

Proportionality test

- See Art. 52 of the EU Charter for a possible restriction on fundamental rights:

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

Now I jump to the ECHR for showing you what a general **interest** can be (it is not as clear-cut in the EU Charter):

- ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are **prescribed by law** and **are necessary in a democratic society**, in the interests of **national security, territorial integrity or public safety**, for the **prevention of disorder or crime**, for the **protection of health or morals**, for the protection of the **reputation or rights of others**, for **preventing the disclosure of information received in confidence**, or for **maintaining the authority and impartiality of the judiciary**.

It follows that those things in bold are interests which can justify limitations of freedom of expression.

- **Summary of proportionality test** (I used Craig – de Búrca. 2011. EU Law. Text, Cases, and Materials. 5th ed., Oxford: Oxford UP, p. 526, but modified it a little bit).

- 1) there must be a **legitimate aim** (interest) for a measure (see in bold above)
- 2) the measure must be **suitable** to achieve the aim
- 3) the measure must be **necessary** to achieve the aim
- 4) there **cannot be** any **less onerous** way of doing it, the measure must be reasonable, considering the competing interests – this is usually the most problematic part, in other words: the measure should not impose an excessive burden in relation to the objective sought

- **Example of the application by the ECJ**

The most difficult to comprehend is probably the scenario when a measure is restricting a free movement.

EU bodies have to observe fundamental rights every time, EU member states when they are applying EU laws:

- a) As agents (typically applying a directly effective regulation)
- b) When having some margin (typically when implementing a EU directive and then applying national laws based on the EU directive)
- c) When derogating from EU rules (typically from free movement rules)
 - a. *Familiapress* situation – derogation from a free movement must be in conformity with fundamental rights
 - b. *Schmidberger* situation – derogation from a free movement is in itself an exercise of fundamental rights.

C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag, ECJ judgment of 26 June 1997 – Austria prohibited a sale of newspapers and magazines with puzzles for prizes because it can destroy small publishers who do not have enough money to run such puzzles. In Germany, such a practice is permitted and a German publisher wanted his newspapers (with puzzles) to be sold also in Austria, but due to the prohibition he was not permitted to do so. Clearly, it is a restriction on a free movement of goods and as such it has to conform to the fundamental rights standards, namely freedom of the press.

24 Furthermore, it is to be noted that **where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights** (see Case C-260/89 ERT [1991] ECR I-2925, paragraph 43).

25 **Those fundamental rights include freedom of expression**, as enshrined in Article 10 of the **European Convention** for the Protection of Human Rights and Fundamental Freedoms (ERT, paragraph 44).

26 A prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression. Article 10 of the European **Convention** for the Protection of Human Rights and Fundamental Freedoms does, however, **permit derogations from that freedom for the purposes of maintaining press diversity**, in so far as they are **prescribed by law** and are **necessary in a democratic society** (see the judgment of the European Court of Human Rights of 24 November 1993 in Informationsverein Lentia and Others v Austria Series A No 276).

27 In the light of the considerations set out in paragraphs 19 to 26 of this judgment, **it must therefore be determined whether a national prohibition** such as that in issue in the main proceedings **is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression**.

28 To that end, it should be determined, first, whether newspapers which offer the chance of winning a prize in games, puzzles or competitions are in competition with those small press publishers who are deemed to be unable to offer comparable prizes and whom the contested

legislation is intended to protect and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand.

29 It is for the national court to determine whether those conditions are satisfied on the basis of a study of the Austrian press market.

30 In carrying out that study, it will have to define the market for the product in question and to have regard to the market shares of individual publishers or press groups and the trend thereof.

31 Moreover, the national court will also have to assess the extent to which, from the consumer's standpoint, the product concerned can be replaced by papers which do not offer prizes, taking into account all the circumstances which may influence the decision to purchase, such as the presence of advertising on the title page referring to the chance of winning a prize, the likelihood of winning, the value of the prize or the extent to which winning depends on a test calling for a measure of ingenuity, skill or knowledge.

32 The Belgian and Netherlands Governments consider that the Austrian legislature could have adopted measures less restrictive of free movement of goods than an outright prohibition on the distribution of newspapers which afford the chance of winning a prize, such as blacking out or removing the page on which the prize competition appears in copies intended for Austria or a statement that readers in Austria do not qualify for the chance to win a prize.

33 The documents before the Court suggest that the prohibition in question would not constitute a barrier to the marketing of newspapers where one of the above measures had been taken. If the national court were nevertheless to find that this was the case, the prohibition would be disproportionate.

34 In the light of the foregoing considerations, the answer to be given to the national court's question must be that **Article 30 of the EC Treaty** is to be interpreted as **not precluding application of legislation of a Member State the effect of which is to prohibit the distribution on its territory by an undertaking established in another Member State of a periodical produced in that latter State containing prize puzzles or competitions which are lawfully organized in that State, provided that that prohibition is proportionate to maintenance of press diversity and that that objective cannot be achieved by less restrictive means.** This assumes, *inter alia*, that the **newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand. Furthermore, the national prohibition must not constitute an obstacle to the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize.** It is for the national court to determine whether those conditions are satisfied on the basis of a study of the national press market concerned.

C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge and Republik Österreich, ECJ judgment of 12 June 2003 – question if a derogation from (i.e. restriction on) free movement is in accordance with fundamental rights standards. In fact, here, exercise of fundamental rights (assembly) = restriction on free movement. Was the restriction proportionate?

46.

It should be noted at the outset that the questions referred by the national court raise two distinct, albeit related, issues.

47.

