



**UNIVERSITY
OF TURKU**
Faculty of Law

Free Movement of Goods and the Right to Protest

Examining how the European Court of Justice Finds a Balance Between Free Movement of Goods and the Rights to Freedom of Expression and Assembly

The Law of the EU Internal Market/ Faculty of Law
Bachelor's Thesis

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3.6.2025

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Supervisor: Professor Jukka Snell

Number of pages: 21 pages

Date: 3.6.2025

This paper examines how the European Court of Justice adjudicates cases where the right to protest, made up of the right to freedom of expression and the right to assembly, come into conflict with the fundamental freedom of free movement of goods. Specifically, the paper will try to answer the question “what are the key points of consideration in cases where the right to protest comes in odds with free movement of goods?”. A central part of this analysis will come from studying the CJEU judgements *Schmidberger* and *Commission v. France*. This analysis is supplemented with the work of many scholars of the field, including Stephanie Reynold’s article *Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights*, and the article *Fundamental Rights and the Framework of Internal Market Adjudication: Is the Charter Making a Difference?* by Niamh Nic Shuibhne. Lack of case law limits what conclusions can be drawn on this topic, but it can be said that the Court seems to overall apply a fundamental rights-oriented approach to cases concerning the right to protest. The Court’s argumentation does contain some problems, as it’s not always logical why it chooses to emphasize certain facts when determining how serious of a breach a demonstration causes. There is also some proof that the Court is generally more sympathetic to protesters with non-discriminatory, generally accepted aims like environmental concerns who do everything by the book, compared to protesters with discriminatory motives who conduct themselves in a more disorderly way.

Key words: Free movement of goods, Fundamental Rights, Freedom of Expression, Freedom of Assembly

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Case C-390/12 *Pfleger and Others* EU:C:2014:281.

House of Lords

Regina v. Chief Constable of Sussex EX Parte International Trader's Ferry Limited (1999) All ER (HL).

List of Abbreviations

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
TFEU	Treaty on the Functioning of the European Union

1 Introduction

Free movement of goods is one of the four fundamental freedoms of the EU, enshrined in what is now article 34 of the Treaty on the Functioning of the European Union (TFEU). The article prohibits Member States from enacting quantitative restrictions and all other measures having equivalent effect. This provision, which was originally envisaged as prohibiting discriminatory measures enacted by Member States with protectionist aims,¹ has in the over 70 years of history of the Court of Justice of the European Union (CJEU) widened in its scope to cover all kinds of measures that might hinder intra-Community trade.

The widening scope of free movement law has led to scenarios where fundamental freedoms can clash with the protection of fundamental rights. For example, from the text of article 34 it doesn't seem immediately obvious that an environmental protest that blocks traffic for one motorway could be a restriction of that article. However, in *Schmidberger*², a Member State was found to have breached a trader's right to free movement of goods by allowing this kind of protest to happen.

The right to protest is a central aspect of the rights to freedom of expression and freedom of assembly. Roadblocks and other disruptive methods of protest have been employed by many activist movements for a long time and are still a relatively common occurrence, so it is relevant to explore how the Court would balance the rights of the protesters with fundamental freedoms. Specifically, my research question for this paper will be: What are the key points of consideration in cases where the right to protest comes in odds with free movement of goods?

My main research method for this paper will be doctrinal research. A central weakness for conducting this study is that there is little relevant case law to draw conclusions from on this specific issue. So far, the Court has only given two decisions on cases where a protest was claimed to have breached article 34 TFEU. As part of my paper, I will be conducting a case study into these cases and compare them to find the central factors that influenced the Court's argumentation. Additionally, I will be supplementing this with other legal research conducted in the area.

¹ Reynolds 2016, pp. 653.

² Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333.

My paper will be structured into the following chapters: First, I will look into how the Court handles conflicts between fundamental rights and fundamental freedoms in general in chapter 2.1., and in chapter 2.2. I will present some specific considerations that are relevant in cases where the breach of free movement is claimed to have been caused by a protest. In chapter 3 I will look into why the Court might find a demonstration to be a derogation of article 34, and what kinds of arguments it uses to establish how seriously free movement of goods was breached. Lastly, in chapter 4, I will look into how a breach can be justified by fundamental rights arguments, by examining the Court's argumentation on the aforementioned *Schmidberger*.

2 Fundamental rights and fundamental freedoms at odds

2.1 How are clashes between fundamental rights and fundamental freedoms handled?

As Reynolds has stated, the EU doesn't have any kind of general fundamental rights competence, and thus there needs to be a "hook" to Union law in order to give the Court the competence to rule on fundamental rights questions.³ This hook was created in the field of fundamental freedoms in the case *ERT*, where it was established that the act of justifying breaches of free movement fall within the scope of Union law, and so those justifications must be compatible with fundamental rights.⁴

The Lisbon Treaty in 2009 made fundamental rights more visible in the Union by making the Charter of Fundamental Rights of the European Union into primary law, but fundamental rights have been successfully used as mandatory requirements that justify derogations from free movement of goods in the Court's case law even before that, in cases like *Schmidberger*⁵, which is in many ways a central case for this research paper and will be studied in great detail in later chapters. In the pre-Lisbon era, the Court based its fundamental rights considerations primarily on the European Convention on Human Rights and the Member States' "constitutional traditions".

