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European Court of Justice and the Question of Value Choices

Fundamental human rights as an exception to the freedom of movement of goods

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Abstract

This paper is divided into three parts. The first part is focused on the analytical assessment of the meaning of value choices, regulatory autonomy and identity in the EU, which is characterized by the complex constitutional relationship between the Member States and supranational polity. I have conducted this analysis on the basis of the jurisprudence of the European Court of Justice (hereinafter Court or ECJ) in the field of freedom of movement of goods which in the most colorful way depicts the problems, tensions and consequences that arise in the judicial balancing between the economic values of the Community and other prevailing values of the Member States.

The second part of the paper is more specifically oriented to the free movement cases in which the Member States purport to justify their violation of Article 28 TEC by invoking the need for protection of fundamental human rights of their citizens. Avoiding completely abstract approach, I have conducted a short case study on the basis of the recently decided case Eugen Schmidberger v. Republik Österreich in which the Court for the first time directly faced the oppositional relationship between the Community fundamental freedom of movement of goods and the fundamental human rights of freedom of expression and association. I have evaluated the approach of the Court in the light of its current human rights jurisprudence and through the prism of various critical theoretical views of this issue.

The purpose of the third part of the paper is to sum up and to conceptualize the relationship between freedom of movement of goods and fundamental human rights. The guiding line of this part is a question whether human rights as a ground of justification differ from the other grounds of justification of the obstacles to the freedom of movement and if they therefore call for a different judicial approach and why.

At the end of my stroll through these three parts I have concluded that there can be no doubt that the Court exercises its human rights jurisprudence within the scope of the Community legal order only according to the genuine Community standard. The saga of high and low standards presented and thoroughly analyzed in the second part of the paper is inherently wrong. Fundamental human rights as an exception (i.e. justification of the obstacles) to the freedom of movement of goods deserve a special and different treatment from the other recognized exceptions. Fundamental human rights are the expression of the core social value choices which differ among the Member States. The Court suffers inherent institutional drawbacks which undermine its legitimacy and which consequently do not allow it to interfere with these core social value choices to any significant degree. The result is a high degree of deference granted to the Member States' authorities in this type of cases. In response to this I have endorsed the approach, being convinced that it could lead to more efficient, legitimate and more favorable outcomes both for the Member States and the Court, according to which the Court should limit its jurisdictional claim and abdicate its review of derogations from free movement of goods for the compliance with human rights, which should be again entrusted to the national courts. The Court should instead pay its full attention to the respect of the paramount principles of non-discrimination and proportionality. Finally, on the basis of the close scrutiny of the values incorporated in the concept of fundamental human rights and in the concept of free movement of goods I have argued that it is necessary, subject to the conditions of the mentioned paramount principles, that the former in principle prevail over the latter.

Introduction *

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European Union has from its conception up till now undergone a significant transformation.¹ In the last five decades it has developed from a system of a predominant economic co-operation between the Member States into a new constitutional polity, simultaneously separated from and at the same time completely dependent on its constituent units (Member States). Following this transformation, and while the integration deepened and widened, economic issues have become more and more pervaded by the fundamental issues leading to the core questions of the European identity, fundamental values, standards of human rights protection on the national and Community level, to the most contentious issue of ever more extended competences of the Community at the expense of the Member States.

Taking a glimpse at the principles and objectives set in the preambles of the Founding Treaties as amended during the years, one can see that a creation of the common market with the guarantee of the four Community fundamental freedoms: freedom of movement of goods, workers, service and capital has remained in the center of the Community's mission. Economic basis has remained the engine of the Community, but it has always been only the engine which should move the Community to the ultimate goal – to the achievement of an ever closer union among the peoples of Europe² - which is often overlooked, but in truth the first objective of the Community, as conceived by its founding fathers.³ European Union is thus nowadays more than a mere economic

¹ For a great analytical presentation of the transformation of Europe and for the reasons and consequences See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991): "*Forty years and more later, the European Community is a transformed polity. It now comprises more than double its original Member States, has a population exceeding 350 million citizens, and constitutes the largest trading bloc in the world*". This effect would be even more enhanced with the enlargement of the EU on May 1st 2004, we could add.

² Preamble to the Consolidated Version of The Treaty Establishing the European Community (2002/C 325/01).

³ See Schuman declaration at http://europa.eu.int/abc/symbols/9-may/decl_en.htm.

integration, it is more than an international agreement on free trade, it is a constitutional polity with a common marketplace and with its own identity and values which are inexact reflection of the values of its constituent units.

The purpose of this paper is to explore the relationship between the two concepts of fundamentals: the relationship between the four Community fundamental freedoms and fundamental human rights as understood, guaranteed and protected in the Community. Presuming that the exceptions to the four fundamental freedoms (concentrating especially on the freedom of movement of goods) pose a question of value choices between economic values of the Community and other prevailing values of the Member States, I would like to explore how the European Court of Justice (hereinafter: Court or ECJ) has approached this question and the problems and tensions that arise in this context. In order to do that, I will first try to analyze and explain the question of values and value-based decisions on the level of EU and in the Member States.

In the second part of the paper I will concentrate on special issues that arise in the cases when the Member States justify their violation of Article 28 of the Treaty⁴ by invoking the need for protection of fundamental human rights of their citizens. I will conduct a short case study on the basis of the recently decided case *Eugen Schmidberger Internationale Transporte Planzüge v. Republik Österreich* (hereinafter *Schmidberger*)⁵ in which the Court for the first time directly faced the oppositional relationship between the fundamental freedom of movement of goods and the fundamental human rights of freedom of expression and association. I will try to assess the approach of the Court in the

⁴ See Treaty of Nice, Article 28, Official Journal of the EU Communities, C325/1: "*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.*"

⁵ Case C-112/00, *Eugen Schmidberger Internationale Transporte Planzüge v. Republik Österreich*, ECR [2003] -000.

light of the Court's current jurisprudence on human rights and through the prism of different critical theoretical views of this issue.

Finally, in the third part of the paper I will try to conceptualize the relationship between freedom of movement of goods and fundamental human rights when they stand in the opposition to each other. The main question of this part will be whether human rights as a ground of justification differ from the other grounds of justification of the obstacles to the free movement of goods and therefore call for a different judicial approach. In the search for an answer, I will focus on the nature of the two fundamentals, based on the assumption that the distinction between the two concepts originates in the values incorporated in the background of the concepts. I will argue that the underlying values of the both concepts have guided the Court in setting the rule, which governs the relationship between the free movement of goods and freedom of expression and assembly.

Part I: Value choices, regulatory autonomy and identity

a) Value choices, regulatory autonomy and identity

What do I mean by words values, value choices and even identity? By these words I would like to describe the decision of a particular society for its system of

organization. Any decision, a decision for a system of social organization of any kind, is a value-based decision because it is a choice between certain values based on the characteristics and on the content of these values. For example, a choice, if it is ever to be made, between a totalitarian system and democracy is a value-based decision since it is made on the basis of the characteristics of the underlying values of both systems. If a decision-maker in the society prefers the rights of the individuals, liberty, equality, human dignity, pluralism of interests and all the other terms which describe the values characteristic of a democratic society, it will make a value based decision for democracy. On the contrary, if it prefers collectivism, dominance of the leading class, dictatorship, terror and hegemony, it will decide for a totalitarian regime with its value characteristics.

Values are usually defined as a measure of worthiness, as a relative status of a thing, or the estimate in which it is held, according to its real or supposed worth, usefulness, or importance.⁶ In the context of the particular society, as presented in the upper example, values describe the principles or standards of a person or society, the personal or social judgments of what is valuable and important in life.⁷ The decision for a particular set of values in the society is usually made by the people, accurately by their representatives in the parliament, and enacted in the form of the constitution which is in the formal sense the supreme legal act, whereas in the substantive terms it embodies a social compact of the society to which it serves.⁸ The decision for a particular set of

⁶ See for example: Oxford English Dictionary.

⁷ *Id.*

⁸ See for example the jurisprudence of the German Constitutional Court which expressly stated that the German Constitution embodies an objective order of values and is thus not a value neutral document (*Lueth Case 7 BVerfGE 198*). This notion of the constitution being a value-based document is not just a German peculiarity but it is spread across Europe and it is present also in the other constitutional democracies. See for example decision of the Constitutional Court of South Africa in *Carmichele v. Minister of Safety and Security 2001 (4) SA 938* where the Court claimed that South African Constitution embodies an objective normative value system, too.

values, once enacted and given a normative force, shapes by the mandatory power of law the entire public and private sphere of the country's social system and thus in a broader sense creates a special identity of the country.

Different countries with different societies have opted for distinct fundamental values and have formed distinct systems of social organization and therefore have different identities. Weiler calls this phenomenon *Fundamental Boundaries* and defines it

"as a metaphor for the principle of enumerated powers or limited competences which are designed to guarantee that in certain areas communities [...] should be free to make their own social choices...."⁹

These *Fundamental Boundaries* are reasonable, legitimate and in principle also uncontroversial and unproblematic at least as long as the countries do not enter in a certain form of political or economic cooperation with the other countries with different identities when, sooner or later, legal and economic transactions between the countries and their citizens lead to the conflict of laws and values (i.e. identity in a broader sense) that these laws protect and are expression of. However, even absent of any political or economic integration or co-operation, which is inconceivable in a would-be globalized world of today, the doctrine of universality of human rights, modern international law and globalization demand that a certain minimum international standard of human rights protection, as a reflection of the respect for human dignity and humanity as such, has to be satisfied by every country and society. This *ius cogens* of human dignity erodes the concept of inviolable self-chosen social identity of every country and shows that the societies are apparently not completely free to choose their system of values. However, the loss of the society's freedom to choose the system of values by forming its identity in

⁹ See J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, in THE EUROPEAN UNION AND HUMAN RIGHTS 51, 52 (N.A. Neuwahl and A. Rosas eds. 1995).

a unilateral and unhampered way is even more enhanced when the societies enter into the system of as intense co-operation as, for example, that of the European Union.

EU can be perhaps best described as an entity "united in its diversity",¹⁰ an entity in which the Member States, twenty five different societies, "while remaining proud of their own national identities and history, determined to transcend their ancient divisions united ever more closely to forge a common destiny".¹¹ EU is a legal, political and economic entity *sui generis*. Member States have limited their sovereign rights (and consequently their Identity), albeit in limited fields, and have created a new legal order of international law which independently of the legislation of the Member States comprises as its subjects not only Member States but also their nationals.¹² European Union can be thus seen as a two-layered creation, as a two-layered polity. The first layer is constituted by its twenty-five Member States, i.e. by twenty-five different societies with their particular social identities based on their diverse value-based decisions. The second layer is the European Union as a special polity with its specific code of values which is at least an expression of the minimum consensus on values of all the Member States. This is nicely reflected in the *Draft Treaty establishing a constitution for Europe (Constitution)* which enumerates the values of the Union in a cohesive and concise way and stresses that the Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights.¹³ In the next paragraph the

¹⁰ See Preamble to the Draft Treaty establishing a Constitution for Europe, CONV 850/03

¹¹ *Id.*

¹² Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, 1963 E.C.R I, [1963] 2 C.M.L.R. 105 (1963).

¹³ See Draft treaty of the Constitution for Europe, Part I, Article 2: Union's Values.

Constitution states that these values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination.¹⁴

Constitution thus sets a very general framework of the fundamental values common to the EU and its Member States. It is unobjectionable and completely rational that the societies which decide to enter in a particular form of economic, political and legal cooperation share some core fundamental values, but it is also clear that these societies (want to) retain their specific values, their identities which differ from one to another. The question is, however, how these differences in the identities of the Member States affect the operation of the EU, and vice versa, how the operation of the EU affects the different identities of the Member States. To make it clearer, the question that I am interested in is: what happens and who is to decide when the issue within the competences of the EU involves a value choice to be made on the EU level against the Member State whose identity and its special code of values sanctioned by the state's legal order conflict with the value code established on the EU level?

The best examples of this question can be seen in the cases on freedom of movement of goods when the Member State violates its duty to remove all quantitative restrictions on imports and all measures having equivalent effect¹⁵ and tries to justify its conduct by one of the exceptions provided by the Article 30 of the Treaty,¹⁶ or by

¹⁴ *Id.* However, for a more thorough and general discussion of the constitutional values in the Community legal order and their relation to the principle of rule of law in EU, *See* MARIA LUISA FERNANDEZ ESTEBAN, *THE RULE OF LAW IN THE EUROPEAN CONSTITUTION*, 38 (Kluwer Law International 1999).

¹⁵ EC Treaty, Article 28.

¹⁶ EC Treaty, Article 30.

invoking one of the mandatory requirements under the judicially created doctrine of rule of reason.¹⁷

b) Freedom of movement of goods, exceptions and justifications in terms of value choices

Freedom of movement of goods translated into value choices can be read as embodying the economic values of unhampered trade between the Member States, or in a wider context: a value of creation of a veritable common marketplace.¹⁸ Due to the mentioned differences in the identities of the Member States, these economic values can not be absolute if there is to be any regulatory autonomy left to the Member States. Regulatory autonomy is in the other words the autonomy reserved for the Member States to make their value-based choices within the scope of their specific identity independently of the outer interference by the EU. The treaty itself left the regulatory autonomy to the Member States in the fields 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; the protection of industrial and commercial property.¹⁹

Due to a very strict formula set by the Court in the *Dassonville* case²⁰ and due to the absence of *de minimis* rule,²¹ which would give more regulatory space to the Member

¹⁷ C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein; sub nom. Cassis de Dijon [1979] E.C.R. 649.

¹⁸ See J.H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in THE EVOLUTION OF EU LAW 353 (Paul P. Craig, Grainne De Burca eds., 1999).

¹⁹ EC Treaty, Article 30.

²⁰ Case 8/74 Procureur du Roi v Dassonville [1974] E.C.R. 837, Par. 5, where ECJ declared all trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually and

States by allowing the non-substantial restrictions on access to the national market to fall outside of the scope of Article 28, this list of exceptions provided by the Treaty soon turned out to be inadequate and the value scale being thus moved too much on the side of the EU economic values at the expense of the regulatory autonomy of the Member States. The Court realized that very soon and in the case *Cassis de Dijon*²² created the doctrine of mandatory requirements,²³ which extended the regulatory autonomy of the Member States into further fields, inter alia: consumer protection, protection of the environment, financial balance of social security system, protection of national culture and others.²⁴

However, even in these fields Member States can not act in a completely unrestrained way. Member States' values within the scope of their remaining regulatory autonomy are weighed against the economic values of unhampered trade in the EU. In other words, Member States' action in pursuance of the desired values, which should take priority over the freedom of movement of goods, are scrutinized by the ECJ to ensure that they are not used as a means of arbitrary discrimination or that they are not in their very conception envisaged as a disguised restriction on trade between the Member States²⁵ and are finally subject to the test of proportionality exercised by the Court.

The test of proportionality is in fact a test of balancing of the competing values of the Member States against the economic values of the Union enshrined in the freedom of movement of goods. For example, the already mentioned case *Cassis de Dijon* is an

potentially, intra-Community trade; as measures having equivalent effect within the meaning of Article 28 and prohibited as such if not justified.

