1. Internal market: an introduction

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The internal market has been at the heart of the European integration project from the very beginning. The Treaty of Rome was built around a common market. The revival of integration in the 1980s focused on creating a single market. Many of the fundamental principles of European law have been based on and shaped by the needs of the internal market. For example, in *Van Gend* the Court of Justice reasoned that '[t]he objective of the EEC Treaty, which is to establish a Common Market, ... implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States',¹ and used this to ground the principle of direct effect. In *Costa v ENEL* the Court proceeded to hold that the principle of primacy was needed to ensure that the objective of the Treaty, the common market, was not undermined by conflicting national laws.²

The profound legal, political, and policy pressures on the internal market make the focus of this book on the project as a whole timely. First, there is an increasing awareness of the limits of the internal market. The imperative of broadening its scope and deepening its intensity by, for example, establishing a capital markets union in support of EMU, has been examined by policy-makers in Brussels and national capitals. Secondly, the full consequences of the successive EU enlargements for the integration project, including the internal market, are still unfolding. Thirdly, the state of the Eurozone (the duration and implications of the euro-problems have now rendered the term 'crisis' inadequate to describe it) and the emerging mistrust of EU decision-making by an increasingly vocal public have raised existential questions for the process of EU integration. The pressures have manifested recently for example in the context of a New Settlement for the United Kingdom,³ and the Brexit referendum, while the processes surrounding the adoption of the Services Directive represent an earlier example.⁴ This is the right juncture to step back and focus on the internal market as a whole.

Furthermore, and the undoubted centrality of the internal market to the integration project notwithstanding, there have been a surprisingly small number of books, with some notable exceptions,⁵ that focus on it as an object of research. Each of the four freedoms has attracted plenty of attention, but the entirety of the internal market has not

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¹ *Van Gend*, Case 26/62, EU:C:1963:1, at 12.

² *Costa v ENEL*, Case 6/64, EU:C:1964:66.

³ EUCO 1/16, Annex 1.

⁴ Directive 2006/123 on services in the internal market [2006] OJ L 376/36.

⁵ See Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart 2002) for a prominent example.

2 *Research handbook on the law of the EU's internal market*

often been the subject of sustained and comprehensive scholarly examination. The present title seeks to help fill this gap.

The Research Handbook on the Law of the EU's Internal Market is not organised according to the traditional scheme of examining each of the four freedoms in turn. Instead, six overarching themes are tackled:

- the reach of the internal market,
- the relationship between economic and non-economic interests,
- the internal market as an economic union,
- uniformity *versus* diversity,
- the governance and politics of the internal market, and
- the internal market in the world.

By putting forward a set of common themes, this project implies that the similarities between the individual freedoms are more important and worth exploring than the remaining differences. The challenges and questions are often the same, regardless of which of the four freedoms is being analysed. It makes sense, therefore, to approach them in a horizontal manner, rather than keep each freedom locked in its own silo.

The first section on the reach of the internal market is concerned with the contested and much-debated outer limits of the internal market. How far do the freedoms reach? What types of measures amount to restrictions, and what are the implications of this? When are private parties bound by the four freedoms? How far does the competence of the EU to harmonise in the name of the internal market reach? How does the internal market relate to the notion of EU citizenship?

In his chapter, Gareth Davies analyses some of the basic concepts of internal market law, in particular discrimination and market access that have traditionally been used to define the notion of restriction and thus set the outer limits of the internal market. He argues that 'the opposition of market access and discrimination provides a poor framework for the cases'. Instead, he points out the casuistic, somewhat haphazard way the Court has gone about determining the reach of the free movement provisions. He argues that at its heart the case law has targeted national rules that 'distort markets, creating competitive advantages for some and disadvantages for others' and suggests that the real radicalism in the Court's approach lies in its decision to interpret free movement as an individual right. He calls for the spelling out of rules by the Court, given the uncertainty that has persisted for decades and the need to ensure the effectiveness of free movement law at the national level.

Alexandre Saydé's chapter follows on from this. He explains what the different approaches to the reach of free movement entail in terms of imposing market discipline within every Member State. He contrasts two approaches, namely national treatment and mutual recognition. He argues that under national treatment the competitive pressures are merit-based, while mutual recognition grants a structural competitive advantage to producers established in a lower-regulation home State and interferes with competition on merits. The result may be a pressure towards a race to the bottom. He then outlines three largely unsuccessful 'defences' against mutual recognition, namely the claims of reverse discrimination, dumping and abuse, and questions whether the four freedoms serve to increase or constrain human freedom.

