

## **The very essence of the internal market freedoms**

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**ABSTRACT:** The guarantee of the *very essence of rights* is a well-known concept in the German tradition of rights' adjudication. The Court of Justice of the European Union has been influenced by the methods of control used by the German Constitutional Law in relation to restrictions to fundamental rights, and the Charter of Fundamental Rights has adopted some of the limits used therein. The article discusses whether the language of rights developed by the Court of Justice in relation to the internal market freedoms allows for the use of the guarantee of their essential core as a limit to State restrictions. Furthermore, it tries to define what should be taken as the inner core of fundamental freedoms. Attention is drawn to the relationship between the very essence of rights and the proportionality principle. The emphasis put by the Court on this principle shows that the inner core of the freedoms should come as a result of a balancing exercise between these and other compelling interests.

**KEYWORDS:** Fundamental rights, economic freedoms, internal market, non-discrimination, principle of proportionality

### **1. Introduction**

Economic freedoms lie at the heart of European Union Law. For decades they constituted its object almost exclusively, given the historical predominance of economic integration. Even when the social and political objectives of the Union were emancipated, over the last years of the twentieth century, the primacy of economic freedoms remained undeniable.<sup>1</sup> Up

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<sup>1</sup> Niamh Nic Shuibhne, "The resilience of EU market citizenship", *Common Market Law Review* 47 (2010): 1610 *et seq.*; Julio Baquero Cruz, *Between Competition and Free Movement. The Economic Constitutional Law of the EC* (Oxford/Portland, Oregon: Hart Publishing, 2002), 80; Gonzalo Maestro

until the present day, even for those who recognize the open character of the so-called European Economic Constitution,<sup>2</sup> there still seems to be a clear prevalence of economic policies vis-à-vis other Union objectives. It should not be forgotten that the fundamental principles of European order – primacy and direct effect – which are instruments of the Economic Constitution and of European Law in general, were generated precisely in the context of economic freedoms: recall the facts in *Costa-ENEL*<sup>3</sup> and *Simmenthal*.<sup>4</sup>

This emphasis on European economic freedoms is not only a result of specific case law which occasionally qualified them as rights which individuals might rely upon in national courts; it is also deduced from all the judicial decisions which gradually shaped them as superior and fundamental rules of the Union. Whenever the Court of Justice is called upon to balance internal market freedoms against other admittedly relevant interests, it consistently recognizes the prevalence of the former and the exceptional character of the latter. Therefore, in the economic context in which European law developed, the rules on free movement reached the status of fundamental rights (or fundamental freedoms),<sup>5</sup> and economic operators benefit from “a true *Magna Carta* of rights and advantages that place them at the same level of nationals of the host country”.<sup>6</sup> In order to achieve that aim, the Court has adopted some principles and methods which added to the autonomous nature of EU Law conveniently drafted by the Court of Justice. However, the latter’s language is paradoxically neither innovative nor original. On the contrary, the constitutional shape of the European Union was inspired by constitutional patterns well-known and traditionally applied by the Member-States: the Constitutional Law of Member States has lost supremacy because another legal order has stolen

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Buelga, “Estado de mercado y Constitución económica: algunas reflexiones sobre la crisis constitucional europea”, *Revista de Derecho Comunitario Europeo* 8 (2007): 52.

<sup>2</sup> Miguel Poiares Maduro. *We the Court – The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998), 73.

<sup>3</sup> Judgment of 15 July 1964, *Flaminio Costa v. ENEL*, 6/64, EU:C:1964:66

<sup>4</sup> Judgment of 9 March 1978, *Amministrazione delle finanze dello Stato v. Simmenthal*, 106/77, EU:C:1978:49.

<sup>5</sup> Miguel Poiares Maduro, “Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights”, *European Law Journal* 3, 1 (1997): 64.

<sup>6</sup> Alfonso Mattera, “La liberté de circulation et de séjour des citoyens européens et l’application directe de l’article 8A du Traité CE”, in *Mélanges en hommage à Fernand Schöckweiler* (Baden-Baden: Nomos, 1999), 415.

and taken advantage of the very same principles the States had developed, in order to guarantee its own supremacy.

This is true, firstly, in respect of the methodology the Court has consistently applied in order to control restrictions on freedoms, which has roots, at least formally, in the control of restrictions to constitutional rights carried out by the German Federal Constitutional Court. Attracted by the latter's well-established case law, and recognizing the German tradition of protection of fundamental rights at the constitutional level, the Court of Justice of the European Union (hereinafter: CJEU) found that methodology to be appropriate to reflect the priority which it wanted to give to European economic freedoms over State restrictions. This methodology usually involves three steps: firstly the confirmation of the existence of a restriction, in which the Court checks whether the restriction falls within the guaranteed scope of the freedom at stake; secondly, the relevance of the legitimate interest put forward by the State; thirdly, the analysis of the proportionality principle<sup>7</sup> in which the Court develops a multipolar balancing exercise<sup>8</sup> between the controversial measure, its purpose and the effect it has on the right of the affected individual. This methodology, applied with remarkable persistence, "is one of the most predictable and formulaic features of free movement case law"<sup>9</sup> and is an essential element for rationality and intelligibility of the Court's decisions. In addition, it was further exported to other areas of European Law, namely citizenship and free movement rights.

Now, given the fact that this European method of restrictions has a German genetic code, it is legitimate to ask whether the German method was fully imported, in all its components, by the Court of Justice. In particular, one could examine whether the *guarantee of an essential core* of fundamental rights, a concept well known to German Constitutional Law, is also a feature of European freedoms and the judicial control exercised over it. Strangely enough, in spite of the large number of works on European freedoms that seek to rationalize them in the light of common principles and from the dogmatic frameworks of fundamental rights, and which,

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<sup>7</sup> Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford: Oxford University Press, 2013) 24; Loïc Azoulay, "La citoyenneté européenne, un statut d'intégration sociale", in *Chemins d'Europe – Mélanges en l'honneur de Jean Paul Jacqué*, ed. Gérard Cohen-Jonathan, Vlad Constantinesco, Valérie Michel, Jean-Claude Piris and Patrick Wachsmann, (Éd. Dalloz, 2010), 11-12.

<sup>8</sup> Oliver Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Berlin: Duncker & Humblot, 2003), 272-274.

<sup>9</sup> Niamh Nic Shuibhne, *The Coherence...*, *op. cit.*, 24.

in general, accept the influence of German law (even if only in a formal perspective),<sup>10</sup> no attention has been drawn to the problem of the “inner core” of freedoms. And yet the expression, or its equivalent “very essence”, has been occasionally referred to by the Court.<sup>11</sup>

This article will focus on the relevance of the “essential core” as a limit to State restrictions on European economic freedoms. First, the origins of the concept and the fundamental features of its usage in other legal orders will be considered (1); next, the Court of Justice case law regarding the “very essence” of the rights will be examined (2); further, the focus will be on how the inner core of internal market freedoms should be conceived, that is, its absolute or relative meaning, and its relation to proportionality. Finally a proposal of what should be considered as the *essential core* of European freedoms will be proposed: the right not to be discriminated against on grounds of nationality and the prohibition of absolute bans on the exercise of economic activities.

