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## Updating the EU Internal Market Concept

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### I Introduction

During the six decades of the European Union (EU) integration project, the ambition of establishing a 'single market' has provided focus, a strong technocratic drive and a clear sense of direction to the battling project of European integration, as it has been riding a bumpy road marked by numerous blockages and stalemates. Achieving and perfecting the internal market project has been the steady and unmovable aim providing the necessary sense of direction and purpose that has often helped to diffuse the political tension and transform in positive energy the accumulated steam resulting from the various political, economic and social frictions to which the EU has been confronted since its inception. The mechanics of this dynamic of integration seem to have incurred various malfunctions in recent years, and it is still unclear if the efforts made to reignite the spark will bring the expected results.<sup>1</sup> The difficulties incurred by the integration process notwithstanding, the European internal market is largely considered as a success story, both from a legal and economic perspective.<sup>2</sup>

Generations of students have been introduced to the intricacies of EU law through the careful consideration of the intersection of, and balance between, the principles of EU harmonisation and national policy autonomy. The internal market has frequently been the focus of this academic

<sup>1</sup> See, for instance, European Commission, 'White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025' COM(2017)2025; E. Macron, 'Initiative pour l'Europe', *Elysée* (26 September 2017).

<sup>2</sup> See 'Single market scoreboard' for 2017, assessing the performance of EU Member States in implementing the single market objectives (European Commission, 'The Single Market Scoreboard' (5 July 2017)). On the economic impact see, inter alia, the literature review by J. Pelkmans, 'European Union Single Market: Economic Impact', in S. N. Durlauf and L. E. Blume (eds.), *The New Palgrave Dictionary of Economics* (Palgrave 2011); B. Eichengreen, and A. Boltho, 'The Economic Impact of European Integration' (2008) *Centre for Economic Policy Research CEPR Discussion Paper* 6820.

literature, in particular the application of the negative integration rules of the Treaty on the free movement of goods and the definition of the concept of Measures Equivalent to a Quantitative Restriction (MEQR), an area of law Professor Gormley's academic writings have perceptively examined over the last three decades.<sup>3</sup> This literature has often focused on the hermeneutics of the most emblematical judgments for the implementation of Article 34 TFEU, *Dassonville*, *Cassis de Dijon* and *Keck and Mithouard*, which, but for the latter one, have established the sequence of analysis applied by the ECJ ever since in all four freedoms. Another strand of literature has focused on the intricacies of the positive integration process and the limits of legislative harmonisation, as this has evolved through the use of Article 114 TFEU by the EU legislators, the latter provision enabling EU harmonisation in furtherance of the internal market.

It is not the aim of this chapter to revisit these issues, which have been widely commented on by a great number of excellent EU scholars, including Professor Lawrence Gormley. Interesting research work in this area is not in short supply.<sup>4</sup> My objective is instead to analyse the internal market from a dynamic and a contextual perspective, taking into account, not just the normative changes brought by the intense legislative and judicial activity, but also the important economic and technological transformations that have largely altered the structure of the global economy in the last two to three decades, and which, in my view, may challenge the first principles on which the EU economic integration process, and in particular the 'single market' idea, is based. This updating of the internal market project is essential if one is to critically reflect on the real place and the specificity of the EU integration process, in the context of the broader globalisation movement.

<sup>3</sup> L. W. Gormley, 'Quantitative Restrictions and Measures Having Equivalent Effect' (1981) 6 *ELRev.* 454; 'Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods' (1989) 9 *YEL* 195; 'Reasoning Renounced? The Remarkable Judgment in *Keck & Mithouard*' (1994) 5 *EBLR* 63; 'The Definition of Measures Having Equivalent Effect', in A. Arnulf et al. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008), 189; 'Free Movement of Goods and Their Use: What Is the Use of It?' (2011) 33 *Fordham ILJ* 1589; 'Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 *ELRev.* 925.

<sup>4</sup> See, for instance, most recently, the excellent monographs published by S. Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017); R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford University Press 2017); P. Koutrakos and J. Snell (eds.), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017).

The chapter will first present the ‘neo-functionalist’ perspective, which has largely influenced the EU economic integration process, from its incipency, and will explore its theoretical linkages with trade theory, thus presenting the fundamental tenets of positive EU internal market law. I will then delve into the subsequent mutation of the economic integration ideal towards the more modular and scalar concept of regulatory convergence. Opening the black box of economic integration will lead us to analyse its transformation, as this is resulting from the paradigm shift currently taking place in the organisation of the global process of economic production, with the development of global value chains (GVCs), and the important role of technology, in particular the internet, in promoting economic integration not through law, but through code. Addressing the effect of private, as well as public, obstacles to trade may also take centre stage if one is to take a more holistic and dynamic perspective in analysing the process of economic integration. A more extensive intervention of the competition law tool against private restrictions to trade is therefore to be expected in the future. The last part of the chapter will provide some concluding thoughts on the need for the internal market concept to be updated and will raise some questions, which will be left unanswered in this chapter, on its ontology in the context of a globalised economy.

## **II The Neo-Functionalist Dream of ‘Economic Integration’ Meets International Trade Theory: the Law of One Price and the Rise of the EU Internal Market Concept**

The emergence of the concept of ‘integration’ owes a lot to functionalist theories, which were the first to break away ‘from the traditional link between authority and a definite territory’, as it was until then theorised in international law (territoriality), ‘by ascribing authority to activities based in areas of agreement’ between states.<sup>5</sup> States exercise several functions (activities), some of which require action at the international level. This transfer initiates the process of integration, which is driven by the continuous pursuit of these functions, in the context of an international institution created to that effect. According to functionalism, ‘[e]very function is left to generate others gradually; in every case the appropriate

<sup>5</sup> W. Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press 1999), 21.

authority is left to grow and develop out of actual performance'.<sup>6</sup> Based on this approach, neo-functionalism was able to construct a theory of regional integration, for which the model of European integration became the archetypical example. The functionalist approach and the concept of integration are profoundly interlinked: without the functionalist emphasis on the existence of separate functions, where authority can be transferred, there can be no talk of integration.

The concept of 'economic integration' has been a marking element of post-war economic thinking over trade and international economic relations.<sup>7</sup> The concept suffered from an 'abundance of mutually contradictory definitions',<sup>8</sup> perhaps because of its dual essence: integration can be conceived of as a process, encompassing 'measures designed to abolish discrimination between economic units belonging to different national states', as well as a state of affairs, represented by 'the absence of various forms of discrimination between national economies'.<sup>9</sup> Its meaning has been framed by the tensions between the 'liberalist' (market friendly) and the dirigiste (state intervention friendly) ideals that characterised the political landscape of the post-war era.<sup>10</sup>

<sup>6</sup> Ibid., 21–2 referring to the work of D. Mitrany, *A Working Peace System* (Quadrangle 1966).

<sup>7</sup> On the emergence of the theory of international economic integration, see F. Machlup, *A History of Thought on Economic Integration* (Macmillan 1977), 11, noting that the term was first employed in business economics. Economists in the inter-war era employed the negative noun of 'disintegration' of the world economy, probably as a consequence of the national protectionist legislation that followed the economic crisis of 1929. The positive noun of 'integration' was first employed after the Second World War in order to provide a conceptual vehicle for the efforts of 'integration of the Western European economy' the substance of which 'would be the formation of a single large market within which quantitative restrictions on the movements of goods, monetary barriers to the flow of payments and, eventually, all tariffs are permanently swept away', referring to Paul Hoffmann's official pronouncement to the Council of the Organisation of European Economic Co-operation on 31 October 1949.

<sup>8</sup> Ibid., 13.

<sup>9</sup> B. Balassa, *The Theory of Economic Integration*, 1st edn (George Allen & Unwin 1961), 1. For an extended analysis, see B. Balassa, 'Towards a Theory of Economic Integration' (1961) 14 *Kyklos* 1, 17. For a more 'outcome-oriented' definition, see J. Tinbergen, *International Economic Integration* (Elsevier 1954), 95, defining integration as 'the creation of the most desirable structure of international economy, removing artificial hindrances to the optimal operation and introducing deliberately all desirable elements of co-ordination or unification'.

<sup>10</sup> Balassa, *Theory of Economic Integration*, 7–10.

The development of the twin concepts of negative and positive integration, coined by Tinbergen in 1965,<sup>11</sup> and seen as complementary tools to remove discrimination and restrictions of movement in order to enable the market to function effectively, while promoting other broader policy objectives, was seen as a necessary compromise in order to make 'economic integration' acceptable to both camps. The different 'stages of integration', identified by Balassa,<sup>12</sup> as well as the distinction of the concept of 'integration' from that of 'cooperation',<sup>13</sup> were also inspired by the same narrative of removing barriers and achieving regulatory sameness, to the point that they attracted the criticism that their final stage, the unitary state, was 'misconceived' for being inspired 'by a centralist rather than federal state model'.<sup>14</sup> Despite the absence of an authoritative definition of the term, Fritz Machlup noted in 1977 that a wide consensus existed as to the three essential conditions for economic integration: 'economic integration refers basically to division of labour', 'it involves mobility of goods or factors', 'it is related to discrimination or non-discrimination in the treatment of goods and factors'.<sup>15</sup>

Profoundly linked to international trade theory, the aim of economic integration may be conceived more broadly, as the constitution of a single market, or more narrowly, as the removal of customs duties and regulatory trade barriers. This broad conception of economic integration is associated with 'the law of one price', as stated in the neoclassical economics of perfect competition, which determines the boundaries of a (single) market according to the ability of arbitrageurs to purchase the asset in the cheaper market and sell it where prices are higher. Simply put, where there is one price, there is one market. As Alfred Marshall explained, 'the more nearly perfect a market is, the stronger the tendency for the same price to be paid for the same thing at the same time in all

<sup>11</sup> J. Tinbergen, *International Economic Integration* (Elsevier 1965), 76–7; J. Pinder, 'Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC' (1968) 24 *World Today* 88.

<sup>12</sup> Balassa, *Theory*, 2.

<sup>13</sup> Balassa, 'Towards a Theory', 4–5, indicating that '[w]hereas cooperation includes various measures designed to harmonize economic policies and to lessen discrimination, the process of economic integration comprises those measures which entail the suppression of some forms of discrimination'. See also the transformation of the title of Jan Tinbergen's work to *International Economic Integration* (in 1954) from *International Economic Co-operation* (1945).

<sup>14</sup> J. Pelkmans, *European Integration*, 3rd edn (Oxford University Press 2006), 8–9.

<sup>15</sup> Machlup, *History of Thought*, 14.

parts of the market'.<sup>16</sup> This theoretical model depends on a number of assumptions, such as perfect knowledge of any price differential among countries, which could give rise to the possibility of arbitrage. It should also be qualified in order to take into account transport costs, which limit the possibilities of profitable arbitrage, although these have been greatly reduced in recent years following technological progress in the means of transportation, such as containerisation, which limited shipping costs, and the development of refrigeration technologies and modern logistics. The main idea behind the model is that in a 'single' market prices tend to converge.<sup>17</sup> If one follows this approach, the size of a (single) market depends on transportation costs, information on trade opportunities by the arbitrageurs, and the specific characteristics of the various segments of the market, or markets, such as differences in tastes in private and public goods, available revenues, different occupations, governmental barriers to the transport and trade of outputs and inputs or to the dissemination of knowledge.<sup>18</sup>

One should not, however, only focus on the demand side but should also look to the supply side. Charles Kindleberger has put forward the idea that economic integration essentially means factor price equalisation achieved by direct trading on one market.<sup>19</sup> Various forms of 'economic integration' lead to different degrees of factor price equalisation between the countries that choose to constitute a single market. At one side of the economic integration continuum, a customs union involves the free circulation of products (goods and services), eventually leading to some form of price convergence at the demand side for these products, while at the other side of the continuum economic and monetary integration implies that both the capital and labour factors of production are free to move between countries, thus leading, at least theoretically, to some convergence in the factor prices (e.g. wages), although one needs also to take into account the factor quality and the total factor productivity before arriving to any definite conclusions.<sup>20</sup> This factor price equalisation is reached by the movement of factors, by the movement of goods, or by both of them.

<sup>16</sup> A. Marshall, *Principles of Economics: An Introductory Volume*, 9th edn (Macmillan 1952), 325.

<sup>17</sup> On the history of the development of the law of one price in economics, see C. P. Kindleberger, *Economic Laws and Economic History* (Cambridge University Press 1997), fourth lecture.

<sup>18</sup> *Ibid.*, 67.

<sup>19</sup> *Ibid.*, 68.

<sup>20</sup> According to the predictions of the Heckscher–Ohlin–Samuelson theory: P. Samuelson, 'International Trade and the Equalization of Factor Prices' (1948) 58 *Economic Journal*

A broader conception of economic integration would indeed aim to accelerate factor–price equalisation across the EU, to the extent this is of course possible, assuming away ‘natural’ barriers to trade, such as transport costs and climate. Having such a conception of economic integration inevitably leads to an extensive role for integration through law, both of the positive and negative kind, but also integration through the development of common social norms in the countries in question, so that some convergence emerges in each society’s tastes in private and public goods. The measurement of economic integration may take the form in this context of assessing price differentials between the various regions/countries that are supposed to become a single market.<sup>21</sup> Such an approach may be unachievable and normatively undesirable, if the project of economic integration does not aim to reduce differences in tastes and in cultural traditions, as this becomes clear by the chosen motto of the EU, *In varietate concordia* (united in diversity), and the prevalent ideal of the legal pluralism of the EU legal order.<sup>22</sup>

A narrow perspective on economic integration will only focus on the removal of government barriers to trade without paying specific attention to eventual price differentials across the EU or across EU Member States with regard to factor of production prices. Only governmental legal barriers to trade should be removed, to the extent that these result from disparities in regulation/legislation, as opposed to removing barriers to trade resulting from different social norms. These barriers may take the form of customs duties and tariffs, which have been abolished since July 1968 between Member States of the EU, in relation to the trade of all goods following the entry into force of the customs union. The abolition of all customs duties and, in 1993, of customs controls at internal borders of the EU certainly went beyond the economic integration achieved at the global scale with the GATT system. Tariffs were substantially lowered in the first GATT round in 1947, then again with

163; P. Samuelson, ‘International Factor Price Equalization Once Again’ (1949) 59 *Economic Journal* 181.

<sup>21</sup> For a possible example of measurement, see the report on car prices within the European Union that the European Commission published annually between 1993 and 2011, which took into account the consumer prices (both including and excluding taxes) of various brands and models of cars across the EU. The publication of this report was discontinued in 2011. The report only focused on the prices of the product, here the various brands of cars, and did not include information on factor price equalisation (European Commission, ‘Car Price Reports: Archive’ (4 April 2013)).