²¹ However, AG Jacobs points out in his opinion in Case C-112/00 *Schmidberger v. Austria* par. 65, that: "[...] the Court [in some cases] has accepted some restrictions may be so uncertain and indirect in their effects as not to be regarded as capable of hindering trade."

²² See *supra* note 17.

²³ *Id.* Par. 8

²⁴ See PETER OLIVER, MALCOLM JARVIS, *FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY* 216 (London Sweet and Maxwell 2003).

²⁵ See EC Treaty, Article 30.

illustration of weighing the value-based decision of the German society enacted in a regulation of marketing of alcoholic beverages to protect consumers and their health by fixing a minimum alcoholic strength for various categories of alcoholic products. However, the French society made a different value-based decision. Namely, to give less weight to the importance of the public health and to take less paternalistic approach to the consumer protection concerning the strength of the sold alcoholic beverages. In practice that meant that a liqueur lawfully marketed in one Member State (France) could not be marketed in Germany since it did not meet the alcoholic strength prescribed by German laws, which amounted to the restriction of trade between the Member States in this particular good. While all the obstacles to the free of movement of goods are prohibited, Germany when sued by the Commission resorted to the exceptions provided in the Treaty to justify its conduct.

The phase of justification before the Court is a phase in which the Court strikes a balance between the competing values and makes the final determination on the Community level. The principles of direct effect and supremacy of European law, as established in the landmark cases *Van Gend en Loos*²⁶ and *Costa v. Enel*,²⁷ entitle the Court to make the last and authoritative value-based judgment within the scope of the Community legal order which is then out of the reach of national authorities. This can be seen problematic for a variety of reasons.

First of all, it is problematic because the unappealing value choice, which imposes constraints on the Member States' identities, is made on the Community level by the Community institution, i.e. by the Court. As Weiler points out, the Court as a

²⁶ See *supra*, note 12.

²⁷ Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425 (1964).

Community institution is thrust to the centre of substantive policy dilemmas and is thus the arbiter of delicate social choices, reconciling trade with competing social policies.²⁸ There is a pervasive critique of the courts as the institutions which lack legitimacy to make value-based decisions, which are according to the prevailing views reserved for the legislature.²⁹ But if the problematic issues associated with the institutional features of the judiciary (having in mind especially constitutional courts which deal with the constitutional issues that involve the questions that go to the core of the social identity), such as the mighty counter-majoritarian problem, the problem of judicial activism, general problem of accountability and legitimacy of the courts, rank as highly contentious and debatable already within the context of a single country, their problematic effect is even more enhanced in the context of the supranational entity *sui generis* such as the EU.

Despite the fact that the ECJ has undertaken a lot of efforts to enhance its legitimacy and the legitimacy of the entire Community law,³⁰ I think that its legitimacy for resolving the delicate issues that interfere with the identity of the Member States is still lower than that of national courts. There is a whole variety of reasons in support of this claim. First of all, ECJ is even more remote from the popular basis, which is the origin of state's legitimacy and identity in a broader sense, as are the constitutional courts

²⁸ See J.H.H. Weiler *supra* note 18, at 363.

²⁹ For divergent views See, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW*, (New York : Free Press ; London : Collier Macmillan, c1990), BRUCE ACKERMAN, *WE THE PEOPLE – FOUNDATIONS*, (Harvard University Press, Cambridge Massachusetts 1991), RONALD DWORKIN, *FREEDOM'S LAW*, (Harvard University Press, Cambridge Massachusetts 1996), JOHN. H. ELY, *DEMOCRACY AND DISTRUST*, (Harvard University Press, Cambridge 1980), FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY*, (Princeton University Press, Princeton 1999).

³⁰ See MIGUEL POIARES MADURO, *WE THE COURT, THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION, A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY 7,12* (Hart Publishing, Oxford – Portland Oregon 1998). The author states four steps towards greater legitimacy: 1. Construction of Community law as the Community's own legal system; 2. "Subjectivation" of the Treaties by interpreting the Community treaties binding not only Member States but also individuals; 3. Cooperation with national courts, especially within the procedure of preliminary rulings; 4. Court's co-ordination of its efforts and strategy with those of the European Commission.

in the particular country. Beside that, national constitutional courts in their decisions address relatively homogenous popular basis within a national state. They address their own national demos with a common national identity. ECJ's decisions on the other hand address a diverse popular basis, constituted of the peoples of Europe with different identities, while the *European demos* (again as a special supranational *sui generis* concept) is still in its developing phase.³¹ This difference in demos also changes and enhances the effect of the traditional judicial activism and counter-majoritarian difficulty on the Union level. However, as Maduro points out, ECJ suffers of judicial activism of a different nature. It suffers of the so called *majoritarian activism* by promoting the rights and policies of the larger European political community, whose will, following the abandonment of the unanimity, usually corresponds to the majority of the Member States, against the autonomous decisions of the particular national polities which find themselves in the minority.³² It is true that ECJ's constitutional activism was not faced with a traditional democratic representative body at the EU level,³³ as opposed to the traditional "national" counter-majoritarian difficulty where the counter-majoritarian tension exists on the axis parliament - constitutional court, but it is questionable whether one could

³¹ For a discussion on a European citizenship and European demos see J.H.H. Weiler, *To be a European Citizen – Eros and Civilization*, Working paper series in European Studies, Special Edition, spring 1998, at 31, 37. Weiler proposes supranational normative concept of European citizenship (as opposed to a statal concept of nationality), relying on the concept of "multiple demoi" which is enabled by decoupling of nationality and citizenship. Citizens of the EU per definition do not share the same nationality but they (have to) constitute a demos – an origin of all legitimacy for the Community's action. European citizens must be regarded as members of the European demos in civic and political terms, rather than ethno-cultural terms which is a characteristic of statal concept of nationality and citizenship. For the arguments along the similar lines See also Kalypso Nicolaidis, *The New Constitution as European Demoi-cracy?*, The Federal Trust online paper 38/03, December 2003. For the opposite view which perceives the debate of demos and demoi as nationalistic See N.W. Barber, *Citizenship, Nationalism and the European Union*, European Law Review, Vol. 27, Sweet and Maxwell Limited and Contributors.

³² See Maduro *supra* note 30, at 11. Maduro, for example, contends by analyzing the Court's case law on the characteristics and marketing of the products that the Court almost always endorses majoritarian approach and strikes down national regulations that are not shared by the majority of the member states.

³³ *Id.*

claim that in this sense ECJ benefited in its search for legitimacy if compared with national constitutional courts.³⁴ I think that there is a strong ground for the argument that the feeling of the imposed value choice and the loss of self-government is even more enhanced when the delicate value-based decisions are made by the supra-national court³⁵ in favor of *the other majority* of the nascent European demos, distinct of national demos, against *the whole* national demos of a particular Member State. The damaging effect of the "supranational" counter-majoritarian difficulty on legitimacy appears to be doubled: the whole "national demos" is turned into minority and the prevailing value-based view - the identity of the majority of the "national demos", is compromised in favor of a distinct European demos. The legitimacy of the ECJ is in this sense apparently more attenuated. All these factors: remoteness of ECJ, the only nascent European demos, who can be the only origin of social legitimacy,³⁶ the institutional characteristics - these value-based decisions are weighed and taken by the Court and not by the European Parliament - when put together additionally and *per se* enhance not only the problem of the ECJ's legitimacy, but the Union's democratic deficit in general.³⁷

³⁴ *Id.*

³⁵ Some authors are even more critical and contend that it is not even for the national courts to undertake the investigation into proper assessment of the competing values, which is done through the test of proportionality, and that the courts should not substitute its own assessment for that of the legislature. See Derrick Wyatt QC, *Freedom of expression in the EU legal order and in EU relations with third countries*, in FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION 212, (Beatson J., Cripps Y., eds), for the critics on the *Familiapress* case, *infra* note 88.

³⁶ See Weiler *supra*, note 31, at 20: "The authority and legitimacy of the majority to compel a minority exists only within political boundaries defined by a demos. Simply put, if there is no demos, there can be no democracy."

³⁷ The democratic deficit is inherently inbuilt into the Union's mode of governance due to the absence of formal and especially social legitimacy. For a more comprehensive discussion of the social and formal legitimacy and EU democratic deficit See Weiler *supra* note 1, at p. 2469: "*Formal legitimacy is legality understood in the sense that democratic institutions and processes created the law on which it is based (in the Community case the Treaties)[...]*" Social legitimacy, "*on the other hand, connotes a broad, empirically determined social acceptance of the system...*" However, some authors, relying on the intergovernmental nature of the EU, concede that there is no democratic deficit in Europe. See, for example, ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSEINA TO MAASTRICHT*, (Ithaca: Cornell University Press, 1998).

However, all these institutional drawbacks of the Court are not the only characteristics that speak against it as an "arbiter of delicate social choices" who puts constraints on the Member States' identities. Not to mention the overloaded docket of the Court, lack of time and consequently less precisely weighed decision, another contentious issue is the issue of competences. The so called doctrine of enumerated powers, as applied in the EU, governs the division of material competences between the Community and Member States³⁸ in a way that the most of material competences are retained by the Member States, while the Union is left with the competences in the limited fields only.³⁹ Nevertheless, for the variety of reasons thoroughly explained elsewhere,⁴⁰ the doctrine of enumerated powers has been gradually eroded (usually by the Court) in favor of the Community. One of the factors which accelerated this erosion was also the Court's jurisprudence under the *Dassonville* line of cases, which constitutionally initiated a massive expansion of the legislative competence of the Community under Article 94 and 95a (ex Articles 100, 100a).⁴¹ Article 95 of the Nice Treaty confers on the Council the legislative power of harmonization. Council is authorized to adopt by the qualified majority the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States, which have as their object the establishment and functioning of the internal market.⁴² Addressing it as a constitutional

³⁸ *Id.* at 2408.

³⁹ However, See Lenaerts, *Constitutionalism and the many faces of Federalism'* (1990) 38 *A. J.Com.L* 205 at 220 who claims that there "[s]imply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community..."

⁴⁰ See Weiler *supra* note 1, at p. 2431, section II. 1973 to the mid 1980's: mutation of jurisdiction and competences. For further and more comprehensive assessment of the problem of competences in the EU and some comparisons with US federal system See the following: E. Young, *Protecting Member State Autonomy in the European Union*, 77 *N.Y.U.L.Rev.* 1612 (2002), G.A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *Colum. L. Rev.* 331.

⁴¹ See Weiler *supra* note 18, at 363.

⁴² See EC Treaty, Article 95, Par. 1.

consequence of the *Dassonville* decision, Weiler explains the outreaching effects of these provisions in combination with Article 28 and 30 in the following terms:

"...when a state measure on its face violates the *Dassonville* formula, the Member State is required to justify it by reference to European law criteria – ex Article 36 (30) or as a mandatory requirement ex *Cassis de Dijon* often before the European Court of Justice. If the measure can not be justified it is inapplicable or must be modified appropriately. Critically, when it is justified and can, thus be upheld, Article 100 (94) or 100a (95) comes into play. [...] Put it differently, the Community legislative competence ex Articles 100 (94) or 100a (95) is triggered each time there is a finding of *prima facie* transgression by a state measure of the *Dassonville* formula, even when, necessarily, the state measure in question is justified. [...]"⁴³

Having said that, the harshness of the *Dassonville* formula and its outreaching eroding effects for the value choices and for the preservation of the Member State's identity are apparent. Namely, whenever the Member State's "opt out" value choice is justified under one of the exceptions to the freedom of movement goods, it immediately triggers community legislative competence under Article 95.⁴⁴ On the other hand, if it is not justified, that means that the Community's economic values of a veritable common market automatically prevail over the competing national values. In any case, it seems that there is no perspective for the preservation of the distinct value choices and identity of the Member States since they are always overridden by the Community's values, imposed either by the Court interpreting and applying the Treaty or subdued to the harmonization within the Council by the qualified majority.⁴⁵ ECJ's decisions, shielded by the principles of supremacy and direct effect of Community law and thus out of the

⁴³ See Weiler *supra*, note 18, at 362.

⁴⁴ *Id.*

⁴⁵ See Miguel Poiars Maduro, *Where to Look for Legitimacy?*, in., CONSTITUTION-MAKING AND DEMOCRATIC LEGITIMACY, ARENA, (Erik Oddvar Eriksen et al. eds. Oslo 2002) at 85. The author cites Burley and Mattli who call this process the substantial penetration of EC law or "*comunitarizzazione*' *di funzione nazionali*" as it is designated by Prof Sabino Casesse.

reach of the Member State's appeal, and the introduction of qualified majority voting seem to foreclose all the exits for the Member State's peculiarities and thus pose the question whether there still remains any field reserved for the Member State, which can escape the harmonization. This question and the fact of the lost "voice",⁴⁶ i.e. absence of veto of the aggrieved Member State in the Council due to the introduced qualified majority voting, entailed enormous pressure on the Court which was forced to repeatedly invent new and new "overriding requirements of a general interest", weighing them against the economic values of the common market. Everyone can imagine that it has been highly risky and unpleasant for the Court, having in mind all its institutional drawbacks, to engage in the delicate value-based judgments going to the core of the Member States' identity, such as those which were, for example, called for in the "*Sunday trading*" line of cases.⁴⁷

The Court, using its self-preservation instinct,⁴⁸ realized that and in *Keck*⁴⁹ split with its *Dassonville* doctrine. The Court held that the Member States are absolutely free to exercise their regulatory autonomy on the basis of their value choices and preferences as long as they do not discriminate against the products originating from the other Member States and as long as the effect of the exercise of regulatory autonomy does not amount to a complete ban of the foreign products or to a greater impediment of their

⁴⁶ For a discussion of the interplay of the concepts of voice and exit *See* Weiler, *supra* note 1, at 2401.

⁴⁷ *See* for example: Case 145/88 *Torfaen Borough Council v B&Q plc* [1989] ECR 3851, Joined cases C-69/93 and C-258/93 *Punto Casa* [1994] ECR I-2363.

⁴⁸ *See* Weiler *supra*, note 18, at 371.

⁴⁹ Joined cases C-267 and 268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097. In the Par. 16, 17 the Court stated a new rule, namely: national provisions applied to the products from other Member States which restrict or prohibit certain selling arrangements but apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, provided that the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products, fall outside the scope of ex-Article 30 (28) of the Treaty.

access to the market in comparison with domestic products. If these conditions are satisfied, the Member State's measures escape the catch of Article 28, if to the contrary, state's measures are not *per se* prohibited, but they fall under the process of justification and potential harmonization, as established by the presented *Dassonville* formula.

Keck formula thus proves advantageous both for the Member State and the Court. The former's regulatory autonomy is preserved and even enhanced since the Court does not need to interfere with the delicate value choices connected with the identity of the particular society whenever Member State's regulation in pursuance of social value choices satisfies the conditions set in *Keck*. This is simultaneously an advantage for the Court since it does not need to put its legitimacy on the test so frequently.