## **2. The roots of the concept in national constitutional traditions**

The assertion that the restriction must necessarily preserve an essential content of the fundamental right has its origins in German Constitutional Law.<sup>12</sup> The Constitution of Bonn makes reference to the concept, and it provides a fertile ground for discussion in scholarship.<sup>13</sup> From Germany, the concept has migrated to other European Constitutions, such as the Spanish (Article 53), the Portuguese (Article 18, paragraph 3), the Polish (Article 31, no. 3), the Hungarian (Article 1, no. 3) and the Slovak (Article 13, no. 4).

The guarantee of an essential content represents one of the *limits to limits* of fundamental rights, thereby establishing an impregnable border for each right, which restrictive measures cannot surmount. Although it is generally

<sup>10</sup> See, for instance, Hans D. Jarass, “Elemente einer Dogmatik der Grundfreiheiten”, *Europa Recht* 35 (2000): 705-723; Oliver Koch, *op. cit.*; Rudolf Streinz, “Grundrechte und Grundfreiheiten”, in *Handbuch der Grundrechte in Deutschland und Europa*, Band VI/1, ed. Detlef Merten, Hans-Jürgen Papier (Heidelberg: C. F. Müller, 2010), 664-685; Thorsten Kingreen, “Fundamental Freedoms”, in *Principles of European Constitutional Law*, ed. Armin von Bogdandy and Jürgen Bast, 2<sup>nd</sup> ed. (Oxford/Portland, Oregon: Hart Publishing, 2011), 515-549; Pedro Caro de Sousa, *The European Fundamental Freedoms: A Contextual Approach* (Oxford: Oxford University Press, 2015).

<sup>11</sup> On the other side, the *Bundesverfassungsgericht* insists that the EU should respect fundamental rights, and in particular their core: *Solange II*, BVerfGE 73, 339, 387.

<sup>12</sup> Article 19 (2) of the *Grundgesetz* states that “in no case may the essence of a basic right be affected”.

<sup>13</sup> See Peter Häberle, *La garantía del contenido esencial de los Derechos Fundamentales*, Madrid: Dykinson, 2003; Robert Alexy, *A theory of constitutional rights*, trad. Julian Rivers (Oxford: Oxford University Press, 2002).



related to the specific strength which all European States attach to fundamental rights vis-à-vis other interests, the concrete acknowledgement of the *very essence of rights* points to “an irremissible section of fundamental rights”,<sup>14</sup> meaning that amongst the several possibilities of action contained in each right, some constitute its substantial nucleus, which cannot be set aside by the restrictive action.<sup>15</sup>

Beyond this synthetic explanation of the concept, there are of course countless variations of its meaning, in particular regarding the way to determine what should be taken as the very essence of rights. For the purposes of this article and the connection to the internal market freedoms, only three related problems underpinning the general dogmatics of the inner core of rights will be briefly highlighted.

First, it is not clear whether a theory of an essential content of rights can be applied to all fundamental rights. Economic rights do not have a degree of determinability comparable to civil rights, being dependent upon the political and economic circumstances prevailing in each historical moment,<sup>16</sup> and it is therefore more difficult to determine and densify what should be considered as their essential core.<sup>17</sup> That is the reason why some national Constitutions, like the Portuguese, establish the guarantee of the essential content only for restrictions to civil rights, but not in relation to economic, social and cultural rights. Moreover, while it is true that this exclusion is not definitive, in view of the fact that those rights can be considered structurally equivalent to civil rights and therefore benefit from the same regime, the question will lie in the possibility of delimiting which faculties of economic rights can be taken as their very essence. This can be problematic, given that the European economic freedoms can actually be taken as the transnational expression of rights already recognized by Member States, such as the right to property, the right to conduct a business or the freedom

<sup>14</sup> Jorge Bacelar Gouveia, “Regulação e Limites dos Direitos Fundamentais”, in *Dicionário Jurídico da Administração Pública*, 2.º Suplemento (Lisboa: 2001), 458.

<sup>15</sup> Josefa Fernández Nieto, *La aplicación judicial europea del principio de proporcionalidade* (Madrid: Ed. Dykinson, 2009), 125.

<sup>16</sup> José de Melo Alexandrino, *A estruturação dos direitos, liberdades e garantias na Constituição Portuguesa*, vol. II (Coimbra: Almedina, 2006), 48; José Carlos Vieira de Andrade, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 5ª ed., (Coimbra: Almedina, 2012), 98.

<sup>17</sup> Jorge Miranda and Jorge Pereira da Silva, “Anotação ao art. 18.º”, in *Constituição Portuguesa Anotada*, Tomo I, coord. Jorge Miranda; Rui Medeiros, 2ª ed., (Coimbra: Coimbra Editora, 2010): 351.

to exercise a profession,<sup>18</sup> which are precisely those kinds of rights whose content varies from State to State and from time to time. In this respect, the Court has consistently emphasised that “the wording of Article 16 of the Charter [which recognizes the freedom to conduct a business] differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet it is similar to that of certain provisions of Title IV of the Charter”; therefore, it goes on, “the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest”.<sup>19</sup>

Secondly, authors question whether the essential content of rights should be determined in absolute or in relative terms.<sup>20</sup> The first theory – that which favours an absolute conception of the essence of rights – argues that the inner core of rights comprises a set of possibilities of action that must be left untouched by the restriction.<sup>21</sup> Of course, although this theory has the advantage of defending better the right against the attacks, its main difficulty lies in determining what this essential content consists of, because it “must include, in addition to the prohibition of absolute exploitation of the human being, something specific or typical of its own (...), that allows it to be distinguished from every other right”.<sup>22</sup> This absolute theory opposes that which takes the essential content of fundamental rights as “the result of a balancing operation of constitutional goods carried out between the right that is subject to legal restrictions and the rights or interests constitutionally

<sup>18</sup> Case 4/73 *Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491, paragraph 14.

<sup>19</sup> Case C-283/11 *Sky Österreich GmbH v. Österreichischer Rundfunk* [2013], paragraph 46.

<sup>20</sup> Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden; Boston: Martinus Nijhoff Publishers, 2009), 137; Jonas Christoffersen, “Straight Human Rights Talk – Why Proportionality Does (not) Matter”, *Scandinavian Studies in Law* 55 (2010): 27. See, in Portuguese scholarship, Jorge Miranda and Jorge Pereira da Silva, *op. cit.*, 394. Outside the Portuguese constitutional panorama, see, for example, Julian Rivers, “Proportionality and variable intensity of review”, *Cambridge Law Journal* 65, 1 (2006): 184: “addressing the issue in the specific context of the ECtHR, this Author states that “if the notion of essence, or core, is meant to be useful, it must be defined independently of proportionality and play a different role in repressing certain forms of state action”. The author, however, acknowledges that the ECtHR uses the guarantee of the essential core when it intends to demonstrate that the action was disproportionate, which leads it eventually to conclude that the concept of “the very essence of the right” is in practice useless, since it does not distinguish itself from the proportionality principle (*ibid.*: 185-187), being used with autonomy only in cases of true and complete denial of law.

