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Abstract

The study analyses the EU 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 in this area, 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. These could, in my view, challenge the first principles upon 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 role and the specificity of the EU integration process, in the context of the broader globalization movement. The first part of the paper introduces the "neo-functionalist" perspective, which has largely influenced the EU economic integration process, from its incipiency, and explores its theoretical linkages with trade theory (the law of one price), thus presenting the fundamental tenets of positive EU Internal market law. The second part delves 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 a result of a paradigm shift currently occurring in the organization of the global process of economic production, with the development of global value chains, and the important role of technology, in particular the Internet, in promoting economic integration not through law, but through code. The study predicts that addressing more systematically the effect of both private and public obstacles to trade should take centre-stage if one is to opt for a more holistic and dynamic perspective in analysing the process of economic integration. A more extensive intervention of the competition law tool and other regulatory initiatives against private restrictions to trade is therefore to be expected in the future, these areas of law taking a more prevalent part in the EU Internal market law compass. Hence, the study discusses in some detail the recent legislative and jurisprudential developments with regard to geo-blocking and geo-filtering practices. The last part of the study provides some concluding thoughts on the need for the EU Internal market concept to be updated and raises some questions with regard to its ontology in the context of a globalized economy.

Keywords: EU Internal market, free movement, Measures Having Equivalent Effect to Quantitative Restrictions (MEEQR), regulatory convergence, global value chains, digital single market, Internet, geo-blocking, geo-filtering, competition law, regulation

JEL Codes: F1, F15, F6, O24, O52

I. Introduction

During the six decades of the European Union (EU) integration projection, the ambition of establishing a "single market" has provided focus, a strong technocratic drive, and a clear

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sense of direction to the battling project of European integration, as it has been traveling 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[2]. The difficulties incurred by the integration process notwithstanding, the European Internal market is largely considered as a success story, both from a legal and from an economic perspective[3].

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 harmonization and national policy autonomy. The Internal Market has frequently been the focus of this academic 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). 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 that the CJEU has applied to all four freedoms. Another strand of literature has focused on the intricacies of the positive integration process and the limits of legislative harmonization, 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.

The study does not aim to revisit these issues, which have been widely commented on by a great number of excellent EU law scholars[4]. 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. These could, in my view, challenge the first principles upon 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 role and the specificity of the EU integration process, in the context of the broader globalization movement.

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[2] See, for instance, European Commission, White paper on the Future of Europe - Reflections and scenarios for the EU27 by 2025 (March 2017); Emmanuel Macron, Initiative pour l’Europe (September 26, 2017), available at http://www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique/ .

[3] See, the most recent “Single market scoreboard” for 2017, assessing the performance of EU Member States in implementing the Single market objectives http://ec.europa.eu/internal_market/scoreboard/ . On the economic impact see, *inter alia*, the literature review by J. Pelkmans, European Union Single Market: economic impact, in S.N. Durlauf & L. E. Blume, *The New Palgrave Dictionary of Economics*, (Palgrave, Online Edition, 2011); B. Eichengreen, & A. Boltho, The economic impact of European integration, CEPR Discussion Paper No. 6820, (May 2008).

[4] See, for instance, most recently, the excellent monographs published by S. Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) and R. Schütze, *From International to Federal Market – The Changing Structure of European Law* (OUP, 2017), and the collective volume published by P. Koutrakos & J. Snell (eds.), Research *Handbook on the Law of the EU’s Internal Market* (Edward Elgar, 2017)

The study analyses the EU 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 in this area, 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. These could, in my view, challenge the first principles upon 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 role and the specificity of the EU integration process, in the context of the broader globalization movement. The first part introduces the "neo-functionalist" perspective, which has largely influenced the EU economic integration process, from its incipiency, and explores its theoretical linkages with trade theory (the law of one price), thus presenting the fundamental tenets of positive EU Internal market law. The second part delves 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 a result of a paradigm shift currently occurring in the organization of the global process of economic production, with the development of global value chains, and the important role of technology, in particular the Internet, in promoting economic integration not through law, but through code. The study predicts that addressing more systematically the effect of both private and public obstacles to trade should take centre-stage if one is to opt for a more holistic and dynamic perspective in analysing the process of economic integration. A more extensive intervention of the competition law tool and other regulatory initiatives against private restrictions to trade is therefore to be expected in the future, these areas of law taking a more prevalent part in the EU Internal market law compass. The study discusses in some detail the recent legislative and jurisprudential developments with regard to geo-blocking and geo-filtering practices. The last part of the study provides some concluding thoughts on the need for the Internal market concept to be updated and raises some questions with regard to its ontology in the context of a globalized 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[5]. 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 authority is left to grow and develop out of actual performance"[6]. 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

[5] W. Mattli, *The Logic Of Regional Integration – Europe and Beyond* (Cambridge University Press, 1999), p. 21.
[6] Ibid., p. 21-22 referring to the work of D. Mitrany, *A Working Peace System* (Quadrangle Books: Chicago, 1966).

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 central element of post-war economic thinking over trade and international economic relations[7]. The concept suffered from an "abundance of mutually contradictory definitions"[8], 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"[9]. Its meaning has been framed by the tensions between the "liberalist" (market friendly) and the dirigist (state intervention friendly) ideals that characterized the political landscape of the post-war era[10].

The development of the twin concepts of negative and positive integration, coined by Tinbergen in 1965[11], and seen as complementary tools to remove discrimination and restrictions of movement to enable the market to function effectively, while promoting other broader policy objectives, was seen as a necessary compromise to make "economic integration" acceptable to both camps. The different "stages of integration" identified by Balassa[12], as well as his distinguishing the concepts of "integration" from that of "cooperation"[13], 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"[14]. 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

[7] On the emergence of the theory of international economic integration see, F. Machlup, *A History of Thought on Economic Integration*, (Macmillan Press, 1977), 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' F. Machlup (above, p. 11) referring to Paul Hoffmann's official pronouncement to the Council of the Organisation of European Economic Co-operation on 31 October 1949.

[8] F. Machlup, *A History of Thought on Economic Integration*, (Macmillan Press, 1977), p. 13.

[9] B.. Balassa, *The Theory of Economic Integration* (George Allen & Unwin Ltd, 1961), p. 1. For a less extended analysis, see B. Balassa, Towards a Theory of Economic Integration, (1961) 14(1) *Kyklos* 1, 17. For a more 'outcome-oriented' definition see, J.Tinbergen, *International Economic Integration* (Elsevier, 1954), p. 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'.

[10] F. Machlup, *A History of Thought on Economic Integration*, (Macmillan Press, 1977), p. 7-10.

[11] J. Tinbergen, *International Economic Integration* (Elsevier, 1965), p. 76-77. See also J. Pinder, Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC, (1968) 24 *World Today* 88-110.

[12] B. Balassa, *The Theory of Economic Integration, 1st ed.* (George Allen & Unwin Ltd, 1961), p. 2.

[13] B. Balassa, Towards a Theory of Economic Integration, (1961) 14(1) *Kyklos* 1, 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).

[14] J. Pelkmans, *European Integration. Methods and Economic Analysis* 3th ed. (OUP, 2006), 8-9.

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"[15].

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.

The 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 parts of the market"[16]. This theoretical model depends on a number of assumptions, including perfect knowledge of any price differential among countries, which could give rise to the possibility of arbitrage. It also should be qualified to account for 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 containerization, 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[17]. 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 sub-markets. Such characteristics include 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[18].

