DEPARTMENT OF LAW

Externalities of production in GVCs: An EU consumer perspective

Rebecca Ravalli

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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With affection,

Rebecca

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Villa Carlotta (Sarzana)

Summary of the thesis

This doctoral dissertation examines the EU consumer perspective on externalities of production in global value chains (GVCs). Whether as part of the discourse on development or global economic governance, externalities of production are a long-standing issue that has been problematised not only by lawyers but also by economists, anthropologists, sociologists and social scientists at large.

In the legal field, the analysis has struggled to contextualise consumer law and policy together with the peculiarities of GVCs as a distinct model of business organisation characterised by contractualisation of processes of production. The thesis argues that contractualisation of production establishes a relationship between consumers and processes of production, also in relation to externalities. Such a relation is not mirrored either by the voluntary self-regulation through which enterprises regulate externalities nor by EU consumer law. The present dissertation addresses this matter and argues that EU consumer law limits the involvement of consumers in the process of self-regulation that leading enterprises of GVCs undertake to prevent and/or remedy externalities of production and that results into a unilateral exercise of epistemic authority. The exercise of epistemic authority is favoured by a 'communication paradigm' framing EU consumer law, according to which consumer claims' on sustainability and externalities of production depend on the content of the communication consumers receive prior or via the contract. This paradigm prevents consumers involvement, in all phases of the contractual relationship, in the definition of a legal episteme of sustainability in line with the core constitutional principles and values as enshrined in the EU Treaties and constitutional charters of member states. The final part of the thesis suggests that the limits deriving by the communication paradigm can be overcome by the CJEU that, by relying on the principle of effectiveness can integrate the communication paradigm with a consumer perspective on externalities of production in the post-contractual phase.

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Introduction

1. On a personal note

The Cambridge dictionary offers two main definitions of the term 'wonder': As a noun, it indicates 'a feeling of great surprise and admiration caused by seeing or experiencing something that is strange and new'; as a verb, it means 'to ask yourself questions or express a wish to know about something'.[1] Not differing greatly from what philosophers have expressed in the past, the present research stems from a wonder and an act of wondering at the same time. After all, many philosophers have traced the connection between research (philosophy) and wonder.[2] A wonder which filled me, a young law school student at the University of Turin, when I first heard about the Rana Plaza accident which occurred on 24 April 2013. I was surprised, to say the least, to discover that some people very far away from my hometown, some young girls probably of my own age, had died while making the clothes that I, and probably many other girls of my own age living on the lucky side of the world, was wearing. The same clothes which I had purchased without any act of wondering and which I felt to be so important to send a message about my own identity, through my personal sense of aesthetics and taste. The wonder which invested me as a human being was accompanied by an act of wondering as a young law school student. While dying at the workplace is unfortunately something which occurs with a certain (and unacceptable) regularity in countries such as Italy as well, what struck me with surprise about the Rana Plaza was that what was – and still is – for me only conceivable as an exceptional circumstance – dying at the workplace – was somehow 'structural' in other environments.

In 2013, I had just recently passed the exam on labour law and international law, including human rights, fundamental rights and humanitarian law. Back then, I still had to admit to myself that I had a 'passion' for contract law, despite having picked the most difficult course on all types of contracts existing in the Italian legal order as an optional class. Contract law did not seem socially-oriented enough to admit to myself that I found it extremely fascinating, in

[1] WONDER | meaning in the Cambridge English Dictionary

[2] Plato, *Teeteto* (Franco Ferrari tr, BUR Rizzoli 2011); Aristotle and Laura Maria Castelli, *Metaphysics. Book Iota* (First edition, Clarendon Press 2018); Arthur Schopenhauer and others, *The World as Will and Representation* (Cambridge University Press 2010); Michael Funk Deckard, *Philosophy Begins in Wonder* (2011).

contrast to labour law and human rights law which nurtured my inner young and idealistic lawyer. The latter proved to my eyes and mind that the law is a powerful tool for justice enabling humankind to co-exist on earth in a way which is all in all peaceful but not to the point of not allowing society to express the natural, legitimate, inevitable and sometimes even desirable conflict resulting from living together. Obviously, the class on international law taught me about the principle of sovereignty of States, which allows them to regulate the people living within their territories more or less as they please. And if I already experienced trouble in accepting the inequalities stemming from such a random distribution of rights among human beings, it is not hard to imagine the dismay which I felt when I realised that those inequalities were very fruitful for some large corporations and, thereby, for myself. At that point in time, I started wondering how it was possible that the law did not solve this unacceptable state of affairs.

2. The main research question: How does EU law conceive the consumer perspective on externalities of production in GVCs?

From the perspective of a citizen of the EU, where certain values lie at the core of its 'constitutional' foundations, the Rana Plaza accident may look even more outrageous. When searching for the causes of the collapse, beyond immediate considerations on the low standards of workers' protection provided by the state of Bangladesh, it became clear that contracts were crucial in making the collapse possible and, in cases similar to the Rana Plaza, made effective remedies impossible. Naturally, the contract is not exclusively at fault, yet contracts undeniably play an important and crucial part in the way clothes – and all other kinds of consumer products – are made, and in the way that the 'negative effects' or 'externalities' of production, ascribable to damages to people and the environment, occur.

In all probability, the instinctive reaction to this appraisal would be that of looking at the contract with some level of repulsion and to seek solutions for externalities of production in other areas of the law, such as international law, trade law or company law. However, some deeper thinking reveals the potential of the contract as the solution to the problem as well. This conclusion is driven by a twofold reflection: On the one hand, it is reasonable to imagine that, being contract law a key element in the source of harm, the solution to the problem has to involve the contract as a legal tool; On the other hand, other areas of the law have been proved rather ineffective in solving the issue, so that contract law could appear as a new venue to experiment with different strategies. In addition, a solution in contract law would be completely

in line with the nature of global value chains, i.e., the contemporary production model based on contractual relations. As a matter of fact, global value chains (GVCs) are ultimately nothing more than a chain of contracts from a mechanical perspective. Out of the many contracts in which a GVC consists, this dissertation focuses on the 'final' one, the consumer contract. This choice was not only driven by the fewer contributions of legal scholarship on the consumer perspective but first and foremost by the wonder which was the cause of the many questions I started to ask after the Rana Plaza accident, which ultimately resulted in the research question at the origin of the present work: How does EU law conceive the consumer perspective on externalities of production in GVCs?

This relatively broad question may lead to a variety of different answers which differ in the approach underpinning the line of argumentation: in a nutshell, the different sub-research questions. The present work does not have the presumption to be complete and exhaustive in terms of the variety of approaches which could guide the answer to the main research question. The focus on the consumer perspective is in itself a choice. However, this choice is not completely arbitrary either: In the following, I present how the different sub-research questions emerged from the main one. I introduce the conceptual design developed to support the line of argument, with which this introduction is concluded.

3. The sub-research questions

To introduce the sub-research questions is actually to introduce their origins more than the actual questions themselves. The short meta-introduction has stressed the sense of wonder which, as is the case for any research, gave the impulse for the present work. However, some considerations which actively contributed to the format of the present work still need to be presented.

RQ n.1: Why do consumers matter?

The first aspect which needs clarification is the decision to focus on the consumer perspective. This choice is partially conditioned by the personal experience as a consumer of feeling complicit in the Rana Plaza accident and other similar events. However, the personal experience would not be sufficient, and rightly so, to justify the focus of a research project on consumers. The intuition originating from the personal experience was reinforced by the findings resulting from a preliminary assessment which preceded the formulation of the research question. This preliminary assessment concerned the legal tools capable to combat, prevent and/or remedy the phenomenon. The first category of measures analysed were those

taken by state entities. This stage of the study examined whether, be they the less-industrialised exporter or the industrialised Western importer, states had any interest in and/or reason for either mitigating externalities of production or, on the opposite side, letting these harmful effects be perpetrated. Drawing from the Rana Plaza accident, the study initially focused on countries such as Bangladesh and Pakistan.[3] Economies of that kind are inevitably export-oriented. Despite the more favourable conditions required by international economic law (namely, WTO rules), it is not a mystery that the poor standards in terms of working conditions and environmental protection have played their part in attracting foreign capital and production.[4] On the other side of the coin lie the industrialised countries, home to many of the corporations which have 'moved their production' to less industrialised countries.[5] If the EU is to be considered a state entity for the sake of the argument, two factors call attention: The first factor, evidently speculative and political in its nature, considers the economic interest in having EU-based corporations increasing their margins of economic profit; the second factor, no less political in nature but certainly better verifiable, concerns the apparatus put in place by international economic law through the consolidation of its rules and structure in the WTO. Sadly, this part of the debate on externalities of production is hidden behind a veil of hypocrisy which follows the rhetoric of law and development, and more broadly economic development in general, as the great enterprise of the post WWII period.

Opposite state entities we find the corporations which are leading the production process of consumer goods, i.e., those corporations which are described as leaders of GVCs. Back in 2013, the main efforts in scholarship were driven by the debate on corporate social responsibility (CSR) and due diligence.[6] The most interesting aspect of this debate was the shift from focusing on 'how the money is spent' to 'how the money is made'.[7] A brief excursus on CSR may be relevant here. Originally, CSR indicated the commitment of enterprises to invest a portion of

[3] According to the World Bank exports and imports volume index, in 2013, the value of the export volume of Bangladesh amounted to 380,374 against the value of its import volume 215,92. See Export volume index (2000 = 100) - Bangladesh | Data (worldbank.org) and Import volume index (2000 = 100) - Bangladesh | Data (worldbank.org).

[4] D Korten, *When Corporations Rule the World* (Kumarian Press 1995).

[5] Here, the inverted commas are meant to indicate that production was never *de facto moved* abroad, as is shown in depth in Chapter 1.

[6] HS Dashwood, *The Rise of Global Corporate Social Responsibility* (Cambridge University Press 2012).

[7] C Witting, 'Liability for Corporate Wrongs' (2009) 28 University of Queensland Law Journal 113; Dashwood (n 6); S Deva and D Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013); C Wickert and D Risi, *Corporate Social Responsibility* (Cambridge University Press 2019).

their profit into philanthropic efforts, as a way of 'embedding' themselves in society.[8] This approach was notoriously criticised by Milton Friedman, who convincingly argued that the ends pursued by CSR fell under the competence of the government, and therefore of the public authority.[9] Despite the meaning of CSR shifting over time, Friedman's criticisms influenced the evolution of CSR and the conception of the role of businesses in society in general. As long as businesses respect local laws in their operations, they should not be expected to allocate resources for objectives which lie beyond the increase of profit. This creed got more and more difficult to maintain with the increase of cross-borders activity by corporations, and the decreased capacity of governments to regulate such activities. A compromise was reached by accepting the voluntary self-regulation of enterprises. This arrangement had the advantage of leaving businesses enough room in their activities so as not to compromise their freedom of business while reassuring public and social constituencies of the commitment by enterprises to be conscientious of 'how the money was made'. This compromise produced the outlook of CSR which we see today, largely consisting in soft law tools such as codes of conduct and voluntary standards. Under the renewed terminology of sustainability policies or voluntary sustainability standards, CSR is today still the main tool to prevent, and sometimes even to remedy, externalities of production processes. In this landscape, it is not clear why accidents such as the Rana Plaza one keep occurring with a considerable regularity. Not only do they keep happening, but victims of the accidents struggle to receive compensation for the damaged suffered. As a matter of fact, certain limitations to the effectiveness of self-regulatory tools, such as those in the CSR approach, become evident: Among these limitations, first and foremost, there is the use of contracts to organise the production process through GVCs. The use of contracts creates a major issue when it comes to CSR/sustainability policies: the transfer of the responsibility to comply with the voluntarily assumed obligations to suppliers. In the instance of Rana Plaza, this would translate to a primary responsibility of the Rana Plaza factory owner and manager, rather than of the corporations commissioning the goods to be produced in the factory. The story of Rana Plaza is well-known to have had slightly different results, with victims being compensated and corporations entering into the Accord on Fire and

[8] This actually held true mainly in the US, while the emergence of responsible conduct in businesses followed a different dynamic in countries with stronger labour law protection and presence of trade unions. For an overview of the different approaches and their evolution, see HW Micklitz, 'Organizations and Public Goods' in S Grundmann, HW Micklitz and M Renner, *New private law theory: a pluralist approach* (Cambridge University Press 2020).

[9] M Friedman, 'A Friedman Doctrine-- The Social Responsibility of Business Is to Increase Its Profits' *The New York Times* (13 September 1970).

Safety Building.[10] However, at least from this perspective, the Rana Plaza represents an exception rather than the rule. Another reason for the ineffectiveness of CSR/sustainability policies is the reliance on auditing schemes to verify the compliance of factories with the policies: Many obstacles are present to reliability of auditing, including corruption and language obstacles. Faced with the frustrated efforts by different actors and stakeholders, the search for an answer reasonably turned into a different question: how about consumers? Boycotts have proved to be rather effective in some instances. Therefore, consumption must be a driving force of the system. However, the emergence of this question was not exclusively driven by mere 'regulatory strategy'. Not only may consumers be considered a pull factor for the particular regulatory matter at stake, but they also reside in countries with the highest regulatory standards in terms of social and environmental protection. Besides considerations of unfairness which may follow from this appraisal, a further consideration concerns consumers expectations about production processes. Some consumers are certainly more proactive in their search for information on the production processes, but many of them, and probably most of them, are not. Is it reasonable that they assume that a product respects the same high standards of production, at least with regard to respect for basic fundamental and workers' rights, of their home country? Hugh Collins has underlined how the assessment on conformity of goods progressively relies more on consumers' expectations than on the seller's promise.[11] Using a different formula – i.e., not mentioning consumers' expectations –, the new Sale of Goods Directive,[12] with its introduction of the criterion of 'objective conformity', may lead to similar conclusions to those advanced by Hugh Collins. Be that as it may, interest for the consumer perspective on production processes follows from all the above evaluations.

Let me now clarify a point before I move on to the further sub-research questions. In the present dissertation, the expressions 'sustainability' and 'externalities of production' are used interchangeably. The choice is motivated by the appraisal that many of the obligations assumed in voluntary sustainability policies translate to the application of rights, principles and values which are usually included in national or supranational constitutional charters of the industrialised countries where consumers reside, especially with regard to the 'social' character

[10] Accord on Fire and Safety Building in Bangladesh 2013.

[11] H Collins, 'Conformity of Goods, the Network Society, and the Ethical Consumer' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

[12] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

of sustainability. The term sustainability has in fact acquired popularity over the past decade for its comprehensiveness of environmental, social and economic aspects of human activities; it is also less politically contaminated if compared to previous terminology employed to indicate analogous or identical matters.

That being said, it is now time to introduce the next sub-research questions which gave shape to the present work.

RQ n. 2: What is different in GVCs as compared to previous production organisation models? What is the role of the contract in this organisation model?

Generally speaking, GVCs and consumer law are two scholarly domains which do not interact much. Even the first authors to analyse the network of contracts, of which GVCs may be considered an example, left consumers out of the analysis.[13] The literature on GVCs is much more focused on the structure of the business organisation and the dynamics between business actors. The term GVC itself indicates the creation of 'value' in the production process, and the dynamics underpinning it, as opposed to the more general term of global commodity chains (GCCs). Literature on GVCs is therefore more focused on the governance aspects of this specific mode of production, with little interest for the role of consumers beyond their capacity to 'drive' – i.e., motivate – the production.[14] Naturally, externalities of production are an issue of long standing. In recent years, the contractual nature of GVCs has caught the eye of private lawyers. Following the focus on the 'structural' characteristics of GVCs, the attention of private lawyers has been drawn mainly to liability of corporate entities in GVCs,[15] with a particularly intense debate on human rights violations.[16] However, GVCs presents specific limits for tort law effectiveness as well when it comes to providing remedy to victims of the harm (without considering environmental harm, which has its own complications when it comes to judicial

[13] G Teubner, M Everson and H Collins, *Networks as Connected Contracts* (Hart 2011); M Amstutz and G Teubner, *Networks : Legal Issues of Multilateral Co-Operation* (Hart Publishing Ltd 2009).

[14] G Gereffi and GG Hamilton, 'Global Commodity Chains, Market Makers, and the Rise of Demand-Responsive Economies' in J Bair, *Frontiers of Commodity Chain Research*; J Bair, *Frontiers of Commodity Chain Research-Stanford University Press* (Stanford University Press 2008).

[15] Basil S Markesinis, 'An Expanding Tort Law - The Price of a Rigid Contract Law' (1987) 103 Law Quarterly Review 354; GP Fletcher, *Tort Liability for Human Rights Abuses* (Hart Publishing 2008); Witting (n 7); LFH Enneking, *Foreign Direct Liability and beyond : Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing 2012); J Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies'.

[16] P Alson, *Non-State Actors and Human Rights* (Oxford University Press 2005); J Dine, *Companies, International Trade and Human Rights* (Cambridge University Press 2005); A Clapham (ed), *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).

representation).[17] This suggests that any discourse on externalities of production in GVCs must consider the idiosyncrasies of GVCs:[18] As a result, a reflection on the consumer perspective on this matter cannot fail to perform an analysis of the functioning and structure of GVCs as a specific form of business organisation. The second sub-research question precisely relates to this aspect.

RQ n. 3: In what manner and under which terms are consumers connected to GVCs and how do these terms affect their capacity to express their dissent from unsustainable practices of production, i.e., externalities of production?

The third sub-research question, following the analysis of GVCs, concerned EU consumer law more specifically. From a strictly formalistic perspective, consumer law intrinsically offers a limited set of remedies to consumers who expect to consume sustainable products.[19] The limitations are multi-fold: a) the focus on product characteristics rather than production quality; b) the reliance on the pre-contractual phase; c) the reliance on a communication paradigm, which is further explained in the following paragraphs. This limited scope of law text may find an explanation in the origins of consumer law, and its resulting academic and judicial development. Its origins lie in the framing of consumers as weaker parties of a contractual relationship: This is essentially understood as an exception to classical contract law which assumes equality between the parties, particularly in their bargaining power. In the context of EU consumer law, the debate has divided in two main strands: the first strand looks at the impact of consumer law on the process of EU integration, while the second strand looks more specifically at the impact of EU consumer regulation on consumers. The former strand includes work on the attempts to harmonise and consolidate the private law rules resulting from consumer law, such as the Principles of European Contract Law, first, and the Common Frame of Reference, later.[20] The latter strand includes most of the scholarship which has criticised

[17] Cees van Dam, 'Transnational Tort Law' in Peer Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021).

[18] KH Heller, 'Is "Global Value Chain" a Legal Concept? Situating Contract Law in Discourses Around Global Production' [2020] European Review of Contract Law.

[19] There is not clear agreement on what 'sustainable product' really refers to: sometimes to durable products, sometimes recyclable products, sometimes upcycled or recycled products, sometimes products produced in a sustainable way, sometimes a mixture of all of the above. In this specific instance, it refers to goods produced in a sustainable manner.

[20] N Jansen and R Zimmermann, 'Restating the Acquis Communautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law' (2008) 71 Modern Law Review 505; G Howells, 'European Contract Law Reform and European Consumer Law – Two Related But Distinct Regimes' (2011) 2 European Review of Contract Law 173.

consumer law for being too much market-oriented and not enough directed at reflecting welfarist concerns belonging to proper consumer policy making, such as those brought about by considerations of fairness and distributive and social justice.[21] Evidently, the strands are interconnected as criticisms have been directed at the instrumentalisation of consumer law for purposes of market liberalisation which emerged in the European context, according to the authors. The second strand also provided a reflection on the concept of the consumer, and more particularly on the inadequacy of the relative legal constructions to include all varieties of identities which consumers can have. This inadequacy has produced a further fragmentation within the identification of different categories of consumers, specifically the vulnerable and the confident consumer.[22]

The present dissertation presents a somewhat similar, yet different, argument. It shares the critical perspective on the inadequacy of consumer law to capture different 'images' of consumers, and particularly on how the legal construction of the consumer reflects neither the 'responsible' nor the 'average' consumer when it comes to sustainability. At the same time, it differs to the extent that it contextualises the consumer in the broader picture of the production system. More specifically, the present work addresses the discrepancies between the current paradigm of EU consumer law and the *active* participation of consumers in the production system of GVCs. At least in its statutory form, consumer law tends to represent consumers as rather passive actors in both the phases preceding and those following the conclusion (and execution, where applicable) of the contract: EU consumer law conceives of the consumer as the mere and final recipient of products, services and rights. The space for active consumer participation is very limited if not non-existent. In the present work, the notion of 'active consumers' does not refer to consumers who engage in cross-border transactions, but rather to consumers who, even in the post-contractual phase, wish to raise their voices with respect to

[21] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 European Law Journal 653; H Miur-Watt and F Cafaggi, *Making European Private Law* (Edward Elgar Publishing 2008); G Howells and T Wilhelmsson, *EC Consumer Law* (Darthmouth 1997); G Howells, I Ramsay and T Wilhelmsson, 'Consumer Law in Its International Dimension' in G Howells, I Ramsay and T Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010); HW Micklitz, 'The Relationship between National and European Consumer Policy' in C Twigg-Flesner and others (eds), *The Yearbook of Consumer Law 2008* (Ashgate 2008); C Twigg-Flesner, 'EU Law and Consumer Transactions without an Internal Market Dimension' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU law in Private Law Relationships* (Hart Publishing 2013); U Mattei, *The European Codification Process: Cut and Paste* (Kluwer Law International 2003).

[22] See the contributions in D Leczykiewicz and S Weatherill, 'The Images of the Consumer in EU Law', *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

different aspects of the transactions which the law may not have taken into consideration.[23] This is in contrast to not only the increasing aspiration and awareness of consumers with regard to externalities of production but also the decisive function which consumers have in the specific production model brought about by GVCs, where consumption is reproached to production through the contractualisation of production processes typical of GVCs. The consequences of the construction of the consumer as a passive actor in the production system are quite significant in framing the consumer perspective on externalities of production: The lack of regulation on these matters in the form of mandatory rules indirectly confers the function of private regulatory tools to contracts in GVCs, on account of which production processes – and their sustainability features – are organised and managed by the leading corporation of the GVC. The way in which self-regulation unfolds in GVCs, combined with the passive character of consumers as designed in EU consumer law, restricts consumers' capability to express their concerns about issues related to externalities of production, in the ex-ante as well as the ex-post contractual phase.[24] The passive character of the consumer, combined with the self-regulatory capacity of actors in GVCs, has another effect which concerns the 'episteme' of the sustainability concept, and therefore of externalities of production. To the extent that consumers are passive actors in GVCs, at least from a legalistic perspective, and externalities of production are regulated at the private level through self-regulatory tools, the consumer perspective on such externalities is indirectly framed by how the self-regulatory tools define and regulate the externalities. In other words, the legal concept of sustainability – and the relevance of externalities of production –which the consumer must also rely on, is one determined by each and every leading corporation of a GVC through the self-regulatory tools adopted by the company. This result is addressed as an exercise of epistemic authority in the present work.

It follows that, in order to appreciate the limited perspective of consumers on externalities of production, consumer law cannot be examined independent from the characteristics of GVCs, and specifically from the role and understanding of contract in this production organisation model.

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[23] For an understanding of consumer law as the law of passive market actors, see HW Micklitz, N Reich and P Rott, *Understanding EU Consumer Law* (Intersentia 2009).

[24] The view of self-regulation adopted in this work builds on F Cafaggi, 'Self-Regulation in European Contract Law' (2007) 1 European Journal of Legal Studies 163; F Cafaggi, 'The Regulatory Function of Transnational Commercial Contracts: A NEw Architecture' (2013) 36 Fordham International Law Journal.

RQ n..4: Which avenues are open to consumers?

Rather than suggesting the introduction of new rules and rights for consumers with respect to their capability to address externalities of production, the final research question takes a leap of faith and queries whether any avenues are already open to consumers, and if so, what they consist in. The tenet in this sense is that EU law is rich enough to provide the means for providing consumers with the opportunities to express their perspective on externalities of production.

The argument in the present work is presented by relying on three main concepts: externalities, communication and epistemic authority. In the following paragraphs, I will introduce and further develop these three key concepts.

4. The conceptual design

The evolution of industrial organisation from the model of the firm to the fragmented model of GVCs offers the background against which the argument is examined. The fragmentation through contractualisation of GVCs is the decisive element of the broader picture which affects the relation between production and externalities as well as production, and finally consumers. The production organisation through contracts gives GVCs' leaders the opportunity to monitor the industrial production on the one hand, and relations with consumers through market communication claims on production processes on the other. In such a model of organisation of production, contracts represent the operational tool through which leading companies of GVCs regulate their own activities and related externalities. The contractualisation shapes the allocation of responsibility for externalities of production vis-à-vis victims of the externalities as well as consumers. Through contracted production, companies leading the value chain transfer the responsibility of compliance with obligations – from public and private sources – to the suppliers and sub-contractors which perform the specific fragment of production. By transferring said obligations, contractualisation has caused the proliferation of malpractices and externalities of production in countries with high regulatory standards as well. A few years ago, an article in The New York Times revealed that luxury brands used domestic workers in southern Italy:[25] These workers, usually female tailors, work in a grey area of Italian labour law, thanks to the contractual nature of the production process. This proves that GVCs

[25] Lucchetti D, 'Inside Italy's Shadow Economy - The New York Times' <https://www.nytimes.com/2018/09/20/fashion/italy-luxury-shadow-economy.html>.

contribute to making the issue of externalities of production and social sustainability a wider issue which is not exclusive to fast fashion, and affects both more and less developed economies.

The present work takes a close look at the consumer perspective on externalities of production: In order to illustrate this perspective, the analysis builds on crucial concepts concerning the body of European consumer law and the restrictions to consumers' involvement in the delineation of the notion of sustainability in line with principles and values protected in the EU legal order. The conceptual design is based on three main concepts: externalities, communication and epistemic communities.

4.1. Externalities – The Effect

The term externalities has been coined in the economic arena in order to refer to those costs which are not borne or compensated by their producer. Externalities can also be positive, meaning that the beneficial effect of an action is enjoyed by a different subject than the author of the action. The present work, however, only takes into account negative externalities. One classic example is that of the industry which pollutes a river, thereby creating damages which are suffered by the neighbouring actors who have a stake in the quality of the river water, such as, for example, farmers who irrigate their fields with water from the river and who have to find new methods of irrigation which might be more costly because of the decreased quality or safety of the water. The problem is posed in terms of compensation following the economic reductionism of every action to a cost. As such, the matter does not conceive of the normative aspects which justify the desirability of maintaining the good – the river – in a sound condition. From the perspective of the economic analysis of the law, the input which law provides to solving the issue through the distribution of property rights and liabilities, is only relevant insofar as a cost can indeed be attributed to every action.[26] The costs associated with the negotiations on compensation for externalities are defined as transaction costs, and have been the object of study from the mid-twentieth century. When the externality remains uncompensated, markets experience a failure, meaning that their performance is substandard according to a given definition of market efficiency, and therefore some market actor is in the worst condition. As a result, reducing transaction costs is a key element in increasing the economic market optimality. Negative externalities can also result from a contractual

[26] RH Coase, *The Problem of Social Cost* (Economica 1960).

agreement: in this sense, externalities can be conceived as negative effects of contracts which cause a loss to subjects that are not part to the contractual agreement, as in the case at stake. In economic theory, externalities should be compensated by an additional market transaction aiming at internalising its cost. However, this is not always feasible, either because of the cost of such additional transaction or because of structural obstacles.[27] In the context of the present research, externalities are understood as all those violations of internationally recognised social and environmental standards which occur in the context of GVCs and affect the rights of workers and individuals as well as the environmental and available resources at large. In GVCs these negative effects are the result of single contracts and/or of the aggregation of the contracts of the chain, including the consumer contract. Hence, the adopted consumer perspective does not intend to suggest that consumers are at any point or level to be considered as victims of the externalities. On the contrary, consumers contribute to the causation of externalities insofar the consumer contract they enter is connected to the chain that is ultimately producing the negative externalities on third parties. However, regardless of whether consumers can be labelled as 'responsible consumers', their participation in the co-causation of externalities is unintentional. Their involvement in the causation of externalities should however not be considered to prevent their perspective from being normatively relevant. The analysis of Courage[28] shows in fact that, given certain conditions, the participation to a contract that produces externalities does not prevent one of the parties to have a claim against the effects produced by that contract. Although consumers do not bear the cost of externalities directly, they may still have an interest in addressing the negative effects produced by their contracts to the extent the causation of the externality is unintentional and is against values and principles established in EU Treaties and relevant constitutional charters of the legal order where the consumer operates.

One key difference between externalities in GVCs and the example of the polluted river waters is that, whereas the instigator of the harm is easily identifiable in the latter case, such is not the case GVCs, where the fragmentation of production stages makes it hard to detect the responsible actor. The practical implementation of this theoretical framework has produced particularly severe effects in some industries which have witnessed massive production externalisation in the past 30 years. The garment industry, being such a market, is quite illustrative of how externalities unfold in GVCs, and therefore has been chosen as a benchmark

[27] Guido Calabresi, Transaction Costs, Resource Allocation, and Liability Rules: A Comment, 11 J. Law & Econ. 67, 68 (1968).

[28] C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd et al ECLI:EU:C:2001:465

for this dissertation through the study of Levi Strauss. The denim brand not only has undergone a process of transformation from the model of the firm to that of a GVC, but has also been traditionally quite active in addressing externalities of production.

If we apply the example of the polluted river to the stages through which the industrial organisation of Levi Strauss has evolved from its foundation, we find that the simple model of the clear attribution of property rights – and thereby the plain design of liability rules – fits the first two stages of industrial organisation, i.e., the model of the firm and multinational corporations, but not the third one, that of GVCs. This frustrating factor is demonstrated by the filing of some lawsuits for workers' rights violations occurring in Levi Strauss' GVC. Those lawsuits have addressed Levi Strauss rather than Tan Holdings corporation, which was the supplier owning the factory where the abuses had been committed. In the same vein, the measures adopted in order to internalise the externalities occurring during the jeans manufacturing process – the ToEs – have been adopted and designed on Levi Strauss' initiative, and not on that of any among the hundreds of its suppliers. This engagement to the production impact reduction by the brand rather than the direct manufacturers corresponds to the idea that the fragmentation of the productive process in GVCs does not mean a complete disregard for the issue of the company which acts as the chain driver and which gives the products its brand signature.[29] However, the dissertation shows how the production fractionalisation in GVCs is one of the major reasons for the impairment of the effectiveness of the mechanisms designed to ensure the internalisation or prevention of externalities. This impairment is caused by the fragmentation as well as the avoidance of territorial authority through the externalisation of the manufacturing processes to suppliers located in countries with less stringent labour, environmental, and energy regulations.[30]

4.2. Communication – The Tool

Contractualisation of GVCs produces its effects not only on suppliers but also on consumers, especially with regard to sustainability claims made by enterprises. This is made possible by what the present dissertation defines as the 'communication paradigm'. This paradigm mainly has the effect of limiting the scope of consumers' claims to the communication consumers

[29] G Gereffi, 'International Trade and Industrial Upgrading in the Apparel Commodity Chain' (1999) 48 Journal of International Economics 37; G Gereffi, J Humphrey and T Sturgeon, 'The Governance of Global Value Chains' (2005) 12 Review of International Political Economy 78.

[30] The escape from stringent regulation has caused the discontent in civil society which has resulted in campaigns and boycotts pointing the finger at the companies rather than the suppliers.

receive in different contractual phases: the pre-pre contractual phase, the pre and contractual phase, and the post-contractual phase.

By outsourcing production, leading brands in GVCs have remained chiefly responsible for communication of their sustainability practices rather than for the effectiveness of the measures adopted. Communication is a crucial concept to illustrate how the contractualisation of GVCs affects the perspective of consumers on production sustainability. The reason why communication is so crucial is that, in contract law, communication contributes to the creation of the mutual obligations which the parties assume. Not all communication is a source of obligation: Different contract theories have progressively defined the set of communication tools which have a regulatory relevance for a contractual relationship. In EU consumer law, the counterfactual to the obligation is the extension of claims deriving from the contractual relationship: Evidently, communication is also fundamental in delimiting the scope of a party's claims. In this regard, consumer law relies on communication – more so than classical contract law –, to the point that a 'communication paradigm' can be identified in EU consumer law. The communication paradigm is broader in its scope, incorporating the more familiar 'information' paradigm. The information paradigm revolves around the necessity to re-calibrate the misalignment between the parties with regard to the information in their possession. This misalignment is to be corrected to the extent that it undermines the exercise of private autonomy by the party with less information, that is, the consumer. In this sense, the information paradigm centres on the pre-contractual phase, including the pre-pre contractual phase where consumers are exposed to advertising practices, of the contractual relationship with classical contract law as the inspirational (and aspirational) model. The communication paradigm looks at the pre-contractual phase and its dynamics in the post-contractual phase: In EU consumer law, it looks at how the pre-contractual stage defines the scope of claims which are available to consumers. From this perspective, the communication paradigm is not limited to information requirements but rather encompasses information duties as well as a wider range of communicative practices, such as advertising, pre-contractual information and the contractual clauses themselves. The dynamics between the pre- and post-contractual phases of consumer contracting reveal that consumer contract law is a vehicle to achieve regulatory outcomes and objectives which did not belong to classical contract law or, when that was the case, they were pursued through reference to general principles and clauses. The communication paradigm is interdependent with the contractualisation of production processes, especially for matters such as sustainability and externalities of production which lack a public source of binding regulation. How the interdependence unfolds is crucial for the

illustration of the consumer perspective on sustainability in contractualised production of GVCs. This interdependence is responsible for the transformation of consumer contract law from a contractual model based on bi-lateral communication to a model based on reflexive communication. Contrary to the bi-lateral communication of classical contract law, reflexive communication does not give consumers the faculty of directing their claims against a scope which they have been involved in creating. Reflexive communication rather produces the opposite results for matters of production processes: The substantive scope of consumer claims is defined in negative, on the basis of the communication which consumers have received prior to the contract.

4.3. Epistemic Authority – The Legitimacy and the Responsibility

The notion of epistemic authority finds its origins in the juxtaposition between practical authority and theoretical authority, where epistemic authority corresponds to the meaning of the latter.[31] The two concepts traditionally differentiate themselves in the 'reason' which motivates a subject to act. While both kinds of authority 'give reason' to act, epistemic authority provides a reason for belief in the first place, which may then trigger an act. The reason for belief stems from the expertise of the subject vested with epistemic authority. In other words, epistemic authority is traditionally intended as 'authority resting on epistemic elements'.[32] In the legal field, subjects which are typically recognised as holders of epistemic/theoretical authority are judges and other professionals who possess a thorough competence in a certain field of knowledge.[33] The notion has often been employed in the field of international law, where the vagueness of legal concepts and their often non-binding nature has drawn scholars' attention to the actors exercising authority with respect to the interpretation and definition of key concepts in international law.

The connotation given to 'epistemic authority' in the present work is however different. It refers to a kind of practical authority which produces epistemic consequences. This approach aims at shedding light on the effects of the exercise of private authority for the construction of an episteme which has legal and normative implications. By shaping their sustainability

[31] AJ Simmons, *Boundaries of Authority* (Oxford University Press 2016).

[32] K Klabbers, 'The Normative Gap in International Organizations Law' [2019] International Organizations Law Review 272.

[33] PM Haas, 'Introduction_ Epistemic Communities and International Policy Coordination' (1992) 46 International Organization 1.

policies, GVCs regulate externalities of production. This self-regulation model assumes legal and normative relevance (for both suppliers and consumers) through the contracts which found the GVC. One of the problematic outcomes of such a form of self-regulation is that contractualisation enables companies leading the GVCs to apply a form of reflexive-governance with regards to externalities of production. This form of reflexive governance is characterised by the possibilities for companies to select the scope of their commitment to sustainability, thereby deciding which and to what extent specific externalities are addressed. The instrumental use of contracts to perform such a form of governance adds another layer to the issue, insofar the voluntary commitments taken by companies are translated in the form of contractual obligations with suppliers. Ultimately, the source of authority lies in the contracts which create the GVC, rather than in an alleged expertise and competence in the field, while the epistemic result relates to the construction of the legal meaning of sustainability. In line with the recognition of a form of reflexive governance in GVCs with regards to externalities of production, the idea of epistemological constructivism and epistemic authority employed throughout the text is borrowed from the conceptualisation formulated by system theorists and specifically by Gunther Teubner (and Niklas Luhmann to the extent Teubner's work relies on his work).[34] Their particular understanding of epistemological constructivism is of relevance to the work insofar the self-regulatory capacity of GVCs with regards to externalities of production can be framed as a form of reflexive governance. In this sense, the contracts forming the chain are the operational tool through which reflexive governance is legally performed. The lack of an external legal concept of sustainability (and therefore of the substantive characteristics of externalities of production) results into a construction of the legal and normative scope of sustainability which remains inherent to the mechanisms of reflexive governance (and reflexive communication) performed in GVCs. As a result, while a company may attribute to its products and activities the generic label of 'sustainability', the scope of the specific characteristics underpinning such an attribution will be commensurate with the objectives of the economic activity carried out by the leading company. With regard to consumers, the exercise of epistemic authority by the chain leader finds its reason in consumer contracts which, together with other communication tools, provide the frame for the exercise of authority. In this sense, the notion of epistemic authority is here a kind of practical authority

[34] G Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (Social Science Research Network 1989) SSRN Scholarly Paper ID 896502; N. Luhmann, Law as a Social System (Oxford University Press 2004).

which is combined with a constructivist approach to the creation of knowledge.[35] Pointing at the reflexivity of the construction of legal knowledge, the constructivist approach of systems theory is borrowed as a tool to deliver the argument of the present work, which, however, does not aim at engaging with the larger debate on constructivist epistemology and/or its boundaries with ontology. Nonetheless, chapter 3, where the concept of epistemic authority comes into play, elaborates further on the advantages of referring to system theorists' approach to epistemology and specifically on why this approach has been preferred over Foucault's elaboration on epistemology. All in all, the notion of epistemic authority should be taken as an interpretative tool throughout the reading of the work.

5. Structure of the argument

The argument advanced in the present thesis unfolds over four chapters: Each chapter contributes to the progressive delineation of the consumer perspective on externalities in GVCs.

Chapter 1 introduces a narrative on the evolution of the production modes from the Industrial Revolution until present times. The narrative uses the case study of Levi Strauss to delineate three phases in the evolution of production systems. The subject of the case-study is chosen from the garment sector for two main reasons: The first is that this sector has been one of the first to manifest the transformation of its production processes into GVCs; the second reason is that the garment industry has come under the spotlight for the externalities of production which it produces, especially in less industrialised economies. From this perspective, Levi Strauss, as the oldest maker of the blue jean, provides an excellent example from the garment sector, not only with respect to the transformation of production processes but also for highlighting the changing approach to externalities of production through the production transformation. The chapter identifies three main phases, each with a corresponding production model: Phase I (1870-WWI) corresponds to the model of the firm, Phase II (end of WWII-1990) saw the affirmation of the multinational corporation, while Phase III (1990 -) brought about GVCs as the main production mode. The shifts from one phase to the other have been triggered by changes in three main correlates: geography, technology and institutional settings. The chapter largely builds on sociologists, anthropologists, economists and historians, who have explored themes such as economic development, economic geography, and economic

[35] G Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (Social Science Research Network 1989) SSRN Scholarly Paper ID 896502.

governance. The departure from strict legal analysis is necessary as a preliminary step to understand GVCs as an 'order'.[36] The law's tendency to dissect each and every contractual relation forming the chain prevents a legal understanding of GVCs as a 'system' (or as a unitary legal concept),[37] a view which is instead possible to grasp by relying on other social sciences. One of the key sections in the chapter is the focus on the contractualisation of production which is typical of GVCs. The progressive contractualisation reveals the changing approach to externalities of production on the one hand, while it offers the background for a different understanding of the consumer role in the production system on the other. Therefore, the main message of the overview on the evolution of the production system is to highlight the increased relevance of the contract for business organisation, including consumer contracts.

Chapter 2 introduces the theme of externalities of production and frames the connection between them and the legal field. Starting from the Terms of Engagement of Levi Strauss – i.e., the voluntary measures adopted by the company to prevent and, in some cases, remedy the externalities of production –, the chapter shows that externalities of production correspond to effects which are in contrast with the core rights, principles and values established at the international and national level with the highest juridical standards of protection. As a matter of fact, externalities often derive from violations of human rights, labour law, environmental law and the like. All these subjects more often fall under the aegis of sustainability laws and policies today. In the light of this relationship between externalities and sustainability, Chapter 2 continues by exploring the measures taken over time in order to confront and combat externalities of production and favour sustainability. This analysis is conducive to the apprehension of the progressive move from regulation to self-regulation by companies, which is a key finding with respect to the consumer perspective on externalities of production, the topic of Chapter 3. Before introducing said matter, however, Chapter 2 explores the reasons for the shift from regulation to self-regulation by analysing the changing attitudes in economy and politics of trade, and contract and production before and in GVCs. The core message of Chapter 2 is that the emergence of self-regulation is also the result of a degeneration of the state from exercising regulatory authority in transnational matters. Combined with the findings

[36] The intended meaning is that of the notion of 'order' as distinguished from 'system' as illustrated by Culver and Giudice. Referring to EU law, the authors see the idea of 'order' as indicating 'a variety of contingencies associated with institutions of law [such as contracts] and legal institutions' as opposed to the 'system' concept. I subscribe here to the view of GVCs as an order rather than a system to the extent that the concept of 'legal system' refers to state-based law, characterised by hierarchies and authority which are territorially determined on the basis of scope. See K Culver and M Giudice, 'Not a System but an Order' in J Dickson and PZ Eleutheriadēs (eds), *Philosophical foundations of European Union law* (First edition, Oxford University Press 2012).

[37] Heller (n 18).

of Chapter 1, Chapter 2 highlights the discrepancy between the importance of consumers in the functioning of GVCs and their absence from determining the extent and quality of externalities of production regulation.

Chapter 3 introduces the two remaining key concepts of the present work: communication and epistemic authority. In the EU context, the lack of consumer participation in the externalities of production regulation is argued not to be compensated by EU consumer law. On the contrary, EU consumer law builds on a communication paradigm, whereby the extent of consumer claims is largely determined by what is communicated to consumers before and in the contractual phase. The chapter walks through the communication tools present in the pre-pre contractual, in the pre and contractual phase and in the post-contractual phase. By applying these tools to the issue of externalities of production, the chapter shows that, combined with the lack of regulation regarding sustainability, the lack of consumer participation leaves the determination of the 'sustainability' concept to leading corporate actors of GVCs, who are free to decide what to include in and exclude from their sustainability policies. In this way, the extent of consumer claims with regard to externalities of production is preliminary framed by self-regulating private actors who, in this respect, may be considered epistemic authorities. What they define as 'sustainability' determines, in fact, what is also *legally* understood as 'sustainability' for consumers, regardless of whether the overall system implemented in the GVC violates some of the core constitutional principles of the EU and its national constituencies.

Chapter 4 illuminates this obscure picture by investigating the potential of communication in the post-contractual phase as at the Court of Justice of the European Union (CJEU). The Chapter builds on selected case law where the dynamic interpretation of the Court has brought about an *integration* of the communication paradigm with a consumer perspective, regardless of whether the case was brought by a consumer. The legal epistemes emerging in GVCs have the capacity for coherence and legitimacy only when they can be integrated with a consumer perspective: This opportunity occurs in an ex-post phase and the Court – the CJEU – is argued to be the trigger of this integration process Through this integration, the communication paradigm is therefore *supplemented* by and integrated with the consumer perspective with regards to concerns for sustainability and externalities of processes of production. This, however, does not mean that the consumer perspective equates to the perspective of responsible consumer. The work does not aim at addressing only a portion of consumers. On the contrary, it suggests that all consumers shall be given the opportunity to act responsibly. This is in line with the recognition that not all consumers are in the position to behave responsibly, first and

foremost because of different levels of education and literacy. However, consumers who are less aware should not be assumed to be willing to take the risk to cause an externality through their consumption. In this sense, the argument here presented embraces all categories of consumers, whose perspective is not sufficiently considered in GVCs self-regulatory practices. At the same time, the argument is also built in a way that makes the "responsible perspective" of consumers the only perspective that is normative relevant to the extent that such a perspective is the one aligned with rights, principles and values protected and promoted by constitutional charters and EU treaties.

The Chapter also explores the attitude of the CJEU towards contractualisation, and how contractualisation has triggered the use of the effectiveness principle of EU law in some instances in order to counteract the obstruction of EU principles and law by circumstances of contractualisation. The Chapter does not have the ambition to give expression to a generalised rule of the Court: It only aims to explore the potent of post-contractual communication where the consumer perspective on externalities of production can be integrated with the one imposed by leading corporations by means of their epistemic authority. The judicial forum not only offers the possibility of an integrated communication through a bottom-up approach but it also enables the confrontation between self-regulation and the core values which inspire EU law, both at its supra-national and national level to the extent that these values correspond to those established in national constitutional charters. Finally, the conclusion proposes some additional reflections not fully developed in the core chapters which offer some positive outlook for future developments.

Chapter 1

The Contractualisation of Production Processes

1. Introduction – The consumption society

In 1965, Publisher Julliard brought out George Perec's debut novel: *Les Choses* (initially subtitled 'Une histoire des années soixante'). The French sociologist begun his career as a novelist telling a story of a young couple living in Paris during the 1960s. Jérome and Sylvie, the couple of the story, compensate the absence of ideals and aspirations in their lives with the accumulation of objects, of things, overflowing their small Parisian apartment. The main characters of the story crave materially and intellectually richer life conditions. However, the lack of principles enlightening and guiding their existence leaves them without a purpose in life besides the accumulation of physical objects, which, in turn, leaves them frustrated and dissatisfied with their life to the extent that they migrate to Africa looking for an escape from the empty redundancy of their purposeless everyday life.

Well written, the novel provides a snapshot of Western European society during the 1960s, following in the footsteps of those intellectuals who voiced harsh criticisms of what gained the label of a 'consumer society' in those times.

As Frank Trentmann describes in his book, *The Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-first,*[38] the 1960s marked the rise of consumerism, a term which defines a particular relationship between individuals and the objects which they surround them with in their lives. One trait of consumerism, which defines it as a distinctive phenomenon not comparable with any other moment in history, is the accumulation of objects and things as well as the detachment between the procurement of objects and the needs which those objects would serve to satisfy.

The impact which this new social paradigm has on the environment and on society has been denounced on many occasions. Often, the debate is settled for the conclusion that we must consume less in order to avoid the negative consequences which the abnormal quantity of

[38] F Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (Harper Collins Publishers 2016).

goods production – and services offered – have on our planet and people. This conclusion is hard to negate even if it seems far from being accomplished or accomplishable by any means.

The aspiration in this chapter is neither to challenge this conclusion nor to advance a different perspective. Rather, instead of focusing on the elusive characteristic of consumerism, this chapter draws attention to the production side of the phenomenon by describing the evolutionary stages which have transformed the model of industrial organisation in the past century. Each paradigm of industrial organisation is shown to correspond to a different employment of the instrument of the contract, which is argued to take on a key role in the structure of contemporary political economy, and a different type of externality.

1.1. Three Phases of the Consumption Society

The twentieth century can be divided into three phases: a first phase covering the years from the Industrial Revolution to the beginning of the First World War (Phase I), a second phase starting from the end of the Second World War to the 1990s (Phase II) and a third phase beginning at the end of the century and still ongoing (Phase III).

The production organisation in Phase I revolved around the idea of the firm, institutionally relying on the concept of ownership. At this stage, contract and contract law had no particular function in the realisation of the institutional setting of production. The firm was the owner of the factories making the products. In this context, the problem of externalities arose: At this stage, externalities of production mainly took the shape of emissions and pollution of natural resources such as rivers, lakes, and air.

In Phase II, the institutional setting witnessed a first evolutionary stages: the introduction of GATT rules, which established conditions for international trade to prosper and develop through international contracting. In this phase, contract appeared besides ownership in sustaining the institutional design of industrial production. Firms were still the main owner of their production but began to cooperate with other firms to make the distribution of their products reach new and distant markets. In addition to the traditional externalities of production, externalities began to occur related to the transportation of merchandise between opposite regions of the world.

Finally, in Phase III, we saw the rise of supply chains as an institutional production model: The firm was no longer the owner of its production, but rather contracted the goods manufacturing with external suppliers, located in regions of the world remote from the headquarters, usually in countries offering cost-effective workforces. This framework entirely relies on contract

networks which connect the 'firm', which is now better described with the term 'corporation' or 'company' or 'brand', with the external manufacturers, the distributors and retailers. In this context, externalities assume a social connotation, as the manufacturing of goods not only has an impact on the environment but also on the people working for the external suppliers under unsafe and unsustainable conditions.

1.2. Overview: From production to contractualisation

	Organisation of Industrial Production	Role of the Contract	Externalities
1850s-1914	Firm	Local – Internal	P
1945-1990s	Multinational Corporation	Cross-border – Internal	P-T^1
1990s	Global Value Chain	Cross-border – External	T-P-T^1

Table 1.

To the extent that a distinction can be made between a production function (P) and a transaction function (T) of the enterprise, the different paradigms of industrial production differ from each other with regard to the activities falling under one function or the other as well as in respect of the actor 'responsible' for them. Following from this distinction, a three steps scheme can be identified in the – broadly speaking – productive process of a good: the first stage (T) includes the activities for the supply of raw materials; the second stage (P) corresponds to the productive process *strictu sensu*; the third stage (T^1) involves all the stages necessary to transport the good from its place of production to its intended final beneficiary. The type of control over each stage exercised by the enterprise varies according to the dominant model of industrial production: one of the core claims of the present work is that the way in which the contract is employed in Phase III profoundly affects not only the distribution of production activities under the two functions of the enterprise, but also the type of control which the enterprise exercises on each of the three stages and, therefore, on the externalities which occur in each of them.

Despite providing a thorough explanation of the transformation of industrial production is beyond the scope of this work, the chapter nevertheless partly and indirectly deliberates on these aspects by focusing on three yardsticks: the geographical, technological and institutional conditions in which each model of industrial production is embedded. A *caveat*: the conditions illustrated in the chapter not always represent the cause for the emergence of the specific

paradigm of industrial organisation at stake. Rather they provide the context in which each of these paradigms take place.

The choice for the three yardsticks has not been an autonomous decision. On the contrary, literature on economic history and economic development, the two branches which provide an overview of the evolution of industrial production and its impact on economic growth, is divided on which of the three parameters is most relevant in determining the economic growth of certain countries and/or regions of the world as compared to others. Again, since the purpose of the present chapter is not to agree or disagree with any of the theories advanced in the relevant literature, the analysis is limited to illustrating the variables which, in one way or the other, have accompanied the evolution of the models of industrial organisation.

This analysis is paired with the broader theoretical framework adopted for the present chapter, looking at the way in which industrial production has adapted to factual circumstances through the lens of transaction costs economics. This theory addresses the problem of economic organisation as 'a problem of contracting'.[39] In economic theory, contracting is assumed to coordinate the system of prices according to which production is organised. According to transaction costs economics, the contracting system is not cost-free: The chosen model of industrial production will assume one possible form out of those falling within a spectrum which goes from the model of the firm – internalisation of production – to the market – production based on contracting and price mechanism – according to the contracting costs.[40] What guides the proximity to one extreme of the spectrum or to the other is the cost of contracting: the higher the cost, the more industrial production will be organised on the model of the firm; in contrast, when contracting costs are low, transactions will tend to be externalised. The contracting costs may depend on a variety of correlates which largely corresponds to the three yardsticks selected in this chapter: geographical, technological and institutional conditions may affect or accommodate how industrial production is organised. Scholars are for example shown to have acknowledged that the Industrial Revolution was particularly favourable to the British Empire because of the conveniently located reserves of coal which became easily extractable thanks to the technological innovation brought by steam-power machines. At the same time, however, the economic growth of the British Empire owes much to the end of the Napoleon wars in Europe, which signalled the beginning of the so-called Pax

[39] O.E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (The Free Press, a Division of Macmillan, Inc. 1985), 20.

[40] RH Coase, 'The Nature of the Firm' (1937) 4 Economica 386, 388 ff.

Britannica. Before the link between the three conditions was established, trade and production had a rather different connotation. The notion of cost employed in the present work is therefore rather broad, as the search for causality is not an objective which the present work aims at satisfying. To put things in perspective: In the following, the decrease of transaction costs is not consistently regarded as a driver of industrial organisation; rather, it is an occurrence which may also be the result of certain 'environmental' circumstances existing at a given moment in history.

The narrative about the evolution experienced in the field of industrial organisation is built on one example, with the aim to provide a concrete and realistic take on the transitions conceptualised in the chapter. The chosen example depicts the evolution in the production organisation which has occurred in the last century from the perspective of the garment industry.

2. Garment Industry

The example to develop the narrative illustrated by the table above is taken from the garment industry. This choice, which may be arbitrary to a certain extent, is however guided by a few factors. Firstly, a vast of garment goods is present in people's everyday life. Clothes shops dominate the streets of our cities, one after the other, so much so that they design a topography of spaces according to the brands' quality and *Prest*ige as well as to the type of retailing system. A tourist visiting any European city for the first time will be able to distinguish the luxury district from the area with fast fashion or large multi-brands retailers. Beyond the shape apparel shops give to our surroundings, the expansion of people's wardrobes has proliferated in the last decades, as a result of the phenomenon of fast fashion, led by the Spanish Zara (Inditex Group) and the Swedish H&M in the early 2000s. Statistics provided by Eurostat confirm that, at least at the EU level, clothing and footwear consumption's share in the total households' expenditure has increased. In 2017, 4.9 per cent of EU households' total consumption expenditure was spent on clothing and footwear, a trend which has remained steady throughout the financial crisis. However, the volume of total households' clothing and footwear consumption augmented with 11.3 per cent between 2008 and 2017.[41]

[41] Eurostat Statistics on household consumption by purpose, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Household_consumption_by_purpose#Composition_of_EU-28_household_expenditure_in_2017.