Decision in *Keck* can be thus viewed as a prudent step of the Court,⁵⁰ as a self-imposed doctrine of self-restraint whose result is that some previously hard cases, which went to the core of the Member States' identities such as the mentioned *Sunday trading* line of cases, have become easy cases since they do not any more demand value choices to be taken on the Community level. However, many regulatory measures of the Member States do not satisfy the *Keck* conditions. I call these hard cases because they trigger *Dassonville* doctrine in the most delicate fields, such as protection of health and life of humans,⁵¹ public morality,⁵² mode of production or treatment of goods⁵³ and they force

⁵⁰ For a deeper explanation of the reasons that lead the Court to *Keck* decision, *See Weiler supra* note 18, at 370, 372, who mentions four core reasons: By 1993 the common market has developed to a significant degree and has been internalized by national administrations; The Court exercised its own self-preservation agenda; Courts jurisprudence in the field of human rights protection which put it in de facto appeal instance vis-a-vis national courts and finally; the issue of competences.

⁵¹ *See* for example recently decided, but so far not reported, Case C-416/00 Morellato.

⁵² Case 34/79 Regina v Maurice Donald Henn and John Frederick Ernest Darby [1979] E.C.R. 3795

⁵³ Case C 1/96 The Queen v Minister of Agriculture, Fisheries and Food ex parte Compassion in World Farming Ltd. [1998] ECR I-1251 and Case C-350/97 Wilfried Monsees and Unabhängiger Verwaltungssenat für Kärnten [1999] ECR I-02921.

the Court to interfere even with the internal affairs of the Member State and with the necessity of the use of oppressive apparatus of the state.⁵⁴

To provide one example in illustration: if a Member State decides to ban certain products from the other Member States out of the health concerns, the Court finds itself in the extremely difficult position in which it has to weigh economic values of the common market against the public health concerns. Balancing of this type of values through the test of proportionality, by reviewing whether the Member State could employ less restrictive means to attain the same objectives, always carries an immanent threat that the Court might get it wrong and should therefore face the burden of responsibility for the health of the citizens of the respective Member State. These types of cases are especially hard since it is not only the legitimacy of the Court and the identity of the Member State which are at stake, but also the health and life of the concrete people. Being aware of these problems, the Court would and has given more deference to the Member States in cases where they use the protection of health and life of humans as a ground of justification of the obstacles to the common market.⁵⁵

Another set of hard cases are the cases of the so called fifth generation.⁵⁶ They force the Court to determine whether Member States can prevent import or export of particular products, usually live animals, because of the mode of their treatment, usually cruel, in the importing or exporting state.⁵⁷ The Court has generally been reluctant to

⁵⁴ Case C-265/95 Commission of the European Communities v French Republic [1997] ECR I-06959.

⁵⁵ See *De Peijper* Case 104/75 [1976] E.C.R. 613 where the Court held that "[t]he health and the life of humans rank first among the property of interests protected by Article 30 and it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to insure, and in particular how strict the checks to be carried out are to be." The Court's traditionally cautious approach to matters of public health has been additionally confirmed in recent years by its endorsement of the precautionary principle. See PETER OLIVER, MALCOLM JARVIS *supra* note 24, at 256.

⁵⁶ See Weiler *supra*, note 18, at 373,374.

⁵⁷ See *supra* note 53.

acknowledge such concerns as a legitimate justification for excluding the products.⁵⁸ Nevertheless, these cases can not be dismissed in such a straightforward way, especially if they are read in terms of animal rights. The rights of animals to be treated in a proper and humane way are enshrined into a growing belief of many societies as an important value, which finds its expression even in the constitutions of some countries and thus enjoys constitutional protection. Such an example is the constitution of Republic of Slovenia which provides that protection of animals from cruelty shall be regulated by law.⁵⁹ So, what if Slovenian parliament enacts a statute that would demand a very strong and comprehensive protection of animals from cruelty and would ban the products, for example beef, from the other Member States - this time not out of the health protection reasons, but because of the cruel conditions as defined by Slovenian parliament, in which these animals were bred, transported and slaughtered. The Court would apparently have a difficult job in deciding whether or not Community economic values should prevail over Slovenian value-based and constitutionally grounded decision of animal rights protection. When deciding the issue, the Court would actually need to decide whether Slovenian society is entitled to make a value choice to grant such a high level of protection to animal rights. However, one could oppose that the concept of animal *rights* is not developed to the phase in which it could in an objective sense prevail over the Community fundamental freedom of movement of goods. It could be additionally contended that, as in my hypothetical case Slovenian but as in real cases British⁶⁰ and Austrian societies,⁶¹ in truth these societies have made their value-based choices, but that

⁵⁸ See Weiler *supra*, note 18, at 373,374.

⁵⁹ See Constitution of Republic of Slovenia, Article 72, Par. 4, at: <http://www.us-rs.si/en/>

⁶⁰ See *supra*, note 53.

⁶¹ *Id.*

these value choices represent more or less convictions which are "fashionable" at the present moment and that they must be compromised in order to prevent the whole avalanche of similar issues arising out of the potential fads of the other Member States, which would threaten the existence of the veritable common market to a significant degree. Be it as it may, the fact is that the mode of production or treatment of the product is a highly subjective justification of the obstacle to the freedom of movement of goods, as opposed to the justifications based on the objective characteristics of the product, but it is thus perhaps even more connected to the identity of the societies and as such presents a great, so far unresolved, problem for the Court.⁶²

Of course, these examples can seem a little bit odd and may be even exaggerated, but their purpose is to show that if already the question of animal rights and the standard of their protection presents such a controversy, one could presume that the question of standards of protection of human rights and fundamental freedoms, which can certainly not be labeled as contemporary fashionable fads, raise within the context of the European Union even more serious problems and questions. To see what they are and to provide possible answers I turn now to the case in which fundamental human rights were used as a ground of justification of the obstacle to the free movement of goods.

Part II: Fundamental human rights as an exception to the freedom of movement of goods

I will illustrate the problems and issues that arise when a Member State derogates from the freedom of movement of goods in order to protect a particular fundamental human right enrooted in its constitution by conducting a short study of a recently decided case

⁶² See Weiler *supra*, note 18, at 374.

Schmidberger v. Austria. In this enterprise I will briefly present the current stage of Court's human rights jurisprudence, analyze some theoretical underpinnings of this subject, apply this analysis to the selected case and finally try to critically assess the approach of the Court.

a) Short review of ECJ's jurisprudence on human rights protection in EU

There has certainly been written a lot about the human rights protection in the European Union.⁶³ My aim is not to repeat these issues in any details therefore I will address them only as far as they are directly relevant for the discussion of the selected case.

It is well known that for a variety of reasons the founding treaties of EU did not contain any provisions on human rights protection.⁶⁴ The life of the Community, however, soon showed that the Community, initially perceived as a mere economic entity and understood in plain technical economic terms, was very much able to interfere with the fundamental human rights. However, in the absence of any written Community Bill of Rights the Court initially showed reluctance to scrutinize the actions of the Community institutions for the respect of human rights.⁶⁵

⁶³ For the comprehensive coverage of the human rights policy in EU and the list of other writings on the human rights in EU, See Philip Alston and J.H.H. Weiler, *An 'ever closer union in need of a human rights policy: The European Union and Human Rights*, Harvard Jean Monnet Working Paper 1/99, (especially footnote 8).

⁶⁴ See Wieler J.H.H., *Methods of Protection: Towards a second and third generation of protection*, in HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: METHODS OF PROTECTION, 555, (Antonio Cassese at al. eds., 1991).

⁶⁵ Case 1/58, *Stork & Co. v. High Authority of the European Coal and Steel Community*, [1959] E.C.R 17. In this case ECJ refused to engage in judicial review based on fundamental human rights by claiming that it was required only to ensure that the law is observed in the interpretation and application of the Treaty and of rules laid down for implementation thereof, and that it was normally not required to rule on provisions of national law. There was namely a contention that High Authority by adopting its decision infringed

But soon the protection of human rights became a joined legal and political imperative.⁶⁶ The *supra* mentioned principles of direct effect and supremacy of European law, which vested huge constitutional power in the political organs of the Community, especially in the Court, with their effect to efface the possibility of national legislative or judicial control of Community law would be inconceivable without postulating embedded legal and judicial guarantees on the exercise of such power.⁶⁷ National courts, especially the constitutional courts in the countries with a strong and for a long time established constitutional tradition, such as Italy and Germany,⁶⁸ reacted vigorously to the potential threat that the principles of direct effect and supremacy could present for the fundamental human rights as protected in national constitutions if the Community organs had acted in a completely unrestrained way in the absence of the human rights protection on the Community level.

The Court reacted to these "threatening voices" and changed the course of its jurisprudence. The establishment of the Community principle of human rights protection was achieved in two steps. In the first, less controversial step, the Court decided that Community institutions, when they exercise their powers, are bound to respect the

principles of German constitutional law. It is obvious from the wording of this decision that ECJ understood the protection of human rights to be in exclusive domain of the Member States.

⁶⁶ See Weiler, *supra* note 9, at 56.

⁶⁷ *Id.*, at 57.

⁶⁸ See Case 2 BvG 52/71, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreibe und Futtermittel, [1974] 2 CMLR 540. German *Bundesverfassungsgericht* (Federal Constitutional Court) in this case, better known as *So lange I.* case, reserved for itself the right to determine Community rule which would conflict with a guarantee of basic rights in the German Constitution inapplicable in Germany, as long as the integration process has not progressed so far that the Community law would also embody a catalogue of fundamental rights decided on by a parliament and of settled validity which would be adequate in comparison with the catalogue of fundamental rights contained in German Constitution.

fundamental human rights as recognized on the Community level. The Court in *Nold*⁶⁹ thus announced the famous formula and has thereafter consistently held that:

"Fundamental rights form an integral part of the general principles of law, observance of which [the Court] ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. [...] The European Convention on Human Rights (ECHR) has special significance in that respect."

This formula of protection of human rights on the Community level as the general principles of law has been criticized for its vagueness and opaque weighing and balancing which it entails and thus allows the Court too broad a discretion.⁷⁰ However, the claims of this sort were not so frequent since the Member States were in principle content with the Court's early stage approach, according to which only Community institutions were bound by the general principles formula. But the Court soon made another, for some even surprising and unexpected step,⁷¹ when it decided that human rights recognized as general principles of Community law bind also Member States when they implement Community law. This was in the clearest way expressed in *Wachauf*⁷² where the Court repeated the requirements of general principles formula introduced in *Nold* and *Hauer*⁷³ and concluded:

"Since those requirements [human rights recognized as general principles of Community law] are also binding on Member States when they implement Community rules, the Member States must, as

⁶⁹ Case 4/73, *J. Nold, Kohlen-und Baustoffgrosshandlung v Commission*, 1974 E.C.R. 491, 507, [1974] 2 C.M.L.R. 338, 354 (1974).

⁷⁰ See Leonard F.M. Besselink, *Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union*, 35 CMLRev. 629, 636, (1998).

⁷¹ See PAUL CRAIG, GRAINNE DE BURCA, *EU LAW, TEXT CASES AND MATERIALS*, 337 (Oxford University Press, 3rd ed. 2003).

⁷² Case 5/88, *Wachauf v. Germany*, [1989] ECR 2609.

⁷³ Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

far as possible, apply those rules in accordance with those requirements."

Despite the fact that this was striking enough, the Court in *ERT*⁷⁴ extended the binding effect of general principles formula on the Member States to those cases in which they derogate from Community law requirements by relying on one of the exceptions provided in the Treaty. In a landmark case *ERT* the plaintiff, a municipal information company which could not broadcast its own television programs since the Greek authorities granted exclusive rights to ERT - Greek national radio and television undertaking, claimed that the granted broadcasting monopoly by Greece government infringed its right to freedom of expression, as guaranteed in Article 10 of the ECHR.⁷⁵ The Greek government in the justification resorted to the exception provided in Articles 56 and 66 of the Treaty. The Court responded:

"In particular, where a Member State relies on the combined provision of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by the Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided [...] only if they are compatible with the fundamental rights, the observance of which is ensured by the Court."⁷⁶

This extension of the Court's human rights jurisprudence to the Member States' actions, either when they implement Community law or derogate from its requirements, produced mixed responses in the legal academia and predominantly reluctance on the side of the Member States. This can be easily understood. The member States saw the move as an extension of Community's competences on their expense and as a further step

⁷⁴ Case 260/89, *Elliniki Radiofonia Tileorasi – Anonimi Etairia (ERT-AE) v. Dimotiki Etairia Pliroforissis*, 1991-6 E.C.R. I-2925, [1993] CEC (CCH) 167 (1993).

⁷⁵ *Id.*, Recital 1-2

⁷⁶ *Id.*, at Recital 43.

in erosion of their specific identities and value choices. If the Court was now to determine whether Member States' acts are in compliance with human rights as protected on the Community level, that is as conceived by the Court under the general principles formula, this determination would interfere with the core of the sovereign value choice of the particular state: namely a choice of the relationship between the interests of the individual and the collective interests of the society.⁷⁷

But this was not the view of the Member States only. On the contrary, some academic critique was even more relentless towards the Court. The Court was, for example, blamed that its human rights jurisprudence was not for the sake of human rights, but that it was rather an attempt to extend its jurisdiction into areas previously reserved to Member States' courts and to expand the influence of the Community over the activities of the Member States.⁷⁸ In short, some authors have understood the Court's human rights jurisprudence as a mere manipulative usage of fundamental rights principles and as a means for the triumph of the Community will.⁷⁹

On the other hand, the others deemed Court's jurisprudential moves justified on the basis of the principle of legal consistency.⁸⁰ Weiler, for example, asserts that in the cases in which the Member States implement Community law as the agents of the Community (*Wachauf* line of cases) and thus virtually act as the executive branch of the

⁷⁷ See Weiler, *supra* note 9, at. 52. The author describes this as the concept of Fundamental Boundaries "as a metaphor for the principle of enumerated powers or limited competences which are designed to guarantee that in certain areas communities (rather than individuals) should be free to make their own social choices without interference from above."

⁷⁸ J. Coppel and A. O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 CMLRev. 669, (1992).

⁷⁹ *Id.* at 682, 683.

⁸⁰ See Francis G. Jacobs, *Human Rights in the European Union: the role of the Court of Justice*, 26 E.L.REV. 331, 334 (2001). " [...] it seemed self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator."

Community it would be legally inconsistent with the constant human rights jurisprudence and even arbitrary to subject Community institutions, but not the Member States when they execute substantially identical duties, to judicial scrutiny to assure the compliance with fundamental rights.⁸¹ The same author justifies the result in the *ERT* type of review as wholly consistent with the earlier case law and the policy behind it, namely:

"In construing the various Community law limitations on the Member States' ability to derogate from the Treaty and in administering these limitations in cases that come before it, should the ECJ insist on all these other limitations and yet adopt a "hands off" attitude towards violation of human rights? Is it so revolutionary to insist that when the Member States avail themselves of a Community law created derogation they also respect the fundamental human rights [...]?"⁸²

This justification and explanation of Court's human rights jurisprudence is surely more founded and plausible than the straightforward accusation of the Court with manipulation, but it is not entirely stainless and unproblematic.