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 equalization achieved by direct trading on one market[19]. Various forms of "economic integration" lead to different degrees of factor price equalization between the countries that chose 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). One would need also to take into account the factor quality and the total factor productivity before arriving to any definite conclusions[20]. This factor price equalization is reached by the movement of factors of production, by the movement of goods, or by both of them.

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[15] F. Machlup, *A History of Thought on Economic Integration*, (Macmillan Press, 1977), 14.
[16] A. Marshall, *Principles of Economics: An Introductory Volume*, (Macmillan, 9th ed., 1952), 325.
[17] On the history of the development of the law of One Price in Economics, see C. P. Kindleberger, *Economic Laws and Economic History* (Cambridge Univ. Press, 1997), fourth lecture.
[18] Ibid., p. 67.
[19] Ibid., p. 68.
[20] According to the predictions of the Heckscher-Ohlin-Samuelson theory: P. Samuelson, International Trade and the Equalization of Factor Prices, (1948) 58 Economic Journal 163-184; P. Samuelson, International Factor Price Equalization Once Again, (1949) 59 Economic Journal 181-196.

A broader conception of economic integration would indeed aim to accelerate factor-price equalization 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[21]. Such an approach may be unachievable and normatively undesirable, if the project of economic integration is not aiming 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[22].

The narrow perspective on economic integration only focuses 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 first 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 that the GATT system achieved at the global scale. Tariffs were substantially lowered in the first GATT round in 1947, then again with the Kennedy round in 1963-1967, before another significant reduction with the Uruguay Round (1986-1994). They may also take the form of non-tariff barriers to trade. Public authorities began addressing such barriers 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[23], followed by the judgment of the CJEU in *Dassonville*[24] and culminating with the *Cassis de Dijon* case law a few years later[25].

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

[21] For a possible example of such measurement, see the Report on car prices within the European Union that the European Commission has 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. This report only focused on the prices of the product, here the various brands of cars, and did not include information on factor price equalization. See, http://ec.europa.eu/competition/sectors/motor_vehicles/prices/archive.html .

[22] On this concept, see, *inter alia*, N.W. Barber, Legal Pluralism and the European Union, (2006) 12(3) European Law Journal 306.

[23] 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 L 13/29

[24] Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

[25] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649.

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 Measures Equivalent to a Quantitative Restriction (hereinafter MEQR). Choosing the non-discriminatory path may have brought within the scope of the prohibition of MEQR indistinctly applicable measures simply because they imposed additional costs for the specific product to reach the consumers of the host country. The prohibition would apply 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[26].

The approach of the CJEU 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 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[27]. However, it is also clear that shifting the burden to prove the absence of a MEEQR to the host Member State, requiring it to put forward mandatory requirements of general interest and to establish that they 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 the international economic law approach[28], 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 "(h)ost States no longer may regulate imports that have already been regulated by the home State"[29]. This tectonic change also may mark a "shift from positive to negative integration" as the main tool for promoting economic integration in the EU[30]. According to the same authors, the jurisprudence of the CJEU briefly has approached the "national" market model, when it expanded the logic of mutual recognition to cover both product requirements and selling arrangements. This led it

[26] See, Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649, paras. 8-11 and 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(5) EBLRev 705- 760; I. Lianos, In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods, (2015) 40(2) European Law Review 225-248.

[27] Mutual recognition is not therefore equivalent a country of origin rule, which requires higher degrees of trust in the regulatory system of the country of origin.

[28] R. Schütze, *From International to Federal Market – The Changing Structure of European Law* (OUP, 2017), 126 refers to the "international law loyalty" of the first decade of interpreting the provisions of the Treaty regarding MEQR.

[29] R. Schütze, *From International to Federal Market – The Changing Structure of European Law* (OUP, 2017), 5-6. Schütze distinguishes three "ideal types" of economic coordination/integration: (i) 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"; (ii) 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 (iii) "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".

[30] Ibid., 126.

to include in the definition of an "obstacle to trade" all forms of trade restrictions resulting from regulatory diversity[31]. One should expect the law of one price to apply in a "national" market, to the extent that there are no disparities regarding the enforcement of the national legislation, there are no differential costs, and consequently any price differential would have, in principle, led to 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 less commercial opportunities of arbitrage.

The main difficulty with this conceptualization 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 CJEU abandoned this expansive view of Article 34 TFEU in *Keck*[32], a judgment widely commented by the literature[33]. 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 any measure that would be "by

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[31] As this was exemplified by the "Sunday Trading "case law of the CJEU: For an analysis see, C. Barnard, 'Sunday Trading: a Drama in Five Acts', (1994) 57 Modern Law Review 449.

[32] Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard* (hereinafter *Keck*) [1993] ECR I-6097.

[33] See, See, among others, L. Azoulai (eds), *L'entrave dans le droit du marché interieur* (Bruylant: Brussels, 2011); C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US?', (2009) 68(3) Cambridge L J 575; G. Davies, 'Understanding market access: exploring the economic rationality of different conceptions of free movement law' (2010) 11 German Law Journal, 671-704; D. Doukas, 'Untying the Market Access Knot : Advertising Restrictions and the Free Movement of Goods and Services', (2006-2007) 9 CYELS 177; P. Eeckhout, 'Recent Case Law on Free Movement of Goods: Refining Keck and Mithouard', (1998) EBLRev 267; A. Fromont & C. Verdure, 'La consécration du critère de l'"accès au marché" en matière de libre circulation des marchandises : mythe ou réalité?', (2011) 47 (4) Revue trimestrielle de droit européen, 717-748 L. Gormley, Inconsistencies and Misconceptions in the Free Movement of Goods' (2015) 40 European Law Review 925; T. Horsley, 'Unearthing Buried Treasure: Article 34 TFEU and the Exclusionary Rules' (2012) 37 (6) ELRev, 734-757; R. Kovar, 'Dassonville, Keck et les autres : de la mesure avant toute chose', (2006) 42(2) Revue Trimestrielle de Droit Européen (RTDE) 213 ; P. Koutrakos, 'On Groceries, Alcohol and Olive Oil : More on the Free Movement of Goods after *Keck'*, (2001) 26 ELRev 391 ; I. Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integration', (2010) 21(5) EBLRev 705; I. Lianos, In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods, (2015) 40(2) European Law Review 225; P. Oliver, 'Of trailers and jet skis : is the case law on Article 34 TFEU hurtling in a new direction?*'*, (2010) 33(5) Fordham International Law Journal, 1423-1471; N.N. Shuibhne, 'The free movement of goods and Article 28 EC : an evolving framework', (2002) 27 (4) ELRev, 408-425; R. Schütze, Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?. (2016) 41(6) European Law Review 826; N.N. Shuibhne, *The Coherence of EU Free Movement Law – Constitutional Responsibility and the Court of Justice* (OUP, 2013), 234-256; J. Snell, 'The Notion of Market Access: A Concept or a Slogan?', (2010) 47 CMLRev, 437-472; P. Wennerås & K. Bøe Moen, 'Selling arrangements, keeping Keck' (2010) 35 (3) ELRev, 387-400.

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"[34].

As I have explained elsewhere[35], the discriminatory market access approach chosen by the CJEU in *Keck* requires a comparison of the burdens imposed pre-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). It is possible that 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 contribution of *Keck* was that 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 will be found to infringe Article 34 TFEU). One may also interpret this case law as showing that, for the CJEU, 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. 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 market. The reason is that the process of domestic production internalizes the constraints of the specific regulatory context, prior to making any business decision over the designation, form, size, weight, composition, presentation, labelling or packaging of the product. Imported products do not benefit from such internalization 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 the market access of the imported products more 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 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 denotes

[34] Joined Cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard* (hereinafter *Keck*) [1993] ECR I-6097, para. 17.