Stefan Enchelmaier shifts the focus from what is prohibited to who is bound. The four freedoms obviously target restrictions imposed by Member States. But to what extent are private parties bound by them as well? Enchelmaier accepts that the case law appears far from uniform but maintains that, despite sometimes obscure reasoning, the Court has arrived at convincing solutions. He argues that the key to the case law is the effect of the measure, not its author. If a measure has collective effects, it is caught. However, the ultimate responsibility still rests with the Member State that has allowed private bodies to engage in such collective regulation.

The chapter from Stephen Weatherill also concerns the limits of the internal market, but this time focuses on positive integration, namely the limits to harmonisation. He notes that the competence to harmonise is flexible and broad. This allows the EU to enhance the internal market in a responsive manner but carries potential dangers such as the suppression of diversity and may even risk damaging the fundamental principle of conferral. While there are limitations in principle to the competence of the EU, in practice those limitations may be hard to identify. In many ways, the issues described by Weatherill are the mirror images of those examined by Davies – since the notion of internal market is broad, so is the competence to harmonise. Weatherill concludes by cautioning the Court against putting too much emphasis on the claims of the legislature when assessing the constitutionality of legislation, but notes that creating a satisfactory method for producing ‘rules that are uniform enough to achieve the Treaty objectives yet not wholly destructive of diversity and local colour is an immense and persisting challenge’.

The final chapter under the theme of the reach of the internal market is by Catherine Barnard. It deals with the relationship between the internal market and EU citizenship. The argument is that ‘the flowering of EU citizenship may in fact have been a brief interlude ... between periods when the establishment of the single market was, and has reverted to being, the EU’s primary focus’. The attempt to extend the freedoms beyond the market may have gone into reverse. Yet Barnard warns that the internal market, despite its seeming solidity and incontestability, may not be immune to the same forces that have forced citizenship into retreat. In particular, the law of free movement of persons is vulnerable to dilution as a result of the pressures that led to the new settlement agreed for the United Kingdom.

The second section concerns how economic and non-economic interests are reconciled. The freedom of movement that the Treaty bestows may undermine other objectives the Union or its Member States are seeking to protect. The Union itself is committed to matters such as social market economy, environmental and consumer protection, and fundamental rights. Further, the Member States have their own views on these types of issues, and those views often diverge. How is the balance to be struck? And have the lingering problems of the Eurozone affected this balance?

Floris de Witte considers the architecture of the EU social market economy. He points out that originally in the EU the market aspects and social aspects were structurally separated – the European integration project was meant to create wealth, and the Member States were meant to distribute it through their national social policies. He then shows how, partly in response to judicial developments, the Union’s social policy first sought to safeguard the capacity of Member States for offering social protection, but has more recently pushed towards imposing social policy convergence

in the EU, in particular in the aftermath of the financial crisis. He warns that the EU's institutional set up may not be equal to this task and lacks the sophistication to embed the market in its social environment. There is a danger that the EU's social market economy will prove light on the social and heavy on the market.

Vassilis Hatzopoulos considers how the balance between different interests has been struck in the context of healthcare. He points out how abruptly healthcare was brought from the national domain to the scope of EU law as a result of the Court's case law – a telling example of the struggle to draw the line between that which is economic and within the ambit of the Treaties and that which is not. He explores the complex interplay between the Court and the EU legislature that has created a degree of Europeanisation of healthcare which, he argues, runs the risk of transgressing national competences and eroding the social *aquis* in both rich and poor Member States. It is probably no surprise that some of the findings of de Witte for social policy and Hatzopoulos for healthcare coincide.

The chapter by Hans Vedder deals with the domain of environmental policy. Again the issue is the balance between the freedoms and the public interest, namely environmental protection, again some of the initial guidance was provided by the Court, and again there was also a legislative response. However, Vedder resists seeing economic freedoms and environmental protection as opposed. Instead he argues that the two issues are integrated – markets can 'work for the environment, raising the level of protection just as they have brought us new and cheaper products'. There are interesting parallels between this and the need to embed markets in society, discussed by de Witte. The simple metaphor of balancing two competing interests may prove too simplistic.