The Court has, however, been criticized for how it approaches cases where its decision will have major implications for the protection of fundamental rights. Many have argued that, especially in older case-law, it often failed take into account the special importance of fundamental rights when they needed to be balanced with fundamental freedoms. The Court often applied the same *breach/justification methodology*⁶ to all article 34 TFEU cases, where it first finds a breach, then checks if there is a justification for that breach, and lastly checks for proportionality.⁷ This methodology places all arguments that are brought up in support of derogating from free movement law in a disadvantageous position in comparison to free movement rights, as justification for derogations must justify their importance against the

³ Reynolds 2016, pp. 660.

⁴ Case C-260/89 *ERT v. DEP* EU:C:1991:254, para 42-43.

⁵ Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333, paras 70-74

⁶ Reynolds 2016, pp. 647.

⁷ Nic Shuibhne 2017, pp. 218.

fundamental freedoms, which importance is presupposed. Reynolds has brought up that because of this, derogations that aim to protect fundamental rights might have to overcome many requirements to be deemed suitable to use as justifications, such as they have to be non-arbitrary, necessary, effective and the option that is the least restrictive on free movement.⁸

2.2 Specific questions when dealing with protests

As stated in the introduction, there have only been two cases in the Court's history which pertain to demonstrations and free movement of goods. These cases are the aforementioned *Schmidberger*, and its predecessor *Commission v France*⁹. Even though the *Commission v France* doesn't expressly deal with the demonstrators' right to expression and assembly, it set out some clear principles that the Court later applied in *Schmidberger*. These are, firstly: Member States are responsible for allowing private individuals to cause breaches to article 34 through inaction,¹⁰ and secondly: demonstrations can constitute a breach by directly restricting the movement of goods between Member States,¹¹ and this breach is even more serious if the demonstration is responsible for the creating a "climate of insecurity" which has a deterrent effect on trade flows as a whole.¹² These principles will be considered in more detail in chapter 3.

Of these principles, the first one is especially important, as it is a central reason why the legality of protests can even come into question in the Court. The principle essentially contains a positive obligation on the States to protect the fulfilment of free movement of goods by adopting all appropriate measures to ensure that private individuals in its territory do not infringe on others' article 34 rights.¹³ The common opinion among scholars is that article 34 only has vertical direct effect.¹⁴ The Court has expanded direct effect onto private parties for free movement of workers and free movement of services and establishment, but it has been very reluctant to do so in the case of free movement of goods.¹⁵ Because of this, it is

⁸ Reynolds 2016, pp. 647-648.

⁹ C-265/95 *Commission v. France* EU:C:1997:595.

¹⁰ *Ibid.*, paras 29-30.

¹¹ Case C-112/00 *Eugen Schmidberger Internationale Transporte und Planzüge v. Austria* EU:C:2003:333, para 64.

¹² C-265/95 *Commission v. France* EU:C:1997:595, para 53.

¹³ *Ibid.*, para 56.

¹⁴ Barnard 2022, pp. 75.

¹⁵ Savković 2018, pp. 89-92.

very unlikely that the Court will ever consider that a conflict is between a party that is claiming a breach of article 34 and the group of protesters that is claimed to cause the breach. Instead, the responsibility for the protesters' actions will fall on the State that allowed the breach to happen.

However, the direct effect of the positive obligation set out in *Commission v France* has been argued at the Member State level. In the UK case *R v. Chief Constable of Sussex EX Parte International Trader's Ferry Limited*¹⁶, Lord Hoffmann argued that from the language of the CJEU case it is unlikely that it would be directly enforceable, as direct effect can be given only to obligations that are clear, unconditional and such that they do not leave Member States discretion on their application, according to the case *Van Gend en Loos*.¹⁷ As Lord Hoffmann pointed out, the Court left the French Government a wide discretion on what measures to implement to fulfil their positive obligation, and according to Hoffmann, this means that it is unlikely that this obligation can have direct effect.¹⁸

Another thing to consider here is what are the fundamental rights that the State can claim it is protecting when it allows a protest to go on despite the restrictions it places on free movement? In *Schmidberger*, both the Advocate General and the Court held that whatever rights or aims the protest itself was attempting to protect or achieve, these are "of no significance".¹⁹ Since the question in these cases is whether the authorities of the State had a justification for their actions, what matters is the rights that they were trying to protect when letting the protest happen, which are the demonstrators' freedom of expression and freedom of assembly.²⁰ These rights are guaranteed by both the ECHR and the Charter in their respective articles 11 and 12. However, I will argue in chapter 3.2.2. that this isn't the case in practise, as the aims of the protest seem to significantly influence the Court's argumentation, and how the protest can be justified.