<sup>22</sup> On this concept, see, inter alia, N. W. Barber, ‘Legal Pluralism and the European Union’ (2006) 12 *ELJ* 306.

the Kennedy round (1963–7), before another significant reduction with the Uruguay Round (1986–94). They may also take the form of non-tariff barriers to trade. These had also come to the attention of public authorities, in the context of the international trade negotiations for the GATT at the Tokyo Round, starting in 1973, which constituted the first major attempt in the context of the GATT to tackle non-tariff barriers to trade. The equivalent step in the process of EU economic integration was ignited by the intervention of the Commission in 1970,<sup>23</sup> followed by the judgment of the ECJ in *Dassonville*<sup>24</sup> and culminating with the *Cassis de Dijon* case law a few years later.<sup>25</sup>

The dilemma at this moment was if the negative integration clauses of the EU Treaty concerning the free movement of goods should have extended to cover discriminatory (directly or indirectly), as well as non-discriminatory barriers to trade (or indistinctly applicable barriers to trade). Choosing the former approach offered more leeway and discretion to the Member States to regulate their economy, with the aim of satisfying the preferences of their citizens, as only regulation leading to some form of discrimination in law or in fact could fall under the prohibition of the EU Treaties on MEQR. Choosing the latter may have brought within the scope of the prohibition of MEQR indistinctly applicable measures simply because of the fact that these imposed additional costs for the specific product to reach the consumers of the host country, to the extent that the obstacle to trade was not justified by means of mandatory (or imperative) requirements in the general interest applied in a proportionate manner, i.e. appropriate, necessary and reflecting the (lack of) equivalence of the regulatory framework in place in the country of origin.<sup>26</sup>

The approach of the ECJ was based on the principle of mutual recognition, which may not accommodate a pure application of the law of one price, as some form of regulatory divergence is permitted, if the public

<sup>23</sup> Commission Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L13/29.

<sup>24</sup> 8/74 *Procureur du Roi v. Dassonville*, EU:C:1974:82.

<sup>25</sup> 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, EU:C:1979:42.

<sup>26</sup> 120/78 *Cassis de Dijon*, paras. 8–11, 14–15. On the distinction between the broad and narrow approach in defining an ‘obstacle to trade’, see I. Lianos, ‘Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of “Economic” Integration’ (2010) 21 EBLR 705; I. Lianos, ‘In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods’ (2015) 40 *ELRev.* 225.

interest in question is not protected by the regulation of the country of origin, and the regulation of the host state satisfies the proportionality test. However, it is also clear that shifting the burden to prove the absence of an MEQR to the host Member State, the latter being required to put forward mandatory requirements of general interest and to establish that these lead to a 'proportional' restriction of trade, may potentially exercise some deregulatory effect. More importantly, for some authors, the *Cassis de Dijon* case law marks the rite of passage of EU internal market law from an international market with a law that is intrinsically linked to an international economic law approach,<sup>27</sup> to the establishment of a federal market, where states lose a part of their internal sovereignty over their 'national' market and there is a transition from host-state regulatory control to home state control, as a host state is no longer allowed to regulate imports that have already been regulated by the home state.<sup>28</sup> This tectonic change may also mark a 'shift from positive to negative integration' as the main tool for promoting economic integration in the EU.<sup>29</sup> According to the same authors, the jurisprudence of the ECJ has briefly flirted with the 'national' market model, when it expanded the logic of mutual recognition to cover both product requirements and selling arrangements. This led it to include in the definition of an 'obstacle to trade' all forms of trade restrictions resulting from regulatory diversity.<sup>30</sup> One should expect the law of one price to apply in a 'national' market, to the extent that there are no disparities with regard to the enforcement of the national legislation, there are no differential costs, and consequently any price differential would have, in principle, led to

<sup>27</sup> Schütze, *International to Federal Market*, 126 refers to the 'international law loyalty' of the first decade of interpreting the provisions of the Treaty regarding MEQR.

<sup>28</sup> *Ibid.*, 5–6. Schütze distinguishes three 'ideal types' of economic coordination/integration: (1) the 'modern international' market model, which is based on host-state regulatory control and which prohibits discrimination, determined in comparison with the regime applied to the products of the host state, although this is not interpreted broadly so as to cover 'discrimination flowing from a diversity of national regulations'; (2) the 'federal' market model, which is based on the principle of mutual recognition and 'examines whether the extension of host-state laws to imports imposes a 'restriction' or 'obstacle' to intra-Union trade, and thus does not only focus on discrimination against imports by the host state, and (3) 'national' market model, where 'all trade restrictions that are above a – legislative or judicial – Union standard must be removed' and thus also covers obstacles to trade resulting from disparities between different national legislations, the important element to consider being if the host-state law 'reduces the volume of trade within the internal market disproportionately'.

<sup>29</sup> *Ibid.*, 126.

<sup>30</sup> As this was exemplified by the Sunday trading case law of the ECJ. For an analysis, see C. Barnard, 'Sunday Trading: A Drama in Five Acts' (1994) 57 MLR 449.

arbitrage. However, cheaper imported products lose their competitive advantage when they are subject to the regulatory costs resulting from the regulation of the host state at the point of sale. The consumers of the host state may therefore suffer a welfare loss from not being able to purchase cheaper imported products. The volumes of trade are also reduced, as there exist fewer commercial opportunities of arbitrage.

The main difficulty with this conceptualisation of economic integration is that any additional regulatory costs the host state imposes on imported products may be found to constitute an obstacle to intra-EU trade. Hence, the framework does not easily accommodate the need for regulatory pluralism when this results from the democratic choice of a specific polity to adopt certain standards representing different regulatory values and/or the different tastes in public goods of its citizens. This was the underlying reason the ECJ abandoned this expansive view of Article 34 TFEU in *Keck*,<sup>31</sup> a judgment widely commented on in the literature.<sup>32</sup> *Keck* reversed the burden of proof for selling arrangements, with regard to the evidence of the existence of an 'obstacle to trade'. The prohibition stated in Article 34 TFEU may apply only if the plaintiffs have already provided evidence that the rules in question are likely to have a discriminatory impact (in law or in fact) on the market access of the imported goods. The prohibition of 'discrimination in fact' precludes

<sup>31</sup> C-267/91 and C-268/91 *Keck and Mithouard*, EU:C:1993:905.

<sup>32</sup> See, among others, L. Azoulay (ed.), *L'entrave dans le droit du marché intérieur* (Bruylant 2011); C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 CLJ 575; G. Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 GLJ 671; D. Doukas, 'Untying the Market Access Knot: Advertising Restrictions and the Free Movement of Goods and Services' (2006–7) 9 CYELS 177; P. Eeckhout, 'Recent Case Law on Free Movement of Goods: Refining *Keck and Mithouard*' (1998) EBLR 267; A. Fromont and C. Verdure, 'La consécration du critère de l'accès au marché en matière de libre circulation des marchandises: mythe ou réalité?' (2011) 47 *Revue trimestrielle de droit européen* 717; Gormley, 'Inconsistencies and Misconceptions'; T. Horsley, 'Unearthing Buried Treasure: Article 34 TFEU and the Exclusionary Rules' (2012) 37 *ELRev.* 734; R. Kovar, '*Dassonville, Keck* et les autres: de la mesure avant toute chose' (2006) 42 *Revue trimestrielle de droit européen* 213; P. Koutrakos, 'On Groceries, Alcohol and Olive Oil: More on the Free Movement of Goods after *Keck*' (2001) 26 *ELRev.* 391; Lianos, 'Shifting Narratives'; Lianos, 'In Memoriam *Keck*'; P. Oliver, 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurling in a New Direction?' (2010) 33 *Fordham ILJ* 1423; N. Nic Shuibhne, 'The Free Movement of Goods and Article 28 EC: An Evolving Framework' (2002) 27 *ELRev.* 408; R. Schütze, 'Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?' (2016) 41 *ELRev.* 826; N. Nic Shuibhne, *The Coherence of EU Free Movement Law* (Oxford University Press 2013), 234–56; J. Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CMLRev.* 437; P. Wennerås and K. Bøe Moen, 'Selling Arrangements, Keeping *Keck*' (2010) 35 *ELRev.* 387.

any measure that would be ‘by nature such as to prevent [the imported goods] access to the market or to impede access any more than it impedes the access of domestic products’.<sup>33</sup>

As I have explained elsewhere,<sup>34</sup> the discriminatory market access approach chosen by the ECJ requires a comparison of the burdens-imposed pre-market commercialisation to the domestic and imported products. The inquiry focuses on the competitive relationship between the imported and the domestic products, which should not be ultimately altered by the national measure. Traders should enjoy equal opportunities in taking advantage of price differences and in performing their arbitrage function, to the extent that these price differences do not reflect differences about the social costs of the specific economic transaction (e.g. the sale and consumption of a specific product). For instance, if the price differential results from disparities in the regulation of the commercialisation of a product between home and host states, because the host state considers that commercialising this product, domestic or imported, generates social costs, the host state should not be required to substantiate the reasons and calculations that led it to believe that the specific product generates social costs, if the regulation does not make any formal distinction between imported and domestic products and it is not expected that it will have a discriminatory impact or will eventually prevent the market access of the imported product. In the absence of such *prima facie* evidence of discrimination in law or in fact, which is to be brought by the trader, it makes sense to consider that this type of regulation of the host state will be deemed compatible with Article 34 TFEU. In the statistical parlance, this presumption aims to avoid type 1 errors or false positives (e.g. a non-discriminatory and non-protectionist regulation aiming to preserve a public interest in a proportional way, which is found to infringe Article 34 TFEU). One may interpret this case law as showing that, for the ECJ, the cost of false positives outweighed in this case that of false negatives (e.g. discriminatory or protectionist regulation that was found to be legal).

However, one may also argue that it is more likely that regulations on the composition and characteristics of a product affect disproportionately imported rather than domestic products, to the extent that state rules on product requirements almost always impose on imported products costs that have not been incurred by the domestic products post-entry into the

<sup>33</sup> C-267/91 and C-268/91 *Keck and Mithouard*, para. 17.

<sup>34</sup> Lianos, ‘Shifting Narratives’.

market. The reason is that the process of domestic production internalises the constraints of the specific regulatory context, prior to any business decision being made over the designation, form, size, weight, composition, presentation, labelling or packaging of the product. Imported products do not benefit from such internalisation of the host-state's regulatory framework, as their natural market is presumably that of their country of origin. Hence, it is safe to establish a presumption in this case that such regulation restricts more the market access of the imported products than that of domestic products.

It would be for the host state to reverse such presumption by arguing that its regulation did not aim to impose a differential burden or to affect the competitive relation between the imported and domestic products but to raise the price of all products in the host-state market in order to reflect their true social costs (as these are perceived by the host-state regulator), in view of their effect on some public-interest objective(s). The fact that the increase of the cost and price of the imported products caused by the host-state's regulation was not disproportional shows that the host state lacks protectionist intent, and that therefore its measure escapes the prohibition of Article 34 TFEU. Proportionality is assessed in comparison to the effect of the regulation on domestic products or on the basis of some principled/abstract approach examining the true social costs of their production, as revealed by the broader regulatory preferences of the host state, if there is no competing domestic production. Further possibilities of justification are provided, even for discriminatory measures, by Article 36 TFEU.

The *Keck* approach does not signify a return towards a more 'international' market approach, but a different and probably a more genuine 'federal' market vision, to the extent that in federalism one should not always expect the transfer of regulatory competences to work only in one direction (from states to the federal state), but actually in both directions (also from the 'federal' level to that of its constituent states). The trader's right to take advantage of market/arbitrage opportunities should be protected, without, however, that affecting the regulatory values and public interests pursued by the Member States, to the extent that the EU has not regulated this area, according to the principle of pre-emption.

The focus has shifted in the most recent case law of the EU from the impact of the differential regulatory regime on traders to that on the effect of the specific measure on consumer demand. Examining some national regulations restricting the use of products, the ECJ held that a national measure may fall under Article 34 TFEU if it exercises

a ‘considerable influence in the behaviour of consumers’ of the host state, thus limiting the opportunities of a foreign product to get access to the market of the host state.<sup>35</sup> This mixed approach, combining a discriminatory market access rule focusing on the supply side with an approach emphasising the ‘considerable influence’ of the measure ‘on the behaviour of consumers’ at the demand side, may eventually bring under the scope of Article 34 TFEU simple disparities in the regulatory conditions prevailing in each market. Indeed, if the host state’s regulation leads to significant price differentials for imported products, and imposes higher costs, as compared to domestic products, this may potentially exercise a ‘considerable’ influence on consumer demand, and therefore may affect the ‘market access’ of the imported product. Although this case law does not mark the transition towards a national market model, if the latter is to be modelled in accordance with the law of one price, it is certainly less accommodating for regulatory pluralism than the *Keck* approach, at least in situations where the host state’s regulation considerably affects consumer demand. Focusing on consumers may also have interesting implications, in particular when assessing the compatibility with EU law of private restraints of trade, which are not directly targeted by Article 34 TFEU,<sup>36</sup> but may be targeted by other provisions of the EU Treaties, such as competition law. Moving from a broader to a narrower definition of obstacles to trade and then again to a slightly broader one is to be expected in a federal system that is often characterised by a frequent reallocation of competences between the centre and the periphery.

The various models put forward by the literature when coding the voluminous case law on free movement of goods are certainly useful in understanding the broader narratives in operation, but may offer a limited explanation to what would seem frequent changes of direction, since they do not take into account the complexities of the legal construct of the internal market. The theoretical framework for the free movement of goods was partly transposed to other freedoms. However, there is some divergence in the interpretation of the concept of ‘obstacle to trade’, or of

<sup>35</sup> C-110/05 *Commission v. Italy*, EU:C:2009:66, para. 56. For a discussion of this evolution, see Lianos, ‘In Memoriam *Keck*’.

<sup>36</sup> 311/85 *Vlaamse Reisbureaus*, EU:C:1987:418, para. 30 (‘Articles [34 and 36 TFEU] concern only public measures and not the conduct of undertakings’; C-159/00 *Sapod Audic*, EU:C:2002:343, para. 74 noting that ‘a contractual provision cannot be regarded as a barrier to trade for the purposes of Article [34 TFEU] since it was not imposed by a Member State but agreed between individuals’. Hence, the important thing is for the measure to be attributable to a Member State’s action or inaction (on the latter, see C-265/95 *Commission v. France*, EU:C:1997:595).

the personal and material scopes of the EU free movement provisions. This has led some authors to talk of 'several Internal Markets',<sup>37</sup> rather than a 'single market'.