[35] I. Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic" Integration', (2010) 21(5) EBLRev 705-760.

that the host-State lacked protectionist intent, and that therefore its measure should, in principle, escape the prohibition of Article 34 TFEU. Proportionality is assessed in comparison to the effect of the regulation on domestic products or based on some principled/abstract approach examining the true social costs of their production, as revealed by the broader regulatory preferences of the host-State, should there not exist any competing domestic production. Further possibilities of justification are provided, even for discriminatory measures, by Article 36 TFEU.

Contrary to what some authors contend[36], the *Keck* approach does not therefore 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 the 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.

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 CJEU 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 access the market of the host State[37]. 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, as incorporating 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[38], but may be targeted by other provisions of the EU treaties, such as competition law. Moving from a broader to a narrower definition of

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[36] See, R. Schütze, *From International to Federal Market – The Changing Structure of European Law* (OUP, 2017), 279.
[37] Case C-110/05, *Commission v. Italian Republic*, [2009] ECR I-519, para 56. For a discussion of this evolution see, I. Lianos, In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods, (2015) 40(2) European Law Review 225-248.
[38] See, Case 311/85, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, ECLI:EU:C:1987:418, para. 30 ("Articles [34 and 36 TFEU] concern only public measures and not the conduct of undertakings"); Case C-159/00, *Sapod Audic v Eco-Emballages SA*, ECLI: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 Case C-265/95, *Commission of the European Communities v French Republic*, ECLI:EU:C:1997:595).

obstacles to trade and then again to a slightly broader one follows in a federal system that frequently might re-allocate 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. However, they offer a limited explanation to what would seem to be rather frequent changes of direction, and at different levels with regard to the policy space of the periphery versus the centre, since they do not take into account all 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 the personal and material scopes of the EU free movement provisions. This has led some authors to talk of "several Internal Markets"[39], rather than a "single Market". Hence, the above analysis is meant only as an illustration of the quite complex interaction between Member State's regulatory autonomy and the EU economic integration legal compass.

The co-existence 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 tools to measure the success of the project of EU integration particularly challenging. Measuring the success for such a complex project of 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 incomplete process of factor price equalization. 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 conceptualizing 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 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 December 31, 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 to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market"[40], that is an Internal market established and regulated by common rules or coordinated standards. The Lisbon Treaty 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"[41]. This was the first time the economic and social dimensions of integration were

[39] S. Weatheril, The Several Internal Markets, (2017) *Yearbook of European Law*, yex007, https://doi.org/10.1093/yel/yex007 .

[40] Case 15/81, *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal*, ECLI:EU:C:1982:135.

[41] Lisbon European Council – Conclusions of the Presidency (March 23-24, 2000), available at http://www.europarl.europa.eu/summits/lis1_en.htm .

seen as 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[42]. 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"[43] 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[44].

"Policy convergence" could offer an overarching concept to conceptualize the governance of the economic and social realms in tandem. Several strategies and mechanisms were suggested to achieve this aim, through a mixture of the traditional Community method and new imaginative approaches of convergence or "Europeanization". These drew on the open method of coordination for more politically sensitive issues[45], or the constitution of European networks of independent regulators for areas considered as being more technocratic[46]. The EU promoted policy convergence over specific performance goals, not just as a way to erode inter-jurisdictional trade barriers, but also mainly to drive towards more efficient, that is markets-compatible, policy-making. To the extent that the globalization of economic production spearheaded by the IT industrial revolution in the 1990s led to a significant decrease of management costs, and the development of global value chains, this quest for "regulatory compatibility"[47] or regulatory "alignment"[48] expanded outside the EU, to also cover the various EU trade partners, associated with the EU through 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

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[42] See, N. Countouris & M. Freedland, The myths and realities of Social Europe, in N. Countouris & M. Freedland (eds.), Resocialising Europe in a Time of Crisis (CUP, 2013), 1, at 4-5 (noting that the Lisbon strategy was a "Trojan Horse" leading to deregulation of labour markets and high levels of unemployment).

[43] B.E. Harcourt, *The Illusion of Free Markets* (Harvard Univ. press, 2011), Chap. 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.

[44] 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* (CUP, 2011); K.A. Armstrong, *Governing Social Inclusion - Europeanization through Policy Coordination* (OUP, 2010); V. Hatzopoulos, Why the Open Method of Coordination Is Bad For You: A Letter to the EU (2007) 13(3) European Law Journal 309; D. Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (OUP, 2005).

[45] See, *inter alia*, K. Featherstone & C. M. Radaelli (eds.), *The Politics of Europeanization* (OUP, 2003);

[46] 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.

[47] Article 21.2(4)(b) of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU.

[48] The concept of regulatory "alignment" appears in Annex II of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU 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 (December 8th, 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".

concept "has emerged as an overarching horizontal discipline in the latest generation of preferential trade agreements"[49]. Policy observers may note the importance of "regulatory convergence", "regulatory compatibility" and "regulatory coherence" in the negotiations for the TTIP between the European Commission and the US and other mega-trade agreements[50].

Each of these mega-trade agreements include, in addition to traditional provisions for trade agreements such as market access rules, regulatory "behind the border" issues involving foreign direct investment, intellectual property rights, labour standards, as well as competition rules. These are usually accompanied by horizontal provisions on "regulatory compatibility" and "regulatory convergence"[51]. For instance, the EU/Canada Comprehensive Trade and Economic Agreement (CETA) includes "horizontal" regulatory cooperation provisions 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[52]. Similar provisions have been discussed to be included in the Transatlantic Trade and Investment Partnership (TTIP) that was negotiated between the EU and the US. The EU Negotiators Mandate called for "enhanced cooperation between regulators" and "regulatory compatibility"[53]. A Section on Regulatory Policy Instruments provided for some harmonization of "analytical tools" such as Impact Assessments. The parties envisaged that a bilateral cooperation mechanism would 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, but also in areas covered by [specific or sectoral provisions –to be

[49] 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 & P. Sauvé, The Treatment of Regulatory Convergence in Preferential Trade Agreements, (2017) World Trade Review 1.

[50] 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-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.

[51] 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(1) Legal issues of Economic Integration 3-28; B. Hoekman, Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization, (2015) 18 Journal of International Economic Law 609-624

[52] EU Canada Comprehensive Economic and Trade Agreement (CETA) formally proposed by the European Commission for adoption by the Council of the EU in July 2016, Chapter 26 on Regulatory Cooperation, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/26.aspx?lang=eng .

[53] See the EU proposals on Regulatory Cooperation, available at http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf .

identified] of this Agreement". The parties further "reaffirm[ed] their intention to implement within their respective domestic systems those international instruments they have contributed to, as provided for in those international instruments"[54].

The idea is that once regulatory systems develop some form of "convergence", the reasons for regulatory diversity erode. The convergence can be based, for instance, on a common reliance on similar sources of scientific expertise and similar regulatory processes, or international cooperation to promote a common interpretation and understanding of that expert body of knowledge. 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, clearly such an approach aims to kick-start the process of inter-state regulatory cooperation 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 conceptualization of "policy convergence" is that it may not accommodate the need for regulatory pluralism and diversity, which might better represent the diverse 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, in particular 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, similar to the crisis the neo-functionalist integration model recently has entered. Indeed, institutional choices should not only be judged 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[55]. One needs to account for 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[56], and more recently to discussions over "The Europe of bankers", the return of "national identity", and a generalised distrust of the European elites[57].

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[54] See, https://wikileaks.org/ttip/Regulatory-Cooperation/Regulatory-Cooperation.pdf .