Reasons of increased households' consumption on apparel items and spatial proliferation of clothing retailers, which will probably encounter a reader's sensitivity, provide no decisive explanation for selecting this industry as example. These reasons are coupled by a stronger rational for picking the garment sector as explanatory of the subject treated in this chapter. The garment industry indeed represents one of the industries which best displays the transformative process of the paradigm of industrial organisation which has occurred over the past 2 to 3 decades. In order to give the historical reconstruction an even more punctual reference, the history of the US iconic brand of denim production Levi Strauss & Co. is used to support the storytelling.

2.1. Levi Strauss & Co.: History of the Company

2.1.1. Early beginnings and success

One of the most iconic garment items which characterises modern and contemporary times is certainly the blue jean. Today, models of jeans are available to match any taste and inclination, from straight to flare, from bootcut to shorts, from with button to with zip, from clear to dark wash, etcetera. Almost 150 years have passed since the blue jean was patented in 1873, and the blue jean is still the clothing article which is included in most people's wardrobes, independent of their social class, gender, or age.

As all stories with 'legendary' elements which are verbally preserved from passing into oblivion, the story of the birth of the blue jean also knows different versions, but all of them conclude in 1873, when Jacob Davis and Levi Strauss patented their rivet version of what was known as the 'waist overall' at the time. In the first half of XIX century, Levi Strauss emigrated together with his sisters from Bavaria to New York to rejoin two older brothers who had already settled there and owned a wholesaler of dry-goods. Levi Strauss entered into the business with his brothers and opened a branch in San Francisco at the time of the Gold Rush. However, Levi Strauss' interest lay not in gold mining but rather in providing gold miners with adequate working clothes.

One of Levi Strauss' clients was a tailor whose name was Jacob Davis. One day, the latter was asked by a worker's wife to make a pair of trousers which could longer resist the stress of

workman's tasks.[42] To meet the lady's request, Davis came up with the idea to use metal rivets to reinforce some parts of the trousers, like pockets and the base of the button flies. In order to realise his idea, Davis turned to Levi Strauss, his supplier of the traditional fabric for workwear 'Serge de Nîmes', the original name of the textile fibre used to make jeans where the term 'denim' comes from. Davis' intuition was ingenious and increased the durability and strength of men's working trousers so effectively that the two collaborators decided to proceed to patent it, a patent which they officially obtained on 20 May 1873, which is known today as the date of the blue jean's birth.

Ever since its launch, the blue jean has become more and more popular. Initially, it spread among working people, as the sturdiness which characterises this fibre made it particularly suitable for different types of jobs. Starting from the 1960s, jeans were no longer exclusively worn by working people as they became popular among a variety of categories, from workers to rockers, and from hippies to office employees.

The success resulting from the versatility of the blue jean, which in the meanwhile had developed new shapes and styles to supplement the traditional 501 model in order to meet the diversified demand, brought an incredible expansion of Levi Strauss business. In the decade of 1964 to 1974, Levi Strauss went from owning 16 to 63 plants in the US. In 1965, it launched its international division, opening offices and factories in Europe and Asia.[43]

2.1.2. The 1990s

Levi Strauss reached the apex of its success – at least in terms of economic profit margins – in 1996, when the company's annual revenue reached $7.1 billion. However, only one year later the company witnessed a huge decrease in sales, which reduced the annual revenue to $6.8 billion in 1997.[44] In those years, the company began to suffer from competition from similar brands, which were able to offer products at lower prices as a result of reduced production costs.

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[42] This is one version of the story: other versions claim that a goldminer went to Davis complaining that the pockets of his pants would fall apart every time he stuffed them; another version want the wife of the goldminer complaining about the low strength of the pants pockets.

[43] https://web.archive.org/web/20090109043550/http://www.americanheritage.com/articles/magazine/ah/1978/3/1978_3_14.shtml

[44] N Tokatli, 'Networks, Firms and Upgrading within the Blue-Jeans Industry: Evidence from Turkey' (2007) 7 Global Networks: A Journal of Transnational Affairs 54.

In response to this hardship, Levi Strauss resctructured its production sites. The process reached its peak in 1999 with the closure of eight manufacturing facilities located in El Paso, Texas. In 2002, 3,600 jobs were lost due to the closure of six manufacturing plants based in the US among which was also the oldest Levi Strauss' plant of Valencia Street, San Francisco. The year after that, the last US-based facilities, located in Sant'Antonio, were closed. This was the end of the historical American production of Levi Strauss' jeans, which now has contractors in more than 50 countries. This progressive closedown of all US factories reduced the number of Levi Strauss' employees in the US from the 37,000 employee units of 1996 to the 9,750 units of 2004.

Predictably, Levi Strauss faced many complaints and protests about the high job loss derived from the closure of all its US factories. However, this strategy allowed Levi Strauss to survive a moment of difficulty and to progressively gain back portions of sales of a market which it had dominated for over a century.

2.1.3. Present time

Today, the numbers representing Levi Strauss' organisation of production and sales differ greatly from the ones reflecting the image of Levi Strauss before 1990s.

The company now has three head-quarters: one in Brussels, one in Singapore and the old one in San Francisco. The present number of employees reaches 14,400 units, of which 6,700 are in the US, 4,200 are in Europe and the remaining 3,500 work in the Asian Pacific area.

The restructuring of production together with the changes introduced by Chip Berger, appointed as the company's CEO in 2011, brought Levi Strauss back on track to the point that its shares have been relaunched on the New York Stock Exchange in March 2019.[45]

2.2. Restructuring

At first glance, no peculiarities may seem to be present in Levi Strauss' history. The decision to close the US factories was taken to prevent further loss of market shares and can be read as a strategy for Levi Strauss to adapt to new trends of industrial organisation already followed by most of its competitors. Furthermore, even prior to the 1990s, Levi Strauss factories were

[45] The company had previously been part of the stock exchange market from 1971 until 1984.

not located exclusively in the US. After the launch of the international division, the company had already established overseas factories and opened offices in 35 countries.[46]

However, the changes which Levi Strauss underwent in the 1990s reflect a different phenomenon from the expansion of the brand in the 1960s. If that was indeed an expansion, this label would not fit to the overhaul which occurred thirty years later. The latter represented a fundamental restructuring of Levi Strauss' production organisation which becomes evident when comparing the number of Levi Strauss employees at present with the location of the factories where jeans are produced nowadays. While the majority of Levi Strauss employees is still US-based, no factory is located in the US' territory. This means that, contrary to the situation before the restructuring, the occupational tasks of the majority of Levi Strauss employees is no longer making jeans. Another striking data point is revealed by the comparison of the number of factories making jeans now with the number of those making jeans in the 1980s, for instance: At the time of writing, Levi Strauss jeans are produced in more than 500 factories located in 29 countries.[47]

After the restructuring of its production organisation, Levi Strauss had turned into a 'manufacturer without factories',[48] a label attributed to companies which, have relations with a large number of licensed factories, contractors, and sub-contractors involved at different stages of the production process instead of basing their production on making their own-labelled products themselves.

Particular aspects of this process have to be taken into account as these represent the differentiating elements between the process of restructuring of production, as carried out by Levi Strauss – and many other Western companies –, and its mere displacement. The latter does not necessarily entail the transformative stage of the corporation's identity from a manufacturing to a brand-managing company, which is a distinctive trait of the process of restructuring. John Ermatinger, president of Levi Strauss Americas division between 1998 and 2000, clarified that the mutation was intentional when asked for an explanatory statement after the disclosure of the decision to shut down twenty-two factories between November 1997 and February 1999:

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[46] https://web.archive.org/web/20090109043550/http://www.americanheritage.com/articles/magazine/ah/1978/3/1978_3_14.shtml

[47] Levi Strauss and Co. website, https://levistrauss.com/wp-content/uploads/2018/04/Levi-Strauss-Co-Factory-List-March-2018.pdf, last accessed on 6 April 2019.

[48] Gereffi (n 27).

> Our strategic plan in North America is to focus intensely on brand management, marketing and product design as a means to meet the casual clothing wants and needs of consumers. Shifting a significant portion of our manufacturing from the U.S. and Canadian markets to contractors throughout the world will give the company greater flexibility to allocate resources and capital to its brands. These steps are crucial if we are to remain competitive.[49]

2.3. Consequences of Restructuring

As evidenced by Ermatinger's statement, the restructuring by Levi Strauss had been forced to a certain extent by a necessity to remain competitive on the market and to react to the advantages gained on the denim market by its competitors as a result of the re-modelling of their organisation around the full-package sourcing method.[50] Such reorganisations were mainly driven by the intent to make production cost-effective by taking advantage of the access to low cost workforces in developing countries. Levi Strauss followed the same path. In addition to facing complaints from the dismissed American workers about their job loss, Levi Strauss was, as other brands were, accused of capitalising on the poor working conditions existing in developing countries, such as China, Indonesia, the Philippines, Mexico, Vietnam and others. Besides the low workforce costs, another advantage for companies producing in those countries was that those territories were usually export processing zones, meaning that no customs duty was applicable at their border, on the single condition that the exported good had been processed in the countries before being exported.[51]

Levi Strauss' response to the criticisms was twofold: The initial reaction was of a constructive nature as it conduced to the development in 1991 of Terms of Engagement (TOE), making Levi Strauss one of the first companies to adopt a code of conduct. The Terms of Engagement were meant to apply to all Levi Strauss' suppliers and incorporated major international human rights and labour standards. The second reaction was more concrete than the first one, as it consisted of withdrawing production from China in 1993 due to alleged human rights violations in the

[49] Levi Strauss & Co. to Close 11 of its North American Plants, Business Wire, 22 February 1999, B1.

[50] Tokatli (n 41).

[51] K Chu and B Davis, 'China, Levi Strauss and the Long-Simmering Battle Over Labor Rights' *Wall Street Journal* (23 November 2015) <https://blogs.wsj.com/chinarealtime/2015/11/24/china-levi-strauss-and-the-long-simmering-battle-over-labor-rights/>.

factories where Levi Strauss commissioned the production of its own designed products.[52] However, the break between Levi Strauss and Chinese plants lasted less than ten years, as Levi Strauss resumed production in China not long after having announced the complete shut-down of its North-American factories.

Among the two paths taken by Levi Strauss to calm down the public concern, the US brand has opted to pursue and strengthen the first one. TOE are periodically refined and adjusted to respond to the most compelling issues; the company is leading a campaign for more responsible use of water in the production of jeans –a notoriously high water-consumption industry –; the company is also taking part in an initiative fostering ethical sourcing practices and is a member of the Better Cotton Initiative (BCI). In contrast, Levi Strauss did not limit itself to resuming production in China a few years later its withdrawal, but rather intensified its presence in the country, where the majority of the brand's licensee factories and subcontractors are currently located.[53]

The history of Levi Strauss was chosen as an instance to anchor the evolution of production models in factual circumstances and make the division into three phases of globalisation less abstract. The case study indeed offers the factual framework to deepen the analysis of the passing from one phase of globalisation to the other as each transitional movement of paradigm is mirrored in the historical development of the garment industries of which Levi Strauss is ambassador in this context.

3. Evolution of Production Models: Geography, Technology, Settings

Production and trade of goods have been the object of interest for many centuries as they could be interpreted as being social phenomena, to the extent that they are one of the dimensions in which societies of different spaces and times express their distinctive traits and features. According to the different understandings of the notions of production and trade, the study of these two disciplines can refer to older and less old origins of the phenomena. For the purpose of building a narrative of the evolution of production models responding to the argument here deployed, it only makes sense to take the premise from the production models based on industrial operations. Since the focus of this chapter lies on the evolution of production

[52] N Klein, *No Logo: No Space, No Choice, No Jobs* (Harper Perennial 2005) 201; Chu and Davis (n 48).

[53] The list of all factories manufacturing Levi Strauss' varieties of goods is accessible via the Levi Strauss website: https://levistrauss.com/wp-content/uploads/2018/04/Levi-Strauss-Co-Factory-List-March-2018.pdf (last access on 11 April 2019).

organisation models,[54] the analysis takes its premises from the industrial revolution to conclude with the current production organisation model. The narrative is built upon the subdivision of this temporal framework into three phases: phase one covers the decades from the industrial revolution until WWI; phase two covers the aftermath of the Second World War until the 1980s/1990s; phase three refers to the latest decades from the 1990s until the present days.

From the chronological perspective, the subdivision is necessarily arbitrary to a certain extent while at the same time drawing on similar historical overviews found in literature on globalisation in the field of economic history.

From the perspective of production models, the distinction between the three phases is determined not only by the different organisational models but also – and mainly – by the pre-conditions for these models to come to existence, and affirm themselves as paradigmatic. Such pre-conditions correspond to the geographical, institutional and technological circumstances specifically distinct for each of the three phases.

Geography, technology and the institutional setting provide the guiding lines to grasp the emergence of each model of organisation of production as well as the shift from one model to the other. Economics of growth and the history of international economics and globalisation heavily rely on geographical, institutional and technological correlates to production and trade development.[55]

3.1. Phase I: From Industrial Revolution to the First World War

The analysis takes its premise from the industrial revolution, as it indicates the birth of proper production 'organisation' models. The use of the term 'revolution' does not indicate the eruption of a resonant and striking event – as in the context of social revolution, such as revolutions for independence –, but rather serves the purpose of conveying the idea of a

[54] The Cambridge Dictionary attributes three meanings to organization: '1. [*Group*] a group of people who work together in an organized way for a shared purpose; 2. [*Arrangement*] the planning of an activity or event; 3. [*System*] the way in which something is done or arranged'. See https://dictionary.cambridge.org/dictionary/english/organization.

[55] Literature on the correlates to growth and development is extensive JM Diamond, *Guns, Germs, and Steel : The Fates of Human Societies* (First edition, WW Norton & Co 1997); JL Gallup, JD Sachs and AD Mellinger, 'Geography and Economic Development' (National Bureau of Economic Research 1998) Working Paper 6849; G Jones, *Merchants to Multinationals : British Trading Companies in the Nineteenth and Twentieth Centuries* (Oxford University Press 2000); D Rodrik, *In Search of Prosperity: Analytic Narratives on Economic Growth*. (Princeton University Press 2012). The meaning attributed to 'institutional' should be clarified here. While literature on the relevance of institutions in fostering growth, productivity and development mainly refers to a country's institutions (mainly protection of – investors' – property rights), in the present work, the term is used to indicate the institutional setting at the international and supranational level.

significant overturning in the way of thinking about production. While the production of goods before the Industrial Revolution was mainly what today would be referred to as 'handicraft', after the Industrial Revolution, this fragmented modality of production turned into organised and systematised manufacturing.

The industrial revolution, which spread from England to continental Europe in the nineteenth century, has determined the geographical, technological and institutional conditions which were necessary for the affirmation of a specific organisation model associated with Phase I. For the decisive impact of geography, institutions and technology on the pre-conditions affecting the path undertaken by different countries, the study of the industrial development and the production organisation overlaps with the existing narratives which populate the literature on economic development. This branch of scholarships tries to engage with the poignant question concerning the differences – or, rather, inequalities – between countries in terms of their social and economic development, wealth and growth rate. The present work, even if it does not address the same question on countries-inequalities, draws on that literature in so far as the narrative concerning the cause for countries' development is based on the idea that economic growth fosters development.[56] This conviction rests on findings showing how the Industrial Revolution coincides with the beginning of what has been called the 'great divergence' between North and Western countries of the world as compared to those areas of the world which have not witnessed a similar path to growth but which have instead remained at pre-Industrial Revolution levels of income and economic performance.[57] Many contributions to the literature on development focus on the correlates of development, and alternatively identify such correlates in geography,[58] institutions,[59] and technology.[60] The search for causes of development would be a much more ambitious endeavour compared to the intentions of the present chapter, which instead focuses on the imprint which geography, technology and

[56] Evidently, this is only one – albeit widely supported – view on the correlates of development. In contrast to this 'narrow' understanding of development stands Sen's theory of 'development as freedom', according to which «[d]evelopment can be seen […] as a process of expanding the real freedoms that people enjoy».

[57] See data from Gallup, Sachs and Mellinger (n 52).

[58] Gallup, Sachs and Mellinger (n 52); Diamond (n 52); P Krugman, 'Increasing Return and Economic Geography' [1991] Journal of Political Economy.

[59] D Acemoglu, A Ozdaglar and A Tahbaz-Salehi, 'Systemic Risk and Stability in Financial Networks' (2013) 18727 NBER Working Paper 1; D Acemoglu and JA Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Paperback ed, Profile Books 2013).

[60] RE Baldwin, *The Great Convergence : Information Technology and the New Globalization* (The Belknap Press of Harvard University Press 2016); RC Allen, 'Technology and the Great Divergence: Global Economic Development since 1820' (2012) 49 Explorations in Economic History 1.

institutions have left and still leave on the production organisation emerging within a particular time frame.

The following paragraphs inspect those imprints in an attempt to facilitate the identification of the distinctive trait of production organisation in early modernity.

3.1.1. Geography

One of the most validated theories seeking to explain the origins of the divergence of paths towards development and prosperity among the countries of the world relies on the spatial/ geographical differences among countries. In broad terms, geography 'relates to the advantages and disadvantages posed by a country's physical location' – latitude, proximity to navigable waters, climate, and so on.[61] These advantages or disadvantages have been identified in the location of certain raw materials; the easier or less easy access to certain resources and markets; the distribution of diseases; other environmental conditions. While the latter two elements have hardly any direct impact on the structural production organisation, the formers amount to those conditions which, combined with institutional and technological circumstances, affect the preferred use of a certain paradigm of production organisation over another.

Therefore, a first geographical feature of Phase I has concerned the emergence of new strategies for the access to resources and access to markets. Such parameters take on relevance to the extent that they may either facilitate or hinder the performance of economic activities by respectively lowering or increasing the costs of these activities. For the purposes of the present work, geographical correlates of production models intertwine and partially overlap with those elements which pertain more to the 'institutional' equilibria characterising the first Phase In the evolution of production models.

One of the reasons supporting the employment of the term 'revolution' is that, in considering the conditions preceding the Industrial Revolution, we acknowledge that the economy of Europe in those times significantly relied on different activities from those which characterised the first phase of production organisation. Usually referred to as 'pre-modernity', the ages which preceded the beginning of industry in Europe were characterised by agrarian societies and by handicraft production of goods. In this pre-modern era, trade played a central role in the performance of economic activities both in the supply of raw materials and in the distribution of handicraft goods. Europe's trade routes looked to both Eastern and Western territories and

[61] Rodrik, *In Search of Prosperity* (n 52) 5.

heavily relied on the existence of colonies, with which the European empires had special trade arrangements for the importation of resources from colonies into their own territories.

During the first phase of industrial production, the trade equilibria which had been established from the emergence of colonial empires witnessed a progressive transformation due to the altered access to resources enabled by the establishment of industrial production. Despite literature on Industrial Revolution proliferating with divergent theories concerning the causes of its beginning, there is agreement on the crucial function of coal reserves for the impressive industrial development of England in the late eighteenth and nineteenth-century. The coal stocks present in England territories had been underexploited until the late eighteenth century, when the steam engine made its appearance in the technological domain.

One of the theories which has placed emphasis on the geographical location of resources – coal in this specific instance – as the main factor underlying the industrial breakthrough of England was put forward by Kenneth Pomeranz. In his search for the causal relationships which led to the 'great divergence' between North and South as well as between Western and Eastern countries of the world, Pomeranz's initial claim was that the industrial breakthrough which England witnessed at the end of the eighteenth century was not the immediate outcome of a distinctively European technological advantage. On the contrary, he argues that Europe had no particular mastery over technological means as compared to other areas of the world, especially China, which could provide a credible and sound explanation for the economic growth which made England and the rest of continental Europe undertake a faster path towards development than that followed by today's less developed or developing countries.[62] In Pomeranz's view, the success of the steam-engine, which is agreed to be the key factor leading to the exploitation of coal resources in full, was itself a result of the geographical contingencies of the same location of the resource and the technology for its capitalisation, which happened to be England.[63]

The study of the impact of geographical circumstances on growth and development has also entered into the field of development economics, where less conventional understandings of geography have appeared beside more traditional approaches. As a follow-up to the 'new trade theory', at the beginning of 1990s, economist Paul Krugman developed the 'new economic

[62] K Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Stanford University Press 2000) 44.

[63] Pomeranz (n 59). According to the Author, geographical contingencies of England and Europe were decisive for the departure from the Malthusian world and the embracing of a virtuous cycle of growth and prosperity.

geography' approach to development, for which he was awarded the Nobel Prize in 2008. According to this theory, regions and countries possessing similar environments present a different distribution of economic activities and a different development or growth rate. A typical example of this differentiation is the difference between North and South Korea, which experience highly divergent economic characteristics despite sharing the same geographical conditions. In Krugman's view, the geographical distribution of production depends on the interaction between economies of scale and transportation costs. This interaction is determined by some key parameters which trigger the level of concentration or non-concentration of production in a certain region/country. In this model, geographical conditions are mainly relevant to the extent that they affect the level of transportation costs.[64] In contrast to the less traditional approach to the study of geography used by Krugman, Gallup and Sa*CHS* proposed a model which attributes the cause for the differentiation in levels of development among regions of the world to the traditional understanding of geography.[65]

Looking back at the geographical circumstances of the first phase, industrial production notably heavily relied on the supply of raw materials. The proximity of raw materials to the location of their processing was a key factor for making production cost-effective.

Turning back to our example, Levi started his denim production business in tumultuous years for cotton cultivation. The US had been developing their cotton industry at a uniquely fast rate during the eighteenth century. Indeed, it seemed that the Southern States of North America possessed the perfect qualities for the cultivation of cotton: a warm, almost tropical, climate; vast stretches of land; appropriate technology; slave labour.[66] The impressive development of the cotton industry made European merchants rapidly move their trade routes for the supply of cotton from the West Indies to the Americas, as transportation with the latter was less costly than moving goods from Eastern areas of the world. In less than a century, the US managed to substitute the West Indies as a major world exporter of cotton to Europe, which was the main consumer of cotton cloth. The productive capacity of the US was heavily reliant on enslaved labour, which was the issue around which the American Civil War broke out.

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[64] Krugman, 'Increasing Return and Economic Geography' (n 55); P Krugman, 'Scale Economies, Product Differentiation and the Pattern of Trade' (1980) 70 The American Economic Review; P Krugman, 'History and Industry Location: The Case of the Manufacturing Belt' (1991) 81 The American Economic Review.

[65] Gallup, Sachs and Mellinger (n 52).

[66] G Riello, *Cotton The Fabric That Made the Modern World* (Cambridge University Press 2013) 203.

Predictably, and as indeed predicted, the end of enslaved labour on cotton plantations negatively affected the cotton industry in the US. While planters managed to keep the majority of former slaves working in the fields as a waged workers,[67] cotton prices started to plummet at the same time. This crisis reached its peak in 1873, the same year in which Levi Strauss and Davis patented their overall. The end of enslaved labour had a major impact on the export of cotton rather than on local production, which the farmers tried to keep as closed as possible to pre-war levels. As a result, Levi Strauss could profit from the easy accessibility to raw materials – cotton – for denim production and to lower prices maintained also at the end of enslaved labour, thereby establishing the firm in San Francisco, where the production was also carried out in a vertically integrated system.

3.1.2. Technology[68]

Another set of conditions which affect the emergence of specific production organisation models are those linked to the technology available at a given time. In this respect, as well as for the previous analysis of geographical conditions' significance in determining patterns of industrial production, the overview of the contributions of technology to the production organisation considers the literature on globalisation and development studies. The narratives built by these two strands of research take their premise from the Industrial Revolution and seek to explain the reason behind the forward 'great divergence' of the late nineteenth century. Geography is not the only correlate to this process. Actually, technological innovation has been by and large considered the key factor at the roots of the industrial development concerning Western and Northern areas of the world as it represents the element allowing for the expansion of trade and for the increase in production capacity which subsequently led industrialised countries to outperform less industrialised countries today.

[67] In some States, former slaves were forced to sign contracts to work in the fields, the so-called compulsory contracts. In the years immediately following the end of the war, cotton farmers maintained the ownership of lands and were able to impose contractual conditions which were not so different from those of enslaved labour, except for the introduction of both monetary wages and other types of remuneration. In 1867, Northern States imposed military control over Southern States in order to create the condition for workers to renegotiate their contracts under more favourable terms and introduce sharecropping. The consequence was a fall in profits from cotton cultivation, which reached its peak in 1873. For more on the history of cotton, see S Beckert, *Empire of Cotton: A Global History* (First edition, Alfred A Knopf 2014).

[68] EL Jones, *The European Miracle: Environments, Economies, and Geopolitics in the History of Europe and Asia* (3rd ed, Cambridge University Press 2003). Chapter 3 describes how the technological drift was not a sudden impetus but rather a constant evolution, something which emerges organically rather than out of nowhere.

Authors who turn to arguments based on European technological advantage over Eastern and Southern areas of the world in order to develop a credible narrative for the clarification of the causal dynamics of the Industrial Revolution indicate the development of the steam engine as the defining moment for the process of great divergence to begin. According to these views, the development of the steam engine proved to be particularly crucial for the decrease of labour costs and in the fields of transport and communication.[69]

While the application of technology to local production had the result of increasing the per capita out-put, thereby increasing the overall levels of production, the introduction of the steam engine in the field of transport enabled the transfer of bulk goods and a wider distribution of the final products. The steam engine gave rise to steamships and railway companies which were involved at the cross-border and national levels.[70] Broadly speaking, steamships were mainly deployed for the overseas transport of goods, while railways increased the intensity of internal trade, favouring the distribution of goods – and mail – within smaller territories.

Whichever view is regarded as more convincing, technological impetus arising in the ages of the Industrial Revolution indubitably decreased the production costs and trade, thereby shaping the production model which became regionally clustered within factories while at the same time enabling what Richard Baldwin has coined as 'globalization first unbundling'.[71] The author provides a narration of the history of globalisation based on three phases which correspond to the unbundling of those constraints which were responsible for the former local dimension of economy. The constraints identified by the author are the costs of moving goods, the cost of moving ideas and the cost of moving people. While the first two constraints have been reduced thanks to technological development, the third has yet not been overcome. The first of these unbundlings coincides with the lowering of transportation costs resulting from the introduction of steam engines to shipping and railways. This process reduced the costs for the transport of goods: as a result, the unbundling deriving from the Industrial Revolution affected the constraints which kept production geographically connected to consumption. According to the author, pre-industrialised economies saw the production of goods closely linked to consumption to the point that the location of the former coincided with the location of the latter. The decrease of transportation costs on account of the application of new technologies to

[69] A Gambles, *Protection and Politics : Conservative Economic Discourse, 1815-1852* (Boydell 1999).

[70]C Smith, *Coal, Steam and Ships: Engineering, Enterprise and Empire on the Nineteenth-Century Seas* (2018) 10.

[71] Baldwin (n 57).

shipping and railways benefitted global trade. At the same time, as Baldwin illustrates in his narrative, the costs of moving ideas remained high. Said author identifies the discrepancy between the costs of moving goods and the costs of moving ideas as the cause for the global expansion of trade in a world of regionally clustered production.[72]

The technological development was not confined to transport and industry. The world 'shrinking'[73] was accentuated by the breakthrough of the telegraph in communication technologies in the 1860s. Circulation of information had already been benefitting from steamships as mail was carried by shipping companies and railways from the 1820s on.[74] Because the telegraph did not immediately follow the development of global trade, but its invention arrived at quite a later stage, mail was carried and dispatched by shipping companies, which refined their organisation and routes in order to improve the efficiency of communication systems. Therefore, communication had already witnessed significant improvements as a result of the diffusion of steamships and steam railways. However, overseas communication particularly saw a notable improvement when the telegraph substituted steamships as a means for the transmission of information.[75]

3.1.3. Institutional settings

The expression 'institutional settings' may refer to different concepts. One common understanding of this expression refers to the instauration of legal regimes characterised by a strong protection of property rights and regulatory design able to sustain economic growth and attract investors.[76]

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[72] Baldwin (n 57) 5.

[73] In the words of Y. Kaukiainen: Y Kaukiainen, 'Shrinking the World: Improvements in the Speed of Information Transmission, c. 1820-1870' [2001] European Review of Economic History.

[74] Many of these were British companies, such as the East India Company, Peninsula & Oriental Steam Navigation Company (P&O), Royal Mail Steam Packet Company (RMSP), Pacific Steam Navigation Company, and Cunard Company. These companies were privately owned and connected Great Britain to almost the entire globe. For a map of the routes covered by the companies' ships, the Lloyd's List counted as a register for mail communication and therefore provides a database for consulting the routes.

[75]Kaukiainen (n 70); R Wenzlhuemer, *Connecting the Nineteenth-Century World: The Telegraph and Globalization* (Cambridge University Press 2015).

[76] DC North, 'Institutions' (1991) 5 The Journal of Economic Perspectives 97; MJ Trebilcock and MM Prado, *Advanced Introduction to Law and Development* (Second edition, Edward Elgar Publishing 2021); MJ Trebilcock and MM Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (Edward Elgar 2011); Acemoglu and Robinson (n 56); D Acemoglu, S Johnson and JA Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 The American Economic Review; Rodrik, *In Search of Prosperity* (n 52).

To the extent that the division of historical narrations is ultimately at least partially arbitrary, the first phase sketched in the present chapter covers the time-range from the mid-nineteenth century, when the effects of industrialisation spread throughout continental Europe, to the years preceding WWI. This time framework is characterised by two preponderant institutional conditions: the so-called Pax Britannica and colonisation.

The period which has been identified here as the 'first phase' is usually addressed under the name 'Pax Britannica'. This appellative indicates the period of peace which characterised the nineteenth century in Europe after the end of Napoleonic wars. During Napoleon reign as Emperor of France, Europe had indeed been tormented by perennial conflicts, which prevented trade from flourishing on the continent.

The end of Napoleonic wars signalled the beginning of a period of peace in Europe which allowed for industrialisation to expand from Britain to the European continent. This peaceful period of time was not occasioned by the traditional territorial exercise of authority of one power over others. At least, not in the traditional understanding of such. Peaceful relations among conflicting powers were maintained by means of a less blatant but as effective a force: free trade.

With the conflicts coming to an end, and it being the largest of world's empires, Britain imposed a regime of liberalisation of trade which well complemented the type of relationship it had with its colonies.

3.1.4. The Firm

What emerges from the different narratives combining technological development, the Industrial revolution, and the great divergence, is that economic growth during the nineteenth century occurred in those regions which possessed favourable institutional and geographical conditions. As the purpose of the present chapter is not tracing the origins of the divergence in development among regions of the world, whether the cause for this divergence lies in the geographical, technological or institutional advantages of industrialised countries over the others is of no concern. The adoption of a deterministic approach would not be meaningful and it would lead to questions which cannot have a univocal answer. Rather, the intent of the chapter is to highlight how such conditions have moulded the production organisation, which has therefore changed over time as a result of variations in the geographical, institutional and technological conditions.

The first phase essentially corresponds to the unfolding of the Industrial revolution characterised by the development of industries, resulting in a more efficient use of land, resources, and labour; the intensification of trade exchanges, both at the national and the global level; the consolidation of colonial powers. All this triggered a positive cycle of economic growth and development. Organised production finds its origins in the era and therefore reflects the context of technological, geographical and institutional backgrounds as depicted in this chapter.

What emerges from this picture is a clear separation between trade and production: Raw materials were supplied through trade, which could assume a global or a local shape according to the geographical availability of supplies. While trade in raw materials commenced from the start of the history of trade itself, the impact of the industrial revolution mainly affected the routes of consumption. This systematisation was supported by the introduction of policies for the liberalisation of trade, thereby ensuring a constant and reliable flow of materials from region to region. This system, which was worked mainly between Britain and third countries first, and Europe and the latter later, was crucial for Europe to sustain its levels of production and to maintain its role of industrial hub – or 'workshop of the world', a designation used to describe this phenomenon nowadays. Liberalisation was indeed crucial to ensure the supply of raw materials, the demand of which Europe could not meet on its own, and to support trade for the cross-border distribution of the final products.[77]

However, while trade was expanding and the process of globalisation was taking its first steps, production began to cluster in industrialising countries.[78] Production was clustered not only in regional/geographical terms, but also in technical terms: a T-P-T[1] scheme began to emerge during the nineteenth century, where T stands for trade and P stands for production (in a narrow sense). The phase of production, in the strict sense, occurs between the trade for raw materials and the trade for the distribution of the final good. In this case, every step which takes place in between the two trade-phases is located within the same factory: the organisation model which corresponds to this scheme is the model of the firm, especially in the manufacturing sector.

Before turning into the world leader producer of jeans and expanding its business, Levi Strauss was 'unidimensional', meaning that all tasks related to production and management were carried out in San Francisco. The construction of a pair of jeans required that the materials were

[77] Riello (n 63) 266.

[78] Baldwin (n 57).

to arrive in San Francisco, where they would be processed and the final good – the blue jean – would then be distributed to the relevant market. Phases of production are therefore 'integrated' in the same physical location rather than being dispersed among different providers of productive inputs. Trade in cotton had already reached global levels at the time of Levi Strauss' consolidation of production, with British cotton cloth dominating the market. This dominance was created by the invention of the spinning wheel, which provided Britain with a technological advantage over the processing of cotton textile fibres as compared to Asian producers from India, which used to be the main cotton world provider until the Industrial Revolution.[25] Differing from the British economy, which relied on the supply of the raw material cotton fibre from foreign countries, North America cultivated its own cotton supply, circumventing the need to import the fibres from abroad. Indeed, the US was even one of the main suppliers for British cotton cloth producers.

Mapping the trade in cotton suggests that, while trade had reached a global dimension centuries ago, production did not: industrialisation clustered production within single and all-encompassing firms, where raw materials were transformed into finished products. Obviously, this does not mean that Levi Strauss' factory in San Francisco undertook the spinning and processing of cotton fibres. On the contrary, jeans are made of cotton cloth, being cotton which has already undergone a processing stage. However, all the necessary elements to make the final consumer product, to wit capital and labour, shared the same physical space, the factory. The model resulting from production industrialisation of is that of one company, one factory, and one integrated production model: the firm. While trade is horizontal in nature, the industrialised production model was vertically integrated in the firm, incorporating both the managerial and the substantive aspects of production.

3.2 Phase II: from the end of the Second World War to the 1980s/1990s

The narrative presented in this chapter presents a gap, which corresponds to the interwar period. While war time conflicts present peculiarities on their own, and it is therefore not particularly meaningful for the purpose of the present work to engage with the conditions affecting industrial production in times of war, the choice to ignore the interwar years is also due to the fact that the shake-up effect which the wars had for production can be better appreciated in the years following. Naturally, this does not mean that particularly meaningful events, such as the Great Depression of the 1930s, will be completely overlooked. Rather, mention of the effects of interwar occurrences are given throughout the account of the second phase which

consequently covers the years from the end of the Second World War to the decades of the 1980s/1990s.

The analysis of Phase II follows the same procedure adopted for the analysis of Phase I: geographical, technological and institutional elements of the time are described in order to contextualise the variations among the ways of organising production over time.

3.2.1. Geography

The global conflicts which ravaged the European continent for two periods in less than thirty years' time, could not leave political and economic geography unaffected. Focusing on the geography of industrial production, the main change with respect to Phase I is a first unfolding of the integrated dimension of the firm. While all activities related to the firm were incorporated within the same physical space in Phase I, Phase II sees a first level of horizontal expansion of industrial production. This means that the horizontal deployment of economic activities was not a distinctive feature of trade but it started to affect production in a strict sense as well. As is often the case, the fact that this geographical expansion is described as characteristic of the post-war period does not mean that instances of the same model were completely inexistent in former decades. Quite the opposite, an understanding of paradigm evolutions as sudden leaps springing out of nowhere, would be contrary to any meaningful historical narrative and to the concept of evolution itself. Paradigms always follow from their predecessors, even when they oppose the latter. Unsurprisingly, some firms – especially in Europe – therefore already began to geographically expand their production in a way that implied some degree of cross-border activities before the first world conflict.[26] The geography of the firm changed in accordance to two approaches: the first one was based on the location of raw materials whereas the second one was more market-oriented.[79] This tendency mainly originated in European countries and was later in the twentieth century consolidated by US companies in particular.

The growth of Levi Strauss as leader of the jeans-making industry mirrors the here-provided historical account about the development of MNCs in the twentieth century. Between the 1960s and 1970s, the company's business went through a considerable geographical expansion of its activities. After the official launch of the international division, Levi Strauss undertook a strategy for accessing foreign markets through the establishment of productive facilities. As a

[79] This second approach was typically adopted by US firms seeking to expand their businesses in Europe, see R Barff, 'Multinational Corporations and the New International Division of Labour' in RJ Johnston, PJ Taylor and M Watts (eds), *Geographies of Global Change: Remapping the World in the Late Twentieth Century* (Blackwell 2000) 53.

result, Levi Strauss quadrupled the number of its plants, the number of which went from 16 to 64, in a single decade, and its business spread out over 35 countries.

The geographical features of Phase I show a clear separation between the global trade dimension as opposed to the regional clustering of production, while in Phase II, the geographical conditions showcased a paradigm which saw a growing global production expansion *together with* the consolidation of worldwide trade.

3.2.2. Technology

The legacy of the two World Wars not only manifested in a need for reconstruction and rebuilding of entire cities and countries, often both physically and economically, but the wars of the twentieth century also represented a main driver for the technological progress which characterised Phase II, even at the time of the conflict. The internal combustion engine and the development of air transport were the result of investments made during WWI while in the wake of WWII, the world powers mainly became concerned with the development of nuclear weapons.[80] These advancements were the seeds for launching new fields of technological development which became dominant in Phase II.[81] With respect to the impact of these advancements on trade and production, the major changes are reflected in the energy sources employed for industrial production, and in the field of transport technologies. The development of the combustion engine led to an increasing preference for the employment of oil over coal as an energy source and natural gas for industrial production. Moreover, in the field of transport, the combustion engine brought about a new means of transport.[82]

The technological framework of Phase II can be understood as in continuity with that of Phase I: transportation costs and new energy sources are the key drivers shaping the technological features typical of the two phases. However, as for Phase I, technological progress was

[80] Diamond (n 52) 240; D Christian, *Maps of Time: An Introduction to Big History: With a New Preface* (University of California Press 2011) 443.

[81] Obviously, the competition over technological development between the US and Russia – the Cold War – played a decisive role in the massive investments in technology and the output of this sector from the end of the Second World War until the later decades of the twentieth century.

[82] Richard Baldwin puts particular emphasis on the revolutionary impact of air cargo for the realisation of what he calls 'globalization second unbundling'. While the airplane is one of the technological output of the first decades of the twentieth century, air cargo only began to assume a leading role in transportation of goods during the 1980s, with the growing presence of global value chains. See: Baldwin (n 57) 85.

geographically non-homogeneous and this uneven distribution contributed to the emergence of multinationals in Phase II.[83]

3.2.3 Institutional Settings

Probably the most noticeable difference between Phase I and Phase II concerns the institutional setting in which production was embedded.

A first major transformation was the end of colonial empires which had been the political unit and the economic framework of the nineteenth century. While colonies had already ceased to exist in the Americas, Phase I was still characterised by colonial dominance of European powers over African and Asian territories.[84] The dismantling of colonial powers was accompanied by the adoption of the General Agreement on Tariffs and Trade (GATT), establishing a set of rules for the ordering of international trade and the application of tariffs, in 1947. The first round of GATT took place in Geneva in 1947, but it was established under the proviso that it be adjusted and subject to renegotiations over the years of its existence. From the start, one of the main objectives of GATT was to avoid discriminatory policies in international trade by the application of different tariffs to different trading partners. The reasons for this concern may be found in the discriminatory and protectionist trade policies which were increasingly being adopted at the beginning of the twentieth century. The introduction of discriminatory and protectionist rules overturned the positive effects that Pax Britannica and liberalisation had produced for trade and production during Phase I. The immediate repercussion of restrictive trade policies was a shrinking in trade and production growth, which was accentuated even further by the Great Depression. While discriminatory regimes were often the result of preferential treatment between empires and their colonies, protectionism was often the economic policy mirroring the ascendance of nationalism in continental Europe, where autarchy had been gaining support and popularity.[85] The establishment of a liberalised regime for international trade was therefore intellectually framed

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[83] G Jones, *Multinationals and Global Capitalism : From the Nineteenth to the Twenty-First Century* (Oxford University Press 2005) 149.

[84] India (1947), North and West Africa, Rwanda, Congo, South Africa (all around 1960s). The Second World War and the involvement of soldiers from the colonies had probably shown them that European supremacy could be defeated, thereby reinforcing the already existing movements for independence.

[85] Jones, *Multinationals and Global Capitalism* (n 80); DA Irwin, PC Mavroidis and AO Sykes, *The Genesis of the GATT* (Cambridge University Press 2009) 6; P Vries, 'A Very Brief History of Economic Globalisation since Columbus' in RC Kloosterman, V Mamadouh and P Terhorst (eds), *Handbook on the Geographies of Globalization* (Edward Elgar Publishing 2018) 36.

as a way to exorcise the atrocities of the Second World War, to the extent that these had been claimed to be the direct consequence of interventionist economic policies characterising the totalitarian regimes.[86]

The notion underlying the instauration of the liberalised system of international trade can be summarised in the belief that this system would have fostered cooperation among countries, thereby providing a stable support for maintaining peace and avoiding unilateralism in economic policy making.[87]

This economic regime of liberalisation was supposed to rest upon three main institutional pillars: the World Bank, the International Monetary Fund and the International Trade Organisation. While the first two saw the light of day after the conclusion of the Bretton Woods Agreements in 1944, the latter never got implemented. For fifty years, the project of a liberalised system of trade remained based on the simpler version provided by the General Agreement on Tariffs and Trade (GATT), signed in 1947 and provisionally entered into force in 1948. The GATT was supposed to have had temporary validity as the establishment of the ITO would also have encompassed the discipline relative to tariff on international trade. However, the project of adopting a broader institutional framework for international trade failed until the mid-nineties when the World Trade Organization came into being.

For fifty years, the core of trade liberalisation policies lay in the reduction of trade tariffs imposed by GATT, which was the first instrument to be adopted in order to implement the renovated project of a liberalised international economic order fostering cooperation among countries in trade policies.

The global conflict had left the main industrialised economies in a state of distress: unemployment was perceived to be an urgent issue to solve on both sides of the Atlantic. In addition, Britain also faced the pressing requests from former colonies and Commonwealth countries for the settlement of debts which the Empire had assumed during the war. A liberalised trade regime was therefore in the interest of all industrialised countries which were in need of restoring their economic activities after the years of moderate flow during the conflict. However, the interests underlying behind the adoption of this regime differed greatly between the UK and the US, which were the main protagonists of the negotiation process. While the US had an interest in pure liberalisation, the UK hoped to restore the type of

[86] FA von Hayek, *The Road to Serfdom* (50th anniversary ed. / with a new introd. by Milton Friedman, University of Chicago Press 1994); Jones, *Multinationals and Global Capitalism* (n 80).

[87]PC Mavroidis, *Trade in Goods: The GATT and the Other WTO Agreements Regulating Trade in Goods* (First edition in paperback, Second edition, Oxford University Press 2013) 12.

liberalisation which was so advantageous to its affairs during the Pax Britannica époque. Accordingly, they were still planning to hold a position of supremacy over trade exchanges.[88] The core rule of GATT was the most-favoured-nation (MFN) principle, according to which «any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties».[89] Despite the exceptions to the rule – which included the system of preferences in force, albeit with limitations, between the Commonwealth countries –, the MFN principle was one of the key factors in the integration of the international trade system while avoiding the reignition of the old frictions deriving from state-planned economies with protectionist tendencies.[90] As is the case for all international instruments, GATT negotiations were also long and often preceded by informal meetings between the representatives of the countries holding major stakes in the agreement. The main protagonists of the GATT negotiations were the representatives of the US and the UK who engaged in intense and prolonged discussion concerning not only customs and tariffs policies, but also quotas, cartels and state trading. In an account of the negotiations based on official documents reporting the declarations of the negotiating officials of the time, Miller suggests that the UK was the true winner of the negotiating rounds as it managed to sugar-coat the pill of the American hard-core ideal of trade liberalism.[91] One of Britain's main achievements in the Washington Proposals was the gradual cancellation of the system of preferences, as this system was crucial for a sustainable repayment of their debts owed to the Commonwealth countries. The introduction of a liberalised trade system is visible in the increased trade volume in merchandise, which almost doubled in the ten years following GATT.[92] The progressive decreasing of the system of preferences and the tariff reduction at each GATT 'round' had an impact on the shape of economic activities and the organisation of businesses. This was especially the case for those located in the US, which started to intensify their cross-border activities to consolidate their presence in overseas markets.

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[88] This refers to the juxtaposition between US idealism and British pragmatism.

[89] GATT (1947), Article 1.

[90] This is often referred to as a 'beggar-thy-neighbour' strategy.

[91] JN Miller, 'Origins of the GATT - British Resistance to American Multilateralism' (2000) 318 Working Paper 6.

[92] WTO Data shows that the World merchandise trade volume increased from 58.5 billion US dollars in 1948 to 110.21 billion US dollars in 1958.

3.2.4. The Multinational Corporation

The distinction between Phase I and Phase II indicates a transition between two different forms of organisation of production, namely the firm and the multinational corporation.

The variations in geographical, technological and institutional conditions mainly affected aspects of production related to its organisation rather than to the process itself. The multinational corporation is indeed the result of the strategy adopted for the internationalisation of business activities undertaken by companies in the twentieth century, and even earlier.[93]

Different variables influenced the rise of multinational corporations: the protectionist economic policies which emerged at the end of Phase I made it less convenient for firms to engage in cross-border activities. The application of trade tariffs hindered cross-border transactions for the supply of raw materials and limited the possibilities to enter new markets: as a consequence, enterprises seeking to engage in economic relations with other countries found it more convenient to establish their presence in those territories of interest rather than to engage them in trade.

However, the new policies on tariffs introduced with the adoption of the GATT had a twofold impact on the model of business organisation which progressively emerged when the second post-war period's institutional design was implemented. The shape which GATT gave to international trade on the one hand favoured international trade as the reduction of tariffs opened the borders of certain markets which had been effectively closed during the war and even before. As a result of this, circulation of goods and supply of raw materials was made easier and less costly for all the countries participating in the GATT. On the other hand, the reduction of tariffs also had an impact on foreign direct investment (FDI) by companies. The presence of tariffs constituted a barrier to international trade, making trade in goods less convenient for companies. As a consequence, enterprises which wished to expand their businesses to foreign markets, were more inclined to invest abroad by either buying existing factories or establishing their own (greenfield investment). The newly opened or acquired businesses were in the hands of the 'parent' company, together with which they formed the multinational corporation. Obviously, the reasons for companies to expand their business into foreign countries are manifold. The following elements were most probably all reasonable correlates for the establishment or acquisition of new businesses in countries other than the

[93] Economic historians tend to stress that multinationals must not be understood as a phenomenon confined to the post-war periods but rather as an independent tendency, the development of which had its origins in the nineteenth century. See: Barff (n 76) 50; A Teichova and others (eds), 'Introduction: Multinational Enterprise', *Historical Studies in International Corporate Business* (Cambridge University Press 2002) 2.

parent company's country of origin: business growth; access to raw materials; direct competition with other companies; technological disparities; protection of a knowledge and information advantage.

Even if the decrease of international trade costs cannot be assumed to be the absolute direct cause for the proliferation of multinational corporations, it certainly facilitated the exchange of raw materials, inputs of various kind and the trading of finalised goods among distant parts of the world. At the same time, such correlates would not explain why enterprises did not simply trade with foreign producers, instead preferring to have their own subsidiaries established in the relative markets. Besides the pre-existence of this presence, the decrease in tariffs could have easily discouraged the growth of multinationals in favour of trade between separate entities. Data show however that foreign direct investment grew explosively after the end of the Second World War, especially on the part of the US, which accounted for 80/85 per cent of FDI flows.[94] Various reasons may exist for this expansion of multinational activities of industrial production even after the decrease of tariffs: For example, difficulties in communications could lie at the root of the choice to keep production within the scope of one single enterprise.

The transition from the model of the firm to the multinational corporation is more a continuous evolution than a break between paradigms for the organisation of production: From the narrower point of view of the production process, the differences are not particularly significant.

As enterprises expanded their business abroad, the variations between the firm and the multinational involved aspects related to the management of production rather than the techniques of the production process, which remained aligned with the model of the firm. The coordination of multiple sites of production and the management of international trade activities of the company required a specific unit to take care of the management of the company. This task had been unnecessary in the previous model of organisation based on the firm model, where business governance was usually in the hands of the business owner.[95] The degree of integration of activities for production remained unvaried while the development of new branches within the companies followed the birth of the corporation – independently of

[94] SD Cohen, *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity* (Oxford University Press 2007); G Jones, 'Nationality and Multinational Enterprises in Historical Perspective' (1997) 230 Discussion Papers in International Investment and Management.

[95] Cohen (n 91) 30; AD Chandler, *The Visible Hand: The Managerial Revolution in American Business* (16. print, Belknap Press of Harvard Univ Press 2002) 486.

its multinational character, actually. This is also supported by the rate of autonomy which was achieved by subsidiaries in certain instances. In many cases, subsidiaries were able to develop competences relevant to, and acquire specific knowledge about, the market in which they were located so that they became rather autonomous from their parent companies and even established their own economic partnerships with other firms.[96] In multinationals, the parent company exercised control through ownership but subsidiaries were left much freedom in the arrangement of their operations. As a consequence, the production model typical of Phase II might be understood as a mushrooming of the firm model of Phase I while at the same time involving an initial separation between managerial and labour divisions.

3.3. Phase III: from the 1990s onwards

The last phase of the historical reconstruction presented in this chapter begins in the 1980s/1990s and continues into present times. The features of the production model emerging in this phase are more distinctive than those which differentiate the multinational from the firm. Trade and production are reconciled and merged in Phase III under the global value chains (GVCs) model, the emergence of which finds its origins in technological development as well as geographical and institutional conditions established over the course of the twentieth century.

3.3.1. Geography

One core difference between Phase II and Phase III as concerns the way industrial production was organised, becomes visible by juxtaposing the two terms which indicate the geographical expansion of their respective industrial organisation models: multinational and global. The use of two different terms suggests that the geographical character of multinational corporations differs from the global scale of GVCs. Intuitively, this may give the impression that, while the multinational is to operate in several countries, the global value chain is to operate in every country of the world. However, this does not need to be the case.[97] In previous sections, mention was made of the fact that the multinational did not deviate from the model of the firm in the sense that the production functions were still integrated in a single facility. Hence, if the main difference between Phase I and Phase II lay in the organisation of business management

[96] Jones, *Multinationals and Global Capitalism* (n 80) 162.

[97] T Sturgeon, 'How Do We Define Value Chains and Production Networks?' (2001) 32 IDS Bulletin-Institute of Development Studies 11.

caused by the expansion and growth of the firm, the difference between the multinational and the GVC involves a different arrangement in the organisation of the tasks related to the production function of an enterprise. This different arrangement relies on the fractionalisation of the production process: The integration of the different stages of the production process was outsourced to other firms rather than maintained *within* the bounds of the multinational. Often, this outsourcing involved a relocation of the outsourced stage of production – usually to countries with lower production costs, located in the Southern regions of the world. Accordingly, the fractionalisation of production brought about an enlargement of the territorial reach of an enterprise, even if this reach was occasioned by relations with external enterprises rather than the subsidiaries of the parent company exclusively. Therefore, a multinational and a GVC may have similar geographical characteristics from a quantitative perspective, but the attribute of 'global' industry is a better fit for the latter as the production process of a single good spills across different territorial spaces. Conversely, the multinational production is integrated in a single facility to a larger extent. This broader reach of GVCs is also well exemplified by comparing the closing rate of US based companies after the Second World War and the number of subcontractors of Levi Strauss in 2018. According to data reported by Vaupel and Curhan, between 1946 and 1961, US-based multinationals established around 2009 new subsidiaries, mainly located in developed countries.[98] This trend was followed by the internationalisation strategy undertaken by Levi Strauss a few years later: Between 1964 and 1974, the number of plants involved in production for the jeans brand increased from 16 to 63, located in 35 different countries. Today, the production of Levi Strauss, which has also expanded its variety of products and product lines, involves more than 500 factories located in far apart corners of the world, from China to Italy, from India to Colombia, and from Sri Lanka to Brazil.

In other words, as is the case for many other companies, Levi Strauss went from being a multinational to being a multinational running its own GVC.

3.3.2. Technology

As for the role of technology in Phase I, innovations in technological capacity were the main factor for the developments in industrial production materialising in Phase III. If the Industrial

[98] JW Vaupel and JP Curhan, *The World's Multinational Enterprises: A Sourcebook of Tables Based on a Study of the Largest U.S. and Non-U.S. Manufacturing Corporations* (Harvard University Press 1973); JH Dunning, *Explaining International Production* (Unwin Hyman 1988).

Revolution changed the method of energy supply and led to the development of new engines for production and transportation of materials and goods, Phase III saw the emergence of technologies which have increased the capability for long-distance communications. The need for a means to ensure practical long-distance communication grew along with the geographical expansion of enterprises in Phase II, and was particularly felt in coordinating the activities of multinational corporations. The connection between parent companies and their subsidiaries was maintained on the basis of ownership: ownership links served the purpose of keeping ties between organisation and production as well as to preserve the integration of production processes in the light of the lack of any more effective or less costly means to organise production.[99] Ownership links allowed what the market could not really provide – yet –, meaning a cost-effective strategy to coordinate different branches of a businesses where production and management of economic activities had become two different and separate tasks.

