down the Community legislation on finding that it violates fundamental human rights as enshrined in the national constitutions. The judgment in the *Internationale Handelsgesellschaft*[67] serves as an example of a conflict between EC law (regulation) and provisions of the German constitution. The case involved the administration of a financial penalty (forfeiture of an export deposit), permitted by the EC Regulation, by the German government against the German exporter. The plaintiff claimed that the regulation in question infringed the principle of proportionality, provided for by the German constitution, and should therefore be nullified. As a rule, due to the superior position of the constitution in the hierarchy of legal acts, any ordinary law in breach of the constitution is invalid. EC law has been incorporated into the German legal system by statutory. The German constitution includes no provision allowing to override the constitutional norm in case of conflict with the Community law. The European Court of Justice emphasised, in the strongest terms, that the legality of the Community provision cannot be judged in the light of national law:

> "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national

67 *Internationale Handelsgesellschaft mbH*, Case 11/70 [1970] ECR 1125.

> constitutional structure."[68]

The German Federal Constitutional Court (*Bundesverfassungsgericht*) stated that:

> "as long as the integration process has not progressed so far that Community law also possesses a catalogue of rights … of settled validity, which is adequate in comparison with a catalogue of fundamental rights contained in the German constitution, the German Federal Constitutional Court would permit German constitutional review of the EC law (Solange I)."[69]

The Court stated that Article 24 of the German constitution, which was the basis for the German accession to the EC, did not permit the violation of fundamental rights. Consequently, as long as no Bill of Rights existed on the Community level, the German Constitutional Court was in a position to control the compatibility of Community law with German fundamental rights.[70]

Later, the German Federal Constitutional Court set aside the Solange I doctrine and in Solange II declared that:

> "a measure of protection of fundamental rights has been established … which, in its conception, substance and manner of implementation, is essentially compatible with the standards established by the German constitution."[71]

The preliminary references from German courts attacking the constitutionality of EC acts have been prohibited "*as long as the EC, and in particular the ECJ, generally ensures an effective protection of fundamental rights.*"[72] The German Constitutional Court departed from its previous position in a notable way. It stated that, due to the sufficient development of the protection of fundamental rights on the Community level, the control of compatibility of EC law with German fundamental rights was no longer necessary. It shall be observed, however, that the position of the German Constitutional Court, although progressive, never reached the unconditional statement of the European Court of Justice that the Community norm cannot be overridden by "*domestic legal provisions, however framed"*[73] and consequently, that the Community law would take precedence over any domestic norm, including "*principles of a*

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68 *Ibid.*, para 3.

69 BVerfGE 37, 271; for the English translation and discussion see: Stone Sweet, in: Slaughter/Stone Sweet/Weiler, The European Court and National Courts. Doctrine and Jurisprudence (1998), p. 318.

70 Frowein, Solange II, 25 (1988) CMLRev., 202.

71 BVerfGE 73, 339 = NJW 1987, 577; for the English translation and discussion see: Stone Sweet (supra note 69), p. 318.

72 Stone Sweet (supra note 69), p. 319.

73 *Internationale Handelsgesellschaft mbH* (supra note 67), para 3.

nationally constitutional structure".[74]

The second principle concerning the role of human rights considerations in the application of the Community law has been established in the *Wachauf* decision. According to the *Wachauf* formula, the Member States are bound by human rights recognised as general principles of Community law when they implement the Community law.[75]

Finally, according to the judgment in the *ERT* case, the Member States are bound by fundamental rights when they are relying on an overriding requirement relating to the public interest or on the grounds for justification stipulated in the Treaty in order to justify a national rule which is likely to obstruct the exercise of a fundamental freedom arising from the Treaty.[76]

7. Fundamental rights as limits to fundamental freedoms

The most conspicuous and prominent element of the judgment in the *Schmidberger* case was the direct application of fundamental rights as distinct exceptions to fundamental freedoms.[77] The Advocate General pleaded for considering human rights as a public policy objective justifying the exception to the free movement of goods. According to his reasoning the Court would have to establish whether, in relying on the particular fundamental rights recognised in Austrian law, Austria was, as a matter of Community law, pursuing a legitimate objective in the public interest capable of justifying a restriction on a fundamental freedom.[78] The Court did not follow the Advocate General's opinion. Instead it recognised the fundamental rights as a distinct ground of justification for imposing restrictions on the fundamental freedom.