First, the Court is asked to rule on whether the fact that the Brenner motorway was closed to all traffic for almost 30 hours without interruption, in circumstances such as those at issue in the main proceedings, amounts to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law. Second, the questions relate more specifically to the circumstances in which the liability of a Member State may be established in respect of damage caused to individuals as a result of an infringement of Community law.

48.

On the latter question, the national court asks in particular for clarification of whether, and if so to what extent, in circumstances such as those of the case before it, the breach of Community law - if made out - is sufficiently manifest and serious to give rise to liability on the part of the Member State concerned. It also asks the Court about the nature and evidence of the damage to be compensated.

49.

Given that, logically, this second series of questions need be examined only if the first issue, as defined in the first sentence of paragraph 47 of the present judgment, is answered in the affirmative, the Court must first give a ruling on the various points raised by that issue, which is essentially the subject of the first and fourth questions.

50.

In the light of the evidence in the file of the main case sent by the referring court and the written and oral observations presented to the Court, those questions must be understood as seeking to determine whether the fact that the authorities of a Member State did not ban a demonstration with primarily environmental aims which resulted in the complete closure of a major transit route, such as the Brenner motorway, for almost 30 hours without interruption amounts to an unjustified restriction of the free movement of goods which is a fundamental principle laid down by Articles 30 and 34 of the Treaty, read together, if necessary, with Article 5 thereof.

Whether there is a restriction of the free movement of goods

51.

It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Community.

52.

Thus, Article 3 of the EC Treaty (now, after amendment, Article 3 EC), inserted in the first part thereof, entitled Principles, provides in subparagraph (c) that for the purposes set out in Article 2 of the Treaty the activities of the Community are to include an internal market characterised by the abolition, as between Member States, of obstacles to *inter alia* the free movement of goods.

53.

The second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14 EC) provides that the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.

54.

That fundamental principle is implemented primarily by Articles 30 and 34 of the Treaty.

55.

In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Similarly, Article 34 prohibits, between Member States, quantitative restrictions on exports and all measures having equivalent effect.

56.

It is settled case-law since the judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5) that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see, to that effect, Case C-265/95 *Commission v France* [1997] ECR I-6959, paragraph 29).

57.

In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State (*Commission v France*, cited above, paragraph 30).

58.

The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act (*Commission v France*, cited above, paragraph 31).

59.

Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (*Commission v France*, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to

ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty.

60.

Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods.

61.

Paragraph 53 of the judgment in *Commission v France*, cited above, shows that the case giving rise to that judgment concerned not only imports but also the transit through France of products from other Member States.

62.

It follows that, in a situation such as that at issue in the main proceedings, where the competent national authorities are faced with restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty, such as the free movement of goods, which result from actions taken by individuals, they are required to take adequate steps to ensure that freedom in the Member State concerned even if, as in the main proceedings, those goods merely pass through Austria en route for Italy or Germany.

63.

It should be added that that obligation of the Member States is all the more important where the case concerns a major transit route such as the Brenner motorway, which is one of the main land links for trade between northern Europe and the north of Italy.

64.

In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.

Whether the restriction may be justified

65.

In the context of its fourth question, the referring court asks essentially whether the purpose of the demonstration on 12 and 13 June 1998 - during which the demonstrators sought to draw attention to the threat to the environment and public health posed by the constant increase in the movement of heavy goods vehicles on the Brenner motorway and to persuade the competent authorities to reinforce measures to reduce that traffic and the pollution resulting therefrom in the highly sensitive region of the Alps - is such as to frustrate Community law obligations relating to the free movement of goods.

66.

However, even if the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, as the Advocate General pointed out at paragraph 54 of his Opinion, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.

67.

Indeed, for the purposes of determining the conditions in which a Member State may be liable and, in particular, with regard to the question whether it infringed Community law, account must be taken only of the action or omission imputable to that Member State.

68.

In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.

69.

It is apparent from the file in the main case that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.

70.

In its order for reference, the national court also raises the question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.

71.

According to settled case-law, fundamental rights form an integral part of the general principles of law the 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 to which they are signatories. The **ECHR has special significance** in that respect (see, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25).

72.

The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (*Bosman*, cited above, paragraph 79). That provision states that [t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

73.

It follows that **measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community** (see, *inter alia*, *ERT*, cited above, paragraph 41, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14).

74.

Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.

75.

It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR (see to that effect, *inter alia*, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28).

76.

In the present case, the **national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.**

77.

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

78.

First, **whilst the free movement of goods constitutes one of the fundamental principles** in the scheme of the Treaty, **it may**, in certain circumstances, **be subject to restrictions** for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649.

79.

Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that **freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued** (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42, and Eur. Court HR, *Steel and Others v. The United Kingdom* judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 101).

80.

Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed (see, to that effect, Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 *P X v Commission* [1994] ECR I-4737, paragraph 18).

81.

In those circumstances, **the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.**

82.

The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

83.

As regards the main case, it should be emphasised at the outset that the circumstances characterising it are clearly distinguishable from the situation in the case giving rise to the judgment in *Commission v France*, cited above, referred to by Schmidberger as a relevant precedent in the course of its legal action against Austria.

84.

By comparison with the points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in *Commission v France*, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it.

85.

Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in *Commission v France*, cited above.

86.

Third, 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*, cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.

87.

Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the

demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.

88.

Moreover, it is not in dispute that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission v France*, cited above.

89.

Finally, concerning the other possibilities envisaged by Schmidberger with regard to the demonstration in question, taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.

90.

The imposition of stricter conditions concerning both the site - for example by the side of the Brenner motorway - and the duration - limited to a few hours only - of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.

91.

An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.

92.

In that regard, the Republic of Austria submits, without being contradicted on that point, that in any event, all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the

group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed.

93.

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.**

94.

In the light of those considerations, the answer to the first and fourth questions must be that **the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.**