3.3.3. Institutional Settings

From the institutional perspective, Phase III saw a consolidation of a tendency to trade liberalisation with the creation of the World Trade Organization with the signing of the 'Final Act' in 1994. The WTO conferred to international trade the institutional framework which countries had sought but failed to achieve during the negotiation for the establishment of ITO in the aftermath of the Second World War. The establishment of WTO was accompanied by a revision of the GATT and the adoption of the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

One important achievement of the WTO was the institutionalisation of the procedure for dispute settlement on trade matters between countries and the establishment of rules on trade aimed at the reduction and regulation of technical barriers to trade, including all rules, regulation and standards which could create obstacles to free trade. The dispute settlement

[99] Williamson motivated the choice to integrate the organization and the stages of production by employing transaction economics theory. His main claims were that specific technology does not affect the organization of production, asset specificity does; Long term relations require asset specificity, not easily substitutable, and therefore the organisation costs which would out-weight the bureaucratic costs deriving from internal organization of production through market transactions. O.E. Williamson, *The Economic Institutions of Capitalism,* 88 ff.

mechanism has contributed to the emancipation of trade law, and trade liberalisation, from the influence of the states.[100]

3.3.4. The Global Value Chain

With the changing conditions in technology, geography and the institutional framework in the late 1980s and early 1990s, production processes began to be organised in line with a different model from that of the multinational corporation of Phase II. The new model increasingly relied on bilateral agreements between a leading company and suppliers. Nowadays, this type of organisation is referred to as a global value chain (GVC) or global production networks (GPN).[101] Besides their contractual nature, GVCs are characterised by the presence of a chain leader or leading firm which has the function of organising the production process at each fragmented step. The presence of a chain leader is the main difference existing between the simpler frame of global production networks and GVCs. Both have in common the feature of contractualised and fragmented production, but in GVCs, the leading company exercises a type of control and overview of the productive process which is not shared with other participants of the chain.

GVCs can be divided between buyer-driven and producer-driven GVCs.[102] GVCs of consumption goods are typically 'buyer-driven' GVCs: buyers exercise influence over their contractual fragment of the chain. In consumption GVCs, there are two important type of buyers: consumers, who play the role of ultimate buyers, and the leading company, which plays the role of intermediary-ultimate buyer. The latter role is ultimate to the extent that the leading company is the only buyer for suppliers, and it is intermediate in the sense that goods are meant to be sold to consumers, who are the real ultimate buyers in a demand-driven economy. However, consumers do not manage to influence (or regulate) the GVC, as opposed to leading companies. The function of intermediate-ultimate buyer performed by the leasing company is explanatory of the transformation of the production process into several transactions: from the

[100] This emancipation has not been welcomed with the same enthusiasm by all WTO members, as shown by the opposition on the part of the US of the recent years.

[101] Wh ile the term GVCs may also refer to the specific method to generate value in the chain, for the purposes of the present work, the two terms are interchangeable. For a comparison on the differences between the two models and literature, see: A Beckers, 'The Invisible Networks of Global Production: Re-Imagining the Global Value Chain in Legal Research' (2020) 16 European Review of Contract Law 95.

[102] Gereffi and Hamilton (n 14); Gereffi (n 27); G Gereffi, 'The Organization of Buyer-Driven Global Commodity Chains: How U. S. Retailers Shape Overseas Production Networks' in G Gereffi and M Korzeniewicz, *Commodity Chains and Global Capitalism* (Praeger 1994).

point of view of the production organisation, each stage corresponds to a transaction between the supplier and the leading company. If the diffusion of ICT is the determinant for success of GVCs from a practical perspective, from a legal point of view, the institutional transformation taking place from the late 1980s onwards have increased the advantage of the contract in other means of organising production, in line with Williamson's suggestions. In other words, ICTs made it possible for companies to administer and regulate the production process through contract without having to bear the costs and liabilities inherent to the 'ownership' of the production process.[103] In the same vein, contracts have increasingly become a regulatory tools for global production.[104] A tool which can be used to reach different economic and normative purposes. As a result, contracts in GVCs not only bind actors to fulfil an obligation but also set requirements regarding the production process and the consequences for violation and non-fulfilment in addition to the rules defined by the contract law.

Thanks to the transition to managerial tasks, leading companies could not only maintain their acquired multinational character but even expand it at the 'global' level by integrating suppliers coming from different geographical areas (even if often within the same region).

4. Interim Conclusion: Consumer law is back

The chapter presents a possible narrative of the historical evolution of various models adopted for the organisation of industrial production from the Industrial Revolution until the present. The narration began with the story of a man, called Levi Strauss, who dressed thousands of people from a small factory in San Francisco.

The story served two purposes: an explanatory one and an evidentiary one. From the explanatory point of view, the story helps to clarify the reasons at the roots of the different phases which characterise the history of industrial organisation; from the evidentiary point of view, the story confirms the narrative presented in the chapter with facts.

The historical evolution of industrial organisation has been divided into three phases, each of which is characterised by the prevalence of a specific model of organising industrial production. Phase I includes the decades from the Industrial Revolution until WWI; Phase II

[103] G Gereffi and O Memedovic, 'The Global Apparel Value Chain: What Prospects for Upgrading by Developing Countries?' 41.

[104] Fabrizio Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts New Architectures' (2013) 36 Fordham International Law Journal 1557; F Cafaggi, 'Transnational Governance by Contract. Private Regulation and Contractual Networks in Food Safety.' in A Marx and others (eds), *Private Standards and Global Governance* (Edward Elgar Publishing 2012).

covers the period from the end of the Second World War until 1990s; Phase III began in the 1990s and is still ongoing.

The emergence of each specific paradigm of industrial organisation has been put in relation with the geographical, technological and institutional context existing at the time of each of the three phases. This contextualisation helps to understand the conditions in which each of the paradigm took shape. The paradigm of the firm emerged in the context of a turning point in technological development, with colonial empires providing the institutional background and shaping the geography of a (large part) of the world. The multinational corporation (significantly) developed in Phase II, during the second post-war period. During this phase, the technological surplus of the two global wars was employed for the further enhancement of means of transport and communication, while the geographical and institutional background were strongly influenced by the introduction of a liberalised system of international trade. The notion of free trade as the only system capable of ensuring economic prosperity, and thereby peace among countries, was developed in Phase II. Finally, GVCs have come into being in Phase III, as a result of the ICT revolution and in a context of further trade liberalisation and the transition from a multinational to a global paradigm of industrial organisation.

The transformations occurring in the geographical, technological and institutional contexts have altered the way in which industrial production has been organised since its inception. However, all three paradigms analysed in the present work share one characteristic: the enterprise causes externalities on the environment and/or people. These externalities include environmental pollution, environmental damage, violation of workers' and human rights, forced and child labour, and animal exploitation. The historical overview of the different modalities for arranging industrial production show that, despite the profound differences which distinguish one paradigm from the others, any model of industrial production creates some costs which are not borne by the enterprise causing them. If changes in the models of industrial organisation did not alter the nature or the presence of externalities of production, the same cannot be said with respect to the dynamics which lead to the creation of these negative side effects. The evolution of industrial organisation could be read in the type of activities carried out by the enterprise and the changes in the amount of control which the latter exercises over such activities. The enterprise has two main scopes: a productive and a transaction one. While the former includes the activities of production *strictu sensu*, the latter refers to activities related to trade of raw material and final goods and to the management of the productive activities. Following this scheme, the production process can be divided – broadly speaking – into three phases: T) the transaction activities aimed at supplying the

elements necessary for making the good; P) the productive activities; T^1) the transaction activities necessary to bring the product on the market.

While the firm presents itself as an atomistic paradigm as the enterprise only has control over P without having the power to influence T and/or T^1, the multinational maintains control over P to the extent production is still vertically integrated within firms owned by the enterprise and, at the same time, the territorial expansion through the acquisition or establishment of foreign subsidiaries is useful for increasing the control over T^1. By fractionalising and outsourcing P, the GVC extends its control over T.

The differences in the control exercised by the enterprise over the productive and transaction activities has an impact on the extent to which the enterprise may be attributed responsibility for the causation of the externalities deriving from these activities.

The chapter concludes with a brief explanation on how the overview of the industrial modes of production is relevant to the main theme of the thesis: Namely, the overview offers the elements necessary to follow the conceptual sequence presented in the next three chapters. The evolution of the modes of production from the firm to GVCs highlights the criticalities posed by a contractualised production process with regard to externalities of production. The analysis of contractualised production in GVCs is based on EU consumers' perception of the production process. This perspective requires the introduction and development of three main concepts: externalities; communication; epistemic authority. Through these three concepts, the work highlights how the legal framework of consumer law in the EU affects the consumers' perspective on externalities by establishing a system of communication that, while conferring epistemic authority to leading companies, leaves consumers as passive collaborators in a failing system.

The next two chapters explore the way in which the sequence T-P-T^1 gets transformed in the context of GVCs with a particular focus on the role of the contract and how this transformation poses questions for a reconceptualisation of the relationship between contract law, production and the regulation of externalities.

Chapter 2

Legal Framework for Contract and Externalities

1. Externalities before and after contractualisation

The first step to take in order to present the main argument of the thesis is describing the relation between externalities of production and contractualisation in GVCs. The theme of externalities has been addressed at different regulatory levels in the present and the past, respectively. This chapter aims to provide an overview of all these regulatory measures as well as to highlight the pitfalls of the broad picture. This broad picture arises from the jigsaw of regulatory segments, the coherence of which is provided by the political and economic intentions underlying the complex scheme which are backed by contract law. Along these lines, contract law is not neutral, with its very non-neutrality making it particularly significant for GVCs. With the contractualisation of production, the non-neutrality is reflected in the production processes and the negative effects which are part of it. As a result, the contract has a specific weight in the effectiveness of the regulatory tools designed to oppose externalities.

The regulation of externalities is not contextual to the contractualisation of production. Rather, it has evolved following the transformation of modes of production. At the same time, the contractualisation of production has brought to light the limits of the complex puzzle for regulating production and externalities. These limits resonate with the difficulty to accept that the reliance on means of private law (private ordering) does not exonerate the outcoming private order from being questioned in its political implications.[105] However, externalities of production reveal the struggles underlying the political implications of global production in GVCs and give rise to questions with regard to the values which direct the contractualisation of production.

In this context, the chapter presents the regulatory puzzle with the intent to highlight the role of the state, both at the national and international level, so as to emphasise that the shift

[105] P Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14 Indiana Journal of Global Legal Studies 191; D Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2018).

from the model of the firm to that of GVCs is not merely an efficiency preference. Rather, that efficiency depends on the fact that contract allows to cut those costs which derive from regulatory standards and which are the representation of political values and principles at the same time. With the move to contractualisation and the inability (and unwillingness) of states to ensure that the normative prerogatives enshrined in regulations are vanished by the contractualisation of production in GVCs, contracts in GVCs come to occupy a key normative role with respect to externalities of production.

The chapter unfolds as follows. First, it provides a general overview of the issues which fall under the category of externalities of production. Second, it illustrates the state regulatory measures in areas concerned with externalities of production: international human rights, international labour law and environmental law. At the national level, statutory measures relate to tort law in the first place. Even though it is part of national law, company law is analysed as part of the regulatory responses which relate to corporations: the limits originating in company law, and specifically in the corporate veil, have triggered the proliferation of forms of self-regulation in the form of voluntary sustainability standards which include policies, labels and certification schemes. The chapter concludes with a section on the differences between externalities before and after GVCs. This part of the chapter underlines the instrumentalisation of the contract to build a system which exacerbates political and economic inequalities existing within GVCs, currently also independently from the geographical location of the members of the chain.

2. Externalities

Today, one of Levi Strauss' pride and joys beyond the making of jeans is their corporate social responsibility policy. With the adoption of their Terms of Engagement in 1991, Levi Strauss has been one of the first companies in the clothing industry to provide itself with a corporate social responsibility policy. The company presents itself as a pioneer in the field to the world, not limiting itself to comply with standards drafted by ad-hoc organisations, but investing in the drafting of their own policies for decreasing the impact of their business on the environment and humankind.

This sense of achievement is however the result of a black page in its history which refers back to the relations between US clothing companies and one of its protectorates, Saipan Island, which is part of the Northern Mariana Islands. In the early 1990s, many US companies found it convenient to outsource production to this territory because it allowed

them to categorise the goods as 'Made in the USA' while profiting from the foreign cheap labour which was made possible due to the independence of the protectorate from American labour laws. Levi Strauss was one of the American corporations producing on the island involved in the scandal when the issue of labour exploitation came to public attention.[106] The company's reaction to the scandal consisted in the termination of its contractual relationship with the specific supplier where the abuses were found, while nevertheless maintaining its production with other five suppliers on the island.

2.1. Garment industry

On a corporate level, Levi Strauss was the first to adopt a Terms of Engagement, a corporate social responsibility policy which takes into account the production chain.

This first version of the Terms addressed five categories of requirements which suppliers must meet in order to enter into, and remain in a business partnership with the group Levi Strauss.

The five categories included:

1) Environmental requirements according to which Levi Strauss would make business only with partners who share the terms set by the Levi Strauss Environmental Action Group;

2) Ethical requirements which prescribed compatibility between ethical standards of Levi Strauss and those of business partners;

3) Health and Safety requirements according to which Levi Strauss exclusively enters into partnerships with businesses which provide workers with a safe and healthy working environment;

4) Legal requirements with respect to the compliance with local laws, both when the actors involved act in their own's individual capacity and in their capacity as employers;

5) Requirements on employment practices according to which workers's presence must be voluntarily; no physical risk of harm should be present in the work place; workers need to be fairly compensated, be allowed freedom of association, and not be exploited in any way. In addition to this, requirements on employment included the following guidelines:

[106] Philip Shenon, 'Made in the U.S.A.? -- Hard Labor on a Pacific Island/A Special Report.; Saipan Sweatshops Are No American Dream' *The New York Times* (18 July 1993).

5a) Regarding wages and benefits, the guidelines provided that business partners had to grant wages and benefits in compliance with local laws or follow the prevailing industry practice;

5b) With respect to the working hours, the guidelines required at least one day a week off and compensation for exceeded hours;

5c) Neither (knowing) child labour nor prisoned or forced labour was allowed;

5d) Discrimination and corporal punishment, as well as other forms of mental or physical violence, were not permitted.

Despite the adoption of such requirements, in 1999, Levi Strauss was found in violation of workers' rights once again, when three lawsuits were presented by workers on Saipan Island against several companies, including Levi Strauss. A settlement was reached, which the Californian company distanced itself from, refusing to compensate the workers altogether. Today, Levi Strauss subscribes to many 'sustainability' commitments, praising the high standard of their self-imposed obligations toward respect for workers, their communities, the environment and the use of resources.

The Saipan case is more than 20 years old but it sounds as if it could have been in today's newspapers. Similar cases have indeed kept occurring and are still one major concern in present times, with growing interest in not only the social but also, and especially, the environmental impact of global business. The main difference with the past is that much more attention is given to the issue, up to the point that fields of legal research have arisen which specialise in the phenomenon, such as business & human rights or corporate social responsibility studies. Sadly, the examples of similar episodes to the Saipan case are numerous and extend far beyond the fashion industry: recently, high tech companies, food companies and oil companies, have been at the centre of scandals involving child labour, unsafe working conditions and environmental disasters.[107]

2.2. Three phases: three externalities

Externalities of production are not a by-product exclusive to GVCs. Quite the contrary:

[107] Ben Chapman, 'Samsung Faces Charges over "Misleading" Ethics Claims after Alleged Labour Abuses in Factories' *The Independent* (4 July 2019); Jamie Doward, 'Children as Young as Eight Picked Coffee Beans on Farms Supplying Starbucks' *The Guardian* (1 March 2020); Oliver Balch, 'Chocolate Industry Slammed for Failure to Crack down on Child Labour' *The Guardian* (20 October 2020).

Each production organisation model corresponds with certain consequences for side effects/externalities. One core claim in this respect is that the variations in the industrial production models are paired with the relationship between each of the entities – the firm, the multinational and the global value chain – and the externalities that industrial production causes.

This argument can be built along a narrative which sees the different arrangements exercising a different type of control over their production system broadly speaking, therefore including both production *strictu sensu* and trade related activities. The differences between the three models presented in previous sections do not only affect their structural differences: what distinguished the firm from the multinational is not only the geographical spread of production in the same way that the difference between the multinational and the global value chain is not merely the outsourcing of production. In other words, what distinguishes these models from one another is not simply their internal administration but also the resulting effect the alteration of the internal arrangement for the management of their activities has on the control over, and consciousness of these entities of the side effects/externalities which they produce. The disentanglement between ownership and management, as well as the outsourcing of production, affect the morphology of the organisations of industrial production to an extent which influences the range of issues over which the economic entity exercises its control. In order to better highlight these aspects, the analysis draws on a rather established distinction between the scopes of enterprises: production, above referred to as production *strictu sensu*, and transactions, which are necessary to coordinate the production. The control exercised over these two elements varies in accordance with the relevant paradigm, thereby giving rise to different considerations about the link between the activities of the firm and the side effects/externalities deriving from such activities.

Phase I. Organisation of industrial production during Phase I was arranged following the lines of the model of the firm. The firm-model accounts for a rather atomistic paradigm, in which the factory and the firm are located in the same place, and the management of the business is therefore much more intertwined with the activities related to the production process. Simply put: In Phase I, owning a business for the production of goods or services coincided with owning a factory. The story about the success of Levi Strauss and his blue jean at the end of the nineteenth century provides a beautiful example of the correspondence between production and management of the business. Once he had met with Davis and decided to enter into a business partnership with him, he neither continued his activity as a

seller nor asked a third party to produce the blue jean which he and Davis had in mind. Rather, he set up his own factory and produced the blue jean himself. Looking at the distinction between production and transactions, production was clearly the function over which Levi Strauss exercised a direct control, while the transaction function was rather undersised compared to the production function. The dominance of the production over the transaction function originated in the atomistic structure of the firm paradigm of industrial production: the production of the blue jean in the first Levi Strauss plant in San Francisco required the establishment of transactions for the supply of raw materials, and energy to run the machineries and the facilities, as well as for selling the goods there produced. Both production- and transaction-related activities had their impact on the external environment and resources involved: energy extraction; pollution deriving from the productive process itself and from the delivery of raw materials and finalised goods; workers' treatment. However, Levi Strauss can hardly be said to have had direct control over the externalities resulting from the practices employed for the extraction of energy resources, or over the means of transport adopted to carry the materials. At the same time, the emissions generated from the productive factory, the mistreatment of workers were directly dependent on the production function of Levi Strauss' firm.

In other words, the only externalities which were directly associable with the operations of the firm were those related to the productive function of the firm. As all activities related to the production function were internalised in the firm, the operations related to the production process were those which represented the soul of the firm: the transactions preceding or following the production process were not under the direct influence of the firm. As a consequence, concerns for externalities during Phase I only concerned the activities carried out on the premises of the firm.

Phase II. The emergence of the multinational corporation presents elements of diversity with the firm-based organisation model of industrial production. Before looking at the 'multinational' attribute of the model, attention should be drawn to the term 'corporation'.[108] The use of this expression suggests that production was not managed by the indivisible entity represented by the firm, but rather included a multiplicity of divisions. The criterion to separate these divisions was first of all the functional differentiation among them rather than the geographical location of the relative operational units. The emergence

[108] The Oxford dictionary defines the term corporation as '[a] large company or group of companies authorized to act as a s*ingle entity* and recognized as such in law' (emphasis added).

of tasks distinctively related to managing the enterprise as opposed to those associated with the production function determined a different control of the business over its activities. For example, the establishment or acquisition of subsidiaries, be it domestically or abroad, determined an increase in the level of coordination needed for the business to operate successfully. In the history of Levi Strauss, the geographical expansion of the production sites of the company was accompanied by the launch of corresponding headquarters. The increased structural complexity of the business indeed required a different organisation for the activities necessary for running the business and for the production of jeans. Referring once again to the distinction between the production and transaction functions of the enterprise, the transition from the firm to the multinational corporation delineates an assumption of responsibility of the enterprise in the latter, while the production function remains shaped on the basis of the model of the firm. To the extent that the enterprise's enlargement of the productive activity, either in terms of geographical expansion or in terms of product offer, aimed at entering new markets without sharing knowledge and/or technological advantages, the move from the firm to the corporation requires control of the enterprise over its transaction functions, especially those related to the coordination between units as well as between units and their regional headquarters.[109]

While the production process was still entirely carried out within a single factory, the supply of raw materials and energy required a higher degree of coordination on the part of the enterprise: as a result, the association between the activities of the company and transport-related externalities became easily identifiable, besides those deriving from the production operations carried out within the individual factories.

Phase III. The emergence of GVCs as a paradigm for industrial production has posed new challenges from the perspective of the externalities caused by industrial production, or at least in terms of attributing – and thereby internalising – the costs of such effects to a specific market actor. If the transition from the multinational to the GVC entailed the outsourcing of those tasks which were carried out within the firm under the former model, the question arises what type of control the enterprise leading the GVC exercises over the outsourced activities. This question is addressed in more detail in the next chapter: here, it suffices to indicate that the control exercised over the outsourced activities is affected by the modalities in which this control is exercised. The move from the vertical integration of production typical of the firm and the multinational to the system of GVC did not dilute the

[109] Dunning (n 95) 103.

power of the enterprise leading the productive process, it only loosened the reigns on the control over the process.[110] As a result, even the control over the externalities of production caused along the chain is dampened as the control exercised by the enterprise leading the GVC over the actors taking part in the chain, is external to the structure of the enterprise itself.

Mention has already been made that industrial production has hardly ever been neutral with respect to either its social or environmental impact. Much of the climate urgency which the world is faced with today, is the result of an incremental deterioration of environmental conditions resulting from long-lasting polluting and detrimental activities, the impact of which was unknown back when such activities were ubiquitously practiced. In the same way, labour exploitation is as old as labour itself, with slavery being a commonly accepted practice before and after modernity. However, the way of organising industrial production affects first of all the understanding of social and environmental impact as externalities as well as the methods employable in order to compensate for or avoid their manifestation. Taking the premise again from the industrial revolution, it is possible to trace an evolution in the approach towards the addressing of externalities, a story in which some actors slowly disappear or retire from the scene and others emerge and take up their own space. To the first group belongs the figure of the state which, through the exercise of territorial authority, held the reins of the link between industrial activities, economic development, and social and environmental policies. To the second group belongs the plethora of organisations and associations which have emerged in order to respond to the necessity of making the enjoyment of economic freedom more responsible, in the light of the – to a certain extent voluntarily – lost state authority over economic actors.

2.3. ‘Fatta la legge, trovato l’inganno’

The story of externalities follows that of globalisation and political economy. It is therefore backed by the same dynamics which shaped their transformation, in particular during the past century, when market liberalisation through the dismantling of barriers to trade decisively contributed to the progressive loss of grip on economic actors by states. In turn, this waning control and opening of barriers brought about a new discourse on the level of

[110] For an overview of the use of soft power along the chain, see: Nye 1990, but especially (also for literature review): JS Nye, ‘Soft Power’ (1990) 80 Foreign Policy 153; JS Nye, *Soft Power: The Means to Success in World Politics* (1st ed, Public Affairs 2004); AA Kudryavtsev, ‘A Systemic View of the Soft Power’ [2014] EUI Working Paper RSCAS.

externalities of production, a discourse in which transnational corporations – including GVCs in this sense as well – have been accused of unilaterally enjoying the deal which had promised economic and social development to less favoured countries through the abolition of trade barriers.[111]

The promise underlying the project was not entirely lived up to, especially in South-East Asia and Latin America.[112] Obviously, it would be reductionist to attribute the reason behind the slow development rate solely to the exploitation of workforce and natural resources. However, the deal was undeniably transformed from free trade in exchange for development to unregulated economies in exchange for export growth. The game which has been played ever since the first scandals appeared on the public radar is a game of hide and seek in which a new way to circumvent each and every new solution created as a response to the gravity of the issue is used, even before adoption of said solution.[113]

Gunther Teubner refers to this game with the old Italian motto 'fatta la legge, trovato l'inganno', thereby accentuating the role of the actors which have been participating in a long-standing dialogue, made of strategic declarations, followed by sometimes serious and sometimes hypocritical moves on all sides of the playing field. Outside the game court stand actors which cannot be directly involved in the game but whose voices sometimes break through, influencing the fate of the game. Sitting on the bench, some other actors are ready to enter the game and play, hoping for a new strategy which may lead to different outcomes.

The aim of the following paragraphs is to present the players which have already entered into the game and to see whether the goals they have scored have been sufficient to invert the direction of a game which sees principles of justice and fairness clearly losing the battle. On both sides of the game, laws are adopted and interpreted in a strategic manner.

The persistent presence of externalities in industrial production despite efforts made at different policy and legal levels is the basic premise underlying the present research, as well as that of many other scholars. Two questions follow logically: Why have the measures adopted so far not eradicated the phenomenon? What are possible or desirable alternative

[111] See ch. 1.

[112] Human Development Index, World Bank on people living on 5.50 dollars per day or less (in Bangladesh this is more than 85% of the population).

[113] Fatta la legge trovato l'inganno, G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 97.

solutions to those already developed? Answering these simplistic questions necessitates a reconstruction of the panorama seen by observer viewing the world of businesses through the lenses of their social and environmental impact. The approach to introduce the regulatory puzzle is a legalistic one: The analysis looks at the inclination of the law and its application in the different areas analysed. This analysis is essential to evaluate to what extent the scope of law addresses externalities of production.

The results of the analysis conduce to an assessment of the changing significance of economic and political elements in trade, production and, particularly, contract. This changing significance emerges from the comparison of the treatment of externalities before the age of the GVCs and during. That section of the chapter leaves behind the legalistic approach by introducing the influence of law and economics on the regulatory paradigm, and by complementing the analysis with socio-legal considerations. The essence of the comparison of externalities before and during the GVC's era suggests that contracts have acquired a topical – structural – function in GVCs, not only in production organisation but also in regulating the externalities of production. The economic and political stances of production and trade have entered the domain of contractual governance in GVCs. However, these stances have been overlooked and hidden behind the formalism of the contract which remains understood as a neutral legal tool at the disposal of private actors. As a result, while the content and enforcement of contracts matter a greater deal in GVCs than they did before the emergence of GVCs, the formalistic understanding of the contract prevents an assessment of GVCs vis-à-vis those principles and values informing the body of laws which regulate the externalities of production.

3. Regulatory Action of International Organisations

The period following the end of WWII signalled the beginning of a new phase of multilateralism in international relations. This period saw the development of the first GATT, the signing of the Bretton Woods Agreement, the birth of the UN and NATO, and the signing of international agreements on environmental protection and the principles deriving therefrom. The paradigm emerging out of this 'move to institutions'[114] is one in which states enter into a series of multilateral partnerships which are functionalised in scope

[114] D Kennedy, 'The Move to Institutions' (1986) 8 Cardozo Law Review 841.

in order to coordinate their actions at the international level.[115] Among this plethora of organisations, the UN was supposed to be a general arena, making the protection of human rights a priority in the international sphere. Other organisations were to be sector specific. Following this strategy, human rights achieved their institutionalisation through the creation of the Universal Declaration of Human Rights in 1948. Within this framework, the UN began developing a strategy to address violations of human rights by multinational corporations during the late 1970s. The outcome of this process has been delivered in 2011 in the adoption of the UN Guiding Principles, a non-binding instrument which provides for a much less ambitious package of guiding principles than had been the initial the intention of the international organisation. The difficulties encountered during the drafting and the development of this set of principles reflect the limitations of international on account of its de-politicisation and its multilateralisation. The former phenomenon has contributed to the compartmentalisation of political action at the international level, thereby shaping an international world order which does not provide for political priorities or a ranking of conflictual interests. The latter phenomenon has contributed to the compartmentalisation of authorities among actors. The main consequence of this depoliticisation is, in the words of Koskenniemi, that '[i]n a world of plural regimes, political conflict is waged on the description and re-description of aspects of the world so as to make them fall under the jurisdiction of particular institutions'.[116] The compartmentalisation without politicisation brings to the fore the issue of allocating judicial authority in the framework of a paradigm of international law which leaves states at the helm. In other words, without a political conflict on the matter, and in a context in which states are seen as the sole subjects of international law, the issue of violations of internationally recognised rights cannot be properly dealt with through the adoption of binding rules for corporations. The multilateralism of this international order allows for coordination through bilateral and unilateral actions. In particular, the creation of a system in which states cooperate in the framework of multilateral organisations has resulted in a system of governance of international affairs based on the collective adoption of measures which are often

[115] M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 7 Modern Law Review 1.

[116] Koskenniemi (n 112) 7.

implemented by way of bilateral relations, and extended to other actors in conformity with principles of solidarity and non-discrimination.[117]

The increasing sectorialisation of international organisations is also reflected in the way externalities of production are addressed at the international law level. Labour issues are dealt with by the ILO, environmental externalities fall under the scope of environmental protection measures, economic and social impact is addressed by sustainable development tools, human rights are tackled by several covenants according to the polity which commits to their protection. While each and every one of these instruments creates a separate regime, a common trait is the lack of direct binding effect on the actors which should be the ultimate addressees of the legal instrument. At the international level, externalities of production are addressed through a set of declarations, principles and guidelines, which cannot be enforced by any court as they do not create obligations, while mandatory norms keep targeting state activities. The resulting administration of externalities of production, both in terms of tools and methods employed as well as outcomes sought and achieved, reflects a specific idea of what function states are to perform in the international order and which purposes they aim to achieve.

3.1. The Human Rights Strand: The UN Guiding Principles on Business and Human Rights

The international law instrument which nowadays represents the main yardstick for the treatment of externalities of production is the UNGP on Business and Human Rights. The process of approval of this document has been prolonged for decades and the final outcome was only achieved in 2011. The task of developing this set of principle was entrusted to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie. In delivering the outcome he was commissioned for, the law professor had to confront previous and failed attempts to regulate the subject. The first failed effort dated back to the late 1970s, when the Working Group on a Code of Conduct under the Commission on Transnational Corporations had begun negotiations on establishing a code of conduct on transnational corporations which never saw the light of day however.[118] After the code of conduct had

[117] JG Ruggie, 'Multilateralism: The Anatomy of an Institution' (1992) 46 International Organization 562.

[118] For an extensive and detailed account of the controversial issues during the negotiation of the code, see: KP Sauvant, 'Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 Journal of World Investment & Trade 11.

been abandoned, the subject witnessed a revival within the UN operational framework at the turn of the century and millennium. In 1999, the Global Compact made its appearance on the international scene; In 2003, the Sub-Commission on the Promotion and Protection of Human Rights adopted the Norms on Transnational Corporations and Other Business Enterprises, a set of rules which were supposed to bind multinational enterprises 'to promote, secure the fulfilment of, respect, ensure respect of and protect human rights'.[119] Both documents had the advantage of offering a comprehensive framework by considering the impact which transnational corporations have on human rights, labour and social rights, discriminatory practices and environmental safeguards. Of these two instruments, only the Global Compact has survived until present days, while the Norms were never implemented by the Commission on Human Rights. This difference in longevity is unsurprising considering that the aspirations of the two projects were diametrically opposed. The Global Compact provides ten principles covering the areas of human rights, labour right, environment and anti-corruption. These principles are short sentences on the values which should inspire corporations or other business entities aiming to act in a responsible and sustainable manner. The principles reproduce core principles of international law consolidated in the various areas they address, such as the precautionary principle, the respect for human rights and the principle of responsibility. However, none of the ten principles provides for an obligation for those companies which decide to commit to the values there incorporated. The 'decalogue' modestly aims to give businesses a simple guidance to the understanding of which values they need to subscribe to at a minimum in order to avoid irresponsible acts in the organisation and fulfilment of their activities, but it does not extend any further than that. Conversely, the Norms provided for a detailed and extensive commentary on the obligations to be assumed by transnational corporations and other business entities in order to legitimately exercise their activities. The Norms were the first instrument to introduce obligatory measures for transnational corporations and, along similar lines to the Global Compact, address different concerns raised by the activities of global production together. The drafting process of the Norms followed an inclusive process of adoption. The Working Group entrusted with the task of drafting the Norms consulted with stakeholders from different environments, including corporations and

[119] Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', available at https://digitallibrary.un.org/record/501576.

NGOs, besides government representatives.[120] The level of detail foreseen by the Norms in addressing the sensitive issues posed by transnational business entities as well as the broad scope of application made the Norms an unprecedented document in the field of corporate social responsibility. The discussions on the definition of transnational corporations ultimately favoured a rather broad approach in order to avoid an excessively limited scope of application of the Norms. The solution adopted was that of specifying the addressees of the Norms as transnational corporations, defined as '*an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively'*; And other business entities defined as *'any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security'*.[121]

These two definitions combined resulted in providing a broad subjective scope of application to the Norms, so as to include any possible variety of business organisation from a structural as well as a geographical perspective. The objective scope of application of the Norms is also rather comprehensive to the extent that the Norms impose the obligation on their addressees to conform their behaviour to '*applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate*'. Besides the references to already existing provisions, such as in the field of environmental protection and human rights, the Norms also directly enforce obligations on discrimination, security of persons, rights of workers, and consumer protection.

[120] Weissbrodt, David and Kruger, Muria, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 American Journal of International Law 901, available at https://scholarship.law.umn.edu/faculty_articles/243.

[121] Sub-Commission on the Promotion and Protection of Human Rights (n 34), par. 20, 21.

The identification and expansion of both the subjective and objective scope of the application of the Norms, combined with the mandatory nature of the measures therein provided, had created factious positions regarding the desirability of introducing this body of rules, which ultimately led to the abandonment of the project.[122]

While the Norms were put aside, the sentiment and ambition that a framework needed to be adopted to discourage international production from practices causing social and environmental externalities, remained alive and well for the members of the Council. In 2005, the baton was therefore passed to Professor John Ruggie, who was nominated Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG) with the mandate of drafting a new instrument which could overcome the dissatisfactions expressed about the Norms.

The new mandate was crystallised in 2011 in the adoption of the UN Guiding Principles for the implementation of the three-pillars structure as designed in the UN 'Protect, Respect and Remedy' framework.[123] The deliberative attitude, which characterised the development of the Norms, also guided the drafting of the principles. During the six years of the mandate, 47 public consultations took place, in order to consider and possibly incorporate the observations of different stakeholders.[124] If the GPs have followed the good-practice established by the working group during the development of the Norms procedure-wise, content-wise they differ greatly from the Norms. Firstly, the GPs are rather less ambitious in terms of scope of application, which is limited to reinforcing the principle that States remain the only addressee of international law obligations, and in particular of human rights

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[122] The International Chamber of Commerce and the International Organisation of Employers expressed particular reluctance to the adoption of the Norms by the Human Rights Council by arguing:

> The binding and legalistic approach of the draft norms will not meet the diverse needs and circumstances of companies and will limit the innovation and creativity shown by companies in addressing human rights issues in the context of their efforts to find practical and workable solutions to corporate responsibility challenges. […] To be effective and relevant to a company's specific circumstances, business principles and responsibilities should be developed and implemented by the companies themselves.

See, U.N. Sub-Commission on the Promotion and Protection of Human Rights, 'Joint Written Statement Submitted by the International Chamber of Commerce and the International Organization of Employers, Nongovernmental Organizations in General Consultative Status, U.N. Doc.E/CN.4/Sub.2/2003/NGO/44 available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/152/81/PDF/G0315281.pdf?OpenElement.

[123] The framework was established by the SRSG during one of the sequences of mandates which led to the formulation of the UNGPs.

[124] J Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises Part C: Appendices' [2011] Netherlands Quarterly of Human Rights 224.

obligations.[125] The GPs have however clarified that this duty upon the State also extends to violations committed by third parties, including corporations and other business enterprises. Secondly, the GPs themselves, in contrast to the Norms, do not provide specific applicable provisions, but they are rather built on references to existing instruments of international law, thereby eliminating one of the points of friction which had compromised the adoption of the Norms.

In accordance with the second pillar, corporations are attributed the 'responsibility to respect' human rights instead. This responsibility mainly consists of a negative requirement not to violate human rights, meaning that this responsibility does not translate into any enforceable obligations, leaving the matter largely reliant upon the voluntary initiative of businesses. The GPs include suggestions on the most effective measures which corporations are advised to take in order to effectively meet with their responsibility to respect. Among the 'operational' requirements, the GPs suggests enterprises to disclose their commitments and expectations by instituting a 'statement of policy'; to exercise human rights due diligence; to carry out impact assessments and to take action accordingly. In this regard, the GPs are the seeds which have sprouted a jungle of voluntary initiatives designed by either enterprises themselves or *ad hoc* organisations to which enterprises subscribe, in order to communicate their abidance to criteria of responsibility or, or in the term lately more in vogue, sustainability.

3.2. The labour law strand and ILO declaration

Whereas the initiatives within the framework of the UN mainly focus on the protection of human rights, other initiatives have been dedicated to more specific instances of externalities occurring in global production. In the realm of labour law, multinational enterprises have been expressly invoked in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[126] Such principles were adopted for the first time in the late 1970s with the aim of 'guiding' governments, enterprises and workers' organisations towards the implementation of the provisions included in ILO's various conventions and recommendations. The Declaration contains some similarities

[125] United Nations, 'Guiding Principles on Business and Human Rights' HR/PUB/11/04, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[126] International Labour Organization, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy'.

with the UNGPs in terms of overall purposes: It embraces a broad definition of multinational enterprises which encompasses entities of all sizes and territorial presence, in either private or public ownership; it neither addresses multinational enterprises directly nor does it develop new principles or rules of international law. Indeed, reference is mainly made to established principles of international labour law included in ILO Declarations, Conventions, Recommendations, guidance and codes of practice, e.g., the elimination of forced and child labour, the right to a healthy and safe working environment, the elimination of any form of employment discrimination, freedom of association and right to organise. As a result, the main contribution of the Declaration lies in creating a reference work for the guidance of the endeavours of governments, enterprises and workers' organisations in order to promote and achieve the principles included in main ILO legal instruments. As is the case for the UNGPs, the principles included in the Tripartite Declaration are not binding but only serve the purpose of offering guidance for the voluntary initiatives which multinationals enterprises are expected to take on.

Due to its sectorial competence, the Tripartite Declaration brings to light further implications which follow from the project of creating a distinct distribution of roles and ensuing responsibilities and duties among the actors addressed, which is typical of the UNGPs as well to a lesser extent. Multinational enterprises are mainly recommended to comply with existing international law and national laws and regulations of the host countries. Such references reveal a lack of political willingness to further commitments not only on the part of multinationals but also of governments, which maintain the flexibility to design their own domestic legal frameworks as well as enforceability requirements.

3.3. Tort law and private international law

According to the timeline depicted in the previous chapter, industrial production was prominently organised in the model of the firm until the 1990s. The succession from the firm to the global corporation was until the 1990s characterised by the development of international trade, which was conducive to companies geographically expanding to those areas of the world where they were not bound to bear the costs of internalising the externalities of production, due to the less stringent or complete lack of regulations in the field of labour and environmental protection. From the perspective of externalities, accordingly, the internalisation was no longer embodied in certain areas of law, in which rights and obligations were distributed among the different actors involved to facilitate or

directly formulate the resolution of the conflict caused by the externalities themselves. The geographical expansion challenges this resolution of conflicts and confronts the victims of externalities with a series of challenges when seeking judicial redress for the damages generated through industrial production. As the geographical expansion of business production has often been realised through the institution of foreign subsidiaries, the first example of a strategic employment of legal tools has concerned established principles of corporate law. The main obstacles to tort law were derived from rules of private international law. These hurdles have emerged in circumstances which saw victims on one side of the conflict and corporations on the other. For the sake of avoiding redundancy, the obstacles present in tort law and private international law are analysed together with the measures adopted in the field of corporate law.

3.4. Environmental law strand

Whereas the ILO Tripartite Declaration is mainly concerned with the social externalities concerning labour conditions in global production, environmental matters have been the subject of several agreements among states, such as the Rio Declaration on Environment and Development[127] and the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters.[128] Many of the principles established in these international law instruments, such as the precautionary principle or the polluter pays principles, have been incorporated into the OECD guidelines for multinational enterprises, which comprise a section on environmental impacts of MNEs and recommend that enterprises comply with 'the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development'. Being included in the OECD guidelines, action for the prevention or the remediation of environmental externalities caused by MNEs is again limited to the enforcement of national laws and regulations and enterprises' compliance to this set of rules on a voluntary basis.

[127] UN General Assembly, 'Rio Declaration on Environment and Development' (UN 1992).
[128] 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)'.

4. Companies' regulatory responses

In 2011, the adoption of the UNGPs has been joined by the publication of the OECD guidelines for MNEs, a document with which governments have sought to address enterprises directly – with the exception of the provisions related to human rights – by drafting a catalogue of recommendations concerning various matters falling under the management of MNEs in their global operations.[129] Similarly to the UNGPs, the Guidelines address several topics, ranging from human rights and environmental damage to bribery and corruption. Unfortunately, like the UNGPs, the Guidelines also represent a non-binding instrument with a main objective of guiding the behaviour of enterprises, rather than making those legal prescriptions consolidated at the international and national law levels directly applicable so as to achieve a uniform level of safeguarding and protection of social and environmental goods as well as a direct enforcement of human rights when violations occur at the hands of private – transnational – actors.

However, a uniform level of protection was never achieved because the interests in maintaining those unbalances, concealed behind alleged prerogatives of sovereignty, outweighed the interests in levelling the playing field. As a matter of fact, the fear of protectionist measures capable of hindering the liberal regime of trade which has slowly built over the past century, combined with the necessity for less developed economies to have access to international markets, lies at the basis of the current regime, which sees domestic laws and regulations playing upon the difference between a fair and an unfair world. This regime is straightforward with respect to sectorial policies such as labour and environmental law, while human rights advocacy against private actors has been translated into domestic legal orders under tort law litigations. Sometimes, the reliance on transnational tort law has been regarded with suspicion due to the privatisation of human rights which it creates. The consequences of this privatisation include the monetarisation of harms which can hardly be put in economic/monetary terms and the contraposition with the territorial dimension of human rights as state-centred vindications.[130]

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[129] OECD, *OECD Guidelines for Multinational Enterprises, 2011 Edition* (OECD 2011) <https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en>.

[130] In the words of Daniel Augenstein, 'the exposure of the international legal order of states to the operations of global business entities leads to a collusion of sovereign state interest and globalised corporate power to the detriment of victims of human rights violations'. D Augenstein, 'The Crisis of International Human Rights Law in the Global Market Economy' [2014] EUI Working Paper RSCAS.

4.1. Parent-subsidiary relationship: piercing the corporate veil

In the context of rising corporations expanding their business to foreign countries through the opening of new subsidiaries, the means for the circumvention of liability for externalities of production were provided by rules and principles pertaining to corporate law, mainly the principle of limited liability and that of corporate personality.

4.1.2. The separation of corporate responsibility

The principle of separation of corporate responsibility dates back to *Salomon*, a judgment issued by the House of Lords in 1897, establishing the general rule according to which shareholders cannot be held personally responsible for liabilities of the company as expressed in the Companies Act of 1862.[131] The second principle establishes the basis for the limited liability to function as it separates the legal personality of the company from that of its shareholders. This principle established a legal fiction which produced two relevant consequences for the scope here analysed. The first one is that a separate corporate personality allows a company to become the shareholder of another company. Owning an autonomous legal personality gives corporations the ability to purchase or sell corporate shares, as well as establish or discontinue different corporate entities. This separation of legal entities allows the parent company to shield itself from the liabilities of its subsidiary. The second consequence of the legal fiction lies in the principle of corporate personality allowing companies to own subsidiaries. Should the shares of the subsidiary mainly or exclusively be owned by the parent company, the parent company exercises 'control' over its subsidiary, enjoying the redistribution of profits while maintaining a regime of separation of entities and liabilities. Furthermore, in case the parent company owns all or a qualified majority of the subsidiary's shares, the control it exercises does not have to undergo any of the procedures which company law and corporate governance put into place in order to favour the reach of compromise solutions between the different interests and visions presenting themselves when the composition of the board of shareholders is variegated. The formal or *de facto* single ownership of the subsidiary could create, as it has often done in the past, the conditions for both the parent and the subsidiary itself to avoid liability, be it tax payment or other sources of liability, such as torts, environmental damage or workers' complaints. This possibility follows from the fact that the parent company can

[131] '*Salomon* v *Salomon* & Co Ltd [1896] UKHL 1.

easily dissolve the subsidiary, thereby leaving the claimant without a subject to address in seeking reparation for the externality caused, or the company's failure to comply with given laws and regulations.

The separation of corporate personality between a parent company and its subsidiary therefore produces a condition in which the former *de facto* directs the activities of the latter, while remaining outside the range of the liabilities in a way which shields the parent company from facing the externalities produced by its subsidiary. These circumstances have been particularly examined in the field of insolvency law, revolving around the issue of whether the parent company should be held responsible for the financial liabilities of the insolvent subsidiary when creditors are left unsatisfied. However, the same issue has emerged in the context of the type of externalities which are discussed in the context of the present research. If the principle of corporate personality ideally allowed for a clear attribution of liability by means of a clear distribution of property rights, the principle has produced the opposite effect to that intended under certain circumstances. In other words, the principle of corporate personality is likely to be strategically employed by corporations in order to escape, rather than face, liabilities.

The severity of the principle has been therefore mitigated through the adoption of provisions and judgements for the overcoming of the fiction of legal personality. One of the outcomes of this endeavour has been the development of a doctrine generally referred to as 'lifting' or 'piercing the corporate veil'. The aim of this doctrine is establishing certain criteria which would allow courts to 'lift' – disregard – the corporate veil and hold liable the corporate entity which was factually involved in the direction and/ or organisation of the activities which caused the externality.

The expression 'piercing the corporate veil' mainly refers to the doctrine as it has been established in common law systems, while civil law countries have relied on the notion of 'abuse of rights', which encompasses the case in question.[132] The two can be jointly considered in the sense that both of them address the problem relating to the employment and/or enjoyment of a legal principle with fraudulent objectives.

[132] *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970, p 3*.

4.1.3. Piercing the corporate veil – A renewed debate?

The piercing of the corporate veil is a doctrine of jurisprudential origin, consolidated through several judgements which have incrementally shaped this principle's scope of application. This doctrine aims at overcoming the limitations of the legal fiction of corporate personality in circumstances where this principle is 'abused' or employed for fraudulent purposes which exceed its *raison d'être*.[133] The application of the doctrine is limited by certain requirements, which makes it extremely unlikely that it could be the ultimate solution for externalities of production. The doctrine touches upon one of the core aspects of company law, which is the reason why courts have attributed a residual character to it while carefully building its boundaries – especially in the common law system. The principle was officially recognised as a part of English common law in *Prest v Petrodel*, where L Sumption identified the principle as occurring in circumstances of 'evasion', in which 'the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement'.[134] Piercing the corporate veil is therefore possible, but rarely executed, in the UK as the constraints set by the courts limit the application of the doctrine in circumstances in which an impropriety occurs and a company is interposed in order to prevent any sanction or the enforcement of a right as a consequence of that impropriety.

The doctrine has found more success in the US, where Courts tend to pierce the corporate veil more easily, especially to offer reparation to victims of torts, to the extent that tort claimants are framed as 'involuntary creditors', as opposed to contract creditors.[135] Both in the UK and in the US, however, a court will only pierce the corporate veil if there is sufficient evidence that the parent company controls the activities of the subsidiary and/or was using the subsidiary with fraudulent intentions. While the panorama of possibilities to pierce the corporate veil is rather variegated in US courts,[136] under British common law, the piercing of the corporate veil has usually been invoked in those cases where courts were looking for the existence of a duty of care on the part of the parent company towards the

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[133] *Prest (Appellant) v Petrodel Resources Limited and others (Respondents)* 45.

[134] *Prest (Appellant) v Petrodel Resources Limited and others (Respondents)* (n 130) par. 28.

[135] J Macey and J Mitts, 'Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil' 100 Cornell Law Review 59.

[136] Macey and Mitts (n 132); PI Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 Journal of Corporation Law 573.

claimants. In such circumstances, however, courts would only pierce the corporate veil when the requirements of the duty of care were met, ie when duty of care can be considered a cause of action. Such requirements have been spelled out in *Caparo Industries Plc v Dickman*, in which the court ruled that, in order for the duty of care to apply, the three following conditions must be present: 1) The risk must have been foreseeable by the defendant which is held to have had the duty of care; 2) A certain level of proximity between the defendant and the claimant must exist; 3) The application of the duty of care must be fair, just and reasonable.[137]

Being conditioned on the satisfaction of this requirements, the recognition of a duty of care, and the possible resulting piercing of the corporate veil, is subject to a significant limitation, which has led to a number of judgements in the past last years. One of the proceedings with the highest resonance has been *Okpabi and others v. Royal Dutch Shell Plc and another*.which saw the plaintiffs acting against Royall Dutch Shell Plc ('Shell'), a company incorporated in the UK and parent company of Shell Petroleum Development Company of Nigeria Ltd ('SPDC'), a exploration and production company incorporated in Nigeria.[138] The case joining two lawsuits is one of several ones which have resulted from the ongoing environmental damage due to oil spills from the pipelines operated by Shell's subsidiary SPDC in the delta of the Niger area. The plaintiffs complained of Shell's failure to take measures to repair the damages and to prevent future ones, an oversight which resulted in the further and broader contamination of lands close to the area where the oil spills initially started. After the case had been dismissed by the High Court, the claimants, representing the Ogale and Bille Nigerian communities, filed an appeal at the Court of Appeal, which confirmed the ruling of the High Court, as the claims did not pass the three-pronged test of foreseeability, proximity and fairness and reasonableness. In particular, the court found that the claimants could not offer sufficient evidence to meet the second and the third requirements. As regards the proximity test, the court found that the evidence presented by the claimants failed to prove any operating function of Shell, which was a mere holding company of SPDC.[139] In respect of the fairness and reasonableness, the court simply

[137] *Caparo Industries Plc v Dickman [1990] UKHL 2 (08 February 1990)*.

[138] *Okpabi & Ors v Royal Dutch Shell Plc & Anor (Rev 1) [2018] EWCA Civ 191 (14 February 2018)*.

[139] *Okpabi & Ors v Royal Dutch Shell Plc & Anor (Rev 1)* [2018] EWCA Civ 191 (14 February 2018) (n 135) par. 118-129.

dismissed all the plaintiffs' arguments in support of the claim.[140] Because the court did not or could not impose a duty of care on Shell, there was no need to evaluate the facts under the perspective of the corporate veil, as the lawsuit lacked a cause for action which could support the application of the principle *tout court*. Only in 2021 the UK Supreme Court reversed the judgement delivered by the Court of Appeal.[141] The Supreme Court, in reversing the judgement of the Court of Appeal, referred to the judgement released in 2019 in *Vedanta Resources PLC and another v. Lungowe and others*[142] by reaffirming that there is not a general principle in British law that excludes duty of care of a parent company for activities of its subsidiaries. Additionally, the Supreme clarified, and extended, the scope of control that can constitute the basis for the recognition of a duty of care of the parent company, by including relationships of supervision and advice and other forms of relationships. A similar trend has been witnessed in the Netherlands in a practically identical case brought by the NGO Milieudefense and the Nigerian farmers against Shell. In January 2021 the Dutch Court of Appeal recognised that Shell owes of a duty of care to the people of the village affected by the oil spills and is therefore liable, together with its subsidiary, for the failure to prevent such an occurrence. Interestingly, the Dutch judgement resulted into the Court imposing to Shell the provision of leak detection system.[143] The new approach to duty of care taken by English Courts has also been reflected in the judgement released in 2020 by the High Court in *Hamida Begum (on Behalf of MD Khalil Mollah)v. Maran (UK) Ltd*.[144] In that case, the Court did not rule out the possibility that the sell of a ship for its dismantling to an intermediary which took the ship to a Bangladeshi site, where the decease of MD Khali Mollah occurred, could count as the creation of danger for the deceased, whereby admitting the possibility for a duty of care to be recognised in similar circumstances, regardless of the fact that the conditions of labour in the Bangladeshi operating site did not depend on Maran's control over the site.

[140] *Okpabi & Ors v Royal Dutch Shell Plc & Anor (Rev 1)* [2018] EWCA Civ 191 (14 February 2018) (n 135) par. 130-131.

[141] *Okpabi v. Royal Dutch Shell Plc* [2021] UKSC 3.

[142] *Vedanta Resources PLC and another v. Lungowe and others* [2019] UKSC 20.

[143] *Milieudefense et al v Shell Petroleum and Royal Dutch Shell* [2021] The Hague Court of Appeal, ECLI:NL:GHDHA:2021:132.

[144] *Hamida Begum (on Behalf of MD Khalil Mollah)v. Maran (UK) Ltd* [2020] EWHC 1846 (QB).

These latest development in the doctrine of the duty of care have provided the foundation to pierce the corporate veil beyond instances of fraudulent enjoyment of legal principles and rights in order to evade responsibilities or frustrate the enforcement of rights. As the developments are quite recent, it is hardly predictable whether Courts will maintain this orientation, pushing the doctrine of duty of care beyond its old limits but the release of these judgements in the last years gives reason to believe that Courts are willing to move beyond the obstacles of doctrinal and formalistic legal reasoning.

The number of judgements brought in front of Courts places outside the country where the damage occurs reveals another difficulty which arises in cases related to lawsuits brought against the parent company by the victims of externalities. Reasons for bringing cases in a jurisdiction different from their own usually have to do with the consideration that the latter fails to provide adequate response to the claims advanced, as exemplified by the ruling delivered by the court of first instance in the Dutch lawsuit against Shell, or that any present legal remedies are rarely enforced.[145] Seeking recourse in countries with more advanced environmental and social regulations can be challenging, especially when claimants come from disadvantaged areas. This search for a 'fair' trial reveals much more than a mere issue of jurisdiction: it breaches right through the space where the design of an international economic order entrenches with legal tools, which can however only be bend for a limited length of time and for a limited set of purposes. The result is a game played by means of the law, which serves to mask the struggle for upholding or rejecting the current economic 'order'. The piercing of the corporate veil is a good example of how this game is played. However, this game sees the participation of a multiplicity of actors and is often – purposely – played outside the bounds of courts.