[55] N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, (University of Chicago Press, 1997).

[56] See, *inter alia*, K. Featherstone, Jean Monnet and the 'Democratic Deficit' in the European Union, (1994) 32(2) Journal of Common Market Studies 149; J.H.H. Weiler, U.R. Haltern & F. Mayer, European Democracy and its Critique (1995) 18(3) West European Politics 4; G. Majone, Europe's 'Democratic Deficit': The Question of Standards (1998) 4(1) European Law Journal 5; A. Moravcsik, In Defense of the Democratic Deficit: : reassessing the Legitimacy of the European Union, (2002) 40(4) Journal of Common Market Studies 603; A. Follesdal & S. Hix, Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik (European Governance papers, No. C-05/02, 2005);

[57] For a discussion of the different facets of Euroscepticism, see B. Leruth, N. Startin & S. Usherwood (eds.), *The Routledge Handbook of Euroscepticism* (Routledge, 2017); J. FitzGibbon, B. Leruth & N. Startin (eds.), *Euroscepticism as a Trans-National and European Phenomenon* (Routledge/UECAS, 2016); H. Best, G. Lengyel, L. Verzichelli, *The Europe of Elites - A Study Into the Europeanness of Europe's Political and Economic Elites* (OUP, 2012); C. Leconte, *Understanding Euroscepticism* (Palgrave Macmillan, 2010); A. Szczerbiak & P. Taggart (eds.), *Opposing Europe? – The Comparative Party Politics of Euroscepticism* (OUP, 2008).

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, regulatory convergence follows what looks like an incentives mechanism design approach, where the rules of the game are set in such a way as to engineer regulatory convergence, and to avoid situations where conflict might emerge in the future. This change of approach may be justified by new circumstances in the way economic production and commercialisation are structured at a global scale.

IV. The changing face of economic integration: global value chains 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 conceptualization of economic integration looks parochial in the era of the globalized production system driven by the important technological changes in ICT during 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 characterized as international but as being global in nature, with cyberspace acting as "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 something different: it is an economy with the capacity to work as a unit in real time on a planetary scale"[58].

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 global value chains 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 characterizing the European Internal market project as a different (qualitative) step in the process of economic integration. To answer these questions one needs to explore the profound transformations of modern international trade, in view of the development of global value chains 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 conceptualizing 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

[58] M. Castells, *The Information Age: Economy, Society and Culture – The Rise of the Network Society* (Wiley, 1996) , 92

take full advantage of the most powerful and self-reiterated integrative force of the modern economy, the cyberspace.

A. Comparative advantage and global value chains: 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 organization of production, with the slicing or "unbundling" of the production process in various discrete tasks or phases through the establishment of modular production networks[59], and its vertical outsourcing in off-shore production facilities managed by Global Value Chains (or GVCs)[60]. The value chains include a 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[61]. 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"[62]. The structural and geographical diversification of multinational enterprises constitutes an important dimension of the development of GVCs, with Foreign Direct Investment (FDI) acting as a catalyst for trade integration. However, GVCs have also provided an 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"[63], thus indirectly contributing to exports. They may also participate more actively in the global production process and technology sharing, to the extent that a lot of productive activity is managed across trans-national 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 GVs constitutes "(b)etween 30% and 60% of G20 countries' exports"[64]. Economic production is increasingly structured around GVCs, which enable the simultaneous and coordinated transnational production and distribution of a very large array of products that each stage of the supply chain must 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

[59] T. Sturgeon, Modular Production Networks. A New American Model of Industrial Organization, (2002) 11(3) Industrial and Corporate Change 451, noting that GVCs rely on codified inter- firm links with the "generic manufacturing capacity" residing in "turn- key" suppliers.

[60] OECD, WTO, and UNCTAD, Implications of Global Value Chains for Trade, Investment, Development (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? 0OECD, Policy Papers, No. 41, July 2017).

[61] R. Kaplinsky & M. Morris, A Handbook for Value Chain Research (Institute of Development Studies, 2002).

[62] K. Sobel-Read, 'Global value Chains: A Framework for Analysis' (2014) 5(3) Transnational Legal Theory 364, 364.

[63] OECD & UNCTAD, Inclusive Global Value Chains (2015), 7-8.

[64] OECD, WTO and World Bank group, Global Value Chains; Challenges, Opportunities and Implications for Policy (2014), <https://www.oecd.org/tad/gvc_report_g20_july_2014.pdf> accessed 6 March 2017, 13. See also UNCTAD, World Investment Report 2013, <http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf> accessed 6 March 2017.

both guide it and stem from it, is no longer the template of the market but rather the role of global value chains", or corporate action, in the form of global value chains not only driving but also defining, and therefore creating, the market[65].

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 "noncore" business functions. This was achieved by the unbundling of the production process in various steps, some of which could be transferred off-shore, according to the comparative advantage provided by the specific off-shore jurisdiction (i.e. low wages, specialised staff with important technological and research capabilities, or excellent infrastructure)[66]. 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"[67].

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, 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, which are situated in multiple locations.

These various forms of supply chain management share the common characteristic that they are all ultimately (intermediary and final) consumer-orientated, 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 may alter the utility function of States, as these aim to promote policies ensuring that their firms participate in these global value chains 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"

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[65] Ibid, 367.

[66] R. Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Harvard Univ. Press, 2016) 156 (noting that this "second unbundling" allowed globalization 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.

[67] R. Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Harvard Univ. Press, 2016) 12.

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 regarding non-tariff barriers to trade in the early 1970s[68], which ultimately led to 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[69].

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 in 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 be limited[70]. It all depends on the value added of the unbundled productive activities taking place at the specific State. They may rise to 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, the unbundled productive activities may contribute 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 assuming that the GVC attributes the full commercial value of a product to the last country of export, and assuming that products are made and exported either fully or primarily by one country. A GVC-inspired trade analysis will shift the focus to (i) the value added of activities and tasks performed at each level of the production chain, (ii) the measurement of the participation of a country in GVCs and (iii) 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

[68] 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 L 13/29 distinguished between discriminatory and indistinctly applicable measures (to a product or industry).

[69] The distinction between indistinctly applicable measures and discriminatory measures has been the only two substantive law categories used by the jurisprudence of the CJEU on what is now Article 34 TFEU, at least until it added in in *Keck* the dichotomy between measures relating to product requirements and selling arrangements.