<sup>21</sup> Jorge Miranda, *Manual de Direito Constitucional*, Tomo IV, Direitos Fundamentais, 5<sup>a</sup> ed. (Coimbra: Coimbra Editora, 2012), 350.

<sup>22</sup> Jorge Miranda and Jorge Pereira da Silva, *op. cit.*, 399.

protected that could possibly justify them”.<sup>23</sup> The guarantee of the essential content will thus not constitute an autonomous limit to restrictions on fundamental rights, but rather an explanation of the principle of proportionality.<sup>24</sup> The relative theory recognizes that the weight of the right is always measured against other conflicting interests, but in the end it allows the right to be entirely emptied, because there is no definitively protected nucleus. Therefore, it “adds nothing but rhetoric to the weighing and balancing of interests”.<sup>25</sup> Conciliatory positions inevitably arise, notably that of Häberle, who considers that the core of a right is the point over which there is no other superior good that can trump the fundamental right.<sup>26</sup>

Finally, it is also discussed whether the essential content must be understood in an objective or subjective way: it is a matter of knowing, respectively, whether it is the essence of the very fundamental right in general that must be preserved<sup>27</sup> or the essential content of the right that must be protected in relation to each specific individual affected by the restriction, by taking into account his particular circumstances.

The answer to these questions, which are only partly uncovered here, do not appear detached from the strength that each author attributes to fundamental rights and the dogmatic conceptions regarding their restriction. The demarcation of the essential content is necessarily a complex task in any legal system.

The concept of essential content has paved its way to the case law of the European Court of Human Rights (hereinafter ECtHR). Although this Court generally refers to the “essence” of the Convention itself, pointing to human dignity and freedom,<sup>28</sup> it does in many cases mention the intangibility of the very essence of some specific rights.<sup>29</sup> For instance, references

<sup>23</sup> Jorge Miranda and Jorge Pereira da Silva, *op. cit.*, 394; Jorge Reis Novais, *As restrições aos direitos fundamentais não expressamente autorizadas pela Constituição* (Coimbra: Coimbra Editora, 2003), 781; Peter Häberle, *La garantía del contenido esencial de los Derechos Fundamentales* (Madrid: Dykinson, 2003), 64.

<sup>24</sup> Robert Alexy, *A theory of constitutional rights*, trad. Julian Rivers (Oxford: Oxford University Press, 2002), 193-196.

<sup>25</sup> Jonas Christoffersen, “Straight Human...”, *op. cit.*: 27.

<sup>26</sup> Peter Häberle, *op. cit.*, 64-65.

<sup>27</sup> Jonas Christoffersen, “Straight Human...”, *op. cit.*: 137; Jorge Miranda and Jorge Pereira da Silva, *op. cit.*, 397; Robert Alexy, *op. cit.*, 192.

<sup>28</sup> *Christine Goodwin v. The United Kingdom*, no. 28957/95 [GC], 11/07/2002, paragraph 89.

<sup>29</sup> For instance in *Bélané Nagy v. Hungria*, no. 53080/13, ECHR 2015, the ECtHR has considered that the legislative amendment which had led to the loss of a disability allowance by a beneficiary

are made to the “very essence” of the right of access to courts (art. 6),<sup>30</sup> the right to privacy (art. 8),<sup>31</sup> and the right of suffrage (art. 3 of Protocol No. 1).<sup>32</sup> Although formally the concept is inspired by the German tradition, its definition remains vague and of little rigorous use.<sup>33</sup> While enunciated as a third limit to restrictions (along with legitimate purpose and proportionality), the “very essence of the right” does not give out considerations of proportionality.<sup>34</sup> Thus, for example, in a case in which an alleged infringement of access to court was discussed, the Strasbourg Court concluded that the decisions of the national court “declaring the applicant’s action inadmissible cannot be regarded as disproportionate to the legitimate aim pursued and they did not, therefore, impair the very essence of the applicant’s ‘right of access to a court’ within the meaning of the Court’s case-law”.<sup>35</sup>

In short, even though it is not a concept of widespread use in the national constitutions of a significant number of EU Member States, the concept has achieved popularity enough to reach the system of the European Convention on Human Rights. This, coupled with the fact that the protection of fundamental rights as conceived by the Court of Justice of the European Union was largely dependent on the German tradition, made the guarantee of the *essential core*’s relevance to the freedoms of the internal market highly plausible.

### ***3. The development of the guarantee of the “very essence of rights” in European Union law***

As it has been described so far, the guarantee of the essential core is linked to the protection of fundamental rights, as a limit to their restraint. Its usage

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amounted to an infringement of the right to property, since “the freedom enjoyed by the States in this matter cannot go so far as to deprive the right, once conferred, of its own essence (§ 53). Similarly, *Jalloh v. Germany*, no. 54810/00 [GC], § 97, ECHR 2006-IX.

<sup>30</sup> Yutaka Arai-Takahashi, *The margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen: Intersentia, 2002), 36; Jonas Christoffersen *Straight Human...*, *op. cit.*: 28 *et seq.*

<sup>31</sup> *Laakso v. Finland*, no. 7361/05, 15/01/2013, paragraph 55.

<sup>32</sup> *Sitaropoulos and Giakoumopoulos v. Greece*, App. 42202/07 [GC], 15/03/2012, paragraph 80.

<sup>33</sup> Yutaka Arai-Takahashi, *op. cit.*, 37, 40.

<sup>34</sup> Pieter Van Dijk and Marc Viering, “Right to a Fair and Public Hearing (Article 6)”, in *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006): 571-572; Aalt Willem Heringa and Leo Zwaak, “Right to respect for privacy (Article 8)”, in *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006), 747; Jonas Christoffersen, “Straight Human...”, *op. cit.*: 29.

<sup>35</sup> *Prince Hans-Adam II of Liechtenstein v. Germany*, 42527/98 [GC] 12 /07/2001, paragraph 69.

in European Union Law and in particular in relation to internal market freedoms will now be addressed.

It is well known how the “transformation of Europe” (Weiler) that the Court has steered was a consequence of the settlement of the constitutional qualities of Union law and its autonomy vis-à-vis the Member States. On the one hand, this transformation has occurred through the conversion of a set of inter-State rights and duties subject to international law to a genuine Bill of Economic Rights of individuals to be invoked precisely against Member States.<sup>36</sup> For this reason, since the mid-1960s, the protection of the fundamental economic rights of individuals was taken at the heart of European Union Law and from that point on, the development of a set of case law and scholarship based on a fundamental reading of economic freedoms has taken place. This subjectivation of the treaties has led to another major constitutional development in EU Law, the one regarding the protection of fundamental rights,<sup>37</sup> which the Court embraced in the absence of a clear mandate in the Treaty. It was actually this last evolution that paved the way for the arrival of the “guarantee of the essential core of rights” to EU Law.