4.2. Beyond the parent-subsidiary relationship

The examples on the lifting of the corporate veil have shed light on other sets of obstacles which victims face when they approach courts to seek remedy for the harm suffered. Such obstacles include issues of jurisdiction, when remedies are sought in foreign countries for the reasons mentioned above, and the problem of access to evidence. While the first issue is easier to overcome in Europe, where the matter is governed by the regime resulting from

[145] N Bernaz, *Business and Human Rights : History, Law and Policy - Bridging the Accountability Gap* (Routledge 2016) 258.

the Brussels Regulation,[146] the collection of sufficient evidence still represents one of the major obstacles which victims face in trials. Corporations will refuse claimants access to protected information and will even be extremely reluctant to disclose information on court orders. This custody of information often prevents victims from supporting their allegations in judicial proceedings, as exemplified in the British case against Shell summarised above.

Recently, a report commissioned by the European Parliament's Subcommittee on Human Rights (DROI) has listed the main legal and practical barriers to access to legal remedies by victims. The report is based on a study mapping a series of lawsuits occurring in domestic courts of the EU: The results show that the main practical barriers encountered by victims concern the costs of proceedings, the lack of opportunity to gather and present evidence because of limited access to information, difficulties in securing representation, and corruption and political interference.[147] Victims face these difficulties independently of whether the industrial organisation relies on a property/corporate law or contractual basis: In case the production occurs across territorial boundaries, jurisdictional burdens and imbalances between parties manifest regardless of the form of business organisation.[148] Despite tort law ideally offering plausible venues of redress at the substantive level for the protection of at least part of the rights which are usually infringed by corporations, the actual effectiveness of the remedies has remained below a desirable level.

The criticalities resulting from the combination of the privatised tort paradigm and the territorialised human rights paradigm concern the emergence of a 'grey' area which remains not covered by the scope of application of either state or tort law. This point is very relevant for the argument here introduced as it suggests that the creation of this grey area is the result of a collusion between private corporations and states in shaping the paradigm of rights protection when the violation is perpetrated by a private actor. This sort of collusion can be considered as one of the causes of the limited results achieved through tort

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[146] Courts and commentators have in particular indicated the relevance of Article 4 of the Brussels Regulation (recast), which allows persons of whatever nationality to be governed by the rules of the Member States in which they are domiciled. 'Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' OJ L351/1. As regards similar outcomes reached through the application of Brussels I in certain Member States, see also the 'Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party in Kiobel et al. v Royal Dutch Petroleum et al.'

[147] European Parliament Study on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries, February 2019, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf.

[148] This is particularly important in the light of the fact that this aspect is worsened on account of the contractual shield and the triggering of the communication paradigm.

law litigation but also the construed indifference of contract law towards the establishment of the institutional infrastructure sustaining the system of rights violations and blind redress mechanisms which heavily relies on contractual relations and property rights.

Of the several instruments adopted in the field of 'business and human rights', as it is generally addressed, the UNGPs are certainly assumed to be the yardstick and reference for other restricting measures in the field, be they sectorial or regional. This objective was actively pursued by the OHCHR, which tried to avoid the development of concurring frameworks capable of hindering their implementation by generating confusion or misalignments with the content of the GPs. This occurred for example on the occasion of the proposed constitution of a new ISO Technical Committee on Social Responsibility, when the High Commissioner addressed the ISO in order to disincentivise the formulation of a new set of standards.[149]

The paradigm resulting from the GPs has indeed been consolidating over the past decade by being implemented at the domestic level through the adoption of National Action Plans on the part of governments and the design and adoption of corporate responsibility and due diligence schemes by enterprises.

This design leaves the enforcement of human rights – through transnational tort litigation –, labour rights, and environmental protection measures, in the hand of states which regulate actors within their domestic boundaries, making the 'extra-territorial' implementation of such rights reliant on the 'transnational' reach of private actors, which in turn retain the freedom to exercise this 'extra-territorial' implementation in line with their own voluntarily designed schemes of corporate social responsibility and due diligence, without being held accountable for mandatory obligations. In this way, governments found themselves in collusion with private actors by avoiding the extra-territorial application of their regulations on the one hand, and on the other hand using the WTO rules to justify the impossibility to establish a ban or restrictive laws and regulations for the marketisation of those goods of which the production caused several social and environmental externalities.[150]

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[149] 'OHCHR High Commissioner's Letter to ISO Regarding the Proposal for a New Technical Committee on Social Responsibility' available at: https://www.ioeemp.org/index.php?eID=dumpFile&t=f&f=130207&token=d5be4cfe728 951b74e0d2783eea7ab387fb57350&L=.

[150] O de Schutter, *Trade in the Service of Sustainable Development : Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing 2015) 75.

This framework is the cause of the present over-complicated fabric of voluntary standards, auditing and monitoring schemes, and certification, verification and labelling programs, which is broadly defined as 'corporate social responsibility' and which ultimately consists of self-regulatory measures adopted by private actors.[151]

4.3. Self-regulatory measures

If it holds true that corporate social responsibility (CSR) is not an entirely new phenomenon, it is equally true that the shape which it has assumed since the 1990s differs from the form of CSR which was prominent in the debate on the topic back in the 1980s. As– an early bird in the field, Vogel, recollects, CSR was a prominently US phenomenon in the 1980s as it was used to argue in favour of corporations supplying social services which were largely performed by welfare systems in other countries.[152] Levi Strauss, for example, offered its Canadian employees non-profit daily child care and free English lessons to immigrants workers, among other benefits.[153] A different type of CSR has emerged from the regulatory space left to the voluntary shouldering of commitments by enterprises: This regulatory space has been filled with codes of conduct, standards and certification and labelling schemes.

In some instances, the development of these regulatory tools has been directly undertaken by the enterprises, whereas in many other cases, enterprises subscribe to codes and standard schemes which are designed by *ad hoc* private organisations. Such programs can either address a broader spectrum of issues connected to externalities of production or can be rather subject-specific, with the result that an enterprise is usually connected to several schemes which co-exist with one another.

The increasing presence of self-regulatory measures against externalities of production, which are today usually referred to as voluntary sustainability standards (VSS), mirrors the approach which was adopted in relation to the regulation of product characteristics such as quality, technical requirements and safety of products. This approach is traditionally perceived to be market friendly as it impedes or decreases the adoption of measures which conceal protectionist purposes, i.e., non-tariff barriers to trade. The increasing development

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[151] B Sheehy, 'Defining CSR: Problems and Solutions' (2015) 131 Journal of Business Ethics 625.

[152] D Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (The Brookings Institution 2005) 8.

[153] 'Levi Strauss' bottom line not just jeans' *The Toronto Star* (17 April 1990) G1.

of international standards has been considerably promoted by the insurgence of international standards of organisation, among which the ISO is the most prominent one, which define s set of standards, often categorised according to different industrial sectors or functions pursued, which enterprises can voluntarily adopt. The standards are usually granted upon successful verification of compliance with the requirements through a conformity assessment procedure of the products or production process.

The insurgence of standardisation is mainly to be attributed to WTO provisions on non-tariff barriers to trade and specifically to the provisions included in the agreement on technical barriers to trade (TBT Agreement).[154] The purpose of this agreement is to avoid technical regulations and standards adopted at a domestic level representing an unnecessary obstacle to trade, and to establish a predilection for the adoption of international standards. The only exceptions to the rule apply to legitimate objectives comprising, '*inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment'.[155] However, the pursuit of these legitimate objectives should not restrict trade more than is necessary, meaning that the type of restrictions resulting from such objectives must be kept at a minimum and must be founded on 'available scientific and technical information, related processing technology or intended end-uses of products'.[156] If this type of references in WTO legislation has the effect of limiting state legislative intervention on the one hand, on the other hand, environmental protection, animal and human health and safety become subject to rather specific regulatory intervention and somehow get absorbed by trade law. The regulation of those matters is organised through a complex array of private and voluntary standards which allow enterprises to 'customise' their commitments to sustainability.[157] First incorporated in codes of conduct, companies have sought to achieve more credibility with the public on their voluntary commitments by expanding their 'sustainability portfolio' with externally developed criteria.

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[154] PC Mavroidis and R Wolfe, 'Private Standards and the WTO: Reclusive No More' (2017) 16 World Trade Review 1.

[155] Article 2.2. of the 'Agreement on Technical Barriers to Trade' available at https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf.

[156] 'Agreement on Technical Barriers to Trade' (n 149).

[157] This section relies on the rationalist theory behind the development of CSR. For an overview of the theories explaining the development of CSR, see: D Kinderman and M Lutter, 'Explaining the Growth of CSR within OECD Countries: The Role of Institutional Legitimacy in Resolving the Institutional Mirror vs. Substitute Debate' (2018) 18 MPIfG Discussion Paper.

4.3.1. Levi Strauss

The development of this trend is evidently visible in Levi Strauss' corporate social responsibility development.

Accredited as the first example of a voluntary code of conduct for sustainable production, Levi Strauss' Global Sourcing and Operating Guidelines (GSOG) were indeed a rather advanced form of corporate social responsibility for the time in which they were drafted, back in 1991. Such guidelines included a section on Terms of Engagement, i.e., terms which businesses had to follow after entering into a partnership with Levi Strauss.

The most innovative trait of those terms is certainly their consideration for the supply chain element of production: They were supposed to be adhered to by every business partner of Levi Strauss. Notwithstanding the potential elongated reach of the Terms along the supply chain, Levi Strauss was subject to further scrutiny in the years following the adoption of the Terms as its conduct was found to be irresponsible and inconsistent with the commitments included in its CSR strategy. The misconduct occurred in offshore production sites as well as in the last remaining plants in the US, where Levi Strauss was sued for discrimination against workers in the factories in El Paso, Texas.[158] Today, the Terms are one of the two substantive parts of Levi Strauss' sustainability guidebook. Their requirements have been supplemented with indications about compliance policies for violations of the Terms for suppliers: In accordance with the seriousness of the violation, Levi Strauss' response will range from a Zero Tolerance reaction, resulting in immediate termination of the partnership, to support for Continuous Improvement. The Terms are categorised approximately following the original structure, but each category has been further subdivided into a series of more specific instances of violations. References are made to 'values' promoted by the company as well as principles developed in the context of international law, such as sustainable development goals or the ILO conventions.

The Guidebook is not the only source of CSR policy of Levi. Of its own volition, Levi Strauss has launched the Water<less® program, aiming at reducing water consumption during the finishing phase of jeans making, and the Levi Strauss® Wellthread™, which targets 'sustainability at every step of the supply chain', among other initiatives.[159] Both

[158] 'Levi Strauss & Co. To Appeal Verdict in El Paso Discrimination Suit' *Business Wire* (11 September 1997)http://global.factiva.com/redir/default.aspx?P=sa&an=bwr0000020011005dt9b021si&cat=a&ep=ASE accessed 14 February 2020.

[159] https://www.levistrauss.com/how-we-do-business/design/.

mentioned initiatives are particularly concerned with the use of water, as it is one of the core resources which is considerably impacted by denim production.[160] Levi Strauss has also joined initiatives promoted by external bodies, such as the Better Cotton Initiative (BCI), Cottonized Hemp, Evrnu, all concerned with the sustainability of cotton sourcing and use.[161] Finally, Levi Strauss' CSR strategy includes philanthropic initiatives promoted through the Levi Strauss foundation and other type of social investments, which mirror the first generation of CSR techniques which saw companies as promoters of social development and social investment.

4.3.2. GVCs

Taken in its entirety, Levi Strauss manages the social and environmental impact of its production through an intricate ensemble of – sometimes even redundant – standards and voluntary commitments which may apply to the entire GVC or be focused on a specific stage of production, as in the case of BCI which specifically affects the modalities of cotton sourcing. The development of concurring CSR policies and their transformation from being merely addressed at social investment to being focused on responsible sourcing and product manufacturing is related to an increased trans-nationalisation of production which corresponds to the rise of GVCs as the organisation model production organisation. Standards had proved to be a successful regulatory technique in relation to safety and technical product qualities for products marketed across borders. As a consequence, voluntary standards seemed even more appropriate as an instrument for the regulation of production elements which did not even have to be mandatory in order to access certain markets. The emergence of the second generation of CSR measures is indeed to be understood as a response on the part of enterprises to the social pressure exerted by civil society related to the social and environmental externalities of production.

The social quest for responsible production and the emergence of new forms of CSRs reveal that GVCs have not been neutral with respect to the social responsibilities connected to externalities. In a nutshell, the progressive withdrawal by states from the regulation of production applied to the global economy and the development of ICT have allowed for a

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[160] In particular on the environmental impact of Levi's 501, see T Hackett, 'A Comparative Life Cycle Assessment of Denim Jeans and a Cotton T-Shirt: The Production of Fast Fashion Essential Items From Cradle to Gate' 128.

[161] https://www.levistrauss.com/how-we-do-business/source/.

strategic use of the contract as an instrument for the production organisation which puts this tool of private law under a political scrutiny which had been less necessary before the emergence of GVCs.

The articulation between production, trade and contract has been modified in its economic and political aspects by the dawn of technological development– –followed by GVCs.

The focus of the following paragraphs is to provide an illustrative road map to understand the emergence of a different political-economy paradigm in production with respect to the ascending role of the contract in conjunction with the simultaneous fading into the background of trade law – at least as it had been foreseen in the framework of the WTO. Under the leading force of diffusing ICTs in industrial production and organisation, the paradigm shift included the role played by contract, trade and production, i.e., the role played by suppliers and dealers, governments and manufacturers. For each of these three aspects, it is possible to highlight the differences between a pre- and a post-GVCs paradigm: The scope of this research requires the analysis mainly to address the changes affecting the political and economic meanings of activities occurring in those three areas. The paragraphs below therefore look into the change of political and economic aspects of contract, trade and production between the antecedent paradigm to GVCs and that established through GVCs.

5. The impact of externalities

5.1. Externalities of production before GVCs

5.1.1. Contract

5.1.1.1. The economics of contract

In GVCs, the production function is fragmented into small transaction functions which represent different phases of production processes based on contracts between various suppliers and the enterprise leader of the chain. The increasing number of contractual relations which form the infrastructure of global production depends on the decreased transaction costs, achieved through the development of ICTs and trade liberalisation, in comparison to the costs of vertical integration through ownership. The choice between instruments for arranging industrial organisation has been the object of study in the field of

transaction costs economics, according to which the ultimate outlook of industrial organisation will gravitate toward markets or hierarchies in line with the arrangement which most effectively reduces transaction costs of industrial organisation.[162] In other words, various possible forms of contracts played the economic role of sustaining structures of industrial organisation whenever the employment of this legal tool was considered more cost effective than vertical integration through ownership schemes, i.e., firms. In looking at the transaction costs, the application of this criterion to business relations progressively led to a revision of the classical contract theory, at least in relation to those assumptions developed in the field of law and economics as a result of which classical contract theory became associated with the notion of discrete economic transactions entered into between rational men. Because this model of contracting was not representative of the reality of business transactions, the analysis of the contract economy moved towards the exploration of what became known as relational contracting.[163]

Before the emergence of GVCs, therefore, the contract was mainly understood in its nature of 'institution of capitalism'. Its focus progressively moved from discrete contracts to relational contracts. However, the move from one view to the other did not involve considerations for a strategic employment of the contract beyond its value as an economic instrument: Its focus remained on the economic effectiveness of the contract as a legal tool for regulating relations in the field of industrial organisation and the law, as agreed in between the contractual parties.

5.1.1.2. The politics of contract

Before the rise of GVCs, much of the political value of the contract had been associated with its distributional function. This concern was a response to inequalities resulting from the classical theory of the contract, and especially from its re-interpretation by law and economics. The evolution of these perspectives revolves around the definition, and therefore the content and extent, of the concept of freedom of contract, which is

[162] H Dagan and M Heller, *The Choice Theory of Contracts* (Cambridge University Press 2017); AA Alchian and H Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 The American Economic Review 20; Coase (n 26); KJ Arrow, 'The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation' [1969] In The Analysis and Evaluation of Public Expenditures: The PPB System. Joint Economic Committee, 91st Congress, 1st Session 1.

[163] S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 American Sociological Review 55; IR Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1977) 72 Northwestern University Law Review 854.

unquestionably the fundamental principle of the contract law, at least in Western legal orders. Many theoretical explanations have been posited as foundations for freedom of contract and contract itself: consequently, contract has been interpreted as a promise,[164] as a tool for enhancing the autonomy of individuals and their self-determination,[165] or as a tool for corrective and distributive justice purposes.[166] All these arguments relate to the quality and quantity of freedom which should be conceded to individuals and to the actual expressions of this freedom. The political dimension of the contract in classical contract law is therefore represented in the debate on the right of individuals to self-determination and autonomy vis-à-vis the state. This debate evolved during the 1970s as a consequence of the emerging of 'the Social' and the subsequent materialisation of contractual relations:[167] This trend resulted in the establishment of 'protective' measures of those categories of contracting parties which were deemed to be in a weaker position in comparison to their contractual counterpart, following the recognition that formal freedom of contract does not necessarily correspond to material freedom of contract. This process is clearly visible in the development of particular adjustments to the contract law with respect to labour and consumer contracts. Because these parties are in a weaker bargaining position, they are not in the position to bargain for the best possible arrangement themselves: This 'structural' challenge is addressed by compensating the imparity of bargaining positions by altering the rights and prerogatives which the weaker parties are entitled to both ex-ante and ex-post the conclusion of the contract. The protection of freedom of contract relies on ensuring the exercise of personal autonomy, an exercise which, even for the most classical theory, faces limitations when it can prevent the exercise of the same autonomy by other parties. Traces of this paradigm are found in those provisions of civil codes which govern the 'defects of consent' – such as duress, fraud, and error–, as well as the rules concerning the (in)validity of contractual relations in case of contrariety to public order or incapacity of certain categories of actors, such as children. In

[164] C Fried, *Contract as Promise a Theory of Contractual Obligation* ([Second edition], Oxford University Press 2015); C Fried, *The Ambitions of Contract as Promise* (Oxford University Press); D Markovits, 'Making and Keeping Contracts' 92 Virginia Law Review 50.

[165] Dagan and Heller (n 156); PS Atiyah, 'The Liberal Theory of Contract', *Essays on Contract* (Oxford University Press 1986).

[166] Hugh Collins, *Regulating Contracts* (Oxford University Press 2002); H Collins, 'Distributive Justice Through Contracts' (1992) 45 Current Legal Problems.

[167] D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', *The New Law and Economic Development: A Critical Appraisal* (2006).

common law, similar limitations are for example incorporated in the doctrines of duress and misrepresentation. The existence of such rules depends on the acknowledgment that contracts may not always be the result of a voluntary act: Ensuring the non-enforcement of contracts under certain conditions is therefore a way to protect the parties and is the virtue of the contract as a tool for the exercise of personal autonomy in co-operation with others.

This paradigm largely corresponds to classical contract theory of the nineteenth century. The introduction of distributive provisions for the protection of groups of people sharing a certain status, whose position had become vulnerable in the light of social and economic transformations occurring at that time,[168] represented one of the major legal and political achievements of the twentieth century. Despite the introduction of such provisions corresponding to a more political understanding of the contract, contractual relationships did not have political relevance in and of themselves. The same notion of contractual justice, whether understood as corrective or distributive justice, is rather focused on relations between the parties. The political concerns in respect of the contract were therefore projected onto the relation between the parties where one of the two was presumed to be in a weaker bargaining position.

Apart from the discourse on weaker parties, the political dimension of contract remained rather unexplored as no purpose was served by engaging in such an endeavour: The politics of contract concerned distributive effects to be achieved through private law, as a response to the progressive withdrawal of the welfare state from actively sponsoring social policies.[169] Before the 1990s, contractual relations had been ubiquitous and consumption was more than established in the Western world. Nevertheless, the production organisation was still a composition of markets and hierarchies, and production was not as fragmented as it would become later on during the 1990s. In this fashion, contractual relations were considered to be neutral from the perspective of business organisation: They represented only one possible method for the production organisation, to be preferred over others because of its contingent cost effectiveness. In other words, before GVCs, contractual relations and business were much more a matter of economics than politics.

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[168] HW Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice* (1st edn, Cambridge University Press 2018).

[169] Micklitz, *The Politics of Justice in European Private Law* (n 162).

5.1.2. Trade

5.1.2.1. The economy of trade

From the economic perspective, during the twentieth century and as a response to WWII, trade was understood as being the key tool to development. The idea originated in the liberal conviction that development as a whole is a consequence of economic development: Economic prosperity brings the means to invest in social development. Because the institutional foundations of today's global economy were established in the aftermath of WWII, they resonate with the influence of the contraposition between liberalism and socialism. Moreover, because the engagement at the international level was mainly driven by the US, as winners of the conflict and funders of the re-building of the European continent, liberalism became the dominant procedural strategy for securing economic prosperity. The rhetoric of development as a goal to be achieved through multilateral economic co-operation was established during that historical phase: the Bretton woods and the GATT are notably representative of this paradigm. The flow of goods and investments were to provide countries with the necessary resources to make their national economies flourish. The market economy would have regulated the distribution of resources in society, thereby initiating a virtuous cycle of development and progress toward raising standards of living, both at the economic and the social level. From the Marshall Plan, this idea of investing in the least developed economies has been traveling through time and space, and is today at the basis of conventions and political actions undertaken to help developing countries leave behind conditions of poverty.[170] The idea that trade liberalisation could lead to development through safeguards directed at facilitating domestic social policies, such as full employment, was based on the conceptual premises of nineteenth century laissez-faire economics which were however softened, giving rise to what Ruggie labelled as 'embedded liberalism'.[171] This label was well suited to the extent that the GATT and the international monetary regime facilitated trade between industrialised economies. A less embedded form of liberalism is instead associated with the idea of expanding the GATT to ex-colonies in order to allow continuity of authority over former colonial powers through economic rather

[170] A recent example of this phenomenon at the EU can be found in: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Trade, growth and development. Tailoring trade and investment policy for those countries most in need {SEC (2012) 87 final}.

[171] JG Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379.

than territorial presence.[172] At least, this is how it was understood by some former colonies and one of the reasons for their reluctance in joining free trade regimes,[173] perceived as a compulsory economic liberalism.[174]

This economic – and political project – was subsequently successfully exposed and modified as a result of the Washington Consensus, where embedded liberalism made space for further liberalisation and financialisaiton of international economy.

5.1.2.2. The politics of trade

Unsurprisingly, the project guiding the international political sphere after WWII was the creation of a system of international relations which favoured peace rather than the explosion of conflicts. Multilateral trade co-operation was deemed a viable option in contrast with the pre-war order based on bilateralism in trade agreements and multilateral diplomatic alliances. Bilateralism in trade agreements was indeed deemed to be conducive to exercise of power and authority between countries in the form of economic relations in a manner which could lead to instability and conflict.[175] In this vein, the achievement of economic stability through liberalisation and fixed currency exchange rates were therefore the key feature to ensure long-term political stability:[176] The interpretation of international relations through multilateral trade agreements was supposed to offer a different venue for the exercise of international relations among countries and to provide incentives for co-operative behaviour towards a common shared interest: peace via economic prosperity. Accordingly, discrimination had to be avoided through multilateralism, which in the field of trade assumed the nature of the non-discrimination principle and the most favoured nations' rule under the aegis of the GATT.

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[172] S Bhandari, 'From the Era of Colonialism to Globalization: Making Rules in the GATT/WTO' (Social Science Research Network 2010) SSRN Scholarly Paper ID 1657724 <https://papers.ssrn.com/abstract=1657724>.

[173] J Scott, 'Developing Countries in the ITO and GATT Negotiations' (2010) 9 Journal of International Trade Law and Policy 5.

[174] P Bairoch, 'The Paradoxes of Economic History' (1989) 33 European Economic Review 225.

[175] AO Hirschman, *National Power and the Structure of Foreign Trade* (University of California Press 1945).

[176] MD Bordo, 'The Bretton Woods International Monetary System: A Historical Overview' in MD Bordo and B Eichengreen (eds), *A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform* (University of Chicago Press) 41.

5.1.3. Production

5.1.3.1. The politics of production

Before the fractionalisation of production processes made the separation between product and process blurred, the regulation about traded goods mainly concerned product related qualities. Preceding the emergence of ICTs and GVCs, the separation between the two phases, and two functions, of production had been quite straightforward: The production function was associated with the production process and concerned – at least in industrial production – the manufacturing phase; the transaction function corresponded to the distribution of materials and finished products, which was regulated by trade laws. In the beginning, trade liberalisation mainly promoted intra-firm exchanges chiefly involving trade among industrialised countries.[177] At that stage, the transnational activity of trade was primarily related to product exchange as production processes had not yet fractionalised as much as they would in the context of GVCs. As a consequence, the priority for the promotion of internal trade lay in the product regulation agenda rather than that of production processes. The latter remained a matter for domestic regulation: In this way, the rhetoric on trade and development concealed the project of leaving production processes unaddressed on the political agenda of international trade expansion. Production processes fell under the scope of sectorial regulation related to environmental and labour law while trade liberalisation – and financialisation later – increased competitiveness among countries at the same time. For developing countries – and especially for former colonies –, the actual implementation of social regulation lags behind because their participation in the global economy integration process depends on the low regulatory standards which decrease production costs for global enterprises. Some of the least developed economies which had become production sites for western enterprises, were former colonies which often joined the GATT on gaining independence,[178] thereby becoming exposed to global competition without having the industrialisation rate of their competitors. Despite being mitigated by the introduction of special preferential schemes like the GSP and GSP+ which aim at allowing a slower transition for developing countries towards higher levels of living standards, this unbalance shifted the competitive strategy of those economies to the

[177] R Gilpin and JM Gilpin, *Global Political Economy : Understanding the International Economic Order* (Princeton University Press 2001).

[178] This is particularly evident in most of the former British colonies and some of the French colonies.

prevention of an increase in production costs caused by the introduction of more stringent regulatory standards, particularly in the field of environmental and labour standards. This occurred in the context of a separation between state affairs and economic affairs: While labour and environmental standards remained under the former, trade law fell under the latter. A separation was created between product regulation, pertaining to trade law and therefore economic affairs,[179] and production processes regulation, pertaining to state law. The latter became a competitive tool in the international economy, especially for vulnerable economies. This distinction has therefore put least developed economies in the position of dealing with social policies domestically while at the same time engaging in international trade – in some instances, for the first time outside a colonial relationship. With respect to externalities of production, the division between trade and other policies, as well as product regulation and production processes, has actually 'concealed' the advantages which this separation brought to private entities. The benefits of realising economies of scale were not only related to the decreased product circulation costs, the decrease in input costs was as advantageous but it was shielded from international political scrutiny by the relegation of state action to social spheres which had to have the least interference with the economic project of global economic integration.

Today, in a global economy organised in GVCs, the distinction between product regulation and production processes regulation has become obsolete at best, and hypocritical at worst, as GVCs factually and conceptually challenge the ideal paradigm for which this distinction was designed.

5.1.3.2. The economy of production

Because of the disregard for trade law in production processes, the efforts to promote the integration of international trade focused on product characteristics. The aim was to prevent that the movement of goods indirectly suffered from domestic requirements related to product regulation, while at the same time preventing risky products from entering the market. Standardisation was hailed as the ideal compromise to ensure the coexistence of free trade with the necessity of ensuring minimum levels of safety and technical qualities of product marketing. Indeed, international standardisation acts as a more flexible regulatory tool than domestic technical regulation as it applies to product categories across

[179] RM Unger, *Free Trade Reimagined : The World Division of Labor and the Method of Economics* (Princeton University Press 2007).

boundaries, and at the same time acts as a vehicle for information to reach the interested market actors when supported by a certification scheme such as those provided by ISO and other relevant standard organisations. Technical regulation deviating from international standards can only be adopted – if in a more restrictive form – when an international standard has not yet been adopted, in case of sanitary and phytosanitary measures when scientific evidence supports the adoption of these higher standards, or as a precautionary measure based on a risk assessment. Exceptions to the conformity rule also apply when the stricter regulation is adopted to protect 'human, animal or plant life or health'. However, this exception only relates to product features and does not include the processes behind the production of goods: In this vein, international standardisation had excluded production processes from the sphere which relates to production processes, while at the same time other trade rules instituted general obligations not to restrict trade. Regulations about production processes chiefly remained a domestic matter while trade law absorbed product-related matters. With respect to externalities of production, the separation of regulatory matters between product- and process-related issues has created an uneven treatment between cases involving externalities: Indeed, externalities only gain an international law dimension should a country adopt a trade restriction which addresses production processes applied for specific product categories. Instances of this approach apply to animal welfare cases such as the European ban on seal products, the conflict mineral regulation or the regulation on cosmetics with respect to the ban on animal testing. In these examples, the aim is to prevent the marketing of products which involve damages to the environment or animals, or exploits human labour. However, because of the distinction between product and production processes developed within trade law, these bans can only apply to specific product categories, with the result that externalities of production are addressed and regulated unevenly.

5.2. Externalities of production in GVCs

5.2.1. Contract

5.2.1.1. The economy of contract

As we have seen in the first chapter, the driving force behind the emergence of GVCs was initially the advancement in technological innovation, namely in ICTs. This technological

aspect of production allowed for the fractionalisation of production processes. The legal infrastructure on which this fractionalisation relies is a contractual one: The restructuring of Levi Strauss in the mid-1990s, and the reduction of number of employees contrasted with the increased number of suppliers, signals the move towards a contractualised model of industrial organisation which is the distinguishing legal trait of GVCs. In this context, not all contracts are the same: Transactions among suppliers and dealers have different characteristics from consumer transactions, insofar the former include both long term and discrete transactions which are based on standard contract terms. However, both types of contract benefit from the introduction of ICTs in supply and distribution chains, connecting all stages. While the traditional business partnership arrangements are usually long-term relations, consumer contracts may assume either the long-term form, in case of contracts for the supply of services, or the discrete. ICTs transformed both categories of contractual relations but had their highest impact on those relations which used to be vertically integrated in firms before the arrival of such technologies. ICTs have indeed transformed the way in which contract governance is possible, as well as the techniques to procure and monitor business partners. The element of contract governance in GVCs affects actors beyond the direct business partners. Within GVCs, the element of governance became central for the existence of the chain itself. Cost effectiveness drives the chain of suppliers and dealers. As such, contracts – understood as instruments for the reduction of transaction costs – became a tool not only for linking two business actors together but also for maintaining the entire structure of business organisations. Even this boosted capacity in contract governance was due to the development of ICTs by providing the technological tools to make visible the chain or networks of relations constituting the fractionalised business framework. In this manner, economic control is gained over business actors over which – before GVCs – monitoring and control could have been exercised within the boundaries of the firm.[180] The information flow made possible by information technology not only allows for a larger pool of possible partners, but also allows for the management of plural contractual relations, including monitoring operations.[181] The economic advantage of the contract over property was therefore intensified by the introduction of new

[180] OE Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (The Free Press, Macmillan ed 1985); OE Williamson, *Markets and Hierarchies, Analysis and Antitrust Implications : A Study in the Economics of Internal Organization* (Free Press 1975)..

[181] T Dietz, 'Relational Contracts 2.0' in AC Cutler and T Dietz (eds), *The Politics of Private Transnational Governance by Contract* (Routledge 2017) 2. The monitoring, however, does not suffice to impede non-compliance with standards.

technologies to operations of contract governance. Instead of relying on social norms, contract governance in GVCs relies on technological means. In other words, while contract governance before GVCs was based on the contingent relation between the parties, contracts are not merely the object of governance within GVCs but also the means by which the governance of industrial organisation is carried out among different actors of the chain. Merely viewing contracts as an instrument of economic efficiency in industrial organisation would conceal the political role the contract has assumed, which gains particular significant value in the impact which the contractualisation of production processes of GVCs has on the possibility to address the externalities of production.

5.2.1.2. The politics of contract

The understanding of contractual relations as an efficient means for the production organisation has offered a strategic gateway for the political discourse on externalities of production to be effectively addressed neither with respect to the role of the state in regulating society or with regards to the role of private actors as self-regulating actors. This political role results from the acknowledgment that the control over production chains has been accompanied by the traditional features of contract law, including the principle of parties' autonomy as well as the rebalancing of this principle with distributive and/or public interest concerns.[182] The outcome is however the increased de-politicisation and related de-responsibilisation of the private actors leading the chain with respect to the externalities caused to benefit of their industrial organisation. The contractualisation of production processes clusters each and every stage of the process into contractual relations which do not even necessarily involve the leading company. The nesting of production stages within contractual boundaries would certainly be less problematic if such stages would occur within the same territorial jurisdiction. However, as in the case of the multinational enterprise, this is also not the case in GVCs, which are characterised by a geographical expansion involving different jurisdictions and thereby different legal contractual regimes. As illustrated above, the involvement of different jurisdictions makes addressing externalities a complicated matter, which becomes even more so when the link between jurisdictions is based on contract rather than property. For argument's sake, two circumstances can be differentiated: one in which the GVC leader is a contractual party and

[182] This is particularly true for the EU context.

one in which it is not. Assuming that the contract at stake does not explicitly allow for the causation of externalities, at least within the jurisdiction of its performance, any externality arising in the first instance allows the leading company to terminate the contract. In the second instance, the company may impose termination of the contract on the sub-suppliers using market-mechanisms, or simply avoid liability due to its external position to the contractual relationship. From this perspective, the political role of the contract goes well beyond the undertaking of distributive instances and public interests as a form of private ordering emerging from the retirement of state from the field of political authority over economic activities. Rather, this view of the political role of the contract puts the formal features of contract law under the spotlight. The mechanisms introduced in the EU particularly – if not only – to reduce the flexibility granted to or conquered by private actors for the self-regulation of their own fields of action do not represent a sufficient challenge to the very essence of the contract law: that of shielding – within the framework of its criteria of validity – the parties from intrusion – both from public and other private actors – against the performance of the obligations deriving from the law that they have chosen for themselves. Within GVCs, the shield works in favour of the parties involved in the contract but also for those who remain outside of the contract, as they can be considered extraneous to any emerging liability. This occurs regardless of the control which the leading firms exercises over the chain, through technologies and market mechanisms, in particular in buyer-driven GVCs, such as those of consumption goods. In this sense, the cost-effectiveness of the contract also relies on the limitation of liability of chain leading companies for the externalities of production occasioned throughout the chain, which makes the contract a strategic instrument not only from the economic but also from the legal perspective. Because of the formal features which determine the validity of the contract, the role of the law in shaping global industrial production extends further than the concept of Lex Mercatoria. The law neither merely acts as a process of 'juridification' of social practices nor does it lend itself to the adaptations necessary for its employment in social spheres of interaction. Rather, its formal traits are strategically employed for the achievement of certain results which include the causation of certain effects contrary to the law, understood as an architecture of normativity.[183]

[183] AC Cutler, *Private Power and Global Authority* (Cambridge University Press 2003).

5.2.2. Trade

5.2.2.1. The Economy of Trade

On the economic side of trade policies, the emergence of GVCs was accompanied by the transition from embedded liberalism to Washington consensus. This term was coined by economist Williamson at the end of the 1980s and identified the recommended neoliberal agenda to be implemented by developing countries in order to exit poverty and industrialise their economies. Despite including points beyond the promotion of fierce capitalism, as Williamson himself specified at a later stage,[184] the agenda also embraced several points which corresponded to the neoliberal program which had previously been sponsored by the US and UK administrations of Ronald Reagan and Margaret Thatcher respectively, including trade liberalisation, financial liberalisation (towards FDI), privatisation and fiscal discipline. Trade liberalisation remained a key element of the agenda which was to promote growth and development. The recipe for successful development certainly depends on different variables and economists point out the different paths undertaken in Asia as opposed to the failing stories of Latin America. However, when it comes to the relation between growth and externalities of production, the stories sadly remain comparable. The engagement in global trade has in fact not been conducive to economic emancipation everywhere. Many of the countries which have engaged in GVCs based their economic 'development' (or survival) on exports gained through these production chains. However, when low production costs depending on poor regulatory standards are the 'comparative advantage' on which these exports depend, the result is a form of regulatory captivity failing to provide incentives for the adoption of those reforms which are associated with the development process. At the same time, GVCs have also been a disappointment in their capacity to promote economic emancipation for actors in developing economies. If GVCs make it possible for actors located in those countries to take part in industrialised production processes and global economic exchange without having to build their own value chains, recent studies have shown that the economic benefits of participation in GVCs have remained quite limited for low-income countries as opposed to middle- and high-

[184] J Williamson, 'A Short History of the Washington Consensus' in N Serra and JE Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance.* (Oxford Scholarship Online 2008).

income countries.[185] The reasons for this limited success may be manifold, often depending on the particular weaknesses of public institutions and the rule of law,[186] but the ways in which contract and contract law drive and reinforce the existing inequalities between leaders and suppliers in GVCs cannot be ignored.

5.2.2.2. The Politics of Trade

The trade system witnessed a significant moment in 1994 when the WTO was finally established. The organisation offers a framework organisational structure for the several trade-related agreements between countries, including the old GATT. One of the key institutional developments was the establishment of a dispute resolution system within the WTO. The judicialisation of the trade system was seen as a necessary step in order to ensure compliance with, and effectiveness of the rules regulating the system through judicial enforcement. To a certain extent, the establishment of the WTO was seen as the finishing touch on the process towards neoliberal economic liberalisation and integration promoted in the Washington consensus. In the 1990s, globalisation became increasingly subject to criticism with contestations arising on different levels: at the political level, the scepticism took the form of emerging regional trade system especially among developing economies;[187] at the doctrinal level, economists increasingly expressed perplexity about the effective benefits of economic liberalisation;[188] at the level of civil society, the 'No global' movement gained strength.

Many of these contestations questioned the old promise according to which economic liberalisation would have led to economic prosperity and development. The argument supporting the Washington consensus did not take into account sufficiently the economic

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[185] D Rodrik, 'New Technologies, Global Value Chains, and Developing Economies' [2018] NBER Working Paper 25164; A Ignatenko, F Raei and B Mircheva, 'Global Value Chains: What Are the Benefits and Why Do Countries Participate?' [2019] IMF Working Paper European Department; OECD, 'Interconnected Economies: Benefiting from GVCs'.

[186] DM Trubek, 'The "Rule of Law" in Development Assistance: Past, Present, and Future' in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006).

[187] J Luckhurst, *The Shifting Global Economic Architecture Decentralizing Authority in Contemporary Global Governance* (Springer International Publishing : Imprint: Palgrave Macmillan 2018).

[188] JE Stiglitz, 'Participation and Development: Perspectives from the Comprehensive Development Paradigm' (2002) 6 Review of Development Economics 163; P Krugman, 'Dutch Tulips and Emerging Markets: Another Bubble Bursts' (1995) 74 Foreign Affairs 28; D Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion?' (2006) 44 Journal of Economic Literature 973; NN Taleb, *The Black Swan: The Impact of the Highly Improbable* (1st ed, Random House 2007).

inequalities which already existed at that time and which neoliberalism allegedly exacerbated rather than neutralised.[189] With neoliberalism being unable to keep said promise, particularly evident after the global financial crisis showed how the system was even unsuitable for developed economies, and with increasing pressure of environmental concerns, the discourse progressively moved towards sustainable development and environmental protection. While these concerns have been translated to political engagement, for instance on the UN Agenda 2030 and in the Paris Agreement, when it comes to their impact on international trade, the matter has been left to private self-regulation by companies engaging in global trade through GVCs. Attempts have been made in trade law to promote a 'green' turn at the least. The main such attempt has been put forward by the Asian-Pacific Economic Cooperation which has a policy of tariff-reduction for green products. However, this attempt has remained a regional initiative, of a scope limited to green 'products', thereby failing to address the issues resulting from production processes.[190] The issue of externalities of production has remained largely dependent on the General Exception rule provided in Article XX of the GATT.

5.2.3. Production

5.2.3.1. The Economy of Production

As briefly mentioned in the previous chapter, the introduction of new technologies in production systems has contributed to the shift from a model of industrial organisation founded on multinational enterprises to the current model of GVCs. The development of ICTs brought industrial systems the capacity to manage industrial relationships by contract, making contract preferable to property. Naturally, this is not totally valid for all industrial sectors or for every enterprise, but a generalisation is possible to the extent that GVCs represent an affirmed model of industrial organisation today. The difference between the models of the firm and the MNE does not end with the mutation of the institutional structure of the organisation, from propriety to contract, but also includes the substantial production organisation. The possibility to manage relationships led to the fractionalisation of production processes. From the economic perspective, GVCs have implemented the project

[189] P Krugman, 'Inequality and Redistribution' in N Serra and JE Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008).

[190] PC Mavroidis and DJ Neven, 'Things Have Changed (or Have They ?) Tariff Protection and Environmental Concerns in the WTO' [2018] EUI Working Paper RSCAS.

of the aftermath of WWII which foresaw development linked to economic development through the facilitation of trade exchange. With respect to the least industrialised economies, the project of development through trade was initially applied to former colonies, while other economies largely remained outside this system. The development of GVCs is one of the factors which led to an increased participation in international trade: China, Vietnam and Bangladesh being the main examples of this transformation. The economic benefits of least developed economies finally participating in international trade are linked with a decrease in production costs: on the one hand, intensive labour reduced the outputs costs, and on the other the firm-to-firm relationship established within GVCs reduced the business management costs and the relative responsibilities for the production technique put in place. The externalisation of labour has indeed shielded the buying companies – leaders of the chain – from accountability for the compensation of externalities caused during the production process.

This de-responsibilisation has been partially contrasted with the development of voluntary sustainability standards, codes of conduct and strategies of other corporate social responsibility. This development has been seen as a 'constitutionalisation' of corporate governance, i.e., as a way to enjoin corporate economic inclinations with socially oriented considerations.[191] The introduction of this type of self-regulatory instruments has shown a commitment by enterprises to promoting sustainable production. Yet, this commitment is largely academic to the extent that the development of self-regulatory measures has shifted responsibility from business to suppliers on the one hand, and from business to consumers on the other. In the former case, the de-responsibilisation occurs by including VSS and CSR requirements in contractual clauses with contractors. The violation of requirements therefore leads to a simple termination of the contractual relationship, without the leading company incurring any responsibility. With regard to the downstream links of the chain, the de-responsibilisation occurs by considering consumers responsible for externalities caused by industrial production. In this vein, consumers are criticised for mainly caring about the lowest prices in consumption, while ignoring considerations of ethics, the environment and other sustainability parameters.[192] This short-sighted approach would lead consumers to purchase higher quantities of lower quality products. Attention for sustainable

[191] Teubner, *Constitutional Fragments* (n 110).

[192] KJ Cseres and J Mendes, 'Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits' (2014) 51 Common Market Law Review 483.

consumption has been increasing over the past decades as a result of research conducted in two fields of study which have been growing along parallel lines. Consumer behaviour has been the subject of studies in the field of behavioural law and economics;[193] Studies on GVCs have stressed the buyer-driven rational adhered to by chains for the production of consumer products.[194] This transfer of responsibilities therefore relies on the particular position which consumers take in GVCs: While the main buyer is represented by the enterprise leading the chain in the upstream links of the chain, in the downstream distribution links, the main buyers are consumers, who are the ultimate *raison d'être* of the GVC.

This double process of de-responsibilisation is further examined in chapter III, with a particular focus on the role which contracts play in construing a paradigm of communication which protects GVCs from responsibility for externalities of production.

5.2.3.2. The Politics of Production

The separation between product and production processes as emerged from the political intentions of trade liberalisation is not representative of the reality of industrial production within GVCs, where the company exercises control over the whole supply chain and production processes can be fractionalised to the point that each and every necessary step is isolated from the others. Any regulation addressing product qualities must therefore be reconsidered in the context of GVCs. An example of the inadequacy of product-centred regulation is provided by rules of origin applied to a good for the determination of the economic nationality of the product.[195] These rules lose their meaning when the production process is fractionalised and carried out at different sites. Take Levi Strauss famous 501® model: the place of production is difficult to determine as a pair of jeans is dyed in a different location from the one where the cotton is grown or the famous copper rivets are fabricated. Obviously, the cotton has never been grown by Levi Strauss directly at any stage

[193] E van der Zee, 'Regulatory Structure of Standards Underlying Sustainability Labels. Laying the Foundations for Effective Intervention Strategies to Increase Consumer Confidence in Sustainability Labels' in H Bremmers and K Purnhagen, *Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective* (Springer 2018).

[194] Gereffi (n 27); Gereffi and Memedovic (n 100); Gereffi, Humphrey and Sturgeon (n 27).

[195] S Sankari, 'Collective Valuation of Common Good through Consumption: What Is (Un)Lawful in Mandatory Country-of-Origin Labelling of Non-Food Products?' in A do Amaral Junior, L Vieira Klein and L De Almeida, *Sustainable Consumption: The Right to a Healthy Environment* (Springer International Publishing AG 2019).

of its business history. But the ever present international element of trade turns into a challenge for the determination of product origins when the leading enterprise exercises control over the entire chain and the different steps of the production process are obscured by their fractionalisation. As a result, the determination of a product's origin becomes an 'arbitrary' choice in so far as the indication of origin hides the locations of previous stages of the production processes, and to the extent that the place of production has been associated with political concerns for externalities of production. A product made in China or India is in fact usually associated with poor working conditions or high levels of emissions: a product label 'made in Portugal' may 'clear' the reputation of a product – and a brand – by concealing the previous stages of production, thereby preventing plausible associations between the product and the production of externalities. Some companies have increased the level of transparency of the information on product origin by differentiating between production place and assembly place: Apple, for example, labels its products made in China and assembled in the US. However, this differentiation does not completely overcome the issue of defining product origins. Rather, it highlights the limit of the rules pertaining to product origins: while the product's assembly place is easily identifiable, in pinpointing the production location, the same obstacles are present which were brought about by the fractionalisation of production in GVCs.

The inadequacy of product-based rules leaves regulations on production processes not covered by trade law and therefore by a scheme of international rules which deals with economic relations between countries neither. In fact, the ILO does not offer a system comparable to the one put in place by the WTO. The multilateralism of ILO is only formal, as it does not operate on the basis of shared interests of countries in increasing labour standards.[196] On the contrary, the WTO – and formerly, the GATT – was established on the premise that countries gravitate towards the same common interest of increasing their economic development through international trade. Rules on this matter served the purpose of ensuring that this legitimate objective was achieved fairly, in order to prevent conflict. The same reasoning did not apply to the ILO. As a consequence, rules on production processes remained a domestic affair, even though production processes today form the core of international trade.[197]

[196] Ruggie, 'Multilateralism: The Anatomy of an Institution' (n 114).

[197] According to the World Bank Report 2020, GVCs are 'about a half of world trade'.

6. Interim conclusive remarks: Contract law as a tool for externalities

The current chapter had one main purpose: showing that the continued presence of externalities of production is due not only to the fact that these effects are a by-product of production processes, but also to the regulatory framework which surrounds these negative effects. In other words, the persistence of externalities is also a reflection of the legal framework which ultimately creates a basis for the legitimisation of externalities through the safeguard offered by contract law. On the one hand, the global nature of GVCs raises issues of enforcement for national laws which, if in existence, regulate externalities of production. On the other hand, the contractual structure offers a self-standing framework to organise production which limits the interference of those regulations with global production. At the same time, contract law offers the legal stand for validity while contract clauses provide the specific rules to be applied to the contractual relations. The outcome is not only that externalities of production are not effectively prevented but also that when they occur, it is impossible to assess them against the social, economic and political stakes in global production and trade which are reflected in GVCs. The normative principles inspiring the rules which aspire to prevent or sanction externalities of production at different regulatory levels (including sustainability standards) are therefore hindered by the global and contractual nature of GVCs. The analysis of the chapter suggests that this is not simply a 'natural' outcome of economic activities, but rather a scheme which is established in, and made possible by the law.

Chapter 3

Contract and Communication in EU Consumer Legislation

1. Communication and epistemic authority: The concepts

This chapter introduces the perspective of the consumer on sustainability of production processes in EU consumer contract law. The chapter argues that the consumer perspective on the matter has been largely overlooked. Rather, EU consumer contract law follows a communication paradigm which circumscribes consumer claims on sustainability to the communication that consumers receive – especially – prior or through the contract. The argument furthers two concepts: the first one is the notion of the communication paradigm; the second concept is the notion of epistemic authority.

1.1. Communication paradigm

The communication paradigm mentioned in the chapter with regard to EU consumer contract law is intended as a broader notion than the traditional information paradigm. While the information paradigm results in the prescription of information duties to enhance individual autonomy and protect consumers' choices, the communication paradigm serves to describe the rationale used to determine the scope of consumers' claims, especially with regard to sustainability.

The scope of consumer claims is largely defined by the information that these actors receive prior to or in the contract. Much of the laws concerning consumer 'protection' have therefore addressed the accuracy of information to be provided to consumers in order to enable them to make choices which are true to their preferences or, in more legal terms, in order for them to exercise their private autonomy fairly. In other words, the scope of consumer claims relies on the communication that they receive prior to or through the contract: This approach determines a communication paradigm which has the effect of particularly compromising consumers' involvement in the epistemic exercise of defining and evaluating sustainability of production processes.

The roots of this paradigm date back to the rules protecting the authenticity of contractual consent, such as the rules concerning defects of the consent which are found in continental law civil codes.[198]

The diffusion of mass contracting in the twentieth century lead to increased recourse to standard contract clauses. Under these circumstances, the traditional mechanisms for the protection of contractual consent proved to be insufficient for their purpose and, in conjunction with the rise of the figure of the 'weaker party' in various fields of contracting,[199] new bodies of rules for consumer protection began to emerge beyond general contract law. The concern for consumers as a separate category of contractors was the reflection of social considerations which were soon to be combined with factors related to market regulation.

Considerations of market regulation shaped the distinctive characteristics of consumer protection rules and especially the function of pre-contractual information. To the extent that the exercise of private autonomy has been understood to coincide with the perfectly rational man of classical economic theory, information was a key tool to ensure that consumers' choices were to satisfy their preferences.[200] The right to information was therefore one of the four consumer rights which were listed by J.F. Kennedy in 1962, during his famous congressional speech calling for the introduction of a consumer protection policy in the US.[201]

In the EU, the right to information progressively gave rise to the introduction of several duties to inform on the part of the producer. Furthermore, the scope of relevance of information provided to consumers expanded to include 'market' communication, namely advertising and commercial practices. The introduction of the duty to inform is today still one of the favoured mechanisms in the EU to combine consumer protection with market regulation: Recently, in the European Green Deal, the European Commission has

[198] See Articles 1112, 1116 ff from the French Civil Code, Article 1427 from the Italian Codice Civile and Articles 119ff, 123(1) from the German BGB.

[199] Kennedy, 'Three Globalizations of Law and Legal Thought' (n 161).

[200] Stefan Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 Common Market Law Review 269; S Grundmann, W Kerber and S Weatherill, *Party Autonomy and the Role of Information in the Internal Market* (W de Gruyter 2001); P Nelsol, 'Information and Consumer Behavior' (1970) 78 Journal of Political Economy 311.

[201] Special Message to Congress on Protecting Consumer Interest, 15 March 1962.

announced that more information on products sustainability is to be provided to consumers in order to meet the preferences of 'responsible consumers'.[202]

While EU consumer law largely focuses on product qualities in the EU, the consumer perspective on production processes remains framed by the lead corporation of the GVC which makes statements about sustainability using a series of communication tools, particularly in the pre-conclusion phase of the consumer contract, as well as after conclusion. In this vein, the lead corporation exercises epistemic authority over consumers on the content of their statements about sustainability. The exercise of this authority depends on the fact that sustainability at the production level is also regulated by the lead corporation through the contractualised structure of production in GVCs, and – where applicable – codes of conduct and voluntary sustainability standards.

1.2. Epistemic authority

The second notion is the one of epistemic authority. The effects of reflexive communication, as applied in the context of GVCs through self-regulation, on consumers' perspective on matters such as sustainability are particularly meaningful: The lack of a commonly agreed definition of the concept leaves the possibility open for the exercise of epistemic authority on the part of the companies, which define their own sustainability policies. This is not merely an exercise of theoretical authority; On the contrary, it is a kind of practical authority in so far that it implies consumers' acceptance of production processes.[203]

The word 'episteme' derives from the Greek word *epistêmê,* which stands for 'knowledge', 'theory', as opposed to practice *(technê).*[204] A legal episteme is therefore to be understood as knowledge about the law. Being a social 'science', actual knowledge of the law is a matter on which hard evidence cannot be provided, unless subscribing to the most positivist and formal approaches to law; in the same sense, knowledge may be attributed to hard sciences. The law can be understood as an object of knowledge from a constructivist point

[202]'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 Final'.

[203] T Christiano, 'Authority' in EN Zalta (ed), *The Stanford Encylopedia of Philosophy* (Summer 2020 Edition, 2004) <https://plato.stanford.edu/archives/spr2013/entries/authority/>.

[204] Parry, Richard, '*Episteme* and *Techne*', *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2020/entries/episteme-techne/>.

of view:[205] From this perspective, not only the method but also the subjects involved in the construction of the episteme are of importance with respect to the normative value of the law. Among the constructivists approaches to epistemology, the one adopted in the present work follows the conceptualisation developed by system theorists. This approach has some advantages: first, as for every constructivist approach, it focuses on the processes underlying the construction of concepts and knowledge; second, as opposed to the Foucault's approach to epistemological constructivism, the reliance of systems theory on reflexivity allows to grasp the dynamics underlying the formation of concepts and knowledge without recurring to a "a priori". While Foucault attributes relevance to these dynamics in their historical perspective, ie to the extent they contribute to the formation of what he calls the "historical *a priori*",[206] system theorists embrace self-referentiality in the construction of social epistemes, thereby highlighting fragmentation of knowledge as the result of reflexivity, which is performed by the same subjects belonging to a given social system, and not as determined by an "historical *a priori*". This version of epistemological constructivism is more convincing in the context of the present work to the extent self-regulation in GVCs provides the opportunity for the exercise of reflexive governance along the chain. In legal theory, reflexivity came through as an explanation for the construction of legal epistemes without falling into contested methodological individualism or into taking recourse to non-legal grounds for the ontological justification of the law.[207] Both in the 'harder' and in the 'softer' use of reflexivity, by Niklas Luhmann[208] and Gunther Teubner[209] in their own version of systems theory respectively, one complicated aspect involves the normative orientation of the law. If the law lends itself to the 'rationalities' of social subsystems by translating such rationalities into a form of legal communication, reflexivity is at risk of coming to justify opposing epistemes of a same legal notion. In the instance of externalities of production, a GVC's leading company could legitimately 'allow' externalities to occur in the GVC without incurring any responsibility: As is shown in the second chapter, the (publicly condemned) behaviour of GVCs' leading firms, such

[205] G Samuel, *Epistemology and Method in Law* (Ashgate Publishing Limited 2003).