The coexistence of various principles, some moving closer, and some moving further from the law of one price and the idea of a 'national' market, makes the effort of developing adequate measurement tools for the EU project of economic integration particularly challenging. Measuring the success for such economic and social integration cannot rely on the same measurement tools employed for assessing the operation of the law of one price. It cannot also rely on the simple measurement of an increase in the volumes of intra-EU trade, as these may result from a higher degree of divergence in the prices of the various factors and an uncomplete process of factor price equalisation. Finally, as the focus gradually shifted from constituting a 'single market', in the sense of removing trade barriers, to that of managing regulatory diversity through a process of managed mutual recognition, the concepts of regulatory compatibility or regulatory convergence may provide more adequate reference points for conceptualising and measuring the 'success' of the EU economic integration project.

### III From Economic Integration to 'Regulatory Convergence'

It is clear that the concept of 'economic integration' has served as a rallying slogan for proponents of the constitution of the EU internal market in the first three decades of its existence. By the time the Single European Act came into effect in 1987 and following the expiration of the 31 December 1992 deadline, the idea of 'economic integration' evolved. Its purpose was not just to ensure the integration of national markets through 'the elimination of all obstacles to intra-[Union] trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market',<sup>38</sup> that is an internal market established and regulated by common rules or coordinated standards. An additional aim was added: that of constituting 'the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion', as proclaimed in Lisbon in 2000.<sup>39</sup> This was the first time the economic and social dimensions of integration were seen as

<sup>37</sup> S. Weatherill, 'The Several Internal Markets' (2017) 36 YEL 125.

<sup>38</sup> 15/81 *Schul*, EU:C:1982:135.

<sup>39</sup> European Parliament 'Lisbon European Council: Conclusions of the Presidency' (23–24 March 2000).

complements, although for some the social engagement of the EU was clearly not of equal importance and, in reality, may have worked against achieving a higher level of social protection in the various EU Member States.<sup>40</sup> This new emphasis on sustainable economic growth had nevertheless transformative effects on the conception of ‘economic integration’. This could not be conceived as just aiming to the establishment of a ‘single’ market, akin to the constitution of some form of ‘natural order’<sup>41</sup> of an EU-wide market. It was widely understood that it had to move simultaneously with some form of coordination, Europeanisation or ‘communitarisation’ of the policies dealing with the social question, resulting from the necessary compensation of the losers of the expansion of free trade principles.<sup>42</sup>

‘Policy convergence’ could offer an overarching concept in order to conceptualise the governance of the economic and social realms in tandem. A number of strategies and mechanisms were suggested in order to achieve this aim, through a mixture of the traditional Community method and new imaginative approaches of convergence or ‘Europeanisation’. These drew on the open method of coordination for more politically sensitive issues,<sup>43</sup> or the constitution of European networks of independent regulators for areas considered as being more technocratic.<sup>44</sup> What was promoted was policy convergence over specific performance goals, not just as a way to erode inter-jurisdictional trade barriers, but also as the main drive towards

<sup>40</sup> N. Countouris and M. Freedland, ‘The Myths and Realities of Social Europe’, in N. Countouris and M. Freedland (eds.), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013), 4–5 (noting that the Lisbon strategy was a ‘Trojan horse’ leading to deregulation of labour markets and high levels of unemployment).

<sup>41</sup> B. E. Harcourt, *The Illusion of Free Markets* (Harvard University Press 2011), ch. 3, on the birth of the idea of the market as a ‘natural order’ and the intellectual linkage of this to the physiocrats and their intellectual offspring, the Hayekian tradition of natural law theory, followed by the Chicago school of law and economics.

<sup>42</sup> On the various forms of social regulation coordination and their interaction (sometimes synergetic, sometimes competitive) with the traditional EU ‘community method’, see, M. Dawson, *New Governance and the Transformation of European Law* (Cambridge University Press 2011); K. A. Armstrong, *Governing Social Inclusion: Europeanization through Policy Coordination* (Oxford University Press 2010); V. Hatzopoulos, ‘Why the Open Method of Coordination Is Bad For You: A Letter to the EU’ (2007) 13 ELJ 309; D. Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford University Press 2005).

<sup>43</sup> See, inter alia, K. Featherstone and C. M. Radaelli (eds.), *The Politics of Europeanization* (Oxford University Press 2003).

<sup>44</sup> See, inter alia, G. Majone (ed.), *Regulating Europe* (Routledge 1996); M. Thatcher, ‘Regulation After Delegation: Independent Regulatory Agencies in Europe’ (2002) 9 *Journal of European Public Policy* 954.

more efficient, that is markets-compatible, policymaking. To the extent that the globalisation of economic production spearheaded by the IT industrial revolution in the 1990s led to a significant decrease in management costs, and the development of GVCs, this quest for ‘regulatory compatibility’<sup>45</sup> or regulatory ‘alignment’<sup>46</sup> expanded outside the EU, to also cover the various EU trade partners associated with the EU with accession agreements, association agreements and regional or bilateral trade agreements.

A similar trend towards ‘regulatory convergence’ may be observed with the trade policy followed by a number of other developed economies during the same period as this concept ‘has emerged as an overarching horizontal discipline in the latest generation of preferential trade agreements’.<sup>47</sup> One may note the importance of ‘regulatory convergence’ and ‘regulatory compatibility’ in the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the European Commission and the US and other mega-trade agreements.<sup>48</sup> Each of these mega-trade agreements include, in addition to the traditional for trade agreements market access rules, regulatory ‘behind the border’ issues

<sup>45</sup> Art. 21.2(4)(b) Canada–EU Comprehensive Economic and Trade Agreement (CETA) [2017] OJ L11/23.

<sup>46</sup> The concept of regulatory ‘alignment’ appears in Annex II of CETA stipulating that ‘approximation of legislation means . . . the alignment of the legislation of one or more of the parties to the regional economic integration agreement with the legislation of the other Party or Parties to that agreement’. It also appears in the recent ‘Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during Phase 1 of Negotiations under Article 50 TEU on the United Kingdom’s Orderly Withdrawal from the European Union, TF50 (2017) 19’ (8 December 2017), para. 49 noting that ‘[i]n the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union’.

<sup>47</sup> For a discussion of the nebulous conceptual boundaries of this concept and of the different mechanisms used to achieve regulatory convergence, see R. Polanco Lazo and P. Sauvé, ‘The Treatment of Regulatory Convergence in Preferential Trade Agreements’ [2017] *World Trade Review* 1.

<sup>48</sup> Further examples of these ‘deep’ mega-trade agreements, include the EU Korea FTA, the US Korea FTA, the EU Singapore FTA. One may also cite the Australia–New Zealand regulatory cooperation and the US–Canada Regulatory Cooperation Council. The US and Canada have also put in place the US–Canada Regulatory Cooperation Council, which was created in 2011 by the US president and the Canadian prime minister, thus not resulting from an international trade agreement. It aims at better alignment in regulation, enhancing mutual recognition of regulatory practices and establishing new effective regulations in specific sectors. It is composed of high-level representatives of regulatory oversight bodies as well as senior representatives from the international trade departments, but other regulatory agencies are also involved.

involving foreign direct investment (FDI), intellectual property rights, labour standards, as well as competition rules. These are usually accompanied by horizontal provisions on ‘regulatory compatibility’ and ‘regulatory convergence’.<sup>49</sup> For instance, the EU–Canada Comprehensive Trade and Economic Agreement (CETA) includes ‘horizontal’ regulatory cooperation provisions in order to ‘prevent and eliminate unnecessary barriers to trade and investment’, ‘regulatory compatibility, recognition of equivalence, and convergence’, including ‘[b]uilding trust, deepening mutual understanding of regulatory governance’ and ‘reducing unnecessary differences in regulation’, among other similar objectives.<sup>50</sup> Similar provisions have been discussed to be included in the TTIP, which was negotiated between the EU and the US. The EU negotiators’ mandate called for ‘enhanced cooperation between regulators’ and ‘regulatory compatibility’.<sup>51</sup> A section on regulatory policy instruments provided for some harmonisation of ‘analytical tools’ such as impact assessments. It was envisaged that a bilateral cooperation mechanism will support regulatory cooperation with the aim to ‘seek increased compatibility between their respective regulatory frameworks’. This would include information and regulatory exchanges ‘led by the regulators and competent authorities at central level responsible for the regulatory acts concerned’. A specific provision on the promotion of ‘International Regulatory Cooperation’ stipulated that:

the Parties agree to co-operate between themselves, and with third countries, with a view to strengthening, developing and promoting the implementation of international instruments inter alia by presenting joint initiatives, proposals and approaches in international bodies or fora, especially in areas where regulatory exchanges have been initiated or concluded pursuant to this Chapter and in areas covered by [specific or sectoral provisions – to be identified] of this Agreement.

And ‘reaffirm their intention to implement within their respective domestic systems those international instruments they have contributed to, as provided for in those international instruments’.<sup>52</sup>

<sup>49</sup> S. S. Krstick, ‘Regulatory Cooperation to Remove Non-Tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada–EU Comprehensive Trade Agreement (CETA)’ (2012) 39 *LIEI* 3; B. Hoekman, ‘Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization’ (2015) 18 *Journal of International Economic Law* 609.

<sup>50</sup> EU–Canada CETA, ch. 26 on Regulatory Cooperation.

<sup>51</sup> ‘TTIP–EU proposal for Chapter: Regulatory Cooperation’.

<sup>52</sup> WikiLeaks, ‘Initial Provisions for Chapter ... [EU: Regulatory Cooperation] [US: Regulatory Coherence, Transparency, and other Good Regulatory Practices]’.

The idea is that once regulatory systems develop some form of ‘convergence’, based, for instance, on a common reliance on similar sources of scientific expertise and similar regulatory processes, international cooperation in order to promote a common interpretation and understanding of that expert body of knowledge, the reasons for regulatory diversity erode. Whatever one may think of the view that similar inputs of expert knowledge, with some degree of regulatory cooperation and regulatory process convergence, will lead to similar regulatory outputs, it is clear that such an approach aims to kick-start the process of interstate regulatory cooperation in order to reduce ‘unnecessary differences’ in regulation and achieve ‘regulatory compatibility’.

It remains, however, that, as with the narrow view of economic integration presented in the previous section, the main difficulty with this conceptualisation of ‘policy convergence’ is that it does not accommodate the need for regulatory pluralism and diversity, which might better represent the preferences of the various political communities (in the absence of a single political community) connected through the nexus of global markets (and global supply chains). By focusing on the demands of specific stakeholders, businesses eager to expand their activities in global markets, the narrow definition of ‘policy convergence’ as the process through which the convergence point of a ‘natural’ market order will be achieved may face a similar legitimacy crisis to the one the neo-functional integration model has recently entered into. Indeed, one may not necessarily view institutional choices from a welfare perspective, in the sense that a particular institutional equilibrium produces superior welfare effects in comparison to another one, but also from a participatory perspective, regarding the quality and extent of participation in the decision-making processes at issue by the various stakeholders of the community/communities in question.<sup>53</sup> One needs to take into account the interests of all parties affected, which of course supposes some form of democratic legitimation. The idea that this ‘policy convergence’ may be more the result of the work of a technocratic elite, rather than the product of participatory and democratic politics, has been a major source of concern and criticism. This led to the ‘democratic deficit’ debate a few decades ago,<sup>54</sup>

<sup>53</sup> N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago University Press 1997).

<sup>54</sup> See, inter alia, K. Featherstone, ‘Jean Monnet and the “Democratic Deficit” in the European Union’ (1994) 32 *JCMS* 149; J. H. H. Weiler et al., ‘European Democracy and its Critique’ (1995) 18 *West European Politics* 4; G. Majone, ‘Europe’s “Democratic Deficit”: The Question of Standards’ (1998) 4 *ELJ* 5; A. Moravcsik, ‘In Defense of the Democratic Deficit: Reassessing the Legitimacy of the European Union’ (2002) 40 *JCMS*

and more recently to discussions over ‘The Europe of bankers’, the return of ‘national identity’ and a generalised distrust of the European elites.<sup>55</sup>

These discussions notwithstanding, there is a considerable qualitative step in shifting attention from managed mutual recognition and defining what constitutes an ‘obstacle to trade’ to regulatory convergence. If the former accepts, to a certain extent, disparate regulatory burdens, by focusing on the traditional tools of trade law and the interaction of negative and positive integration, as well as the existence of a regulatory conflict with regard to the allocation of jurisdictional authority between the centre and the constituent units, the latter follows what looks like an incentives mechanism design approach, where the rules of the game are set in such a way so as to engineer regulatory convergence, and avoid situations of conflict to emerge in the future. This change of approach may be justified by new circumstances in the way economic production and commercialisation is structured at a global scale.

#### IV The Changing Face of Economic Integration: GVCs and Economic ‘Integration through Code’

Discussions over economic integration have always focused on the role of regulatory barriers to trade, from customs duties to non-tariff barriers, the latter being particularly damaging for the free flow of commerce in an integrated economy. However, this conceptualisation of economic integration looks parochial in the era of the globalised production system driven by the important changes in information and communications technology (ICT) over the last twenty years and the emergence of a new kind of global infrastructure technology, the cyberspace. As sociologist Manuel Castells remarks, this economy should not be characterised as international but as being global in nature, the latter being ‘a historically new reality, distinct from a world economy’. Indeed, ‘a world economy, that is an economy in which capital accumulation proceeds throughout the world, has existed in the West at least since the sixteenth century ... A global economy is

603; A. Føllesdal and S. Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *JCMS* 533.

<sup>55</sup> For a discussion of the different facets of Euroscepticism, see B. Leruth et al. (eds.), *The Routledge Handbook of Euroscepticism* (Routledge 2017); J. FitzGibbon et al. (eds.), *Euroscepticism as a Trans-National and European Phenomenon* (Routledge 2016); H. Best et al., *The Europe of Elites: A Study Into the Europeaness of Europe’s Political and Economic Elites* (Oxford University Press 2012); C. Leconte, *Understanding Euroscepticism* (Palgrave 2010); A. Szerbiak and P. Taggart (eds.), *Opposing Europe?: The Comparative Party Politics of Euroscepticism* (Oxford University Press 2008).

something different: it is an economy with the capacity to work as a unit in real time on a planetary scale.<sup>56</sup>

This raises the question of what could be the role and value of economic integration within a European 'single' market in the context of a 'global economy' marked by the important role of GVCs in regulating trade flows, and more generally the circulation of factors of production, globally as well as in the EU. Furthermore, one may speculate on the distinguishing element characterising the European internal market project as a different (qualitative) step in the process of economic integration. To give an answer to these questions one needs to explore the profound transformations of modern international trade, in view of the development of GVCs as the most influential institution for the governance of international trade flows, and to examine the continuing relevance of the traditional concept of comparative advantage, which has served as the bedrock of the global and regional projects of economic integration, including the EU internal market project. This new perspective will assist us in conceptualising the EU internal market project, not just as a process of economic integration through the removal of public barriers to trade, but as a regulatory compass that combines traditional tools of negative economic integration, such as the prohibition of tariffs and non-tariff barriers to trade, and positive integration, but which also includes other instruments having an integrative potential, such as competition law and regulation, or tools of 'smart' or complex economic integration that proactively aim to take full advantage of the most powerful and self-reiterated integrative force of the modern economy: cyberspace.