In fact, the first references to the concept were made by the Court when reviewing the legality of European acts in regard to their alleged incompatibility to fundamental rights. This should not come as a surprise, given the fact that the Court was inspired by the constitutional traditions of Member States as well as by the ECtHR case law.

Thus, in *Marshall*,<sup>38</sup> the Court held that “as regards the question of any interference with the right to exercise a professional activity, it must be borne in mind that (...) limitations may be placed on the exercise of that right if they are justified by the objectives of general interest pursued by the Community, on condition that the substance of the right is left untouched. (...) In this case, the limitations placed on the right to fish are justified by the general interest, since they are intended to ensure the conservation of the species in question. Moreover, they do not affect the substance of the

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<sup>36</sup> The finding of the subjective nature of the freedoms would not even be original in the European Union: Amar (1998) describes an analogous evolution in U. S. constitutional Law with the incorporation of the first ten amendments to the Constitution (Bill of Rights). These were first established as a set of limits to the federal power in relation to State organs (thus a set of rights of States) and only progressively understood as the subjective rights of citizens, also opposable to the States (221 *et seq.*).

<sup>37</sup> Thorsten Kingreen, *op. cit.*, 523.

<sup>38</sup> Judgment of 13 November 1990, *Procurator Fiscal v. Andrew Marshall*, C-370/88, EU:C:1990:392, paragraphs 27-28.

right to fish, since the freedom to fish is maintained provided that authorized nets are used". Similarly, in *SMW Winzersekt* case, it held that "so far as concerns the impairment of the freedom to pursue a trade or profession, the second and third subparagraphs of Article 6(5) of Regulation No 2333/92 do not impair the very substance of the right freely to exercise a trade or profession (...) since those provisions affect only the arrangements governing the exercise of that right and do not jeopardize its very existence. It is for that reason necessary to determine whether those provisions pursue objectives of general interest, do not affect the position of producers (...) in a disproportionate manner and, consequently, whether the Council exceeded the limits of its discretion in this case".<sup>39</sup> References to the "substance of rights" can also be found whenever the Court refers to ECtHR decisions regarding rights established therein, for the reason that those decisions constitute the inspiration of the Court in the protection of fundamental rights.<sup>40</sup>

Notice, however, that these references to the essence of rights were made regarding fundamental rights in general, and not specifically European freedoms. They are amongst the set of case law that gradually brought fundamental rights to the European discourse and to the Court's protective function. To this process the Charter of Fundamental Rights (hereinafter: CFR) has added a clear normative foundation, by stating, in Article 52 no. 1, that any restrictions to rights must "respect the essence of those rights and freedoms",<sup>41</sup> thus opening the gates to the widespread use of a "fundamental rights language".<sup>42</sup>

In contrast, the reference to an obligation to respect the core of internal market freedoms as such was, until recently, entirely absent from case law: although one may occasionally find the suggestion in some of the Advocate

<sup>39</sup> Judgment of 13 December 1994, *SMW Winzersekt v. Land Rheinland-Pfalz*, C-306/93, EU:C:1994:407, paragraph 24. See also Judgment of 8 October 1986, *Staatsanwaltschaft Freiburg v. Franz Keller*, 234/85, EU:C:1986:377, paragraph 8.

<sup>40</sup> Judgment of 3 September 2015, *Inuit Tapiriit Kanatami and Others v. Commission*, C-398/13, EU:C:2015:535; Judgment of 13 July 1989, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 5/88, EU:C:1989:321, paragraphs 17-18.

<sup>41</sup> See art. 51 CFR. Judgment of 30 June 2016, *Direcția Generală Regională a Finanțelor Publice Brașov v. Vasile Toma, Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraphs. 39 *et seq.*, concerning the right of access to courts.

<sup>42</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 4<sup>th</sup> ed. (Oxford: Oxford University Press, 2008), 419.

General's Opinions,<sup>43</sup> references made to the Court's case law therein do not lead exactly to the wording "essential content", but to the quotes "directly opposes the freedom to provide services"<sup>44</sup> or "the requirement (...) is the denial of one's freedom"<sup>45</sup>. Why the contrast? Why did not the Court use the guarantee of the fundamental core of rights when controlling State restrictions to European economic freedoms and, in contrast, made regular references to the very same guarantee when supervising the respect towards other fundamental rights?

One possible answer could be that internal market freedoms are not seriously taken by the Court as fundamental rights, and are therefore not granted the same regime that the Court develops in regard to fundamental rights. That would be a favoured answer for those that have either never accepted the fundamental nature of economic rights and therefore take the apologetic language of the Court on them merely as an instrument for the reinforcement of its own power over Member States' activity, or that affirm the decline of European market freedoms vis-à-vis other public interests, such as the protection of (other) fundamental rights.

Notwithstanding, no one can realistically ignore the small steps taken by the Court in order to affirm the fundamental character of economic freedoms. Along with the liberal tradition in which the original Treaties were drafted, the contribution of the European citizenship for the recognition of individuals as actors and addressees of the freedoms made the supreme value attached to the internal market freedoms unequivocal. The reason for the initial lack of the reference to the "fundamental core" on economic freedoms and its presence on other fundamental rights stemming from common constitutional traditions may, instead, be this: since the Court has always recognized the strength of economic freedoms against other interests (including other fundamental rights), it never felt the need to lay their foundations on the fundamental rights recognized by constitutional traditions in which they could be subsumed – such as the right to conduct a business, the right to property or the right to exercise a profession (*Berufsfreiheit*). Therefore, the plea for the essential core of rights was

<sup>43</sup> V., for instance, the Opinion of Advocate General MAZAK in case C-546/07, *Commission v. Germany* ("posted workers"), EU:C:2010:25, paragraph 37.

<sup>44</sup> Judgment of 9 March 2000, *Commission v. Belgium* ("security activities") C355/98, EU:C:2000:113, paragraph. 27.