[206] M. Foucault, The Archaeology of Knowledge (Routledge, 2002).

[207] Teubner, 'How the Law Thinks' (n 32).

[208] N Luhmann, *Law as a Social System* (Oxford University Press 2004).

[209] G Teubner, 'Exogeneous Self-Binding: How Social Subsystems Externalise Their Foundational Paradoxes in the Process of Constitutionalisation' in A Febbrajo and G Corsi, *Sociology of Constitutions: A Paradoxical Perspective* (Routledge 2016).

as Levi Strauss, is perfectly legitimate from a reflexivity and/ or a formalistic point of view. The collective basis of reflexive epistemology struggles to consolidate ex-ante contrasting perspectives on legal notions which transcend application to a specific social subsystem. Furthermore, individuals are not counted among the actors who may determine the social aptness of a legal episteme as applied in different social contexts. With regard to the content of this work, consumers may be not satisfied with the production practices causing harm to persons and/or the environment. Yet, this discontent, which does not depend on extra-legal factors, can hardly be incorporated in the law as far as consumer law is concerned.

In the legal field, authority is a concept traditionally linked to the relationship of individuals (and entities) with the state, and in particular linked to the grounds on the basis of which individuals are subject to the normative power of the state.[210] This normative power may rely on different kinds of justifications: relational/procedural justifications or reason-based justifications.[211] Relational accounts include the long-standing tradition of contractualists, whereby authority is conferred to the state as a result of an agreement among those subjected to its power. Reason-based views ground the power's legitimacy in the validity of the substantive values which it promotes.[212]

Authority can be found in private entities as well, especially in the globalised world.[213] In GVCs, the authority of leading companies is the result of the exercise of a freedom rather than of a 'delegated' power. However, when it comes to externalities of production processes, the exercise of private authority may produce effects which are de facto in contrast with the substance of public authority. The present work takes into consideration this instance when using the notion of epistemic authority.[214]

The concept of epistemic authority in the context of the present work corresponds to the following characteristics:

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[210] N Roughan, *Authorities_ Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press 2013).

[211] Roughan (n 203).

[212] Roughan (n 203).

[213] Cutler (n 177).

[214] With reference to the understanding of consumers' complicity to externalities of production in GVCs, Lyn K.L. Tjon Soei Len employs the notion of 'hermeneutical injustice' as defined by Miranda Fricker to highlight how the narrative which sees consumers as weak parties 'obscures' their complicity in the causation of damages in GVCs to the damage of sweatshops workers. While relying on similar considerations, the present work takes a different normative stance on the role of consumers and adopts the notion of epistemic authority to focus on how the regulatory puzzle presented in Chapter 2 opens the way to the exercise of this kind of authority, rather than on the resulting considerations related to justice. See: Tjon Soei Len L-K L, Hermeneutical Injustice, Contract Law, and Global Value Chains, (2020) 16(1) European Review of Contract Law; Fricker M, Epistemic Injustice: Power and the Ethics of Knowing, (2007) Oxford University Press.

A) Source: In contrast to its most common use, in the present work, the notion of epistemic authority does not refer to the type of authority which finds its legitimacy in the 'knowledge' or 'expertise' of the actors involved.[215] The concept in this work does not refer to the expertise in the field of sustainability and its associated 'respect' and '*Prest*ige'. Rather, reference is made to legal epistemes which emerge as a result of an exercise of authority. The authority is therefore practical in nature as it leads to the creation of legal epistemes which affect the understanding and implementation of legal concepts. If the source of authority is not theoretical, then what is it? In this case, the source of authority lies in the self-regulatory capacity of a corporation with regard to rules and principles which govern the concept of sustainability. The right to self-regulation should be in contrast with the concept of authority: However, in GVCs, this self-regulatory capacity is only ostensible to the extent that the implementation of self-regulation is executed by means of contractualised production whereby the 'self'-assumed obligations are transferred to suppliers which bear the true obligation of compliance, and consumer claims are defined by the contractual communication over which they have no control.

B.) Tools: Voluntary sustainability policies developed by private actors *selectively* incorporate regulatory standards and principles on matters such as labour law, environmental law and fundamental rights typical of legal regimes with the highest regulatory standards, or at least those adopted in the EU as EU values.[216] As a result, the concept of sustainability is fragmented in the countless combination of rights as developed in each voluntary sustainability policy. Because sustainability is not a legal concept but rather a construction consisting of legal concepts, at least in the reality of GVCs, the fragmentation of this notion into idiosyncratic sustainability policies affects the episteme of the legal concepts backing the notion of sustainability. While this fact is interesting from different perspectives, for instance from that of competition law, from a consumer perspective, this is all relevant to the extent that these policies reflect 'their own' understanding of legal rights supporting 'their own' concept of sustainability on consumer rights through reflexive contractual communication.

C.) Effects: The resulting outcome is an ex-ante subsumption of facts into legal concepts incorporated in voluntary sustainability policies when present, or in the contract itself,

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[215] Peter M. Haas, 'Introduction Epistemic Communities and International Policy Coordination' (1992) 46 International Organisation 1.

[216] Article 2 TEU.

which remains potentially uncontested due to the communication paradigm of consumer contract law.[217] The absence of ex-ante contestation (negotiation, in contractual terminology) as one of the characteristic traits of consumer contracts results in consumers accepting the production practices. This implicit form of acceptance, as it is understood from a contract law perspective at least, prevents consumers from bringing claims against the externalities of production when they become aware of them. In this sense, the contractualisation of production processes provides the margin for the exercise of authority which affects the epistemic value of legal concepts as encrypted in legal systems, rooted in a democratic deliberative process and conveying a different normative value than the one enacted through private authority. However, the individual consumer is certainly taken into account when considering the legitimacy, be it procedure- or reason-based, of public authority; that same involvement is only apparent in the private authority exercised in GVCs.

In this vein, the chapter illustrates the epistemic authority exercised by Levi Strauss over consumers as well as over suppliers with regard to sustainability of production. Depending on the regulatory regime established by the lead corporation of the GVC, epistemic authority in contracts with suppliers may also be exercised – partially –by suppliers: this happens, for example, when contracts with suppliers include relational elements which prevail over the transactional ones. Despite that clauses in the sustainability policies may confer a relational connotation on the relationship between chain leader and suppliers, the lack of clear parameters on what sustainability implies, leaves the epistemic authority to those actors which actually implement the standards. In GVCs, these actors are mainly the lead enterprise and external standard organisations, where applicable. The epistemic authority is not resolved by instituting a legal obligation. Epistemic authority adds a layer which concerns the actual meaning of the substantive content of an obligation: in the absence of a clear definition on what sustainability means, the structure of contractual governance gives lead enterprises the possibility to use the term 'sustainable production' for a regime which may not be that sustainable after all in the eyes of other stakeholders, such as consumers. The contractualised structure of GVCs has implications for consumers: By imposing sustainability standards on suppliers through the incorporation of such standards in contractual arrangements, lead enterprises are able to label their production as

[217] J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

'sustainable', despite this not necessarily being the case *de facto*. At the same time, consumers find it hard to challenge sustainability statements made by the lead enterprises because they are not involved in the private regulatory regime applied to the GVC. As a result, we do not witness consumer involvement in the epistemic exercise concerning sustainability of production processes. It follows that the contractualised structure of GVCs on the one hand brings together again consumers to production processes, to the extent that the consumer good or service is the outcome of a series of contractual relationships, which make up the production process. On the other hand, it shields consumers from participating in the epistemic exercise for the definition of a sustainable production process. The rapprochement of consumers to the production process is made possible in the first place by the contractualised structure of GVCs. If globalisation has *spatially* unbundled consumption and production,[218] from the perspective of business organisation governance, GVCs have functionally reproached consumers to production processes.[219] The consumer contract is the final step in the production process which a lead enterprise oversees, to a lesser or higher extent depending on the modes of product distribution.

At the same time, the production contractualisation in GVCs benefits from the formalistic approach to contract law which is in place for both suppliers and consumers. On the consumer side, the formalistic approach lies at the base of the communication paradigm which moulds consumer contract law in the EU. This communication paradigm is broader than the information paradigm which has been generally recognised as shaping consumers' rights. The communication paradigm does not contain the idea that consumer protection is efficiently achieved by protecting consumers' choices through the enhancement of their private autonomy. This conceptualisation of consumer protection is certainly a considerable and important element of the communication paradigm. However, the communication paradigm entails something broader than the enhancement of consumers' autonomy and protection of their choices: Consumers claims are largely based on the communicative practices to which they are exposed. With respect to sustainability of production processes, the communication paradigm followed by EU consumer contract law creates a difficulty for consumers to express their interests beyond the 'take it or leave it' alternative generated by the transactional character of consumer contracts.

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[218] Baldwin (n 57).

[219] Even more so since companies can draw on big data collected from consumers' (generally individuals) activities online.

The subsequent parts of the chapter are structured as follows. The first part introduces the communication paradigm as framed in EU consumer contract law. The analysis of this paradigm looks at the central role attributed to information rules to protect and emancipate consumers on the market. The traditional view on consumers is then challenged from a consumer perspective on the contractualised production in GVCs. Recalling the first chapter, the argument is made that the consumer perspective on GVCs is relevant to not only products but also production processes. In order to detail the consumer perspective on production processes and sustainability, the third paragraph describes the main communication tools through which shape the consumer perspective on production processes. This analysis looks at Levi Strauss' sustainability policy and is conducive to the conclusion that Levi Strauss exercises epistemic authority over the consumer on sustainability criteria. This authority is made possible by the communication paradigm of EU consumer contract law but originates in the private regulatory regime which Levi Strauss put in place to regulate suppliers through contracts and sustainability standards. Levi Strauss' regime is briefly analysed in the second half of the chapter. From the analysis, the argument emerges that, while the relational elements of contracts with suppliers enable the formation of an epistemic community on certain aspects of production sustainability, the transactional nature of consumer contracts and the communication paradigm prevent the same from happening with regard to consumers, over whom lead enterprises exercise unilateral epistemic authority on criteria of sustainability of production processes. 1.3 Communication and epistemic authorities

The communication paradigm on which EU consumer law is based, combined with the tendency to private self-regulation, provides companies such as Levi Strauss with the capacity to determine what sustainable and/or responsible production really means, from a legal perspective as well. This exercise of 'epistemic authority' has both legal and normative implications, not only with respect to the direct link between the enterprise and suppliers but also with regard to what consumers are able to claim as 'sustainable' or 'responsible' production. The exercise of this authority varies in accordance with the content of sustainability and corporate social responsibility policies of the lead enterprise, where present. In other words, epistemic authority vis-à-vis consumers is exercised on the basis of the regulatory private regimes which lead enterprises adopt and impose on their suppliers, to the extent that this regime aligns with communication towards consumers.

2. Communication and contractualisation in EU consumer legislation

One of the criteria to distinguish different types of GVCs from each other is to look at their driving force. According to this criterion, GVCs can be divided between buyer-driven and producer-driven chains. Consumer GVCs are of the first type: While the chain leader represents the main buyer in the upstream branch of the chain, consumers represent the ultimate buyer for the downstream branch, which is also considered to be the final stage of the chain. The nature of ultimate driver of the chain makes the consumer part of the chain, a fact which has sometimes been ignored by some legal perspectives which have instead favoured an approach more focused on the business organisation side of contract networks, understood as hybrids between markets and hierarchies.[220] Chains of contracts can also be seen as a form of contract network: GVCs are an example of chains of contracts which include consumers in their networks to the extent that consumers represent the final pillar of production and the trade cycle.[221] Consumers access this structure by the act of consumption which takes the form of a contract. The scope of the access is determined by the terms of the consumer contract, which is usually a standard-terms contract in which no possibility is granted to consumers to define the terms of the contractual relation. The problem of adhesion contracts' standard contract clauses has been addressed from the perspective of the exercise of freedom of contract.[222] This freedom has been interpreted as the faculty to negotiate the content of rights and obligations to be included in the contractual agreement. This approach has resulted in the promulgation of one of the pillars of consumer protection rules in the EU: the Unfair Contract Terms Directive (93/13/EEC). However, the limits of adhesion contracts not only apply to the contract as a product,[223] but also apply to those products which are the object of a contractual relation: Because consumer products are standardised, they have been described as 'goods of adhesion'.[224] The element of adhesion signals the presence of two facts, which result from each other: On the one hand, adhesion is an indicator of standardisation of both contract terms and product

[220] Teubner, Everson and Collins (n 13).

[221] See chapter 1.

[222] Grundmann (n 194); J Ghestin, *Traité de Droit Civil / 2 Les Obligations, Le Contrat.* (LGDJ 1980); R Sacco and G De Nova, *Il Contratto* (UTET 1993); HL MacQueen and S Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical' in S Weatherill and S Vogenauer (eds), *General Principles of Law : European and Comparative Perspectives* (Hart Publishing 2017).

[223] AA Leff, 'Contract as a Thing' (1970) 19 American University Law Review 131.

[224] Leff (n 216).

characteristics, while on the other it points out the limited choice in actions which can be undertaken by the adhering subject, in this case the consumer. The option before contracts and goods of adhesion is in fact binary: To adhere or not to adhere, that is the question which consumers must answer.

At the EU level, while the UCTD quite extensively addresses the issue of standard contract clauses, no such a correspondingly broad instrument exists to respond to the limitations of goods of adhesion. The tools provided to consumers concerning product qualities can be divided into two categories: defects of products and non-conformity of products. The former relates to minimum mandatory standards concerning product safety to be met by every type of product circulated on the single market, while the latter looks at the conformity of consumer goods with the contract.[225] With regard to the latter, consumers' role is most revealed in GVCs. By concluding a consumer contract, consumers access the GVC and at the same time 'adhere' to the consumer good which is the purchased object. However, because of the contractualisation of production process occurring in GVCs, consumers' adhesion extends beyond the product to the production process. Contractualisation of production alters the consumer perception of the production process in GVCs and of sustainable production. However, in general terms, the scope of consumer claims is limited to the communication provided to consumers: This mechanism is responsible for the communication paradigm which applies to sustainability standards: this paradigm excludes consumers from the possibility to define ex-ante sustainability's the content, meaning and consequences for the production process. The possibility for consumers to engage with those matters is confined to the post-contractual phase, by means of its remedies.

2.1. Contractualisation from the consumer perspective

One of the defining characteristics of production in the twentieth century is the evolution from the integrated to the fractionalised structure of production processes. This evolution has been materially supported by the progress and diffusion of new ICT technologies and by the progressive liberalisation of international trade from the governance perspective. From the institutional perspective, the horizontal extension has found its structural support in the institution of contract. The advantages procured by the development of new

[225] Art.2 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees L 171/12 (Sale of Goods Directive).

technologies have not only had an impact on the form of the business organisation model but also changed the methods through which the substantive relationships between actors unfold . The use of contracts to organise industrial production also reflects a reconditioned function of the contract: The production process is governed through regulation of the relationship between the parties. In this vein, what has been defined as a fractionalisation of production processes, in legal and institutional terms, has been defined as a contractualisation of production processes in the present work. However, the contractualisation of production processes does not merely imply a reference to the partitioning of processes occurring within GVCs. Contractualisation of production especially indicates the blurring difference between product and production regulation: Because each stage of the production process corresponds to a contractual relation in a GVC, and each contract in a GVC corresponds to a stage of production process, contracts for the supply and trade of products within a GVC form a *crasis* between the regulation of product characteristics and those concerning production process.

The difference between product and production blurs even more when considering that contracts with suppliers along the chain often incorporate requirements of the leader of the chain concerning production processes. The inclusion of those standards in contracts allows leaders of GVCs to implement their sustainability policies – where existing – throughout the value chain. As a matter of fact, the incorporation of sustainability standards within contracts is sometimes actually the only mechanism through which leaders of the chain can ensure their own compliance with such standards:[226] Being 'manufacturers without factories', leaders of GVCs can only give effectiveness to standards which they have drafted themselves or to which they have subscribed by including these within contracts with their suppliers. In other words, in order to ensure their own compliance with voluntary sustainability standard schemes, leaders of a chain often transfer the obligation of such compliance to their sub-contractors. This technique translates to a strategy for eluding the responsibility deriving from the adoption of voluntary self-regulation against externalities of production. When standards are given the shape of contractual obligations, leaders of the chain are free to terminate the contract in case the sub-contractor does not fulfil the

[226] Voluntary sustainability standards schemes often include a process of verification and accreditation which relies on an auditing system. This system is proving insufficient to prevent non-compliance as is sadly evident from the many accidents which still occur despite the existence of said auditing system (see the Rana Plaza as one of many examples). See also M Tampe, 'Leveraging the Vertical: The Contested Dynamics of Sustainability Standards and Labour in Global Production Networks: Leveraging the Vertical' (2018) 56 British Journal of Industrial Relations 43.

obligation. At the same time, because including sustainability standards in agreements with sub-contractors is sufficient, leaders of GVCs can claim their products to be sustainable and to meet sustainability requirements. These claims reach consumers in the form of market communication, such as labels and certifications, particularly today, now that claiming sustainability is a trend in marketing/competition strategy.

The contractualisation of production occurring in GVCs has had a profound impact on the relationship between consumers and the production process: However, this deep transformation has not – yet – been translated to a legal narrative about consumer protection. The major cause for this delay is the reliance on a communication paradigm for the determination of the normative scope of consumer protection rules. This communication paradigm is enabled by the chain of contracts established in the GVC, and can simultaneously be strengthened by the adoption of voluntary (sustainability) standards and the adoption of labels, logos and certifications. The connection between production and consumers first of all rests on the chain of contracts, but the adoption of voluntary standards, especially if followed by label schemes, makes the connection more visible and stronger.

The communication paradigm is distributed along the GVC through a series of tools which are used before the conclusion of the consumer contract. The contract between suppliers may in fact be supplemented with sustainability/CSR policies which are addendums to the supply contract. While these policies have a contractual relevance in contracts with suppliers, from a consumer perspective, they are contractual practices which assume contractual relevance only to the extent that they are communicated to consumers. When communication about requirements of production processes are not communicated to consumers, because they are not in place at all or because they focus on specific aspects of the production process leaving other parts aside , these measures are not considered by consumer contract law.

2.2. Contractualisation from the business perspective

From the point of view of business organisation, contractualisation is the main characteristic which distinguished GVCs from previous production models. The contractualisation of production has also affected the way in which externalities of production are handled by businesses. In the framework of GVCs, which are ‘global’ in character, the matter of externalities is typically handled by the leader of the chain which

may opt to prepare a 'policy' where it states the measures to prevent externalities of production as well as actions to be taken in case of an externality. Because of the increasing concerns for sustainability, these policies are today often headed as sustainability policies, the substance of which is ascribable to externalities of production. Because the adoption of the policy is completely voluntary, the extent, substance and scope of the policy may – and does – vary from policy to policy. Naturally, a policy could also be completely missing.

The sections following look at how contractualisation affects the methods in which externalities of production are regulated. The analysis is crucial to the extent that the scope of the sustainability policies directs the ways in which rights and authorities are identified and imposed not only on suppliers but also on consumers.[227]

2.2.1. Absence of sustainability policy

Let us first consider the instance where the enterprise has no sustainability policy in place. This case may be becoming rarer. Yet, if we consider our everyday life in more detail, we are able to find many examples where the trader leading the GVC has no sustainability policy. The consumer perspective on production process is more limited if compared to instances where the lead enterprise is equipped with a code of conduct or sustainability guidelines to the extent that the lack of these instruments provides consumers with less information, which reduces the scope of consumer claims according to the communication paradigm outlined above. This does not necessary mean that no commercial practices is in place, but rather that, in the absence of any self-regulation regime addressing sustainability and corporate responsibility, consumers will have fewer elements in which to ground their claims. In this case, the exercise of epistemic authority vis-à-vis consumers is entirely enshrined within the contractual relations between the lead enterprise and the suppliers: Despite that the contractualisation of production processes in GVCs contributes to influencing the consumer perspective on the production process, this perspective does not find outspoken recognition in the communication paradigm shaping EU consumer contract law.

The outcome is that, should consumers discover that the production process of a given product was not sustainable, they have no grounds to address the issue as they are not part of the contracts between lead enterprise and suppliers, and they were not 'promised' a

[227] S Sassen, *Territory, Authority, Rights From Medieval to Global Assemblages.* (Princeton University Press 2008).

sustainably produced product. The effectiveness of consumer involvement when a sustainability policy has not been instituted, is hindered by traits of classical discrete contract law which still persists within consumer contract law. The transactional understanding of consumer contracts perpetuates the idea that consumers' choice is limited to a take it or leave it alternative based on the information give through communication tools. Protection of intellectual property rights does therefore not contribute to integration of the communication paradigm with a consumer perspective: On the contrary, even in the hypothesis in which consumers may be able to ask information about production process, a lead enterprise will be able to shield itself from disclosing this type of information by resorting to the protection of intellectual property rights.[228]

2.2.2. Presence of internal sustainability/CSR policy

Brands increasingly turn to adopting sustainability/CSR policies, either internally and/or by subscribing to third-party designed standards schemes.[229] These have been considered as a pre-pre contractual communication tool: Consequently, they may have a misleading effect on consumer choices and are therefore taken in consideration by the communication paradigm of EU consumer contract law. In this sense, consumers may present a claim against the lead enterprise which formulated or subscribed to the sustainability standards, should its activities not be in compliance with such standards.

Here, the role of corporation as epistemic authority produces a direct effect on consumers: Because the standards are drafted either directly by the lead enterprise or by an organisation of which the lead enterprise holds a membership on payment of a fee, the interpretation of the specific criteria included in the standards is under direct or indirect influence of the lead enterprise itself. Ultimately, the exercise of epistemic authority is a necessary component of a system based on private self-regulation such as the one implemented through GVCs. The exercise of epistemic authority over consumers is made possible by the relationship between not only the lead enterprise and consumers but also the enterprise and its suppliers. From analysing the features of Levi Strauss' private regulatory regime results clear that, even in prior stages of the GVC, the interpretation of sustainability criteria does not involve a 'deliberative' process on the epistemic scope of sustainability standards applied

[228] J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge University Press 2000).

[229] Sustainability standards' growth rates have increased in the past four years, see International Trade Centre, 'The State of Sustainable Markets 2019: Statistics and Emerging Trends' 6 ff.

throughout the GVC. The moment of supplier adhesion to the contract and to the clauses which incorporate voluntary standards signals the moment when the contractual communication attributes regulatory significance to the standards: the regulatory effect is produced on the one hand by the obligatory nature of the communication and on the other by the policies of continuous improvement which provide a window of opportunity for post-contractual communication to adjust to the terms of the contract before the chain leader resorts to contract termination.[230]

It must be mentioned, however, that the initiatives on mandatory human rights due diligence partially mitigate such an effect. In the EU several member states have recently adopted mandatory human rights due diligence ((HRDD) legislation[231] and the EU is currently in the process of adopting its own generalised measure on sustainable corporate governance, which will include HRDD measures (and will complement the existing sectorial legislation[232] and the non-financial reporting requirements[233] already in place). Among the essential characteristics of HRDD, as defined in the OECD Due Diligence Guidance for Responsible Business Conduct[234] – a document which represents an internationally recognised benchmark in the field of due diligence – two are particularly relevant for the argument advanced in this work. First, due diligence, following a preventative approach, focuses on the measures that corporations need to adopt to identify and mitigate and prevent accordingly the risk of human rights violations emerging in their own business operations, their supply chains and other operations related to their business activities. While the focus is on the prevention of these violations, due diligence demands

[230] Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts New Architectures' (n 101).

[231] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF N°. 0074 du 2 mars 2017; Dutch Child Labour Due Diligence (CLDD) Act of 113 November 2019; Act on Corporate Due Diligence Obligations in Supply Chains, BGBl I 2021, 2959. Official English translation at https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supplychains.pdf https://www.bmas.bund.de/XXX ; Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions, LOV-2021-06-18-99. Unofficial English translation at: https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent.

[232] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295, 12.11.2010; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017.

[233] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330/1 15.11.2014.

[234] OECD (2018), *OECD Due Diligence Guidance for Responsible Business Conduct*.

corporations to establish clear and transparent rules for the management of both the risk of violations and violations themselves. This requirement implies that corporations adopt so called *obligations de moyen* (obligations of conduct) also with regard their relationship with suppliers. By being obligations of conduct, measures of due diligence require enterprises to engage with suppliers and other stakeholders in order to acquire knowledge on the risks of violations of human rights and to how best mitigate or even remedy them once they occur. From this perspective, mandatory due diligence may soften the epistemic authority exercised by enterprises to the extent the set of requirements which companies have to meet is pre-defined by mandatory legislation. From this perspective, the recently adopted Norwegian legislation is a case of particular interest. The adoption of the Norwegian due diligence law has been strongly pushed by consumer organisations, whose concerns have been duly taken into account in drafting the legislation.[235] The second relevant characteristics of mandatory HRDD is the requirement of ongoing communication on the measures put in place to avoid and mitigate violations of human rights in their operations. This includes reporting obligations and transparent information on the initiatives undertaken under due diligence purposes. The connection of measures for prevention and mitigation of the risk with the requirement of ongoing communication contribute to increase the reliability of what is communicated by enterprises towards relevant stakeholders, including consumers. While the focus of mandatory due diligence is on the prevention of violations of human rights, the French *Loi de vigilance* extends its scope on the surveillance mechanisms that ensure compliance of enterprises with the obligations undertaken. One of the key elements introduced by the French law is indeed the jurisdiction attributed to civil courts when an enterprise fails to meet the requirements imposed by the law and its Plan de vigilance. Unfortunately, in February 2020 the French Government released an assessment of the showing that the progress achieved by the *Loi de vigilance* has been lower than expected, also in light of the declared constitutional invalidity of the fines to which companies should have been subjected under the original text of the law. For the purpose of the argument here presented, however, it must be pointed out that the concept of due diligence is as vague as that of sustainability and it is still not clear how mandatory HRDD will relate to voluntary sustainability standards and their contractual application in GVCs. While some nationl legislation, in particular the newly adopted German Act on

[235] Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions, LOV-2021-06-18-99.

Corporate Due Diligence Obligations in Supply Chains[236] requires termination of the contractual relationship to be a last resort measure to be applied only in cases of serious violations, contractual termination remains overall difficult to challenge for smaller business parties in the GVC: The recent experience of the Covid-19 virus provides an example of this insofar that the measures to halt the spread of the virus have led to suspension of payment and/or contract termination with smaller suppliers, due to a decrease in consumption rate following constraints to movement of goods and people. Transactional elements of classical contract law therefore still persist in long-term contractual arrangements between business partners which may be used as a last resort measure when facing unforeseen circumstances or a systemic failure of the parties to comply with the sustainability standards or other core elements of contract.[237]

The effectiveness of the regulatory scope of sustainability standards is produced contract by contract through the chain to the extent that subcontractors further on in the GVC must also abide to the standards. In this case, no direct communication takes place between the lead firm of the GVC, such as Levi Strauss, and the second-tier subcontractors: The regulatory scope of sustainability standards depends on their incorporation into contractual obligations between subcontractors. Even more so, at this stage of the chain, contracts establish a unidirectional channel for communication of standards related to sustainability of production processes: Second-tier subcontractors are not in direct communication with the lead firm but fall under its regulatory private regime by entering its 'jurisdiction' through contractual agreement.

2.2.2.1. Levi Strauss' private regulatory regime

A. Sources

The Sustainability Guidebook developed by Levi Strauss includes references to international conventions and local laws.[238] This type of reference is mostly present in the Terms of Engagement, which is the section of the Guidebook dealing with labour standards. In the field of labour, the existence of the ILO Conventions makes it easier to identify a

[236] Act on Corporate Due Diligence Obligations in Supply Chains, BGBl I 2021, 2959.

[237] Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (n 174); Ian R Macneil, 'Relational Contract: What We Do Know and Do Not Know' (1985) 1985 Wisconsin Law Review 483; IR MacNeil, 'Power, Contract, and the Economic Model' (1980) 14 Journal of Economic Issues 909.

[238] Levi Strauss & Co., 'Sustainability Guidebook, November 2020'.

coherent and comprehensive framework to refer to in the Guidebook. This is not possible for other chapters of the Guidebook, including the chapter on environmental requirements. As regards to domestic law and regulations of the country where the supplier is based, the Terms prevail unless they are in violation with such laws and regulations.

The situation is different for standards provided by BCI: In this case, the requirements are autonomously drafted by the standard organisation. The Assurance model of BCI includes a glossary of key concepts according to which 'better cotton is cotton that has been produced by licensed BCI Farmers, or by farmers licensed under a recognised equivalent standard. Licensed BCI farmers have been assessed as compliant with the Core Indicators of the Better Cotton Principles and Criteria (P&C) – Version 2.1 and have fulfilled the Licensing Requirements outlined in the BCI assurance model. Farmers licensed to sell Better Cotton produce cotton in a way that cares for people and the environment, ensuring decent work conditions for workers and caring for water, soil health and natural habitats'.[239] The substantiation of these requirements is found in the principles and criteria formulated by BCI, which are divided between key principles and criteria, including rather general requirements, and specific normative requirements for small and medium holders and large farms, which specify the key principles and criteria according to the addressees. Besides the requirements related to the use of pesticides, the care for soil and land quality, the BCI standards also consider social criteria such as the promotion of decent work. However, contrary to the Terms of Engagement, the BCI standards do not incorporate references to other sources of law, such as ILO conventions, or domestic laws and regulations.

Both the Terms and BCI principles are autonomously and voluntarily drafted by private actors, being Levi Strauss and a no-profit organisation, which have exclusive authority over the content and scope of their respective Terms and principles. The unilateral authority is the result of the wider approach adopted with regard to regulation of transnational activities and externalities of production which is analysed in chapter 2: on the one hand, measures adopted at the international level are exclusively public and mostly non-binding; on the other hand, states with developing economies – in which countries manufacturers are commonly based – have little incentive to adopt binding laws for the protection of workers and the environment in their domestic legal order, as this would lead to increased production costs which would decrease their competitiveness on the supplier market in turn.

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[239] 'BCI-Assurance-Manual-v4.0_2020.Pdf' <https://bettercotton.org/wp-content/uploads/2020/03/BCI-Assurance-Manual-v4.0_2020.pdf> accessed 1 May 2020.

Conversely, companies such as Levi Strauss are incentivised by civil society to develop CSR policies by developing their own codes of conduct and by subscribing to sustainability schemes. However, the incorporation of voluntary sustainability standards into contracts with suppliers factually amounts to a transfer of responsibility from the lead corporation to suppliers: A lead corporation like Levi Strauss develops its own CSR/sustainability policy under a presumption of self-regulation while it transfers the obligation to comply with this policy to its contractual partners at the same time. For a company like Levi Strauss – the lead enterprise of the GVC –, the fulfilment of self-imposed sustainability standards is in fact complete when these are incorporated within contractual arrangements with suppliers. Certainly, compliance by subcontractors has to be monitored and verified, but the reference in contracts is enough to make sustainability claims about the GVC of which it is lead enterprise.

B. Evaluation of compliance

Both the Terms of Engagement and the BCI standards provide for verification methods of compliance. The Terms are accompanied by suggestions which include visual observation; review of records; interviews with factory managers and workers; information gathering from workers and/or external resources.[240] For each requirement, one or more verification methods are suggested.

The BCI scheme provides for multiple ways to assess compliance of licensees: self and internal assessment; readiness checks; licensing assessment; support visits; surveillance assessment. These are foreseen and apply differently in case of small and medium holders or large farms. Third-party verifiers are employed for carrying out those assessments which are directly linked to the issue or renewal of the license, the license assessment and the surveillance assessment. Other types of assessments are carried out by licensees or implementing partners, i.e., partner organisations of BCI which have a local expertise and whose function is to support the implementation of the criteria established by BCI to obtain a better cotton license.[241] Similar to the Terms of Engagement by Levi Strauss, License and surveillance assessments are conducted on the basis of a field inspection, interviews with managers, farmers and workers, and a review of documentation.

[240] These methods are better and fully illustrated in an older version of the ToE,Levi Strauss & Co. (n 225).

[241] 'BCI-Assurance-Manual-v4.0_2020.Pdf' (n 226).

Empirical studies[242] and, most unfortunately, accidents such as the collapse of the Rana Plaza in 2013, have shed light on the doubtful effectiveness of these verification methods in practice. The collapse of the Rana Plaza is well-known to have been preceded by a visit from the certification organisation TÜV Rheinland a few months earlier which failed to report the unsafe working conditions in the factory.[243] Certification schemes rely on a rather fragile system of auditing and reporting which is jeopardised from time to time by behaviour on the part of factory managers or auditors which impedes parties from detecting social and/or environmental externalities.

C. Actors involved

The chief actors participating in the CSR system put in place by Levi Strauss are three: Levi Strauss, BCI and addressees. Involvement of other actors is occasionally sought for suggestions on the substantive content of the CSR requirements, but their participation in the system is not institutionalised.

Ultimately, the Terms are unilaterally drafted by Levi Strauss, while better cotton criteria are unilaterally drafted by BCI: Both assume binding force for the addressees when reference is made to them in their contractual arrangements with Levi Strauss or when a license is granted to them by BCI. From the perspective of their contractual value, incorporation by reference of the Terms and the Better Cotton criteria make them standard contract clauses.[244] Subcontractors of Levi Strauss neither participate in drafting CSR policies nor are they consulted in choosing external standard schemes with which to comply. In this vein, Levi Strauss retains authority over the regulation of the supply chain and BCI retains authority over the meaning of 'better cotton' as well as soil and land treatment, the use of pesticides, and the definition of 'decent work'.

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[242] Tampe (n 219).; S Barrientos and S Smith, 'Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems' (2007) 28 Third World Quarterly 713; D Klink, 'Compliance Opportunities and the Effectiveness of Private Voluntary Standard Setting – Lessons from the Global Banana Industry' in A Marx and others, *Global Governance of Labour Rights* (Edward Elgar Publishing 2015); RJ Liubicic, 'Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights through Private Initiatives' (1998) 30 Law and Policy in International Business 49; CA Rodríguez-Garavito, 'Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala' (2005) 33 Politics & Society 203.

[243] RanaPlaza_TueVRheinland_OECD_CaseReport (ecchr.eu)

[244] Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts New Architectures' (n 101).

D. Nature of the obligation/consequences of non-compliance

The time has come to turn the focus towards the consequences for non-compliance with the Terms and the better cotton criteria. Levi Strauss identifies three levels of non-compliance: zero-tolerance violations (ZTV), immediate action (IA) and continuous improvement (CI). Levi Strauss claims not to conduct business with partners which employ ZTV practices. If these are committed by a business which is already a partner of Levi Strauss, the ZTV is followed by immediate remediation and the implementation of measures to prevent the reoccurrence of the violation. Items associated with IA policy require that the violation must be fully repaired in two months. CI requires Levi Strauss to support the business partner in adopting measures to improve the factory management and labour conditions.

As regard the BCI standards, since they aim to support farmers in the adoption of more sustainable production practices, the main reaction to non-compliance with the standard is remediation and continuous improvement. However, some violations lead to license cancellation: These cases include those in which the annual self-assessment is missing and those in which a systemic non-conformity with the criteria is detected. In these cases, corrective actions are put in place to be implemented and assessed before the next licensing assessment. What follows is an overlapping regime of conformity with the BCI standard scheme and the contractual arrangement between Levi Strauss and the subcontractor: To retain membership of the BCI, Levi Strauss must not infringe the code of practice, including making false or misleading statements about the BCI, not lack engagement with the BCI, and, in general, not fail to meet the membership criteria.[245]

The focus on continuous improvement strengthened by Levi Strauss' sustainability Guidebook and the BCI confers a relational character to the relations between Levi Strauss and suppliers. This trait is particularly relevant for adjusting the requirements to the cultural and social context in which the GVC operates. For instance, the provision for an IA associated with the terms related to working hours allows for flexibility to accommodate different practices related to shifts and days of rest. Workers in developing economies are often willing to reduce the amount of days of rest: The emphasis on IA and CI is an opportunity to accommodate and negotiate these terms in the post-contractual phase to the extent possible. The emphasis on post-contractual communication resonates with the association between relational contract and production governance through contract: the

[245] See the BCI Terms of Membership: https://bettercotton.org/wp-content/uploads/2013/12/BCI-Terms-of-Membership.pdf .

use of the contract for long-term projects, related to development and production of goods and value brings to light the relational character of these arrangements which is developed in the post-contractual phase due to the impossibility of planning the future developments of the contractual relationship in advance.

The presence of relational elements in the contractual relations between Levi Strauss and suppliers also contributes to the inclusion of actors in the epistemic endeavour concerning the interpretation of the sustainability criteria implemented in the GVC. In this sense, the relational elements of these contracts benefit the emergence of an epistemic community,[246] which does however not include a consumer perspective. The scholars' studies on relational contract has one limitation with respect to consumers' involvement in GVCs: Relational elements enhance and strengthen precisely the relationship *between* the parties.[247] As a result, the consumer perspective on production processes remains filtered by the communication paradigm determined by EU contract rules.

2.2.2.2. Levi Strauss' as epistemic authority of the GVC

An evaluation can be performed of the different effects that the sustainability policy put in place by Levi Strauss produces with regard to the consumer perspective on production processes.

On the one hand, it is true that the relational flavour of contracts with suppliers expands the amount of actors involved in the epistemic exercise – for instance through adjustments of the sustainability standards to the social and cultural context in which suppliers perform production stages. On the other hand, to the extent consumer contracts do not own the same relational elements, the fact that the expansion is made possible by the introduction of relational elements in contracts with suppliers reinforces the perception that the consumer perspective on sustainability of production processes is overlooked. Besides, the relational element introduced in the standards may always be counterweighted and superseded by transactional elements of the contractual relation with suppliers. Whereas the standards adopted by Levi Strauss provide for obligations for suppliers, Levi Strauss is not bound by continuous improvement or immediate action responses to non-compliance. In other words,

[246] Braithwaite and Drahos (n 221); C Kaufman and HJ Berman, 'The Law of International Commercial Transactions (Lex Mercatoria)' (1978) 19 Harvard International Law Journal 58.

[247] Macneil (n 224); Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (n 174); Macaulay (n 157); Macneil (n 224); Macneil (n 157); IR MacNeil, 'Reflections on Relational Contract' (1985) 141 Zeitschrift für die gesamte Staatswissenschaft 541.

the contractual regime puts Levi Strauss in the position to make the contract with suppliers more transactional or more relational. This authority is mitigated with reference to compliance with the BCI standards, which instead require the members to comply with the standards – including policies of continuous improvement – in order to maintain the membership. On a substantive level, however, the epistemic authority exercised by BCI over Levi Strauss is weakened by the BCI's reliance on fees membership. In other words, the authority which Levi Strauss exercises over actors involved in the upstream limb of the GVC results in the opportunity for Levi Strauss to determine the substance and extent of its commitment to sustainability in the final instance.

3. Externalities and contractualisation in EU consumer legislation

Every action has an equal reaction, be it intended or not. Industrial production is not exempted from this common rule. Its social and environmental impact has gone beyond the intensions of its promoters, for better or worse. Many of the better living conditions achieved in certain areas of the world could never have been achieved without industrial and economic development. However, on the other side of the coin, the rising concerns about climate change as well as conditions of social distress are mainly the outcome of the extractive and exploitative practices on which this development was built for the past two centuries.

These issues have not been remained unobserved by experts, who have been pointing out the problematic nature of industrial production, and the damages to society, from different perspectives. One way of framing the discourse has been developed by economists, who have translated the negative impacts generated by production into costs which are not borne by the actor creating them and which have been therefore labelled with the epithet of externalities, as such costs remain 'external' to the price.

The nature of externalities has evolved overtime following the evolutions experienced in the history of industrial production.

In Phase I and Phase II, production was still localised in single, autonomous factories, wherever they were located. Until the 1980s, the internationalisation of production mainly concerned the stages of supply of raw materials and the distribution of goods to foreign markets, supported by the decrease in transportation costs which most of the time was accompanied by an institutional support in the form of liberalisation policies. During these phases, externalities were linked to local production as well as to the movement of goods

from country to country. Externalities linked to the production site primarily amounted to water and air pollution, affecting both the environment and the people living in proximity to the production area, as well as the exploitation of energy reserves. The same problems have been indicated with respect to the increased use of transportation means, which affects the quality of air and water and contributes to global warming and the worsening of climate conditions in general.

In the traditional law and economics literature, one influential view to respond to the problematic nature of these types of externalities relied on the work of the English economist Arthur Cecil Pigou and the tax named after him, the Piguvian tax. According to this view, the negative social cost generated by externalities should be compensated by the introduction of a tax equal to the amount of the cost produced by the inefficiency of the market. The present work will abstain from engaging in a more detailed analysis of this argument. Be it sufficient to point out that the application of a piguvian tax in the context of GVCs presents a few challenges which this thesis aims to address.

Industrial production in Phase III is characterised by an increase of production fractionalisation and in its reliance on contractual relations. The fact that most of the offshore production was subcontracted to factories operating in countries offering cheap labor at the price of poor working conditions and weak or inexistent environmental protection has intensified the debate on the disruptive impact of production on society and the environment. The debate on these new generation of externalities has found its framework within the field of sustainable development and, more recently, of sustainability in general. However, GVCs' reliance on contractual relations brings about conceptual challenges in relation to the conceptualisation of the origin of externalities and the possible means to respond to them. The contractualisation of production emerging in the context of GVCs provides the opportunity to reconceive externalities as external effects of contracts: each contractual relation on which the chain is built, contributes to the final output as well as to the causation of the negative effects on society and the environment.

Looking at externalities as external effects of contracts requires contract lawyers to engage in a challenging exercise of re-imagining the role of the contract in GVCs. Each contractual relationship which is part of the structure of the chain contributes to the production of the final product as well as the externalities deriving from the production process.

However, the structure of contract law does not easily lend itself to this exercise. The understanding of contract as an enclosed relationship between the contracting parties poses

ontological challenges for the view of externalities as external effects of contracts. In simple terms, how is it even possible to recognise the existence of external effects of contracts if the latter only produce effects between the parties? The principle of privity of contract, which embodies the relational trait of the contract's functioning, constitutes the very essence of contract law since Roman law.[248]

The principle of privity has nevertheless shown flexibility in the evolution of contract law over time. Two main instances prove the elasticity of this principle: the contract for the benefit of third parties and the German rule on the contract with protective effects for third parties. Both instances challenge the rigidity of privity of contract to the extent that they take into consideration the impact of the contractual obligation on third parties. However, in both cases, the relevant third party must have a connection with one of the contracting parties as either the benefit or the protection granted to the third party must find justification in the will of one of the parties.[249] The external effects of contracts lack this subjective element however, thereby stretching the privity of contract beyond its limits.

The argument to engage in this exercise is nevertheless twofold: formal and normative. Taken in its formalistic dimension, the principle of privity of contract establishes that the contract only produces its effects for the contracting parties. This poses a challenge to the conceptualisation of external effects to a limited extent, as the external effects are usually effects which contracts *de facto* produce on third parties and the environment, while the principle of privity mainly applies to the 'obligations' created by virtue of the contractual relations assumed by the parties. The second order of argument lies in the nature of GVCs, and in the intentions of the parties to cause the external effects by entering into one of the contracts supporting the chain. From this perspective, the issue of the external effects of contracts appears particularly problematic with respect to the consumer contract.

The downstream tie of GVCs is usually represented by a consumer transaction. Once having gone through all production stages and finally being assembled, the final good is traded and distributed until it reaches its relevant market. In case the final market is the

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[248] F Mattioli, 'Il Contratto a Favore Di Terzo. Spunti per Una Comparazione Diacronica Dal Diritto Romano al << Draft of Common Frame of Reference>>.' (2010) X Rivista di Diritto Romano 1; R Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition* (Oxford University Press 1996).

[249] In the case of the contract for the benefit of a third party, the benefit must be accepted by the third party. For reference on the two examples, see: Zimmermann (n 235); Mattioli (n 235); Markesinis (n 15); B Markesinis, H Unberath and AC Johnston, *The German Law of Contract : A Comparative Treatise* (Second edition, Hart Publishing 2006); H Kotz, 'The Doctrine of Privity of Contract in the Context of Contracts Protecting the Interests of Third Parties' (1990) 10 Tel Aviv University Studies in Law 195; Guido Alpa and others (eds), *Effetti del contratto nei confronti dei terzi* (Giuffrè 2000).

consumers market, the ultimate transaction concluding the GVC therefore involves a consumer contract.

3.1. The restricted normativity behind consumer contract law in the EU.

The development of consumer protection in European contract law has been the result of a debate on contractual justice and the necessity to grant protection to weak contractual parties. The necessity to rebalance the bargaining positions of consumers with that of their business counterparties was the result of the acknowledgement that formal parties' equality was not fulfilling the objective of protecting the private autonomy of the consumers. Formal equality between the parties was based on the normative assumption that the organisation of society should promote formalistic equality and individuals' private autonomy. In contract law, this autonomy is represented by freedom of contract, which is expressed through the manifestation of consent to be bound by and to the terms of the contract. In economic theories of contract law, this freedom of contract represents the self-determination of rational individuals, which leads to the efficient allocation of resources through market transactions at the macro level. Whenever consent is not the result of an autonomous act of self-determination, the contract should not be deemed enforceable. At the time when this traditional scheme was initially drafted, the requirements of freedom and equality between the parties were deemed to be satisfied even when they were only formally fulfilled. However, the complexity of contractual relationships, and especially of mass transactions, drew attention to the circumstances in which the parties to a contract lack substantial freedom and equality (*Materialisierung*).[250] Substantial inequalities between the parties could potentially lead to distortions in the distribution of resources through private exchanges in a similar manner to formal inequalities. For the sake of the efficient functioning of market society, new sets of remedies were therefore adopted in

[250] L Raiser, *Il compito del diritto privato saggi di diritto privato e di diritto dell'economia di tre decenni* (Giuffrè 1990); MW Hesselink, *CFR & Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law: What Roles for Fairness and Social Justice?* (Sellier 2008) 13. With reference to the Principles of European Contract Law, see: HW Micklitz, 'The Principles of European Contract Law and the Protection of the Weaker Party' (2004) 27 Journal of Consumer Policy 343; R Sefton-Green, 'Duties to Inform versus Party Autonomy: Reversing the Paradigm (from Free Consent to Informed Consent)? A Comparative Account of French and English Law' in Geraint G Howells, Andre Janssen and Reiner Schulze (eds), *Information rights and obligations: a challenge for party autonomy and transactional fairness* (Ashgate 2005); N Cohen, 'Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate' in J Beatson and D Friedmann (eds), *Good faith and fault in contract law* (Clarendon 1997); A Brudner, 'Reconstructing Contracts' (1993) 43 University of Toronto Law Journal 1. Micklitz, 'The Principles of European Contract Law and the Protection of the Weaker Party'; Sefton-Green 172; Cohen 26; Brudner.

order to re-balance the relationships where, being the parties equal formally, one party was stronger than the other in terms of bargaining power and thus able to impose unbalanced terms of contract.[251] The rebalancing of the substantive positions of the contracting parties, by way of 'state interference' with individual self-determination, resulted in enhancing the private autonomy of the weaker party, rather than compromising it.

3.2. The missing normativity of consumer contract law in GVCs.

If the aim of consumer protection is to ensure that the consumer contract does not oppose consumers' will, then the external effects caused by contracts in the context of GVCs invite a reflection on their link with consumer interest.

Taking a consumer perspective on the external effects of contracts' issue becomes even more relevant if coupled with the buyer-driven nature of GVCs producing consumer goods. One traditional distinction among various types of value chains is between buyer-driven and producer-driven GVCs.[252] While the management of the transaction is in the hands of the manufacturers in producer-driven value chains, this power is held by retailers and traders in buyer-driven GVCs.[253] In order to manage the network of intra-firm links building the chain, traders and retailers gather information through sales points and other means, and use this information to direct the manufacturers' activities. This strategy lies at the basis of the emergence of demand-responsive economies, which are 'organized backward from final demand'.[254] This means that the ultimate purpose of production coincides with consumption in buyer-driven GVCs, making the causation of negative externalities particularly relevant for consumers who wish not to cause them yet are unable to influence the GVCs because the structure of contract law prevents them from acting against the external effects which they unwillingly produce on society and the environment in the context of GVCs.

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[251] S. Scheffler, Distributive Justice, the Basic Structure and the Place of Private Law, in 35(2), *Oxford Journal of Legal Studies* 2015, 214; B. Lurger, *The Common Frame of Reference/Optional Code and Various Understandings of Social Justice in Europe*, in T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe*, (Wolters Kluver 2007), 186.

[252] G. Gereffi, O. Memedovic, 'The Global Apparel Value Chain: What Prospects for Upgrading by Developing Countries? SSRN' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=413820.

[253] ibid, 5.

[254] G. G. Hamilton, G. Gereffi, *Global Commodity Chains, Market Makers, and the Rise of Demand-Responsive Economies*, in J. Bair, *Frontiers of Commodity Chain Research*, 136 – 161.

The lack of consumer empowerment in context of the occurrence of externalities in buyer-driven GVCs results to be incompatible with the purpose of consumer contract law in the sense that consumers cannot avoid an undesired outcome which is contrary to their interest, even if the actual damage affects a third party or the environment, and is not material in its nature.

The main limitations in this sense faced by consumers derive from the parcelled approach adopted in looking at contractual relations, which result to be inadequate to capture the function of contracts in the context of GVCs. The relational understanding of contract hardly suits the broader reach of the contractual links on which production lie in GVCs.

4. Effects of externalities on communication through contract

The regulatory regime for suppliers put in place by the lead enterprise mainly rests on the conclusion of contractual agreements with suppliers which are performed prior to the consumer contract. Some of the regulatory tools which are employed at the regulatory level may function as communication tools to inform consumers about features of the regime regulating the production process, such as sustainability requirements imposed on sub-contractors. In this vein, sustainability standards have a double function: They define sustainability requirements which serve to regulate the production process and at the same time they work as a communication tool to provide the consumer with information about sustainability features of production process.[255] Because the scope of consumer contract law is largely defined by communication delivered to consumers prior to signing of or within the consumer contract, the more information consumers receive, the larger the scope of their claims. Nonetheless, this 'quantitative' approach does not solve the issue regarding the 'quality' of the information received: In this sense, the scope of consumer claims remains limited to the extent that consumers do not contribute to the definition of the notion of sustainability in the regulatory communicative tools established by the lead enterprise. When voluntary standards are present, these overlap with the contractual regime, while the contractual relation is the only point of reference with regard to the aspects of sustainability which are not covered by the applicable set of voluntary standards. From the consumer perspective, the presence of standards defines the scope of their claims against requirements

[255] In this light, providing correct communication about the standards in the communication campaigns is unsurprisingly the main obligation, besides payment of the membership fee, of companies member to the BCI.

of sustainable production: To the extent that standards can fall under the scope of commercial practices, consumers in the EU can rely on the Directive on Unfair Commercial Practices (UCPD). Inversely, when standards are missing or partial, consumers lack the communicative basis for their claims. In a nutshell, the consumer perspective on the regulation of a GVC is filtered through what is communicated by the lead enterprise: In this vein, the regulatory instruments implemented in the contractualised production of GVCs from a consumer perspective assume the shape of communication tools. These communication tools especially apply in the pre-pre contractual phase, i.e., the phase which precedes the consumer contract, yet has not yet established relations between the parties. This Phase Is populated by an array of communication tools, often defined as commercial practices or market communication, to which consumers are exposed. At this stage, the consumer perspective on the product and production process is filtered through the communication at the pre-pre contractual phase: This exposure is offered the protection of the UCPD to the extent that consumers' transactional choices can be misguided by this sort of communication.

The following paragraphs look at the kind of communication tools which are put in place by Levi Strauss. These include not only those tools which are explicitly developed to address consumers, but also those tools which serve the purpose of regulating the GVC, such as the code of conduct of Levi Strauss and external sustainability standards schemes constituting part of the sustainability or corporate social responsibility policy of the brand.

Taking the consumer contract as a point of reference, the communication tools used by Levi Strauss are presented according to the following timeline:

a. Pre-pre contractual stage
b. Pre- and contractual stage
c. Post-contractual stage

Each stage presents different tools of communication which contributes to framing and limiting the consumer perspective on issues concerning externalities of production. These instruments are chronologically analysed in the following paragraphs.

4.1. Communication tools in the pre-pre-contractual phase

The tools of communication are used prior to the consumer contract are rather numerous. These instruments include, among others, the contracts through which the GVC is

regulated, the standards incorporated in such contracts, label schemes and trademarks. Levi Strauss sustainability policy offers instances for each type of these communication tools.

A. Contracts in the chain

Contracts between business partners involved in the GVC are the key element for the establishment of a communication link between suppliers and Levi Strauss: The content of the obligations is defined outside the sphere of influence of the addressees of those obligations. Contracts between lead firms and suppliers serve the purpose of establishing a stream of communication between the parties which is necessary to transform the standards into contractual obligations. Without this type of communication occurring, the regulatory strength of standards would be extremely weak, if existent at all. When the self-regulatory scheme provides for policies associated to non-compliance, the nature of the contract is disciplinary: When continuous improvement is promoted, the nature of the contract assumes a more defined inclination towards the relational paradigm of contractual relations. The relations between Levi Strauss and contractors in the GVC is governed by contract law and the standards included in BCI principles and the Terms at the same time: to the extent that these standards are associated with a policy for non-compliance, the function of the contract is to transform these standards into legally binding obligations. The incorporation of standards in contractual agreements with business partners in the GVC contributes to defining their transactional or relational character. Given the terms established in the voluntary standards, termination and modification of contractual agreements remain a faculty of the parties which overlaps with the policies for non-compliance established in voluntary standards.