The Advocate General admitted that "it might seem excessive and unduly intrusive to question whether a Member State which relies on a particular fundamental right recognised in its national legal order pursues a legitimate public interest objective."[79] Indeed it seems difficult to understand how scrutiny of the justification based on the public policy objective would differ from scrutiny of the independent human right exception.[80] Especially in cases when the

74 *Ibid.*, para 3.
75 *Wachauf v. Germany*, Case 5/88 [1989] ECR 2609.
76 *ERT* (supra note 31).
77 Kadelbach/Petersen, Europäische Grundrechte … (supra note 19), p. 695.
78 Opinion of Advocate General Jacobs, *Schmidberger* (supra note 2), para 95.
79 *Ibid.*, para 96.
80 Avbelj, European Court of Justice and the Question of Value Choices (supra note 27), p. 48.

right relied upon by a Member State is at the same time protected at the Community level (e.g. in *Schmidberger* – freedom of expression). In such cases, it seems, the application of different methods of introducing exceptions to fundamental freedoms would lead to the same conclusion – granting or denying the protection of a particular fundamental right. The balancing of the conflicting interests and the determination of the scope of protection of the rights at issue would remain the key question. The Advocate General admitted that when a Member State seeks to protect fundamental rights recognised in the Community law it necessarily pursues a legitimate objective since the Community cannot prohibit Member States from pursuing objectives which it is itself bound to pursue.[81] He pointed out, however, that there might exist divergences between the human rights catalogues of Member States and that "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."[82] A situation of this kind seems to be rather an exception, especially in the light of the convergence of the standards of protection of human rights on the European continent.

The thesis put forward in this paper is that within the ambit of application of Community law, the actions of Member States are to be scrutinised in the light of Community law, that is for conformity with the Community standards of human rights protection. If the human rights are recognised as a distinct and independent ground of justification for restrictions upon fundamental freedoms, the scrutiny of the justification relied upon by the Member States will be based on the Community standard of human rights protection. This is due to the fact that any derogation from the obligations imposed by the Treaty is to be judged in the light of the Community law itself. Furthermore, the human rights as limits upon fundamental freedoms are a special case and differ from other possible exceptions to the fundamental freedoms specified in the Treaty in that they do not form a ground of exception related specifically to a particular Member State but are a subject of concern to both Member States and the Community.[83]

In the *Omega* case the Court indicated the need to protect human dignity as a public policy objective. The statement was somewhat confusing. At first it was stated that since the protection of human dignity is in conformity with

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81 Opinion of Advocate General Jacobs, *Schmidberger* (supra note 2), para 102.

82 *Ibid*., para 98.

83 Avbelj, European Court of Justice and the Question of Value Choices (supra note 27), p. 49.

Community law it was immaterial that in Germany the principle of respect for human dignity has the status of an independent human right.[84]

The Advocate General explained the difference in reasoning compared to the *Schmidberger* case by the inchoate nature of the concept of human dignity in the Community law, due to which it was

> "impossible for the Court – unlike in the Schmidberger judgment – immediately to equate the substance of the guarantee of human dignity under the German Basis Law with that of the guarantee of human dignity as recognised in the Community law."[85]

A situation of this kind seems to be rather exceptional. The fundamental rights as general principles of Community law derive from the common constitutional traditions of the Member States and draw inspiration from the international human rights treaties on which the Member States collaborated or to which they are signatories. A special significance in this regard has been accorded to the European Convention on Human Rights, which emerged as an effective Europe-wide system of human rights protection, binding and applied also within the Community. Thus, the judge-made development of the Community bill of human rights is symptomatic of a strive towards a convergence and uniformity of standards of protection on the European continent. With regard to the possibility of divergences between the human rights catalogues of the Member States and the Community, the decisive question appears not to be whether a particular right is encompassed by the Community catalogue, but what is the scope of this right, to what extent it allows restrictions in accordance with the Community law.