¹⁶ *Regina v. Chief Constable of Sussex EX Parte International Trader's Ferry Limited* (1999) All ER (HL).

¹⁷ Case 26/62 *Van Gend en Loos* EU:C:1963:1.

¹⁸ *Regina v. Chief Constable of Sussex EX Parte International Trader's Ferry Limited* (1999) All ER (HL), Opinion of Lord Hoffmann.

¹⁹ Case C-112/00 *Eugen Schmidberger Internationale Transporte und Planzüge v. Austria* EU:C:2003:333, Opinion of AG Jacobs, para 54 and Case C-112/00 *Eugen Schmidberger Internationale Transporte und Planzüge v. Austria* EU:C:2003:333, para 66.

²⁰ Case C-112/00 *Eugen Schmidberger Internationale Transporte und Planzüge v. Austria* EU:C:2003:333, Opinion of AG Jacobs, para 54.

3 Breach phase

3.1 Case law

In this chapter I will focus on the breach-phase of the Court's breach/justification methodology to find the key points of consideration that influence how the Court finds that a demonstration has breached article 34, and what factors might either diminish or increase the perceived seriousness of the breach. First I will present the two cases that the Court has decided on and analyse their case law and why the Court has seen them as breaches of free movement.

Chronologically the first one of these cases was *Commission v France* in 1997. The case concerns a series of systemic attacks instigated by French farmers against transporters and sellers of foreign agricultural produce. The farmers tried to stop the sale of these foreign goods in the French market by using threats and violence against supermarkets who sold foreign produce and by intercepting lorries transporting foreign goods and destroying their cargo.²¹ These attacks had at the time of the judgement been going on for over 10 years, and the Commission had first contacted the French government back in 1985 asking it to adopt measures to stop these attacks on the free movement of goods.²² The French government however failed to act. The Commission claimed that the French authorities regularly let the attacks go on without interference, prosecuting only a handful of perpetrators, even though many more were caught on camera committing the attacks.²³

France defended itself by claiming that it had taken all the available steps to stop these attacks but couldn't stop them completely since the perpetrators committed the attacks in small, fast-moving groups. The French government also brought up the claim that the French farmers' actions were motivated by dissatisfaction caused by the negative effects on the French market for fruits and vegetables that Spain's accession into the Union had caused, as the Spanish farmers could sell their products for considerably cheaper than the French.²⁴

²¹ Case C-265/95 *Commission v. France* EU:C:1997:595, para 2.

²² *Ibid.*, para 41.

²³ *Ibid.*, paras 48-49.

²⁴ *Ibid.*, paras 22-23.

The Court disagreed and found France to have breached article 34 by failing to fulfil its positive obligation to protect free movement of goods by “manifestly and persistently” failing to adopt measures to stop the attacks.²⁵ Additionally, it held that the harmful effects of the attacks weren’t limited to the products that were directly attacked, but they harmed trade on a larger scale by creating “a climate of insecurity which has a deterrent effect on trade flows as a whole”.²⁶

In 2003, the Court delivered its other judgement on this issue, the *Schmidberger* case. In this case the Court had to decide if Austria breached article 34 by allowing an environmental group to hold a protest on a motorway, stopping lorries from using the road for 30 hours.²⁷ The protesters aim with the protest was to bring attention to how increasing movement of heavy lorries on the motorway was causing harm to the environment.²⁸

In its judgement the Court is starting from the principles it laid down in *Commission v France*. Firstly it echoes the argument it made in that case that article 34 mandates that Member States abstaining from taking all necessary and appropriate measures to stop private individuals from creating obstacles to free movement of goods is a breach of the article.²⁹ Considering this in connection with the fact that the motorway that the protests closed was a major transport route between two Union countries, Germany and Italy, the Court concluded again that Austria’s conduct had constituted a measure of equivalent effect to a quantitative restriction, and there had thus been a breach of article 34. The Court did however find that in this case the breach was justified, unlike in the *Commission v France* case, and the reasons for that will be explored in chapter 4.

3.2 Facts that mitigate the seriousness of the breach

From the facts of these cases, it is clear that they are at the opposite ends of a spectrum in terms of the scope of how gravely they impacted free movement. Unfortunately, that means that we do not have case law of more nuanced cases of protests affecting intra-Community

²⁵ Case C-265/95 *Commission v. France* EU:C:1997:595, para 65.

²⁶ *Ibid.*, para 53.

²⁷ Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333, para 16.

²⁸ *Ibid.*, para 65.

²⁹ *Ibid.*, para 59.

trade, so it is difficult to draw clear answers as to how the Court would judge these cases if they were to be brought before it today. However, in this case the Court does bring up some reasons that it seems to see as facts that mitigate how serious the breach the protest created was, which then possibly lessened the threshold that the justifications for that breach needed to overcome.