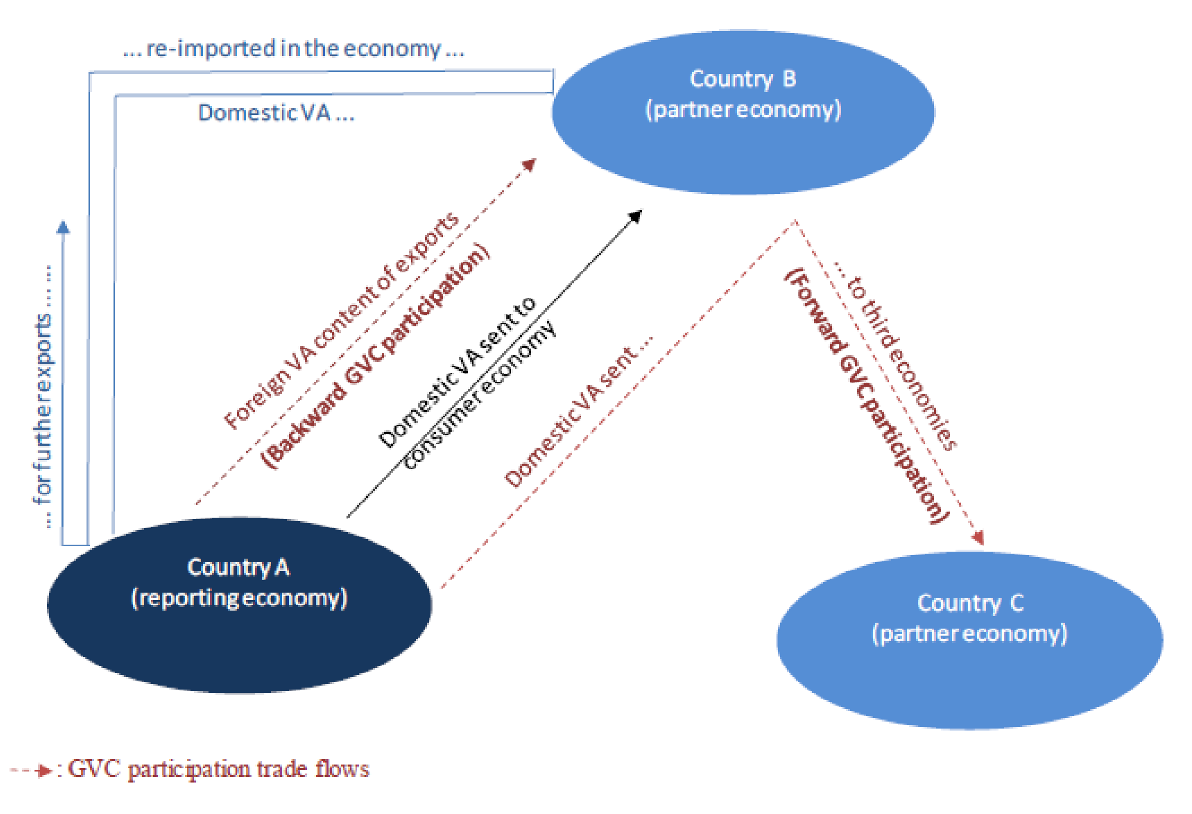
[70] Value-added is defined as value of output minus value of inputs.

by the shift towards a "servitization" of manufacturing[71], 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"[72] (see Table 1). 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[73]. 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 decomposed into domestic and foreign value-added contents. The domestic value added content of exports may take different forms: (i) it may form part of the final or intermediate products directly consumed by the consumers of the home country A, (ii) 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 (iii) it may relate to the exported intermediary products or inputs that are re-imported in the home country A, and then used to produce other intermediary products before being exported to a host country B.

Table 1: Value added components of gross exports and GVC trade flows[74]

[71] See, *inter alia*, T.S. Baines, H.W. Lightfoot, O. Benedettini & J.M. Kay, The servitization of manufacturing: A review of literature and reflection on future challenges, (2009) 20(5) Journal of Manufacturing Technology Management 547.
[72] R. Banga, Measuring Value in Global Value Chains (UNCTAD, Background Paper, No. RVC-8, 2013), 14.
[73] Ibid.
[74] OECD, see https://www.wto.org/english/res_e/statis_e/miwi_e/Explanatory_Notes_e.pdf .



These value chains are governed by leading firms, in most cases transnational corporations (TNCs), which now account for 80 per cent of global trade[75]. Economic actors may maintain or improve ("upgrade") their position in global value chains. "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"[76]. States may also develop various trade policies with the objective of "upgrading", by shifting the composition of their exports towards processing industries requiring higher 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.

[75] G. Gereffi, J. Humphrey & T. Sturgeon, The Governance of Global Value Chains, (2005) 12(1) Review of International Political Economy 78.
[76] G. Gereffi, Global value chains in a post-Washington Consensus world, (2014) 21(1) Review of International Political Economy 9, 18.

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 global value chains. Economic transactions within GVCs when they involve multinational firms and their affiliates, or when they take place between firms and their independent suppliers, involve multiple crossing of borders, so that the products may be subject to various rounds of industrial transformation that exacerbate the costs of trade barriers. Producing according to world standards becomes essential for a firm to be able to integrate into 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[77]. This may bring within the scope of negative integration tools non-tariff barriers that do not just have a protectionist intent", but which "nevertheless can have impact on trade costs" or produce trade frictions resulting from differences in regulations, and their implementation[78]. Emphasis is clearly put on the need to ensure the "efficiency" of the value chain, rather than on catering to the preferences of the citizens and consumers of the regulating State for specific public interest standards. However, it is also recognized 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"[79]. One should rather focus on the trade costs that are actually "reducible"[80]. There is a conceptual link here with the idea of regulatory convergence, as such an approach may enable a further reduction of trade costs, without nevertheless compromising on the public interest aims valued by the specific polity.

In conclusion, focusing on global value chains may offer an alternative conceptualization 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 enable participation of firms of all the Member States of the Union in Europe-wide value chains[81]. This conceptualization could be complementary to the more consumer-focused logic of the law of one price[82].

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 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

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[77] OECD & UNCTAD, Inclusive Global Value Chains (2015), 74.
[78] Ibid.
[79] Ibid., 75.
[80] Ibid.
[81] Such an approach may draw inspiration by the "cybernetic approach" of K.W. Deutsch, who envisioned integration as a community of amalgamated or pluralist type with the development of communication channels in order to create interdependence between peoples. GVCs may constitute a form of communication channel: K. W. Deutsch, *Political Community at the International Level* (Utah: Global Pub. Company, 2006, first published 1954).
[82] See, J. Amador, R. Cappariello & R. Stehrer, Global value chains: A view from the euro Area (2013) cited by F. di Mauro, H. Plamper & R. Stehrer, Global value Chains: A case for Europe to Cheer Up, COMPNET Policy Brief 03/2013 (ECB, 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".

economic integration questions the need for different regimes for goods and services, includes into 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 implement this shift of focus from market access to access to value chains, and what subsequent adjustments would have to occur in the jurisprudence of the CJEU on the free movement of goods. There are, however, increasing signs that the EU courts takes a more aggressive stance towards restrictions on exports, that may set important challenges for the organisation of EU-wide value chains[83]. The case law also shows greater concern for promoting the ability of economic operators to gain direct access to the market through Internet distribution of their products[84], and considers restrictions to price competition between economic operators situated in different Member States, as constituting a 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[85]. The focus on value chains should also provide arguments to maintain the essence of the *Keck* approach, which seems to have made an unremarkable come-back[86], as restrictions on selling arrangements to final consumers

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[83] Case C-15/15, *New Valmar BVBA v. Global Pharmacies Partner Health Srl*, ECLI:EU:C:2016:464.

[84] Case C-322/01, Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval, ECLI:EU:C:2003:664.

[85] Case C-148/15, *Deutsche Parkinson Vereinigung eV κατά Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*, ECLI: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).

[86] See, AG Szpunar in Case C-148/15, Deutsche Parkinson Vereinigung eV v. Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, ECLI: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 at the European Law Review, entitled "In Memoriam Keck", in which I raised questions as to the continuing vitality of the Keck and Mithouard case law [see I. Lianos, In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods, (2015) 40(2) European Law Review 225], 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 CJEU did not mention Keck at all in its judgment in this case. See, however, Case C-198/14, Valev Visnapuu v. Kihlakunnansyyttää, ECLI:EU:C:2015:751, paras 103-104 (a judgment issued after the publication of my paper), where the CJEU referred to Keck although it found that it did not apply in this case and went on applying the Dassonville test. Hence, although may be "still alive", *Keck* shows limited signs of practical vitality.