### A *Comparative Advantage and GVCs: The Transformation of International Trade*

The development of IT and in particular the internet in the early 1990s led to significant changes in the global economic organisation of production, with the slicing or 'unbundling' of the production process in various discrete tasks or phases through the establishment of modular production networks,<sup>57</sup> and its vertical outsourcing in offshore production

<sup>56</sup> M. Castells, *The Information Age: Economy, Society and Culture: The Rise of the Network Society* (Wiley 1996), 92.

<sup>57</sup> T. Sturgeon, 'Modular Production Networks. A New American Model of Industrial Organization' (2002) 11 *Industrial and Corporate Change* 451, noting that GVCs rely on codified inter-firm links with the 'generic manufacturing capacity' residing in 'turn-key' suppliers.

facilities managed by global value chains (or GVCs).<sup>58</sup> The value chains include the full range of activities and processes that are needed to bring a product from conception through the intermediary stage of production to delivery to final consumers and final disposal after use.<sup>59</sup> The process starts from the research and the design of a product, continues with its production, and ends with the retail stage. These input–output operations ‘take place through coordinated chain components that stretch systemically across multiple – from a few to a few thousand – firms’.<sup>60</sup> The structural and geographical diversification of multinational enterprises constitutes an important dimension of the development of GVCs, FDI acting as a catalyst for trade integration. However, GVCs have also provided the opportunity to small and medium local undertakings to gain expertise and technical capabilities that would enable them to be ‘plugged into GVCs as domestic suppliers of exporters’,<sup>61</sup> thus indirectly contributing to exports. They may also participate more actively to the global production process and technology sharing, to the extent that a lot of productive activity is managed across transnational networks linked by contractual and other non-equity external arrangements and ties. A recent joint OECD, WTO and World Bank report indicates that the size of international trade consisting of intermediate inputs, traded within GVCs constitutes ‘[b]etween 30% and 60% of G20 countries’ exports’.<sup>62</sup> Economic production is increasingly structured around GVCs, which permit the simultaneous and coordinated transnational production and distribution of a very large array of products that each stage of the supply chain has to manage effectively, without this involving necessarily vertical integration by ownership. Some authors go as far as arguing that ‘[t]he most important paradigm for understanding the global economy, and the political and social relationships that both

<sup>58</sup> OECD, WTO and UNCTAD, ‘Implications of Global Value Chains for Trade, Investment, Development’ (6 August 2013); UNCTAD, ‘Global Value Chains and Development’ UNCTAD/DIAE/2013/1 (2013); OECD, WTO and World Bank Group, ‘Global Value Chains: Challenges, Opportunities and Implications for Policy’ (July 2014); OECD, ‘The Future of Global Value Chains: Business as Usual or a New Normal?’ (2017) *OECD Policy Papers* 41.

<sup>59</sup> R. Kaplinsky and M. Morris, *A Handbook for Value Chain Research* (Institute of Development Studies 2002).

<sup>60</sup> K. Sobel-Read, ‘Global Value Chains: A Framework for Analysis’ (2014) 5 *Transnational Legal Theory* 364, 364.

<sup>61</sup> OECD and UNCTAD, ‘Inclusive Global Value Chains’ (2015), 7–8.

<sup>62</sup> OECD, WTO and World Bank Group, ‘Global Value Chains; Challenges, Opportunities and Implications for Policy’ (2014), 13; UNCTAD, ‘World Investment Report 2013’.

guide it and stem from it, is no longer the template of the market but rather the role of global value chains', corporate action, in the form of GVCs not only driving but also defining, and therefore creating, the market.<sup>63</sup>

There are various reasons explaining this recent phenomenon. The development of technology has made supply chain management more effective and less expensive, enabling companies to achieve higher quality at a lower production cost by focusing on 'core competencies' and outsourcing any 'non-core' business functions. This was achieved by the unbundling of the production process in various steps, some of which could be transferred offshore, according to the comparative advantage provided by the specific offshore jurisdiction (i.e. low wages, specialised staff with important technological and research capabilities, or excellent infrastructure).<sup>64</sup> With the development of ICT and logistics, firms were able to coordinate their production activity globally and take advantage of the best combination of the comparative advantage of each state in which some tasks of the production activity were transferred. The constitution of these international production networks is driven by the value added that the exploitation of these various comparative advantages confers to the lead firm managing the GVC. Comparative advantage becomes therefore 'de-nationalized'.<sup>65</sup>

One may also trace the development of value chains in the expansion of national and international regulations regarding consumer protection, food safety and quality, and technical standardisation. Firms find it crucial to enter into long-term agreements with partners in other segments of a value chain, in order to create the necessary relation of trust that is required by the importance of relation-specific investments that need to be undertaken in setting the supply chain management. This may lead to disintermediation and vertical integration but also to de-concentration through the constitution of networks or supply alliances that are managed by supply chain councils. Finally, the process of concentration of the retail sector has led to the development of powerful buyers (retailers or branded manufacturers) that rely on a complex web of suppliers and service providers of all kinds and situated in multiple locations.

<sup>63</sup> *Ibid.*, 367.

<sup>64</sup> R. Baldwin, *The Great Convergence* (Harvard University Press 2017), 156 (noting that this 'second unbundling' allowed globalisation to reach much deeper into national economies and in particular the production function). The 'first unbundling' refers to the process of the increased possibilities of the mass consumption of products produced in other countries because of low transport costs and technological advances in transportation.

<sup>65</sup> *Ibid.*, 12.

These various forms of supply chain management share the common characteristic that they are all ultimately (intermediary and final) consumer oriented, as any segment of the chain directs its efforts towards meeting the needs of the next chain ring, the perception being that all segments of the chain do not constitute separate islands of activity but essential ingredients for the formation of the total surplus value of the chain. For instance, brand-building takes the wider perspective, that of the whole value chain, leading to the elaboration of labels and standards to which the various segments of the chain abide.

How could this affect economic integration and trade policy? First, this alters the utility function of states, as these aim to promote policies ensuring that their firms participate to these GVCs and are thus able to share a significant part of the surplus value brought by the chain. Second, it increases the costs for trade of regulatory disparities. The most obvious implication of GVCs relates to their transnational dimension, which calls for a 'transnational coordination' between various firms established in the 'host' and the 'home' states at various levels: products may often be exported from the home state and then reimported again to the home state, after they have incurred one or more rounds of transformation in several host states, or they may end up in other host states. Hence, an important characteristic of GVCs is that goods and services increasingly cross international borders multiple times as they become finished products. 'Old' trade law assumed that competition was taking place between states, aiming to attract through the development of their comparative advantage products or industries that were primarily produced in each state and which were following a strategy of specialisation in the industries or products for which they held the comparative advantage. Tariffs and regulations that had a protectionist purpose typically were discriminating against imported products (or industries) and/or providing some favourable treatment to domestic products (or industries). The distinction between domestic and foreign products constituted the foundation of the approach put forward by the European Commission with regard to non-tariff barriers to trade in the early 1970s,<sup>66</sup> which ultimately led to

<sup>66</sup> Commission Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L13/29 distinguished between discriminatory and indistinctly applicable measures (to a product or industry).

the development of the various tests of the case law of the EU courts on the application of the free movement provisions of the treaties.<sup>67</sup>

In contrast, a GVC-inspired trade law should take into account the unbundling and the fragmentation of the productive activity in various inputs or steps, which may take place in several countries, and of the ability of firms to exploit the comparative advantage of each country for the specific task to be accomplished. It is therefore possible that a state may have a high participation to GVCs without necessarily this occurring at the last segment of the value chain. This does not mean that the net domestic value added created by trade for this state will in this case be limited.<sup>68</sup> It all depends on the value added of the unbundled productive activities taking place in the specific state. These may be high added value activities pertaining to research and development services, such as basic and applied research and experimental development of new products and processes, professional services, such as legal and accounting, management consulting services, technical business services or information and communication technology services, in which case the share of the surplus value will be significant. In other circumstances, these may be activities with a lower added value, in which case the specific state would need to expand their productive capacity and the size of their market (domestic and foreign through forward linkages). This breaks with the focus of current trade law, at the WTO, as well as at the EU internal market levels on comparative advantage as expressed in terms of products/industries on the assumption that the full commercial value of a product is attributed to the last country of export and that products are made and exported either fully or primarily by one country. A GVC-inspired trade analysis will shift the focus to (1) the value added of activities and tasks performed at each level of the production chain, (2) the measurement of the participation of a country in GVCs and (3) the estimation of the distribution of gains between countries in terms of countries' shares in total value added created by trade under GVC. This approach also breaks with the distinction between products and services, which seems outdated in a world marked by the shift towards

<sup>67</sup> The distinction between indistinctly applicable measures and discriminatory measures has been the only two substantive law categories used by the jurisprudence of the ECJ on what is now Art. 34 TFEU, at least until it added in *Keck* the dichotomy between measures relating to product requirements and selling arrangements.

<sup>68</sup> Value added is defined as value of output minus value of inputs.

a ‘servitization’ of manufacturing,<sup>69</sup> as well as the future development of user-based manufacturing (or cloud-manufacturing) and 3-D printing.

Participation in GVCs may take place either through ‘forward linkages’, ‘where the country provides inputs into exports of other countries’ and the domestic value added is contained in inputs sent to third countries for further processing and export through the value chain, or through ‘backward linkages’, ‘where the country imports intermediate products to be used in its exports’.<sup>70</sup> The share of a country in total value added created by forward and backward linkages in GVCs may provide a measure of the extent of a country’s participation and its relative gains in GVCs.<sup>71</sup> Just focusing on exports may misrepresent the level of participation of the country to GVCs and the exact distribution of gains resulting out of their participation to GVCs. Indeed, exports may be broken down into domestic and foreign value-added content. The domestic value-added content of exports may take different forms: (1) it may form part of the final or intermediate products directly consumed by the consumers of the home country A, (2) it may be contained in intermediary products exported to host country B, which then re-exports them to host country C after these have been embodied/integrated as inputs in other products, and (3) it may relate to the exported intermediary products or inputs that are reimported in the home country A, and then used to produce other intermediary products before being exported to a host country B.

These value chains are governed by lead firms, in most cases transnational corporations (TNCs), which now account for 80 per cent of global trade.<sup>72</sup> Economic actors may maintain or improve (‘upgrade’) their position in GVCs. ‘Economic upgrading’ is defined as ‘the process by which economic actors – firms and workers – move from low-value to relatively high-value activities in GVC’.<sup>73</sup> States may also develop various trade policies with the objective of ‘upgrading’, by shifting the composition of their exports towards processing industries requiring higher

<sup>69</sup> See, inter alia, T. S. Baines et al., ‘The Servitization of Manufacturing: A Review of Literature and Reflection on Future Challenges’ (2009) 20 *Journal of Manufacturing Technology Management* 547.

<sup>70</sup> R. Banga, ‘Measuring Value in Global Value Chains’ (UNCTAD, Background Paper, RVC-8, 2013), 14.

<sup>71</sup> Ibid.

<sup>72</sup> G. Gereffi et al., ‘The Governance of Global Value Chains’ (2005) 12 *Review of International Political Economy* 78.

<sup>73</sup> G. Gereffi, ‘Global Value Chains in a Post-Washington Consensus World’ (2014) 21 *Review of International Political Economy* 9, 18.

imported content, or by increasing their productive capacity to increase their share in the tasks and activities that are part of existing GVCs.

An important implication of these structural changes of the global economy is that multinational corporations and global business networks may constitute a source of more significant restrictions of trade than those deriving from purely public barriers to trade. Private barriers to trade form part of these companies' competitive strategies as they aim to expand their profit base by increasing their sales in various geographic and product markets (horizontal competition), as well as by increasing their share in the total surplus value produced by their respective value chains (vertical competition). This profoundly affects trade policy to the extent that states should not only focus on the removal of trade barriers, but also on improving competition and, more broadly, the contestability of markets to the benefit of their consumers and suppliers. It becomes also important to ensure that quality certification, technical regulations, standards and conformity assessment procedures are non-discriminatory, and that they also do not create unnecessary barriers to trade that may affect the efficient operation of GVCs. Economic transactions within GVCs when these involve multinational firms and their affiliates, or when they take place between firms and their independent suppliers, involve multiple crossing of the borders, so that the products may be subject to various rounds of industrial transformation and this exacerbates the costs of trade barriers. Producing according to world standards becomes essential for a firm to be able to integrate a global value chain to the extent that different standards and other non-tariff measures may influence trade flows and thus block the efficient operation of the GVC.<sup>74</sup> This may bring within the scope of the negative integration tools non-tariff barriers that have not been imposed with a 'protectionist intent', but which 'nevertheless can have impact on trade costs' or produce trade frictions resulting from differences in regulations, and their implementation.<sup>75</sup> The focus is clearly on the need to ensure the 'efficiency' of the value chain, rather than on catering for the preferences of the citizens and consumers of the regulating state for specific public-interest standards. However, it is also recognised that a 'reduction to zero' of these non-tariff barriers may not be a 'feasible option' and that a 'certain amount of trade costs related to those measures will always exist'.<sup>76</sup> The focus is rather on the trade costs that are actually

<sup>74</sup> OECD and UNCTAD, 'Inclusive Global Value Chains' (2015), 74.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, 75.

‘reducible’.<sup>77</sup> This clearly links with the idea of regulatory convergence, as such an approach may enable a further reduction of the trade costs, without nevertheless compromising on the public-interest aims valued by the specific polity.