Appleton and Graf have in their paper *Freedom of Speech and Assembly Versus Trade and Transit Rights: Roadblocks to EU and MERCOSUR Integration* identified an extensive list of factors that a court could take into account when considering if a demonstration caused an unacceptable breach on free movement, based on *Schmidberger*, *Commission v France* and a similar MERCOSUR case.³⁰ This list can be summarized in viewpoints that cover the central points raised by Appleton and Graf: What is the scope of the disruption caused by the demonstration, what is the aim of the demonstration and is it a proportionate measure for reaching that aim, and how were Member State authorities involved in the demonstration.

3.2.1 Scope of disruption

The first point is very simple, as it just means that the more disruption a demonstration causes, the more it needs to be justified. In the *Schmidberger* decision, the Court considered many measures that the demonstrators took in order to limit the disruption of their protest, compared to the French attackers. The disruption lasted for only 30 hours, compared to over a decade, and the protest organizers and authorities had attempted to alert people to the coming disruption by launching a campaign to notify people about the protest well in advance.³¹ The Court didn't expressly point it out, but an obvious point in the Austrian protesters' favour is that their demonstration was wholly peaceful, unlike the French who resorted to acts of very serious violence.

Taking these things into consideration, the Court then concluded that the protest “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

³⁰ Appleton - Graf 2007, pp. 278-279.

³¹ Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333, para 87.

issue in the case giving rise to the judgment in *Commission v France*”,³² bringing up the phrase “climate of insecurity” again like in the *Commission v France* -judgement.

While demonstrations that cause a limited amount of disruption to intra-Community trade seem to be more easily justifiable, the Courts’ case law shows that they would still constitute a breach of free movement of goods, no matter how insignificant the disruption is. The Court has been very firm in its stance on rejecting to adopt a *de minimis* test when applying article 34, which would mean that only substantial hindrances to market access would be caught by the article. Multiple Advocate Generals have suggested the Court use this test, arguably most notably Advocate General Jacobs in *Leclerc-Siplec*³³, and the Court has multiple times responded by rejecting these suggestions by holding that even the slightest hindrances are caught by article 34.³⁴ So it is unsurprising that the *Schmidberger* -demonstration, which is claimed to only have effected one trader from using one motorway for 30 hours was deemed to be a breach of free movement, and it seems to set a precedent that future demonstrations cannot escape article 34 even if their effects on intra-Community trade are in fact insignificant.

This principle can be further illustrated by contrasting *Schmidberger* with a case that was delivered two years after it, which concerned Austria’s attempts at placing regulations on the weight of lorries that drive through the area where the demonstration was held.³⁵ The regulation would have prohibited, among other things, lorries that weighed over 7,5 tonnes and that were carrying certain goods from using a specific 46 km long section of a motorway.³⁶ This was understandably found to be a breach of free movement of goods.³⁷ This shows how absolute the Court can be about insisting that the scope of the disruption isn’t a decisive in determining if something is a breach, since a 30 hour blockade of a motorway and a permanent ban on certain lorries from a section of another nearby motorway are both breaches on free movement of goods. But, as stated before, it does seem to affect how

³²Case C-112/00 Eugen Schmidberger Internationale Transporte und Planzüge v. Austria EU:C:2003:333, paras 85-88.

³³ Case C-412/93 *Leclerc-Siplec* EU:C:1995:26, Opinion of AG Jacobs, para 42.

³⁴ Snell 2010, pp. 450-451.

³⁵ Case C-320/03 *Commission v Austria* EU:C:2005:684.

³⁶ *Ibid.*, paras 22-24

³⁷ *Ibid.*, paras 68-69.

justifiable the action is, as *Schmidberger* was successfully justified, but the regulation in question in *Commission v Austria* wasn't.³⁸

3.2.2 Aim of demonstration

The second point is perhaps more surprising, as it goes against the opinion that the Court and Advocate General Jacobs gave in *Schmidberger* that the aims of the protest do not matter in these cases. However, from the text of the decision it is clear that the aims of the demonstrations do clearly matter in how the Court will treat a case. A point that the Court presents in *Schmidberger* as seemingly favourable for the case is that the aim of the protest was not to restrict intra-Community trade, like in *Commission v France*.³⁹

Even though the focus in judging whether a protest breached article should be on how the authorities acted, the fact that protests with different aims can be judged differently seemingly puts significant pressure to protesters to consider if the Court would react favourably to their aims. Further, it suggests that the Court might be judging demonstrations that act like distinctly applicable measures more harshly than those that are more akin to indistinctly applicable measures.

The distinction between distinctly and indistinctly applicable measures was made in *Dassonville*.⁴⁰ Distinctly applicable measures are discriminatory by being very explicitly aimed at treating foreign goods differently than their domestic counterparts, while indistinctly applicable measures are in their face non-discriminatory and neutral about the origin of goods but have a discriminatory effect in practice.

In the two cases discussed here, the Court doesn't use the language of direct or indirect discrimination. Advocate General Lenz does, however, claim in his opinion on *Commission v France* that the attacks had both direct and indirect consequences on traders from other Union countries. The attacks had a very obvious negative effect on the traders whose products were destroyed by the demonstrators, but the "climate of insecurity" caused by attacks was

³⁸ Case C-320/03 *Commission v Austria* EU:C:2005:684, para 91.