In his Opinion in Case C-148/, 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 "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 in some past publications: see, I. Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of ''Economic'' Integration', (2010) 21(5) EBLRev 705-760; I. Lianos In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods, (2015) 40(2) European Law Review 225.

may be judged less problematic for the 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 (and technology), including competition law and regulation.

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[87]. Indeed, Europe is lagging behind the U.S. and China with regard to the development of large digital companies, as this is illustrated by the very few unicorns (start-up companies valued more than $1 billion) established in Europe, in comparison to those based in the United States or Asia[88]. The follow-up process has been rather quick. In 2015, the European Commission adopted a Communication setting a Digital Single Market Strategy for Europe[89]. 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", all of which reduce the "great opportunities offered by digital technologies, which know no borders"[90]. The digital single market aims to allow seamless access for consumers and businesses to online goods and services across Europe.

This objective will be achieved through an array of tools:

- specific EU rules on e-commerce, including a review of the regulation on consumer protection cooperation[91],

[87] 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.

[88] FT, European unicorns remain elusive (June 16th, 2016), available at www.ft.com/cms/s/2/10a73408-2e37-11e6-bf8d-26294ad519fc.html#axzz4JkzP0bRa . 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 2015-2016, HL Paper 129 (April 2016), Chapter 8.

[89] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 192 final 6; Commission Staff Working Document, Digital Single Market Strategy for Europe - Analysis and Evidence, COM(2015) 192 final.

[90] J.C. Juncker, Political Guidelines for the next European Commission (July 15th, 2014), available at https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf .

[91] Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM(2016) 283 final.

- the improvement of price transparency and regulatory oversight regarding the delivery of parcels cross-border[92],
- regulation on the cross-border portability of online services in the internal market[93],
- a modernised "more European" copyright framework[94],
- a review of the Satellite and Cable directive to facilitate the online cross-border distribution of television and radio programmes[95],
- harmonizing VAT rules to deal with the complexity of the various VAT systems that may apply to EU cross-border transactions[96],
- specific rules prohibiting geo-blocking and geo-filtering that may raise barriers to cross-border online activity[97].

The justification of these new EU-wide normative and adjudicatory interventions derives from the traditional "market integration" handbook, although it appears 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[98]. The main text of the Commission explaining the reasons for promoting a "Single Digital Market" reads as follows:

"(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

[92] Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services, COM(2016) 285 final.

[93] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L 168/1.

[94] Proposal for a Regulation of the European Parliament and of the Council 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 of the European Parliament and of the Council 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 and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, [2017] OJ L 242/6; Regulation 2017/1563 of the European Parliament and of the Council 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 L 242/1

[95] Proposal for a Regulation of the European Parliament and of the Council 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.

[96] 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) No 282/2011 as regards certain exemptions for intra-Community transactions, COM(2017) 568 final; Proposal for a Council Regulation amending Regulation (EU) No 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 of 5 December 2017 in Brussels, after the European Parliament gave its opinion on 30 November 2017: see, http://www.consilium.europa.eu/en/press/press-releases/2017/12/05/vat-on-electronic-commerce-new-rules-adopted/# .

[97] Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM(2016) 289 final.

[98] See, Final report on the e-commerce sector inquiry (10 May 2017) http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf , para.

could contribute €415 billion per year to our economy and create hundreds of thousands of new jobs"[99].

The focus on the digital single market agenda offers a new chance to the process of "economic integration". It is carried forward by capitalizing on the wave of global 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[100]. 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 to organize EU-wide and global-wide value chains in sectors that were until recently considered as part of the non-tradable economy, such as retail or some professional services (e.g. taxi transport), is also significant. This economic evolution may also change the traditional tools of economic integration: it may not be necessary to reduce trade barriers through elaborate and politically risky efforts at detailed harmonization, or through a generalised system of mutual recognition, such as that attempted with the Bolkenstein Directive on services in the Internal market, which contributed immensely to the Eurosceptic sentiment and rhetoric in various regions of the Union[101]. With the Internet, economic integration is, to a certain extent, perhaps more laissez-faire, relying on consumers' and suppliers' incentives to find the best deal, and the governments' incentive not to jeopardise digital economic growth.

However, firms also may have the incentive to take advantage of technology to block the free flow of commerce. In particular, the European Commission has expressed concerns about geo-blocking and geo-filtering practices[102]. 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"[103]. Geo-filtering consists of offering different terms and/or conditions depending on the location of the user, when situated in a different Member State than that of the online provider[104]. 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, particularly when they

[99] European Commission, A digital single market in Europe (European Commission, 2016), available at https://publications.europa.eu/en/publication-detail/-/publication/01368318-4e3d-11e6-89bd-01aa75ed71a1/language-en , p 4.

[100] See, J. Meltzer, Supporting the Internet as a Platform for International Trade (Brookings, Global Economy and Development, Working paper 69, February 2014), available at https://www.brookings.edu/wp-content/uploads/2016/06/02-international-trade-version-2_REVISED.pdf

[101] Directive 123/2006/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36. For a discussion of the political tensions arising out of the Directive, see M. Dagnis Jensen & P. Nedergaard, From 'Frankenstein' to 'toothless vampire'? Explaining the watering down of the Services Directive, (2012) 19(6) Journal of European Public Policy 844; M. Chang, D. Hanf & J. Pelkmans, The Services Directive: Trojan Horse or White Knight?, (2010) 32(1) Journal of European Integration 97; K. Nicolaides & S.K. Schmidt, Mutual recognition 'on trial': the long road to services liberalization, (2007) 14(5) Journal of European Public Policy 717;

[102] For a detailed analysis of the various legal frameworks in the EU that may apply to "geo-blocking" see, DG Internal Policies, The Geo-Blocking proposal: Internal Market, Competition Law and Regulatory Aspects (January 2017).

[103] Commission Staff Working Document, 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.

[104] Ibid., para. 33.

are re-routed 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"[105]. More generally, geo-filtering also may occur when online providers allow users to access and purchase consumer goods/digital content services cross-border, but offer different terms and/or conditions depending on the location of the user in a Member State different from that of the provider"[106]. 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"[107]. Geo-blocking or geo-filtering may be applied by various operators: retailers operating an online store, online marketplaces and price comparison websites[108].

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'[109]. This sketches an industrial policy-light design, where competition law is an instrument to achieve the right framework conditions and the right environment 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[110]. 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 publishes a report, which informs its subsequent

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[105] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 192 final, at 6.

[106] Commission Staff Working Document, 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. 33.

[107] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 192 final, at 6.

[108] Commission Staff Working Document, 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. 67.

[109] European Commission, Communication on Online Platforms and the Digital Single Market, (COM(2016)288 fin)

[110] See, ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html .

enforcement action under Article 101 and/or 102 TFEU. The aim of the e-sector inquiry was 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[111]. Technical geo-blocking 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 inhibit the ability of an existing user to access the service in different territories[112]. The Commission's Staff Discussion paper makes it clear that limiting the ability of European users to shop online cross borders, "may run counter to the objective of establishing a *single* market"[113].