The *Omega* and *Schmidberger* judgments seem to once again deal with the problem of the authority to ultimately define the standards of protection of human rights. This discussion exposes a struggle between the European Court of Justice and the national constitutional courts as well as the fields of possible conflicts between the national and Community standards of fundamental rights protection. If the restriction on a fundamental Treaty freedom is based on the need to protect fundamental rights as enshrined in the national constitution of a Member State, to what extent can the European Court of Justice reject the national human rights considerations as incompatible with the Community law or to what extent can a Member State invoke the national human rights considerations and through that arbitrarily frustrate the Community law provisions on fundamental freedoms?

In *Omega* the Advocate General put forward the following thesis:

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84 *Omega* (supra note 3), para 34.

85 Opinion of Advocate General Stix-Hackl, *Omega* (supra note 3), para 93.

> "In the present case (…) it remains to be established whether the protection of human dignity required under the German Basic Law should be considered in the context of justification for the public order notice in question or whether the existence of the corresponding guarantee of a fundamental right in Community law makes a decision necessary at Community law level (…).
>
> Because of the inchoate nature of the concept of human dignity, however, it is almost impossible for the Court in this case – unlike in the *Schmidberger* judgment – immediately to equate the substance of the guarantee of human dignity under the German Basic Law with that of the guarantee of human dignity as recognised in Community law."[86]

The *Schmidberger* case is symptomatic of a direct conflict between the freedom of expression and the free movement of goods, whereas in *Omega* the Court resorted to the concept of public policy considerations as justification for imposing restrictions upon the fundamental freedom.[87] It appears that in cases of clashes between fundamental rights and fundamental freedoms, the direct application of the human right in line with the *Schmidberger* judgment (human right as a distinct exception to the free movement provisions), will depend on whether the fundamental right concerned is protected under the Community law alongside the possibility to equate the substance of the guarantees on the national and European level. The conflict at issue will then amount to a conflict between the *Community* fundamental freedoms and the *Community* fundamental rights. In the process of balancing, the Member States enjoy a wide margin of discretion and the European Court of Justice plays a supervisory role in controlling and determining whether a fair balance was struck between the competing interests.[88]

The judgments in *Omega* and *Schmidberger* seem to draw attention to the problem of the national application of the Community human rights law. In situations of conflict between fundamental rights and fundamental freedoms state authorities applying Community law will have to balance the competing interests. In this regard it is of particular importance to better define – on the Community level – the scope of protection of particular rights, that is the scope of restrictions which can be imposed upon these rights. As a matter of Community law, European citizens have to enjoy the same rights throughout Europe. It is therefore not sufficient to say that the citizens of Europe enjoy the right to free expression. The requirement of legal certainty and the uniform application of Community law can be fulfilled only if the framework of the restrictions which are allowed upon the right in question is better defined at the Commun-

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86 *Ibid*., paras 73 and 92.

87 See: *Omega* (supra note 3), para 41.

88 *Schmidberger* (supra note 2), para 81.

ity level. Provided that this general framework has been designed, the Member States may be granted a margin of appreciation in balancing the competing interests. The execution of the discretion is, however, subject to the ECJ's supervision. The Court may therefore define the limits of possible restrictions upon the fundamental Community rights.

Consequently a complex theoretical framework for the protection of fundamental rights has emerged. It differentiates between (1) the national application of the Community fundamental rights, given the margin of appreciation accorded to the Member States in line with the *Schmidberger* formula, and (2) the reliance on the national fundamental rights (as incorporated in the national constitutions), which cannot yet be equated with the Community rights (although the right as such might be protected – in the *Omega* judgment the Court held that the human dignity is protected under Community law), and have to be therefore treated as public policy justifications for the imposition of restrictions on fundamental freedoms, scrutinised, however, for conformity with the Community fundamental rights in line with the *ERT* judgment.

8. Restrictions upon fundamental rights in the EU context

The process of balancing conflicting interests necessitates a recourse to the problem concerning the scope of allowable restrictions on fundamental rights in the EU law context. The thesis put forward in this paper is that the process of balancing conflicting interests has to be anchored in the concept of allowable restrictions, which can be imposed upon the fundamental right at issue. The key question is therefore the scrutiny of the allowable restrictions on fundamental rights. It has been noticed that the ECJ acknowledged almost any allegedly violated human right as protected by the Union's legal order, but hardly ever did it define the actual scope of that right.[89] Definitely the lack of determination of the exact scope of rights is detrimental to their visibility and it would certainly be of much benefit if the scope and the relationship between different human rights were better defined.[90] Commentators explain this situation by referring to the manner in which the ECJ developed fundamental rights, namely – as the French Constitutional Council – through the general principles of law.[91] It has been said that

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89 Von Bogdandy, The European Union …, (supra note 18), 1330.