³⁹ Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333, para 86.

⁴⁰ Case C-8/74 *Dassonville* EU:C:1974:82, para 5.

substantial enough to cause other traders to understandably be weary of bringing their products to France to be sold, due to the fear that their products would be also attacked.⁴¹

In my opinion the attacks in question in *Commission v France* can be seen being akin to a distinctly applicable measure, and the demonstration in *Schmidberger* as indistinctly applicable. The aim of the French protestors was very directly and expressly to stop traders from other Union countries from selling their products in the French market, while the Austrian protestors had no aims related to free movement of goods. I would argue that in bringing up the non-discriminatory nature of *Schmidberger* in contrast to *Commission v. France* the Court shows at least a more sympathetic attitude towards demonstrations that do not attack the core of the Union.⁴²

This then raises questions about what aims are more or less acceptable by the Court. Here it has to be stated again that there isn't a sufficient amount of case law to conduct a comprehensive analysis on this topic, but these two cases do seem to create a divide between environmental, non-discriminatory aims and economic, more directly discriminatory aims. Firstly, the Court has been consistently very open in accepting environmental concerns as justification for derogating from fundamental freedoms.⁴³ In contrast, it has been established in case law that derogations from article 34 cannot be justified by economic concerns alone.⁴⁴ Additionally, the Court stated in *Commission v. France* that Member States cannot "unilaterally adopt protective measures or conduct itself in such a way as to obviate any breach by another Member State of rules of Community law".⁴⁵ This statement was in connection to the claim France made that the protestors were acting out of frustration that was caused by Spanish farmers themselves breaching union law by dumping prices and destabilizing the French market in an act of outright provocation.⁴⁶

However, what the appropriate distance from the core of free movement of goods that the concern needs to be at is unclear, since some level of connection seems to not be an issue to the Court. The Court doesn't mention in *Schmidberger* that the issue at the centre of the

⁴¹ C-265/95 *Commission v. France* EU:C:1997:595, Opinion of AG Lenz, para 14-15.

⁴² Humphreys 2004, pp. 193.

⁴³ Humphreys 2004, pp. 192.

⁴⁴ C-265/95 *Commission v. France* EU:C:1997:595, para 62.

⁴⁵ *Ibid.*, para 63.

⁴⁶ C-265/95 *Commission v. France* EU:C:1997:595, Opinion of AG Lenz, para 22.

demonstration, the rapidly growing traffic on the blocked Brenner motorway, was accelerated by Austria's accession to the Union, as the motorway is a major transit route between Italy and Germany.⁴⁷ It was probably a good choice from Austria to not bring this up in Court as a defence, and instead focus on the environmental aspects of the demonstration, which seem to be received better by the Court. Humphreys has even in his article *Free Movement and Roadblocks: The Rights to Protect in the Single Market* claimed that especially environmental concerns are often well protected by the Court,⁴⁸ and perhaps the French could have had a better chance of getting a more favourable judgement if their objectives had been more green.⁴⁹

3.2.3 Authorities' involvement

The third point concerns the role that the authorities play when the Court is considering a case's justifiability. This goes beyond just considering if the authorities enacted all necessary and appropriate measures to limit disruptions to free movement of goods and seemingly places some expectations on how protestors should involve authorities in their demonstrations.

One thing that is seemingly seen favourably by the Court is that the demonstrators have asked for and received approval for their protest from the authorities.⁵⁰ In *Schmidberger* it is pointed out that contrary to *Commission v France*, the demonstrators asked for permission to hold their demonstration, and that permission was granted on the basis of Austrian law.⁵¹ Why this should diminish the level of breach the protest caused is unclear, since intuitively the opposite should be the case. If the question is whether the authorities did everything that can be expected from them to manage disruption caused by a protest, wouldn't the fact that the authorities had no knowledge of the demonstration show that they couldn't have been able to mitigate that disruption, at least not as effectively as in the scenario where they were aware of the demonstration?

⁴⁷ Humphreys 2004, pp. 192.

⁴⁸ *Ibid.*, pp. 192.

⁴⁹ *Ibid.*, pp. 194.

⁵⁰ Appleton - Graf 2007, pp. 278.

⁵¹ Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333, para 84.

Humphreys suggests that the Court might have considered that the Austrian protest was a more proportionate use of the right to freedom of assembly and freedom of expression due to the consistent cooperation of the demonstrators and the authorities, compared to *Commission v France*.⁵² This then allowed the authorities to prepare for the coming disruption and mitigate it as much as they saw was appropriate. There isn't, however, any clear justification for this approach. ECHR case law is the most suitable point of reference here as *Commission v France* and *Schmidberger* were decided based on the Convention, and we do not have any CJEU case law on demonstration that were given after the Charter became primary law. As Humphreys points out, at the time of the judgement ECHR case law didn't have a clear bias towards well organized protests with authorisation over poorly organized ones.⁵³ This seems to still be the case, as Member States to the convention are allowed to require authorisation for demonstrations, but lack of authorisation doesn't give authorities the automatic right to shut down a demonstration.⁵⁴

⁵² Humphreys 2004, pp. 194.