In conclusion, focusing on GVCs may offer an alternative conceptualisation of the project of economic integration than the law of one price, in that it hinges on the establishment of value networks across the Member States of the Union as a possible measure of the ‘success’ of the European project of economic integration, a perspective that would provide more weight to the extent of participation of the firms of all the Member States of the Union in Europe-wide value chains. This conceptualisation could be complementary to the more consumer-focused logic of the law of one price.<sup>78</sup>

The process of the integration of the EU internal market may therefore be rethought as relying on a complex array of wide-ranging policies facilitating GVCs’ participation. These do not only depend on the traditional trade policy tools, but also take into account all internal and external factors that may have an impact on the ability of firms to participate in GVCs (access to ICT networks, access to finance, EU-wide and international standards of quality and product certification, connectivity and trade facilitation measures). Such a holistic approach to economic integration questions the need for different regimes for goods and services, includes in the broader picture the interests of traders, consumers and investors, and raises doubts as to the need for a strict separation between the rules applying to public and those applying to private obstacles to trade.

It remains to be seen if the case law of the EU courts will take into account this shift of focus from market access to the access to value chains, and what would be the subsequent adjustments to be made to the jurisprudence of the ECJ on the free movement of goods. There are, however, increasing signs that the EU courts take a more aggressive stance towards restrictions on exports, that may set important challenges for the organisation of EU-wide value chains.<sup>79</sup> The case law also shows

<sup>77</sup> Ibid.

<sup>78</sup> J. Amador et al., ‘Global Value Chains: A View from the Euro Area’ (April 2013) cited by F. di Mauro et al., ‘Global Value Chains: A Case for Europe to Cheer Up’ (2013) *COMPNET Policy Brief* 03/2013, 4, noting that the foreign value added in exports – while increasing as a share of exports – ‘was to a major extent sourced from other euro area countries’.

<sup>79</sup> C-15/15 *New Valmar*, EU:C:2016:464.

greater concern for promoting the ability of economic operators to gain direct access to the market through internet distribution of their products,<sup>80</sup> and considers restrictions to price competition between economic operators situated in different Member States as constituting an MEQR, to the extent that they have a greater impact on the sale of products by foreign economic operators than on the sale of the same products by domestic economic operators established within the national territory.<sup>81</sup> The focus on value chains should also provide arguments to maintain the essence of the *Keck* approach, which seems to have made an unremarkable comeback,<sup>82</sup> as restrictions on selling arrangements to final consumers may in principle be judged less problematic for the

<sup>80</sup> C-322/01 *Deutscher Apothekerverband v. DocMorris*, EU:C:2003:664.

<sup>81</sup> C-148/15 *Deutsche Parkinson Vereinigung*, EU:C:2016:776 (with regard to a system of fixed sales prices imposed to pharmacies for prescription-only medicinal products that limit price competition).

<sup>82</sup> See the Opinion of AG Szpunar in C-148/15 *Deutsche Parkinson Vereinigung*, EU:C:2016:394, para. 23, noting that ‘Keck is still alive’. To the extent that I have published a paper a few months earlier in the *European Law Review* (‘In Memoriam Keck’), in which I raised questions as to the continuing vitality of the *Keck* and *Mithouard* case law, I can take the AG’s point as a direct answer to the question I raised. Yet, I remark that, as AG Szpunar notes, *Keck* has been sparsely applied and that, in any case the ECJ did not mention *Keck* at all in its judgment in this case. See, however, C-198/14 *Visnapuu* EU:C:2015:751, paras. 103–4 (a judgment issued after the publication of my paper), where the ECJ referred to *Keck* although it found that it did not apply in this case and went on applying the *Dassonville* test. Hence, although it may be ‘still alive’, *Keck* shows limited signs of practical vitality.

In his Opinion in C-148/15 *Deutsche Parkinson Vereinigung*, AG Szpunar described the rationale of the *Keck* case law as following: ‘[s]ensitive matters of a non-economic nature which are only marginally linked to free movement as such (and which are non-discriminatory should be left to Member States’, noting that such ‘sensitivity’ cannot be identified ‘when the effect of the measure is to limit competition and the market access of foreign economic operators’. It is not clear to me what are the criteria AG Szpunar employs in order to distinguish between ‘sensitive’ and non-sensitive issues of an ‘non-economic nature’. If competition can potentially be limited, and in particular price competition, it is quite clear in my mind that the issue in question relates to an economic matter. I am also unable to understand why such measure would be, as AG Szpunar argues, ‘a far cry’ from rules on sale at a loss, rules prohibiting opening hours/days, such as the Sunday trading cases, or cases on restrictions on advertising. In all these cases, the measures in question restrict different parameters of competition (price and quality of service or branding). Hence, I do not think that one can easily distinguish these cases from the present case, as AG Szpunar contends on this basis. In my view, the issue is about the existence of a discriminatory impact (in law or in fact) on the market access of the imported good, which can be unveiled by using the comparative burdens methodology and its focus on the competitive relationship between the imported and the domestic product, which should not be altered by the national measure that I have put forward (Lianos, ‘Shifting Narratives’; Lianos, ‘In Memoriam Keck’).

organisation of supply chains across the EU, than restrictions affecting the composition and the characteristics of the product.

*B The 'Single Digital Market' Agenda: 'Smart' Economic Integration Through Technology, Regulation and Competition Law*

The 'single digital market' agenda constitutes an illustration of the increasing complexity of 'economic integration' and the way this may be enhanced through a 'smart' interaction of different policies.

1 The Digital Single Market Strategy, Geo-Blocking and Geo-Filtering

In his 2014 Political Guidelines for the next European Commission, Jean-Claude Juncker, the President of the Commission, put forward the need to create a connected digital single market as one of the new Commission's priorities.<sup>83</sup> Indeed, Europe is lagging behind the US and China with regard to the development of large digital companies, as illustrated by the very few unicorns (start-up companies valued at more than \$1 billion) established in Europe, in comparison to those based in the United States or Asia.<sup>84</sup> The follow-up process has been rather quick. In 2015, the European Commission adopted a Communication setting a Digital Single Market Strategy for Europe.<sup>85</sup> This will be built on three pillars, one of which includes better access for consumers and businesses to online goods and services across Europe.

The recent efforts to promote a 'digital single market' testify to the continuing relevance of the idea of economic integration and of the need to break down 'national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law' that reduce the 'great opportunities

<sup>83</sup> J.-C. Juncker, 'Political Guidelines for the Next European Commission – A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (15 July 2014). The establishment of a Connected Digital Single Market was listed as priority no. 2.

<sup>84</sup> A. Mooney, 'European Unicorns Remain Elusive', *Financial Times* (16 June 2016). Most of the unicorns in Europe are UK based, which is also the Member State that enjoys the highest levels of e-commerce in Europe (European Union Committee, 'Online Platforms and the Digital Single Market', 10th Report of Session 2015–16, (2016) HL Paper 129, ch. 8).

<sup>85</sup> European Commission, 'Communication: A Digital Single Market Strategy for Europe' COM(2015) 192 final 6; European Commission, 'Commission Staff Working Document: Digital Single Market Strategy for Europe – Analysis and Evidence' COM(2015) 192 final.

offered by digital technologies, which know no borders'.<sup>86</sup> The digital single market aims to allow a seamless access for consumers and business to online goods and services across Europe. This objective will be achieved with an array of tools:

- specific EU rules on e-commerce, including a review of the regulation on consumer protection cooperation;<sup>87</sup>
- the improvement of price transparency and regulatory oversight regarding the delivery of parcels cross-border;<sup>88</sup>
- regulation on the cross-border portability of online services in the internal market;<sup>89</sup>
- a modernised 'more European' copyright framework;<sup>90</sup>
- a review of the Satellite and Cable Directive to facilitate the online cross-border distribution of television and radio programmes;<sup>91</sup>
- harmonising VAT rules to deal with the complexity of the various VAT systems that may apply to EU cross-border transactions;<sup>92</sup>

<sup>86</sup> Juncker, 'Political Guidelines'.

<sup>87</sup> European Commission, 'Proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws' COM(2016) 283 final.

<sup>88</sup> *Ibid.*

<sup>89</sup> Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market [2017] OJ L168/1.

<sup>90</sup> European Commission, 'Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes' COM(2016) 594 final; 'Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market' COM(2016) 593 final; Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L242/6; Regulation 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L242/1

<sup>91</sup> European Commission, 'Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes' COM(2016) 594 final.

<sup>92</sup> European Commission, 'Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States' COM(2017) 569 final; 'Proposal for a Council implementing legislation amending Implementing Regulation (EU) 282/2011 as regards certain exemptions for intra-Community transactions' COM(2017) 568 final; 'Proposal for a Council Regulation amending Regulation (EU) 904/2010 as regards the certified taxable person' COM(2017) 567 final. This e-commerce package was adopted without discussion at the meeting of the Economic and Financial Affairs Council

- specific rules prohibiting geo-blocking and geo-filtering that may raise barriers to cross-border online activity.<sup>93</sup>

The justification of these new EU-wide normative and adjudicatory interventions derive from the traditional ‘market integration’ handbook, although it appears this time more consumer oriented. To this is added a social and macro-economic growth-oriented dimension, in view of the important benefits that e-commerce is expected to provide to the relatively low levels of economic growth in the EU.<sup>94</sup> The main text of the Commission explaining the reasons for promoting a ‘Single Digital Market’ reads as following:

(a) digital single market means fewer barriers, more opportunities. It means a seamless area where people and business can trade, innovate and interact legally, safely, securely, at an affordable cost, making their lives easier. It means business able to fully use new technologies; and small businesses in particular able to cross the EU with ‘just a click’. This could contribute €415 billion per year to our economy and create hundreds of thousands of new jobs.<sup>95</sup>

The focus on the digital single market agenda offers a new opportunity for the process of ‘economic integration’. It is carried forward by capitalising on the wave of economic integration through technology, the development of the internet in the mid 1990s, which has considerably reduced, inter alia, the costs of marketing, and made it easier for firms and products to gain access to consumers or suppliers in foreign markets.<sup>96</sup> Internet and big data also provide higher price transparency, enabling the comparison of prices across various states and increasing possibilities of arbitrage, often exploited by the well-known ‘heroes’ of EU trade law, parallel importers and exporters and other intermediaries. The medium of the internet and the opportunities it represents for firms

of 5 December 2017 in Brussels, after the European Parliament gave its opinion on 30 November 2017 ([www.consilium.europa.eu/en/press/press-releases/2017/12/05/vat-on-electronic-commerce-new-rules-adopted](http://www.consilium.europa.eu/en/press/press-releases/2017/12/05/vat-on-electronic-commerce-new-rules-adopted) [accessed 22 October 2018]).

<sup>93</sup> European Commission, ‘Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market’ COM(2016) 289 final.

<sup>94</sup> European Commission, ‘Final Report on the E-commerce Sector Inquiry’ COM(2017) 229 final.

<sup>95</sup> European Commission, *A Digital Single Market in Europe* (Publications of the European Union 2016), 4.

<sup>96</sup> J. Meltzer, ‘Supporting the Internet as a Platform for International Trade’ (February 2004) *Brookings, Global Economy and Development Working Paper 69*.

to organise EU-wide and global-wide value chains in sectors that were up until then considered part of the non-tradable sector, such as retail or some professional services (e.g. taxi transport), is also significant. It is not any more necessary to reduce trade barriers through elaborate and politically risky efforts of harmonisation, or through a generalised system of mutual recognition, such as that attempted with the Bolkenstein Directive on services in the internal market, which contributed a lot to the Eurosceptic sentiment and rhetoric in various regions of the Union.<sup>97</sup> With the internet, economic integration is, to a certain extent, on automatic pilot and relies on consumers' incentives to find the best deal.

However, firms may also take advantage of technology in order to block the free flow of commerce. The European Commission has expressed concerns about geo-blocking and geo-filtering. Geo-blocking 'refers to practices used for commercial reasons by online sellers that result in the denial of access to websites based in other Member States'.<sup>98</sup> Geo-filtering consists in offering different terms and/or conditions depending on the location of the user, when situated at a different Member State from that of the online provider.<sup>99</sup> Geo-blocking may occur even if consumers are able to access the website, when they are not able to purchase products or services from it, in particular if they are rerouted to a local website of the same company with different prices or a different product or service. Geo-filtering occurs when 'geo-localising practices are used as a result of which different prices are automatically applied on the basis of geographic location, for example when online car rental customers in one Member State pay more for the identical car rental in a given destination than online customers in another Member State',<sup>100</sup> or more generally online providers allow users to access and purchase consumer goods/digital content services cross-border, but offer

<sup>97</sup> Directive 123/2006/EC on services in the internal market [2006] OJ L376/36 (Bolkestein Directive). For a discussion of the political tensions arising out of the Directive, see M. Dagnis Jensen and P. Nedergaard, 'From "Frankenstein" to "Toothless Vampire"? Explaining the Watering Down of the Services Directive' (2012) 19 *Journal of European Public Policy* 844; M. Chang et al., 'The Services Directive: Trojan Horse or White Knight?' (2010) 32 *Journal of European Integration* 97; K. Nicolaïdes and S.K. Schmidt, 'Mutual Recognition "On Trial": The Long Road to Services Liberalization' (2007) 14 *Journal of European Public Policy* 717.

<sup>98</sup> European Commission, 'Geo-Blocking Practices in E-commerce – Issues Paper Presenting Initial Findings of the E-commerce Sector Inquiry Conducted by the Directorate-General for Competition' SWD(2016) 70 final, para. 32.

<sup>99</sup> *Ibid.*, para. 33.

<sup>100</sup> European Commission, 'Communication: A Digital Single Market Strategy for Europe' COM(2015) 192 final 6, 6.

different terms and/or conditions depending on the location of the user in a Member State different from that of the provider.<sup>101</sup> According to the Commission, '[g]eo-blocking is one of several tools used by companies to segment markets along national borders (territorial restrictions)'; it is further explained that '[b]y limiting consumer opportunities and choice, geo-blocking is a significant cause of consumer dissatisfaction and of fragmentation of the Internal Market'.<sup>102</sup> Geo-blocking or geo-filtering may be applied by various operators: retailers operating an online store, online marketplaces and price comparison websites.<sup>103</sup>

There is more of course in the Digital Single Market than just reducing barriers to online trade. The European Commission has also published a Communication on digital platforms, in which it stresses the importance of open and non-discriminatory markets, and acknowledges that '[a]s online platforms play an increasing role in the economy, the terms of access to online platforms can be an important factor for online and offline companies' and that '[f]or SMEs and micro-enterprises, some online platforms constitute important, sometimes the main, entry points to certain markets and data'.<sup>104</sup> This sketches an industrial policy-light design, where competition law is an instrument to achieve the right framework conditions and the right environment in order to retain, grow and foster the emergence of new online platforms in Europe.

However, we will focus here on the market integration objective of competition law and how this may be achieved by enforcing competition law against the practice of unjustified geo-blocking.