90 *Ibid*., 1331; see also cited there: Storr, Zur Bonität des Grundrechtsschutzes in der EU, (1998) Der Staat, 547, 554 et seq.; Pauly, Strukturfragen des unionsrechtlichen Grundrechtsschutzes, (1998) EuR, 253 et seq.

91 Von Bogdandy, The European Union …, (supra note 18), 1331; see also cited there:

> “the relationship between different general principles is more difficult to define than the relation between positive provisions of an authoritative text.”[92]

It remains to be seen if the Charter will serve as a convenient tool in concretising fundamental rights and will lead to their more precise handling.[93] Title VII of the Charter contains general clauses which relate to its interpretation and application. Art. II-112 (1) TCE defines the conditions for restrictions on rights and freedoms.[94] According to this provision:

> “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or need to protect the rights and freedoms of others.”

In other words, to pass a scrutiny test a restriction must be:

1. prescribed by law,
2. respect the essence of the right or freedom at issue,[95]
3. necessary but proportionate to genuinely meet
   a) the objectives of general interest recognised by the Union,
   b) the need to protect the rights and freedom of others.

As far as the freedom of expression is concerned, this test greatly resembles the “necessity test” as set out in Art. 10 (2) ECHR.

The need to examine the extent to which fundamental rights allow restrictions has been clearly stated in the *Omega* case by Advocate General Stix-Hackl.[96] The scope of allowable restrictions is connected with the concept of a

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de Witte, The past and future role of the European Court in the protection of human rights, in: Alston (ed.), The EU and Human Rights (1999), 864; Schilling, Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts, (2000) EuGRZ, 24 et seq.

92 Von Bogdandy, The European Union …, (supra note 18), 1331; see also cited there: Besselink, Entrapped by the maximum standard: On fundamental rights, pluralism and subsidiarity in the European Union, 35 (1998) CML Rev., 633.

93 See: Von Bogdandy, The European Union …, (supra note 18), 1331.

94 For criticism see: Triantafyllou, The European Charter of Fundamental Rights and the “Rule of Law”: Restricting Fundamental Rights by Reference, 39 (2002) CML Rev., 53.

95 The prerequisite that the limits imposed on rights must be justified by the overall objective pursued by the Community, on the condition that the substance of these rights is left untouched, has been established by the ECJ. See: *Nold KG v. Commission* (supra note 13), para 14.

96 Opinion of Advocate General Stix-Hackl, *Omega* (supra note 3), para 53.

margin of discretion left to Member States and the scrutiny test applied by the Court with regard to justifications for restriction. There exists a considerable uniformity of view between scholars in criticising the Court for the lack of coherence and visibility in determining the exact scope of fundamental rights.[97] With regard to the *Bosman* case commentators criticised the Court for not even trying to shape the right to freedom of assembly in Community law. As a result the range of limitations also remained vague and the process of balancing was tainted by failure.[98]

As the freedom of expression lies at the core of discussion in this paper, a digression will be made to illustrate differing levels of protection accorded to different forms of speech. In more concrete terms the problem of the scope of protection of commercial speech in the Community legal order will be presented in brief. Different levels of protection resulting from differing tests of scrutiny applied with regard to different forms of expression are symptomatic of the importance of the examination of the extent to which the fundamental rights allow restrictions, which in turn makes it possible to define in a more precise manner the exact scope of the right in question.

The issue of commercial speech was raised on the occasion of the challenge to the legality of the Tobacco Advertising Directive[99]. Germany instituted proceedings seeking the annulment of the Directive. Several possible grounds for annulment have been raised, *inter alia,* the violation of the right to freedom of speech. The question whether a restriction allegedly pursuing public health objectives is proportional under the "necessity test" set out in Art. 10 (2) of the European Convention on Human Rights has been examined. This paper will refer to the reasoning presented by Advocate General Fennelly in this respect. The issue of compatibility of the restriction on advertising and sponsorship of tobacco products with the right to freedom of expression has not been addressed in the Court's judgment, due to the fact that it upheld the challenge on the grounds of lack of proper Treaty basis and annulled the Directive.