The consumer perspective on regulation through contracts with suppliers is framed by the contractualisation of the production process: the product which is the object of the consumer contract is the result of the previous contracts which had been used by Levi Strauss to regulate the production process. In this vein, the contractualisation of production connects consumers to the production process. This connection rests on a type of communication which is only implicitly received by consumers and in fact remains uncovered by consumer contract law. The content of contracts which anticipate the consumer contract is in fact excluded from the scope of consumer contract law, even from the pre-contractual phase. From the consumer perspective contract law, contracts which

regulate the production process in GVCs fall outside of the scope of consumer interests.[256] The authority to define the criteria making the production process sustainable and fair to the actors and resources involved, such as workers, animals, and the environment, is left entirely in the hands of the lead enterprise.[257] In this sense, these actors assume the role of solitary 'epistemic authorities' for the definition of the criteria which make a production process sustainable; The notion of sustainability is defined along the requirements which the lead enterprise imposes on the suppliers in the GVC.

B. Standards (internal and external)

The sustainability policy of Levi Strauss is composed of several instruments: The most comprehensive one is represented by the Sustainability Guidebook, which includes the Terms of Engagement imposed by Levi Strauss on all its business partners. Other initiatives include a registered trademark by Levi Strauss and adhesion to standard schemes drafted by third party organisations. The Water<Less and Levi Strauss Wellthread initiatives, both registered trademarks for the reduction of water consumption in the process of denim production, belong to the first category. Partnerships with other organisations include the adhesion to Better Cotton Initiative (BCI) and the collaboration with Evrnu for the creation of denim from post-consumer cotton waste.

The partnership with BCI represents an example of a CSR policy based on standard schemes designed by third party organisations – also called voluntary sustainability standards (VSS). The relations between Levi Strauss and BCI are based on membership governed by the Terms of Membership, according to which the membership is subject to the payment of an annual membership fee and compliance with the BCI's Code of Practice. Infringements of the code of practice include examples of false representation of BCI and Better Cotton; making misleading claims about the production or impact of BCI; lack of engagement with reporting progress and achievements to BCI; anticompetitive conduct.[258]

Besides agreement to these conditions, Levi Strauss commits to source only from farmers who grow 'better cotton', and to help them to meet the criteria to achieve said result, by

[256] With the exception of defective products.

[257] Cutler (n 177); AC Cutler, 'Locating "Authority" in the Global Political Economy' (1999) 43 International Studies Quarterly 59.

[258]'The-Better-Cotton-Initiative-Code-of-Practice_Commercial-Members.Pdf' available at: https://bettercotton.org/wp-content/uploads

/2014/01/The-Better-Cotton-Initiative-Code-of-Practice_Commercial-members.pdf.

becoming a member of BCI. The compliance with criteria is carried out by third party verifiers whose mission is to 'carry out Licensing and Surveillance Assessments in specific countries' after they have completed a training developed by BCI.[259] To be granted and maintain the BCI license, farmers and producers must comply with the core indicators of BCI's Principles and Criteria; provide an annual self-assessment on producer practices; submit an annual Results Indicator of on-field data; provide evidence of continuous improvement in the application of sustainable practices.[260]

As foreshadowed earlier, sustainability standards are a powerful regulatory tool in the context of production in GVCs. The regulatory capacity of standards is coupled with their communicative function: From a consumer perspective, standards are a tool to acquire information on the product and/or the production process. With regard to sustainability standards, the adoption and implementation of these requirements along the GVC is an entirely voluntary matter. The voluntary nature of sustainability standards has produced two consequences which are linked to one another. The first consequence has been the proliferation of sustainability standards schemes. While some years ago, three EU Eco-labels and the Fairtrade logo were very recognisable standards schemes on the market, today, enterprises can choose among hundreds of different sustainability schemes. The proliferation of this self-regulatory technique is not only attributable to the flexibility on account of their voluntary nature, which allows for the combination of multiple standards so as to create the preferred balance of obligations, but also from the implications that these standards produce in terms of competition. In this sense, sustainability standards belong to the array of contractual practices which anticipate the pre-contractual phase but which are not yet covered by consumer contract law in the EU.

Sustainability standards may be drafted by the lead enterprise of the GVC, and incorporated in the brand's code of conduct, or may be drafted by external standard organisations. Levi Strauss provides examples for both cases: The Sustainability Guidebook represents an instance of the former, whereas the membership to the Better Cotton Initiative represents an instance of the latter.

One of the core elements covered in the Sustainability guidebook is the Terms of Engagement (ToE): the latter provide for a set of requirements which must be met by

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[259] 'BCI-Assurance-Manual-v4.0_2020.Pdf' available at: https://bettercotton.org/wp-content/uploads/2020/03/BCI-Assurance-Manual-v4.0_2020.pdf.

[260] 'BCI-Assurance-Manual-v4.0_2020.Pdf' (n 226).

subcontractors in order to become – or remain – business partners with Levi Strauss. The scope of the Terms is rather broad: A substantial chapter is devoted to standards related to labour requirements, while other chapters cover environmental and other social aspects which are particularly sensitive in the garment sector and especially so for the denim manufacturing industry, such as requirements addressing the use of chemicals.

Beyond drafting the sustainability guidebook, Levi Strauss is also a member of the BCI, a non-for-profit organisation which provides a system of standards specifically designed to address sustainability issues connected to cotton cultivation.

From the consumer perspective, the development of standards, their adoption and implementation in the GVC are outside the scope of EU consumer contract law. Similarly to what has been mentioned for communication through contract, consumers are also conceived as final takers with respect to voluntary sustainability standards: The application of these requirements is considered to be a contractual practice which is not of interest to the consumer side. This assumption has been challenged and progressively eroded by some authors who have been arguing in favour of the expansion of the unfair commercial practices directive (UCPD) when business engage in behaviour which is contrary to obligations under the applicable sustainability codes of conduct and/or sustainability schemes.[261] This argument lies in much compatibility with the paradigm of communication shaping the EU consumer contract law to the extent that it requires an expansion of the communicative basis on which consumers can base their demands.

C. Labels

Labels[262] and logos are tools to convey a complex set of information to final consumers. From a governance perspective, labels, logos and certifications serve the purpose of claiming compliance with minimum standards and qualities regarding products and/or production processes. From the consumer point of view, these tools are mechanism to provide consumers with the necessary knowledge to make informed choices. In this vein,

[261] A Beckers, 'Environmental Protection Meets Consumer Sales' (2018) 14 European Review of Contract Law 157; A Beckers, 'The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms' (2017) 54 Common Market Law Review 475; T Wilhelmsson, 'Consumer Law and the Environment: From Consumer to Citizen' (1998) 21 Journal of Consumer Policy: Consumer Issues in Law, Economics and Behavioural Sciences 45.

[262] The labels referred to do not include mandatory ones related for example to nutritional factors for food or energy labels. Those labels are not associated with the voluntary implementation of standards setting.

labels and certification aim at establishing consumers' confidence in products marketed on the EU internal market. Labels and certifications are usually the result of a process of verification and certification of compliance with relevant standard schemes. This system applies not only to sustainability standards but also to other product requirements.

Labels can be distinguished according to different parameters: A first distinction regards mandatory and voluntary labels. Mandatory labels are either obligated by specific EU laws and regulations or certify compliance with an EU mandatory standard. One of the most famous labels of the EU is the CE mark through which manufacturers, producers and traders certify that their products are in conformity with the relevant EU standards. In this vein, the CE mark is not linked to any specific standard, but rather acts as an umbrella logo for declaring compliance with the EU standards which are relevant to the product holding the mark. As such, the CE mark is mandatory where it certifies compliance with mandatory standards. In the field of textile, the CE mark is only mandatory if textile products fall under the scope of notably the Regulation for Personal Protective Equipment (Regulation (EU) 2016/425) and the Toy Safety Directive (2009/48/EC), whereas the mandatory labelling requirements for all other textiles are established by Regulation (EU) 1007/2011 on textile fibre names and related labelling and marking of the fibre composition of textile products. This and indications on product care refer to *product* requirements.

A second distinction concerning labels, and a very relevant one for the scope of this research, is the division between labels for product requirements and those concerning production processes. Indications about production processes are entirely voluntary and reflect compliance with a given set of voluntary standards. The label of this kind which is most commonly found on the EU market is the EU Ecolabel, which certifies that the product has a reduced impact on the environment. The requirements for the application of the EU Ecolabel vary according to the product category: In the field of textile the requirements concern fibre quality, use of chemicals during the production process, environmental impact along the life cycle of the product, respect for basic workers' rights, and at the same time ensure fitness for use of the product complying with such criteria.

A separate discussion is needed for labels concerning products origin. These labels lie exactly at the heart of the problem analysed in chapter 2 regarding the incompatibility of mandatory requirements concerning production processes with the GATT/WTO system of rules – and generally with the spirit of free trade. This type of indication on the one hand is

made necessary by rules concerning customs, imports and exports,[263] while it has the potential of producing equivalent effects to quantitative restrictions on the other hand.[264] In the EU, the matter is left to requirements adopted by MS which can introduce mandatory requirements concerning product origins to the extent that these are compatible with Article 34 TFEU. From a consumer perspective, labels on the country of origin may be indicative of the sustainability of production processes:[265] A presumption prevails that a product made in for instance Italy carries qualities relating to both product and production processes superior to those carried by a product made in China. However, when production occurs in GVCs, labels on origin rules are bound to provide partial information: To the extent that production is contractualised and every stage – or grouping of them – is carried out by a new actor in a new place, labels on product origins can turn out to be unreliable with respect to their indicative potential on sustainability of production processes. This is particularly problematic when products are only finalised in countries with higher standards for labour and environmental protection: These products can carry a label 'made in Spain' even when the rest of the production process has been carried out in other countries, with lower protective standards. In this vein, labels on country of origin may become a tool for competition on the market. The implications of competition promoted by standards and labels generally apply to technical standards and especially to voluntary sustainability standards. These effects can produce a race to the top where market leaders develop their own standards which have the capacity to cut competitors out, or can be exploited as a competitive tool for market communication.

With regard to rules of origin, the CJEU recently delivered a judgement through which it established what type of information can be inferred from a label, showing the rule of origins of certain product. The judgement in question is *Psagot* and is analysed in depth in chapter 4.

D. Trademarks

Besides the Sustainability Guidebook and the membership to BCI, Levi Strauss sustainability policy lists two other initiatives, Water<Less and Levi Strauss Wellthread.

[263] This does not mean that marks of origin are mandatory, it only means that customs management makes them convenient and useful, especially for the application of preferential treatments under GPS schemes etc.

[264] Article IX GATT; article 34 TFEU.

[265] Sankari (n 189).

These are both registered trademarks which address the issue of water consumption in denim production. Trademarks are one of the traditional elements of intellectual property law, which are protected by Directive (EU) 2015/2436[266] and Regulation (EU) 2017/1001 in the EU.[267] The protective function of property rights is supplemented by the communicative function which trademarks fulfil when applied on the market. This function is exercised to ensure fair competition on markets, a function which necessarily demands that consumers not be deceived by the communication received on the market. Therefore, the CJEU has progressively acknowledged that some consumer directives are relevant to trademarks as well: in *O2*, for instance, the Court recognised that trademarks can be used by a business competitor for purposes of comparative advertising if the advertising clearly meets the requirements of the Comparative Advertising Directive, the scope of which is limited since business to consumer advertising is regulated by the UCPD today.[268] The UCPD also contributes to the protection of trademarks to the extent that the broad definition of misleading commercial practices covers 'any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor'.[269]

From a consumer perspective, the symbolism of a trademark increases consumers' trust in the quality of the product or the production process: In this vein, Water<Less and Wellthread initiatives have the purpose to communicate to consumers that the purchase of a pair of denim by Levi Strauss implies a reduced water consumption and recycling of materials. The reliability of such information is assured by the procedure for obtaining the registration of a trademark, which ensures that the methods applied to achieve the results on diminished water consumption and recycling of materials are effective and distinguished from other techniques used by competitors for the same purpose. The protection granted to trademarks impedes consumer involvement during the procedural phases anticipating trademark registration. Similarly to the communication through standards and labels,

[266] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (Text with EEA relevance) 2015 (336).

[267] 'Regulation (EU) 2017/ 1001 of the European Parliament and of the Council - of 14 June 2017 - on the European Union Trade Mark' 99.

[268] C-533/06, O2 Holdings Limited & O2 (UK) Limited v. Hutchison 3G UK Limited [2008] ECLI:EU:C:2008:339; Catherine Seville, *EU Intellectual Property and Policy* (Edward Elgar Publishing 2009); Geraint Howells, Hans-Wolfgang Micklitz and Thomas Wilhelmsson, *European Fair Trading Law* (Ashgate Publishing Limited 2006), 71.

[269] Directive (EC) 2005/29 (UCPD) Art. 6 par. 2(a).

consumers are not represented at the stages where the sustainability concept is specified. Trademarks therefore fall under the type of pre-contractual communication which is understood as a commercial practice in consumer law terms. In this case, due to the 'practice' rather than contractual obligation nature, consumer choices are once again protected under the scope of the UCPD.

E. Commercial Practices

Advertising is probably the most obvious type of communication to which consumers are exposed prior to the conclusion of the contract, and it is certainly the core form of communication which can produce a misleading effect on consumer choices. All previously mentioned forms of communication may also be used for advertising purposes. Claims of sustainability of production process are particularly convenient for this purpose as the information concerning the real conditions of production is only rarely able to verify the truthfulness of the information received. Most often, information about production processes conflicting with the type received at the pre-contractual stage is gained when 'scandals' become part of the public domain, as was recently the case for the Volkswagen scandal.[270] Advertising is one of the main commercial practices falling under the scope of the UCPD because it directly addresses consumers and aims to influence their transactional choices. The definition of advertising adopted at the EU level is rather broad as it encompasses any 'representation in any form made in connection with a trade, business, craft or profession in order to promote the supply of goods or services'.[271] The definition covers a broad range of practices as the purpose of the directives is twofold: 'to protect traders against misleading advertising and its unfair consequences and to lay down the conditions under which comparative advertising is permitted'.[272] The consumer perspective is a concern only in as much as the advertisement can be considered an unfair commercial practice, and in as much as that what is communicated by the trader results in a misleading effect on transactional choices – as a result of the anti-competitive effect on the market.

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[270] R Hotten, 'Volkswagen: The Scandal Explained' *BBC News* (10 December 2015) <https://www.bbc.com/news/business-34324772>.

[271] Article 2(a) of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376).

[272] C-657/11 Belgian Electronic Sorting Technology NV v Bert Peelaers, Visys NV, [2013] ECLI:EU:C:2013:516.

4.1.1. Conclusion on communication in the pre-pre-contractual stage

The stages which anticipate the consumer contract in the GVC are rich with communication tools which affect, in one way or another, the consumer perspective on the product and production process. To the extent that contractualisation of production processes blurs the traditional lines between the two, consumer adhesion to the GVC implies adhesion to contract terms as well as to final products, which are the outcome of the fragmented and contractualised production. Besides this basic form of communication through which consumers get closer to the production process, the pre-contractual Phase Is enriched with a series of communication tools: Some of these serve the double purpose of regulating the GVC and inform consumers about the qualities of the production process, while others mainly have the purpose of informing consumers. At the EU level, this type of communication generally falls under the scope of the UCPD, which has the scope of preventing consumer deceit by means of the communication received before conclusion of the contract. This type of protection affects the pre-pre contractual stage, i.e., an indefinite point in time before the conclusion of the contract where the parties are not yet in connection to one another (pre-contractual stage). This Phase Is different from a pre-contractual stage where consumer protection law intervenes by imposing duties to inform on the business party of the contractual relation. In the pre-pre contractual stage, consumers are exposed to market communication/practices which can assume different forms and needs not be always accurate: As long as consumers are not materially harmed by this type of communication, by making a transactional choice which they would not otherwise have made, market communication/practices are completely under the control of the business entity. The passive status of consumers is only altered if and when the type of communication is misleading.[273] Apart from these circumstances, consumers' status remains passive in this phase. When it comes to communication on sustainability standards of production processes, consumer passivity entails a larger freedom for business actors than applies, for instance, in case of safety standards or product sustainability. Sustainability standards of production process are entirely voluntary, as is illustrated in chapter 2, and are generally not subject to an ex-post scrutiny by consumers which is verifiable by the use of products, as is the case for product sustainability. It follows that sustainability of the production process is entirely controlled by the transnational regulatory

[273] For an overview of the case law on the concept of 'misleading', see Jules Stuyck, 'Court of Justice and the Unfair Commercial Practices Directive, The' (2015) 52 Common Market Law Review 721.

regime put in place by the lead enterprise of the GVC and will be exposed to the public only through social activism campaigns or by serious accidents such as the collapse at Rana Plaza in 2013.

4.2. Pre- and contractual stage

The pre-pre contractual stage is followed by the pre- and contractual stage, when consumers start to approach the relationship with their business partner which will lead to the conclusion of the contract. In this phase, communication tools are more strictly regulated at the EU level, this phase being the one addressed by most traditional consumer protection rules. Be it for contractual justice, private autonomy, or market efficiency, the foundation of consumer protection addresses the issues which may emerge at this stage of the consumer interaction with the business partner. The relevant consumer protection measures at the EU level are often the consumer rights directive and the unfair contract terms directive (UCTD), which deal with the pre-contractual and contractual phase. In this phase, communication therefore loses its voluntary character and assumes the form of an obligation.

A. Duty to inform/Information rights

One of the core elements of consumer protection rules is represented by those provisions which impose a duty to inform on the business party. The right to information is one of the traditional pillars of consumer rights and is today part of the consumer rights directive as well as many other legal instruments which regulate market sectors at the EU level. Consumer information protection is in fact rather ubiquitous in EU market regulation. An instance of this approach to consumer right to information is enclosed in the European Green Deal, launched in December 2019, where the European Commission stresses the importance of ensuring that consumers are well informed about sustainability of food products in order to promote the transition to a circular economy in the food market sector.[274]

The normative foundations of the consumer right to information are based on at least three different grounds according to the implications associated with lack of information. From

[274] 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 Final' (n 196).

an economic perspective, lack of information represents one type of market failure, to the extent that it impairs economic actors from behaving as perfectly rational actors. From a traditional private law perspective, lack of information represents an obstacle to the correct exercise of private autonomy of the consumer due to their 'structural' weaker position vis-à-vis the business party. From a regulatory perspective, information rules strike a compromise between the need for market regulation and a free market.[275] In the EU, this latter perspective has been the reason behind several CJEU decisions and the introduction of information duties in different contexts involving consumers.[276] Confining the analysis to the sources which pertain to consumer policy, Directive 2011/83 on consumer rights has introduced a significant body of information rules. These are mandatory rules which impose an obligation to provide consumers with a minimum amount of information on the trader. The directive is well-known to distinguish distance and off-premises contracts from other contracts. The distinction is made to solve the challenges deriving from the particular environment in which consumer contracts are entered, which are more insidious for contracts concluded at a distance from or outside commercial premises. Rules for contracts other than distance and off-premises contracts are included in Article 5 of the directive which establishes that, '[b]efore the consumer is bound by a contract', the trader shall provide the consumer with information regarding the main characteristics of the products or services; the identity of the trader; the total price of the goods or services; arrangements for payment, delivery and performance; the existence of the legal guarantee for conformity and after-payment services if provided; the duration of the contract, and if applicable information related to digital nature and content of the goods and services. This information is mandatory if not 'already apparent from the context'. In this sense, Article 5 is slightly less narrow than Article 6, establishing information requirements for distance and off-premises contracts where the traders cannot avoid the duty to inform. In addition to the requirements listed in Article 5, the duty to provide information concerning the following is imposed on the trader in Article 6: the costs of distance communication if differing from a basic rate; the geographical address of the trader; the conditions and limits of the right of withdrawal if applicable; possible costs related to the exercise of the right of withdrawal; the existence of relevant codes of conduct; possible redress mechanisms.

[275] Grundmann (n 194); S Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2005).

[276] Art. 169 TFEU

While the penalties for the infringement of these duties are defined at the national level, the Directive does not prejudice national laws of contract, the consumer is arguably not bound by any obligation as a general rule if not adequately informed prior to the conclusion of the contract.

Other than in their mandatory character, the information rules introduced by Directive 2011/83 also differ from the type of pre-contractual communication which was analysed in the previous paragraph in the fact that, according to paragraph 5 of Article 6, '[t]he information referred to in paragraph 1 shall form an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise'. The directive not only indicates the substance of the mandatory information, but also its formal requirements. While information may appear clear from the context in case of contracts other than distance and off-premises contracts, in case of the latter, information must be 'legible, and in plain intelligible language'.[277] Other formal requirements address the medium through which information is conveyed to consumers, which must be tangible and durable.[278] Finally, chapter V of the Directive deals with general provisions, including Article 26, according to which 'Member States shall take appropriate measures to inform consumers and traders of the national provisions transposing this Directive and shall, where appropriate, encourage traders and code owners as defined in point (g) of Article 2 of Directive 2005/29/EC, to inform consumers of their codes of conduct'. In this sense, the Directive invites Member States to connect commercial practices regarding codes of conduct with contractual information, without however providing any indication on what type of obligation should follow from the provision of similar information. Considering that the Directive provides for maximum harmonisation, it is hardly imaginable that information about codes of conduct should be made mandatory. In this respect, the type of remedies provided by the UCPD seems to be more effective after the amendments introduced by Directive (EU) 2019/2161 with regard to consumers' redress against unfair commercial practices.[279] The amendment expands contract law's

[277] Article 7 and – slightly different in the text but identical in its message – Article 8 of Directive 2011/83.

[278] Extensive analysis of the formal requirements of information is given in C-430/17 *Walbusch Walter Busch GmbH & Co. KG v Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV*, [2019] ECLI:EU:C:2019:47.

[279] Article 3 of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. OJ L 328/7.

scope by suggesting that consumer redress may include individual damages, price reduction and termination of the contract. The recommendation is non-exhaustive and non-exclusive but it obviously aims to provide Member States with the type of enforcement which must be sought for breach of the UCPD. The necessity to increase the grip on harm inflicted on consumers by commercial practices as a result of the Volkswagen scandal back in 2015 which revealed the ineffectiveness of the administrative enforcement system connected to infringement of the UCPD for consumer protection purposes.

The move is significant for the argument here uncovered: Consumer protection rules in the EU are arguably built on the idea that consumers should be informed and that all sorts of communication which they receive prior to the contract, be it market communication though commercial practices or contractual communication connected to duties to inform, must not have a misleading effect on consumer transactions. The closer to the conclusion of the contract the communication takes place, the more stringent the relative requirement becomes. At the same time, however, the closer to the conclusion of the contract communication takes place, the less it will concern production processes.

B. Contract terms

When it comes to contract terms, the most relevant measure at the EU level is without any doubt the unfair contract terms directive (UCTD).[280] The objective of the directive is not limited to granting protection to consumers' transactional choices, but rather it aims at preventing that contractual communication result in an excessive obligation weighting on the consumer side. The Directive aims to address an issue regarding consumer contracts which was practical as much as normative in nature: the disadvantaged bargaining position of the consumer vis-à-vis the contractual business partner. From the perspective of communication, the Directive is relevant to the extent that it addresses the disadvantage caused to consumers by the use of standard contract terms in consumer contracts. The issue leads back to debates on contracts of adhesion which have been particularly abundant and vibrant at some domestic levels, such as in the French and Italian legal scholarships.[281] The issue raised by the standard contract form addresses the limited role of consumer parties in the definition of rights and obligations included in consumer contracts: While consumer passivity in this regard facilitates the increase of the number of transactions, particularly

[280] Directive (EC) 93/13 on unfair contract terms.

[281] Ghestin (n 215); Sacco and De Nova (n 215).

convenient in the present era of mass production and mass consumption, it also reduces consumers to a take it or leave it option, thereby excluding consumer from the communicative process of contracts. The Directive adopts two main 'regulatory techniques':[282] one addresses the fairness of the bargaining process while the other directly addresses the substantive content of the contract by including a non-exhaustive list of clauses which are considered to be unfair. The first technique relies on the concepts of unfairness and good faith to ensure that the bargaining process provides no opportunity to the business partner to take advantage of the consumer's weaker bargaining position.[283] In this respect, Article 3(1) of the Directive considers a term which has not been individually negotiated to be unfair and that, 'contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.[284] The article has been thoroughly clarified by the CJEU in the *Aziz* judgement where the Court concluded that a) the 'significant unbalance to the detriment of the consumer' must be assessed against what is provided by national law in the absence of any agreement between the parties and b) that the contrariety to the good faith requirement necessitates the evaluation of whether the supplier, 'dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations'.[285] The element of good faith introduces a subjective element on the side of the trader/supplier, by means of which the determination of unfairness is not only based on the literal interpretation of the term and/or the consumer's perception of unfairness, but it is rather integrated with the perspective of the business contractual party.

The integration is diminished by the second regulatory technique adopted by the Directive, which provides instances of types of clauses which are deemed unfair, the perception of

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[282] To use the language of Stephen Weatherill, Weatherill (n 262).

[283] C-618/10 *Banco Español de Crédito v Joaquín Calderón Camino* [2012] ECLI:EU:C:2012:349 para. 39; C-34/13 *Kušionová v SMART Capital a.s.* [2014] ECLI:EU:C:2014:2189; C-470/12 *Pohotovost v Miroslav Vašuta* ECLI:EU:C:2014:101 para. 39; C-26/13 *Kásler and Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282 para 39; C-169/14 *Sánchez Morcillo and Abril García v Banco Bilbao Vizcaya Argentaria, SA*, ECLI:EU:C:2014:2099, paragraph 22.

[284] Article 3(1) UCTD. The Article has a controversial translation in the Italian legal system, where the provision determines that a contract is deemed unfair if it creates a significant unbalance of rights and obligation to the detriment of the consumer 'despite the good faith' of the trader. For a comprehensive overview of consumer law in the Italian legal order, see S. Mazzamuto, *Il contratto di diritto europeo*, Torino, 2015, p. 192.

[285] C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, [2013] ECLI:EU:C:2013:164.

the parties notwithstanding.[286] These instances are listed in the Annex to the Directive which provides for a non-exhaustive list of examples. The consequences of unfairness are the non-enforceability of the term, or of the contract as a whole if the unfair term was essential to the contract.

The Directive offers an example of the integration of the communication paradigm with a consumer perspective: The unilateral authority on the draft of contractual terms is integrated with the evaluation of the material scope of the term regarding rights and obligations, moderated by consideration for the requirement of good faith, and with the unenforceability of the term when deemed unfair. The fact that the unenforceability only regards the unfair term introduces a relational element to the contract between the parties, a moment which was lacking in the phase prior to the conclusion of the contract. This relational element is however limited to the scope of the concept of unfairness as derived from the Directive and which may be considered rather material and 'introspective' to the extent that it is limited to the rights and obligations which the parties confer to each other in the contract. In this sense, once the communication paradigm applies to the contract terms, the regulatory paradigm shifts attention from the impact of the transaction to the broader market context of the internal relations between the parties.

When it comes to sustainability of production process, the notion of unfairness provided in the Directive results rather irrelevant in addressing issues related to externalities of production, even if the conclusion of the contract may be actually result from a lack of good faith on the side of the trader/supplier. Issues of sustainability in the production process are also left out of the consumer sales directive:[287] The Directive tries to solve the issues deriving from the transactional nature of consumer sales contracts by introducing relational elements in the post-contractual phase with regard to the conformity of the product to the contract.[288]

[286] This does not mean that the clauses listed in the Annex are automatically considered unfair. The assessment of unfairness of contract terms must always take into account the particular circumstances of the case, as made explicit by Article 4 of the Directive.

[287] Sale Goods Directive (1999).

[288] The Directive has been revised one year ago. The new text of the Directive now includes a reference to the requirement of 'objective' conformity, which is analysed in the next chapter.

C. Guarantees and conformity

EU consumer contract law provides for specific rules to be applied to consumer sale contracts. The Directive regulating this matter was first adopted in 1999,[289] and recently revised as a result of the fitness check under the New Deal for Consumer protection.[290] The Directive addresses seller obligations with respect to the object of the sale contract, i.e., the product purchased by the consumer. The Directive introduces after-sales services, which are examined in the following paragraphs, and guarantees 'associated' to the sale contract. The Directive defines guarantees as 'any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising'. This provision sums up the requirement of conformity set out in Article 2 of the Directive, which established that the goods delivered by the seller must be in conformity with the contract.[291] Article 7 of the Directive establishes that any contractual term waiving the liability of the seller for the lack of conformity is to be considered as non-binding. These rules do not usually address elements concerning the production process: Both guarantees and conformity address products qualities and their performance in relation to their intended use. From a communication perspective, Directive 99/44 reinforces the idea that the closer to the contract the communication occurs, the less it relates to production process: As a result, even when consumers are entitled to a claim or a post-contractual service, the scope of these claims and services does not cover issues appearing during the production process, unless these issues affect the use and qualities of the final product.

Insights on the contractualisation of production could attribute a new function to the rules contained in Directive 99/44, to the extent that this production model blurs the lines between product and production process. However, as long as externalities occurring in the production process do not affect the functioning of the product, consumers may not be granted any claim against the seller and/or the producer, unless this possibility is granted in the contract, in the guarantee statement or in the relevant advertising. Together with the rules on commercial practices, the disposition on conformity and guarantees represent the

[289] Sale Goods Directive (1999).

[290] 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 Final' (n 196).

[291] Article 2(1) Sale Goods Directive (1999).

limits of the communication paradigm regulating consumer contracts in the EU with respect to sustainability of production processes: When the content of communication is unilaterally defined by the lead enterprises in the chain, to the extent that the scope of consumer claims refers to the communication which they have – passively – received before and through the contract, the scope of the commitment to sustainability vis-à-vis consumers is also unilaterally defined by the lead enterprise.

4.2.1. Conclusion: Fair communication

The communication paradigm emerging from consumer contract law in the EU assumes different traits depending on which point in time the communication takes place. The closer to the conclusion of the contract the communication takes place, the more stringent the requirements become in order to prevent market inefficiencies to the detriment of consumer welfare and causing abuse of consumers' 'weaker position'.

This translates to a combination of ensuring 'fair dealing' and integrating the consumer perspective with some traits of the communication paradigm which, due to their unilateral nature, are suitable to be considered as unfair to consumers. However, this integration is limited to the internal relations between the parties and does not enter into the broader effects which the consumer transactions cause on the market, including the contractualised production processes which occur there and their sustainability. In other words, the closer communication approaches the moment of the conclusion of the contract, the more the paradigm of classical contract law comes to the fore, to the extent that the regulatory techniques adopted to regulate consumer contracts lean towards protecting the agreement between the parties or – using the language of traditional contract law – to the extent that the rules promote the fair exercise of private autonomy.

4.3. Communication in the post-contractual communication tools

The communication tools available after the conclusion of the contract comprise an array of different instruments which are more often informal than formally contractual. Especially for transactional contracts, such as the purchase of a pair of jeans, it may be complicated for consumers to communicate their perspective in a way which transcends the 'take it or leave it' scheme. Because of the high level of product standardisation, consumer dissatisfaction is most often expressed by the return of the product to the seller, to the extent that it is not always possible to modify the characteristics of a product, or the

consumer's failure to return to purchase from the same seller/trader, should the consumer be unsatisfied with the deal. When the consumer contract is a long-term contract, the post-contractual communication between trader and consumers is physiologically present to a larger degree than in transactional contracts. However, in both scenarios, the post-contractual communication will be framed in terms of the communication which informed the contractual relation in the pre-pre, pre- and contractual phases.

The expression of the consumer perspective beyond the content of pre-pre, pre- and contractual communication is only possible by means of communication between trader and consumers which is informal from a contractual point of view.

A. Withdrawal

The second kind of consumer rights introduced by Directive 2011/83 is the right of withdrawal. This consists in the possibility for consumers to return the goods purchased through distance and off-premises contracts without any justification within 14 days from the conclusion of the contract. The rationale behind the rule lies in the fact that the type of contract affected by the rule presents a different pre-contractual moment compared to contracts other than distance and off-premises contracts.[292] The rule can potentially benefit consumers who want to avoid consumption of products which they consider to be produced unsustainably. However, the short time validity of the right of withdrawal barely allows consumers to get to know about potential externalities which occurred during the production of the product purchased. In fact, consumers may never get to know about externalities, unless these result in an accident or a big scandal so severe as to reach the public's ears. In this sense, the right of withdrawal turns out to be rather worthless to consumers who find out about the unsustainability of their purchases. Besides the irrelevance from a practical point of view, the right of withdrawal is also superfluous from the point of view of communication: The lack of any obligation for the consumer to justify the return of products does not bring anything to the table beyond the take it or leave it alternative which consumers are exposed to in their contracts.[293]

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[292] Moreover, information rules are less stringent for this type of contract as some information is evident 'from the context'.

[293] The right of withdrawal is being questioned by the EC because of its excessive of traders. More interesting are however the concerns with regard to the impact of the consumers' exercise of such a right on the environment, especially deriving from the increased volume of transportation needed to fulfil the obligations of such a right. For this, see Hans-W. Micklitz, Squaring the Circle? Reconciling Consumer Law and the Circular Economy, 8:6 *Journal of European Consumer and Market Law* (2020).

B. After-sale services

The essence of post-sale EU contract law is included in the consumer sales directive and it concerns the post-sale services which the seller must provide to consumers in case the good is not in conformity with the contract. The seller is deemed liable for any lack of conformity appearing within two years from the delivery of the goods; the consumer has the right to have the goods brought into conformity, when possible. The remedies provided in the directive include repair, replacement, price reduction and rescission. The order in which such remedies are disposed is not casual but actually indicates an order of execution: where possible, the good shall be repaired or replaced; only when these remedies are not available, the consumers may ask for reduction of the price or rescission.[294] Damages are provided by national contract law or by the product liability directive, the application of which is called upon when the non-conformity of a product affects consumer safety. As analysed above, the presence of post-contractual services is linked to a non-conformity of products with their use and function, rather than their production process. Besides, most of the remedies provided in the directive would be of little interest for consumers whose interest lies with production processes: Bringing the product into conformity would not be a viable option, only leaving consumers with the option of rescission when confronted with a 'non-conformity' concerning the sustainability of production processes. The issue would hardly be presented before a court in the first place: The rule on conformity is rather straightforward and the few cases decided by the CJEU on the matter do not really offer a different insight into the connection between post-contractual remedies for non-conformity does not really allow for a different interpretative orientation of the Directive.[295] The interesting aspect of after-sale services is the introduction of a relational character of the contract into consumer contract law: In Ian Macneil's words, remedies such as repair, replacement and price reduction create different possible 'futures of contract' which follow the lack of conformity. When applied to GVCs, this relational element challenges the idea that the consumer contract signals the end point of the down-stream link of a GVC. On the contrary, the provision of remedies for lack of conformity establishes a connection between

[294] S. Grundmann, Regulating Breach of Contract – The Right to Reject Performance by the Party in Breach, ERCL 2/2007, (2007), 121.

[295] Hugh Collins has argued that externalities of production could be seen as reasons to declare the non-conformity of a good to the extent that the occurrence of such externalities does not correspond to consumer expectations, H Collins, Regulating Breach of Contract – The Right to Reject Performance by the Party in Breach, in D. Leczykiewicz, S. Weatherill (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, (Oxford:OUP, 2016), 226.

the consumer and the GVC which lasts beyond the conclusion of the contract. An interesting perspective on this relational dimension between consumers and the GVC is provided in the *Putz-Weber* joined cases decided by the CJEU in 2011.[296] The facts of the cases are well-known: Both cases address the extent of the obligations of the seller with regard to the replacement of a defective product. The CJEU was called upon to interpret the concept of replacement and specifically whether this obligation included the removal of the defective product and, should that be the case, whether that was not to be considered a disproportionate obligation. The CJEU responded in the affirmative with regard to the first question, reasoning that the scope of the obligation to replace a defective product must not violate the in the *Quelle*[297] judgement established principle according to which consumers must not incur any cost for bringing the product into conformity.[298] The 'spill-over' effect generated by the necessity of not imposing any extra-cost on consumers, costs which would have never been incurred if the products had been in conformity in the first place, involves an expansion of the scope of the obligation to replace which includes performances not explicitly included in the original contractual agreement. The interesting aspect of the case for the sake of the argument presented in this work, does not concern the specific outcome in terms of obligations but rather the CJEU's engagement in an exercise of integration of the communication paradigm with a consumer perspective, i.e., moving beyond the performance specified in the contractual agreement.[299] The integration of the communication paradigm follows the idea that contractual remedies may deliver a continuation of the contractual relation even in a typical discrete contract such as the sales contract. In other words, contractual remedies in the form of after-sale services fulfil not only a 'restorative' function with regard to consumer conditions, but also a relational function of promoting cooperation between the parties to fulfil this restorative function.[300] This cooperation may result in either an expansion of the seller's obligations or the application of the principle of proportionality, according to which the seller may refuse the

[296] Joined cases C-65/09 and C-87/09, *Gebr. Weber GmbH* (C-65/09) *v Jürgen Wittmer*, and *Ingrid Putz* (C-87/09) *v Medianess Electronics GmbH*, [2011], ECLI:EU:C:2011:396.

[297] C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-2685.

[298] *Quelle*, para 32.

[299] Angus Johnston and Hannes Unberath, Joined Cases C-65/09 & C-87/09, Gebr. Weber GmbH v. Jürgen Wittmer and Ingrid Putz v. Medianess Electronics GmbH, Judgment of the Court of Justice (First Chamber), 49:2, *Common Market Law Review* (2012) pp. 793 – 807, at 802.

[300] Yehuda Adar and Moshe Gelbard, The Role of Remedies in The Relational Theory of Contract, 3 *European Review of Contract Law* (2011), 399.

remedy requested by the consumer if another remedy is available which is less burdening for the seller. Nevertheless, due to the connection between the concept of conformity and the contract, the relational dimension applicable to the after-sale services does not extend beyond the defects which concern the use of the product. Concerns for sustainability of production processes remain excluded from the after-sale relational dimension of consumer contracts.

C. Informal communication tools

The absence of a post-contractual space for the integration of the communication paradigm beyond product characteristics leaves consumers with only informal tools to express their concerns about sustainability of production processes. In the previous chapters, Levi Strauss and other companies have been shown to be the target of campaigns and boycotts as a result of consumer dissatisfaction with production practices which negatively affect workers and the environment. In this sense, the complaints emerging in the post-contractual phase only find expression in a new and different pre-contractual Phase In which consumers, once again facing the choice to adhere or not to adhere to the product and contract terms, can only opt for the latter in order to express their concerns about the sustainability of production processes. Besides, when possible, this act of non-consumption may be accompanied with a stream of informal communication coming from consumers, which often finds expression in the digital space through social platforms and in the real space through social activism. In the digital space, the communication flux from consumers in the post-contractual phase often takes the shape of ratings which may be displayed on *ad hoc* rating platforms, the website of the trader, or other platforms such as YouTube, where the distinction between rating and advertising is arguably very loose.[301] This communication flux can be exploited by enterprises through data collection: However, whether this results in actual changes of production processes or mere greenwashing through the adoption of voluntary standards, is a matter that this work looks on with a

[301] This is an aside to the objective of the thesis which is still rather unexplored: Social media platforms such as Youtube and Instagram are used by enterprises to promote their products through sending products to so-called 'influencers' – normal people who are followed by thousands or millions of persons on either one of the two or both platforms – who get paid to provide a review of the products received. The usual disclaimer included is that such reviews contain the influencer's own opinion and are at any rate biased by the gift received from the company. The effectiveness of this technique relies on the trust between the influencer and the followers. However, this marketing technique also gives way to potential consumer harm, to the extent that unfair commercial practices can only be attributed to a 'trader' (see *CHS*). As long as the advertisement takes the shape of a person's own opinion, it will hardly be challengeable before a court.

sceptical eye Nonetheless, the outpouring of substantial post-contractual expressions of and among consumers suggests that the communication paradigm established by EU contract law misses a considerable part of the 'conversation' which may address matters going beyond what is taken into consideration by the current normative *apparatus.*

4.3.1. Conclusion: A promising but incomplete tool

The post-contractual dimension represents a relational space in consumer contracts: The provision of remedies such as in the consumer sales directive introduces a moment in which the consumer may challenge what has been claimed in the pre- and contractual phases. This relational space gives the consumer the opportunity to integrate a communication which thus far had been unilaterally construed by the lead enterprises through the upstream and downstream links of the GVC. Nevertheless, the limitation of after-sale services to product conformity makes the post-contractual dimension of consumer sales contracts fruitless in addressing the sustainability of the production process. The connection of the after-sale services with the legal guarantee limits the scope of the extension of the contractual relation beyond the transactional moment to product-centred requirements. Sustainability of production processes concerns are therefore completely excluded from the post-transactional phase: These elements can only be challenged with respect to the pre- and contractual communication instead. No external parameter exists to measure the conformity of production processes with criteria established in regulations concerning environmental protection, workers' rights, and animal welfare: The only benchmark to evaluate these criteria is that provided by the lead enterprise and implemented through the contractual arrangements with suppliers throughout the chain.

5. Interim remarks: A plea for taking consumer law seriously

The contractualisation of production processes has different implications for consumers with regard to sustainability and externalities of production. The effects of this particular way of organising industrial production intertwines with a particular paradigm moulding EU consumer contract law.

The consumer perspective on GVCs mainly rests on contractualisation of production: In the absence of a sustainability policy and a label scheme, the consumer perspective on GVCs is exclusively framed by the contractual structure of the chain. When a sustainability policy is in place – whether in the shape of a code of conduct or a third party standard

scheme, be it succeeded by a type of labelling or not –, the consumer perspective is further brought in line with the standards which regulate the production process and which are incorporated into contracts in the chain.

The role of the contract is therefore not only to organise the production process but also to regulate the externalities of production by means of the scope of sustainability policies. The contract is the tool through which leading companies of GVCs exercise their self-regulatory capacity – and authority. Substantively, however, the exercise of this authority brings about normative implications for the sustainability episteme, and the externalities of production underlying the concept.

The exercise of this authority is directed towards not only suppliers but also consumers. Consumers' ability to express their autonomy with regard to principles and values endangered by externalities of production is limited by the communication paradigm of EU contract law. If this paradigm excludes the possibility for consumers to engage with the matter in the ex-ante phase of the contract, the ex-post phase offers an opportunity to re-establish a kind of bi-lateral communication through the judiciary. This integration is the object of inquiry in the next chapter.

Chapter 4

Ex-post corrective measures through the CJEU

1. Responsible Consumption and the Court of Justice: Integration through Judicialisation

In the previous three chapters, the study has looked at the implications related to respectively the economy, the state and society with regard to the issue of externalities of production.

As a conclusion of Chapter 3, I have pointed out that the 'transnational' and multilevel contractual architecture put in place by/in global value chains, and facilitated by the arrangements of the international economic order, exploits the traditional features of classical contract law and consumer contract law by relying on a 'communication paradigm' which ultimately produces a dis-engagement of consumers with relation issues of externalities of production and sustainability of production processes. The concluding chapter of this analysis may call for different trajectories, but in addressing the EU consumer perspective which has been – deliberatively – taken, the present chapter considers what options are left for consumers to express their engagement with issues which challenge not only their particularistic existence in the single market but also the meaning of their acts in a broader and holistic sense.[302]

Once again, a consumer perspective may lean more towards considerations of traditional private law and therefore focus on the impairment of the exercise of private autonomy – and contractual autonomy – suffered by consumers. Considerations of this kind have enriched the debate on standard contract clauses especially in national contexts, but also in the EU context.[303] These may be considered to be implicit remarks underpinning the considerations which are made in the present chapter, which is nevertheless not to go explicitly in that direction. Rather, the chapter offers reflections on how the consumer perspective emerges as an expression of an idea of the consumer beyond the boundaries

[302] The reference to 'single market' rather than simply 'market' is justified to the extent that consumption is performed in the EU normative background. As previously observed, however, the negative effects caused by these acts of consumption are also suffered, and considerably so, beyond the EU borders.

[303] N Reich, *General Principles of EU Civil Law* (1st edn, Intersentia 2013).

which are usually associated with its 'image'.[304] Specifically, the chapter looks at how such expressions enter the legal discourse: consumer and, broader societal, turmoil regarding externalities of production processes are in fact well expressed in social activism, boycotts, name-and-shame practices and educational activities. None of these manifestations of dissent, however, has sufficient resonance in the legal sphere to actually challenge the legal architecture which constraints consumers' opposition to practices which, if performed in a context different from that of GVCs, would hardly be accepted.

The consumer perspective therefore finds a different and less direct path into the legal discourse, which is often mediated by the action of courts integrating the communication paradigm with the consumer perspective on matters relating to the effect which the communication paradigm has on determining the scope of consumers' rights and remedies.

1.1. Responsible consumption

In the previous chapters, the concept of the 'consumer' has been employed rather vaguely. However, anything but a single and uniform concept of consumers exists. The figure of the consumer developed in the first half of the twentieth century, when standard contract terms made their appearance as a follow up to standardised products and services. The rise of 'the social', as Duncan Kennedy described it,[305] led to the adoption of sets of rules specifically dedicated to contractual parties which were deemed to be 'weak', such as workers and consumers.[306] While the former were weaker with respect to employers, consumers were deemed to have a more minor bargaining power than their business counterpart, due to lack of information and use of standard terms. This disparity prompted a national-based response in Western legal systems, where specific forms of consumer protection were adopted within national private law systems. The yardstick for the introduction of these special rules was still classical contract law: The rules aimed to establish equal bargaining powers of contractual parties by limiting the private autonomy of businesses to the extent that this limitation enhanced consumers' freedom of contract. Since then, the figure of the consumer has assumed different sub-connotations, from the vulnerable consumer to the circumspect consumer to the broader idea of the marketised consumer, which has been

[304] Leczykiewicz and Weatherill (n 22)..

[305]Kennedy, 'Three Globalizations of Law and Legal Thought' (n 161).

[306] Friedrich Kessler, 'Contracts of Adhesion–Some Thoughts About Freedom of Contract,' Colum. L. Rev. 43 (1943).

particularly affirmed in the EU where consumer protection has been instrumentalised for the purposes of the integration of the internal market.[307] With respect to the externalities of production processes and concerns for sustainability, voices have recently begun to be raised advocating for a more active consumer role. While activism has traditionally been an 'extra-legal' domain, more recently, demands for more responsible consumption have been particularly captured by the political, and legal, debates surrounding environmental sustainability and the circular economy.[308] Here, the idea of a responsible consumer is not only associated with the individual moral and ethical choices in consumption, but it even suggests that consumers should bear responsibility towards society at large for practices of consumption which are unsustainable.[309] The debate on responsible/sustainable consumption, where the latter mainly refers to the environmental aspects of sustainability while the former addresses the social and ethical questions of consumption, involves sustainable products and sustainable production in the same way, with no demarcation between the two objectives. For sustainable products, the focus lies on the impact on the environment produced by the use of the product and the post-consumption phase of the life-cycle of the product (recycling). When using the expression 'sustainable consumption' as referring to the production process, reference is made to the employment of sustainability standards and certifications. Once again, the fact that inquiries on sustainable production are *de facto* hindered by the monopoly of leading corporations of (consumer) GVCs makes it impossible for consumers to sincerely live by their ethical values. Before anything can be achieved, consumers have to put in a position to behave in accordance to those values, which may well be represented in primary EU norms. The notion here conveyed is not 'anything goes', but rather enabling the consumer to act in line with the principles, norms and values which are protected and pursued by constitutional charters and EU primary norms, including the EU Charter of Fundamental Rights. Nonetheless, the debate on responsible consumption points in the right direction when it stresses the necessity to reconsider the passive role which has traditionally been associated with the category.

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[307] HW Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' in S Weatherill and D Leczykiewicz, *The Images of the Consumer in EU Law : Legislation, Free Movement and Competition Law* (Hart Publishing 2016).

[308] The concept of 'responsible consumer' is different in the financial field. For an illustration and critique, see Stănescu CG, 'The Responsible Consumer in the Digital Age: On the Conceptual Shift from "average" to "responsible" Consumer and the Inadequacy of the 'information Paradigm' in Consumer Financial Protection' (2019) 24 Tilburg Law.

[309] T Wilhelmsson, 'Varieties of Welfarism in European Contract Law' (2004) 10 European Law Journal 712.

The fragmentation encountered in consumer protection in different EU policy fields has also brought a differentiation of the kind of rights and remedies which are at the disposal of consumers: Under certain conditions, the prevailing image is that of the vulnerable consumer; in other circumstances, the consumer is required to act as a circumspect consumer, which takes care of its own protection. The fragmentation also has the positive impact of exposing a variety of traits which apply to consumers in different circumstances. While these different traits have been traditionally defined through a top-down regulatory approach, a bottom-up approach building on the capacity of the judiciary to integrate the communication paradigm may reveal traits of consumers which correspond to those of the praised active and responsible consumer. While the first criteria driving consumer choice has been found to be 'price',[310] studies have also discovered that non-material interests are taken into account by a large portion of consumers.[311] These non-material interests are subsumed under the exercise of market-related activities within the European internal market.[312] However, due to the limited competence of the EU, they need a judicial venue – i.e., a bottom-up approach – to be 'seen' and affirmed within the legal sphere.[313] In this vein, through the integration of the communication paradigm of consumer contract law, a court is able to assume principles and rights, which would otherwise be missed on account of the limited competences of the EU on non-material subject-matters, as legally relevant for individuals and market actors, thereby giving voice to responsible consumers who would otherwise be left un-represented. This operating system has been described in different ways. While focusing on a specific dimension, they still refer to the same process of the transformation of society beyond the state[314] by focusing on the constitutionalisation of/through private law, on the emergence of a 'societal private law' or on the identification of a shadow citizenship through the exercise of economic freedoms and economic rights.[315]

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[310] The regulatory technique of nudging suggests that as long as prices are the first indicator which is displayed to consumers, prices will obviously remain the first driver of consumer choices.

[311] Jens Hainmueller, Michael J. Hiscox, and Sandra Sequeira, Consumer Demand for Fair Trade: Evidence from a Multistore Field Experiment, *The Review of Economics and Statistics,* May 2015, 97(2): 242–256.

[312] G Comandé, 'The Fifth European Union Freedom' in HW Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014).

[313] Micklitz, *The Politics of Justice in European Private Law* (n 162); Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' (n 294); Comandé (n 299).; G. Comande'; Micklitz in The Images of the Consumer.

[314] Micklitz, *The Politics of Justice in European Private Law* (n 162); Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015)..

[315] Comandé (n 299).

These terms also refer to a transformative capacity of the judicial activity with respect to society beyond the state, to the extent that this new dimension also brings forward the affirmation of rights which are not necessarily the expression of existing primary EU law. While this claim is not contested here, the argument is much more limited in scope and at the same time builds on this conceptualisation: The internal market is inherently a transboundary space which calls for the affirmation of individual rights beyond the state, especially in the context of GVCs. However, the current argument is limited to the affirmation of these rights as a result of the application of the principle of effectiveness of already existing primary EU law and specifically the ECFR to the extent that the Charter touches upon many of those rights which are hindered by externalities of production processes in GVCs.

In this sense, the argument here presented not only argues for giving fair representation to responsible and active consumers, but it also challenges the position of consumers as final receivers of goods and services. As consumers are the ultimate buyers in GVCs and consumer GVCs are buyer-driven, consumer contracts produce an aggregate impact in the internal market by driving the activities of businesses operating in GVCs ex-ante but also and especially ex-post.[316] While the communication paradigm of EU consumer contract law prevents consumers from actively expressing their views with respect to requirements for sustainability and limitation of externalities of production, a post-contractual integration by the Court of Justice of the European Union (CJEU) is to provide the opportunity to *materialise* consumer consent with respect to the production processes in which they participate by contracting for a certain product.

1.2. Integration through judicialisation

The communication paradigm of EU consumer contract law has the effect of marginalising, if not voiding, consumers' engagement with issues concerning sustainability and externalities of production processes. The value of this engagement can be argued from many angles: Ultimately, it can be reduced to a diminution of the exercise of personal

[316] The Court in *Scarlet* also highlights the connection between business activity and consumers when it affirms that the exercise of the freedom to conduct a business also depends on the ability of a business to conclude contracts with customers and consumers.

autonomy with implications for self-determination,[317] distributive justice,[318] or (reflexive) regulation.[319] All three angles are equally valuable. However, only the latter calls for a representation of the consumer beyond the appearance of victim and weaker party which has usually informed the concept of the consumer in the EU.[320] The victimisation of consumers supports the conditions which make the communication paradigm possible: the concentration of information and obligations in the pre-contractual and contractual phases, and the consequent subordination of post-contractual consumer claims to what has been communicated in those phases. As a result, consumer weakness is now concentrated in the post-contractual phase. This weakness has been overcome in two ways: through the introduction of consumer 'rights and remedies' in specific laws and through judicial interpretation of EU law by the CJEU. With regard to the constraints created by the paradigm, the Court has been able to create a legal space for the integration of the paradigm with a consumer perspective. How the court has managed to achieve this feat, is the subject of the following paragraphs. The cases chosen as evidence for this phenomenon differ greatly: some concern pure consumer law cases; some exhibit a regulatory use of consumer interest arguments in cases which do not directly involve consumer matters.

A *caveat* is mandatory at this point: The oldest case law of the CJEU can already be seen in the light of an integration of the consumer paradigm. Cassis de Dijon, for example, surely counts as an instance in which the court had to take the consumer perspective as a yardstick of the 'rule of reason'. And indeed, it is clearly visible that the constraints to consumer claims caused by the communication paradigm are in place when it comes to technical and safety qualities of products: not only a complex is in place a system of standardisation, which involves participation by consumer organisations , but this system is reinforced by measures of private law imposing strict liability for 'defective products' – where a defective product is a product which 'does not provide the safety which a person is entitled to expect'. As analysed in the previous chapter, this combination of public and private law measures is absent in the field of sustainability requirements, in general, and specifically for those

[317] S Weatherill and S Vogenauer, *General Principles of Law : European and Comparative Perspectives* (Hart Publishing 2017).

[318] Collins, 'Distributive Justice Through Contracts' (n 160); S Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 Oxford Journal of Legal Studies 213.

[319] G Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9 Social & Legal Studies 399.