Court's jurisprudential approach and its formula of general principles of law derived from the *sources of inspiration*⁸³ is not burdened only by the critique of vagueness and opaqueness, but also by the contention of the imposition of the (potentially lower) Community standards of human rights protection on the Member States. Namely, the Court in *Hauer* and consistently thereafter not only equated the Community standard of human rights protection with the general principles of law formula, but it also claimed that

"[...] the question of possible infringement of fundamental rights by a measure of the Community institutions [which was later, as presented, extended also to the measures of the Member States] can be only judged in *the light of Community law itself*."⁸⁴

⁸¹ See Weiler, *supra* note 9, at 68.

⁸² *Id.* at 70.

⁸³ See CRAIG, DE BURCA, *supra* note 71, at 327.

⁸⁴ See *Hauer* note 73, Recital 14.

This pronouncement provoked a huge debate in legal academia about the propriety of this jurisdictional claim⁸⁵ of the Court and about the substance of the Community standard of human rights protection. In order not to remain on the exclusively abstract level, I will present and evaluate these debates and their arguments in the light of the Court's approach in the case *Schmidberger v. Austria*.⁸⁶

b) Schmidberger v. Austria

Schmidberger case can be used as a perfect case study because of the two main reasons. First, it provides a nice battleground for the theoretical approaches, taken by different authors, about the Community standard of human rights protection to be applied against the Member States when they derogate from the freedom of movement of goods. And second, the case itself brings forth a new issue to the Court's jurisprudence on freedom of movement of goods. In the words of Advocate General (AG) Jacobs:

"This appears to be the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty."⁸⁷

Despite the fact that AG's observation is not entirely correct, a very similar issue has namely already arisen in the *Familiapress* case discussed *infra*,⁸⁸ *Schmidberger* nevertheless differs from the traditional *ERT* type of cases. Indeed, if we once again recall the facts of *ERT*, we can see that in *ERT* the individual relied on the right of freedom of expression against the Member State, while the facts of *Schmidberger* depict

⁸⁵ See Weiler, *supra* note 9, at. 65.

⁸⁶ See *Schmidberger* *supra* note 5.

⁸⁷ *Schmidberger*, at Recital 89.

⁸⁸ Case C-368/95, Vereinigte Familiapress Zeitungsverlags- Und Vertriebs GmbH v Heinrich Bauer Verlag, [1997] ECR I-3689.

a different story. In *Schmidberger* an Austrian environmental protection association gave notice to the competent Austrian authorities in accordance with the applicable Austrian legislation of its intention to hold a demonstration on a stretch of the Brenner motorway adjacent to the Italian border. The competent Austrian authorities granted the permission, allegedly not taking much cognizance of the Community law, which resulted in a complete closure of the motorway for almost thirty hours. The plaintiff Schmidberger, a transport undertaking whose lorries carry goods between his seat in southern Germany and northern Italy using the Brenner motorway, brought a claim against the Republic of Austria for the losses incurred due to the closed transit way. He averred that Austria breached Article 28 of the Treaty by failure on the part of the competent Austrian authorities to ban the demonstration and to intervene to prevent that trunk route from being closed.⁸⁹

Before the Court, which had *inter alia*⁹⁰ to determine whether the described closure of the Brenner motorway amounted to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law, Austrian government asserted in its defense that the restriction on free movement of goods arising from a demonstration is permitted, provided that the obstacle it creates is neither permanent nor serious and that in any case the assessment of the interests involved in this case, i.e. the relationship between freedom of movement of goods and freedoms of expression and

⁸⁹ *Schmidberger*, at Recital 16.

⁹⁰ *Id.* at Recital 47. The second set of questions was related more specifically to the circumstances in which the liability of a Member State may be established in respect of damage caused to the individuals as a result of an infringement of Community law. Because the outcome of the case was contrary to the plaintiff's expectations this issue did not arise at all.

assembly, should lean in favor of the latter since the fundamental rights are inviolable in a democratic society.⁹¹

In short, in *Schmidberger* the Member State relied on the need of protection of freedom of expression and assembly of the individuals (demonstrators) against the individual who relied on a Community fundamental freedom of movement of goods and claimed that the rights of freedom of expression of the other individuals could not prevail over [his rights under]⁹² the fundamental freedom of movement of goods as guaranteed in the Community legal order.

Hence, this case is a straightforward presentation of the conflict between fundamental human rights and Community fundamental freedom and it is therefore an especially hard case because the Court had to weigh the values which are central both to the Community and Member State's legal systems. The Court not only had to ensure, as in *ERT*, that the Member State's derogation from free movement of goods would not cause the latter to be unjustifiably impaired and that the act of derogation itself would not violate the fundamental human rights as recognized in Community law. No, the Court additionally had to determine whether the asserted protection of human rights, itself a derogation, is justified according to the Community standard of human rights protection so that the freedom of movement of goods is not excessively, i.e. unjustifiably impaired.

The stakes were really high. Namely, if we follow Weiler's words according to which *ERT* type of cases are about the application of the Member State's policy and that the purpose of the extension of the Court's human rights jurisprudence to the actions of the Member States is to prevent the violation of core human rights, but to allow beyond

⁹¹ *Id.* at Recital 17.

⁹² What is the nature of the fundamental freedom of movement of goods and whether they indeed confer rights upon the individual will be discussed in Part III *infra*.

that maximum leeway to the national policy - meaning that the Court will not interfere with the content of the policy pursued by the Member States if they do not violate human rights⁹³ - we can see that the Court in *Schmidberger* faced an extremely cumbersome task of deciding precisely where the ceiling of this maximum leeway is. To translate this in the concrete terms of *Schmidberger*: if the content of the policy pursued by the Member State is the protection of human rights, precisely freedom of expression and assembly, the real question faced by the Court is how much freedom of expression and assembly the Member State can still grant to remain in compliance with its duties under the Treaty. Or differently: the Court in *Schmidberger* had to determine whether from the Community perspective, according to the Community standard of human rights protection, the Member State granted a too extensive protection of freedom of expression and assembly to its citizens. If so, the Court would have to decide that Austrian "allocation" of the fundamental values was incompatible with that demanded by the Community. The Court, of course, has not done this. But before we get to that point, we should take a closer look at how the Court and Advocate General structured their opinions.

The Court first had to determine whether the closure of the motorway, which resulted from the acts of the individuals, amounted to an obstacle to the freedom of movement of goods for which Austrian government would be liable. The question whether the Community four fundamental freedoms bind the individuals namely remains open. There are some implications in the case law of ECJ which show that especially the prohibition of discrimination in connection with four fundamental freedoms applies also

⁹³ See *supra* Weiler, note 9, at. 71.

to the individuals.⁹⁴ However perplexing question this is, it loses its importance in *Schmidberger* since the individuals whose conduct (demonstration) hampered the flow of the goods between the Member States were granted an official leave for their constitutionally protected conduct, which was thus committed under the color of Austrian law and therefore constituted a state action. It is thus clear that the responsibility for the closure of the interstate Brenner highway lies solely with the Austrian authorities and the question of the responsibility of the individuals does not arise.⁹⁵

Once finding that the obstacle to the free movement of goods exists and disregarding AG Jacobs' another implicit attempt to introduce *de minimis* rule,⁹⁶ the Court moved to the stage of justification in which it had to determine whether the Austrian defense could be deemed satisfactory and thus a permitted justification. In this part the Court faced a rather tricky question, referred by Austrian court in which the latter was asking whether the Austrian authorities acted lawfully because they granted the permit in

⁹⁴ See OLIVER *supra*, note 24, at 75. For a straightforward opinion that Community law should be interpreted to impose obligations upon private individuals under the free movement of goods principle, See G.R. Milner-Moore, *The Accountability of Private Parties under the Free Movement of Goods Principle*, Harvard Jean Monnet Working Paper No.9/95, <http://www.jeanmonnetprogram.org/papers/95/9509ind.html>

⁹⁵ It would have been different if Austrian authorities had not granted the leave and if the individuals had forcefully blocked the traffic. This case would then have parallels with *Commission v. France*. The Court, however, nevertheless repeated its decision from the latter case in which it held that Articles 28 and 29 of the Treaty require not only the Member States to refrain from adopting measures or engaging in a conduct liable to constitute an obstacle to trade but also, when read with Article 10 of the Treaty, to take all necessary and appropriate measures to ensure that fundamental freedom is respected on their territories. But according to my opinion, the resort to this case was not necessary, since in *Schmidberger* it was clear that individuals, i.e. the demonstrators, received an official permit from Austrian authorities and were thus acting under the color of the Member State's law.

⁹⁶ The Court once again, as in the previous case C-412/93 *Societe d'importation Edouard Leclerc-Siplec* [1995] ECR I-0179 where AG proposed *de minimis* rule to be introduced into Court's jurisprudence on the freedom of movement of goods, simply overlooked AG's proposal. However, according to AG's proposal in *Schmidberger* two questions have to be asked: whether the effects of the blockage in issue were of a significant magnitude to trigger the applicability of the prohibition in the Treaty and whether the blockage in issue is attributable to the Austrian authorities. (AG's Opinion in *Schmidberger*, Recital 64). AG noted that it is generally said that there is no *de minimis* rule in relation to Article 28 EC, but he insisted that the Court in some of the cases has accepted that some restrictions may be so uncertain and indirect in their effects that they can not be regarded as capable of hindering trade. However, he concluded that if *de minimis* rule exists, a blockage such as this in *Schmidberger* constituted in his view an obstacle to the free movement of goods too substantial to fall within the rule. (AG's Opinion in *Schmidberger*, Recital 65, 67).

conviction that the objective of the demonstration was paramount to the Community freedom of movement of goods.⁹⁷ The objective of the demonstration was *to express* environmental concerns and to urge the national authorities to limit heavy traffic on the Brenner motorway and thus strengthen the environmental protection in order to avoid dangers to public health.⁹⁸ The question as originally put invited the Court to pronounce whether the fundamental rights of freedom of expression and assembly exercised by the demonstrators prevail over Community fundamental freedom of movement of goods because of the importance of the specific content of the opinion expressed and shared by demonstrators. The Court was in fact asked to scrutinize the expression (speech) of demonstrators on the basis of its content. AG Jacobs understood the trap immediately and responded that the objective of the demonstration is immaterial and thus of no concern of Community law and ECJ. It is the Member State which is liable for the execution of Article 28, thus it is only the objective pursued by the Member State, which allowed the conduct of the individuals that led to the obstacles of free movement of goods, which is important. Thus, AG refused to answer the question as it was put by the national court, but he stated in the same voice that the protection of constitutional rights of the individuals could provide reliable grounds for justification.⁹⁹

⁹⁷ See *Schmidberger*, Recital 25. However, this question might be seen also in a different light and not as a trap set by the national court. The Austrian court was probably unsure whether the ECJ will be prepared to recognize fundamental human rights protection as an independent ground of justification. Therefore, it is very plausible that by putting the question in this way the Austrian court wanted to bring the case within the two exceptions, namely public health and environmental protection already recognized by the Treaty and the Court's jurisprudence.

⁹⁸ See *Schmidberger*, Opinion of the AG Jacobs, Recital 7.

⁹⁹ *Id.* at Recitals 53-55.

The Court prudently followed AG's approach,¹⁰⁰ but later on in the judgment when it tried to delimit this case from the case *Commission v. France*, which was relied on by the plaintiff Schmidberger, contradicted itself using the following words:

"[It] is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission v France*, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic [...]."¹⁰¹

This digression of the Court can be either understood as a mere inconsistency in the judgment or as an implication that the purpose, i.e. the expressed content of the demonstration, could nevertheless change the outcome of the balance between freedom of expression and freedom of movement of goods. While the first option undermines the Court's legitimacy and persuasiveness by showing weakness in its legal methodology, the second could be even incompatible with the doctrine of free speech, which in principle holds that public authorities may not interfere with a free speech solely because they dislike or oppose its content, i.e. the message conveyed. The latter is especially so if the Court is saying that demonstration for some purpose can be allowed, but not for the other.

Be it as it may, the Court in the next steps had to determine whether the principle of free movement of goods guaranteed by the Treaty prevails over the invoked fundamental rights guaranteed by the ECHR and the Austrian Constitution¹⁰² Here we

¹⁰⁰ See *Schmidberger*, Recital 68: "In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorize or not to ban the demonstration in question."

¹⁰¹ See *Schmidberger*, Recital 86.

¹⁰² *Id.* Recital 69, 70.

enter the foresaid battleground of the theoretical approaches to the standard of human rights protection that the Court should apply when it reviews the Member State's derogation from the Treaty's fundamental freedom for the compliance with the human rights protection. Before turning to the final resolution of the *Schmidberger* case, I will present and analyze the mentioned theoretical approaches and try to determine which, if any, was followed by the Court.

c) Theoretical approaches to the standards of human rights protection and their application to the Schmidberger case

1. Introduction and jurisdictional claim as a procedural solution

There are split views in theory and in legal academia about the Community standard of fundamental human rights protection. It is disputed whether the Court should adopt the highest, lowest or whatsoever special standard of human rights protection on the Community level. In short, in the remaining of the second part of this paper I will deal with the so called saga of the high-low standard conundrum.¹⁰³

The proponents of the highest standard approach contend that the Court, whenever it scrutinizes the acts of Community institutions or the acts of the Member States for the compliance with the fundamental human rights, should opt on the Community level for the highest standard which would provide the individual with the greatest human rights protection that is guaranteed by any of the Member States.¹⁰⁴

Weiler, on the other hand, thinks that the debate is from its very conception structured in a wrong way and that it is not possible to lead the conversation in terms of high and low standards.¹⁰⁵ His opinion is based on his understanding of the concept of fundamental human rights as a balance struck by a particular society between the competing values of collectivity, represented by governmental authority, and the interests of the individual in his autonomy and liberty.¹⁰⁶ Every society strikes its balance between

¹⁰³ See Weiler, *supra* note 9, at 56.

¹⁰⁴ See Besselink, *supra* note 70, at 632.

¹⁰⁵ For a similar line of arguments opposing the maximalist approach advocated by Besselink See Armin von Bogdandy, *The European Union as a Human Rights Organization?*, 37 CML Rev., 1307, at 1322-1323; and Bruno de Witte, *The Role of the ECJ in the Protection of Human Rights*, in THE EU AND HUMAN RIGHTS (Philip Alston ed.), at 881.