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97 Von Bogdandy, The European Union … (supra note 18), 1326; Stieglitz (supra note 4), p. 127; Gramlich, Grundfreiheiten contra Grundrechte ... (supra note 4), 801.

98 Gramlich, Grundfreiheiten contra Grundrechte ... (supra note 4), 804.

99 Directive 98/43/EC of the European Parliament and the Council of 6 July 1998, on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products; *Germany v. Parliament* Case C-376/98 [2000] ECR I-8419; [2000] 3 CMLR 1175.

9. Defining commercial speech and its scope of protection in the Community

Advocate General Fennely defines commercial speech as:

> "the provision of information, expression of ideas or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communication."[100]

A clear statement as to the need for protection of commercial expression follows:

> "Commercial expression should also be protected in Community law. Commercial expression does not contribute in the same way as political, journalistic, literary or artistic expression do (…) to the achievement of social goods. (…) Individuals' freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the Community context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on *any* topic, including the merits of the goods or services which they market or purchase."[101]

Commercial speech is clearly recognised by the Community law.[102] Its protection is based on the general statement that all speech – regardless of form – is protected. However, the freedom of expression is not absolute and may be subject to restrictions so as to achieve certain objectives of relevance for the common good or to secure the rights of others.[103] Thus, the exact scope of protection will be established by reference to the restrictions.

The Advocate General referred to the rules governing the imposition of restrictions on the right to free speech under the European Convention on Human Rights and distinguished between the general rule in this regard and the specific case of commercial expression. As a matter of rule the restrictions imposed on the exercise of the right to free speech have to be justified by presenting evidence of a pressing social need for their imposition.[104] The com-

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100 Opinion of Advocate General Fennelly, Case C-376/98 (supra note 99), para 153.

101 *Ibid.*, para 154.

102 Weatherill, The EU Charter of Fundamental Rights (supra note 28), p. 36.

103 Opinion of Advocate General Fennelly, Case C-376/98 (supra note 99), para 155.

104 *Sunday Times v. United Kingdom*, judgment of 26 April 1979, Series A, No 30, (1979-80) 2 EHRR 245; *Observer and Guardian v. United Kingdom*, judgment of 26 November 1991, Series A, No 216, (1992) 14 EHRR 153, para 70-71 (71. The adjective 'necessary' within the meaning of Article 10(2) of the Convention is not synonymous with 'indispensable' or as flexible as 'reasonable' or 'desirable', but it implies the existence of a pressing social need. 72. The notion of necessity implies that the inter-

mercial expression represents a special case in this regard. The European Court of Human Rights (ECtHR) ruled that the national authorities enjoy a wider margin of appreciation with regard to commercial speech, therefore the restrictions imposed thereupon are subject to a less severe scrutiny test.[105] On this basis Advocate General Fennely submitted that limits upon commercial speech are acceptable where the competent authorities 'on reasonable grounds' had considered the restrictions to be necessary.[106]

In the Tobacco Advertising case the difference in treatment was justified by reference to different functions and interactions with more general public interest. The Advocate General concluded that whereas

> "the political expression serves certain extremely important social interest (…) commercial speech does not normally perform a wider social function of the same significance."[107]

The so-called public debate test has been applied by the ECtHR in determining the level of protection accorded to the speech in a commercial context.[108] The same test has been explicitly applied by the ECJ in the case which gave rise to the preliminary ruling in *Herbert Karner Industrie-Auktionen GmbH and Troostwijk GmbH*[109]. The provisions of Austrian Unfair Competition Law prohibited certain statements in advertising goods for sale. The Court had to establish whether such a regulation, if capable of distorting intra-Community trade, was in conformity with the principle of freedom of expression as guaranteed in Art. 10 ECHR.[110] The Court recognised that Member States enjoy dis-

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ference of which complaint is made corresponds to this pressing social need, that it is proportionate to the legitimate aim pursued and that the reasons given by the national authorities to justify it are relevant and sufficient.); *Barthold v. Germany*, [1985] 7 EHRR 383, para 55.