⁵³ *Ibid.*, pp. 194.

⁵⁴ Guide on Article 11 of the European Convention on Human Rights 2024, pp. 21-22.

4 Justification phase

In the previous chapter I explored how the Court determines if a demonstration constitutes a breach of article 34. I brought up that there are factors that seem to diminish the severity of that breach, which then make that breach easier to justify. However, based on the case law it still seems that demonstrations that have even the slightest effect on intra-Community trade will in the end be seen as breaches of free movement by the Court, especially due to the principle established in *Commission v France* that authorities have a positive responsibility to use all necessary and appropriate measures to stop even private individuals from disrupting the enjoyment of this right, and the Court's rejection of establishing a *de minimis* test on article 34. Thus, it is likely that if a demonstration like the one in *Schmidberger* would come before the Court in the future, the authorities who allowed it to happen would need to justify their decision with the protection of the fundamental right to expression and assembly.

So, in this chapter I will firstly analyse how *Schmidberger* was successfully justified by fundamental human rights concerns. I will not do the same for *Commission v France* this time, as the French didn't attempt to raise justifications based on the violent attackers' human rights. It is expressly stated in the freedom of assembly articles in both the ECHR and the Charter that the right only covers peaceful assemblies, so there is no question if a demonstration like the ones in *Commission v France* could ever be justified by it.

As *Schmidberger* was delivered before the Lisbon Treaty made the Charter of Fundamental Rights of the European Union into primary Union law, I will lastly explore how the Court's adjudication of conflicts between fundamental rights and fundamental freedoms has changed in the post-Lisbon era. As I will explain in chapter 4.1., *Schmidberger* was a case where the Court introduced a way of balancing fundamental rights with free movement rights that was at the time quite advanced, so the Charter doesn't in my view bring any substantial changes to how it would be decided on today.

4.1 Pre-Lisbon

As stated before, *Schmidberger* was decided before the Charter became primary law, so the Court drew its freedom of expression and assembly from the ECHR and the Austrian constitution. It firstly states that fundamental rights "form an integral part of the general principles of law the observance of which the Court ensures", and thus measures that are

incompatible with those rights are not acceptable. Because of this, the protection of fundamental rights can be a legitimate justification for derogating from fundamental freedoms.⁵⁵

However, the Court does also point out that rights to freedom of expression and assembly are not themselves absolute rights like the right to life and can thus be derogated from if there is a legitimate reason to do so and those derogations do not impair the very substance of those rights. So, there is a need to balance these fundamental rights with the fundamental freedoms, as neither automatically trump the other.⁵⁶

First, the Court lays out all the points stated in chapter 3 that limit the severity of the breach on free movement of goods that the protest caused, and that show how proportional the breach was in comparison to the aims of the protest. Taking these facts into consideration, the Court then states that the disruption caused by the demonstration was proportional and the authorities were justified in protecting the demonstrators' right to freedom of expression and assembly. Not only would a total ban on the protest been a "unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public", the Court goes further in its human rights analysis and states that placing limitations on the protest by, for example, restricting its length to only couple of hours or by moving it from the motorway to its side could have been excessive restrictions. The Court accepts inconvenience to outsiders as a part of a demonstration, if it protects the demonstrators' right to lawfully express their opinion.⁵⁷

The response to *Schmidberger* has been mixed. It was celebrated by some scholars as a fundamental rights oriented approach to resolving clashes between fundamental rights and fundamental freedoms due to how the Court chose to balance the two conflicting rights, instead of putting fundamental rights in the defending position.⁵⁸ This approach was later used in other pre-Lisbon cases, such as *Promusicae*⁵⁹, which tends to be cited by the Court more

⁵⁵ Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333, paras 69, 74.

⁵⁶ *Ibid.*, paras 80-81, 90.

⁵⁷ *Ibid.*, paras 89-93.

⁵⁸ Nic Shuibhne 2017, pp. 231.

⁵⁹ Case C-275/06 *Promusicae* EU:C:2008:54, para 68.

often than *Schmidberger* by the Court today.⁶⁰ However, other commentators have been less enthusiastic about the decision, and deny that the Court's approach was fundamental rights centric. Instead, they see that *Schmidberger* applies the standard free movement law analysis and *breach/justification* methodology⁶¹, and the Court in fact is failing to take into account that at the centre of the case is a need to protect fundamental rights.⁶²