Hans-W. Micklitz and Carla Sieburgh do not merely deal with two sets of interests, but instead consider how the demands of two branches of law can be reconciled, focusing on the influence of EU free movement rules on private law. They argue that the different legal communities have failed to engage with each other. EU lawyers have been focusing on public law concerns, in particular the legitimacy of EU law, while private law scholars have directed their attention towards specific harmonisation initiatives, neglecting the impact of primary EU law. Micklitz and Sieburgh call for a broadening of perspectives so that the transformative effects that the EU law has on private law can be perceived more clearly and propose ways of achieving this. However, they warn that the mood has changed: there is a tendency to retreat 'to national law that considers EU law as a threat and source of irritation'. In this, Micklitz and Sieburgh echo the warnings that were expressed in particular in the chapter by Barnard.

The final chapter in this section is by Niamh Nic Shuibhne and concerns the interplay between the internal market and fundamental rights. Her focus is on the impact of the Charter of Fundamental Rights. She asks whether the Charter has made a difference, given earlier concerns that the case law of the Court may have prioritised free movement over fundamental rights. To what extent have the changes to the primary law brought by the Lisbon Treaty altered the methodologies and priorities of the Court? She argues that the Court's approach to the review of EU legislation has undergone a change and that there is also a change in the language used by the Court. However, 'the established methods of and priorities within internal market law have not shifted significantly in a more substantive sense'. Nic Shuibhne concludes that fundamental

rights are values that the Union is founded upon, and that this should be better reflected in both the analysis of restrictions and of proportionality when the Charter rights are at stake.

The third section concerns the internal market as an economic union. It is generally recognised that the EU's economic and monetary union is asymmetric – its monetary component is strong with exclusive EU competence and the European Central Bank, while the economic component is much weaker. The need to balance the two elements by strengthening the economic union is widely acknowledged. But how does this interact with the internal market? How does it influence European capital markets, which are a critical ingredient of an economic union but also an aspect of the internal market? What do the demands of the economic union mean for the autonomy of the Member States to set their laws and policies? And how can EMU coexist with the internal market, when all Member States are part of the latter, but some have failed to qualify or chosen not to join the euro?

Jennifer Payne and Elizabeth Howell deal with the creation of a European capital market. They point out the enormous change that has taken place in the last few decades to create a single financial market. The legislative and institutional reforms have resulted in 'increased harmonization, greater centralization of powers at the EU level, more intensive regulation and an expansion of the regulatory perimeter'. This is likely to continue with the capital markets union project. However, it remains unclear how well equipped the EU is to deal with future challenges. While centralisation carries advantages, as demonstrated in the context of the eurocrisis, it also entails risks. Payne and Howell identify in particular the danger of systemic regulatory error inherent in a centralised system.

Thomas Beukers considers the effects of the crisis to the autonomy of Member States in economic union. He points out that the main response to the crisis has been an increased supranational control of Member States' economic policy-making. The scope of control has been broadened to include macroeconomic imbalances and its intensity has increased so that there may be '*effective* pressure on an *individual* Member State to adopt *detailed* substantive economic reform'. This includes specific actions in areas such as labour markets or social security, extending the impact of EU requirements beyond what the internal market has entailed. Further, there have been particular internal market challenges, for example, as regards banking supervision, the fragmentation of financial markets along national lines during the crisis and the management of tensions between the 19 euro area Member States and the rest. Altogether, there is a broader question: 'what EMU is needed for the internal market and what internal market for EMU'?

Paul Craig and Menelaos Markakis examine the concern that regulation of the euro area can have an impact on internal market issues more generally, and that this can be prejudicial to the non-euro Member States. Particular worries include the danger of caucusing, where the euro area countries agree on matters among themselves and then dictate to the entire EU, and the possibility of discrimination on the basis of currency, for example when location requirements are imposed on financial sector operators. Craig and Markakis also examine the existing and possible counter measures, including those adopted in the new settlement for the UK agreed in early 2016.

The fourth section is about uniformity versus diversity. It investigates how the persistent tension between the uniformity that integration may entail and the diversity that enduring national autonomy implies can be managed. How is this dealt with in a field such as taxation where Member States jealously guard their sovereignty and the decision-making rule continues to be unanimity? How can enhanced cooperation contribute in situations where some Member States wish to move forward but others remain staunchly opposed? How do the devices specifically built into Article 114 TFEU to manage this tension work?

Peter J. Wattel notes that while on an abstract level taxation within the internal market looks orderly with no Union-taxing jurisdiction, harmonised or uniform indirect taxes, and national sovereignty on direct taxes, in practice the reality is far messier. He identifies almost 20 different mechanisms that have been used to manage the interplay between the internal market and diverse national tax systems, ranging from exclusive EU regulation to open method of coordination. He focuses in particular on the attempts of the Court to coordinate separate national tax systems, noting the cyclical pattern the case law has shown: 'hesitance at first, followed by a decade of outright free movement activism in direct tax matters, producing many erroneous judgments, and in the last decade showing more awareness of its own limitations and more reverence for legitimate tax base protection interests of the Member States'.