105 *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* [1989] 12 EHRR 161.

106 Opinion of Advocate General Fennelly, Case C-376/98 (supra note 99), para 158; *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* [1989] 12 EHRR 161, para 37; *Groppera v. Switzerland*, judgment of 28 March 1990, Series A, No 173, para 55.

107 Opinion of Advocate General Fennelly, Case C-376/98 (supra note 99), para 158.

108 *Hertel v. Switzerland* [1998] 28 EHRR 534.

109 *Herbert Karner Industrie-Auktionen GmbH and Troostwijk GmbH*, ECJ Case C-71/02 [2004] 2 CMLR 5.

110 The case concerned Paragraph 30 (1) of the Austrian Law on Unfair Competition. This provision prohibits any public announcements or notices intended for a large circle of persons from making reference to the fact that the goods advertised originate from an insolvent estate when the goods in question, even though that was their origin, no longer form part of the insolvent estate. The provisions of such information is deemed to be capable of attracting consumers, who believe to make purchases at advantageous prices because the company is wound up, not being in the position to

cretion in balancing the competing interests. In this regard, however,

> "[w]hen the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising."[111]

On this ground the Court held that the restrictions imposed by Paragraph 30 (1) Austrian Law on Unfair Competition were reasonable and proportionate in the light of the legitimate objectives pursued, namely consumer protection and fair trading.[112] In the light of this judgment the conclusion may be drawn that the Court seems to differentiate between the exercise of freedom of expression which does or does not contribute to a discussion on matters of public concern. As a consequence a less strict test is applied in scrutinising the restrictions imposed on the exercise of the right to free speech in a commercial context and as a consequence Member States are granted a wider margin of discretion, just as under the ECHR.

The demonstration in the *Schmidberger* case was clearly a political demonstration, calling for a healthy environment and drawing attention to the danger to public health caused by the constant increase in the traffic of heavy vehicles.[113] The Court followed the opinion of the Advocate General and stated that although the environment and public health can constitute a legitimate objective in public interest, capable of justifying a restriction on the fundamental freedom, the specific aims of the demonstration are not in themselves material in legal proceedings, which seek to establish the liability of a Member State for breach of Community law.[114] Such a statement follows from the fact that, in establishing Member State's liability, account can be taken only of the action or omission imputable to that Member State.[115] Thus account should be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or to ban the demonstration in question.[116] Some commentators submit that only discriminatory effects of demonstrations should

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determine whether the sale has been organised by the insolvency administrator or by a party who had acquired the goods from the insolvent estate. *Ibid.*, para 9.

111 *Ibid.*, para 51.

112 *Ibid.*, para 52.

113 *Schmidberger* (supra note 2), para 25.

114 *Schmidberger* (supra note 2), para 66; Opinion of Advocate General, *Schmidberger* (supra note 2), para 54.

115 *Ibid.*, para 67.

116 *Ibid.*, para 68.

be considered (based on the comparison with *Commission v France* above), not the views or intentions of the demonstrators.[117] It remains to be seen, yet it is submitted here, that the form of speech may play a role in balancing the conflicting interests in cases where freedom of expression clashes with free movement. The thesis put forward in this paper is that the process of balancing conflicting interests has to be anchored in the concept of allowable restrictions to a fundamental right. As the Court repeatedly emphasised, the national authorities are accorded a wide margin of discretion. The Court thus plays a supervisory role in determining whether a fair balance has been struck between the competing interests. In the *Schmidberger* case the balance had to be struck between the freedom of expression on the one hand and the freedom of movement of goods on the other, not – as the Court rightly pointed out – between environmental protection, which the demonstrators promoted, and the free movement. A rather vague statement followed that Austrian authorities were inspired by considerations linked to fundamental rights of demonstrators to free expression.[118] This paper claims that the form of speech plays a role in the process of balancing competing interests along the lines of the *Karner*[119] judgement, in which the Court admitted a possibility of further-reaching restrictions in cases of speech which does not contribute to a debate on an issue of great public concern. It seems, however, that the Court in the *Schmidberger* judgment referred to the aims of the demonstrators within the given category of expression, that is political expression. Within this category it is indeed of no relevance whether the demonstrators aimed at drawing public attention to the issues of environmental protection, or whether they expressed their support for a particular political party, or whether they were against the war on Iraq.

