

ECONOMIC FREEDOM AND TRADE FREEDOM

*Cristina (GHERMAN) IUHAS**

Abstract

The paper has a multidisciplinary, historical and comparative approach on the origin and evolution of trade freedom in the sense of seeing whether it is part of, or distinct from, the economic freedom. In this approach, we will start from the premise that the economic freedom is part of the fundamental rights of man and of the citizen. With the evolution of social relations, the economic freedom has undergone changes in the sense of divisions of its material content, among which we can mention the freedom of trade. We also intend to highlight the trends towards which the market economy in our country is moving due to the obligations assumed by Romania as a member state of the European Union.

Keywords: *market economy, economic freedom, trade freedom, Romania, the European Union*

JEL Classification: [K 1, K 10]

1. Economic freedom vs. trade freedom - doctrinal distinctions

Doctrine distinguishes between human rights and freedoms. The notion of “human rights” (...) “derives from the concept of natural law, according to which man, precisely because he is a human being, has an ensemble of rights inherent in himself. Regardless if the positive law enshrines them or not, these rights subsist in themselves, closely related to man, as the subject to which they are recognized” (Bîrsan, 2005, p. 8).

To the contrary, freedom appears as “a power to act or not to act” and all freedoms are public freedoms in that they do not enter into positive law unless the state enshrines them in the national legal system, regulates their exercise and ensures their observance” (Bîrsan, 2005, p. 8). To perceive a relationship between economic freedom and trade freedom requires a conceptual discussion on their material content.

Starting from Adam Smith's system that sustained freedom in its natural state to the capitalism of Karl Marx (Boudreaux et al, 2015, p. 67), economic freedom is one of the benchmarks for the organization of the state and the removal of the arbitrary and chaotic behavior of individuals. That is why

* Lawyer, PhD. candidate, Doctoral School of the West University of Timisoara, Faculty of Law, e-mail: avocatiuhas@gmail.com.

economic freedom is a creation of the state, through centralized planning and control of the means of production, which must not be left to “the discretion of the decentralized decisions of individuals” (Boudreaux et al, 2015, p. 67). Therefore, “economic freedom is the foundation of all freedoms” (Barron, 2018).

Economic freedom is an exponent of public human liberties, with a pragmatic reflection in positive law. Economic freedom is part of the generation of economic, social and cultural rights that was born by accepting that they are of a public nature (Băeșu, 2-15, p. 90). Thus, “The economic rights of man as public liberties are not to be mistaken for the subjective rights, which are the rights belonging to a subject, while public freedom belongs to all subjects of law equally from a legal point of view, an universal legal freedom” (Băeșu, 2-15, p. 90).

In another opinion, it is argued that “subjective law is a conceded faculty, while public freedom is not conceded by the legal order, but only ascertained and defended by it” (Pescatore, 1978, p. 239).

In another sense, it is argued that economic freedom is dependent on the existence of a market economy whereby any person can initiate and undertake a lucrative or economic activity, under the legal consecration of unrestricted exercise and access to free enterprise (Muraru & Tănăsescu, 2011, p. 178) (Preduca, 2011, p. 200). Correlatively, it is considered that economic freedom is the result of the conduct of individuals who pursue their own interest (...) and who succeed in indirectly promoting the general or collective well-being” (Iliescu, 1998, p. 66).

We consider that economic freedom is dependent on a democratic state because it guarantees the free exercise of economic activities.

2. Constitutional evidence on economic freedom and trade freedom

In practice, economic freedom is guaranteed by the constitutionalization of the economic rights as fundamental human rights and it is protected by the fundamental principles of the modern state, namely the principle of the rule of law, the principle of market economy, the principle of free trade, the principle of unfair competition, and so on.

Creating opportunities by providing a stable and predictable legislative framework has led to economic growth and development, to overcoming traditional and geographical legal boundaries and to the development of international relations through which the classical economic principles have become transnational.

In this context, economic freedom has favoured free trade, which has also generated the legal concept of freedom of trade. Nowadays, the two concepts are interdependent and they create rights and obligations. The free trade thus “gives the citizens of the world the economic freedom to promote

their economic interests as consumers, distributors and producers without the state intervention” (Kafele, 2018). Trade freedom therefore creates entrepreneurship, economic growth and innovation in a global society.

Free trade has given rise to commercial practices derived from the commercial law, which, although juggling with the same economic patterns - market, demand, offer, producer, consumer - focuses on international agreements or partnerships.