¹⁰⁶ See Weiler, *supra* note 9, at 55.

the collective and individual interests in a different way due to its own self-understanding of the prevailing values. European Union is a community constituted of many different societies. The adoption of the highest standard of human rights protection guaranteed by any of the Member States as a Community standard would lead to the imposition of the balance between the fundamental values of the particular Member State to the Community as a whole.¹⁰⁷ Additionally, to adopt such an approach it would mean to impose on every Member State excessively individualistic standard as a Community standard. This would not only mean that the Member States would be deprived of their own fundamental social value choices, but it would also very likely hamper the Community governance since the balance on the public and general interest would be always struck in the most restrictive way.¹⁰⁸ This, according to Weiler's opinion, makes the Member States' highest standard as a Community standard unworkable and eventually even impossible.¹⁰⁹

Besselink, who is one of the proponents of the highest standard, on the contrary argues that "maximum standard trap", as he calls it, can not be avoided and he claims that "better standard" must prevail. Thus, according to this author, the only question is what form this standard should take: that of adopting the maximum standard on the Community level, or should the protection of fundamental rights be left to each Member State?¹¹⁰

Before going into details of the proposed Besselink's concepts, it has to be understood why these two authors adopt diametrically opposite stands. I think that the

¹⁰⁷ *Id.* at 61.

¹⁰⁸ *Id.* at 61.

¹⁰⁹ *Id.* at 58.

¹¹⁰ *See* Besselink, *supra* note 70, at 632.

main reason lies in the authors' different understanding of the concept of fundamental human rights. Alexy describes the nature of the fundamental human rights, which enjoy constitutional protection, as fundamental in a formal and substantive way. They are formally fundamental because they are located at the top of the legal system as law directly binding on the legislature, executive and judiciary; and they are substantively fundamental because they incorporate decisions about the basic normative structure of state and society.¹¹¹ The difference between the concepts of fundamental human rights, as advocated by Weiler and Besselink, according to my opinion stems from a different emphasis on the nature of fundamental human rights. Whilst, as we have seen, Weiler apprehends fundamental human rights as a reflection of the fundamental value choices of a particular society which logically presupposes their differences among the societies,¹¹² Besselink applies a sort of absolute concept of fundamental rights, albeit undefined, but certainly not conditioned on the social value-based choices. For Besselink talking about the fundamental rights in terms of values would mean that fundamental rights lose everything that distinguishes them from the other principles and that this transfiguration, as he calls it, would even divest the western constitutional tradition of the very legal nature of constitutions and of the rights granted therein.¹¹³ Having said that, it can be concluded that while Weiler concentrates on the substantive nature (content-value-based approach) of the fundamental rights Besselink focuses on their formal nature. According to Besselink's formalist (almost positivist) reasoning, fundamental rights are fundamental because they are hierarchically supreme rules. If they were inferior, they could hardly be

¹¹¹ See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 349, 350 (Julian Rivers trans., Oxford University Press 2002).

¹¹² See Weiler, *supra* note 9, at. 51-61.

¹¹³ See Besselink, *supra* note 70, at 668.

called fundamental,¹¹⁴ which implies that they are not fundamental because they would reflect fundamental values-based choices of the particular society or community.¹¹⁵

Understanding fundamental rights in that way, Besselink further argues that the Court's current formula of protection of human rights as the general principles of law common to the constitutional traditions of the Member States necessarily means that only the right which is found as a fundamental right in all constitutional traditions of the Member States is common to all those traditions and as such recognized and protected on the Community level. If a particular fundamental right is not found in all the Member States, it will not be encompassed by the general principles formula, which means that the Community standard of human rights protection, which is due to the primacy of the Community law - and that makes the case even more problematic - also exclusive standard, is merely a common minimum standard.¹¹⁶ Besselink therefore offers two alternative concepts - both based on the highest standard - as a solution to this conundrum.

The first is the so called universalized maximum standard. This standard would be achieved by gathering of all the fundamental rights protected in the Member States and by choosing those which guarantee to the individuals the maximum protection. This would eventually result in the adoption of the substantive maximum standard approach at

¹¹⁴ *Id.* at 669.

¹¹⁵ There could, however, be envisaged an alternative explanation of the division of the opinions between the authors. Their opposing opinions could be due to their different perception of the conception of right as such. Besselink's absolutist approach to the fundamental rights corresponds to the conception which gives the rights priority over the competing principles and interests (rights as trumps, or rights as shields), while Weiler's is closer to the Alexy's conception of rights as principles which equates the rights with principles and thus does not prioritize them. For more on the conceptions of constitutional rights *See* Mathias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice – A Review essay on Robert Alexy, A theory of Constitutional rights [OUP 2002]*, forthcoming ICON 2004.

¹¹⁶ *See* Besselink, *supra* note 70, at 664.

the Community level as a matter of judicial policy.¹¹⁷ The major advantage of this standard should be simultaneous co-existence of the primacy and uniformity of Community law and maximum protection of all the fundamental human rights. However, the major disadvantage of this approach is its underlying formalist or positivist understanding of the fundamental human rights. This approach is theoretically unfounded since it runs contrary to the theory of comparative law which teaches us that legal concepts, such as fundamental rights, can not be merely taken from their social, historical and legal context to be mechanically transplanted into another context.¹¹⁸ We have to be aware that certain fundamental right can play a much different role in the environment of a single Member State than in the environment of the entire EU. Besselink in his positivist approach thus overlooks the fact that different social and legal environments entail different assessment of the competing values and interests and that therefore a simple collection of the most protected rights in the Member States and their transposition to the Community as a Community standard is simply not feasible. It is thus of no wonder that the Court of First Instance in the recent case *Mannesmannröhren-Werke*,¹¹⁹ in relation to the right to remain silent in the context of competition proceedings, dismissed the "universal maximum standard" approach:

"[I]n the field of competition law, the national laws of the Member States do not, in general, recognize a right not to incriminate oneself. *It is, therefore, immaterial to the result of the present case whether or not, as the applicant claims, there is such a principle in German law.* [...]" (emphasis added).¹²⁰

¹¹⁷ *Id.* at 671.

¹¹⁸ See *The Special Hazards of Comparative Law*, in SCHLESINGER, et al, *COMPARATIVE LAW*, 973, (Foundation Press, 6th ed, 1998).

¹¹⁹ T-112/98, *Mannesmannröhren-Werke v. Commission* [2001] ECR II – 729

¹²⁰ See CRAIG, DE BURCA, *supra* note 71, at 328.

In this light is the second Besselink's proposal – the local maximum standard - even less realistic. This approach could be based either on the division of labor between the Court and national courts or on the general principle of subsidiarity applied to the field of human rights. Practical consequences of this approach would be that whenever national legal order would provide for a better human rights protection under higher national standard the Court would have to leave judicial protection under this higher national standard to the national courts. As the author himself confesses,¹²¹ this approach does not solve the problem of divergent standards of human rights protection and, and this is of crucial importance, it runs contrary to the core principles of Community law: supremacy and direct effect whose preservation was the main reason for the Court's original establishment of the human rights protection on the Community level.¹²²

The failures of Besselink's proposals thus more or less prove Weiler's conviction that human rights discourse on the Community level in any case can not be structured in the high-low standard terms. The Court's purpose is also not the achievement of some sort of mathematical average as a Community standard of human rights protection. The nature of the message the Court is sending through its human rights jurisprudence to the national courts is in fact jurisdictional.¹²³ For example, as we have seen *supra*, in *Hauer* the Court decided that a question of possible infringement of fundamental rights which fall within the scope of Community law can be judged only in *the light of Community law itself*.¹²⁴ Weiler understands and supports this pronouncement as an inevitable and justified

¹²¹ See Besselink, *supra* note 70, at 677-679.

¹²² The Court had to react in order to ensure that substantive unity and efficacy of Community law are not damaged, Common market not destroyed and cohesion of the Community not jeopardized. See *Hauer supra* note 73, Recital 14.

¹²³ See Weiler, *supra* note 9, at 65.

¹²⁴ See *Hauer, supra* note 73, Recital 14.

jurisdictional claim.¹²⁵ Justified because the Court, given its position in the Community, is [the only one] able meaningfully to assess the claims of the general interest and proportionality in the Community as a whole;¹²⁶ and inevitable because only so the unity and coherence of the Community law can be preserved. However, the understanding of the Court's approach in this way produces only procedural and thus partial solution to the problem. Weiler admits that when he correctly concludes that the whole conundrum is not about high and low standards, but about the definition of the Community's own fundamental balances, its own core values.¹²⁷ He thus points at the substantive solution - to the substance of the Community standard which is "about the definition of the Community's own fundamental balances - its own core values", but he does not elaborate this further. I will try to do exactly that, but before I get there I think it is necessary to say some more words about the procedural solution which is, as we have seen, quite persuasively justified, but still subject to some criticism and alternative proposals.

Whilst it is true that principles of supremacy and direct effect dictate the jurisdictional role the Court has assumed, there still hangs a shadow of a doubt whether the Court's involvement into the field of human rights protection indeed needs to be so expansive.¹²⁸ Of course, it is not revolutionary to insist that when the Member States avail themselves of a Community law created derogation that they also respect the

¹²⁵ See Weiler, *supra* note 9, at 65.

¹²⁶ *Id.* at 66.

¹²⁷ *Id.* at 66.

¹²⁸ See Siofra O'Leary, *Aspects of the relationship between community law and national law*, in THE EUROPEAN UNION AND HUMAN RIGHTS 23, 37 (N.A. Neuwahl and A. Rosas eds., 1995). The author argues that one of the fields which should remain reserved to the Member States is the constitutional protection of the rights and principles construed as fundamental by a given community.

fundamental human rights.¹²⁹ But is it really necessary that a review should be done *by the European Court of Justice*?

In order to answer this question, I think it is appropriate to analyze AG Jacob's test for the *ERT* type of cases, which he proposed after the Court had laid down its decision in the *supra* mentioned *Familiapress* case. In that case the Court had to determine whether the interest in maintaining press diversity, encompassed in the right of freedom of press, justifies the obstacle to the freedom of movement of goods and the encroachment upon the freedom of press of the publishers of the prohibited publications.¹³⁰ Commenting on this case, AG Jacobs confirmed the established rule that a restriction on the freedom of movement of goods must be assessed from the Community perspective. However, he added that a potential existence of the infringement of freedom of press, once the infringement of freedom of movement of goods is found by the Court to be justified, is no more a matter of Community law, but solely a matter for the national law and possibly for the European Court of Human Rights (ECHR).¹³¹

AG Jacobs seems to be proposing a very different test in comparison to that introduced in *ERT* where the Court, and this is worth of repeating, clearly held:

"[T]he national rules in question can fall under the exceptions provided [...] only if they are compatible with the fundamental rights, the observance of which is ensured by the Court."¹³²

¹²⁹ See Weiler, *supra* note 9, at 68.

¹³⁰ See *Familiapress supra*, note 88. In that case Austrian authorities prohibited selling of the publications which offered the chance to take part in prize games competitions by invoking the need of preservation of the press diversity.

¹³¹ See Jacobs, *supra* note 80, at.336. "As it seems to me, the position is as follows: if a Member State seeks to justify a restriction in the interest of human rights – e.g. to preserve the plurality of the press – then that is to be examined as part of the public policy derogation under the Treaty. Once the question has been answered, there is no further question of Community law. If the restriction proves to be permissible under Community law, then it must still be applied with respect for human rights. But that is no longer, at that stage, a question of Community law."

¹³² See *ERT*, at Recital 43.

Under *ERT* doctrine the review for the compliance with the protection of human rights is indispensable for the justification of the obstacle to the free movement of goods and it has to be done by the Court according to the Community standard. The test proposed by AG Jacobs introduces a new division of competences between the Court and national courts. Following AG's test, the Court would determine whether the obstacle is justified without scrutinizing it for possible infringement of human rights. This would be the job of the national court, once the Court would determine that the obstacle is justified. In case if the Court determines that the obstacle is not justified, the question of compliance with human rights protection does not even arise. AG Jacobs would thus narrow the jurisdictional scope of formula of general principles of law in cases in which the Member States derogate from Community law (*ERT* type of cases) by excluding the review for compliance with human rights from the Community domain and would subject the Member States only to the obligation to respect the principles which are the most relevant and exigent for the existence of the Community legal order. These are the principle of prohibition of discrimination on the grounds of nationality and the principle of proportionality.¹³³ This approach, if adopted, would thus cause a significant narrowing of the Court's jurisdictional claim by returning the care for human rights protection in *ERT* type of cases again in the hands of the national courts.

What turns out, however, is that this limitation of ECJ's jurisdiction brings about more correlated positive effects both for the Member States and the Community legal order. The first effect is the elimination of the conundrum of high-low standards in the *ERT* type of cases by simply transferring the duty of review of human rights protection from the Court into the hands of national courts and subjecting them to national law,

¹³³ See Jacobs, *supra* note 80, at 337, 338.

leaving thus national value choices intact. Secondly, national courts are under this model assigned a special controlling role which *per se*, under some conditions, always works in favor of the Community objectives. Namely, when the Court on the Community level decides that the measure of the Member State which constitutes the obstacle to the free movement of goods is justified, national courts can still scrutinize this measure for the compliance with human rights protection, despite its justification in the light of the Community objectives. If the national court decides that the national measure, which encroaches on the freedom of movement of goods but in a justified way, unjustifiably impairs a particular human right, then the court can strike the measure down. This would produce two positive effects: the violated human right would be preserved and Community's fundamental freedom of movement of goods would be free of the otherwise justified obstacle. It seems that AG's test would at the same time promote fundamental objectives of the Member States and of the Community: human rights protection and the common market, and it would simultaneously preserve the core Community constitutional principles of direct effect and supremacy which ensure the uniformity and coherence of the EU legal order.

The prerequisite for the success of the AG's model is a trust in the national courts that they would really ensure an appropriate human rights protection since the Court's jurisdiction would be limited and review for the compliance with human rights would be abandoned in the nowadays *ERT* type of cases. The real chance that national courts would engage in a substantial human rights violation is, however, very small, yet it is true that the loss of the supranational judicial instance can be seen as a disadvantage, which is

again not so big due to the possible resort of the aggrieved to the European Court of Human Rights.

AG's proposal would, however, offer only partial solution to the conundrum of low and high standards of human rights protection. His test applies solely to the *ERT* type of cases, while the measures of the Member States in the cases in which they implement Community law would still fall within the Court's jurisdiction and would be subject to the Community standard of human rights protection whose content is still undefined. Additionally, AG's proposal has not been accepted, yet, by the Court and even AG himself, as it seems in *Schmidberger infra*, has not insisted on it. One further possible reason for the relatively tiny chances of the success of this model is that it would entail a significant break in the Court's jurisprudence. It is well known how reluctant the courts are in general to recognize their "mistakes" and to change the course of their jurisprudence. In the case of the European Court of Justice this reluctance is additionally enhanced by its specific characteristic of being a supranational court and by its peculiar judicial mentality.¹³⁴ However, the *Keck* example shows that development in this direction is not completely impossible, especially if the Court would in the future face more and more cases in which it would have to strike a difficult balance between the four fundamental freedoms and the human rights protection, what in fact AG's prediction in *Schmidberger* is.¹³⁵

¹³⁴ For example, one characteristic of the ECJ is that it never overrules its precedents openly and explicitly. Instead it tries to show its jurisprudence as an uninterrupted continuity. Clear example of this approach is the Court's decision in *Keck* case *supra* note 49 in which the Court effectively departed from its *Dassonville* doctrine but it did not state that *Dassonville* has been changed or overruled, rather it considered "*necessary to re-examine and clarify its case-law on this matter.*"

¹³⁵ See *Schmidberger*, Opinion of AG Jacobs, Recital 89.