I agree with the more sceptical scholars that the Court's approach to *Schmidberger* and other such cases, where it seems that even the slightest restrictions of free movement law are found to breach fundamental freedoms, is not optimal from the point of protecting fundamental rights. However, I do also agree with the scholars who praise the judgement in *Schmidberger* for being more fundamental rights oriented than the Court's case law often was at the time. While the decision in *Schmidberger* wasn't perfect, I would argue that the Court did go as far it could in protecting fundamental rights, given how the structure of the Union law at the time gave substantially more protection to free movement right than to fundamental freedoms, since only fundamental freedoms were protected by primary law. Further, Reynolds has argued that the structural advantage of fundamental freedoms over fundamental rights is the inevitable result of how the Treaties are written and how the Court's case law has developed.⁶³ For example, she argues that the fact that article 34, the article that establishes the prohibition on restrictions of free movement of goods, is written before article 36 on the justifications for restrictions can be seen as giving legitimacy to the viewpoint that justification must be interpreted strictly compared to free movement rights.⁶⁴

In any case, *Schmidberger* didn't signal a shift to a more fundamental rights centric approach in the Court's decision making, as it was followed by cases that relied on the Court's usual breach/justification analysis. One such case was the very infamous *Laval*⁶⁵ judgement in 2007, where the fundamental right to take collective action was treated as an overriding reason of public interest which could in principle justify restricting fundamental freedoms,⁶⁶ but the collective action in question failed the standard proportionality test and could not be

⁶⁰ Nic Shuibhne 2017, pp. 232.

⁶¹ Reynolds 2016, pp. 647.

⁶² Ojanen 2004, pp. 132.

⁶³ Reynolds 2016, pp. 675.

⁶⁴ Reynolds 2016, pp. 648.

⁶⁵ Case C-341/05 *Laval un Partneri* EU:C:2007:809.

⁶⁶ *Ibid.*, para 103.

justified.⁶⁷ These discrepancies are why, for example, Nic Shuibhne has described pre-Lisbon case law as inconsistent.⁶⁸ In this era of case law it would have been difficult to predict if the Court would choose to apply the more human rights oriented approach of balancing fundamental freedoms and fundamental rights like in *Schmidberger*, or used the standard free movement law approach of *Laval*.

It is worth considering why the Court disregarded the balancing test in *Laval* that it was praised for in *Schmidberger*, leading to a less favourable judgement in terms of fundamental rights. The case concerned a collective action instigated by the Swedish building and public works trade union Byggnads, that blockaded a Latvian company Laval and its workers from accessing a work site that Laval was contracted to work on. The action was lawful under Swedish law and was instigated due to Laval refusing to sign the collective agreement for the building sector.⁶⁹ This action was found to have violated the freedom to provide services.⁷⁰

The Court recognized that collective action can be a justified restriction of fundamental freedoms when its objective is to protect the right to strike and worker protection,⁷¹ but stated that it is not absolute and must be used in accordance with Union law.⁷² Here we can see that one major difference between *Laval* and *Schmidberger* comes from the fact that Byggnad's objectives for their collective action were taken into account in the proportionality analysis,⁷³ unlike in *Schmidberger* where the demonstration's objectives were held as "not material".⁷⁴ This discrepancy comes from the fact that free movement of services has been given horizontal direct effect,⁷⁵ so Byggnads could be held liable for their actions as a private party. Byggnads' objective was to pressure Laval into a collective agreement, which was found to be discriminatory, since it didn't take into account that foreign companies like Laval might already be subject to collective agreements in their home country. Thus, the action could only

⁶⁷ *Ibid.*, para 119.

⁶⁸ Nic Shuibhne 2017, pp. 221.

⁶⁹ Case C-341/05 *Laval un Partneri* EU:C:2007:809, paras 27-34.

⁷⁰ *Ibid.*, para 99.

⁷¹ Tans 2008, pp. 270.

⁷² *Ibid.*, paras 91, 103.

⁷³ Case C-341/05 *Laval un Partneri* EU:C:2007:809, para 106.

⁷⁴ Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333, para 66.

⁷⁵ Savković 2018, pp. 90.

be justified by the grounds stated in the Treaty, so public policy, security or health.⁷⁶ None of these justifications were satisfied, so the action was found unjustifiable.⁷⁷

The key difference between *Schmidberger* and *Laval* is that in the former the fundamental right was given value on its own, whereas in the latter the fundamental right was treated as a means to an objective which was subject to the normal proportionality analysis. If *Schmidberger* had been judged with the same approach, the Court would have questioned if the protest was the least restrictive way to bring attention to the environmental issues that the protesters were worried about. Instead, the Court recognized that if the protesters' right to expression and assembly had been restricted by limiting how they could do the protest, this could have been an excessive restriction on their inherent fundamental rights.⁷⁸ So protesters seem to benefit from the fact that they are not themselves responsible for the breaches of free movement of goods that they cause, unlike trade unions who might be responsible in the area of free movement of services.⁷⁹

Why the fundamental rights to expression and assembly were given inherent value but the right to collective action wasn't is unclear. Perhaps this is because the Austrian protesters had no intention to affect how Mr. Schmidberger exercises his right to free movement of goods; he was just coincidentally affected. In contrast, Byggnads explicit objective was to pressure Laval into a situation where they would be tied to a collective agreement in both their home country and host country, making the exercising of the freedom of services less attractive for them. As I argued in chapter 3.2.2. on the aims of demonstrations, the Court does seem to be less sympathetic to aims that come too close to the core of fundamental freedoms, so perhaps the Court saw that Byggnads was trying to dictate how Laval could use its freedom to provide services and thought it was too direct of an attack into the core of the freedom.