10. Conclusions

By incorporating the EU Charter of Fundamental Rights into the Constitutional Treaty the symbolic role and visibility of fundamental rights in the Union's legal system has been raised.[120] Will the Charter thus influence the process of balancing in cases of clashes between fundamental rights and fundamental freedoms? Some commentators emphasise that by granting a fundamental

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117 Agerbeek, Freedom of Expression and Free Movement in the Brenner Corridor: the Schmidberger Case, 29 (2004) EL Rev., 266.

118 *Schmidberger* (supra note 2), para 69.

119 *Karner* (supra note 109).

120 Fossum/Menendez, The Draft Constitutional Treaty. Between Problem-Solving Treaty and Rights-Based Constitution, European Institute of Public Administration, Working Paper 2005/W/04, p. 27.

status to civic, political and social rights; the Charter denied such a status to the four fundamental economic freedoms.[121] As it has been demonstrated in this paper the Court interpreted the exceptions to the fundamental freedoms through a systematic interpretation of the Community law as a whole and according to some authors one might be inclined to think that the Charter reinforces such an approach by means of providing guidance because fundamental rights might be read as a *numerus clausus* of exceptions.[122] According to some opinions

> "the different abstract weighting of fundamental rights versus fundamental freedoms propitiated by the Charter might lead to a different structuring of the weighting and balancing of them in case of conflict, and more specifically, to the shifting of the burden of argumentation in favour of fundamental rights".[123]

The question of an order of rank and degrees of fundamentality can be answered neither in abstract terms nor in an absolute manner. It remains to be seen whether the statement of Advocate General Jacobs that

> "the cases, in which a Member State will invoke the necessity to protect fundamental right to justify a restriction on the fundamental freedom, may become more frequent in the future"[124]

will prove to be true. The Court will then more often be faced with the need to reconcile the requirements of protection of fundamental rights with those arising from the fundamental freedoms enshrined in the Treaty. Given the wide margin of discretion accorded to the Member States, the Court plays a supervisory role in scrutinising whether a fair balance has been struck between the conflicting interests. As some authors put it:

> "It is a common-place for judges to seek to resolve conflicts between "constitutional", "fundamental", or "human rights" (…) by balancing one against the other."[125]

The thesis put forward in this paper is that the process of balancing conflicting interests has to be anchored in the concept of allowable restrictions which can

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121 *Ibid.*, p. 27; see also Menendez, Between Treaty and Constitution: A Deliberative-democratic Critique of the Substantive Content of the Draft Constitution of the European Union, available at <www.arena.uio.no/events/documents/Paper_000.pdf> (last visited 2nd May 2005), p. 31.

122 Fossum/Menendez, The Draft Constitutional Treaty. Between Problem-Solving Treaty and Rights-Based Constitution, European Institute of Public Administration, Working Paper 2005/W/04, p. 28.

123 *Ibid.*, p. 28.

124 *Schmidberger* (supra note 2), para 89.

125 Greer, "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, (2004) *Cambridge Law Journal*, 412.

be imposed on fundamental right at issue. The freedom of expression, despite its undeniable significance in a democratic society, is not absolute. Nor is the free movement of goods. The process of balancing demands a broad inquiry into what is the exact scope of the fundamental right in question. The ECJ repeatedly and overtly ruled that fundamental rights are subject to restrictions. There is considerable uniformity of view in this regard, but more disagreement and hence less certainty with regard to the scope of allowable restrictions. Yet before any process of balancing can begin and any of the interests can tip the balance, the exact scope of the fundamental right has to be determined through recourse to the restrictions which this right allows. The relevance of this thesis is readily apparent in the light of the criticisms levelled at the lack of a coherent approach by the ECJ in determining the range of restrictions which fundamental rights allow.[126] This paper advocates therefore a more wide-ranging inquiry into the exact scope of the fundamental rights guaranteed in the legal order of the European Union.

126 Stieglitz (supra note 4), p. 127.

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