<sup>45</sup> Judgment of 4 December 1986, *Commission v. Germany* ("insurance activities"), 205/84, EU:C:1986:463, paragraph 52.

put forward by the parties only in cases where (other) fundamental rights, derived from common constitutional traditions, were at stake. Additionally, it was an useful tool for the validity control of European rules, where the economic fundamental rights reasoning appears to be particularly useful, since it is not clear whether the European legislature is bound by freedoms themselves, and whenever a transnational situation is not at stake.<sup>46</sup>

The consolidation of the fundamental character of economic freedoms has known a landmark with the adoption of the Charter of Fundamental Rights. It should be recalled that, already in the 1970s, Pescatore had affirmed that “on the basis of these various forms of freedom [goods, services, establishment, persons] there is a concept inspired by the respect for private initiative and the free development of personality in the exercise of economic and professional activities”.<sup>47</sup> The new Charter now gives expression to this perception, by introducing, quite originally in a separate and successive way, the professional freedom (Article 15), the freedom of enterprise (Article 16) and the right to property (Article 17). The change refers, above all, to the possibility, now normatively expressed, of those rights being able to bind States when they apply Union law (Article 51, no. 1) and, what is more impressive, to the recognition that economic freedoms are to be conceived as the transnational expression of the fundamental rights set out therein. This is reinforced by Article 52 (2) of the Charter, which refers to the Treaty as regards the definition of the conditions for the exercise of the rights recognized in it and enshrined therein. Being absent in the Treaties the express consecration of any other fundamental rights, the reference seems tailor-made for internal market freedoms.<sup>48</sup>

Once free movement rules are defined as fundamental economic rights and appear in the Charter, it is expectable to identify decisions where the Court has made reference to an *essential nucleus* of the freedoms that

<sup>46</sup> Rudolf Streinz, “Grundrechte und Grundfreiheiten”, in *Handbuch der Grundrechte in Deutschland und Europa*, ed. Detlef Merten, Hans-Jürgen Papier, Band VI/1 (Heidelberg: C. F. Müller, 2010), 674.

<sup>47</sup> Pierre Pescatore, “Fundamental Rights and Freedoms in the System of the European Communities”, *American Journal of Comparative Law* 18, 2 (1970): 349.

<sup>48</sup> Durner, for instance, states that art. 15 CFR guarantees access to the labour market of the Member States (Wolfgang Durner, “Wirtschaftliche Grundrechte”, in *Handbuch der Grundrechte in Deutschland und Europa*, in D. Merten, H.-J. Papier (Hg.), Band VI/1 (Heidelberg: C. F. Müller, 2010): 1097). In the same sense that general economic freedom strengthened by the CFR was already enshrined in the Treaty rules relating to internal market, see Amin Hatje, “The Economic Constitution within the Internal Market”, in *Principles of European Constitutional Law*, ed. Armin von Bogdandy, Jürgen Bast, 2<sup>nd</sup> ed. (Oxford; Portland, Oregon: Hart Publishing, 2011), 597.



cannot be set aside by the restriction. It is above all in the context of the rights recognized in the Charter that the principle is now referred to by the Court of Justice of the European Union.<sup>49</sup>

Thus, for instance, in *Pfleger*,<sup>50</sup> which concerned gambling activities, the Court examined the restriction not only in the light of the freedom to provide services, but also in the light of the freedom of enterprise, professional freedom and the right to property.<sup>51</sup> The inclusion of European freedoms within the framework of the protection of fundamental rights recognized by the Charter has made it possible to deal with restrictions according to the limits laid down therein, including the respect for the essential core of rights. It is true that, although having mentioned this condition, the Court did not provide it with any autonomous relevance in that case, simply finding that, once a restriction on freedoms had been established, the simultaneous consideration of the corresponding rights contained in the Charter would not be necessary.<sup>52</sup> The silence, however, speaks for itself: when called upon to interpret freedoms as fundamental rights, the Court is satisfied with the *limits to limits* developed in the consolidated case law on freedoms, thereby implying that the need to respect the “essential content” can be inferred, after all, from the method of control already developed therein.<sup>53</sup>

Similarly, in *AGET Iraklis*, the Court considered that the national legislation that it had previously considered to amount to a restriction to the free provision of services also “entails a limitation on exercise of the freedom to conduct a business enshrined in Article 16 of the Charter”,<sup>54</sup> which was

<sup>49</sup> See, for instance, Judgment of 3 July 2014, *Kamino International Logistics & Datema Hellmann Worldwide Logistics*, joined cases C-129/13 and 130/13, EU:C:2014:2041, concerning rights of defence established in the Community Customs Code, and Judgment of 27 May 2014, C-129/14PPU, *Spasic*, EU:C:2014:586, concerning the *ne bis in idem* principle in the context of Policy and Judicial Co-operation in Criminal Matters (PJCC). In some prior-CFR decisions, references were made to the need to respect the inner core of fundamental rights: Judgment of 12 June 2003, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, C-112/00, EU:C:2003:333, paragraph 80. Outside the freedoms’ premises, see also Judgment of 5 October 1994, *X v. Commission* C-404/92, EU:C:1994:361, paragraph 18.

<sup>50</sup> Judgment of 30 April 2014, C-390/12, *Pfleger*, EU:C:2014:281.

<sup>51</sup> Paragraph 57.

<sup>52</sup> Paragraph 60.

<sup>53</sup> Similarly, see Judgment of 22 January 2013, *Sky Österreich GmbH v. Österreichischer Rundfunk*, C-283/11, EU:C:2013:28, paragraph 48.

<sup>54</sup> Judgment of 21 December 2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, C-201/15, EU:C:2016:972, paragraph 66.

therefore subject to the limitations' regime contained therein, including the need to respect the fundamental core of the right.<sup>55</sup>

#### ***4. The very essence of economic freedoms***

##### ***4.1. The scope of the freedoms***

At this point it should be clear that the relevance of the question at hand is perfectly justified: the “guarantee of an inner core” of fundamental rights finds its place in the context of EU (fundamental) economic rights. But what place exactly? What comes to be the “inner core” of the free movement rights of an economic nature? Since it is conceived as a parcel of the content of the right, the interpreter has to delimit it from the overall set of possibilities of action included therein. It becomes therefore essential to define first what the content of the right is.

The vague character of economic freedoms is well-known. Differently from civil rights, their content remains strictly attached to the economic doctrines and the political context of each period of time. It is generally well-accepted that the original versions of the European Treaties were drafted by broadly ordoliberal engaged politicians. The recognition of the freedom of commerce supervised by the State was reflected in the articles concerning the freedoms and the case law developed from there. Notwithstanding, starting in the 1990s, the progressive decline of the liberal principles of the original European Economic Constitution is pointed out by several authors: this is the case of Joerges, who notes that, as a result of the Union's absorption of social values and objectives, the social market economy is now the dominant economic model underlying the European Union, and therefore the so-called European Economic Constitution has been gradually put aside.<sup>56</sup> Beyond the readings that call on the social dimension progressively enshrined in the Treaties, others emphasize the transition from an *economic Europe* to a *Europe of citizens* and hence the dilution of economic freedoms in European citizenship, so that the exercise of those freedoms is now unnecessary to bring a situation into the realms of European Union law.

It is inevitable to recognize the driving force that the Union has known in recent years as a result of the extension of the normative aims it undertakes.

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<sup>55</sup> See paragraphs 61-86.

<sup>56</sup> Christian Joerges, “What is left of the European Economic Constitution?”, *EUI Working Paper Law* 2004/13 (2011), 14-17. Similarly, Gonzalo Maestro Buelga, *op cit.*: 52.

That being the case, there is no denying that one of the essential premises of the European Economic Constitution – that of the primacy of the economy in the process of integration – has been weakened. Under the broader process of political constitutionalisation of the European Union, the internal market is only part of that process, permeable to different influences which connect to other objectives of the European Constitution and which are not just economic. Thus, as European rights have been emancipated in relation to their economic character through citizenship,<sup>57</sup> the European Constitution has articulated market values with other non-market ones. Accordingly, the decline of the European Economic Constitution seems real, since this Constitution, tributary of its ordoliberal origins, is not in itself a neutral concept and is loaded with meaning, because from its constitutional nature flows the primacy of freedoms and market over other State policies, which does not seem to reflect the current political and regulatory reality of the Union.