At this stage it is appropriate to sum up the result of the analysis of the presented theoretical justifications and objections towards the Court's general principles of law formula and to the question of high and low standards of human rights protection that it purportedly entails. There seems to be at least a minimum consensus, leaving AG Jacobs' proposal a side for a moment, about the procedural grounds of the Community standard. The current jurisprudence of the Court confirms that the latter sees itself as being the only one entitled to decide on the human rights protection in the Community and that it claims quite broad a jurisdiction also over the acts of the Member States. The next and more controversial issue is the question of the Community standard itself. As we have seen, the Court has refused the high-low minimum standard approach whose inoperability and unattainability has been argued very powerfully. It follows from this, logically grounded in the procedural jurisdictional claim, that the only possible and workable standard within the scope of the Community legal order is a *genuine Community standard of human rights protection*, severed and distinct from the standard applied in any of the Member States.

2. Substance of the Community standard

Having resolved these procedural stands, we have to turn next to the substance of the genuine Community standard itself. Its substance has to reflect the Community's own fundamental balances, struck between the Community's own core values.¹³⁶ This immediately raises another two sets of questions that need to be addressed for the final determination of the substance of the Community standard. First, it has to be discerned which the values of the Community are, and second how to strike a balance between

¹³⁶ See Weiler, *supra* note 9, at 66.

those values. A balance struck between the Community values is in the other words the Community standard that we are looking for. We turn now to the first question, leaving the second to be discussed in the last part of this paper.

It is certainly true that the values of the Community must to a greater or lesser degree coincide with the values of its constituent units, i.e. with the values of the Member States. They should be an expression of the *mélange* of many Member States and peoples,¹³⁷ but not a simple mathematical average of the Member States' values.¹³⁸ There are according to my view two possible ways for the determination of the Community values which should form the substance of the Community human rights protection standard.

One option is the judicial ascertainment and determination of values; another is the legislative confirmation and enactment of values into the specific treaty provisions. The first option is the one we have described *supra* and which it has been in fact practiced by the Court under the designation of the so called general principles formula. The problems, especially due to the inexistence of sufficient or indeed any written legal basis which is necessary in the nowadays understanding of the role of the courts under the rule of law and *Rechtsstaat* principle, that arise out of this approach have also been thoroughly presented in the analysis of the different theoretical approaches. Thus, we should turn now to the second option to see whether it provides a satisfactory response to the presented challenge.

Second option predicts that Community values should be determined and specified in a special document enacted by the political body of the widest representation

¹³⁷ *Id.*

¹³⁸ *Id.*, at 65.

and legitimacy, i.e. by the Community legislature which consists of the Council and the European Parliament.¹³⁹ This option has so far not been used in a significant way due to the fact that the long term decisions, which might be called even constitutional decisions – and a determination of the Community values certainly is a constitutional step, have been usually taken in the forum of the intergovernmental conferences consisting of the heads and other representatives of the Member States. This forum, which has recently been supplemented by the so called European Convention - a forum which attracts even a wider range of EU interests, can be seen as the most appropriate for laying down the desired Community value code. Unlike the Court this forum does not lack legitimacy, and it certainly can provide the most comprehensive expression of the values common to the Member States, which are then by the consensus of the latter transferred and transformed into the Community values and form the envisaged Community value code.

I think that a type of a comprehensive Community value code can be currently found in the form of the Draft Treaty establishing the Constitution for Europe¹⁴⁰ and especially in the Charter of Fundamental Rights¹⁴¹ which forms the Constitution's integral part. The Charter, which encompasses a really broad set of rights derived from various

¹³⁹ It is nowadays almost forgotten that EU Parliament already in April 1989 introduced the so called Declaration of the Fundamental Rights which marked a first move from the purely judge-made protection of human rights. However, the Declaration has never gained a real bite and it took another 10 years to the creation of the Charter. For more details on the so called first generation issues, *See Weiler, supra*, note 64.

¹⁴⁰ The Draft Constitution in Part II, Article 7 in fact envisages three possible sources of fundamental human rights in the EU: The Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms and still the so called formula of general principles of law. Despite the maintenance of the general principles formula, its nature changes since it forms part of the document which will be ratified by all the Member States and which will thus eliminate the question of standards and the concerns of legal certainty and ECJ judicial activism. It is clear, if the formula of general principles is still used its content will be, as it has been so far, decided by the ECJ and will constitute a genuine Community standard.

¹⁴¹ But *See J.H.H. Weiler, Editorial: Does the European Union Truly Need a Charter of Rights?*, 8 ELJ, No.2, at. 96. Prof Weiler questions the necessity of the Charter and fears that by enactment of the Charter something important, a unique characteristic of the current constitutional architecture in the EU field of human rights would be lost. However, "*The Charter may not thwart this process, but it runs the risk of inducing a more inward looking jurisprudence and chilling the constitutional dialogue.*"

European, international agreements and national constitutions¹⁴² could provide a satisfactory solution and remove the conundrum of high and low standards for good. As showed *supra*, the inexistence of the written Bill of rights in the Community founding Treaties induced the Court to literally invent human rights protection on the Community level by invoking the mentioned general principles of law formula which has been the main source of the controversy. The enactment of the Charter by the unanimous decision of the Member States solves this problem. The Charter, when it comes into force, will bind the institutions of the Community and the Member States when they implement Community law.¹⁴³ Since the Charter is a Community legal act, it is according to the principles of Community law subject to the final and authoritative interpretation by the Court.¹⁴⁴ The latter will now have a determinate legal and legitimate basis for its human rights jurisprudence. Whatever standard would the Court adopt on the basis of the interpretation of the Charter as the sole Community legal act, it would be the Community standard to which the Member States have acquiesced by the enactment of the Charter.¹⁴⁵ It follows from this reasoning that the Member State would be no more in the position to argue that the standard of human rights protection on the Community level, as set by the Court interpreting the Charter, is inadequate and that it will therefore apply its national

¹⁴² See CRAIG, DE BURCA, *supra* note 71, at 359.

¹⁴³ Charter Article II-51, Par. 1.

¹⁴⁴ This, of course, does not mean that the ECJ will be the only interpreter of the Charter; on the contrary, its interpretation will be equally in the hands of the national courts. However, according to the established case law of the ECJ, national courts will have to refer to the ECJ for a preliminary ruling whenever they will think that the Community measure is invalid under the Charter (Case 314/85, Foto Frost, [1987] ECR I 129). This is what is meant by the contention that ECJ will have the last and authoritative say on the interpretation of the Charter and thus on the genuine community standard of human rights protection.

¹⁴⁵ See Grainne de Burca, *Human Rights: the Charter and Beyond*, Jean Monnet Working Paper No. 10/01. Charter is also important because of its symbolic role which could decisively contribute to the reversal of the paradigm – a move from the prevailing economic nature of the Community to the original broadly envisioned goals, to which common market serves only as a tool and not as a goal in itself.

standard instead. In other words, the Charter would preempt and unify human rights protection in all the areas that fall within the scope of the Community law.

However, the Charter contains some provisions which seem to be perpetuating the problem of standards of protection of human rights in the EU. The Charter in the Preamble reaffirms the Court's general principles formula. In the relation to the European Convention for the Protection of Human Rights (ECHR) it provides that when it contains the same rights as ECHR, they should be endowed with the same meaning, but the EU can provide for a more extensive protection. This is not problematic since the ECHR in any case presents only a minimum standard of protection under which no act, neither Community's nor Member States', can fall. The problem arises again in the relation to the constitutional traditions of the Member States. The Charter provides that the rights in the Charter as they result from these traditions should be interpreted in harmony with them and that full account shall be taken of national laws and practices. This is reasonable if it is apprehended in the following way. The Charter provides a written legal basis for the Community standard of protection of human rights and since it is a Community legal act adopted by the consent of the Member States, it certainly has to reflect the constitutional protection of human rights as guaranteed in the Member States. If this were not so, it would be hardly to expect that the latter would consent to it. It is also not contentious if the interpretation of the genuine Community standard, i.e. of the rights protected in the Charter, takes full account of the environment from which certain right derives from. However, since the Charter is the Community act, its final and authoritative interpretation, as I have pointed out before, should be and it is in the hands of the Court. The Court has to interpret it in the context of the Community legal order and not in the

context of the legal order of any of the Member State if the unitary structure of the Community law is to be preserved. In the light of this, Article II-53 of the Charter appears to me as an unfortunate surprise as it provides that nothing in the Charter should be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized *inter alia* by the Member States' constitutions. By literal reading of this provision we could come to the conclusion that the Charter endorses the maximum standard approach that we discarded *supra*. However and since I am convinced that the maximum standard approach is fundamentally flawed, I think that the Court should simply avoid the "trap" of this provision by conferring on it a purposive interpretation of the Charter whose purpose is to eventually bring about legal certainty in the Community human rights jurisprudence.¹⁴⁶ The same approach should be taken in relation to the general principles of law (i.e. the old formula) which are recognized by the Charter as one of the possible sources of the EU human rights jurisprudence. I suggest that the general principles and the reference to the Member States' constitutions should be taken as a sort of soft law, as a guidance which should help the Court in the interpretation and the application of the Charter, especially in the case of the loopholes in the law and in the hard cases in general. Again it would seem to me to be contrary to the purpose and idea of the Charter to finally have a firm legal basis for the genuine Community standard of human rights protection, but to stick to the general principles formula, which instigated

¹⁴⁶ For example the Preamble to the Charter expressly provides that the aim of the Charter is to strengthen the protection of fundamental rights in the light of the changes in society, etc., by making those rights more visible in the Charter. For some insight in the travaux préparatoires See Jonas Bering Liisberg, *Does the EU Charter of Fundamental Rights threaten the Supremacy of Community law?*, 38 CMLR, at 1172: Presidium of the Charter conceived the overarching purpose of the Charter as strengthening the EU human rights by making them more visible and comprehensible to the public. All these arguments go into the overall direction of a greater legal certainty.

so many controversies, or to the maximum standard approach which explicitly runs contrary to the fundamental principle of supremacy of Community law.¹⁴⁷

I am nevertheless aware of the fact that this unification of the human rights protection for all the acts that fall within the scope of the Community law would *de facto* mean the eradication of the fundamental social value choices within this scope. This unification could additionally cause the effect of dual standards of human rights protection applied to the acts which are identical in their characteristics, but which fall within the scope of different legal orders: one into the scope of the Community legal order and another into that of the Member State, which could (as two different polities) presumably provide different standards of protection. Without further elaborating on this point, it should be stressed that this double standard scrutiny could raise the question of equality before the law.¹⁴⁸

As we know, the scope of the Community legal order as far as the protection of human rights is considered embraces all the acts of the Community institutions and acts of the Member States when they implement Community law (*Wachauf* type of cases) or when they derogate from the Community four fundamental freedoms (*ERT* type of cases). *Wachauf* type of cases are neither problematic from the national social value choices perspective nor from the double standard protection problem since the Member

¹⁴⁷ *Id.* at 1193, Liisberg comes to the same conclusion: "The somehow conflicting intentions of the drafters and the inconsistencies in the text do not support an argument that the Article 53 limits the supremacy of Community law...The interpretation is simply politically impossible seen from a Community perspective. One of the major purposes of strengthened human rights protection at the Community level is precisely to safeguard the supremacy principle." The author concludes that: "a close reading of the text ("nothing in this charter"), its political purpose (to send the signal that the Charter is not intended to replace national constitutions) and perhaps most importantly, its source of inspiration (Art. 53 of ECHR), all confirm that Article 53 and its reference to constitutions of the Member States leave the supremacy of Community law intact."

¹⁴⁸ For example, in one case the Member State would infringe the right to ownership when implementing Community law (*Wachauf* type of cases), in the other case it would infringe the same right by exercising its authority based solely on the national legal basis. One infringement would be subject to Community judicial review on the legal basis provided in Charter, the other only to national judicial review.

States in these cases act as the agents of the Community institutions. The nexus with the Community legal order is so strong that it would be an absurd solution not to count these acts within the scope of the Community legal order and not to subject them to the genuine Community standard of human rights protection. Cases of *ERT type*, as we have seen, have been more controversial from their very introduction. It is not necessary to repeat the justification for this type of cases provided *supra*, but it is worth noting once again that the Court was urged to act with the highest possible degree of deference towards the Member State's acts once it had ascertained that the core human rights are not violated by the derogating acts.¹⁴⁹

Therefore, I would propose to the Court to follow the *supra* presented approach of AG Jacobs and to abdicate its human rights jurisdiction over the *ERT* type of cases. I have provided the explanation of the rationale for this proposal in the analysis of AG's approach and it finds its justification also in the text of the Charter. The latter omits the acts of the Member States when they derogate from the Treaty and explicitly provides that it addresses the Member States *only when they are implementing Union law*.¹⁵⁰ Despite the fact that some nevertheless suggest that the Court should continue with its present jurisprudence notwithstanding the explicit wording of the provision¹⁵¹ I think that the Court should follow AG Jacobs' approach because of its another important positive effect. By putting human rights cases to a greater degree in the hands of the national courts the mutual trust and judicial co-operation between the ECJ and national courts, which is of crucial importance for the efficiency of EU legal order, would be enhanced.

¹⁴⁹ See Weiler, *supra* note 9, 71.

¹⁵⁰ Charter Article II-51, Par. 1.

¹⁵¹ See CRAIG, DE BURCA, *supra* note 71, at. 347: "*The explanatory memorandum to the Charter clearly endeavors to read the wording of Article 51 more broadly by emphasizing the unambiguous nature of the ERT ruling[...]*".

This could be used as an important tool for the weakening of the constitutional attacks on the EU constitutional framework after the breakdown of the political-legal equilibrium in the EU.¹⁵²

3. Conclusion of Part II

On the basis of the presented theoretical approaches it can be concluded that when dealing with the Court's jurisprudence on human rights protection in the Community it is not correct to ask which standard – i.e. of which Member State, high or low etc. - of human rights protection the Court applies since the answer can be obviously only one. The Court as a Community institution, which has a jurisdiction only over the issues that fall within the Community law, can apply exclusively genuine Community standard. In jurisdictional-procedural sense the proposal is that the Court should cease with the review of the Member States' derogations from Community four fundamental freedoms for the compliance with human rights protection and should instead review them only for the compliance with the principles of non-discrimination and proportionality.¹⁵³ The acts of the Community institutions and the acts of the Member States when they implement

¹⁵² See J.H.H. WEILER, *THE CONSTITUTION OF EUROPE*, Cambridge University Press, Cambridge 1999) at 96, and Henry G. Schermers, *Comment on Weiler's The Transformation of Europe*, 100 *YALE L.J.* 2525, at 2533.