Anzhela Cédelle and John Vella consider the use of enhanced cooperation to manage the tension between uniformity and diversity. They assess the proposal for the adoption of a financial transaction tax among a group of Member States. A difficult challenge is the need to strike the right balance between further integration amongst participating Member States, and the interests of non-participating Member States and the EU project more generally – in particular, what kind of distortive effects can be tolerated within the internal market? They emphasise the interplay between the political and the judicial levels and argue for strengthening the former at the stage of authorisation and the latter at the stage of implementation as a way of ensuring the balance.

Isidora Maletić analyses the possibilities for derogating from harmonisation that have been built into Article 114 TFEU. When they were incorporated into the Treaty in the Single European Act, there were widespread concerns that the Member States might use them routinely to drive a coach and horses through internal market harmonisation. Maletić notes that this danger has not materialised. She then proceeds to analyse in particular how the treatment of requests for derogation has evolved in judicial practice, and concludes by assessing the relevance of derogations for the internal market harmonisation paradigm, arguing that they foster a regime of dynamic harmonisation and regulatory reconciliation.

The fifth section concerns the governance and politics of the internal market. While legal rules, mechanisms, and procedures are essential for the establishment and functioning of the internal market, their content is shaped by the interplay of a number of actors and they interact with techniques that originate either from the market itself or from the constant redefinition of the function of States. This section highlights the multi-faceted nature of the internal market by focusing on the actors, techniques and processes that have shaped it, and on their interactions. What exactly is the role of the judicial branch in establishing and managing the internal market? How does the principle of mutual recognition, a key device developed through case law and

legislation, operate? What is the role of agencies and standards in the governance of the single market?

Thomas Horsley focuses on the contribution of courts in general and of the Court of Justice in particular. He adopts an institutional perspective. The questions he asks concern the role that the Treaties establish for the Court in the process of market integration, the way the Court has exercised its attributed functions and the broader conclusions that may be drawn from the Court's approach to the scope of its adjudicative competences. He argues that the 'Court's role in the development of EU internal market law is a story of both continuity and profound institutional change'. While there has been no formal alteration to its position, in practice it has radically expanded its own role, but has also seen it curtailed in relation to the enforcement of subsidiarity. He concludes that critical questions regarding the nature and limits of judicial law-making remain unanswered.

Wulf-Henning Roth analyses one of the key techniques used in the creation of the internal market: the principle of mutual recognition that is now embedded both in the primary law of the EU and in much of its legislation. He sets out the many facets and functions of mutual recognition, and shows how it can be distinguished from related concepts. He charts the development of its role in the context of the internal market and its spread to other areas, such as the recognition of judgments in civil matters and decisions in criminal matters. He points out that the principle is applied differently in different fields of Union law and is subject to varying limits, at least partially reflecting the different functions mutual recognition performs. He concludes that the principle does have its inherent limitations and is not always a viable alternative to harmonisation.

Herwig C.H. Hofmann considers the role that agencies and standards have come to play in the internal market. He highlights that the EU has increasingly moved from regulatory activity also to the administrative implementation of Union law. He investigates 'the great diversification and pluralisation of executive bodies on the European level, which has taken place in order to be able to address the requirements of deepening integration in various policy fields'. He points out the co-opting of private and semi-private rule-makers external to the EU. There has been a change in the way the Union exercises its regulatory powers, and sets norms and standards. He concludes that 'the Union is moving ever further away from a two-level legal system, with the Union legislating and the Member States implementing and is evolving towards an integrated legal system linking the various levels through ever more procedural cooperation in implementation'.

The final section concerns the internal market in the wider world. The internal market was not devised in isolation from the international context within which the Union acts. This context has become all the more significant, both in the light of the interdependence of economies around the world and the ambition of the Union to develop an international role commensurate to its economic weight. This section focuses on the legal and policy links between the development of the internal market and the Union's external posture and also places the experience of developing the internal market against the similar, but by no means identical, experience of market development in the federal US context. What is the connection between the internal and external – how do the internal market on the one hand and the external economic

relations of the EU on the other interact? How does the internal market project compare with the establishment of the single market in the US? What are the similarities and differences, and are there lessons to be learnt?