[320] Weatherill and Vogenauer (n 304).

pertaining the sustainability of production processes. Hence, while the field of technical and safety standards foresees some form of consumer involvement, both prior to and after the conclusion of consumer contracts, this same scheme is not replicated with regard to sustainability standards and externalities of production processes. The lack of regulation for sustainability similar to the product liability directive is obviously motivated by reason of international law and international economic law. This point is essential to understand the further reading of the case law cited in the present chapter: The mandate of the Court is that of interpreting EU law and therefore its case law is based on EU directives and regulations. However, the integration of the communication paradigm can prescind from the existence of this official legal basis. As a matter of fact, the Court indeed creates a space for the consumer to express values and interests in the post-contractual stage of the relation. By so doing, *the Court creates the opportunity to reduce the detachment between the legal and the political position of the consumer*. As seen in previous chapters, this detachment is particularly acute in GVCs with regard to harmful practices occurring in the contractual fragments which form GVCs.

The integration of the communication paradigm does not only act in the domain of political values which exceed the consumer economic interest: On the contrary, the communication paradigm has been useful in expanding the societal and political achievements of consumers well beyond the narrow scope of 'protection' of their economic interests. Looking at these achievements from the perspective of the communication paradigm of EU consumer contract law, contributes to perceiving the resulting 'consumer empowerment' as transferable to societal and political interests of the consumer which are not necessarily explicitly associated with the protection of their economic interests.

Bearing this in mind, the reading of the selected case law highlights the potential of post-contractual integration of the communication paradigm which results in an incorporation into the legal field of values and interests which, despite constituting the backbone of fundamental rights of the EU legal system as well as national constitutions, are systematically put in danger in GVCs by means of contractual arrangements. This reading responds to, and stimulates, thought-provoking questions about the changing nature of the EU legal order as increasingly reliant on the potential of the aggregation of private actions to achieve large-scale regulatory outcomes.

Besides the considerations related to the figure of the consumer in the EU, which is further explored later in this chapter, the selection of the case law has the purpose of showing how

the integration of the communication paradigm in consumer contract law can have implications of fundamental relevance for the hurdles in the economic, political and legal tangle by means of which global value chains become a harm to society. These hurdles have been examined in the previous chapters by the analysis of how the economic and political arrangements at the international level have been translated to and manifested in concrete obstacles to the externalities of production in the legal sphere (problems of private international law, labour law, environmental law and human rights law), which, from the perspective of the consumer in the EU, are filtered and, to some extent avoided, through a strategic use of the communication paradigm of consumer contract law.

The problems which have been identified are numerous and each of the cases selected shows how the communication paradigm has the potential to overcome them, with the following stipulation: The previous chapters have made evident that a plain and superficial reading of the law cannot offer a meaningful support to the argument made in this work. The exercise engaged in here, which the reader should follow with a fair amount of doubt and trust, is one where only the composite reading of the case law presented can shed light on the shadows which the use of contract law in GVCs casts over society. As a result, each of the instances of case law provides a limited but specific contribution to the main argument, which will only crystallise through the combined reading of the case law. As has been affirmed before, considerations for externalities of production have been generally incorporated by trade law measures, in compliance with the WTO rule system. The purpose of this chapter is seeing how the integration of the communication paradigm – more precisely, the techniques which have been put in place to bring about this integration – can indicate a way in which to bring consumer contract law closer to consumers' societal, ethical and political priorities. These priorities may not be homogeneous among consumers: there may be consumers who intentionally do not attribute relevance to sustainability concerns when taking their decisions. Such a view is to be considered not normatively relevant for the argument here presented. To the extent the view of these consumers is misaligned with values and principles established in the constitutional legal order where the consumer operates (be it EU treaties and/or national constitutional values), it is hardly conceivable that their views may be positively legitimised by a court. Hence, the only view susceptible to be integrated is, implicitly, that of the 'responsible consumer'.[321] The

[321] Actually, the argument here presented aims at providing all consumers with the opportunity to behave responsibly. The lack of awareness with regard to externalities of production should not be taken as a sign of consumers' unwillingness to consumer responsibly. In this respect, the argument implicitly suggests that the

normative relevance of the consumer perspective does not depend on the priorities of different categories of consumers: rather, it emerges from the rapprochement between production and consumption resulting from contractualisation. The rapprochement depends on the employment of contracts as a tool for the organisation of production and its related externalities. However, consumer contracts do not reflect the structural role of contracts in production and the related rapprochement of consumers to systems of production. The perspective of consumers is not considered at all, regardless of the different categories of consumers that can be identified.

The chapter analyses this possibility by exploring a few cases of the Court of Justice. This analysis can be divided into two parts: the first part looks at how the Court reasons when confronted with the phenomenon of contractualisation; the second part explores instances of non- integration and integration of the communication paradigm by the Court. The first part builds on the judgements delivered in *Courage* and *Scarlet,* to the extent that both cases provide a revealing instance of the effects which contractualisation has on the normative hold of EU law. The second part explores three judgements: Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen, *Psagot* and Team4travel. The first case is an instance of non-integration by the Court while *Psagot* and Team4travel form two instances where the Court deliberately integrated the communication paradigm with the consumer perspective.

The combined reading of the case law on contractualisation and the integration of the communication paradigm provides the material to imagine an appropriation by the law of the shades and facets of consumers which are not taken into account by the current EU legal framework.

2. Contractualisation of production processes and remedies for the internal market

The judgements analysed do not all point in the same direction: some of them reflect the limitations of what has earlier been named the ‘communication paradigm’, while others reveal the importance given to contractual relationships, identifying the measures to combat threats to the functioning of the internal market. The aim of this first half of the chapter is to present the cases mentioned and to establish some order among the thoughts they

assumption should be that all consumers aim at responsible consumption, as opposed to the one where consumers are considered to be willing to consume irresponsibly for the simple fact of not being aware of the externalities they may co-cause through their consumption.

provoked. This exercise ultimately confirms the argument according to which the involvement of consumers in the struggle against negative externalities of production processes is far from being unrealistic, at least in the EU legal system: in fact, the foundations for its implementation have already been laid.

Now, it is time to read the case law in perspective with the main three concepts developed in the previous chapters: contractualisation, the communication paradigm and epistemic authority. While the latter two notions are taken together, the following paragraph exclusively looks at the former.

The main conclusion derived from the first chapter is that production processes have been progressively contractualised, to the point that GVCs have in fact become complex contract chains (and networks) where each contractual relationships corresponds to a single or a set of production stage(s). These chains have a global reach, which is often the cause for the occasions of work-force and resource exploitation. As such, it is of interest for the EU internal market as well. As a result, the internal market is also profoundly contractualised. The functioning of the internal market is therefore profoundly affected by the regulation of contractual relationships and the remedies associated with them: The judgement delivered in *Courage* is an attestation of the foundational character of private law relationships based on contracts for the EU internal market. Because of the structural significance which contractual relations have at different levels of the internal market, the characteristics and the remedies attributed to one kind of contract may actually affect the market at large and to a higher extent.

Contractualisation in *Courage*

Courage is a relatively old judgement which has resonated quite considerably among competition lawyers because the Court affirmed for the first time that damages deriving from infringement of competition law must always be compensated. For the matter at hand, the competition law side of the story is not particularly relevant. Rather, the main point is that the conclusions of the Court are based on a particular understanding of the role of the contract.

Facts and proceedings

Courage Ltd was a brewery which entered into an agreement with Interpreneur Estates Ltd ('IEL' in the text of the judgement), of which it was an owner, according to which the

tenants of the facilities owned by IEL had to purchase beer exclusively from *Courage* at the price established by the price list made by *Courage*. In 1991, Mr Crehan concluded two leases with IEL which included the obligation to purchase a fixed minimum quantity of beer from *Courage* at the price of that list.

In 1993, *Courage* initiated an action against Mr Crehan for the recovery of a debt of 15 000 GBP. In his defense, Mr Crehan argued that the obligation to purchase beer from *Courage* was contrary to Article 81 EC (now Article 101 TFEU) and presented a counter-claim for damages suffered as a result of that violation instead. According to him, the dealers which were not part of the cartel had access to more competitive prices than those imposed by *Courage* on those dealers who had a lease with IEL.

The national court referred the matter to the European Court of Justice because the appellant was a party to the cartel rather than a third party and English law prohibited awarding damages to parties of an illicit agreement. The inverted order of the parties required an interpretation of competition rules, which were usually designed for the protection of third parties, rather than of those taking part in the illegal practices. Building on previous case law,[322] the CJEU pointed out that the Treaties, including Article 101 TFEU, confer rights to individuals which must be respected and protected by national courts. The first consequence of this conclusion is that the illicit agreement must be considered void. With regard to the possibility of granting damages to one of the parties of the illicit agreement, the Court considers that the rights conferred to individuals, and in particular the possibility to seek compensation for damage deriving from infringements of competition law, would also impair the effectiveness of Article 101 TFEU. In that sense, the enforcement of individual rights has not only a compensatory function but also a deterrent effect, contributing to protecting the functioning of the single market.[323] In order to avoid unjust enrichment, the Court identified a threshold beyond which the damages should not be granted. This threshold was to be reached, and damages could not be awarded, when the contractual party requesting them bore significant responsibility for the infringement of the EU rules on competition.[324] Among the elements to be taken into

[322] C-127-73 Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior, EU:C:1974:6 [1974] 1974 -00051; C-234/89 Stergios Delimitis v Henninger Bräu AG EU:C:1991:91 [1991] 1991 I-00935.

[323] *Courage*, paras 26, 27.

[324] *Courage*, para 31.

account when evaluating the degree of responsibility, the Court also included the weaker position of the party, which is typical (or at least common) for contracts between a company and a SME. This is particularly true in circumstances, such as in the facts of this case, where the contract is part of a larger contracts network, the terms of which are designed by the actor leading the network.

In the light of the foregoing, the Court concluded that a national rule cannot prevent a party to seek and obtain damages for losses derived from a violation of competition rules which that same party contributed to by way of an illicit agreement. The Court considered that, in certain circumstances, damages, should be granted, especially if the disadvantaged party had no responsibility for the violation of the competition rules. In this way, the Court brought forward both the compensatory nature of damages and the deterrent effect which is closer to the idea of private enforcement of EU rules to be discussed later in the chapter.

Considerations

The facts in *Courage* do not call on the communication paradigm of consumer law but they offer food for thought in the light of the contractual dimension of the case. The case concerns an agreement – a contract – which intentionally produced some sort of negative effects. The nature of these effects falls under the consideration of competition law because of the anticompetitive outcome of the agreement. On these considerations, the agreement is considered to be a cartel. This particular type of agreement usually generates negative effects – the anticompetitive effects – on third parties to the agreement, while the facts of *Courage* – as in previous cases scrutinised and recalled by the CJEU – challenge this feature in the sense that the cartel is used to damage one of the parties to the agreement (Mr Crehan in this specific case). While EU competition law, and specifically Article 101 TFEU, provides an answer with respect to what happens to the contract when its effects are found to impair market competition, nothing is said with regard to the remedies which parties should have access to when incurring a loss as a result of these anticompetitive effects. On this particular point, *Courage* has been welcomed as quite a revolutionary case since the main conclusion of the Court is that every individual has a right to damages for losses incurred as a result of a violation of competition law. What the case brings is attention for the remedies awarded in response to the 'illicit conduct': It does not matter whether Mr Crehan had agreed to the terms of the contract and – supposedly – made an informed choice, he was still entitled to a form of compensation *once he found out* that the agreement signed

was damaging for his and his own business' economic status. While the introduction of a right to damages depending on contractual relationships rather than tort has certainly been a challenge for some national legal orders, the innovation of the Court's reasoning does not simply reside in foreseeing this possibility.[325] The Court establishes an individual right to compensation in a particular contractual context. The characteristics of this context include the presence of a contract network where one member holds a stronger contractual position vis-à-vis the other contractual parties. The unbalanced relationship is key in the Court's reasoning that the loss incurred by Mr Crehan must be compensated. In principle, the accepted rule is that damages occasioned by illicit conduct should not be compensated. However, the Court found that this rule should have an exception when the disadvantaged party bears no significant responsibility in the illicit conduct. In particular, the Court considered Mr Crehan a weaker party to the cartel: His weaker position was also recognised in the light of the contract network in which the cartel was placed. This network had the result of creating two separate markets for the same products: the network's 'market' – if it could be called that – and a market outside the network. The discrepancy between the two markets in terms of economic opportunities and advantages are therefore a contractual creation which has repercussions for the specific contractual agreements which constitute the network. The Court found that Mr Crehan's contractual position did not put him in the position of being responsible for creating the distortion between the 'market' and the market. This lack of responsibility justified the compensatory measures in favour of Mr Crehan adopted by the Court.

As mentioned earlier, the Court stressed the compensatory as well as the deterrent functions of damages.[326] In *Courage*, the latter function seems to have prevailed, especially in the part of the judgement which deals with the second question posed by the referring court. The deterrent effect of the individual right to damages is strictly connected to the need to ensure the effectiveness of EU law: The effective protection of the rights granted in the Treaties is in fact the key element for ensuring that EU law produces its intended effects.[327] In other words, while the effectiveness of EU law had traditionally been the responsibility

[325] While France and Italy also foresee the possibility of granting damages under contractual relationships, other legal systems provide different types of measures which produce the same compensatory effect between the contractual parties.

[326] B Balasingham, '15 Years after *Courage* v Crehan': (2017) 1 European Competition and Regulatory Law Review 11.

[327] *Courage* v Crehan, para 37.

of Member States, in *Courage*, the Court recognises that, in so far as this effectiveness may be jeopardised within and by private relationships, the obligation of Member States to ensure effectiveness of EU law can be fulfilled directly by national courts by enforcing EU law for private parties. While this has been described as a 'competition specific' element of the judgement, the contractual dimension of the case is here argued to justify the 'direct effect' or 'horizontal effect' of EU law.[328] However, the contractual dimension in *Courage* is analysed and presented quite differently from a traditional perspective. The latter prevailed in the end when the English Court decided to depart from the conclusions of the CJEU and not to grant damages.[329] The CJEU considered the contractual relationship beyond the principles of private autonomy and consent: If it had followed that line of reasoning, the conclusion would probably have been the opposite with regard to the award of damages (second question). Rather, the Court looked of Mr Crehan own responsibility for the negative effects caused for competition, which is a matter of public policy.[330] This 'regulatory' consequence generated by the agreement motivates the emphasis on the deterrent effect of damages. The acknowledgement of the jeopardising effect which contracts have for EU policies, and not only for idiosyncratic individual rights, lies at the root of the answer to the second question given by the Court.

As briefly mentioned above, the communication paradigm is not explicitly brought to the fore in the considerations of the Court. However, the reference to the weaker position of Mr Crehan with respect to *Courage* corresponds to a 'materialisation' of the autonomy expressed by Mr Crehan in the contract with his business partner. To a certain extent, the materialisation of private law and its effect on contracts has been the first technique to overcome the pitfalls of unilateral communication favoured by modern and post-modern contract law. The resemblance between the facts of *Courage* and the consumer contracts in GVCs is analysed in the second part of this chapter.

The decision taken in *Courage* can be read from a contractual perspective: The establishment of the right to damages finds its justification in the effect that the absence of this remedy could have on the functioning of the EU internal market at large. To highlight that this did not have to be the case, it is sufficient to remember that Article 101 TFEU does

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[328] Assimakis P. Komninos, 'New Prospects for Private Enforcement of EC Competition Law: *Courage* v. Crehan and the Community Right to Damages' (2002) 39 Common Market Law Review 447.

[329] Inntrepreneur Pub Company (CPC) and others (Original Appellants and Cross-respondents) v. Crehan (Original Respondent and Cross-appellant) House Of Lords Session 2005-06

[330] Joined Cases C-295 to 297/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, EU:C:2006:461.

not require granting damages as a consequence of its infringement: The Article stops at declaring the illicit agreement null and void, which leaves the matter concerning the rights of the third parties negatively affected by anticompetitive agreements to Member States. The introduction of the right to damages for antitrust violations is motivated by the Court in the light of the need to protect the functioning of the internal market: The principle of effectiveness guides the reasoning of the Court informing the conclusion reached in the judgement according to which effectiveness of Article 101 requires an individual right to damages for any loss incurred as a consequence of a violation of antitrust provisions.[331] The compensation offered through this right results in strengthening the deterrent effect of damages, thereby reinforcing the protection given to competition law, an undisputedly public law matter.

What do the conclusions reached in *Courage* offer the issue of externalities of production processes in GVCs? From a consumer perspective, the similarities between the two situations are multi-fold.

First of all, GVCs and cartels are both contract networks, insofar as the notion of a contract network is intended in its broad version which includes contract chains as well. Not only that: the contract network usually has a leader. In the first chapter was mentioned that, at least in the textile sector, brands, such as Levi Strauss, represent the leading enterprise of the GVC which manage the entire production processes despite not owning any factories ('manufacturer without factories'). Similarly, the Court identified IEL as the network leader when considering the contractual positions of Mr Crehan and *Courage*.[332]

Additionally, the position of Mr Crehan may be likened to that of consumers in GVCs from two other perspectives: the first, Mr Crehan is placed in a weaker position in the same way consumers are; the second, Mr Crehan is damaged by the contract which he is a party to in the same way consumers may conclude a contract which benefits them from a certain perspective while interfering with other values which they care about (reference of this can be found in *Scarlet*). In this sense, consumers may be 'damaged' by the very same contract which they conclude. This detail is not irrelevant when we turn back to the structure of GVCs and take into consideration that this obstruction, if present, is systematic: The structural role of the contract in the EU – and global market – as well as the regularity of

[331] As follows from the Marshall II judgement. However, the obligation was on the State there, rather than on private parties.

[332] *Courage*.

consumptions, the amount of products traded and the lack of consumer involvement in the stages of production, make the consumers partner in a practice that by and large contributes to a systemic violation of EU principles and values. With regard to the substance of these principles and values, the judgement of *Courage* was given when provisions on competition law were among the few to have the privileged position of being part of the EU treaties. This is not the case anymore, which has opened the way for case law which, while keeping an interest in the relationship between contract and remedies for violations of EU law in private relationships, also concern matters which are substantively closer to those approached in this work. One of these cases is indubitably *Scarlet*, where the Court had occasion to perform an unusual balancing of fundamental rights on the basis of a contractual relationship.

Contractualisation in *Scarlet*

The facts of *Scarlet* involved a classic concern of our time, the protection of intellectual property: The access to websites and platforms where reproductions of movies – or other intellectual property material – is provided without the consent of the authors or producers and the relating payment of royalties. *Scarlet* was a Dutch telecoms service provider against which Sabam, an association for the protection of intellectual property rights of authors, composers and musical artists, filed a request for injunction before the Tribunal de première instance de Bruxelles. Allegedly, customers of *Scarlet* were accessing websites and platforms where they could reproduce and download the protected material for free without thereby infringing copyright rules.[333] The infringement was not made possible specifically by *Scarlet*, which had no relationship with the websites where the illicit activity was carried out. However, Sabam maintained that *Scarlet* had to monitor the activity of its users in order to avoid the infringement of the copyright of authors and artists protected by Sabam. After having assessed the existence of a violation of intellectual property rights, the Tribunal appointed an expert in order to see if this request was materially acceptable in the first place, given the state of technologies at that time. The expert attested that, even if a system for monitoring the illicit activities of its users faced various difficulties, the installation of a system able to achieve that result was nonetheless possible. The Tribunal therefore granted the injunction against *Scarlet*, which appealed the ruling before the Cour

[333] C-70/10 *Scarlet* Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) EU:C:2011:771 [2011] ECR 2011-00000.

d'Appel de Bruxelles. In the appeal, *Scarlet* argued that it was materially impossible to comply with the order of injunction. Besides the material constraints, *Scarlet* also argued that the obligation resulting from the injunction resulted in a violation of Directive 2000/31 and of its customers' data protection rights. In the light of these arguments, the Cour d'Appel referred the issue to the Court of Justice asking, in particular, whether it was in compliance with EU law for national courts to issue an injunction in circumstances such as those of the case.

At a first glance, the case presents two juxtapositions: the one that sees Sabam's interests conflicting with *Scarlet*'s customers, and the one that sees Sabam's interests conflicting with *Scarlet*'s interests. In both cases, the decision involves a balancing act of fundamental rights. In the first case intellectual, property rights had to be balanced with the fundamental right to privacy and access to information; In the second case, intellectual property rights had to be balanced with the right to conduct a business. All sets of rights are included in the Charter of Fundamental Rights of the EU (the Charter). Nevertheless, the Court did not pick one out of the two dual relationships relevant to the case and, accordingly, did not treat the two sets of conflict separately. Rather, it dealt with the case by looking at the triangular connection emerging from the facts of the case.[334] The expansion of the scenario was justified by virtue of the contractual relationship between *Scarlet* and its users: The Court found that the possibility of signing contracts was an essential part of the exercise and enjoyment of *Scarlet*'s freedom to conduct a business as granted by Article 16 of the Charter.

Despite Recital 45 of the Directive on Electronic Commerce 2000/31 clearly providing that intermediaries such as *Scarlet* may be subject to an injunction, Recital 47 also clarifies that intermediaries cannot be burdened with a general obligation of surveillance. In *Scarlet*, the technological constraints did not allow for the instalment of a system able to filter illicit activities from the regular activities carried out by using *Scarlet*'s services. As a result, the injunction order would have resulted in a general obligation of surveillance weighting on *Scarlet*. However, possibly even to avoid a potentially unsolvable debate on the status of technology, the Court brought the argument of the need to balance the protection of intellectual property rights with the fundamental right to conduct a business to the table.

[334] B van Leeuwen, 'The Impact of EU Intellectual Property Law and the Charter on Private Law Concepts' in HW Micklitz and C Sieburgh (eds), *Primary EU Law and Private Law Concepts* (1st edn, Intersentia 2017) <https://www.cambridge.org/core/product/identifier/CBO9781780686004A053/type/book_part>.

The entrance of this fundamental right in the considerations of the Court was justified by the need to consider that the exercise of the fundamental right to access to information of *Scarlet*'s users was exercised on the basis of a contractual relationship. In other words, the enjoyment of that right was also enclosed in a contractual obligation pending on *Scarlet* to the benefit of its customers and, as such, was an existential condition of *Scarlet*'s business activity. Because none of the fundamental rights involved in the case deserved absolute protection, not even the intellectual property rights. As the Court clarified by reference to the *Promusicae* judgement,[335] the protection of intellectual property rights needed to be balanced with respect to individual and fundamental rights of the third parties affected. The monitoring of the access to information, and the intrusion into customers' personal data which would have followed, would result not only in a limitation of customers' rights but also in an obstacle to *Scarlet*'s fundamental right to conduct a business.

In *Scarlet*, as in *Courage*, the Court did not limit its reasoning to narrow legal considerations. On the contrary, the Court evaluated the facts in the broader context of the internal market. More specifically, the remedies discussed in both judgements are examined from the perspective of the fundamental role which contractual relations perform within the internal market. As a result, contractual relationships come into contact with a larger context where the internal dimension of the private law relationship is exposed to non-private law matters which affect other areas of law protected in the EU. While the contractual relationship is exposed to the limitations of the intellectual property rights' protection in *Scarlet*, in *Courage*, the contractual relationship between Mr Crehan and *Courage* exposes other economic activities to damages. In either scenario, instead of the existence of a contractual relationship being considered for its contractual nucleus, offers the Court the chance base its reasoning on the external context in which the contract takes place.[336] What is interesting about the contextualisation enacted by the Court is that it is not based on the sociological accounts which pertain to the specific contractual relationship.[337] In other words, the contextualisation does not correspond to a sociological embeddedness of the single contractual relation. Rather, the Court builds its reasoning on

[335] *Scarlet*, para. 43; *Promusicae* C-275/06.

[336] With regard to competition law, English Courts have come up with the concept of Euro-defence to describe situations where the compliance with EU law justifies breach of contracts. For case law on this, see O Odudu, 'Competition Law and Contract: The Euro-Defence' in D Leczykiewicz and S Weatherill (eds), *The involvement of EU law in private law relationships* (Hart Publishing Limited 2013).

[337] M Granovetter, 'The Strength of Weak Ties: A Network Theory Revisited' (1983) 1 Sociology Theory 201.

the effect which the decision has not only on the parties but also – and especially – on the EU legal order at large. In particular EU primary law frames the process of contextualisation. The outcome of the decision is measured against the provisions of EU primary law through the test of effectiveness (and proportionality).[338] When this is applied through contracts, the outcome is that the contractual relationship is not only the object of the decision but also the vehicle *through* which direct enforcement and effectiveness of EU law are ensured.[339] From a private law perspective, this particular understanding of contractual relationships is specific to the EU legal system and has been framed as 'regulated autonomy' to distinguish it from the traditional concept of private autonomy which dominates contract law in national legal orders.[340] The enlargement of the scope of contract law which follows from framing contractual relationships under the concept of regulated autonomy opens the stage for a reflection on how this 'transformation of private law'[341] may affect the relationship between consumers in GVCs with respect to externalities of production processes.

3. Selected case-law on rejection vs. approval of communication

This section examines selected case law on the integration of the communication paradigm by the Court. The selected case law also includes an instance where the Court refused to integrate communication. The present argument is not meant to claim that the Court adopts integration as a consistent methodology. However, the CJEU seems more inclined to perform the integration of legal concepts with different perspectives when a contractual relation is at stake.

3.1. Rejection of communication in Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen

This case does not directly involve a consumer perspective on sustainability and externalities of production processes but it addresses the substantive issue of the scope and

[338] Reich (n 290).

[339] Barend van Leeuwen appropriately speaks of 'constitutionalization *through* private law', van Leeuwen (n 320).

[340] Hans W Micklitz, Yane Svetiev and Guido Comparato, 'European Regulatory Private Law The Paradigms Tested' [2014].

[341] Micklitz, *The Politics of Justice in European Private Law* (n 162).

function of information about the environment. The dispute concerns access to environmental information and whether this should also include access to the name of the manufacturer and the description of the product subject to administrative procedure within the regulation on labelling of certain foodstuffs produced from genetically modified organisms.

Facts and proceedings

Eva Glawischnig was a member of the Austrian Parliament when, on the basis of Directive 90/313 regarding the freedom to access to environmental information,[342] she asked access to information about the administrative procedures concerning the verification of compliance of certain foodstuffs with Regulation 1139/98 regarding the labelling of certain foodstuffs produced from genetically modified organisms.[343] The office of the Government competent to answer those questions only replied to some of the inquiries made by Glawischnig. In particular, the Government did not reply to the last three questions posed by Glawischnig regarding the name of products and manufacturers which were found not in compliance with Regulation 1139/98 and details about the penalties inflicted as a result of the non-compliance. The access to this information was denied as it was not considered to constitute 'environmental data' pursuant to Directive 90/313.

Directive 90/313 defined 'environmental information' as 'any available information in written, visual, aural or database form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes'. The question referred to the CJEU regarded the scope of the definition of 'environmental data', and in particular whether the name of manufacturers and products made from genetically modified organisms could fall under that definition. Directive 90/313 does not grant unlimited access to environmental information. To obtain access, the information must fall under one of the three categories mentioned in Article 2(a), namely 1) on the state of water, air, soil, fauna, flora, land and natural sites; 2) on

[342] Council Directive of 7 June 1990 on the freedom of access to information on the environment (90/313/EEC) L 158/56.

[343] Council Regulation (EC) No 1139/98 of 26 May 1998 concerning the compulsory indication of the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC L159/4.

activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these; 3) on activities or measures designed to protect these, including administrative measures and environmental management programmes.[344] Glawischnig particularly claimed that the access to information regarding the marketing of products not in compliance with Regulation 1139/98 fell under the second category, which was excluded by the Court. Following the AG opinion, it evaluated whether the information requested may have fallen under the third category. The considerations of the Court therefore had to address the objective of the protection in Regulation 1139/98. Mandatory labelling on certain foodstuffs produced from genetically modified organisms serves the purpose of protecting consumers and not the environment, which is instead the protection objective of Directive 90/313. Because the place on the market of products covered by Regulation 1139/98 is subject to control procedures which also involve environmental concerns, a control of the same concerns is not admissible even if the products were found to be not in compliance with the Regulation.

Considerations

The case appears may seem distant from the subject of the present work and even unfavourable, from a substantive point of view, to the argument presented in this work. No contract is involved in this case and consumers are mentioned only marginally. However, the facts and proceedings of this case provide material for the reflections which are made throughout the present chapter. More specifically, the case introduces an important point on how the court, through the interpretation of EU law, may contribute to the creation of an episteme on what environmental information is. This bit of judgement adds in to the broader understanding of the role of information, which has been shown to significantly contribute to the communication paradigm of EU consumer law. The interpretation by the Court of the two pieces of legislation sadly conveys the message that the non-compliance with a regulation meant to protect consumers prevents a scrutiny of the implications of the non-compliance for the environment. Indirectly, this judgement also conveys a sense of the problem connected to a 'linear' understanding of assessments concerning product qualities, or of production processes. The consideration made by the Court, according to which the placement on the market of the products concerned by Regulation 1139/98 exhaust the

[344] Directive 90/31 3/EEC.

supervision and assessment for ensuring protection of the environment even if the products are found in non-compliance, is revelatory of the limits which this 'linear' approach may produce on matters which are evidently correlated to one another such as the consumption of foodstuffs produced from genetically modified organisms.

Glawischnig is a case which corresponds to 'the negative' of what is seen in the further case law selected: It illustrates how the Court does or does not integrate the formation of a legal concept through the evaluation of different perspectives (public authorities, consumers, general public) which inform a certain fact. However, non-integration is not the rule in the CJEU case law: In contexts where the 'communication paradigm' comes into play, the Court seems more inclined to integrate the information and communication in a more cohesive way.

Psagot has recently shown the extent to which the Court is willing to integrate the communication paradigm by inferring conclusions from given information which go well beyond the intentions for which it was originally provided.

3.2. Approval of communication in *Psagot*

The final judgement on the dispute between Organisation juive europeenne, Vignoble *Psagot*, on the one hand, and the Ministre de l'Economie et des Finances on the other, was delivered by the CJEU on 12 November 2019.[345] The decision had quite a considerable resonance among legal scholars as the reasoning of the court invites the reconsideration of the type of information which can be inferred from a single label. From a qualitative perspective, the judgement creates the opportunity for consumers to bring their political perspective on products and production processes into the communication paradigm. This opportunity is created by posing questions about the hidden or implicit information which can be inferred from labels on countries of origin.

Facts and proceedings

In complying with Regulation 1169/2011,[346] and the Interpretative Notice of the European Commission on indication of origin of goods from the territories occupied by Israel since

[345] C-363/18 Organisation juive européenne, Vignoble *Psagot* Ltd v Ministre de l'Économie et des Finances EU:C:2019:954 [2019].

[346] Regulation (EU) No 1169/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006

June 1967,[347] the French Minister for Economy and Finance adopted a notice addressing economic operators with regard to the indication of goods originating in the territories occupied by Israel since 1967.[348] The disputed notice refers to norms of international law with regard to the status of the West Bank and Golan Heights as Israeli settlements and thereby not being part of Israel. The French notice imposed the duty on economic actors to use the expression 'Israeli settlements' for foodstuff originating from such territories, as a different indication would have had the effect of misleading consumers with respect to the 'place of provenance' of the food. This information is mandatory whenever the absence of it may have the effect of misleading the consumer with regard to the true country of origin or place of provenance of the food product. The accuracy of the indication on the origin is required by Article 39 of Regulation 1169/2011 in order for the labelling to be considered 'fair'. As a result, the label cannot simply indicate 'Golan Heights' or 'West Bank' but should be precise that those territories are 'Israeli settlements'.

The appellants, two economic operators affected by the notice, challenged the notice to seek its annulment in the light of its 'ultra vires' effect. The referring court asked the CJEU to define the extent and scope of the labelling requirement at the heart of the dispute and imposed by Regulation 1169/2011. The answer by the Court therefore discusses the meaning of 'country of origin' and 'place of provenance' in depth. The two expressions are defined in two different sources of EU law. While 'place of provenance' is defined in Article 2(2)(g) of Regulation 1169/2011 as 'any place where a food is indicated to come from, and that is not the "country of origin" as determined in accordance with Articles 23 to 26 of Regulation (EEC) No 2913/92 [Community Customs Code, today Regulation 952/2013 "Union Customs Code"];[349] the name, business name or address of the food business operator on the label shall not constitute an indication of the country of origin or place of provenance of food within the meaning of this Regulation', the country of origin

and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 L 304/18.

[347] Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967 (2015/C 375/05).

[348] Avis aux opérateurs économiques relatif à l'indication de l'origine des marchandises issues des territoires occupés par Israël depuis juin 1967, Journal Officiel de la République Française n. 273 du 24 novembre 2016.

[349] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code L 269/1.

is defined in Article 60 of the Union Customs Code as the country or territory where goods are wholly obtained.[350]

The Court engages with an illustration of the different concepts which are relevant to construct the meaning of the two terms. Because the background of the case involves issues of international law, and in particular the definition of the control over certain areas by Israel, the analysis of the Court takes a short detour towards the relevant notion of international law which must be defined for the purpose of clarity and precision of the judgement. In that regard, the Court recalls that the notions of State and country are used as synonyms in many EU law sources, and therefore the same meaning should apply to the judgement.[351] That means that the term 'country' employed in the notion of 'country of origin' refers to a 'sovereign entity exercising, within its geographical boundaries, the full range of powers recognised by international law'.[352] Country and territory, alternatingly used in Article 60 UCC, therefore refer to something different, from which follows that a territory is not a State either. Judges of the Court had already the opportunity to express themselves with respect to the notion of 'territory' in cases such as *Council v Front Polisario*[353] and *Western Sahara Campaign UK*,[354] where the term territory was interpreted as indicating entities including geographic spaces that, despite falling under the jurisdiction or responsibility of a State, do not have the status of a State according to norms of international law. The engagement with this type of analysis is justified to the extent that the obligation provided in Regulation 1169/2011 applies to both territories and countries (states) in the same measure. However, the distinction between the two notions is of fundamental relevance due to the conflict about the recognition of the status of the geographical area between what has been declared by the State of Israel and what has been recognised by the international Court of Justice with regard to the control of the former over the West bank, including East Jerusalem and Golan Heights. The situation concerning the control of Israel over these territories has been indeed the object of dispute within the international community where Israel was ultimately found in breach of international

[350] Article 60(1) UCC.

[351] *Psagot*, para 28.

[352] *Psagot*, para 29.

[353] *Council v Front Polisario* C-104/16 P.

[354] *Western Sahara Campaign UK* C-266/16.

humanitarian law, and of the principle of self-determination of the peoples.[355] The breach has also been recognised by the European Union, in conformity with the obligation of State non-recognition of illegal situations resulting from a breach of the right to self-determination and with the obligation not to support or contribute to the maintaining of this condition.[356]

In the light of these obligations, the Court found that labels of food product originating from the territories occupied by Israel should carry 'Israeli settlements' as their place of provenance. A different label would indeed have the effect of misleading the consumers with respect to the 'health, economic, environmental, social and ethical considerations' at the basis of their transactional decisions, as prescribed by Regulation 1169/2011.

Considerations

The *Psagot* judgement provides an excellent example of the Court's exercise of the integrative power with regard to communication delivered to consumers. By its decision, the Court brings considerations of ethical nature into the concept, the episteme, of place of provenance. These considerations follow from the fact that the Court recognises the term 'settlement' as indicating a 'place of provenance' and, to the extent that the term settlement refers not only to a geographical area but also to demographic contingencies, the label of a place of provenance is integrated with non-geographical aspects.[357]

Specifically, the Court contends that, in accordance with the high level of consumer protection conferred by Regulation 1169/2011, the range of considerations on which consumer choices may be founded includes health, economic, environmental, social and ethical considerations, and extends beyond these concerns to include compliance with international law as well.[358]

This is precisely where the Court integrates the communication paradigm with a consumer perspective: by including observance of international law among those considerations which may influence consumer choice, the Court integrates the range of information which

[355] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, advisory opinion of 9 July 2004, para 159.

[356] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, advisory opinion of 9 July 2004, para 159.

[357] *Psagot*, para 43.

[358] *Psagot*, para 54.

consumers may infer from a label on place of origin, thereby enabling them to evaluate the information according to non-geographical, non-economical but rather social, ethical, political and even legal considerations. Ultimately, in fact, the case in point questions whether consumers should also be able to express their preference on the basis of the illegal behaviour of a State, in this case Israel. If the Court had not integrated the concept of place of provenance by bringing the notion of settlement, and related demographic factors, under its aegis, consumers would have been prevented from establishing a preference, potentially, reflecting their opinion with respect to the illegal behaviour of a country which could indirectly benefit from the consumption of products produced in those territories victim to the infringement of international law. The particular case in point also calls for political views on the illegality of the Israeli settlements: despite Hogan, in his opinion, trying to shield the Court from critiques about the political considerations underlying the judgement, some have not found this caveat credible enough not to address a critique on the political position taken by the Court.[359] However, of note is that the ethical considerations which the Court unlocks, pertain to the respect of international law and not to the political situation itself, on which the European Commission expressed its view. Despite the decision having raised concerns among some international lawyers, from a consumer perspective, it seems perfectly acceptable that the Court creates the opportunity for consumers to make their transactional choices on the basis of considerations which surround the production and trade of products they consume. The creation of the space *within* the law is precisely the integration by the Court with respect to a consumer perspective which challenges the idea of consumers as passive actors in the carousel of global trade. The controversial implications from an international law perspective are partly counter-balanced the judgement is looked at from a consumer perspective: Labelling on place of provenance and country of origins is usually associated with the performance of duties existing under trade law, specifically the application of customs, and the implications which this information has for consumers are treated as a natural consequence of the necessity to indicate the provenance of products. As a result, the labelling on origin of products is rather inconsistent: While being mandatory for food products, textile products carry a country of origin label but this information is not mandatory to the point that sellers do not always

[359] G. Kuchenbecker and A. Tucker, The Israeli Products Labelling Controversy – Imposing Politically-motivated Opinions in the Name of Law: An analysis of the AG's Opinion in the *Psagot Winery* Case, The Hague Initiative for International Co-Operation, https://www.thinc.info/the-israeli-products-labelling-controversy-imposing-politically-motivated-opinions-in-the-name-of-law/.

disclose this information when they sell online. In *Psagot*, the Court challenged the idea that consumers are passive readers of labels and integrates the communication paradigm by giving consumers the opportunity to infer information from a country of origin/place of provenance label, which is not necessarily disclosed by the producer, but that consumers gathered in the context of their social, political life. The Court does not favour boycotts, in the sense that it is inclined to favour this behaviour, but at the same time, creates the opportunity for a boycott of Israel, for reasons which do not only pertain to the politics behind international law, but also to international law itself. Consumers are given the opportunity to express their agreement or disagreement with a certain international law situation through their act of consumption. The reasoning of the Court is particularly powerful in that it does not necessarily compel consumers to take a stance and behave in accordance with international law, but it rather leaves them the option to consider compliance with international law as a valuable consideration in directing their consumption choices. By amplifying the range of considerations which consumers may take into account before taking their transactional decisions, the Court integrates a communication paradigm which often results in an excessively strict tangle. One critique which may be raised against this integration is the criteria according to which new kinds of considerations should be found legitimate and acceptable. The *Psagot* judgement offers a good example in this regard too, to the extent that the opinion of consumers on a matter which can ultimately be seen as political, is actually filtered through an evaluation which is legal. The respect of international law, enshrined in Article 3(5) TEU, together with Article 9 of Regulation 1169/2011, provides the basis for an integration of the communication paradigm as accomplished by the Court in the *Psagot* judgement.

How does *Psagot* support the argument advanced in the present case? The case does not really address global value chains. Actually, from a formal perspective, the case concerns a public act: the claimants requested the referring court to annul the notice adopted by the French Minister of Economy and Finances. In this sense, the case looks at the issue from a top-down perspective. However, the reasoning of the Court is deliberately based on a consumer perspective, which makes the conclusions reached in the judgement easily transferrable to a consumer case. One of the greatest achievements, be it for good or ill, of EU consumer law has been indeed the capacity to transcend the boundaries between the public and private distinction.[360] In this particular instance, the transcendence of this

[360] Micklitz, *The Politics of Justice in European Private Law* (n 162); Weatherill (n 262); Reich (n 290).

distinction takes the form of a transferability of the reasoning of the Court to purely private law relationships. The question then turns to the applicability of this reasoning to global value chains. To the extent that the relation between consumers and global value chains depends on the communication paradigm and in so far as one of the most important means of this paradigm is labels, not many obstacles are in the way for the application of the *Psagot* judgement in global value chains. Questions remain with respect to the extent to which the reliance on label schemes favours a relational dynamic in consumer contracts. As long as the integration of the communication paradigm needs a basis in an established means of communication, the potential of favouring a bottom-up approach is curbed by a top-down approach. Obviously, consumers need a legislative basis in order to challenge the communication paradigm. However, the extent to which the *Psagot* case needs Regulation 1169/2011 in order to achieve the same outcome could be called into question: Is not the combination of private autonomy and Article 3(5) TEU enough to justify the possibility for consumers to base their transactional choices on a broader range of considerations from those unilaterally provided to them by producers and traders through the means of communication – be they means of disclosure or means of marketing? This would require an understanding of the role of consumers which departs from the notion of vulnerable consumer but rather empowers the responsible consumers with actual means to give voice to their willingness to act responsibly in the context of global value chains and global trade.

The consumer perspective on labels has recently been approached anew by the Court in the *Lactalis* judgement delivered on 1 October 2020.[361] The case once again addressed a food label for milk products and milk ingredients made mandatory by the French Minister of Economy and Finance. In particular, the second question of this judgement explored the criteria which allow Member States to adopt new mandatory labels beyond those harmonised in Regulation 1169/2011. Following AG Hogan's opinion, the Court carefully analysed the text of Article 39(2) of the Regulation in order to clarify the extent of the impact of consumer perception as justification for the introduction of mandatory requirements for food labelling schemes. The requirements set out in Article 39(2) are: (i) the existence of a 'proven link between certain qualities of the food and its origin or provenance'; (ii) a significant value attached to the provision of that information by consumers. AG Hogan goes quite far in the reasoning by distinguishing between the term 'quality', in its singular form, and 'qualities', in plural form, remarking that the former

[361] *Lactalis*.

'might refer to a set of properties and features of a product that enable consumers' expectations to be met',[362] while the latter 'generally refers to the intrinsic characteristics or features of the product in question'.[363] The use of the plural form of the term 'quality' would be a further hint to the intentions of the legislator not to connect the introduction of mandatory labels on foodstuff to the mere subjective sensibilities of consumers. Rather, this subjective element exclusively becomes relevant once the link between the 'properties' of the food, as the French wording establishes, and the place of provenance are assessed. The Court does not engage with this detailed discussion on the shades and declinations of the term 'quality' but still reaches the same conclusions as AG Hogan. The assessment of the link between qualities and provenance of food does not justify the adoption of mandatory COOL on its own. The label, which must fall under those not already harmonised by the regulation, can only be introduced if, on top of this 'objective' link, consumers also attach a 'significant value' to the disclosure of this information.[364] The Court further explains that a mandatory label introduced on the sole basis of the subjective preference of consumers would impair the objectives of the regulation with respect to the high level of consumer protection which it seeks to achieve and to the type of information – correct, neutral and objective – which consumers must receive for that purpose.[365] Linking the subjective perception of consumers to an objective requirement is also crucial to maintain and respect the principle of legal certainty, which would otherwise risk becoming subject to changes in the public opinion. As AG Hogan explicitly clarified in his opinion, the need for a 'restrictive' interpretation on the subjective perception of consumers was also considered to be necessary in the specific case, in order to avoid and/or prevent ethnocentric behaviour by consumers,[366] which is a point that the Court makes as well, albeit more subtly.[367]

One obvious conclusion from comparing the judgements in *Lactalis* and *Psagot* is that the Court – and the AG Opinion – takes two different approaches towards consumer influence over food labels. Therefore, it seems that the consumer perspective is not relevant *per se*

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[362] AG Opinion para 45.

[363] AG Opinion para 47.

[364] *Lactalis*, para 39.

[365] *Lactalis*, para 45; Breitsamer und Ulrich, C-113/15, EU:C:2016:718, para 69.

[366] See comment of the judgement by J. Hojnik on EU Law Live available at: https://eulawlive.com/op-ed-cool-obligations-assessed-by-the-court-of-justice-in-*Lactalis*-by-janja-hojnik/.

[367] *Lactalis* para 45.

but only to the extent that it does not oppose a 'political' objective of the Union, such as a fight against nationalistic and ethnocentric attitudes in certain areas of the EU. The *Lactalis* judgement is slightly more conservative in attributing relevance to the consumer perspective, if compared to *Psagot*, which was a trailblazer in expanding the domain of considerations influencing consumer preferences and addressing facts and circumstances which do not strictly pertain to product 'qualities'.

One difference which influences the different outcomes of the judgements is that, in *Lactalis*, the Court and the AG did not delve into the problem of consumer deception, a fact which was considered to have weighted heavily in the outcome of the dispute in *Psagot*. As a matter of fact, the Court and the AG did not have to worry about the consumer being misled and therefore had to refer to the relevant provisions, other than broad remarks connected to Regulation 1169/2011. This difference goes to the heart of the communication paradigm. The *Lactalis* judgement does not address the problem of misleading the consumer because, in the absence of a mandatory COOL, the information is completely lacking, unless that information is voluntarily disclosed. Conversely, the *Psagot* case dealt with information which was already mandatory in accordance with Regulation 1169/2011. In both cases, however, the consumer perspective is subject to a connection with an objective element which is in some way connected to a policy or regulatory aim pursued at the EU normative level. In *Psagot*, the objective element was represented by the (illegal) position of Israel towards international law, while the objective element in *Lactalis* was represented by the 'link' between the qualities of a food product and its geographical origin and/or provenance.

3.3. Approval of Communication in *CHS* v Travel4 Tour

The case is from 2011 and concerned the interpretation of the unfair commercial practice directive (UCPD). The case reached the bench of the CJEU as a result of a dispute between two Austrian travel agencies regarding the criteria according to which the fairness of a commercial practice should be tested with particular respect to the circumstances in which the practice may be result in being misleading for consumers.

The facts

CHS and Team4 Travel were two travel agencies operating in Innsbruck, Austria, which organised skying holidays for schoolchildren coming from the UK. In 2010, Team4 Travel claimed that it had exclusive access to some accommodations in its advertising campaign

for the next winter holiday season. Team4 Travel had concluded contracts for bed quotas with certain accommodations. The contracts included clauses according to which the hotel could not accept bookings made by other tour operators and which required Team4 Travel's written consent for any repudiation of the terms. On the basis of these contracts, Team4 Travel had distributed some leaflets advertising the 'exclusive' access to those accommodations. However, CHS, Team4 Travel's competitor, was able to book the same accommodations on the same dates. Consequently, it considered that the claims of 'exclusivity' made by Team4 Travel constituted misleading advertisement to the extent that the information provided in the leaflet was objectively untrue.

Facts and proceedings

After failing to obtain an injunction from the Landesgericht Innsbruck in 2010, and from the Oberlandesgericht Innsbruck in 2011, *CHS* appealed before the Oberster Gerichtshof, which referred the following question to the CJEU:

> *'Is Article 5 of the [UCPD] to be interpreted as meaning that, in the case of misleading commercial practices within the meaning of Article 5(4) of that directive, separate examination of the criteria of Article 5(2)(a) of the directive is inadmissible?'*

The question is motivated by the fact that the grounds for rejecting the request for injunction by the CHS were founded in the fact that Team4 Travel did not incur any breach of professional diligence when advertising exclusive accommodations. This was taken as sufficient grounds to dismiss any infringement of the UCPD according to the interpretation given to Article 5 in conjunction with Article 6 of that Directive.[368]

[368] Article 5 of the UCPD reads as follows:

'1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers'.

According to Article 6(1) of the UCPD Directive, '[a] commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise'.

Considerations

The judgement in *Team4 Travel* does not offer a direct insight into the consumer perspective on the means of communication. Nevertheless, the case contributes to the argument advanced in the present work to the extent that it shows the implications consumer protection has for the allocation of liability in certain circumstances such as the one in the *Team4 Travel*. In this case, the Court ignored the fact that the misunderstanding on the reservation of the rooms was the fault of the hotel rather than the travel service provider: The fact that the information in the advertising was found to be an objective untruth was sufficient for the Court to declare the unfairness of the commercial practice.

This approach is in line not only with the principle of effectiveness guiding the Court in the enforcement of EU law,[369] but also with the objectives stated in the consumer rights directive regarding the contribution to the proper functioning of the internal market by consumer protection. Under this latter, secondary EU law instrument, the Court has delivered a judgement in *Starman* where the communication paradigm was literally overcome in the name of consumer protection. The case was brought by a communication services provider, Starman, against an order issued by the Estonian Consumer Protection Board regarding the phone numbers offered by *Starman* as an after-sale service to consumers. Consumers were in fact given two options to contact the provider: a landline number at the basic rate, and a speed dial number at a rate higher than the basic rate. It was against this second option that the Board issued a cease and desist order. To make the more expensive option available to consumers is contrary to Article 21 of Directive 2011/83 and to the provision of Estonian law transposing that article.[370]

The case, which has been passively received by legal scholars and has not really been given much attention, is in fact quite significant if read from the perspective of the communication paradigm as the Court uses consumer protection for not only integrating, but almost even overcoming, the communication paradigm. Article 21(1) reads as follows:

‘Member States shall ensure that where the trader operates a telephone line for the purpose of contacting him by telephone in relation to the contract concluded, the consumer, when contacting the trader is not bound to pay more than the basic rate’.

[369] Reich (n 290); T Tridimas, *The General Principles of EU Law* (Second edition, Oxford University Press 2006).

[370] Directive 2011/83.

In the end, the issue at hand was whether offering a double option constituted a violation of Article 21. In the present case, consumers were in fact given – and made aware of – the option of paying a basic rate and a higher rate. The choice between the two numbers was left to consumers, and no different treatment was given to those using the speed dial number.

The Court's reasoning is quite brief and starts from the acknowledgement that the wording of Article 21 of the CRD is not sufficient to answer the preliminary questions asked by the referring court. The Court therefore had to take into account the context and objectives of the rules under scrutiny. In the light of Articles 13 and 19 of the CRD, the Court reasoned that in principle consumers should not bear any extra costs beyond the ordinary ones as a result of the exercise of their rights. Furthermore, Article 4 of the CRD explicitly requires Member States not to deviate from the provisions laid down in the Directive. These provisions, read in the light of the objective of the CRD as expressed in Recitals 4, 5 and 7, lead the Court to assert that these objectives of ensuring a high level of consumer protection would be jeopardised if a service provider was allowed to make consumers pay more than the basic rate by using a speed dial number for contacting the provider after the conclusion of the contract. The Court specifically clarified that the fact that consumers were informed about the two options in a clear and easily accessible manner did not discharge the provider from the obligation set out in the Directive. Furthermore, not even the voluntary – and conscious – choice of consumers to use the speed dial number could release Starman from the obligation set out in Article 21 due to the impossibility for consumers to waive their rights. The 'imperative nature of the Directive', the title of Article 25, has the result of providing consumers with 'inalienable' rights that cannot be waived, not even through a voluntary act of the consumer. The interpretation of the Court in *Starman* has been particularly strict as a result of a joined reading of Article 21 and Article 25 of the CDR. However, the Court seems to have passed by one element of Article 21 which could have resulted in a softer interpretation of the obligations on traders. The wording of Article 21 in fact mentions that consumers must not 'be bound' to pay a rate higher than the basic rate, hinting that a voluntary choice between a basic rate and a higher rate options could mean that consumers are not bound to pay a higher cost.

The reasoning of the Court therefore presents something more than a mere textual interpretation of the text of the Directive, as it pursues the recurring regulatory objective of ensuring the functioning of the internal market through a high level of consumer protection.

By pursuing these objectives in a strict manner, the Court ends up by disarming the communication given by Starman: The tie between contractual effect and communication, typical of the communication paradigm, is broken and the Court steps in between the communication flow of the parties by depriving the communication of legal validity.

The regulatory aim which plainly lies at the heart of the reasoning and decision of the Court in *Starman* brings this case close to the argument put forward in this work to the extent that the principles and rights violated by the externalities of production in GVCs fall under 'regulatory' – or political, in the sense that it is subject to political considerations – objectives of the EU and its Member States.

While the regulatory character of European private law is an argument which is fairly consolidated among consumer law scholars and has found many reaffirmations over time, the regulatory impact of contract law is not confined to consumer law issues alone. The case analysed in the following paragraph is quite representative of the contrary.

4. Communication through contract and the epistemic authority of the CJEU

When looking at externalities in GVCs, the Court finds itself dealing with private regulation on the one side, and consumer contract law on the other. By looking at the consumer contract, the Court scrutinises the effects of an agreement in the light of public policy concerns: That was the case for *Courage* as well as *Scarlet* and *Psagot*. With specific regard to GVCs, by looking at the consumer contract, the Court is able to create the forum where consumers may require the GVCs to engage with issues which the latter may have explicitly avoided in their sustainability policies. To this extent, the Court guides an integration of the communication paradigm with a consumer perspective by exercising epistemic authority over the minimum requirements which constitute the concept of sustainability. In the absence of a commonly-agreed definition of what sustainability means and a minimum set of requirements which makes a production process 'sustainable', the scope of sustainability remains: a) privately decided by corporations and b) extremely fragmented. The communication paradigm described in Chapter 3 suggests that, when a sustainability policy misses one element, for the sake of argument a social aspect of the production process, consumers cannot oppose that specific production externality. However, Courts have the capacity to integrate the communication paradigm with public law concerns by enabling a bottom-up approach in a way which makes the action of private actors compliant with the rights, principles and values which are part of EU law. The societal character of

this integration may be realised by bringing in a consumer perspective. Despite consumer interests also including economic interests, consumers pursue a variety of interests, including non-material ones, on the market. This consideration lies at the core of one of the judgements analysed in the previous paragraphs: the *Psagot* judgement of November 2019. In that specific instance, the triggering of the ex-post and bottom-up approach also enabled the Court to work on the meaning of sustainability and sustainable production processes *for the law*. The unilateral definition of sustainability policies by corporations does not only have an impact on the concept of sustainability for commercial purposes but, by neutralising possible consumer claims, it also has an impact on the legal definition of sustainability. As the Court has in the *Psagot* judgement, the Court's exercise of its own epistemic authority assumes a societal connotation when the perspective adopted is the consumer one. The definition of sustainability and sustainability practices, commodified in voluntary regulations for commercial purposes, turns out to be materialised through the integration of the communication paradigm with a consumer (societal) perspective.