¹⁵³ See Weiler, *supra* note 64, at. 616, where the author argues that the review of compliance with the principle of proportionality is as encroaching and expansive as the review of the compliance with the human rights protection and that the boundary between the two is actually blurred. Therefore, it can be argued with great difficulty that test of proportionality is a jurisdictional one and the test of compliance with human rights protection is a substantive one. My response to this is that I acknowledge the strength of this argument and the expansiveness of the proportionality test. However, recently it has quite frequently occurred that the ECJ draws only very broad guidelines and it leaves the determination of the proportionality to the national court. This fact speaks in favor of the advocated limited jurisdictional claim. See for example: *Familiapress case supra* note 88 and *Joined cases C-34-36: De Agostini* [1997] *ECR I-3843*.

Community law remain subject to the established Court's review, including for the compliance with human rights protection. From the substantive dimension I have defined the content of the so called genuine Community standard, i.e. the Community values, and pointed at the Draft Constitution and at the Charter as their legal source and a determinate legal basis for the human rights protection, which the Court has lacked up till now.

Having defined both procedural and substantive basis for the Court's human rights jurisprudence, the last issue which needs to be explored is how the Court in fact exercises its judicial role, how it strikes the balance between the concrete competing values in the concrete cases. Precisely, the question I will try to answer is what kind of standard or rule¹⁵⁴ can be adopted by the Court when it has to square the freedom of movement of goods and fundamental human rights protection when they stand against each other. This is, of course, the issue that arose in *Schmidberger* and it is the resolution of this case that I turn to in the last part of this paper.

¹⁵⁴ For the important jurisprudential distinction between rules and standards, See Kathleen M. Sullivan, *The justices of rules and standards*, 106 Harv. L. Rev. 22.

Part III: Constitutional balance between fundamental human rights and freedom of movement of goods in Community legal order

The Court in *Schmidberger*, as presented *supra*, needed to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty.¹⁵⁵ In the cases in which the Member State relies on the fundamental human rights protection as a justification of its derogation from the Community law the presented AG Jacobs' minimalist approach to the Court's human rights jurisprudence can not achieve its purpose since the Court, *volens nolens*, has to decide whether the relied ground of the defense, i.e. human rights, is justifiable. In this type of cases the review of human rights protection is therefore unavoidable. This on its face deprives the proposed test of its essential advantage, which exists in the exemption of the Court from the hard cases which entail delicate value choices. However, there are two alternative solutions which could save the purpose of the advocated approach and prevent the repetition of the standards saga.

The first option is to deny human rights protection as an independent ground of justification of the obstacle to the free movement. This has been argued, again, by AG Jacobs' in *Schmidberger*¹⁵⁶ where he contended that Austrian reliance on human rights protection should be considered as a public policy exception to the free movement of goods. This solution, however, poses two problems.¹⁵⁷ First, it is hard to see how the

¹⁵⁵ See *Schmidberger supra*, note 4, Recital 77.

¹⁵⁶ See *Schmidberger* Opinion of AG, Recital 95 and also AG Jacobs, *supra* note 80, at 336.

¹⁵⁷ See Opinion of the Advocate General in the case C-36/02 *Omega*, not reported. In this case a German company which organized laser games, which involved simulated shooting at the people, was denied permission to conduct its business due to the incompatibility of the content of the games with the fundamental values as enshrined in the German constitution and especially with the fundamental value of

review under the public policy exception would differ from that under the independent human rights exception. Secondly, it is doubtful whether the fundamental rights as a ground for justification should really be treated the same as the "traditional" justification based on public policy or public security.¹⁵⁸ AG Jacobs is right that fundamental rights, as described *supra*, depend on the specific situation in the Member State concerned, as the justifications based on public policy and public security do, but equalization is problematic. First of all, the term public policy as adopted in the Treaty originates from the French legal order as a concept of "ordre public" with a special meaning which emphasizes a special importance of certain mandatory rules signaling that they cannot be departed from by anyone since in the opposite case the structure of the society as such would be threatened and therefore the courts must apply them in principle automatically.¹⁵⁹ The Court in cases *Cullet v. Centre Leclerc* and *Commission v. France*¹⁶⁰ construed the public policy exception very narrowly and left open door for it only in extreme cases.¹⁶¹ Additionally, concepts of public policy and public security are based on the collectivism and not on the protection of the individual, as fundamental

human dignity. AG confirmed that a reliance on fundamental values can be accepted as a Community public order or public policy exception to the freedom of providing of service, which was violated by the act of the German authorities. This is, interestingly, the same argument as it was used by AG Jacobs and which I deem not very justified. However, what is more important for the purpose of my thesis is that the AG in *Omega* case explicitly stated that the objections to the application of Community law that are based on the Member States' constitutions are as a rule insufficient, because otherwise the uniform application of Community law would be impaired. A restriction of the freedom to provide services thus cannot be automatically justified on grounds of protection of specific fundamental rights guaranteed in the constitution of a Member State. Instead it is necessary to examine the extent to which such a restriction based on national law may be justified on grounds recognized under Community law, such as, in particular, the protection of public order. When so doing, the Community concept of public policy must be interpreted in the light of the requirement under Community law that human dignity be protected.

¹⁵⁸ *Id.*

¹⁵⁹ See <http://www.eurofound.eu.int/emire/France/PUBLICPOLICYLAWANDORDER-FR.html>.

¹⁶⁰ See Case 231/83, *Cullet v. Centre Leclerc* [1985] ECR 305 and *Commission v. France supra* note 54.

¹⁶¹ See OLIVER, *supra* note 24.

rights are. Public security and public policy are thus actually conceptually different from the fundamental rights and in principle function as their limitation.

The first alternative apparently does not provide a satisfactory answer. Therefore, I think that fundamental rights must be considered as an independent ground of justification, as the Court has held so far. Following the proposed AG's test, I hold that in cases in which the Member States rely on the human rights exception they have to accept that the Court will review this exception jurisdictionally and substantively exclusively on the basis of the Community standard of human rights protection, as set in the Charter. This essentially means that Member States relying on human rights exception have to accept that the value choice will be made on the Community level by the Court. As we have seen, there is no other option since any derogation from the Community law can be judged only according to the Community law itself.

1. Protection of the fundamental human rights as an independent ground of justification

However, there are some special characteristics of the concept of the fundamental human rights which invite the Court to treat derogations from the fundamental freedom of movement of goods which are justified on the human rights protection differently from the justifications based on the other potentially justified grounds. Every lawful justification ground is aimed to ensure the necessary regulatory autonomy of the Member State. Since the protection of the fundamental human rights presents the core of the social value choices about the balance between the individual's freedom and collective interest, it speaks for a higher degree of the regulatory autonomy to be granted to the state. However, what makes the protection of fundamental human rights as a ground of justification particularly special is the fact that human rights protection is not only the concern of the Member State and its regulatory autonomy, but it is also one of the main objectives that the Community is bound to pursue. In other words, the protection of fundamental human rights is the imperative and the objective that are both the Community and the Member States bound to pursue.

The Court in *Schmidberger* acted on this basis when it straightforwardly concluded that since both the Community and its Member States are required to respect fundamental rights, the Member State's reliance on human rights protection as the exception to the freedom of movement of goods constitutes

"a legitimate interest which, in principle, justifies a restriction of the obligation imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom of movement of goods."¹⁶²

¹⁶² See *Schmidberger*, Recital 74.

The Court has thus set a general rule that fundamental human rights *in principle* prevail over Community fundamental freedom of movement of goods. There are two questions that immediately arise: why do human rights prevail over free movement of goods and not the other way around; and what consequences does this have for the Court's jurisprudence in general?

If I tackle with the last question first, another question is posed. Namely, does it mean that whenever the Member State resorts to human rights protection, it also pursues legitimate *Community* interest since the Community is also bound to protect human rights? Is a human rights justification of the obstacle to the freedom of movement of goods thus a win-win situation, i.e. that the Court would never dare to prohibit Member State's acts in pursuance of human rights?

AG Jacobs in his opinion in *Schmidberger* offers a clear answer:

"It can not be automatically ruled out that a Member State which invokes the necessity to protect a right recognized by national law as a fundamental nevertheless pursues an objective which as a matter of Community law must be regarded as illegitimate."¹⁶³

In his view the Member State necessarily pursues a legitimate objective only when it seeks to protect a fundamental right which is as such recognized not only in the national legal order but also in the Community law.¹⁶⁴ The Court somehow confirms this, but it is silent on the issue whether the pursuance of some human right recognized by the Member State could nevertheless be considered from the Community perspective as an illegitimate objective. The Court uses the phrase that fundamental human rights "*in principle*" prevail over Community fundamental freedom of movement of goods. The

¹⁶³ See *Schmidberger* Opinion of AG Jacobs, Recital 98.

¹⁶⁴ *Id.* Recital 102.

meaning of the phrase "*in principle*" is, of course, subject to the interpretation. Relying solely on the literal interpretation, it is clear that "in principle" can neither mean "always" nor "never". It simply means in a great majority of cases, but subject to some exceptions. If we accept this interpretation, it is clear that the Court basically followed AG's approach, but it did not want to state that explicitly, probably because of the prudent reliance on the principle of judicial economy. The Court apparently did not want to engage into conversation 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.

This is, though, quite an important issue which should be devoted some more attention. The designation of the fundamental human rights that are incompatible with the Community objectives is important for the attempted construction of the general rule which should govern the relationship between the fundamental freedom of movement of goods and fundamental human rights. The main objective of the Community is nowadays still the creation of the veritable common market which should function as a classical internal market in any of the Member States. For the internal market to really function, there may not be any discrimination between the domestic and foreign (coming from the other Member State) individuals engaged in the economic activity. Nationals and foreigners have to be subject to the same conditions. The wisdom of this approach is that it ties the fate of the foreign entrepreneurs, who count as a minority both in numeral and in political sense, to the fate of the majority of the domestic entrepreneurs and thus gives to the otherwise voteless nationals of the other Member State an important voice in the "foreign" Member State where they pursue their economic activity. Since the majority

must treat them equally, they can be sure that as long as the majority does not adopt the self-destructive approach they will be able to pursue their economic activity not under the same conditions as at home, but under the same conditions as the natives. The principle of non-discrimination thus enables the so called virtual representation¹⁶⁵ of the foreign entrepreneurs and acts as a representation-reinforcing mechanism, which does not only preserve the economic interests of the individuals, but simultaneously preserves and enhances the integrity of the common market as such. However, the principle of non-discrimination alone is not a sufficient guarantee for the existence of the veritable common market. National authorities in one Member State could simply decide that all entrepreneurs, domestic and foreign, may not engage into a certain economic activity. While this would certainly not be a discriminative measure, it would completely block trade in one sector and it would consequently impair the common market. This is prohibited by the principle of proportionality, which in its essence means that the Member State would have to provide a very compelling justification for such a drastic measure in order to pass the ECJ's scrutiny.

But what does this have to do with fundamental human rights? A lot. It first confirms the approach of AG Jacobs who would subject derogations from the Community fundamental freedoms only to the review of these two principles whose existence is really indispensable for the achievement of the Community objectives,¹⁶⁶ and

¹⁶⁵ See ELY, *supra*, note 29, at 83. The concept of virtual representation is constitutive element of J.H. Ely's proceduralist theory on (American) constitutionalism that the author describes in the following words: "*And their [foreigners' or outsiders'] protection proceeds by what amounts to a system of virtual representation: by constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after.*"

¹⁶⁶ It has to be noted once again that in the apprehension of the Community as a polity a veritable common market is not its final objective. The concept of the polity brings forth the idea of the social inclusion of the others – of the individuals from the other Member States and thus promotes solidarity, mutual understanding and finally peace. According to Maduro, *supra*, note 45, therein lies the democratic added

it simultaneously defines which fundamental rights recognized in the national legal orders do not constitute a legitimate interest as perceived by the Community law. These are all those fundamental rights, applicable in the fields which fall within the scope of the Community law, which are reserved for the nationals of the particular Member State only¹⁶⁷ and those which excessively impair Community objectives of free trade. The former, i.e. rule of non-discrimination is categorical and without exceptions, whereas the latter is a standard which is subject to the ad hoc balancing of the competing values.

2. The underlying values of the fundamental human rights and of the freedom of movement of goods

Talking about the competing values, brings us back to the first question: why the fundamental human rights prevail over the freedom of movement of goods and not the other way around? My thesis is that the main reason is to be sought in the values that both concepts embody. To confirm my thesis and since all the action in the Court focuses on the proper assessment of the balance between the values that the freedom of movement of goods and fundamental human rights incorporate, it is necessary to take a look at the values that the concepts protect. I turn first to the fundamental human rights because they somehow present an easier case.

Whatever the nature of the fundamental human right, whether personal, political, cultural or economic human right, the basic underlying idea is that there is a scope of the private, i.e. freedom of the individual with which the state should not interfere. The

value of European integration. The principle of non-discrimination is a primary prerequisite for the achievement of that goal.

¹⁶⁷ Such an example was the provision of the Slovenian Constitution which provided: "*Aliens may not acquire title to land except by inheritance, under the condition of reciprocity.*" The provision was on its face discriminatory and it was therefore repealed in 1997. Its repeal was a prerequisite condition for the beginning of the formal accession process.

protection of the individual against the collective is the core value pursued by the so called negative concept of the fundamental human rights. However, with the development of the *Sozialstaat* this negative concept was supplemented by the so called positive rights, which demand from the state to undertake some affirmative measures to provide the individuals with the particular set of rights, such as health care, social security and education, which should enable everyone to live a decent life worthy of a human being. The concept of fundamental human rights is thus essentially the expression of the relationship between the individual and the state and it determines the scope of liberty and the overall well being of the individual.

However, the nature of the fundamental freedom of movement of goods and the content of the values protected by it are more discrete. There is a prevailing view that freedom of movement of goods must be distinguished from the fundamental human rights.¹⁶⁸ AG Jacobs in *Schmidberger* explicitly stated that the term fundamental freedom should not be confused with that used in the ECHR.¹⁶⁹ The Court, on the other hand, has not always been so precise. While the Court in *Schmidberger* designated free movement of goods as one of the fundamental principles of the Community,¹⁷⁰ in some other cases addressed it as a fundamental right.¹⁷¹ There are different views on this issue in theory as well. Thus some authors claim that freedom of trade is indeed a fundamental economic

¹⁶⁸ See von Bogdandy supra, note 105, at 1326. "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."

¹⁶⁹ See *Schmidberger*, Opinion of AG Jacobs, footnote 38.

¹⁷⁰ See *Schmidberger*, Recital 51.

¹⁷¹ See Case 240/83, Procureur de la République v. ADBHU, [1985] ECR 531 and Case 228/98, Dounias v. Ypourgio Oikonomikon, [2000] ECR I-577.

right,¹⁷² while the others speak of the fundamental political right.¹⁷³ To make the issue even more complicated the Charter also recognizes the freedom to conduct a business which is a typical economic right of the individual and of the other legal entities acknowledged in the most of the Member States' constitutions. It is true that freedom of movement of goods does not encompass the entire specter of the right to conduct one's business, but in connection with the remaining three Community's freedoms it does. This consequently poses the question of the necessity of the reiteration of the same right in the Charter if it is already guaranteed in the Treaty.¹⁷⁴ Does that mean that freedom of movement of goods is not considered as the individual's right and that its core value is not the protection of the economic interests of the individual?