There are a number of examples in more "traditional" economic sectors, where competition law has applied 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)[114]. Article 101 TFEU targets agreements or concerted practices that are aimed at partitioning national markets according to national borders, or more generally at making the interpenetration of national markets more difficult[115], eventually by restoring the divisions between national markets. These are "liable to frustrate the Treaty's objective" of achieving market integration into a "single market"[116]. 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

[111] Commission Staff Working Document, 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. 174.
[112] Ibid., para. 176.
[113] Ibid., para. 41.
[114] 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 Pub. 2016).
[115] See, for example, Joined cases 56 & 58/64, *Consten & Grundig v Commission* [1966] ECR 299; Case 19/77, *Miller International Schallplaten v Commission* [1978] ECR 131; Joined Cases 100 to 103/80, *SA Musique Diffusion française and others v Commission* [1983] ECR 1825; Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paras 23 to 27; Joined Cases 25/84 and 26/84, *Ford-Werke AG and Ford of Europe Inc v Commission* [1985] ECR 2725; Case C-277/87, *Sandoz prodotti farmaceutici SpA v Commission* [1989] ECR I-045; Case T-77/92, *Parker Pen Ltd v Commission* [1994] ECR II-549; Case C-306/96 *Javico* [1998] ECR I-1983, paras 13 and 14; Case T-13/03, *Nintendo Co, Ltd and Nintendo of Europe GmbH v Commission ('Nintendo')* [2009] ECR II-975; Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paras 67 to 69; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291; Joined Cases C-403/08 & C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083, paras. 243-251**.**
[116] Joined Cases C-403/08 & C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083, para. 139.

constitute an infringement of Article 101(1).[117] 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; product differentiation undertaken as part of an agreement[118]; and restrictions as to the applicability of the manufacturer's warranty and after-sale services provision, if effectuated by an agreement[119], although restrictions on warranties may be valid within the context of a selective distribution system.[120] 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 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, were found to restrict competition by object, within Article 101 TFEU, and have been frequently included in the list of hardcore restrictions which may not benefit from a block exemption regulation[121]. Although in principle a supplier may prohibit a member of his selective distribution system from operating out of an 'unauthorised place of establishment', in *Pierre Fabre Dermo-Cosmétique* the CJEU did not consider a website 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[122]. 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 separately by the CJEU 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[123]. The CJEU distinguished between a platform ban which is permissible, as it only restricts a specific kind of online sale, and an absolute ban on

[117] Case C-551/03 P *General Motors BV v Commission* [2006] ECR I-3173; *PO/Yamaha* (Case IV/37.935) Commission Decision (July 16, 2003), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37975/37975_91_3.pdf
[118] Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441.
[119] Case C-86/82 *Hasselblad (GB) Limited v Commission of the European Communities* [1984] ECR-883.
[120] Case C-376/92 *Metro SB Grossmärkte GmbH & Co. KG v. Cartier S.A.* [1994] ECR I-15.
[121] See, Art. 4(b)(i) of Commission Regulation (EU) No 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] L 102/1.
[121] *Guidelines on Vertical Restraints* [2010] OJ C 130/1.
[122] C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-9419.
[123] See Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:941, para. 51.

internet sales, which is not permitted[124]. It is also true that the case law has not always been restrictive, as when implementing Article 101 TFEU competition authorities and the courts also must consider 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[125]. It remains to be seen if the future case law will move to expand the importance of the legal and economic context.

Unilateral conduct may also fall under Article 102 TFEU, in case the undertaking in question has a dominant position[126]. 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 absolutely forbidden under EU law and are also explicitly prohibited by Article 18 TFEU. The prohibition covers both direct discrimination on nationality and indirect discrimination, based on suspicious criteria, such as domicile or the place of establishment. For instance, in *GVL*, the CJEU 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.[127] Indeed, according to the CJEU, 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 recognized 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 concerning 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[128]. Hence, it was not price discrimination *per se* that was found anti-competitive.

Of particular interest is the judgment of the General Court (GC) in *Tetra Pak II.*[129] Among the different practices examined in this case, it was found by the Commission that Tetra

[124] See Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:941, para. 52. See also, the Opinion of AG N. Wahl in Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI: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).

[125] See, Case 262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* (Coditel II), [1982] ECR 3381 ; Case 62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others (Coditel I)* [1980] ECR 881 ; Case 27/87, *Erauw-Jacquéry (Louis) v La Hesbignonne* [1988] ECR 1919.

[126] Joined Cases C-468/06 to 478/06, *Sot Lelos kai Sia v GlaxoSmithKline* [2008] ECR I-7139.

[127] Case C-7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission* [1983] ECR 483.

[128] See, Case C-27/76 *United Brands v. Commission* [1978] ECR 207, paras 232-233**.** The CJEU 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'.

[129] Case T-83/91 *Tetra Pak II* [1994] ECR II-755, paras 153-173.

Pak's prices for cartons and machines displayed a 'wide disparity' among Member States. Tetra Pak argued that the wide differences were not discriminatory as there was some correlation between machine and carton prices, linked to competition on the local market, so that the decisive factor was 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 the other, 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 to even 70 per cent. The GC proceeded to examine if 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", and "could not be due to normal competitive forces […]"[130].

Hence, non-appreciable differences may not concern the Court, as it did not request a uniform price across the EU, but 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, certainly as to contracts throughout the EU, and as to communications between the Tetra Pak group and its subsidiary Tetra Pak Italiana, which the Commission demonstrated through direct documentary evidence. Hence, some evidence of objective intent seemed also to be relevant, although not explicitly required by the Court. The General Court confirmed the finding of the Commission with regard to the existence of discriminatory pricing contrary to Article 102(c). On appeal, the CJEU 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 are restrictions based on nationality or place of residence of the person receiving 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 to challenge the conduct of a service provider. The claimant can be a private actor and not just a Member State authority. State action is specifically targeted by Article 20(1) of the Services Directive[131]. 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 they do not dispose of a dominant position. This provision targets general conditions of access to a

[130] Ibid., para. 170 (emphasis added).

[131] Art. 20(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market [2006] OJ L 376/36 providing 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".

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"[132]. Most Member States made the choice to confer the task of administrative enforcement of the national provisions implementing Article 20(2) of the Directive to the authorities that had responsibility for administering 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 its implementation[133]. The Commission's guidance document on Article 20(1) of the Services Directive notes that few complaints of different treatment have led to enforcement decisions by competent authorities in the Member States[134], and it became soon clear that "Article 20 does not sufficiently address discrimination of customers and has not reduced legal uncertainty"[135]. 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 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 development of e-commerce, and the significance of the sector for economic growth more broadly, had led the Commission to take initiatives in this area, even prior to the publication of the Digital Single Market Agenda. 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[136]. The Commission noted in its guidance document on Article 20(1) of the Services Directive, that 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"[137].

[132] Recital 95, of Directive 2006/123/EC.
[133] 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.
[134] Ibid., p. 27.
[135] As this is also recognized in the Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM(2016) 289 final, p. 3.
[136] Mystery Shopping Evaluation of Cross-Border E-Commerce in the EU – Final Report (October 2009), available at http://ec.europa.eu/consumers/archive/strategy/docs/EC_e-commerce_Final_Report_201009_en.pdf; 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).
[137] Ibid., p. 4.

The document makes clear that for the Commission, "(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"[138].

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 consist of different characteristics: (i) a refusal to provide access to the service or re-routing the service to a subsidiary/point of sale established in the Member State of the service recipient, (ii) price discrimination, that is, offering the same service at a different price to consumers in other Member States, or (iii) 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. The Report however 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"[139]. During the second step, the competent authorities will assess whether such a different treatment is objectively justified by performing a case-by-case analysis[140].

The Commission puts forward in its guidance document on Article 20(1) of the Services Directive various objective justifications[141], 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 focusing activity on 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[142].

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. Referring again to the e-commerce sector inquiry, although the European Commission considered in the Final Report that online price

[138] Ibid., p. 9.
[139] Ibid., p. 13.
[140] Ibid.
[141] The list of justification included in recital 95 of the Services Directive is non-exhaustive.
[142] Ibid., p. 23.