In this regard, it was appreciated that we would find ourselves in a situation where a state carries on trade with other states as a result of the fact that only its own economy generates a series of unique products (Ricardo, 1821) by virtue of which it is faced with an activity trade between nations, “even if a country has an absolute advantage in producing all the traded products” (Pressum (coord.), 1995, p. 35). In other words, the actual activity has an economic nature and is subject to the fundamental principles of the economy, namely the principle of free trade, the principle of fair competition and the principle of mutual observance of the agreements concluded between the parties.

Therefore, art. 27 par. (1) of the Swiss Constitution guarantees economic freedom. Par. (2) of that same article mentions the material content of that freedom, namely the freedom to choose a profession, the freedom to enjoy free access and the free exercise of a private economic activity.

Art. 45 of the Romanian Constitution enshrines “economic freedom”, namely the free access of individuals to an economic activity, the free initiative and the exercise thereof under the law.

On the other hand, trade freedom is not a novelty in the European constitutional landscape. This concept was born in the 18th century France, together with the Decree d'Allarde of 1791 and the Chapelier Law, which abolished guild organizations and promoted the freedom to practice professions, trade and crafts.

In 1849, the first Danish Constitution (Grundloven) abolished all restrictions on commercial freedom and the free and non-discriminatory access to trade activities.

In Sweden, the Royal Decree of 1864 on the extension of freedoms granted both women and men the right to conduct commercial activities.

In the twentieth century trade freedom was constitutionalized as part of the process of transition from absolutist regimes to representative democracy regimes and to guaranteeing market economy. For this reference period, we take into account the example of Germany and Italy in 1940, of Greece, of Portugal and of Spain in 1970 and of the countries of Central and South-Eastern Europe in 1990.

3. The Influence of International Law on commercial freedom or the influence of commercial freedom on International Law?

Within the universal documents stating human rights, there is the notion of “economic rights”, which tend to be discussed “as part of a wider group of economic, social and cultural rights, which is the basis for defining this concept” (Daintit, 2004, p. 57). In this context, we refer to the Pact on Economic, Social and Cultural Rights adopted by the United Nations General Assembly on 16 December 1966, together with the Convention on Civil and Political Rights.

International agreements have been important for the dissemination of economic rights as well as for their definition. In the Charter of Fundamental Rights and Freedoms of the European Union, the Member States of the Union listed the fundamental rights which, in their view, should govern the Union's work.

Article 16 of the Charter of Fundamental Rights of the European Union establishes the freedom to conduct a trade activity. The freedom to conduct a commercial activity, viewed in the light of the European Union, has a dimension influenced by globalization.

Based on these economic concepts, a new structure has emerged, which promotes commercial freedom and is characterized by the phenomenon of globalization. Influences have been reciprocal in removing the terminological and material barriers between economic freedom and trade freedom, as globalization has eluded traditional and innovating constructions.

Trade development has influenced the demand and supply on the market and has boosted the global production. Economic globalization has given rise to a rethink of the legal space and has influenced the policies of the states. Thus, we can talk about a transnational right that reformed monetary and financial policies, employment policy, consumer protection standards, and so on. The global economy is guaranteed by economic freedom and the trade freedom. This type of economy has been formed by facilitating the investments of multinational companies through legislation, with the main purpose of employment.

By eliminating the isolation of certain national economies and their integration at the international level, the possibilities of major financial crises are diminishing. Accelerating the globalization process has triggered an explosion of international production and financial transactions within the free market economy (Hansen et. All, 1997, p. 7).

World trade is growing faster than production and highlights the duality of the globalization process: trade is growing internationally, but is also growing at the regional level (Hansen et. All, 1997, p. 7).

The trend in lowering customs duties is evident as a result of agreements under the General Agreement on Tariffs and Trade (GATT) or those concluded under the auspices of the World Trade Organization. These agreements have failed to release all kinds of trade activities, with the world's states having a series of “customs barriers” - taxes, allowances, administrative authorizations, sanitary rules, technical regulations, regulated marketing agreements or voluntary export restrictions.

In the European Union, the 1958 Treaty of Rome is of great importance, which in Art. 9 states the following: „The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect”. 10 years later, in 1986, the tariff barriers and quantitative restrictions on trade between the Member States of the Community were eliminated, by creating a single market.