There are some grounds in *Schmidberger* which confirm this assumption. First of all, the plaintiff Schmidberger took advantage of the fact that provision of the Treaty, which guarantees the freedom of movement of goods, is directly applicable which procedurally enabled him to invoke it before the domestic court, but instead of claiming his right being violated, he claimed the violation of the Community law.¹⁷⁵ One could ask in that regard why it was necessary for the plaintiff to rely on the Community law at all, instead of simply relying on Austrian law which also provided him with the right to

¹⁷² See Ernst-Ulrich Petersman, *Constitutional Principles Governing the EEC's Commercial Policy*, in MARESCAU (Ed.), *THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION*, 21 (Kluwer 1993), at 41.

¹⁷³ See MADURO, *supra* note 30, at 166-168.

¹⁷⁴ Article II-52 (Scope and interpretation of rights and principles) of the Charter in paragraph 2, provides: "*Rights recognized by this Charter for which provision is made in other Parts of the Constitution (which embodies provisions now found in the Treaty) shall be exercised under the conditions and within the limits defined by these relevant Parts.*" However, I think that this provision does not say anything against the argument that freedom of movement of goods is not perceived as an economic right of the individual.

¹⁷⁵ See *Schmidberger*, Recital 16.

freely conduct a business.¹⁷⁶ The most plausible answer is that Schmidberger was aware that economic rights in the modern *Sozialstaat* are subject to many limitations in the public interest and that these limitations are subject to very deferential review by the courts, which give their state authorities a lot of leeway in regulating the economic activities. Thus, Schmidberger simply wanted to introduce a stronger trump card than his economic interest, namely the interest of the Community. This reassures me in my conviction that freedom of movement of goods is conceptually conceived as a protection of Community interest against the Member States and it does not regulate the relationship between the individual and the state, as fundamental human rights do. The Court confirms this in *Schmidberger* by stating that the principle of free movement of goods has a fundamental role in the Community system in particular for the proper functioning of the internal market and therefore obliges every Member State to ensure the free movement of products in its territory.¹⁷⁷ The purpose of the free movement of goods is thus to ensure a proper functioning of the common market by using the individual entrepreneurs as the means for the achievement of this end. In other words, at this stage of the Community development the Court wants to guarantee the unimpaired common market, while the care for economic rights of the individuals is left to the Member States. The Court will not interfere with them as long as the economic activity of the individuals is not blocked completely and as long as they are not discriminated on the grounds of

¹⁷⁶ Art 6 Par 1 of the *Staatsgrundgesetz ("StGG") vom 21. Dezember 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrath vertretenen Königreiche und Länder*, RGBl. Nr. 142/1867: "Jeder Staatsbürger kann an jedem Orte des Staatsgebietes seinen Aufenthalt und Wohnsitz nehmen, Liegenschaften jeder Art erwerben und über dieselben frei verfügen, sowie unter den gesetzlichen Bedingungen jeden Erwerbszweig ausüben." In short, every citizen has the right to do business within the parameters of the law of non-constitutional nature, as long as such law (i.e., the "Gewerbeordnung") is proportional.

¹⁷⁷ *Schmidberger*, at Recital 60.

nationality.¹⁷⁸ This shows that the underlying values of the freedom of movement of goods are solely economic interests in the creation of the common market and not (or much less) the economic rights of the individuals.

This analysis of the underlying values of the both concepts thus provides a satisfactory justification of the Court's rule according to which fundamental human rights prevail over the freedom of movement of goods. The opposite would be highly implausible since it would mean that the sole economic interests of the Community prevail over the whole scope of the other rights of the individual and over the fundamental choices of every society of the relationship between the individual and the collective. This is not changed, even if we take the stand that the freedom of movement of goods is a fundamental right of the individual. Freedom of movement of goods regulates and ensures only one part of the human being's existence, i.e. his economic activity. State or public interference with the economic activity of the individuals is subject only to rationality review, i.e. the purpose pursued by the state has to be rationally connected to the legitimate goal.¹⁷⁹ This is true already on the national level, while the degree of deference granted by the Court on the Community level to the Member States

¹⁷⁸ See *Keck supra* note 49.

¹⁷⁹ This standard of review was first established by the United States Supreme Court following the decline of the *Lochner* era with the establishment of the modern economic due process doctrine. See, for example cases like: *United States v. Carolene Products CO.* 304 U.S. 144 (1938), *Wickard v. Filburn* 317 U.S. 111 (1942). "*The existence of facts, on which the Congress relies, has to be presumed, and the consequent regulatory legislation, which could be presumed to make some rational basis within the knowledge and experience of the legislators, can not be proclaimed unconstitutional unless the known or generally assumed facts speak against the mentioned assumption of the rational basis.*" Similar deference is given by the constitutional courts in Europe to the governments when they are regulating economic activities, usually on the basis of the principle of "welfare state or *Sozialstaat*." See for examples cases of the German Bundesverfassungsgericht 82 BVerfGE 60, 81 (1990); 84 BVerfGE 90, 125 (1991), in which the latter affirmed the duty of the Parliament to give effect to the principle of social justice, but it has simultaneously accepted a substantial measure of legislative discretion in that regard. (Michael Sachs, *Grundgesetz, Kommentar* 629-30, 1990).

as the regulators of the economic activity is even enhanced due to the whole variety of the *supra* described institutional drawbacks suffered by the Court.¹⁸⁰

3. Type of proportionality test applied – degree of deference granted to the Member State

Having analyzed the grounds of the Court's general rule which governs the relationship between the freedom of movement of goods and fundamental human rights, I eventually turn to the question of how far the interest in human rights protection can encroach on the Community interest in free movement of goods in concrete cases. This question is the essence of the proportionality test where the Court inquires whether the Member State could achieve the objective of human rights protection to the same degree by employing the means that would impose fewer restrictions on the freedom of movement of goods. Proportionality test is important because it shows how much the Court is willing to interfere with the Member State's original assessment of the competing values. However, in the cases of the contravention between human rights and freedom of movement of goods the answer is clear. The Court applies a highly deferential review as a standard.

¹⁸⁰ However, I think that it could be argued that there exists a hierarchy between the Community fundamental freedoms themselves according to the values that they enshrine and protect. For example, while the freedom of movement of goods deals only with the economic activity of the individual, the freedom of movement of workers addresses a human being in a more comprehensive way. It does not regulate only his ability to apply for the job and pursue the job in another Member State without being subject to discrimination on the grounds of nationality, but it is also extended to his personal and family life. Therefore, when the Member States derogate from the Community freedom of movement of workers there is a much greater probability that these derogations could afflict in a negative sense personal rights and human dignity of the respected person who relies on the Community freedom. That is why the Court has repeatedly and overtly claimed that freedom of movement of workers is their fundamental right (See *Oliver supra*, note 24, at 11). Due to these differences between the two freedoms I argue that the Court should scrutinize derogations from freedom of movement of workers more strictly than the derogations from freedom of movement of goods.

Clear example of this is the Court's conclusion in the *Schmidberger* case. Once the Court determined that freedom of expression and freedom of assembly fell into the group of rights that are protected both by the Community and the Member States,¹⁸¹ it went on and stated:

"Consequently, the national authorities were reasonably entitled, **having regard to the wide discretion which must be accorded to them in the matter**, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade."¹⁸² (emphasis added).

The deferential review in this type of cases can be explained by the presented special features of the concept of fundamental human rights, by the inherent institutional drawbacks of the Court and by the difference in the underlying values of the both concepts which already in principle moves the scale in favor of the fundamental human rights. Lastly, in a concrete case the degree of deference granted by the Court depends on the entire factual context of the case and on the specific human right that the Member State relies on.

Schmidberger again proves as a useful example. The Court in *Schmidberger* took into account the bona fide attitude of the Austrian authorities, as opposed to that of the French authorities in the *Commission v. France*, which undertook many administrative measures to limit the negative effects on the free movement of goods as far as possible.¹⁸³ Additionally, Austrian government invoked the argument that in the factual circumstances of that case more restrictive measures towards the demonstrators would

¹⁸¹ This is true under the current general principles formula where the Court simply relies on the applicable provisions of the ECHR (For example *see Schmidberger*, Paragraph 69) and they will also be protected by the Charter (Article II-11 and II-12).

¹⁸² *See Schmidberger*, Recital 93.

¹⁸³ *See Schmidberger*, Recital 86.

cause even more serious disruptions to the public order and intra-Community trade. Since this argument was not opposed by the plaintiff and since it was made on the factual grounds, it left the Court with only one solution: deference. The latter was even more enhanced by the fact that Austria relied on the need of protection of the fundamental rights of freedom of expression and association. These two rights are not important only for the protection of the interests and the wellbeing of the individuals, but are indeed a prerequisite for the constitutional system of liberal democracy.¹⁸⁴ While the Court qualified the claim of the Austrian government that these rights are inviolable in democracy,¹⁸⁵ it nevertheless confirmed that they constitute the fundamental pillars of a democratic society.¹⁸⁶ Since the values of democracy have the highest ranking in the Member States and in the Community, it is probably not too hasty to conclude that in the case of the democracy-enhancing rights, such as freedom of expression and assembly, the Court will employ even more deferential standard of review. The same is probably true with human rights which protect human dignity, while in the case of some other rights of more economic nature the Court could take a less deferential review. Again, the apparently decisive factor is the values that underpin every single fundamental right.

¹⁸⁴ Freedom of expression is "... *the matrix, the indispensable condition of nearly every other form of freedom.*" as stated by Justice Cardozo in his opinion in *Palko v. Connecticut* 302 US 319 (1937). Similar statements were made by German Federal Constitutional Court (in fact citing Cardozo) for example in *Schmid-Spiegel* case (12 BverfGe 113).

¹⁸⁵ See *Schmidberger*, Recital 17.

¹⁸⁶ See *Schmidberger*, Recital 79.

4. Conclusion

The purpose of this last part of the paper was to conceptualize the relationship between freedom of movement of goods and fundamental human rights in the cases of their contravention. We have seen that fundamental human rights in principle prevail over the free movement of goods. The main reason is to be found in the core values that both concepts embody. I have argued that fundamental human rights as an exception to the freedom of movement of goods deserve a special and different treatment from the other exceptions. Fundamental human rights are the expression of the core social value choices which differ among the Member States. The Court suffers inherent institutional drawbacks which undermine its legitimacy and which consequently do not allow it to interfere with these core social value choices to any significant degree. The result is the high degree of deference granted to the Member States' authorities in this type of cases.

This deferential ad hoc balancing type of review has also its disadvantages since it provides a solution only for a particular case. For example, the only conclusion of *Schmidberger* is that in the particular circumstances of that case the Member State was entitled, having a broad discretion, to derogate from one of the Community's fundamental freedoms. The Court did not set any clear limits to the Member State's discretion, except by stating that the Member State must endeavor to limit the effects upon free movement as far as possible. This is a very vague and elastic standard which suggests that the outcome of each case will apparently always depend on the factual context of the case. Lack of a clear rule with precise lines results in a lower degree of legal certainty and predictability, which produces uncertainty and the chilling effect on the socially

productive behavior.¹⁸⁷ On the other hand, lack of a clear rule is an inherent consequence of the principle of proportionality which the Court is bound to apply following the provisions of Article 28, 29 and 30 of the Treaty. Principle of proportionality with its balancing approach is thus inevitable and, despite its presented disadvantages, also the only plausible solution in the Community. It is hard to imagine that the Court as a supra-national institution would establish a categorical approach with strict rules and with precisely drawn lines which would govern the acts of the Member States in such a delicate field, as the field of the protection of fundamental human rights is.

Hence, it is apparent that when the issue of human rights protection arises, the deference to the Member State is necessary. This conclusion reaffirms the proposed new judicial approach to the Community human rights protection presented in the second part of this paper. To repeat, there is no doubt that the Court exercises the review of human rights protection within the scope of the Community legal order only according to the genuine Community standard.¹⁸⁸ The saga of high and low standards is inherently wrong. The Court does not apply the standard of human rights protection as it is guaranteed in any of the Member States, but as it is guaranteed in the Community law. This will become clear when the formula of general principles, the main source of the "standard debate", is replaced by the Charter. In order to preserve and enhance its legitimacy the

¹⁸⁷ See Kathleen M. Sullivan *supra* note 154, at 62.

¹⁸⁸ This conclusion is reaffirmed by the *supra* mentioned AG opinion in the *Omega* case. According to AG the objections to the application of Community law that are based on the Member States' constitutions are as a rule insufficient, because otherwise the uniform application of Community law would be impaired. A restriction of the freedom to provide services cannot be automatically justified on grounds of protection of specific fundamental rights guaranteed in the constitution of a Member State. Instead it is necessary to examine the extent to which such a restriction based on national law may be justified on grounds recognised under Community law, such as, in particular, the protection of public order. **When so doing, the Community concept of public policy must be interpreted in the light of the requirement under Community law that human dignity be protected** (emphasis added).

Court should limit its jurisdictional claim to the review of principles that really affect Community law.¹⁸⁹

"Basic freedoms enshrined and protected by law are among the elements which give society and its members a sense of identity...By protecting, in the sphere of application of Community law, even if only in the scrutiny of derogations, the freedoms of the individual, the Court will be enhancing this sense of belonging to the European entity and, as a 'bonus', creating solidarity between itself and the individual."¹⁹⁰

We have seen that this approach, albeit very well thought, turned out to be tossed in the middle of the stark disputes about the standards of protection, about the encroachment on the competences of the Member States, about the legitimacy of the Court's interference, and has thus resulted in the opposite effect. I have therefore endorsed the approach, according to which the Court would no more check whether the derogations from the freedom of movement of goods comply with human rights, but only whether they are in compliance with the principles of non-discrimination and proportionality. This approach guarantees that these two principles, which are indispensable for the existence of the Community legal order and for the attainment of its main objective: the achievement of the veritable common market, will be controlled by the Court, while the latter would simultaneously avoid the hard cases of the contentious value choices which underpin the protection of fundamental human rights. Protection of fundamental human rights would be again to some degree entrusted to the Member States' courts, which would positively affect their self-confidence and would strengthen a mutual trust between the ECJ and

¹⁸⁹ Interestingly very similar thoughts can be found in the today a little bit outdated publication HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: METHODS OF PROTECTION (Antonio Cassese et al. eds., 1991), since it precedes *ERT* case, in which the authors lucidly argue: "[M]ember State action outside the scope of Community law which seriously threatens human rights can usually be checked by the existing national and international apparatus. However, where the action is really needed is in the field of Community law."

¹⁹⁰ See Weiler, *supra* note 64, at 617.

national courts, which is of crucial importance for the existence and growth of the EU legal order. I am therefore convinced that the limitation of the jurisdiction of the ECJ certainly does not mean that the Court faced by the choice between the interests in economic integrity of the common market and the well being of the individuals would choose the former.¹⁹¹ On the contrary, I have argued in this paper that narrowing of the ECJ's jurisdiction would introduce more efficient division of the competences between the courts, which would consequently result in more legitimate and favorable outcomes both for the Court, Member States and EU citizens.

¹⁹¹ *Id.* at 616.

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