The discussion shows that economic rights are by nature indeterminate. Across the European history copious debates were held on the scope of economic freedoms and on the tests developed for the judgment of a restriction: should this be confined to the finding of a discriminatory measure? Should it exist whenever the economic operator's access to the market of other Member States is impaired? And what does "access to the market" exactly mean? Should one interpret the economic freedoms more broadly as comprising a right to trade free of obstacles?

One at the time, all of these were once considered to represent the scope of freedoms, according to the case law of the Court of Justice.<sup>58</sup> Since economic rights are permeable to the social and political structures in force in each system, their meaning varies throughout history and allows for multiple concrete solutions that are dependent on the economic models in force in each moment and in each State, all of them satisfying the market economy principle, which is one of the European Union membership criteria.<sup>59</sup> The open content of these fundamental rights is an expression of the economically open character of the European Constitution referred to above,

<sup>57</sup> Cfr. Advocate-General Mazák's Opinion in case C-158/07, *Förster*, EU:C:2008:630, paragraph 54.

<sup>58</sup> Pedro Caro de Sousa, *op. cit.*, 87 *et seq.*

<sup>59</sup> It is one of the criteria for the admission of new Member-States, as defined by the European Council in Copenhagen (1993), that there is "a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union" ("Conclusions of the Presidency", Copenhagen, 21-22 June 1993). See Amin Hatje, *op. cit.*, 616.

and which is subject to the analogous dynamism underpinning the interpretation of equivalent rights in national law.<sup>60</sup> The evolutionary interpretation of the Treaties carried out by the Court receives thus a new breath, and it is from that point of view that the procedural dimension of fundamental rights can be founded, since the European Economic Constitution has undergone many developments precisely because of judicial dialogue among market participants. Therefore, “as formal constitutions are mainly a product of representation and participation in the political process, so too is the European Economic Constitution, to a large extent, a result of participation and representation in European judicial process”,<sup>61</sup> allowing for the balancing of freedoms with social values that are progressively recognized by States.

The insertion of freedoms in Articles 15 to 17 of the Charter rendered now unnecessary complex analyses on the determination of the scope of protection of freedoms. This is so because the scope of the freedoms comes to be determined according to those fundamental rights to which they are equivalent at the transnational level, and which are characterized precisely by the recognition of a possibility of action free from obstacles described as a “right to exercise freely an economic activity”,<sup>62</sup> or a right intended to “facilitate the exercise of professional activities of any kind in the territory of the Union for nationals of Member States”.<sup>63</sup> Fundamental freedoms rec-

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<sup>60</sup> The German Federal Constitutional Court contributed to the debate on the neutrality of the economic and social objectives foreseen in national constitutions in the well-known “pharmacy judgment”, in which it stated that “The Basic Law is neutral in terms of economic policy in the sense that the legislature is allowed to pursue any economic policy which it considers to be appropriate, provided that it observes the Basic Law, in particular the fundamental rights. A law adopted pursuant to Article 12 (1), second sentence, of the GG [“The practice of an occupation or profession may be regulated by or pursuant to a law”] cannot therefore be challenged for constitutional reasons on the ground that it is contrary to other economic policy, for example, or because it is not consistent with a macroeconomic opinion which is, for example, the underlying economic policy; even less so because of the fact that the political-economic conception that emerges from the law is not accepted by the judge”. BVerfGE 7, 377 (400).

<sup>61</sup> Miguel Poiars Maduro, *op. cit.*, 28.

<sup>62</sup> Judgment of 12 July 2012, *Association Kokopelli v. Graines Baumaux SAS*, C-59/11, EU:C:2012:447, paragraph 77.

<sup>63</sup> Judgment of 16 April 2013, *Anton Las v PSA Antwerp NV*, C-202/11, EU:C:2013:239, paragraph 19. The earlier case law already foreshadowed this broad reading by constantly rejecting the application of the *de minimis* rule, stating that any restriction, “even minor”, was contrary to the freedoms: Judgment of 13 December 1989, *Corsica Ferries France v. Direction générale des douanes françaises*, C-49/89, EU:C:1989:649, paragraph. 8. Eleanor Spaventa, “The outer limit of the Treaty free movement provisions: some reflections on the significance of Keck, remoteness and Deliège”, in *The Outer*

ognized by the Treaty share the same identity as rights conferred by Articles 15-17 of the Charter. Being clear that these freedoms include more than the right not to be discriminated, the concrete determination of their content may vary according to time and space. Freedom of enterprise, freedom of choice of profession and right to property allow the individual to be autonomous, to organize himself personally and socially, to earn a living,<sup>64</sup> to guarantee the free development of personality in one of its most important dimensions. However, at the same time they perform a relevant social function, and that is why they may be subject to a broad range of interventions on the part of public authorities, which may limit the exercise of economic activity in the public interest”.<sup>65</sup> That is the reason why the Court considers that the finding of a restriction to the freedoms renders the analysis in relation to the Charter’s rights unnecessary.<sup>66</sup>

As Nic Shuibhne points out, the ultimate definition of the scope of freedoms, which is an interpretive task, will always be left open.<sup>67</sup> In fact, if it is true that “a fundamental right does not fit all that semantically could fit”,<sup>68</sup> it is also true that the width of the scope depends on the task the fundamental right is called upon to fulfil in the normative order in which it is recognized. For this reason, the definition of freedoms shares the same ontological dilemma of the European Union, tied between its liberalizing objectives and the national forces that claim autonomy.<sup>69</sup>

#### ***4.2. The relative character of the very essence of freedoms***

In order to determine the essential core of the internal market freedoms, we should now address the second question identified above: should it be analysed in absolute or relative terms?

The Court does not address the interrogations which the “essential core” calls for in constitutional dogmatics as to whether it has an absolute or relative character. Some of the case law described so far seems to recognize

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*Limits of European Union Law*, ed. Catherine Barnard and Okeoghene Odudu (Oxford and Portland, Oregon: Hart Publishing, 2009), 262.

<sup>64</sup> Timothy Sandefur, *The right to earn a living: economic freedom and the law* (Washington D. C.: Cato Institute, 2010), 2 *et seq.*

<sup>65</sup> Judgment of 22 January 2013, *Sky Österreich GmbH v. Österreichischer Rundfunk*, C-283/11, EU:C:2013:28, paragraph 46.

<sup>66</sup> Judgment of 30 April 2014, C-390/12, *Pfleger*, EU:C:2014:281, paragraphs 57 *et seq.*

<sup>67</sup> Nic Niamh Shuibhne, *The Coherence...*, *op. cit.*, 245-246.

<sup>68</sup> Jorge Miranda and Jorge Pereira da Silva, *op. cit.*, 346.