## 2 Competition Law

In the context of the Digital Single Market strategy, the Commission launched a sector inquiry into e-commerce in the EU, on the basis of Article 17 of Regulation 1/2013.<sup>105</sup> This provision enables the Commission to open investigations into sectors of the economy and into types of agreements, if there are some indications that competition may be restricted. Although the Commission cannot adopt remedies, it

<sup>101</sup> European Commission, 'Geo-Blocking Practices in E-commerce' SWD(2016) 70 final, para. 33.

<sup>102</sup> European Commission, 'Communication: A Digital Single Market Strategy for Europe' COM(2015) 192 final, 6.

<sup>103</sup> European Commission, 'Geo-blocking Practices in E-commerce', SWD(2016) 70 final, para. 67.

<sup>104</sup> European Commission, 'Communication: Online Platforms and the Digital Single Market' COM(2016) 288 final.

<sup>105</sup> European Commission, 'Sector Inquiry into E-commerce' (10 May 2017).

publishes a report, which informs its subsequent enforcement action under Articles 101 and/or 102 TFEU. The aim of the e-sector inquiry is to allow the Commission to gather data on the functioning of e-commerce markets so as to identify possible restrictions of competition, in particular with regard to cross-border online trade, the Commission's findings being merely based on surveys of companies present in the sector. The Commission published its initial findings in March 2016 in relation to geo-blocking, finding that geo-blocking is applied by the majority of online digital content providers and is largely based on contractual restrictions, although it may also be adopted through unilateral conduct. The Commission also acknowledged the existence of 'technical geo-blocking', which aims to restrict a user's ability to access and use content in a given Member State from outside that Member State's territory (access and portability restrictions), which is often used for digital content services.<sup>106</sup> This may limit the user's ability to play previously downloaded content in certain territories, restrict the catalogue of content and/or services available to a given user in different territories, and the ability of an existing user to access the service in different territories.<sup>107</sup>

The Commission's Staff Discussion paper makes it clear that limiting the ability of European users to shop online cross-border 'may run counter to the objective of establishing a single market'.<sup>108</sup> Usually competition law has applied in order to deal with these *private* barriers to trade (as opposed to public barriers to trade, which are dealt by the free movement of goods/services law).<sup>109</sup> Article 101 TFEU targets agreements or concerted practices that are aimed at partitioning national markets according to national borders, or more generally make the interpenetration of national markets more difficult,<sup>110</sup> eventually by

<sup>106</sup> European Commission, 'Geo-blocking Practices in E-commerce' SWD(2016) 70 final, para. 174.

<sup>107</sup> *Ibid.*, para. 176.

<sup>108</sup> *Ibid.*, para. 41.

<sup>109</sup> On the interaction between competition law and free movement law, see V. Brisimi, *The Interface between Competition and the Internal Market: Market Separation under Article 102 TFEU* (Hart 2016).

<sup>110</sup> See, for example, 56/64 and 58/64 *Consten and Grundig*, EU:C:1966:41; 19/77 *Miller International*, EU:C:1978:19; 100–103/80 *Musique Diffusion française*, EU:C:1983:158; 96–102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium*, EU:C:1983:310, paras. 23–7; 25/84 and 26/84 *Ford-Werke*, EU:C:1985:340; 277/87 *Sandoz*, EU:C:1989:363; T-77/92 *Parker Pen*, EU:T:1994:85; C-306/96 *Javico*, EU:C:1998:173, paras. 13–14; T-13/03 *Nintendo*, EU:T:2009:131; C-551/03P *General Motors*, EU:C:2006:229, paras. 67–9; C-501/06P, C-513/06P and C-519/06P *GlaxoSmithKline*

restoring the divisions between national markets. These are 'liable to frustrate the Treaty's objective' of achieving market integration into a 'single market'.<sup>111</sup> Direct restrictions on exports, that is, provisions that oblige a reseller to sell only to customers in its contractual territory or prohibit them from selling to customers in other Member States outside its territory, are considered, by their nature, anticompetitive and constitute an infringement to Article 101(1).<sup>112</sup> This is also the case for provisions preventing the reseller from advertising or offering the contractual good for sale, or establishing distribution outlets, in other Member States outside its territory. Territorial restrictions may also take the form of differential pricing (including by bonus schemes and discount schemes), with which the supplier charges its distributors different prices for the same or equivalent products dependent on their destination or place of sale within the EU,<sup>113</sup> product differentiation undertaken as part of an agreement<sup>114</sup> and restrictions as to the applicability of the manufacturer's warranty and after-sale services provision, if these are imposed by an agreement,<sup>115</sup> although restrictions on warranty may be valid within the context of a selective distribution system.<sup>116</sup> Only contractual clauses imposing an 'absolute territorial protection' are considered as restrictive of competition by their nature and anticompetitive by their object.

The distinction between absolute and relative territorial protection operates as a rule of thumb in order to identify those agreements that are most harmful to consumers. Absolute territorial protection leads to a complete elimination of intrabrand competition. It is impossible for any retailer established in another territory to resell the contractual goods to consumers established in the exclusive territory, either actively or passively (responding to orders by consumers). Relative territorial protection preserves some residual level of intrabrand competition on the market, as passive sales are still possible. These territorial restrictions, in particular if they are absolute, and suppress both active or passive trade,

*Services*, EU:C:2009:610; C-403/08 and C-429/08 *Premier League*, EU:C:2011:631, paras. 243–51.

<sup>111</sup> C-403/08 and C-429/08 *Premier League*, para. 139.

<sup>112</sup> C-551/03P *General Motors; PO/Yamaha* (Case IV/37.935) Commission Decision (15 July 2003).

<sup>113</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v. Commission*, ECLI:EU:C:2009:610.

<sup>114</sup> T-43/92 *Dunlop Slazenger*, EU:T:1994:79.

<sup>115</sup> 86/82 *Hasselblad*, EU:C:1984:65.

<sup>116</sup> C-376/92 *Metro*, EU:C:1994:5.

were found to restrict competition by object, in the context of Article 101 TFEU, and have been frequently included in the list of hardcore restrictions which may not benefit from a block exemption regulation.<sup>117</sup> Although in principle a supplier may prohibit a member of its selective distribution system from operating out of an ‘unauthorised place of establishment’, in *Pierre Fabre Dermo-Cosmétique* the ECJ found that a website will not be considered to be a ‘place of establishment’, therefore finding that such a ban on internet sales by retailers of a selective distribution system constituted a restriction of competition by object under Article 101(1) TFEU as well as a hardcore restriction under Article 101(3) TFEU.<sup>118</sup> The scope of this expansive definition of the category of restrictions of competition by object that would include bans on internet sales by retailers in a selective distribution system has been examined again by the ECJ in *Coty*, where the Court held that suppliers of luxury goods can prohibit the members of their selective distribution system from making online sales through discernible third-party platforms, to the extent this is appropriate to preserve the luxury image of those goods.<sup>119</sup> The ECJ distinguished between a platform ban, which is permissible, as it only restricts a specific kind of online sale, and an absolute ban on internet sales, which is not permitted.<sup>120</sup> It is also true that the case law has not always been restrictive, as in implementing Article 101 TFEU competition authorities and the courts are also required to take into account the legal and economic context of the restriction, which in some cases may lead to the conclusion that even an absolute territorial protection may not be liable to impair competition.<sup>121</sup> It remains to be seen whether the future case law will move to expand the importance of the legal and economic context.

<sup>117</sup> Art. 4(b)(i) Commission Regulation (EU) 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

<sup>118</sup> C-439/09 *Pierre Fabre*, EU:C:2011:649.

<sup>119</sup> C-230/16 *Coty*, EU:C:2017:941, para. 51.

<sup>120</sup> C-230/16 *Coty*, para. 52; Opinion of AG Wahl in C-230/16 *Coty*, EU:C:2017:603 (arguing that a supplier restricting its authorised distributors in a selective distribution system to sell the contract products via third-party platforms cannot, in the present state of development of e-commerce, be assimilated to an outright ban on or a substantial restriction of internet sales, in particular if authorised distributors are allowed to distribute the contract products via their own internet sites).

<sup>121</sup> 262/81 *Coditel II*, EU:C:1982:334, 338; 62/79 *Coditel*, EU:C:1980:84; 27/87 *Erauw-Jacquéry*, EU:C:1988:183.

Unilateral conduct may also fall under Article 102 TFEU, in case the undertaking in question disposes of a dominant position.<sup>122</sup> The objective of market integration has led to holding that nationality-based price discrimination or certain forms of geographical price discrimination may be incompatible with Article 102(c) TFEU, which prohibits a dominant undertaking from ‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’. Discriminations based on nationality are a no-brainer for EU law and are also explicitly prohibited by Article 18 TFEU. The prohibition covers both direct discrimination on nationality or indirect discrimination, on the basis of suspicious criteria, such as domicile or the place of establishment. For instance, in *GVL*, the ECJ found that a refusal by a dominant undertaking, in this case a collecting society having a de facto monopoly in Germany, to provide services based on the nationality or the residence of the client constituted an abuse of a dominant position.<sup>123</sup> Indeed, according to the ECJ, the collecting society in question conducted its activities in such a way that any foreign artist who was not resident in Germany was not in a position to benefit from rights of secondary exploitation, even if he could show that he held such rights either because German law was applicable or because the law of some other state recognised the same rights.

Geographic price discrimination may result from the situation of a dominant undertaking charging different prices in different Member States. This case law is nevertheless less clear than that on nationality-based direct or indirect discrimination, as in all cases involving geographic price discrimination in the context of Article 102 TFEU, there was conduct that supported the market-partitioning effect of price discrimination.<sup>124</sup> Hence, it was not price discrimination per se that was found anticompetitive. Of particular interest is the judgment of the General Court (GC) in *Tetra Pak II*.<sup>125</sup> Among the different practices examined in this case, it was found by the Commission that Tetra Pak’s prices for cartons and machines displayed a ‘wide disparity’ among Member States. Tetra Pak argued that

<sup>122</sup> C-468–478/06 *Sot. Lélós kai Sia*, EU:C:2008:504.

<sup>123</sup> 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten*, EU:C:1983:52.

<sup>124</sup> 27/76 *United Brands*, EU:C:1978:22, paras. 232–3. The ECJ noted that the effect of the price discrimination was to establish obstacles to the free movement of goods. Yet, it also observed that their effect was ‘intensified’ by the other two clauses, the prohibition of resale of green bananas and the reduction of the deliveries of the quantities ordered. The result of the combination of these clauses was a ‘rigid partitioning of national markets’.

<sup>125</sup> T-83/91 *Tetra Pak International*, EU:T:1994:246 (*Tetra Pak II*), paras. 153–73.

the wide differences were not discriminatory as there is some correlation between machine and carton prices, linked to competition on the local market, so that the decisive factor is the cost of the system as a whole, this equilibrium between carton and machine prices varying from one Member State to another. The price divergences were, according to Tetra Pak, due to a complex interaction of historical factors, local market conditions which varied considerably from one state to another, dairy industry structures, local cost considerations and Tetra Pak's policy of allowing maximum autonomy to its local subsidiaries. In contrast, the Commission argued that the differences observed were too great to be explained by the objective material differences between the products. The average price differences were found to be substantial, from 20 up to 70 per cent. The GC proceeded to examine whether the price differences found could not be justified by objective economic factors. The GC concluded that 'the appreciable differences found in the prices of machines and cartons occurred in the context of a partitioning of national markets by the tied-sale clauses in the contracts', 'could not be due to normal competitive forces'.<sup>126</sup> Hence, non-appreciable differences may not be of concern, the Court not requesting a uniform price across the EU. However, it also held that appreciable deviations from the law of one price could not be tolerated to the extent that the relevant market in this case was the entire EU. Indeed, the GC had refuted the specificity of the conditions on local markets, in view of the definition of a single geographical market encompassing the entire EU, by virtue in particular of the marginal role of transport costs. The GC also found that Tetra Pak had an overall strategy of partitioning markets, this strategy being inferred from the policies implemented by Tetra Pak, in particular as to the contracts, throughout the EU and shown by direct documentary evidence produced by the Commission with regard to the communication between the Tetra Pak group and its subsidiary Tetra Pak Italiana. Hence, some evidence of objective intent seemed also to be relevant, although not explicitly required by the Court. The GC confirmed the finding of the Commission with regard to the existence of discriminatory pricing contrary to Article 102(c). On appeal, the ECJ judgment did not discuss discriminatory pricing.

### 3 Regulatory and Other Approaches

Beyond competition law, unilateral conduct may also fall under Article 20(2) of the Services Directive, in case there is restriction on the basis of

<sup>126</sup> T-83/91 *Tetra Pak International*, para. 170.

nationality or place of residence of the recipient of the service (or for legal persons their place of establishment or country of registration), to the extent that the Directive has been implemented by the Member States, thus providing the possibility of challenging the conduct of a service provider. The claimant can be a private actor and not just a Member State's authority. State action is specifically targeted by Article 20(1) of the Services Directive.<sup>127</sup> In contrast to Article 102 TFEU, Article 20(1) of the Services Directive may also apply to the unilateral conduct of service providers even if these do not dispose of a dominant position. This provision targets general conditions of access to a service that is made available to the public at large, and that relates to rules on prices, payment and delivery conditions, rather than rules on terms and conditions that are individually negotiated between the trader and the customer. The provision enables the imposition by the service provider of different conditions of access if these are directly justified by objective criteria, such as 'additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment'.<sup>128</sup> Most Member States made the choice to confer the task of administrative enforcement of the national provisions implementing Article 20(2) of the Directive on the authorities that are in charge of the administrative enforcement of consumer protection rules, although some have also entrusted this task to competition authorities. In view of the relatively limited implementation of this provision, the Commission adopted specific guidance aiming to assist national authorities in the implementation of this provision.<sup>129</sup> The Commission's guidance document notes that few complaints of different treatment have led to enforcement decisions by competent authorities in the Member States,<sup>130</sup> and it soon became clear that

<sup>127</sup> Art. 20(2) Directive 2006/123/EC on Services in the Internal Market [2006] OJ L376/36 provides that: 'Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.'

<sup>128</sup> Recital 95 Directive 2006/123/EC.

<sup>129</sup> European Commission, 'Establishing Guidance on the Application of Article 20(2) of Directive 2006/123/EC on Services in the Internal Market' SWD(2012) 146 final.

<sup>130</sup> *Ibid.*, 27.