4.2 Post-Lisbon

The primary purpose of the Charter was to strengthen fundamental rights protection in the Union by making them more evident.⁸⁰ It wasn't supposed to completely overhaul the fundamental rights case-law that the Court had developed, but to reaffirm it, as it states in the

⁷⁶ Case C-341/05 *Laval un Partneri* EU:C:2007:809, paras 116-117.

⁷⁷ *Ibid.*, para 119.

⁷⁸ Case C-112/00 *Eugen Schmidberger International Transporte und Planzüge v. Austria* EU:C:2003:333, para 90.

⁷⁹ Reynolds 2016, pp. 670.

⁸⁰ Conclusions of the Presidency 1999, para 44.

Charter's preamble. Thus, it is unsurprising that the Charter becoming primary law hasn't led to many major changes in how the Court handles fundamental rights, at least from the perspective of the *Schmidberger* judgement.

Instead, post-Lisbon case-law has changed to follow the *Schmidberger / Promusicae* balancing test consistently.⁸¹ While this is a win for fundamental rights protection, there are some who would have hoped that the Lisbon treaty would have placed above fundamental freedoms,⁸² but this wasn't the case. Fundamental rights are still just equal to fundamental freedoms.⁸³ Accordingly Charter rights can also be restricted, as article 52(1) states that the rights guaranteed by it can be limited if those limitations are "provided for by law and respect the essence of those rights and freedoms" and "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," just like certain ECHR rights such as the right to freedom of expression and assembly could be.

Additionally, the Charter codified some of the central principles from *Schmidberger* and *Commission v. France*, for example article 51(1) of the Charter states that Member States are bound by it only when they are implementing Union law. In *Pfleger* it was confirmed that this applied to Member States when they are justifying restrictions on the fundamental freedoms, upholding the *ERT* principle.⁸⁴ Thus the basic principles that *Schmidberger* was based on still stand, and so it seems that the judgement wouldn't change substantially if it were brought before the Court today. Instead, case law has in some ways changed to follow the precedent set in *Schmidberger*.

However, the Charter has introduced the possibility that conflicts between protesters and traders might be conflicts of two Charter rights, instead of a conflict between a fundamental freedom and a fundamental right. Nic Shuibhne has suggested that this has become a more common situation than a conflict between a fundamental freedom and a fundamental right, like in *Schmidberger*, in the post-Lisbon era.⁸⁵ Under the Charter, traders could maybe claim

⁸¹ Nic Shuibhne 2017, pp. 232.

⁸² Barnard 2013, pp. 46.

⁸³ Nic Shuibhne 2017, pp. 231.

⁸⁴ Case C-390/12 *Pfleger and Others* EU:C:2014:281, paras 35-36.

⁸⁵ Nic Shuibhne 2017, pp. 232

that a protest violates their Charter rights, such as article 16 on the freedom to conduct a business, or article 15 on the right to engage in work. What this means in situations where a trader has a claim that their right to free movement of goods and a right protected by the Charter has been violated is unclear. The Court has practically absorbed freedom of establishment into article 16 of the Charter with the effect that measures are assessed only through the Treaty article,⁸⁶ but it doesn't seem to have done the same for the free movement of goods. This could then possibly mean that a measure that is not deemed a breach of article 34 could be further assessed as a breach of a Charter right.

⁸⁶ Case C-367/12 *Sokoll-Seebacher* EU:C:2014:68, paras 20-23.

5 Conclusion

The question that I set out to answer in this paper was “What are the key points of consideration in cases where the right to protest comes in odds with free movement of goods?”. As stated, from the very limited amount of case law that we have on protests and free movement of goods it is hard to draw comprehensive conclusions on this, but here I will present the central principles and considerations present in the existing case law.

Firstly, in the breach-phase of the analysis some key facts that have an effect on how serious of a breach a demonstration causes are the scope of the disruption, the aims of the protest, and how the authorities are involved in the demonstration. The Court’s argumentation on all of these points is not perhaps completely logical, as it is not clear as to why, for example, protests where the protesters have cooperated with the authorities closely should be seen as more justifiable as more disorganized protests. It also remains to be determined in later case law what aims will be more acceptable than others as justifications for derogating from free movement law.

On the justification phase, I have argued that the Court showed great willingness to make derogations to other’s right to free movement of goods to protect protesters’ rights to freedom of expression and assembly in *Schmidberger*. It is promising that the Court is ready to accept some inconvenience to outsiders as a part of a demonstration, when it protects the demonstrators’ right to protest peacefully. The Charter’s accession into primary law should further strengthen fundamental rights protection in the Union, and signal that the balancing test will be consistently applied to future cases.