Marise Cremona considers the relationship between the internal market and the Union's common commercial policy. She asks whether the common commercial policy really presents the external dimension of the internal market. Cremona investigates the extent to which the policy fields map onto each other in terms of the scope and extent of Union powers, and whether their objectives coincide. She points out that, like the internal market, the common commercial policy has broadened and deepened: today it covers also trade in services, the commercial aspects of intellectual property and foreign direct investment, and is increasingly concerned with regulation, not just market access. As regards the objectives of the common commercial policy, she argues that they reflect, but are not limited to, the Union's internal market. Instead, the common commercial policy is also used to support objectives such as development and security, pursuing a broader external policy agenda.

The final chapter in the volume is by Michelle Egan. She compares and contrasts the evolution of single markets in Europe and the United States. While the US being a common economic unit is often simply taken for granted, in reality there was a difficult and lengthy process of constituting markets, bringing down barriers, and dealing with the consequences of increased competition. She argues that both the US and Europe share the fundamental need to balance the goals of a centralised economic order while preserving regional and local diversity. Egan concentrates on three issues, namely interstate commerce, public finances and monetary union, and bankruptcy and constitutional debt limits. She proceeds to consider the contestation between the social and economic elements on both sides of the Atlantic, in particular as a result of a backlash by those whose interests market integration threatens. She concludes by pointing out that a single market does not flow from a constitutional text alone but 'is also shaped by business mobilization, economic and technological developments, legal choices and compensatory benefits'. They create both a jural and a regulatory State, and require compensatory policies to provide legitimacy, accountability and support for market integration.

In addition to the six themes explicitly identified by the different sections, a number of underlying issues permeate the chapters.

First, it is axiomatic that all markets need regulation to establish matters such as property rights, to deal with market failures such as information asymmetries, and perhaps to achieve other goals as well. But what is contested in the EU is who should produce this regulation: the Union or the Member States? In other words, the internal market is about the vertical division of power. It is possible to imagine both a highly centralised market with little role for national autonomy, and a decentralised market place where much of the detail is left for Member States, subject only to an obligation not to discriminate, as well as many intermediate models. They all have their distinct advantages and disadvantages in terms of economies of scale, regulatory competition, and responsiveness to differing preferences, but also for democracy and national self-determination. It appears that there is no uniform answer to this in the law of the internal market; rather the level of centralisation has varied both across sectors and across time, and not necessarily in a rational or predictable manner. In other words, it

is a dynamic, non-linear process the development of which is subject to multifarious political, legal, economic, and policy factors.

Second, the internal market is the result of complex interplay between the legislature and the judiciary. In other words, there is a question of the horizontal division of power between the different branches of government. Judicial decisions have sometimes opened the markets and the legislature has rushed in to set the rules. Sometimes it has been the other way round, with the judges reacting to the legislation, or modifying their views of the four freedoms in response to laws passed by the Council and the Parliament. Again, the different institutions have distinct strengths and weaknesses, and their roles have varied greatly. In practice, these roles are also intrinsically linked to the shifting political dynamics prevailing in the Member States. To attribute sharply compartmentalised roles to the institutions detached from this reality of integration is to ignore the dynamic institutional terrain within which decision-making occurs.

Third, the internal market contains and sometimes conceals political choices about the intensity and objectives of regulation. The internal market is not a value neutral technocratic project; its shape and contents are proper subjects of political contestation. This dimension of the level of regulation interacts in a complex fashion with the vertical and horizontal division of power. For example, a decentralised internal market that respects national autonomy might end up with highly variable levels of regulation, or the levels might be brought down or up as a result of a possible race to the bottom or a race to the top. A strong role for the Court of Justice in shaping the internal market does not necessarily translate to *laissez faire*, as Member States may respond to its rulings in ways that represent stricter rules; for example, a country might eliminate discrimination by removing the advantages it previously granted to its own nationals, or ensure the consistency and thus proportionality of its law by closing any loopholes.

The above observations illustrate the limits of an analytical attempt to pigeonhole the establishment of the internal market in sharply delineated schemes. They also highlight the constantly evolving nature of the process that underpins the development of the internal market. Finally, they raise a question about what kind of law the internal market law actually is. It has often been analysed as economic law, trade law or substantive law. But if it is truly about the division of power between the EU and its constituent units, as well as between the different branches of government, would it be better to conceptualise it as constitutional law, just like the law concerning the US commerce clause is seen as a key element of US constitutional law? This could affect the mode of analysis. It might encourage us to ask questions about issues such as democracy, accountability and power, and enrich our understanding of this area. Rather than providing an exhaustive answer to these questions, this Research Handbook seeks to highlight their increasing relevance to the dynamic process of developing the internal market.