‘Article 20 does not sufficiently address discrimination of customers and has not reduced legal uncertainty’.<sup>131</sup>

The Commission’s guidance emphasises that the implementation of this provision should focus on ‘service recipients’, rather than service providers, thus indicating the turn of EU internal market law towards a more consumer-oriented focus. The guidance explains that the elimination of regulatory barriers to the provision of services may not be the only problem these consumers may face, but that they may also experience a refusal to supply or a higher price by undertakings on grounds of their residence in another Member State.

The Commission’s concern over geographic price discrimination and other conditions that differ across Member States in the EU was initiated by two studies on geographical discrimination against consumers, with a particular emphasis on e-commerce, which were commissioned by the Commission and published in 2009.<sup>132</sup> As the Commission noted in its guidance document, in practice ‘only a very limited number of the cases brought to the attention of these bodies have resulted in administrative or judicial enforcement action at national level’.<sup>133</sup> In its guidance document, the Commission makes clear that:

[d]ifferences in treatment are often not established directly on the basis of nationality or residence but rather on proxy factors which may end up being tantamount to nationality or residence, such as the country of the driving licence, the country of credit card issuance, the place of delivery, the country of origin of specifically dedicated IP addresses, the lack of credit history in a particular Member State, the lack of registration in the population registry, etc.<sup>134</sup>

A difference in treatment does not, by itself, constitute discrimination, in the event it can be objectively justified. The first step in the implementation of this provision will be to determine the existence of a difference of treatment. That may be of different sorts: (1) a refusal to provide access to the service or rerouting the service to a subsidiary/point of sale established in the Member

<sup>131</sup> European Commission, ‘Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market’ COM(2016) 289 final, 3.

<sup>132</sup> ECC Iceland, ‘Mystery Shopping Evaluation of Cross-Border E-Commerce in the EU – Final Report’ (20 October 2009); ‘Matrix Insight: Access to Services in the Internal Market: Study on Business Practices Applying Different Condition of Access Based on the Nationality or the Place of Residence of Service Recipients – Implementation of Directive 2006/123/EC on Services in the Internal Market’ (2009).

<sup>133</sup> *Ibid.*, 4.

<sup>134</sup> *Ibid.*, 9.

State of the service recipient, (2) price discrimination, that is, offering the same service at a different price to consumers in other Member States, (3) other forms of discrimination, such as offering different terms and conditions such as making different delivery or payment options available to consumers resident in other Member States. The analysis becomes more complex for online sales where neither the provider nor the recipient move to another territory, as in this case the difference of treatment may take the form of a sudden increase in the advertised price at the moment the service recipient indicates the country of residence or the place of delivery of the service, although it is explained that ‘techniques allowing service providers to identify the location of the recipient and thus to direct the consumer to the offer adapted to the territory where he is resident are not per se indicators of discrimination’.<sup>135</sup> During the second step, the competent authorities will assess whether or not such a different treatment is objectively justified by performing a case-by-case analysis.<sup>136</sup>

The Commission puts forward in its guidance document various objective justifications,<sup>137</sup> including a possible divergence in consumer protection and contract law rules, to the extent that the EU *acquis* leaves Member States free to adopt more stringent rules. Without moving away from discrimination, the Commission appears to express concerns over the existence of a different level of regulatory costs across Member States, as costs may be passed on to the consumer and/or may make the economic activity less profitable, thus discouraging the service providers from directing their activities to other Member States. This may be problematic if the service provider is directing its activity to consumers in other Member States. No such concerns are, however, raised if the service provider does not target its service provision abroad and is simply approached by a consumer in another Member State wishing to purchase its services.<sup>138</sup>

By expanding the geographic scope of markets, the development of e-commerce has also multiplied the instances in which customers may face differential treatment by reason of their nationality or residence. E-commerce has also made more transparent existing differential treatment to consumers. This may not only take the form of unilateral practices but also the form of contractual and other arrangements. In its recent final report on the e-commerce sector inquiry, although

<sup>135</sup> *Ibid.*, 13.

<sup>136</sup> *Ibid.*

<sup>137</sup> The list of justifications included in Recital 95 of the Services Directive is non-exhaustive.

<sup>138</sup> *Ibid.*, 23.

the European Commission considered that online price transparency and price competition had a significant impact on companies' distribution strategies and consumer behaviour, it castigated the increased use of contractual restrictions that could hinder the development of interstate e-commerce in the EU.<sup>139</sup> Indeed, according to the report, certain licensing practices may make it more difficult for new online business models and services to develop across the EU and consumers in all EU Member States may not benefit from a similar level of services and choice. One of the key findings of the sector inquiry was that almost 60 per cent of digital content providers who participated in the inquiry have contractually agreed with rights-holders to 'geo-block', as online rights are to a large extent licensed on a national basis or for the territory of a limited number of Member States which share a common language. According to the Commission, '[g]eo-blocking is most prevalent in agreements for TV series (74%), films (66%) and sport events (63%). It is less prevalent in agreements for other digital content categories such as music (57%), children's TV (55%), non-fiction TV (51%) and news (24%).'<sup>140</sup> The Commission stressed that any competition enforcement in relation to geo-blocking would have to be based on a case-by-case basis analysis of potential justifications for the restrictions imposed. Another point stressed was the need 'to avoid diverging interpretations of the EU competition rules with regard to business practices in e-commerce markets which may, in turn, create serious obstacles for companies to being active, in a compliant manner, in multiple Member States, to the detriment of a Digital Single Market'.<sup>141</sup>

In February 2018, the EU adopted a Geo-blocking Regulation, on the legal basis of Article 114 TFEU, to end unjustified geo-blocking for consumers wishing to buy products or services online within the EU, and which will enter into force by the end of 2018.<sup>142</sup> The main drive for adopting the Regulation is the realisation that the implementation of the non-discrimination principle in Article 20(2) of Directive 2006/123/EC has proven insufficient to guarantee that customers will not confront

<sup>139</sup> European Commission, 'Report: Final Report on E-Commerce Sector Inquiry' COM(2017) 229 final.

<sup>140</sup> *Ibid.*, para. 66.

<sup>141</sup> *Ibid.*, para. 73.

<sup>142</sup> Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market [2018] OJ L601/1 (hereafter Geo-blocking Regulation) to apply from 3 December 2018.

refusals to sell and various other limiting conditions, when buying goods or services across borders.<sup>143</sup> The material scope of the Geo-blocking Regulation was aligned with that of the Services Directive.<sup>144</sup> Non-economic services of general interest, transport services, audiovisual services, gambling activities, retail financial services, healthcare and some other social services are excluded from the latter's scope.<sup>145</sup>

The Regulation prohibits discrimination against customers based, directly or indirectly, on the nationality, place of residence or place of establishment of the customer in three specific cases: where a customer seeks to (a) 'buy goods from a trader and either those goods are delivered to a location in a Member State to which the trader offers delivery in the general conditions of access or those goods are collected at a location agreed upon between the trader and the customer in a Member State in which the trader offers such an option in the general conditions of access';<sup>146</sup> (b) 'receive electronically supplied services from the trader',

<sup>143</sup> Directive 2006/123/EC on Services in the Internal Market [2006] OJ L376/36 provides that: 'Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.' Art. 20(1) Services Directive may apply to the unilateral conduct of service providers even if they do not dispose of a dominant position. This provision targets general conditions of access to a service that is made available to the public at large, and that relates to rules on prices, payment and delivery conditions, rather than rules on terms and conditions that are individually negotiated between the trader and the customer. The provision enables the imposition by the service provider of different conditions of access if these are directly justified by objective criteria, such as 'additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment'. A Commission staff work document noted that few complaints of different treatment have led to enforcement decisions by competent authorities in the Member States, and concluded that 'Article 20 does not sufficiently address discrimination of customers and has not reduced legal uncertainty' ('Commission Staff Working Document with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ("the Services Directive")' SWD(2012) 146 final, 27).

<sup>144</sup> Directive 123/2006/EC on services in the internal market [2006] OJ L376/36.

<sup>145</sup> Art. 1(3) Geo-blocking Regulation.

<sup>146</sup> According to Recital 23 Geo-blocking Regulation, 'the customer should be able to purchase goods, under exactly the same conditions, including price and conditions relating to the delivery of the goods, as similar customers who are residents of or are established in the Member State in which the goods are delivered or in which the goods are collected'. However, foreign customers 'will have to pick up the goods in that

such as cloud services, data warehousing services, website hosting and the provision of firewalls, use of search engines, and internet directories, other than services the main feature of which is the provision of access to and use of copyright-protected works or other protected subject matter;<sup>147</sup> and (c) ‘receive services from a trader, other than electronically supplied services, in a physical location within the territory of a Member State where the trader operates’ (for instance, hotel accommodation, sports events, car rental, and entrance tickets for music festivals or leisure parks).<sup>148</sup> To the extent that there could be conflict between the rules of the Geo-blocking Regulation and the Services Directive in these situations, the text of the former will prevail.<sup>149</sup>

The Geo-blocking Regulation also covers indirect forms of discrimination that could lead to similar results as the application of the forbidden criteria of nationality, residence and place of establishment, including, for instance, criteria that rely on information indicating the physical location of customers (IP address when assessing an online interface, the address submitted for the delivery of the goods, the choice of language made or the Member State where the customer’s payment instrument has been issued).<sup>150</sup> The protection of customers from discrimination does not extend to customers purchasing a good or a service for resale, and therefore does not apply in a B2B (business-to-business) context, unless a consumer or business receives a service or purchases a good for the sole purpose of end use. Geo-blocking in a B2B context and without the sole purpose of end use is, however, subject to Article 101 TFEU, in particular for selective and exclusive distribution agreements, and eventually Article 102 TFEU (in case there is a dominant position).<sup>151</sup>

The Geo-blocking Regulation also establishes an obligation on ‘traders’ not to block or limit customers’ access to their online interface, such as websites and apps, for instance through the use of technological means, when this is done on the basis of the prohibited criteria of nationality, place of residence or

Member State, or in a different Member State to which the trader delivers, or arrange, by their own private means, the cross-border delivery of the goods’.

<sup>147</sup> Hence, the Regulation does not include online television, films, e-books, music, online games and streamed sports.

<sup>148</sup> Art. 4(1) Geo-blocking Regulation.

<sup>149</sup> Art. 1(6) Geo-blocking Regulation.

<sup>150</sup> Recital 5 Geo-blocking Regulation.

<sup>151</sup> Recital 12 Geo-blocking Regulation.

place of establishment of the customer.<sup>152</sup> These technological measures include any technologies used to determine the physical location of customers, including tracking their IP address, coordinates obtained through a global navigation satellite system or data related to a payment transaction.<sup>153</sup> A similar prohibition applies to the rerouting of the customer to another online interface, unless the customer has provided consent. In any case the trader should keep easily accessible the version of the online interfaces that the customer sought to access before having been rerouted.<sup>154</sup> It is nevertheless made clear that the prohibition of discrimination with regard to access to online services ‘should not be understood as creating an obligation for the trader to engage in commercial transactions with customers’, as such an interpretation would have seemed disproportional and could have infringed rights protected by the Charter of Fundamental Rights (in particular the ‘freedom to conduct a business’ under Article 16 and the ‘right to property’ under Article 17). Consequently, the Geo-blocking Regulation provides to traders an exemption from these obligations where the access restrictions or the rerouting are necessary, they constitute a mandatory requirement of the EU and/or national legislation, and where the trader provides a clear justification.<sup>155</sup>

Specific rules prevent traders from applying different payment conditions on the basis of nationality, place of residence or place of establishment of the customer, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union.<sup>156</sup> This rule provides that in certain cases traders cannot reject or otherwise discriminate with regard to payment instruments (such as credit or debit cards), although it is also stipulated that traders may request charges for the use of a card-based instrument, as long as the interchanges fees are not regulated. In this case the charge should not exceed the costs borne by the trader in using the payment instrument.<sup>157</sup>

Finally, circumventing such a ban on discrimination in passive sales agreements is not allowed.<sup>158</sup> Hence, the prohibition of passive sales

<sup>152</sup> Art. 3(1) Geo-blocking Regulation.

<sup>153</sup> Recital 14 Geo-blocking Regulation.

<sup>154</sup> Art. 3(2) Geo-blocking Regulation.

<sup>155</sup> Arts. 3(3) and 3(4) Geo-blocking Regulation.

<sup>156</sup> Art. 5 Geo-blocking Regulation.

<sup>157</sup> Arts. 5(1)(a) and 5(2) Geo-blocking Regulation.

<sup>158</sup> Art. 6 Geo-blocking Regulation. This provision relating to passive sales will apply two years from the Regulation’s entry into force.

becomes absolute, notwithstanding the trader's market position. The Geo-blocking Regulation offers an interesting example of the intersection and congruent implementation of the single market rules and those of competition law with the aim of promoting market integration, as it is explicitly stipulated that the projected Regulation will not affect the application of the rules on competition. The Vertical Block Exemption Regulation provides that restrictions on passive sales to certain customers or to customers in certain territories are generally restrictive of competition and cannot normally be exempted.<sup>159</sup> The Geo-blocking Regulation moves nevertheless beyond competition law as it recognises that this prohibition on discrimination may apply to agreements that may not be caught by Article 101 TFEU, but could still disrupt 'the proper functioning of the Internal Market' and could be used to 'circumvent' the provisions of the Geo-blocking Regulation. If this proves to be the case, the Geo-blocking Regulation deems 'automatically void' the relevant provisions of such agreements and of other agreements in respect of passive sales requiring the trader to act in violation of this Regulation.<sup>160</sup> However, the Regulation on geo-blocking does not affect agreements restricting active sales.

In conclusion, the Regulation does not impose an obligation to sell and does not harmonise prices. It focuses on discrimination, access to online interfaces and non-differential access to goods and services where the undertaking cannot objectively justify such actions.

This is not the first time that the EU legislator has intervened to promote market integration in the sense of establishing an EU-wide space for competition between undertakings and the right of EU consumers to avoid geographic price discrimination, although one may note that this does not go as far as implementing the law of one price, and does not constitute a form of direct price regulation, as has occurred for other EU initiatives.

Regulation 717/2007 ('Roaming Regulation'), adopted in 2007, capped and reduced prices for mobile phone consumers who used their devices abroad in other Member States of the EU.<sup>161</sup> The Regulation was thought

<sup>159</sup> Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

<sup>160</sup> Recital 26 Geo-blocking Regulation.