According to an abstract interpretation, the doctrine states that “the market is the space within which goods and services are exchanged between sellers and buyers in a geographical area” (Bozian, 2009, p. 50). In the literature, there is also the concept of “market sociology”, which addresses “*information that is a bridge to economic science*”. (Neményi & Eleodor, 2011, p. 14) In particular, it is the appreciation that “the economic models of the markets are a *sui generis* form of expertise that must be investigated using the tools of scientific knowledge sociology.” Thus, the analogy of information emerges with what is meant by “social action”, “knowledge”, “trust”, “uncertainty” (Neményi & Eleodor, 2011, p. 14), concepts taken from the parents of the economy - Adam Smith, Karl Marx, Max Weber Georg Simmel and others.

In our opinion, the market is born at the conceptual meeting of economic freedom with trade freedom, as a legal response to social facts.

At the European Union level, we meet the terms “common market”, “domestic market” or “single market”, which have the same meaning. From the legal point of view, the concept of the market is defining competition law as “an instrument for identifying and defining the boundaries in which competition takes place between companies” (Bozian, 2009, p. 50). Consequently, „The relevant market is therefore the market on which the competition takes place, the concept being used to identify products and economic agents in direct competition” (Bozian, 2009, p. 50). In 1985, at the initiative of the President of the European Commission, Jacques Delors, the White Charter on completing the internal market was launched, which proposed that by 1 January 1993 there would be no border control for the 12 Member States. In 1997, the European Commission presented the “Single Market Action Plan” to the Amsterdam European Council, proposing measures to improve the single market operation and prepare for the

introduction of the single European currency. In the single market we are talking about the free movement of people, goods, services and capital.

The free movement of persons was guaranteed by art. 48 of the Treaty of Rome, without any discrimination based on nationality, in terms of employment, wage setting and working conditions. Correlatively, the Social Charter of Fundamental Rights of Workers, signed in 1989, proclaimed as fundamental rights the freedom of movement of labor, employment and wages, living and working conditions, social protection, freedom of association and collective bargaining, training, equal treatment of women and men, information, consultation and participation of workers, protection of health and safety at work, protection of children and adolescents, the rights of the elderly, the rights of persons with disabilities.

As regards to ensuring the free movement of goods, we are considering the abolition of intra-Community border control¹.

The free movement of services is enshrined in art. 52 and 54 of the Rome Treaty and allows companies in a Member State to operate in the European Union under the operating license obtained in the country of origin. Financial services, banking services, insurance, telecommunications, transport, electricity, digitization, etc. are also included in this freedom.

The free movement of capital implies the elimination of control over capital transactions, the harmonization of national taxes on capital, and ensuring of fair competition between low taxation and high taxation countries.

We note that the European Union's single market is pan-European in nature, through trans-European networks for transport, energy and telecommunications.

The liberalization of trade in the European Union has been achieved by creating a global network of bilateral relations with a view to concluding partnerships or association agreements with third countries. These include the European Free Trade Association (EFTA), the G-7 Group, with Japan, the Central and Eastern European Countries (TECE), the Commonwealth of Independent States (Russia, Ukraine, Belarus, Moldova, Kazakhstan and Kyrgyzstan), the Mediterranean Area (preferential trade agreements under Art. 113 of the Treaty of Rome: Israel (1975) and Lebanon (1977); association agreements (based on Art. 238 of the Treaty of Rome) which sometimes provided the grant of financial support: Algeria, Tunisia and Morocco (in 1976), Egypt, Syria and Jordan (in 1977); association agreements providing for the establishment of a customs union: Turkey (1963), Malta (1970) and Cyprus (1972), Africa-Caribbean-Pacific (ACP), Latin America, Asia (ASEM).

¹ Exceptions make the unexpected controls on drugs, firearms and irregular migrants.

Conclusions

Economic freedom has made room for trade freedom, which is complex in nature, with sustainable economic valences and prospects. Consequently, acts of competition are considered to be genuine acts that encourage sustainable development through innovation and efficiency. But the enforcement of competition policy is only effective if these instruments are continually upgraded and maintained at the level of real market developments.” (Neagoe, Rădulescu, 2010, p. 44)

The distinction made by doctrine between economic freedom and trade freedom does not go much further from their constitutional conceptualization. We note that economic freedom guarantees the field of action of the trade freedom by providing mechanisms and instruments for its development, deployment and consolidation. Trade freedom goes beyond the traditional limits of economic freedom, reinventing the pattern of market economy, between transnational valences. The idea of a territorial border disappears in the way of trade, leaving a free path to capital markets, goods and services. However, the future of economic or commercial freedom does not appear to be restricted by the geographical or territorial dimension, but by the legal obstacles promoted by the public policies of the world's states.

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