<sup>69</sup> Nic Niamh Shuibhne, *The Coherence...*, *op. cit.*, 245-246.

the autonomous character of the analysis of the “very essence” of rights in relation to proportionality analysis. In the well-known *Sky Österreich* case, for instance, the Court clearly distinguished between proportionality and guarantee of the very substance of rights,<sup>70</sup> as if they were separate *limits to limits*.

However, there seems to be no settled case law on this matter: one can also identify cases in which there is a clear overlap between proportionality and “essential core” analysis. In *AGET Iraklis* the Court dealt with these two matters separately, but under the same topic of proportionality analysis.<sup>71</sup> This is so because there is a strong emphasis on proportionality underlying the case law on freedoms. Once having found a restriction to one of the freedoms – which happens in the great majority of cases, given their largely recognized scope – the Court turns to proportionality analysis and the result of the case is the outcome of a quite stable method that enquires whether the measure is appropriate and necessary to achieve the envisaged end. The centrality given to proportionality is so remarkable that one cannot find one single portion of the freedom that cannot be balanced against the justifications put forward by the defendant State. It is hence very difficult to ascertain whether some forms of restriction are absolutely excluded from the proportionality control and therefore definitively prohibited by reason of injuring the essential core of a given freedom: every restriction leads to a balancing exercise.<sup>72</sup> The relative doctrine steps forward.

However, an overall analysis of the Court of Justice’s case law allows us to identify some kinds of restrictions that the Court considers to be more serious. In fact, it is possible to identify a set of circumstances that trigger a stricter control of justifications put forward by the States. In these cases, the traditional instruments that the Court applies in its analysis – legitimate

<sup>70</sup> *Sky Österreich*, *op. cit.*, paragraph 48. Similarly, Judgment of 21 December 2016, *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, C-201/15, EU:C:2016:972, paragraph 87-90.

<sup>71</sup> *Ibid.*, paragraph 79 *et seq.* The same could be said about the Court’s decision in Judgment of 6 October 2015, *Maximillian Schrems v. Data Protection Commissioner*, C-362/14, EU:C:2015:650, paragraphs 94 and 95, although Tuomas Ojanen argues that “*Schrems* turns into reality the idea that each fundamental right - and not just absolute or non-derogable rights but also those subject to permissible limitations - should be understood as including the inviolable essence that allows neither limitations nor balancing” (, Tuomas Ojanen “Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter”, *European Constitutional Law Review* 12 (2016): 329).

<sup>72</sup> Michael Lothar, “¿El contenido esencial como común denominador de los derechos fundamentales en Europa?”, *Revista de Derecho Constitucional Europeo* 6, 11 (2009): 178.

purpose, adequacy and necessity – take different forms and are balanced differently in the outcome. Sometimes the Court admits that the seriousness of the restriction results from the fact that it affects the “typical elements that give character to the right”<sup>73</sup> thereby hurting its essential core.

This happens mainly with two kinds of restrictions: those that are discriminatory and those that absolutely prohibit a particular activity. Let us see those in detail.

*a. The right not to be discriminated against on grounds of nationality*

Discrimination is seen by the Court with particular suspicion. In his opinion in case *Commission v. Federal Republic of Germany (posted workers)*, Advocate General Mazak dealt with the German requirement that only German-established undertakings could conclude a certain type of contract. He then recalled the settled case law according to which “the requirement of setting up a permanent branch or subsidiary runs directly counter to the essence of the freedom to provide services”.<sup>74</sup>

The importance of the principle of non-discrimination on grounds of nationality in European law cannot be overemphasized. In addition to being mentioned in relation to all freedoms (see Articles 45, 49, 57 TFEU, and Article 28, concerning the free movement of goods, which incorporates it implicitly by prescribing the abolition of border measures), the principle is affirmed as a general principle of European law in Article 18 TFEU. Accordingly, amongst the various proposals of tests of restrictions to freedoms, the discrimination test was the only one which was never put to question; the right not to be discriminated against on grounds of nationality has been consistently recognized as the minimum content of the economic freedoms.<sup>75</sup>

The Court acknowledges this importance in several ways. On the one hand, the justification of discriminatory measures is in principle more difficult for States, because they can merely rely on grounds that are expressly provided in the Treaty, and not on other interests – known generally as *mandatory requirements* – which the Court has accepted since *Cassis*<sup>76</sup> as

<sup>73</sup> José Carlos Vieira de Andrade, *op. cit.*, 283.

<sup>74</sup> Judgment of 21 January 2010, *Commission v. Germany (“posted workers”)*, C-546/07, EU:C:2010:25, paragraph 37.

<sup>75</sup> Hans D. Jarass, *op. cit.*: 709.

<sup>76</sup> Judgment of 20 February 1979, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42.

also relevant to justify non-discriminatory restrictions.<sup>77</sup> Even though one can find several exceptions to the rule, the point remains that the gravity of discriminatory measures leads the Court to restrict the available justifications for it.<sup>78</sup> On the other hand, one can also identify a severer proportionality analysis whenever the Court finds that there are inconsistencies in the way the measures are applied by the defendant State – for instance, the increasingly stricter control exercised by the Court in the gambling cases is connected with its finding that there are some inconsistencies in the way States promote the alleged objectives (vg *consumer protection*) since, by preventing the organization of certain betting games, they simultaneously pursue a policy of expansion of that kind of activities in order to increase fiscal revenues.<sup>79</sup>

This notwithstanding, the principle of non-discrimination carries serious difficulties regarding its scope because of the lack of a clear definition of a comparative term.<sup>80</sup> Besides the prohibition of direct discrimination on grounds of nationality, the Court of Justice has broadened the content of the principle through the prohibition of other excluded grounds of discrimination. The Court has been clear in stating that indirect discrimination on grounds of nationality should also be regarded as contrary to the Treaty; and then it pushed the boundaries of the concept in order to include the possibility of invoking the principle against one's State of origin (vg in cases where the economic operator was disadvantaged by having exercised his right of movement to other Member States or by having returned to his country after having exercised that right). The right not to be discriminated on grounds of nationality can thus amount to something as broadly defined as the possibility to choose the place of one's economic activity.

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<sup>77</sup> See case Judgment of 26 June 1980, *Criminal proceedings against Herbert Gilli and Paul Andres*, 788/79, EU:C:1980:171, paragraph 6: "It is only where national rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to the protection of public health, the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under Article 30".

<sup>78</sup> Stephen Weatherill, "Free movement of goods", *International and Comparative Law Quarterly* 61, 2 (2012): 544.

<sup>79</sup> Judgment of 6 November 2003, *Gambelli and o.*, C-243/01, EU:C:2003:340, paragraphs 67 *et seq.*; and Judgment of 6 March 2007, *Placanica*, joined cases C-338/04, 359/04 and 360/04, EU:C:2007:133, paragraph 54.