<sup>161</sup> Regulation (EC) 717/2007 on roaming on public mobile telephone networks within the Community [2007] OJ L171/32.

as a complement to the electronic communications EU regulatory framework adopted in 2002, which had not provided national regulatory authorities ‘with sufficient tools to take effective and decisive action with regard to the pricing of roaming services within the [EU]’, thus failing ‘to ensure the smooth functioning of the internal market for roaming services’.<sup>162</sup> Although it initially covered only voice calls, it was later extended to text messages (SMS)<sup>163</sup> and internet data.<sup>164</sup> The abolition of all retail roaming surcharges was finally implemented in June 2017 so that European consumers now can ‘roam-like-at-home’ (RLAH),<sup>165</sup> with an EU-wide regulation of wholesale roaming charges ensuring only that operators can recover their costs, including joint and common costs.<sup>166</sup>

Regulation 2015/751, adopted in 2015 by the European Parliament and the European Council, following a proposal by the Commission, introduced a cap on the level of interchange fees for card-based payment transactions at 0.2 per cent for debit card payments and 0.3 per cent for credit card payments (cross-border or national).<sup>167</sup> Although market integration was not the only rationale for adopting such EU-price regulation, since fairness considerations and the protection of the competitive process were important considerations, it was recognised at Recitals 10 and 14 of this Regulation that ‘[i]n addition to a consistent application of the competition rules to interchange fees, regulating such fees would improve the functioning of the internal market and contribute to reducing transaction costs for consumers’. It is noteworthy that both these Regulations were also adopted on the basis of Article 114 TFEU.

<sup>162</sup> Recital 4 Regulation (EC) 717/2007.

<sup>163</sup> Regulation (EC) 544/2009 amending Regulation (EC) 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2009] L167/12.

<sup>164</sup> Regulation (EC) 531/2012 on roaming on public mobile communications networks within the Union [2012] OJ L172/10.

<sup>165</sup> Regulation (EU) 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union [2015] OJ L310/1.

<sup>166</sup> Regulation (EU) 2017/920 amending Regulation (EU) 531/2012 as regards rules for wholesale roaming markets [2017] OJ L147/1.

<sup>167</sup> Arts. 3. and 4 of Regulation (EU) 2015/751 on interchange fees for card-based payment transactions [2015] OJ L123/1.

#### 4 Interaction with the Territorial Dimension of IP Rights: Geo-blocking and Geo-filtering Practices Integrated in Licensing Agreements

This intensive legislative activity is complemented by competition law enforcement activity aimed at geo-blocking and geo-filtering practices that are included in licensing agreements, which are, for the moment, excluded from the scope of the Geo-blocking Regulation, as they involve the complex balancing between the EU interest for cross-border trade and the ability of the IP holder to benefit from the territorially limited scope of its IP right, which is also recognised by EU law.<sup>168</sup>

With regard to geo-blocking affecting copyrighted works, one may refer to the CJEU judgment in *FAPL and Karen Murphy v. Media Protection Services Ltd*, which concerned territorial restrictions in media rights licensing and imported satellite decoder cards. In order to protect such territorial exclusivity and to prevent the public from receiving broadcasts outside the relevant Member State, each broadcaster undertook, in the licence agreement concluded with the FAPL, to encrypt its satellite signal and to transmit the signal, so encrypted, by satellite solely to subscribers in the territory which it has been awarded. The licence agreement therefore prohibited the broadcasters from supplying decoder cards to persons who wished to watch their broadcasts outside the Member State for which the licence was granted. Certain publicans in the United Kingdom have begun to use foreign decoder cards, issued by a Greek broadcaster to subscribers resident in Greece, in order to access Premier League matches. The publicans bought a card and a decoder box from a dealer at prices lower than those of Sky, the holder of the broadcasting rights in the United Kingdom. The FAPL took the view that such activities undermined the exclusivity of the television broadcasting rights and the value of those rights, and sought to bring them to an end by means of legal proceedings in the UK courts. Consequently, the High Court of Justice of England and Wales, referred to the CJEU a number of preliminary questions. The first case (C-403/08) concerned a civil action brought by the FAPL against pubs that had screened Premier League matches by using Greek decoder cards and against the suppliers of such decoder cards to those pubs. The second case (C-429/08) had arisen from criminal proceedings against Karen Murphy, the landlady of a pub that screened Premier League matches using a Greek decoder card.

<sup>168</sup> C-403/08 and C-429/08 *Premier League*.

The CJEU applied Article 56 TFEU (on the free movement of services) and competition law. With regard to the first set of EU law rules, it held that national legislation which prohibits the import, sale or use of foreign decoder cards is contrary to the freedom to provide services and cannot be justified either in light of the objective of protecting intellectual property rights or by the objective of encouraging the public to attend football stadiums. The Court found that payment by the television stations of a premium in order to ensure themselves absolute territorial exclusivity goes beyond what is necessary to ensure the rights-holders appropriate remuneration, because such a practice may result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market.

The Court also applied the competition law provisions of the Treaty, exploring whether licence agreements pursue an anticompetitive object where a programme content provider enters into a series of exclusive licences, each for the territory of one or more Member States, under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite), and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory.<sup>169</sup> The Court held that '[a]n agreement between a producer and a distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market', and that the agreement in question 'had the same effect as agreements to prevent or restrict parallel exports', to the extent that they led to absolute territorial protection and to 'a reciprocal compartmentalisation of licensed territories'.<sup>170</sup> It is noteworthy that the CJEU did not condemn the exclusive licences granted by the FAPL, but only what it regarded as the additional obligations on broadcasters not to supply decoding devices with a view to their use outside the territory covered by the licence agreement. This was done on the basis that these provisions 'prohibit broadcasters from effecting any cross-border provision of

<sup>169</sup> C-403/08 and C-429/08 *Premier League*, para. 245.

<sup>170</sup> C-403/08 and C-429/08 *Premier League*, paras. 247–8.

services', 'granted absolute territorial exclusivity' and eliminated 'all competition between broadcasters'.

Noting that 'conflicting assessments of the fundamental freedoms and competition law are to be avoided in principle', the CJEU examined the possibility for these restrictions to be justified under Article 101(3) TFEU.<sup>171</sup> In particular, the CJEU referred to the proportionality test which it applied for the free movement provisions part of the judgment. The Court did not accept the objective justifications put forward: that the restrictions had the objective of encouraging the public to attend football stadiums (in connection with the prohibition on broadcasting football matches in the UK during the Saturday afternoon 'close period'); and the objective of protecting intellectual property (or similar) rights, by ensuring that rights-holders are appropriately remunerated, remarking that these restrictions were not necessary in order to ensure appropriate remuneration for the rights-holders, as the rights-holder in this case was remunerated for the broadcasting of the protected subject matter (in the country of origin). The 'premium' paid by rights-holders for absolute territorial protection was thus not necessary to ensure appropriate remuneration for exploitation of the rights, in particular as such absolute territorial exclusivity results in the partitioning of national markets and artificial price differences between markets, which is irreconcilable with the fundamental aims of the TFEU and the remuneration agreed between a rights-holder and broadcaster could be set so as take account of the potential audience in other Member States. It remains an open question as to how the CJEU's reasoning in respect of the broadcasting of football matches will be applied to other markets where digital rights are often licensed on a territorial basis (for example computer software, music, e-books or films made available via the internet, as envisaged by Advocate General Kokott in her Opinion in this judgment). It is also noteworthy that in its vertical restraints guidelines, the Commission acknowledges that in exceptional circumstances hardcore restrictions may be objectively necessary for an agreement of a particular type or nature and therefore fall outside Article 101(1) TFEU.<sup>172</sup>

In the specific case, the CJEU held, however, that the publican was still in breach of Article 3(1) of the Copyright Directive, to the extent that the activity in question was profit-making and that the retransmission in the UK amounted to a transmission to a new public, and therefore could not,

<sup>171</sup> C-403/08 and C-429/08 *Premier League*, para. 249.

<sup>172</sup> EU Vertical Restraints Guidelines, para 60.

on this basis, escape a finding of copyright infringement.<sup>173</sup> Hence, broadcasters can rely on their copyright to restrict cross-border sales when this is done for profit to a new public of potential viewers, which could not have been considered by the authors when they authorised the broadcasting of their works.<sup>174</sup> They can also, in theory, impede consumers from having access to online content services when travelling outside their country of residence and want to continue to have access to services they have subscribed to (portability of online content services).<sup>175</sup> This issue has, however, been dealt with in the recent Regulation on cross-border portability of online content services, which although it does not challenge the territoriality of the licences, it assumes (*fictio iuris*) that the consumption of the online service is taking place in the country of residence of the subscriber (thus applying a country of origin principle in this context), with the aim of providing a '[s]eamless access throughout the Union to online content services that are lawfully provided to consumers in their Member State of residence'.<sup>176</sup>

<sup>173</sup> C-403/08 and C-429/08 *Premier League*, paras. 204–6. Hence, the copyright holder had a right to authorise and to require payment for the screenings by Ms Murphy and other publicans. On the follow-ups of this case in UK courts, see [www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licensing-land-escape](http://www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licensing-land-escape) [accessed 22 October 2018].

<sup>174</sup> C-403/08 and C-429/08 *Premier League*, paras. 198–9.

<sup>175</sup> G. Monti and G. Coelho, 'Geo-Blocking: Between Competition Law and Regulation', *CPI Antitrust Chronicle* (January 2017), 1, 4 (noting that FAPL includes certain FAPL copyright logos on the broadcast image, thus bundling the none-copyrighted with copyrighted-protected elements, so that anyone showing such a video is breaching that copyright).

<sup>176</sup> Recital 1 Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market [2017] OJ L168/1. The Directive includes in its Art. 3 an obligation of a provider of an online content service provided against payment of money to enable cross-border portability of online content services by providing to 'a subscriber who is temporarily present in a Member State to access and use the online content service in the same manner as in the Member State of residence, including by providing access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities', without any additional charges, but with no similar quality requirements, unless otherwise agreed between the provider and the subscriber. According to Art. 4 of the Directive, the provision of an online content service to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, is deemed to occur solely in the subscriber's Member State of residence. Art. 6 makes explicit the duty of cross-border portability of an online content service. According to Art. 7 of the Directive, any contractual provision contrary to EU portability shall be unenforceable.

The Commission has also taken competition law enforcement action in this area by opening an investigation of licensing arrangements between Sky UK and six major Hollywood film studios which contained restrictions affecting cross-border provision of pay-TV services.<sup>177</sup> A statement of objections was sent to Paramount, Sony, Twentieth Century Fox, Disney, NBC Universal and Warner Bros., as well as Sky UK, alleging that certain of the content-licensing agreements contained geo-blocking clauses, requiring Sky UK to block access to films to consumers outside the UK and Ireland through its online and satellite pay-TV services, granted absolute territorial exclusivity to Sky UK and eliminated competition between broadcasters, infringing Article 101 TFEU. The Commission viewed the clauses requiring Sky UK to block access to films to consumers outside its licensed territory of the UK and Ireland as restricting Sky UK's ability to accept unsolicited requests for its pay-TV services from consumers located in other Member States (passive sales). Furthermore, certain other contractual obligations in these film studios' agreements with Sky required them to prohibit or limit other broadcasters than Sky UK from responding to unsolicited requests from consumers residing and located inside Sky UK's licensed territory, thus preventing them from making their pay-TV services available in the UK and Ireland, eliminating cross-border competition between pay-TV broadcasters and partitioning the internal market. The Commission found that such restrictions would constitute a restriction of competition by object. In April 2016, Paramount offered commitments in order to address the Commission's concerns and the Commission adopted a commitment decision under Article 9 of Regulation 1/2003, making them binding.<sup>178</sup> These essentially removed the absolute territorial protection and the prohibitions of active and passive sales from which Sky UK benefited. Interestingly, one of the commitments requires Sky UK to abstain from bringing an action before a court or tribunal for the violation of the obligation preventing or limiting passive and/or active sales in an existing licensing agreement.

<sup>177</sup> This competition enforcement action complemented the Commission's legislative actions modernising EU copyright rules and reviewing the EU Satellite and Cable Directive so as to reduce the differences between national copyright regimes and allow for wider access to online content across the EU.

<sup>178</sup> Cross-border access to Pay TV Content (Case AT 40.023) Commission Decision of 26 July 2016, Press Release, European Commission, 'Antitrust: Commission Accepts Commitments by Paramount on Cross-border Pay-TV Services' IP/16/2645.

These recent developments show that competition law enforcement activity complements the new legislative framework against geo-blocking and other forms of prohibited nationality or geographic discrimination, in particular as audiovisual services, including services the main feature of which is the provision of access to broadcasts of sports events provided on the basis of exclusive territorial licences, have been excluded from the scope of the Geo-blocking Regulation.<sup>179</sup>

## V Conclusion

For a significant period of time, the process of EU economic integration and the EU ‘single market’ were the most advanced and successful projects of economic integration worldwide, leading the process of reintegration of the global economy that took place in the post-Second World War period following its disintegration in the protectionist frenzy of the 1930s and the Second World War period. Sixty years later, the project of EU economic integration has achieved several milestones and is still widely considered as the most advanced economic integration experiment among independent nations in modern history, although it is no longer the only one. A number of regional economic integration projects have since emerged in various parts of the globe, and a new generation of mega-trade agreements, regional or across continents,<sup>180</sup> may drive the process towards deeper economic integration at a global, or partly global, scale.

The purpose of this chapter was to reflect on the theoretical underpinnings of the ‘single market’ concept and to explore whether this needs some updating, in view of the significant technological and economic transformations of the last two decades, in particular related to the emergence of a global production process, managed by GVCs and operated with the assistance of ICT. I argued that ‘new globalization’<sup>181</sup> should be duly considered when examining the process of EU economic integration, and the legal concept of the EU internal market. This may

<sup>179</sup> Recital 6 Geo-blocking Regulation. According to Art. 9 of the Regulation, the application of the prohibition of Art. 4(1) to electronically supplied services the main feature of which is the provision of access to and use of copyright-protected works or other protected subject matter will, however, be assessed in the first evaluation of the Regulation two years after its entry into force.

<sup>180</sup> See, for instance, the Comprehensive Economic and Trade Agreement (CETA), the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP) and the Japan–EU FTA.

<sup>181</sup> Baldwin, *Great Convergence*.

lead, in the context of the free movement of goods rules, to the consideration of GVCs when defining the contours of what constitutes an 'obstacle to trade' infringing Article 34 TFEU. It may also lead the charge against private restrictions to trade through a more systematic use of the competition law instrument or through EU regulation. These developments raise more generally the question of the specificity of the EU economic integration project, with regard to the ongoing process of global economic integration, a question that was not explored in this chapter. This may not necessarily relate to the degree of economic integration as measured by the law of one price, the interpenetration of an important number of firms in regional value chains and networks, or even regulatory convergence, but on the mechanisms put in place in order to deal with the social implications arising out of the structural transformations of the economy, and the necessary compensation of the 'losers' of free trade and globalisation.