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 inter-state e-commerce in the EU[143]. 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% of digital content providers who participated in the inquiry have contractually agreed with right 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 %)"[144]. The Commission stressed that any competition enforcement in relation to geo-blocking would have to be based on a case-by-case analysis of potential justifications for the restrictions imposed. Another point stressed was the need "to avoid diverging interpretations of the EU competition rules regarding business practices in e-commerce markets which may, in turn, create serious obstacles for companies actively competing, in a compliant manner, in multiple Member States, to the detriment of a Digital Single Market"[145].

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[146]. 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 refusals to sell and various other limiting conditions, when buying goods or services across borders[147]. The material scope of the Geo-blocking Regulation was

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143 See Final report on the e-commerce sector inquiry (10 May 2017) http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf ;

144 Ibid., para. 66.

145 Ibid., para. 73.

146 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 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 and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, [2018] OJ L 601/1 (hereinafter Geo-blocking Regulation).

147 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market [2006] OJ L 376/36 providing 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'. Article 20(1) of the 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

aligned with that of the Services Directive[148]. Non-economic services of general interest, transport services, audio-visual services, gambling activities, retail financial services, healthcare and some other social services are excluded from the latter's scope[149].

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'[150]; (b) 'receive electronically supplied services from the trader', 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[151]; 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)[152]. 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[153].

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)[154]. 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)[155].

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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.

148 Directive 123/2006/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36.

149 Article 1(3) of the Geo-blocking Regulation (EU) 2018/302.

150 According to Recital 23 of the Geo-blocking Reg., '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 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'.

151 Hence, the Regulation does not include online television, films, e-books, music, online games, and streamed sports.

152 *Ibid*., Article 4(1).

153 *Ibid*., Article 1(6).

154 *Ibid*., Recital 5.

155 *Ibid*., Recital 12. See also our analysis in Suppl. 10.8.1.2.5.

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 place of establishment of the customer[156]. 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[157]. A similar prohibition applies to the re-routing 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[158]. 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[159].

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[160]. This rule provides that in certain cases traders cannot reject or othewise 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, to the extent 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[161].

Finally, circumventing such a ban on discrimination in passive sales agreements is not allowed[162]. Hence, the prohibition of passive sales 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 to promote 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[163]. The Geo-blocking Regulation moves nevertheless beyond competition law as it recognizes that this prohibition on discrimination may apply to agreements that may not be

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[156] *Ibid*., Article 3(1).
[157] *Ibid*., Recital 14.
[158] *Ibid*., Article 3(2).
[159] *Ibid*., Articles 3(3) and 3(4).
[160] *Ibid*., Article 5.
[161] *Ibid*., Articles 5(1)(a) and 5(2).
[162] *Ibid*., Article 6. This provision relating to passive sales will apply 24 months from the Regulation's entry into force.
[163] Commission Regulation No. 330/2010 of 20 April 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 L 102/1. See our analysis in Chapter 10.

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[164]. 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[165]. The Regulation was thought 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"[166]. Although it initially covered only voice calls, it was later extended to text messages (SMS)[167] and Internet data[168]. The abolition of all retail roaming surcharges was finally implemented in June 2017 so that European consumers now can "roam-like-at-home" (RLAH)[169], with an EU-wide regulation of wholesale roaming charges ensuring only that operators can recover their costs, including joint and common costs[170]

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% for debit card payments and 0.3% for credit card payments (cross-border or national)[171]. Although market integration was not the only rationale for adopting such EU-price regulation, since fairness considerations as to preserving

[164] Recital 26 of the Geo-blocking Regulation.

[165] Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, [2007] OJ L 171/32.

[166] Recital 4 of Regulation (EC) No 717/2007.

[167] Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No 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] L 167/12.

[168] Regulation (EC) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (recast), [2012] OJ L 172/10.

[169] See, Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 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) No 531/2012 on roaming on public mobile communications networks within the Union, [2015] OJ L310/1.

[170] Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets, [2017] OJ L 147/1.

[171] Articles 3 & 4 of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, [2015] OJ L 123/1.

consumer welfare were important considerations, it was recognized 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.

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 aiming geo-blocking and geo-filtering practices integrated in licensing agreements, which are, for the moment, excluded from the scope of the Proposal of a 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 a principle recognized by EU law[172].

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 undertakes, 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 license 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, the national court seized, the High Court of Justice of England and Wales, referring 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 have 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.

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

[172] Joined Cases C-403/08 & C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083.

territorial exclusivity goes beyond what is necessary to ensure the right 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 anti-competitive 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[173]. 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" [174]. 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 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[175]. 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

[173] Ibid., para. 245.
[174] Ibid., paras 247-248.
[175] Ibid., para. 249.

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.[176]

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 re-transmission in the UK amounted to a transmission to a new public, and therefore could not, on this basis, escape a finding of copyright infringement[177]. 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[178], and they can, 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)[179]. This issue has however been dealt with the recent regulation on cross-border portability of online content services, which although it does not challenge the territoriality of the licenses, 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 to provide a "(s)eamless access throughout the Union to online content services that are lawfully provided to consumers in their Member State of residence"[180].

The Commission has also recently taken enforcement action with regard to copyrighted work 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-

[176] EU *vertical restraints guidelines*, para 60.

[177] Joined Cases C-403/08 & C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083, paras 204-206. Hence, the copyright holde, 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 https://www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licensing-landscape .

[178] Joined Cases C-403/08 & C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083., paras 198-199.

[179] See, G. Monti & 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 no-copyrighted with copyrighted-protected elements, so that anyone showing such a video is breaching that copyright).

[180] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L 168/1, recital 1. The Directive includes in its Article 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. Article 6 makes explicit the duty of cross-border portability of an online content service. According to Article 7 of the Directive, any contractual provision contrary to EU portability shall be unenforceable.

TV services.[181] 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 that required Sky UK to block access to films to consumers outside the UK and Ireland through its online and satellite pay-TV services, and that granted absolute territorial exclusivity to Sky UK and eliminated competition between broadcasters, which infringed 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, which eliminated cross-border competition between pay-TV broadcasters and partitioned the Internal Market. The Commission found that such restrictions would constitute a restriction of competition by object. In April 2016, Paramount offered commitments to address the Commission's concerns, and the Commission adopted a commitment decision under Article 9 of Regulation 1/2003, making them binding[182]. These essentially removed the absolute territorial protection and the prohibitions of active and passive sales that had benefitted Sky UK. 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.

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 audio-visual 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 licenses, have been excluded from the scope of the Regulation on geo-blocking.[183]

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 re-integration 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

[181] 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.
[182] *Cross border access to Pay TV Content* (Case AT 40.023) Commission Decision of 26 July 2016, press release available at europa.eu/rapid/press-release_IP-16-2645_en.htm .
[183] Recital 6 of the Geo-blocking Regulation. According to Article 9 of the Regulation, the application of the prohibition of Article 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.

integration experiment among independent nations in modern history, although it no longer is 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[184], may drive the process towards deeper economic integration at a global, or partly global, scale.

The purpose of this paper was to reflect on the theoretical underpinnings of the "single market" concept and to explore a possible need for some updating, in view of the significant technological and economic transformations the last two decades, related to the emergence of a global production process, managed by global value chains and operated with the assistance of ICT. I argued that "new globalization[185]" should be duly considered when examining the process of EU economic integration, and the legal concept of the EU Internal market. This may lead, with regard to the free movement of goods rules, to the consideration of global value chains 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 some form of 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 paper. 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 to 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 globalization, a topic that will be examined in a separate paper.

[184] See, for instance, the Comprehensive Economic and Trade Agreement (CETA), theTrans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the Japan-EU FTA.
[185] R. Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Harvard Univ. press, 2017).