<sup>80</sup> Pedro Caro de Sousa, *The European Fundamental Freedoms: A Contextual Approach*, (Oxford: Oxford University Press, 2015), 89 *et seq.*



The various legal protection circles which have been successively outlined by the Court in relation to the non-discrimination principle – either by devising discrimination on the basis of the aim of market access or by engaging it with the free exercise of an economic activity<sup>81</sup> – constitute modalities of the exercise of freedom which may change over time. It should be recalled that in *Keck & Mithouard* the Court intended to restrict the free movement of goods by stating that selling arrangements were not by nature designed to restrict it,<sup>82</sup> except when they proved to be discriminatory.

In sum, given the extension the principle of non-discrimination can reach, some authors support that the entire scope of the freedom can be determined solely by various forms of discrimination.<sup>83</sup> In this case, the inner core of freedoms must represent some kind of refinement of the non-discrimination principle, including only the right not to be subject to the most serious forms of discrimination. The inner circle that should be considered in this respect is the protection against forms of direct discrimination on grounds of nationality.

*b. Beyond discrimination: the absolute impediment of the activity and the essential core of freedoms*

Owing to the liberal nature of the internal market, the Court is also very critical of national regulations that “impede the exercise of the business as such”.<sup>84</sup> These are the cases in which a particular activity is absolutely forbidden.

The Court is particularly clear on the subject: in case *SMW Winzersekt*,<sup>85</sup> for instance, it stated that the prohibition of certain references in relation to a sparkling wine’s description did “not impair the very substance of the right freely to exercise a trade or profession (...) since those provisions affect only the arrangements governing the exercise of that right and do not jeopardize its very existence”.<sup>86</sup> Similarly, in case *AGET Iraklis*,<sup>87</sup> it acknowledged

<sup>81</sup> See, for instance, Pedro Caro de Sousa, *op. cit.*; Niamh Nic Shuibhne, *The Coherence...*, *op. cit.*

<sup>82</sup> Judgment of 24 November 1993, *Keck and Mithouard*, joined cases C-267/91 and 268/91, EU:C:1993:905.

<sup>83</sup> For instance Daniel Wilsher, “Does Keck discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market”, *European Law Review* 33, 1 (2008): 9.

<sup>84</sup> Judgment of 22 January 2013, *Sky Österreich GmbH v. Österreichischer Rundfunk*, C-283/11, EU:C:2013:28, paragraph 49.

<sup>85</sup> Case C-306/93 *SMW Winzersekt GmbH v. Land Rheinland-Pfalz* [1994] ECR I-05555.

<sup>86</sup> Paragraph 24.

<sup>87</sup> Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis)*, *supra*, paragraph 87.

that “the Court has previously held, in respect of national legislation by virtue of which certain undertakings were unable to participate in the collective bargaining body called upon to decide collective agreements (...), that in such a case the contractual freedom of those undertakings is seriously reduced to the point that such a limitation is liable to affect adversely the very essence of their freedom to conduct a business (...). However, it is sufficient to point out, in the present instance, that a regime such as that described in (...) this judgment does not have, in any way, the consequence of entirely excluding, by its very nature, the ability of undertakings to effect collective redundancies, since it is designed solely to impose a framework on that ability. Therefore, such a regime cannot be considered to affect the essence of the freedom to conduct a business”<sup>88</sup>

Once again, there is no definitive solution here. Throughout history, there have been cases in which the Court accepted the justifications put forward by States for measures that totally forbid a particular activity<sup>89</sup> and were clearly non-discriminatory, such as the prohibition of prostitution<sup>90</sup> or abortion<sup>91</sup>. However, there is a sense that the seriousness of the restriction must be accompanied by the seriousness of the justification put forward by the State: rare cases like these are normally connected to public morals or public policy reasons, where there is no consensus amongst the States. That circumstance affects the degree of scrutiny that the Court performs, and allows it to be more flexible in relation to the necessity analysis of the measure, thus accepting that the level of protection should remain to be defined by the defendant State.

## 5. Assessment and conclusion

The guarantee of the “essential core” of the internal market is an essential feature of the control exercised over restrictions to fundamental rights. So far it has not received enough attention from the Court of Justice in the freedoms case law. Here, the essential content is “more a rhetorical than a dogmatic figure of the protection of fundamental rights”<sup>92</sup> Nevertheless,

<sup>88</sup> Paragraphs 77-78. In *Marshall* case, referred to above (C-370/88 *Procurator Fiscal v. Andrew Marshall* [1990] ECR 4071), the Court also reached the conclusion that impositions on the conservation of fishery stocks did not affect the essential core of the right to business, because a freedom to fish was still recognised (paragraph 28).

<sup>89</sup> Hans D. Jarass, *op. cit.*: 711.

<sup>90</sup> Judgment of 1 October 2015 *Trijber*, joined cases C-340/14 and 341/14, EU:C:2015:641, paragraph 68.

<sup>91</sup> Judgment of 4 October 1991, *SPUC v. Grogan*, C-159/90, EU:C:1991:378.

<sup>92</sup> Lothar Michael, *op. cit.*:186.

the *very essence* language is increasingly getting into the Court, mainly due to the incorporation of the freedoms in some of the rights now included in the Charter of Fundamental Rights.

Two rights have been isolated that lie at the core of internal market freedoms: the right not to be discriminated against on grounds of nationality, and the right to engage in an economic activity. Without those, the economic freedom provided by the Treaties through various forms would be rendered useless. However, to cases in which the absolute prohibition of the pursuit of an activity or the sale of a product (vg regulatory measures) is at stake, one can add others in which the restriction is discriminatory and nonetheless, all things considered, the Court concludes that they are proportionate to the envisaged aim.<sup>93</sup> The jurisprudential approach centred on the effects<sup>94</sup> and the economic nature of freedoms, by nature permeable to political and economic conceptions determined by conjunctural factors, make it difficult to consider an irreducible core of freedoms.

Nevertheless, the Court should increase the attention given to this *limit to limits*. The “essential core” is an important instrument of the supremacy of internal market freedoms. While constitutional dogmatics tends to consider that it only performs a relevant function if clearly detached from the idea of proportionality, which apparently does not happen in the Court’s case law, it is nevertheless evident that the affirmation of an *inner core* contributes to the consideration that there are different degrees of gravity within the restrictions, and that their strength is dynamic in the face of other public objectives.

The isolation of those two guaranteed manifestations of the right does not mean that they constitute an absolute core of freedoms, but merely, as Alexy points out, that “the more a principle is restricted, the more resistant it gets”. Accordingly, those manifestations could be close to the point in which “one can say with a very high degree of certainty that no countervailing principle will take priority”.<sup>95</sup>

<sup>93</sup> Judgment of 3 December 1998, *Criminal Proceedings against Ditlev Bluhme*, C-67/97, EU:C:1998:584, paragraphs 54-55.

<sup>94</sup> Catherine Barnard, *The substantive Law of the EU*, 4<sup>th</sup> ed. (Oxford: Oxford University Press, 2013), 86.

<sup>95</sup> Robert Alexy, *op. cit.*, 195.

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