Scepticism is present in legal circles with regard to 'judicial activism' and the expansion of the scope of legal concepts by the Court. Recently, AG Bobek has delivered an opinion in the *Entoma* case which involved the scope of application of Regulation 258/97 on novel foods and novel food ingredients. The referring court asked whether the wording 'food consisting of ingredients isolated from animals' should also mean to include 'food consisting of animals'. The AG's response in the negative also included a critique of the interpretative techniques which would result in a 'teleological expansion of the material scope' of a legislative instrument',[371] which would practically consist of an exercise of legislative power by the judiciary. While recognising the necessity to maintain a dynamic interpretation of legal concepts, Bobek lists a series of limits to this dynamics interpretation. First, he defends the importance of a literal interpretation of legal texts, also for reasons of legal certainty and predictability of the law, which must be easily accessible to all individuals. He then adds considerations concerning the separation of power between the legislative and the judiciary. The ex-post expansion of the scope of legal concepts is harmful not only for the internal power balancing in the EU but also for the repartition of competences between the EU and member states. Finally, he indicates the Court's lack of expertise in highly technical matters: while the legislative process gives the opportunity to involve experts and technicians on the matter to be regulated, the judicial process does not

[371] *Entoma*, AG Opinion, para 61.

allow for an encompassing involvement of this category of subjects, leading to potentially inaccurate results which would be legally binding.[372]

It is worth to examine whether the integration of the communication paradigm by the Court would be contrary to any point listed by AG Bobek in his opinion. With regard to the literal interpretation, a legislative provision evidently needs to be interpreted in order to engage with the exercise of a literal interpretation. In the case of externalities of production processes, we have already observed that such a provision is missing, or at least one which applies to contractualised production in GVCs.[373] The legal provisions which need to be subject to literal interpretation are therefore those regarding consumers and those included in the ECFR. While the latter are not specific, and require a dynamic interpretation holding true to social changes, the former are more specific in their scope. Once again, consumer law does not address the issue of externalities of production. Should the conclusion therefore be reached that consumers not only have not any claim but also that they are prevented from having any because the law 'does not say so'?[374] The argument, which is strictly connected to the principle of legal certainty, does not necessarily apply to externalities of production processes. Considering the vacuum in legislation on the matter, the legal space is currently occupied by corporate actors, who project their own, autonomously produced, sets of sustainability standards on consumers. A legal vacuum leaves space for social practice and social demands: however, this space is 'seized' by corporations through the mechanisms of the communication paradigm of EU consumer contract law. The integration of the communication paradigm makes it possible to have an inclusive debate on the requirements according to which production processes can be labelled as 'sustainable'. The mediation of the Court is also necessary to assign legal meaning to the potential consumer countermovement, which would otherwise remain outside the legal sphere, despite voluntary sustainability standards having legal effects on consumers through EU contract law. At first glance, the assignment of a legal meaning may appear problematic in terms of the separation of powers, which is the second limit to dynamic interpretation identified by Bobek. To see the integration of the communication paradigm by the Court as a threat to the principle of separation of powers amount to an

[372] *Entoma*, AG Opinion, paras 72-81.

[373] In this respect, attempts to introduce due diligence are yet ignoring the consequences of contractualised production. Only recently, Switzerland has proposed the introduction of a due diligence scheme which would apply strict liability to corporations for violations of corporate responsibility towards all members of GVCs.

[374] *Entoma*, AG Opinion.

extremely formalistic reading of the Supreme Court function, and probably beyond what is intended in Bobek's Opinion in the *Entoma*. What the integration of the communication paradigm really brings about is a reading of existing EU law in the light of the principle of effectiveness of constitutional values and principles enshrined in primary EU law. In this, dynamic interpretation consists of a legitimate exercise of epistemic authority by the Court which is made necessary by the voluntary self-regulation regime which hinders the effective hold of EU principles and values on the internal market via an instrumentalisation of consumer law.

The Court is also in the advantaged position of being able to evaluate potential consumer claims and externalities of production as regards the rights, freedoms and values included in the ECFR. Enabling the integration of the communication paradigm in the post-contractual phase allows the Court to evaluate the externalities of production rather than the voluntary sustainability standards, which may include details which are too technical for the expertise of the Court. In this manner, the Court can exercise its own epistemic authority (and exercise its own expertise), thereby rebalancing the legal projection of voluntary sustainability standards, which are designed autonomously by corporations in GVCs, on consumers. The regulatory impact on the range of consumer claims can be rebalanced by the Court in the light of existing rights and values, rooted in the ECFR and national constitutional charts.[375]

Lastly, the integration of the communication paradigm in the ex-post judicial venue allows for balancing of freedoms and rights, a possibility which is currently missing from the ex-ante regulatory construction resulting from voluntary standards and consumer contract law. Consumers may involuntarily affect the respect for freedoms, rights and principles established at the EU level to the extent that the exercise of their personal autonomy is framed by the fact that they affect GVCs through their consumption acts (ex-post) without being involved in the regulation of those GVCs (ex-ante). This *de facto* limitation of personal autonomy is justified by consumer law provisions which however seem not to meet the requirements set out in Article 52(1) of the ECFR, according to which '[a]ny limitation on the exercise of the rights and freedoms […] must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of

[375] H Collins, *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017).

general interest recognised by the Union or the need to protect the rights and freedoms of others'. Three requirements can be identified in the text of the Article: limitations on the exercise of rights and freedoms must be provided by law; must respect the essence of the rights and freedoms which are subject to limitation; must respect the principle of proportionality. The limitation of private autonomy of consumers even fails to meet the first, and most important, of the criteria. The CJEU has specified on different occasions that the fact that a limitation of freedoms and rights must be provided by law also means that the limitation must be clear and precise in defining the scope of the limitation.[376] This substantiation of the limitation of consumer private autonomy is not captured in any legal text, due to the claim that consumer's choices are respected to the extent that they are informed (in a clear manner) in the pre-contractual and contractual phase. However, we have seen that information is not a reliable source for consumers with regard to the aspect of production processes.[377] Yet, a provision legitimising consumer claims against externalities of production, which in the author's opinion would only be desirable, would probably result in a restriction of the internal market, which is actually why private enforcement would also be desirable from the perspective of the internal market. A de-centralised, judicially based enforcement would in fact depend on the willingness of consumers to request this enforcement, thereby avoiding a generalised ex-ante rule which would be inconsistent with trade law while at the same time still respecting individual private autonomy of consumers.

4.1. The CJEU as instigator of communication

The role of the Court in the integration of the communication paradigm is not to merely that of creating the space to 'audit' consumers on issues regarding sustainability and externalities of production processes. The Court exercises a specific function in limiting the effects which the unilateral exercise of epistemic authority from companies has on both the substantive notion of sustainability, when derivable from the trader's claims, and the claims available to consumers. The integration of the communication paradigm relies on the exercise of the Court's own epistemic authority with regard to what production practices

[376] C 265/19 of 6 October 2020 Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, AG opinion para 86; C-149/17 Bastei Lübbe GmbH & Co. KG v Michael Strotzer, para 46; C-311/18 Schrems v Facebook Ireland paras 175, 176.

[377] *Psagot*.

are compatible with the rights, interests, principles and values protected, ensured and promoted in the EU. To clarify, the work of the Court does not directly address the notion of sustainability: a different notion of the term can be derived from the Court's evaluation of the production processes in the light of rights and principles as considered relevant from a consumer perspective, made operational through the application of the effectiveness principle. The trialogue mediated by the exercise of epistemic authority on the part of the Court has procedural and substantive consequences.

4.1.1. a) Procedural consequence.

From a procedural perspective, the integration of the communication paradigm of the Court transforms the exercise of epistemic authority from a unilateral act of the enterprise into a collective exercise. The decision in *Psagot* is quite illustrative in this sense: The rule on the indication of the country of origin and place of provenance may reveal to have a rather generic function if considered beyond its application in relation to customs law. While customs rules exclusively have an impact on traders, the effect of the indication of the country of origin and place of provenance reaches the consumer. The consumer perspective on this information may differ: For instance, while the *Psagot* ruling made clear that, according to AG Hogan and the Court, consumers might have an interest in knowing that a product comes from an Israeli settlement rather than the state of Israel, in the recent *Lactalis* judgement,[378] delivered scarcely one year after *Psagot*, the same AG Hogan and the Court expressed concern for the nationalistic incentives which indication of the country of origin and place of provenance may give to consumers. In either circumstance, the rules on country of origin and place of provenance are analysed by inferring the purpose which this information may fulfil in the eyes of the consumers: In the *Psagot* judgement, the information inferred concerned consumers' ethical evaluation of the political dealings between the state of Israel and the settlements in the Palestinian territories; In the second instance, the information inferred concerned the consumers' preference of for consumption of products originating in their own country in order to promote their own economy. Exercising its own epistemic authority, the Court deemed the former purpose legitimate and coherent with the rules of EU law, while the latter has not been acclaimed to be

[378] Case C-485/18 Groupe *Lactalis* v Premier ministre, Garde des Sceaux, ministre de la Justice, Ministre de l'Agriculture et de l'Alimentation, Ministre de l'Économie et des Finances, EU:C:2020:763[2020].

compatible with EU rules.[379] In both judgements, the Court filters the consumer perspective by interpreting the compatibility of the trader's activity and the consumer perspective with the system of EU laws. In its reasoning in *Psagot*, the Court includes the position expressed by the EU with regard to the occupation of Palestinian territories by Israel. Conversely, in *Lactalis*, the Court considers that, where consumers' subjective attribution of a value to information regarding the existence of a link between the country of origin and certain qualities of the food was sufficient to make this information mandatory, this could be a type of consumer behaviour which could favour protectionist choices.[380] The Court's filter in this sense performs an act of epistemic authority over the legal compatibility of perspectives and perceptions of the (category of) actors relevant to the dispute. While this may be conducive to 'judicial activism' at times, the judgement in *Lactalis* provides an instance of the reading of the Court being quite conservative. While the perception of consumers in *Psagot* required the trader to adopt a higher level of precision on the indication of the country of origin and place of provenance in order that consumers not be misled by less precise information, in *Lactalis*, the sole consumer perspective on the association between certain qualities of the product and the place of provenance in the absence of objective evidence of the existence of this link cannot be considered a sufficient parameter for a member state to make that information mandatory, even if the information is directly addressed to consumers. This suggests that the Court exercises epistemic authority through systemic and functionalist interpretation, to the extent that expansion or limitation of the scope of a certain rule reflects the system of EU laws which are influenced by the facts and circumstances of the dispute. The exercise of epistemic authority is enabled by the different perspectives involved in the dispute.

With respect to externalities of production and claims of sustainability, different scenarios are imaginable. Consumers could appeal against claims of sustainability made by the trader, which are found to be false statements. In this first scenario, the rules on the communication paradigm fulfil their function and the consumer perspective simply brings the falsity of the statement to the table when this falsity has misled or had the possible effect of misleading

[379] The link between country of origin and quality of the products cannot merely rely on the value which consumers attribute (to such a subjective link) but it must also be based on objective evidence of the existence of such a link. If the existence of the link was to be found in the subjective perspective of consumers alone, this could result in availing possible nationalistic patterns of consumption which are not compatible with EU laws.

[380] AG Hogan. The court does not repeat this argument, restricting its reasoning to a literal and formalistic interpretation.

the consumer. In a second scenario, the statement made by the trader may be true but cover only certain areas and aspects of sustainability, while externalities of production occurred in matters which were not covered by the claims. In a third scenario, no statements regarding sustainability have been made by the trader at all.

The last two scenarios can be analysed together from the perspective of the epistemic authority exercised by the Court, as they represent the two instances in which the integration of the communication paradigm is performed in its true essence. The integration of the communication paradigm through the exercise of epistemic authority by the Court triggers a deliberative process with regard to the requirements which make production processes compatible with EU law and the consumer perspective.[381] In the second and third scenarios, the absence of statement made by the trader make it impossible for the Court to integrate the paradigm in a similar manner as in the *Psagot* judgement.[382] When the information is missing, the Court's exercise of epistemic authority must be triggered by consumers in order for this perspective to be taken into account. In this way, the judgement of production processes assumes a deliberative connotation, to the extent that the diversity of perspectives favours the confrontation with the diversity of values of other parties. The ex-post judicial forum provides the space for confrontation that is absent or, even if present, is extra-juridical, in the ex-ante phase – as seen in chapter 3. The confrontation in the judicial forum triggers a process of deliberation that corresponds to a way of achieving a collective decision.[383] This deliberation occurs and is guided by the exercise of the (legal) epistemic authority of the Court. In the absence of specific legal regimes (rules) to guide the judgement, the Court's reasoning revolves around the implementation of general principles, such as the effectiveness principle, which also apply to private parties, as shown by *Courage* and *Scarlet*. The 'epistemic value' of deliberation does not exclusively rely on the collective dimension of the process. As pointed out by Estlund and Landemore, deliberation owns four epistemic properties: 1) participants to the process are able to distinguish good arguments from bad ones; 2) deliberation produces new solutions; 3)

[381] In this sense, the judicial integration compensates for the loss of the deliberative trait of contracts caused by the communication paradigm. For an understanding of the contract as deliberation, see Bertram Lomfeld, 'Contract as Deliberation' 76 *Law and Contemporary Problems* 18.

[382] Omission is only relevant if the information is mandatory, which is not the case for sustainability standards, or if it makes the statement capable of misleading consumers. In all other circumstances, the lack of information does not produce any effects. As explained earlier, this is one of the aspects of the communication paradigm of EU consumer law.

[383] D Estlund and H Landemore, 'The Epistemic Value of Democratic Deliberation' in A Bächtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018).

dialogue between persons may remodel opinions; 4) deliberation leads to unanimous consensus on the 'right solution'.[384] As the authors refer to deliberative democracy, the same properties do not necessarily hold true for the evaluation of externalities of production. As the deliberation takes place within an existing legal framework in this context, the epistemic process does not need to be conducive to unanimity, but it may result to be an 'outcome' of the deliberative process.[385]

4.1.2. b) Substantive consequence

The effects of this process on the concept of sustainability are indirect and spring from the compatibility of production processes with those EU laws which incorporate principles and values often advocated to be an integral part of the concept of sustainability of production processes. In this sense, the epistemic process of deliberation leads to a solution which is 'true' for the legal system at large, rather than only in the light of the statement made by traders in their communication strategy, building on a *common understanding* which involves different actors in the production process, including consumers.[386] The trialogue which takes place in the judicial context benefits from the mediation of the Court, which, in hearing the arguments of the parties, provides an interpretation of the law wherein, while certain provisions are identified in their scope, the argument of the parties enrich the epistemic nature of certain rights. The achievement of a common understanding on externalities of production and their compatibility with EU law also has the potential to trigger convergence upon the substantive scope of the notion of sustainability. As long as it is induced from the myriads of different sustainability policies of private actors, the concept of sustainability will result highly fragmented. Sustainability may refer to production processes or product qualities. Within these two realms, we find sustainability policies which target only environmental externalities and others, such as the one of Levi Strauss, which also cover ethical concerns. The details of the issues covered change accordingly to the issuers of the standards, leading to a paradoxical situation for which

[384] Estlund and Landemore (n 369).

[385] ibid, p. 124.

[386] J Capps, 'Democracy, Truth, and Understanding: An Epistemic Argument for Democracy' in MC Navin and R Nunan (eds), *Democracy, Populism, and Truth*, vol 9 (Springer International Publishing 2020).

there is hardly a set of standards that is equal to another.[387] The differentiation of the sustainability standards can be read as a commodification of sustainability practices: the more differentiated a sustainability practice is from other practices, the more its rent value increases.[388] The deliberative process regarding externalities of production, filtered through the epistemic authority of the Court, may actually result in a convergence of sustainability standards. This convergence is in line with the bottom-up approach enabled through judicial review in an area where ex-ante regulation is left to the idiosyncrasies of private regulation.[389] While these idiosyncrasies build on the unilateral exercise of epistemic authority by corporations, the epistemic value of judicial deliberation allows for the emergence of epistemic communities, which rely on the dialogue between the parties filtered by the (legal) epistemic authority of the Court applied to externalities of production processes.

4.2. Epistemic Authority and Consumers

In respect of the matter of externalities of production processes, the judicial setting can be imagined as a forum where extra-juridical concepts, including those which are not included in the voluntary sustainability standards, enter the space of the law and are evaluated according to the rights, values and principles established therein. While reliance on the communication paradigm places only the 'promises', the communication, delivered to consumers under the scrutiny of the law, a bottom-up approach would provide the opportunity to judicially evaluate facts which would elude judicial scrutiny if left to the mechanism of the communication paradigm of consumer law. In this sense, the judicial forum provides an opportunity for the materialisation of the contract in GVCs to the extent that the judicial scrutiny is triggered by factual circumstances which evade factual enforcement. The bottom-up approach favours such an enforcement by looking at the circumstances which challenge the effectiveness of rights, principles and values promoted and protected in the EU legal system, regardless of the voluntary obligation assumed by

[387] The same occurs for the concept of 'due diligence'. See the Study on Due Diligence Requirements through the Supply Chains, p. 60. Study on due diligence requirements through the supply chain - Publications Office of the EU (europa.eu).

[388] The phenomenon is illustrated by Harvey with regard to the commodification of culture in David Harvey, 'The Art of Rent: The Globalization and Commodification of Culture', in *Spaces of Capitalism: Towards a Critical Geography* (Routledge 2001).

[389] F van Waarden and M Drahos, 'Courts and (EEpistemic) Communities in the Convergence of Competition Policies' (2002) 9 Journal of European Public Policy 913.

the trader and transferred along the GVC. By acting on the consumer contract and its legitimacy, private autonomy witnesses another materialisation which is not based on the weaknesses of the status of the consumer with regard to contractual obligations, but rather on the factual threat posed to EU law and consumer private autonomy. This obviously goes beyond the danger to victims of externalities of production by a system of production which does not allow consumers to counter-act production practices to which they themselves unwillingly contribute. The effects of the materialisation of private autonomy and contract reverberate along the GVC to the extent that the transaction with the consumer is considered as regards its impact on the production function of GVCs.[390]

The integration of the communication paradigm determines itself into social integration whereby the contractual relation between consumers and traders is materialised in the light of the effects which this relation produces beyond the autonomy of the parties.[391] The contractualised structure of GVCs changes the material significance of the consumer contract by incorporating the transaction in the production organisation: While production organisation through the model of the firm (and the multinational corporation) made it possible to clearly distinguish between the production and the transaction functions of production, the contractualised structure of GVCs dissolves this distinction. As a result, the scope of the consumer transaction, and the associated exercise of private autonomy by consumers, extends to the production function of the organisation model in GVCs. In the light of this material understanding of the consumer transaction, the integration of the communication paradigm from a consumer perspective affirms its meaning: The consumer perspective may legitimately involve elements of the production processes even when these have not been the object of a pre - and/or contractual claim, to the extent that the exercise of private autonomy by consumers regards the production process. The communication paradigm is therefore integrated with a consumer perspective which is oriented towards not only the final product and consumer rights associated with product quality and promises made by the trader, but rather expands and legitimises a broader consumer perspective which includes production processes. The outcome of the integration of the communication paradigm is then mediated by the exercise of epistemic authority of the law, in a way that makes production processes compatible with rights protected at the EU primary law level

[390] See Chapter 1 on the transformation of the organisation of production processes from $T\text{-}P\text{-}T^1$ in the firm to $T\text{-}T^1\text{-}T^2\text{-}T^3$ in GVCs.

[391] Habermas, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

and at the same time coherent with the exercise of private autonomy by consumers. In this sense, the integration of the communication paradigm has the potential to achieve social integration through individual emancipation from the constraints of a communication paradigm which categorises individual autonomy according to the promises of the consumer counterparty,[392] at least with respect to externalities of production processes.

4.3. Epistemic Authority, consumers and the CJEU

In this section, the argument is made that GVCs may be framed as entities which are subject to the transformation of private law in the EU legal system. The contractualisation of production processes which characterises GVCs exposes these entities to the evaluation of their impact on the order established by EU law, and specifically EU primary law. The externalities occurring in GVCs challenge many of the principles and values which lie at the heart of the EU legal system, especially after the incorporation of the Charter of Fundamental Rights in the TEU. Within the Charter, we find several articles which are systematically violated by the atrocities which occur in GVCs, just to name a few: the prohibition of slavery and forced labour; freedom of assembly and association; workers' right to information and consultation within the undertaking; right of collective bargaining and action; fair and just working conditions; prohibition of child labour and protection of young people at work; environmental protection. Obviously, as evident from Chapter 2, the atrocities are committed in countries outside of the EU on many occasions, even if that is not always the case, as sadly proved by instances of domestic labour in Southern Italy or the productive area of Prato, Italy. The consumer perspective however helps to circumvent the limitations of the foreign jurisdictions which victims of externalities of production have to deal with, to the extent that consumers are an integral part of the GVCs. In this sense, it is useful to frame consumers as Mr Crehan acting against *Courage*: Consumers systematically take part in GVCs by entering into contracts which have a negative impact on others, and violate freedoms, rights and principles protected in the EU legal order which consumers may themselves want to protect, or at least not to infringe on. The reasoning applied by the Court in *Courage* may therefore be transposed onto the position of consumers in GVCs: Consumers may well benefit from contracting in GVCs, but at the same time such contracts may contribute to atrocities which are against the protected

[392] F de Witte, 'Emancipation Through Law?' in L Azoulai, S Barbou des Places and E Pataut, *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publisher Limited 2016).

freedom, rights and values of the EU. In this sense, should this situation not trigger the possibility of granting damages to consumers, even if immaterial damage is not completely to be excluded, it would certainly call for an inquiry into other remedies associated with the enforcement of EU law through private law, such as the remedy of injunction. While the effectiveness of antitrust rules may be better ensured through the employment of compensatory remedies such as damages, this may not necessarily be the case for different kinds of infringement of EU primary law.[393]

One legitimate objection to the application of the same approach to consumers in GVCs is that consumers are made aware of the policies adopted by enterprises to prevent and/or repair externalities of production in their GVCs, which are referred to as 'sustainability policies' or 'sustainability standard schemes' in this work). However, in chapter 3, we have also explored how the system of communication which steers the choice of consumers does not really allow consumers to express their own view on the standards to be applied. On the contrary, *the communication paradigm of EU consumer contract law confers a monopoly on the definition of 'sustainability' to corporations by attributing exclusive 'epistemic authority' to them. The direct internal elaboration and/or the employment of external sustainability standards erase possible conflicts over the requirements of sustainability and, therefore, over the remedies against externalities of production processes*. Of all the possible actors who may raise such points, consumers are focused on. However, this claim requires an exposition of the consumer figure. While the remedies in *Courage* and *Scarlet* are applicable to individuals by virtue of a contractual relation, of which they may or may not be part, in the case of consumers, the contract has been defined according to the characteristics which pertain to the status of being a consumer. A digression on these qualities in relation to the argument here advanced is therefore necessary.

5. Conclusive remarks

This chapter has looked into the methods for achieving an integration of the communication paradigm with a consumer perspective. The CJEU has been argued to fulfil a central function in achieving this integration through the exercise of epistemic authority. The argument commenced by describing case law in which the Court engaged in the endeavour

[393] Reich (n 290).

of integrating the communication paradigm of EU consumer law with the consumer perspective and has been furthered by explaining how this integration relates to the contractualised structure of GVCs. In this regard, attention was given to the instances in which the principle of effectiveness has been used for direct application of EU primary law in contractual relationships where the external effects of contracts require an intervention by the Court in order to prevent them from hindering the effectiveness of EU law. The application, or non-application, of this principle calls for the Court to engage in an exercise of epistemic authority with respect to the compatibility of certain externalities of production with the rights of primary EU law, and particularly the ECFR. Because of the lack of ex-ante regulation, this exercise needs to be performed with the integration of the consumer perspective beyond the limits of the communication paradigm of consumer law. By integrating the consumer perspective, the Court is able to evaluate circumstances which would otherwise evade its scrutiny, and are inconsistent with rights, principles and values set at the EU primary law level. The exercise of epistemic authority by the Court, together with the integration of the communication paradigm, has a procedural and a substantive consequence: From a procedural point of view, the judicial forum triggers a deliberative process on the compatibility of certain practices of production processes with EU law. The integration of the communication paradigm brings a new and diverse perspective, that of consumers, on production processes. Through this integration, consumers are able to actively participate in defining features of production processes, even if a specific claim on the matter has been made by the trader. This participation implies a different understanding of consumers and a relational understanding of consumer contracts in GVCs.[394] While a differentiation between different consumer personalities has been taken into account in different strands of legislation, all of these differentiations still share an understanding of the consumer as a fairly passive actor. Even the reasonably circumspect consumer refers to consumers who are circumspect with regard to the information and communication provided to them. This characteristic may be a legacy of the first conceptualisation of the consumer as an actor on the mass market, but it does not necessarily reflect the fragmentation of the EU competences. The chapter suggests that, before making consumers responsible in the sense of charging them with duties regarding the sustainability of their consumption choices, consumers should be given the opportunity to be actively involved

[394] See Chapter 3.

in the definition of production practices beyond the limits imposed on them by the communication paradigm of EU consumer law.

From a substantive perspective, the active participation, achieved by the epistemic authority of the Court, would potentially lead to a more comprehensive understanding of sustainability of production processes, to the extent that sustainability standards are seen as the response to externalities of production. Consumer participation in the scrutiny of production processes has the potential to systematise the criteria for sustainability of production processes while at the same time ensuring the compatibility of a product with EU primary law. In this sense, the integration of the communication paradigm with the consumer perspective through functionalist and systemic interpretation by the Court increases the coherence between market practices as performed in and by GVCs and the systems of rights, principles and values which are thereby promoted, including those enucleated in the provisions of the ECFR.

Finally, some brief remarks have been made with respect to the epistemic value of the integration of the communication paradigm and the materialisation of contractual relations in GVCs. One of the issues problems by production through GVCs is in fact the detachment of production processes from the legal system in which products are circulated, and from the social values which EU citizens and individuals perform on the market. The integration of the communication paradigm with a consumer perspective, filtered by the exercise of epistemic authority by the CJEU,[395] challenges the disconnect between GVCs (market) and the law and consumers (society). While the EU as a result of its limited competences cannot respond ex-ante to social demands that find their *raison d'être* beyond national boundaries,[396] a bottom-up approach, such as the one described in this chapter, provides a compromise with the potential to reconcile the fractures which make the occurrence of externalities of production possible but impossible to be remedied. Quite the contrary, the communication paradigm of EU consumer law not only contributes to eluding responsibility but it even promotes a fragmentation of sustainability standards which results

[395] The CJEU is the ultimate interpreter of EU law, but the author would by no means exclude the role of national constitutional courts in integrating the communication paradigm as interpreters of EU law themselves. See generally the project led by Chantal Mak, Judges in Utopia, and specifically the publications in the special issue of the European Review of Private Law dedicated to this project: *European Review of Private Law 4-2020*.

[396] This is what de Witte calls 'dislocation of the social question' to refer to the disassociation of the political authority to respond to social questions from the administrative capacity to exercise this authority, de Witte (n 301).

in a commodification of sustainability practices. However, the value is ever more fictitious, to the extent that contractualisation of production transfers the responsibility of compliance to suppliers which are often not capable of living up to the requirements. The contractualised structure of GVCs changes the consumers' perspective on production processes: However, this perspective may only be integrated ex-post through a judicial mediation. A judicial (active) mediation which, through the exercise of epistemic authority by the Court, enables consumers to exercise their private autonomy to achieve their desired results beyond the limits imposed on them by the communication paradigm of EU consumer law. The result is a composition of the perspectives which are manifestly disassociated in GVCs: The market, EU law and society, as represented by consumers. The door to reconciliation is opened by the contractualisation of production in GVCs which, contrarily to previous production organisation models, also rests on the decentralised system of consumer contracts.

Finally, the model of integration of the communication paradigm through a bottom-up approach is also coherent with a liberal understanding of social organisation. If the lack of ex-ante regulation of sustainability matters finds its origin in the political project of trade liberalisation pursued and performed during the twentieth century, the decentralised, bottom-up approach cannot be but welcome from this perspective as well. The bottom-up approach in fact builds on the exercise of individual private autonomy, a freedom which can only be praised, pursued and celebrated by the same forces which realised the economic and political paradigm in which GVCs are free to seek their fortune. In this respect, the argument here introduced aspires at revealing a potential emancipatory function of the law in the pursuit of a reconciliation between economy and society, at least with regard to externalities of production processes.

Conclusive Remarks and a Look towards the Future

1. A synopsis of the main argument and major findings

This doctoral dissertation has dealt with the issue of externalities of production in GVCs. In relation to this topic, the main research question analysed the consumer standpoint on externalities of production in GVCs by focusing on the way in which EU consumer law frames this perspective.

The analysis led to the identification of five major findings, which rely on the case study of Levi Strauss and, by induction, on the garment sector. Levi Strauss presents specific features of a GVC where a leading company is present. While the major findings certainly apply to GVCs with a leading company, they can also be extrapolated to apply to contract networks (of which GVCs are an example). For simplicity sake, the major findings in the first half of the conclusion mainly address GVCs which have a leading corporation. However, the conclusions drawn also apply to contract networks, a theory which is further developed in the second half of these final remarks.

The major findings rely on the use of four main concepts: contractualisation, externalities of production, communication and epistemic authority. These three main concepts are interconnected; their interaction offers the outlook of the consumer perspective on externalities from a descriptive as well as a normative point of view.

2. Contractualisation in GVCs brings consumers closer to production processes

The first major finding is descriptive in nature and relates to the position of the consumer vis-à-vis the contractualised structure of GVCs. In this respect, the dissertation concludes that the GVCs' expanded scope through contractualisation ranges from production to consumption, from the producer of raw materials to the final consumer, thereby directly linking consumption to production. This connection covers externalities of production insofar as sustainability policies are incorporated into contracts with suppliers: through this incorporation, the leading company regulates the production and is able to claim towards consumers to have a 'sustainable production' at the same time. The modality in which this connection affects consumers is determined by consumer law and policy.

As a result, consumer law affects the mode in which consumers may – or may not – address the externalities of production which they contribute to causing by participating in the GVC. This finding is presented in Chapter 1, which introduces the GVCs as a different production model in comparison to previous models of the firm and the multinational enterprise. The historical review of different business organisation models is presented through the example of Levi Strauss, the oldest denim brand.

The chapter illustrates Levi Strauss' *three* different production modes, first transitioning from the firm to the multinational enterprise, and later from the multinational enterprise to the GVC. The last stage so far is characterised by a full contractualisation of production processes, whereby Levi Strauss no longer owns a single factory and runs its global production by entering into contractual agreements with suppliers, retailers, traders and other actors in the chain. The story of Levi Strauss highlights the contractualisation of production as the key and distinctive feature of GVCs. As the name *G*VC itself suggests, this contractualisation expands rather than constricts the scope of its business activity in relation to not only the territorial reach of the chain but also the actors which the chain affects directly or less directly. As a result, consumers are concerned with the activities performed in GVCs, therefore including externalities of production. Consumer law defines the specifics of this interaction.

3. The political reach of the contract in GVCs

The second major finding of the present dissertation casts light on the political reach of the contract in the context of GVCs. This finding results from the analysis conducted in Chapter 2 where the concept of externalities is thoroughly developed. The chapter on the one hand describes the different sets of measures – including non-binding international law measures, corporate social responsibility and tort law– which have been adopted to defy externalities. On the other hand, this illustration revealed that the persistency of externalities, despite the efforts made to combat them, is the direct result of a regulatory framework characterised by the intervention of several political actors in their own sphere of competence: nation states through national law; private parties through private regulation; international organisations through economic law, labour law or environmental law, depending on their mandate.

Looking at the regulatory framework in its entirety rather than at its fragments exposes that the current order which regulates externalities of production relies on the nation state to a

large degree. The narrative of globalisation brings the decreasing role and capabilities of the state into the limelight. This result becomes particularly obvious in relation to externalities of production. The analysis of the political and economic objectives of trade, contract and production before and after the rise of GVCs highlights that states progressive withdrawal from the transnational regulatory arena did not remain without consequences, and was partially intended. The rise of GVCs has exacerbated the circumstances which rendered the national regulatory order on externalities ineffective. The fact that no measure has been effective and successful in dealing with externalities for 70 years indicates a lack of political willingness on the part of state actors to intervene in favour of a more balanced approach which would prioritise the dignity of human labour and environmental protection.

In this sense, the contractualisation of the process from production to consumption triggered by and in GVCs shifts the focus towards contract law and, even more specifically, towards the provisions occasioned by the contractual relationship constituting the GVC with respect to externalities of production. In this way, contractualisation achieves a political reach through the incorporation of voluntary sustainability policies in the contracts along the GVCs

3.3. Contract as communication paradigm

The incorporation of voluntary standards in contracts along the GVC allows the leading company to claim to have a sustainable production towards consumers. In this sense, it is the contractualisation of production which connects the production to consumption; the means through which this connection is achieved, is communication. Contracts along the chain perform an act of communication whereby rights and obligations are distributed along the chain. With respect to consumers, the constellations of communication performed through contractualisation are framed by consumer law. Consumer law regulates the scope and the mechanisms by which communication interests consumers. These rules provide for some mandatory elements which need to be communicated to the consumer, that is, mostly information duties, or regulate the terms of this communication, such as standard terms. None of these relate to externalities of production and sustainability: This area can be addressed or not addressed to the extent that the leading company desires to do so.

For its part, consumer law regulates the ways in which the communication between consumers and GVCs unfolds. Because no requirement has been established with regard to externalities of production, consumer law can only provide consumers with any remedy

when the leading company has voluntarily expressed claims on the matter, and only to the extent that it does. This means that if a leading company such as Levi Strauss decides to commit to a no child labour policy, but fails to commit to a building safety policy, the latter cannot be contested by consumers. In this sense, consumer contract law conforms to a communication paradigm wherein consumer claims are limited to the information and instructions received by consumers. The result is that consumer contract law leaves the authority to define and specify this connection in the hands of the leading enterprises by relying on the communication which the latter direct towards consumers.

Therefore, *the communication paradigm delimits the consumer claims on externalities to the communication received, including that provided in the sustainability policies contractually adopted by leading enterprises.*

3.4. Exercise of epistemic authority of leading enterprises over consumers

The fourth major finding is that the contractualisation within the GVC brings consumption back into the picture and provides companies with the epistemic authority to characterise the requirements of sustainable production with *implications for consumers and for the legal order at large since the communication paradigm of consumer law will attribute legal relevance to the concept of sustainability as voluntarily defined in each different sustainability policy*.

The exercise of epistemic authority is indivisible from contractualisation: Without the latter, sustainability policies would remain a form of private self-regulation. However, the contractualised structure of GVCs requires companies to include their sustainability policies in the contracts along the chain: This inclusion represents the actual adherence to the obligations voluntarily assumed in the sustainability policies. Due to its communication paradigm, all that consumer law requires from companies in order to fulfil the obligations which they voluntarily assumed, is to incorporate these obligations into contracts with suppliers along the chain. As a result, contractualisation in GVCs provides companies with the opportunity to exercise epistemic authority over consumers insofar as the private voluntary regulation becomes the benchmark against which externalities of production and sustainability can be assessed by consumers. The authority is therefore conferred by the contractualisation of such voluntary obligations, while the epistemic effects are caused by the communication paradigm which frames consumer law.

When a provision regulating an externality is contractualised in the GVC, consumers will have to refer to that provision in its scope and meaning as intended by the actor adopting it – when they wish to denounce the externality. The opportunity to contractualise provisions on externalities of production gives leading companies the authority to characterise and specify what falls under their own concept of sustainability and the externalities which matter to that end. Consumers may have a different view on what sustainability really means and on the externalities of production which must be remedied or avoided in production processes. Consumer communication is however limited by the communication paradigm of consumer law, which circumscribes consumer claims to what has been communicated to them (be it mandatory or not). The legal validity of the provisions regarding externalities of production for consumers, and therefore for the EU legal order to the extent that consumer law can be deemed the point of contact between the EU legal order and GVCs with respect to externalities of production, is the one defined by the corporation adopting the provisions. This may result in a frustration of consumer expectations on externalities to the extent that their own perspective is not contractualised in GVCs. This leads to a dissonance between the merger of production and consumption realised by GVCs and the potential for consumers to use their contractual relationship to have a bearing on the requirements to be respected in production processes. The communication paradigm causes an issue in the normativity insofar as it contributes to maintaining a discrepancy between consumer involvement in GVCs (through contract) and the contractual means awarded to them in order to lead towards a convergence between production processes and principles and compliance with values and principles protected at the EU level, the legal order where their existence as consumers is realised and constructed.

3.5. The CJEU provides for the integration of the communication paradigm ex-post

The fifth finding reveals how the ECJ is interfering in the unilateral exercise of epistemic authority by corporations so as to reintroduce the consumer perspective. The CJEU holds the position to exercise epistemic authority of its own with respect to EU legal concepts brought into play by externalities of production which involve EU law rules, principles and values. In this sense, the Court has the opportunity to integrate the communication paradigm with a consumer perspective on externalities of production. A restored inclusiveness of the legal character of the law is present in this integration process: If externalities of production are unilaterally regulated in contractualised GVCs, meaning that

consumers are excluded from the process, the legal concepts used to design this regulation will be the reflection of a partial and biased position of enterprises on sustainability and externalities. The integration of the communication with a consumer perspective restores the inclusive character of the law in the post-contractual phase.

Chapter 4 builds on this claim by relying on a combined reading of several cases of the Court of Justice of the European Union (CJEU). Even though not all the selected cases concern externalities of production, they still demonstrate the Court's attitude towards cases of contractualisation and provide examples of integration and non-integration of the communication paradigm with the consumer perspective. The existing case law does not explicitly take GVCs into account but rather relies on contractualised relationships, demonstrating the opportunities to integrate consumer law and externalities into the epistemic authority of corporations. However, contractualisation is not GVC specific with the case law selected presenting instances of contractualisation outside of GVCs. In these instances, the Court considers the contractualised structure as a whole rather than looking at its separate elements. As a result, the case law shows that the Court is inclined to integrate the communication paradigm with the consumer perspective in cases of contractualisation. This integration is achieved by means of the Court's own exercise of epistemic authority through the interpretation of EU principles and values which are affected by externalities of production.

The Court offers the space for recovering the inclusive character of the law, as opposed to the partial and biased voluntary sustainability policies situation, by triggering an integration of the communication paradigm with different perspectives, in the light of the principles and values which belong to the legal order where consumers engage in cross-border transactions.

4. Remaining considerations on contractualisation, externalities communication and epistemic authority

The connection among contractualisation, externalities, communication and epistemic authority highlighted in this dissertation propels reflections and prescriptions which reach beyond the findings developed in the core chapters. The final part of this conclusion is dedicated to these considerations, with the hope that they can inspire further research and even more concrete initiatives.

4.1. Re-imagining the consumer

This dissertation has touched upon the theme of the 'image' of the consumer in more than one of its principal passages. These passages evince that the argument relies to a large degree on the image of a responsible consumer who struggles to find a place in the current legal framework.[397] While the argument starts from the assumption that responsible consumers populate the internal market and, normatively, deserve to find a venue to express their perspective on externalities of production, the claim goes further by actually also addressing the non-responsible, average and vulnerable consumer, who does not have the means (be it material or immaterial or often both at the same time) to develop a sense of awareness with regard to externalities of production. Rather than arguing for an emerging class of responsible consumers, this thesis argues in favour of creating the conditions for every consumer to be responsible.

In this regard, the thesis to a certain extent questions the fairness of assuming that the willingness to responsibly consume must be positively expressed or else be considered non-existing or even be taken as a willingness to consume irresponsibly. Many consumers are not aware of the impact of their consumption and would probably never expect it to be negative to the extent that it is. We can define these consumers as passive ones in the sense that they passively accept goods for what they are, without further investigating the processes behind the production of such goods and the impact of consumption.[398] No matter the desirability of consumers adopting a more proactive approach to responsible consumption, not all consumers are able to do that. Consumers originate in a variety of different social classes which may result in a lack of consciousness with respect to the underlying implications of their consumption for third parties. In this light, is it fair that consumers, unless stated otherwise, cannot expect their consumption to be sustainable or at least as sustainable as possible?

In this sense, the argument advanced in this dissertation is similar to Norbert Reich's view that EU consumer protection '*extends these liberties as "freedom of choice and decision" to "passive citizens*" where the latter is defined as '*the "*home, oeconomicus passivus*" who is entering into transactions to satisfy his needs without producing the product or service himself*'.[399] Along similar lines, the integration of the communication paradigm with the

[397] In this sense, 'responsible' and 'sustainable' consumption are synonyms.

[398] Micklitz, Reich and Rott (n 23).

[399] Micklitz, Reich and Rott (n 23) 50.

consumer perspective suggested in this dissertation extends the effects produced by active and responsible consumers, who are those whose perspective is taken into account in the integration process, to passive consumers. This is ultimately a shift in point of departure: Instead of starting from the premise that consumers care only about the price – assuming that this consideration corresponds to EU values in the first place, which could be contested –, and that any other priority should explicitly be manifested, this dissertation argues for overturning this assumption to start from the expectationthat all consumers aim to consume responsibly.

4.2. Of price and beyond

The shift of premise suggested above would immediately have to confront several studies which prove that despite consumers' willingness to consume responsibly, the majority of them still makes purchasing decisions mainly based on price. [400]

This contradiction does not affect the validity of the argument that consumers need to be granted the opportunity to express their perspective on externalities of production. The claim advanced in this thesis does not simply aim to support responsible consumers in expressing their sustainability-related concerns. On the contrary, the 'reprobation' for the communication paradigm precisely addresses the problematic aspects of the assumption that consumers who are driven by price, would not be willing to consume sustainably. The conclusion that consumers who follow the price are willing to consume unsustainable products cannot directly be drawn. This conclusion: a) lowers the bar of what is normatively acceptable as a consumer product; b) does not account for those less-informed consumers – *passive consumers* – who would never expect (and suspect) to consume unsustainable products. Both points are normatively problematic: lowering the bar of acceptability of circulated consumer goods results in what can be perceived as a commodification of sustainability practices. If sustainability remains the exception rather than the rule on what

[400] S Sala and others, 'Indicators and Assessment of the Environmental Impact of EU Consumption Consumption and Consumer Footprints for Assessing and Monitoring EU Policies with Life Cycle Assessment' (Joint Research Centre 2019) EUR 29648 EN; T De Magistris and A Gracia, 'Consumers' Willingness-to-Pay for Sustainable Food Products: The Case of Organically and Locally Grown Almonds in Spain' (2016) 118 Journal of Cleaner Production 97; FA Konuk, 'Consumers' Willingness to Buy and Willingness to Pay for Fair Trade Food: The Influence of Consciousness for Fair Consumption, Environmental Concern, Trust and Innovativeness' (2019) 120 Food Research International 141; SH Min, SY Lim and SH Yoo, 'Consumers' Willingness to Pay a Premium for Eco-Labeled LED TVs in Korea: A Contingent Valuation Study' (2017) 9 Sustainability 814; W Gwozdz, K Steensen Nielsen and T Müller, 'An Environmental Perspective on Clothing Consumption: Consumer Segments and Their Behavioral Patterns' (2017) 9 Sustainability 762.

is found on the market, then it will remain possible to attribute exceptional value to sustainable products. This is not to deny that the cost of production for sustainable products is higher than those of non-sustainable products. However, the risk of commodification of sustainability practices is concrete and cannot be ruled out to be already happening, for example in the food sector where organic products usually are found in separate, dedicated areas in most supermarkets. The higher costs of these products makes them non-affordable for some portion of the population whereby the presumption is reiterated that consumers mainly make their decisions on the basis of the price of products. Many hypotheses should be explored before definitively concluding that price is the element determining a consumer decision: For example, the fact that price is more prominently visible to consumers compared to other indicators is something which may affect consumer decisions. Over the last decades, behavioural studies have shown that the easier a product or information is to get, the more it will influence the final decision.[401] Without commodification and/or with a different system of displaying information about a product, it would perhaps become easier to see a convergence between the stated willingness to consume more sustainably and actual patterns of consumption.

The two suggestions of lack of commodification and non-price-centred product information reflect two possible approaches to implement the shift in premise suggested in the previous paragraph: The barrier to commodification requires the identification of a threshold below which economic value should be 'extracted'.[402]

The consideration of a system of information less centred on the price and more on other 'values', calls for a more moderate approach. This system would still rely on a preference-based regime where each type of information related to the product, production and transaction should be considered equally important so that consumers' priorities could be more reliably taken into account. Both suggestions present advantages and disadvantages. On the one hand, the prevention of commodification has the advantage of raising the bar of what can be considered acceptable, thereby preventing all consumers – regardless of their willingness and/or material and immaterial ability to consume responsibly – from consuming irresponsibly and monetisation of consumer preferences. On the other hand, the

[401] RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press 2008).

[402] M Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (Allen Lane, an imprint of Penguin Books 2018).

prevention of commodification requires a rather interventionist approach to the economic exchange to the extent that it would reduce the range of choice for consumers. Besides being in violation with international economic law,[403] the lack of discussion on this solution can also be seen as a lack of political willingness to resolving the issue of externalities of production in transnational economic activities. However, as has been argued before, this choice can result to be normatively problematic to the extent that consumer choice is held responsible for the protraction of externalities in global production systems.[404] The conundrum between legal (international economic law), political (interventionism vs non-interventionism) and normative (inclusive regulation) constraints to prevention of commodification makes market-based solutions more appealing to regulators.

Market-based approaches also present advantages and disadvantages. While they are more aligned with the principle of free choice, they nevertheless fail to grasp the inherent limitation to the exercise of this choice. One example which has been discussed in this contribution, is information duties.[405] The way in which information is displayed might be one way to enhance the empowering effect of such rules. Yet, much will depend on how the information is processed and the different capacities of consumers to handle the information need to be taken into account. Nonetheless, this formal initiative does not necessarily involve the same improvement on the substance. Despite the empowering effects which the introduction of information rules has provided to consumers, in the absence of a commonly agreed identification of sustainability requirements, this regulatory tool is proving to be one of the sources of commodification when it comes to sustainability practices with all the epistemic effects which have been described earlier.

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[403] RM Unger, *Free Trade Reimagined : The World Division of Labor and the Method of Economics* (Princeton University Press 2007); J Dine, *Companies, International Trade, and Human Rights: Janet Dine* (Cambridge University Press 2005). Less critical in this respect: C Thomas, 'Should the WorId Trade Organization Incorporate Labor and Environmental Standards?' (2004) 61 Washington and Lee :aw Review 347.

[404] M Durovic and F Lech, 'International and Transnational Consumer Law on Sustainable Consumption' in A do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption* (Springer International Publishing 2020); PG da Fonseca, 'The Shift from Consumer Protection to Consumer Empowerment and the Consequences for Sustainable Consumption' in A do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption* (Springer International Publishing 2020).

[405] Hanna Schebesta and Kai Purnhagen, 'Limits to Behavioural Consumer Law and Policy: The Case of EU Alcohol Labelling' and other several contributions in Klaus Mathis and Avishalom Tor (eds), *Consumer Law and Economics* (Springer International Publishing 2021).

Whether through a market-based approach or otherwise, moving away from a price-based consumer economy would require a profound reconsideration of the current economic paradigm with respect to values expressed and promoted on the market.

4.3. GVCs and judicial interventionism

The potential of the regulatory approach followed in this dissertation is not merely the result of a theoretical exercise. On the contrary, the growing trend of judicial activism is based on the premises of the case law analysed in chapter 4. Recently, the Urgenda case has had some resonance in the field of environmental law. In 2015, the Urgenda Dutch Foundation initiated a litigation before the District Court of The Hague to bind the Dutch Government to adopt measures to reduce gas emission by 25 per cent (compared to 1990's levels) by the end of 2020. The dispute ended with the judgement delivered by the Dutch Supreme Court in December 2019 wherein the Court upheld Urgenda's requests by virtue of the obligations deriving from articles 2 and 8 of the European Convention of Human Rights. Similar cases have been presented before national courts in several EU member states and beyond. From the perspective of the main concepts used in this dissertation, judicial activism is not only empowering citizens but it is also providing courts with the opportunity to exercise epistemic authority over legal standards of protection which would otherwise remain largely unquestioned. In cases which invest private companies, judicial activism is even susceptible of directly affecting the ways in which GVCs operate, as it has been the case for the Dutch lawsuit against Shell brought by the victims with the support of the Dutch foundation Milieudefensie, where the decision of The Hague Court of Appeal has imposed a positive obligation on Shell and its subsidiary involved in the case Shel Nigeria) to adopt a leak detection system in its extractions sites. On the same line, in May 2021 The Hague District Court has issued a path-breaking judgement in response to the class action brought by several Dutch NGOs against Shell asking the company to reduce its CO2 emissions. The District Court accepted the claimants' argument and ordered ordered Shell to reduce its CO2 emissions of 45% by 2030 basing the reasoning on standard of care to be taken by Shell, both for its own activities and that of the entire group,[406] towards Dutch citizens and residents represented by the NGOs, in order to contribute to the achievement

[406] *Milieudefensie et al. v Royal Dutch Shell PLC*, ECLI:NL:RBDHA:2021:5339.

of the environmental protection objectives set out in international and national Dutch legislation.

In this sense, these examples of judicial activism in the shape of environmental litigation are example of how courts can turn into a presidium at the cross-roads between law and policy, ensuring that legal principles and obligations are effectively respected while being confronted with some kind of non-legal knowledge and discourse. They reveal the existence of a collective discourse which the law has not yet truly captured in a systematised manner on account of the reasons presented. As long as compliance with the law can be safeguarded, courts are filling these 'grey' areas by ensuring an organic assimilation of the activists' claims into the legal discourse, whereby granting credibility to these positions and re-opening the political conversation on existing legal policies. The *Psagot* case offers a concrete example of how this assumption takes place: Labels indicating the country of origin are not directed towards consumers in the first place, and they certainly are not meant to convey any information on the political circumstances which the country is experiencing. Nonetheless, that is the matter on which the CJEU was asked to decide in *Psagot*. The Court based its decision on extra-legal knowledge in the sense that it attributed a function to labels on country of origins which differed from the one which statutory rules confer to such labels. This incorporation of extra-legal knowledge into the legal system was only possible insofar as international law considered Israeli settlements to be illegitimate and the EU had taken a position in that sense. This exercise will therefore not always be possible but, when it is, the Court is able to incorporate extra-legal views into the legal order.

4.4. Post-interventionist regulatory approach through the judiciary

Judicial interventionism in the format articulated in this dissertation can be read as a form of post-interventionist regulatory approach to externalities of production. To the extent that regulatory approaches can be placed in a spectrum between interventionist and non-interventionist approaches, the present argument falls in between these two extremes. This is typical of post-interventionist approaches, i.e., those regulatory strategies which delimit the extent to which private actors can regulate themselves without reaching the point of state interventionism in private transactions. A representative example of post-interventionist regulatory tools is mandatory information duties in consumer law, which impose a requirement on the trader while enhancing the private autonomy of consumers at

the same time.[407] The approach adopted in this contribution presents elements of either instance: it can be considered interventionist to the extent that it promotes the re-balancing of private authority in the light of EU principles and values, whereas it can be considered non-interventionist to the extent that this re-balancing is triggered by judicial law-making. The most common post-interventionist regulatory technique has been information rules. However, the communication paradigm described in this dissertation has indicated the possible shortcomings of relying on information duties: In areas such as that of externalities of production, the regulatory role of information cannot prevent enterprises from exercising epistemic authority over consumers, with potential epistemic effects for the EU legal order. As has been argued earlier, in order to remedy these effects, a post-contractual dimension needs to be foreseen as this is the only phase where the consumer perspective can be taken into account. In contrast to information duties, the post-contractual phase allows for an exchange of communication between the parties involved in GVCs, an exchange which results in a restored inclusiveness of the law which has been compromised in GVCs due to the voluntary character of sustainability policies. Inclusiveness is possible to the extent that it promotes participation of several actors and it allows the notion of 'consumer' to include responsible consumers by way of a bottom-up approach. In this sense, judicial interventionism brings a normative value of its own by enabling a form of bottom-up participation ex-post which opens a space for consumers to participate in regulatory matters, whereby returning its inclusive and normative character to the law.

5. Projections for the future

Part of this dissertation has been written during the course of the Covid-19 pandemic. Inevitably, some considerations are extrapolated from the events which have impacted humanity over the past twenty months. Particularly at the beginning of the pandemic, when the entire world was essentially not prepared to face the emergency, the feeling was that of a world turning upside down. The sudden change of pace revealed and exacerbated some of the economic failures of GVCs which had this far been hidden by the regularity and comfort of a rhythm which somehow concealed the injustices and struggles occurring in the context of GVCs. The simultaneous lockdowns in countries with high levels of

[407] N Reich, 'Diverse Approaches to Consumer Protection Philosophy' in DB King (ed), *Essays on Comparative Commercial and Consumer Law* (Fred B Rothman & Co 1992); F Cafaggi and HW Micklitz (eds), *New Frontiers of Consumer Protection: The Interplay between Private and Public Enforcement* (Intersentia 2009).

consumption showed the precipice on which GVCs in the garment sector teetered.: In order to avoid economic loss, companies stopped paying for garments already produced, suspending their contracts with suppliers at the bottom of the chains.[408]

The hardship faced by workers in the garment sector during the pandemic tells a story about the contractualisation of production processes: First of all, it tells a story about the economic system's reliance on consumption. Not only is more than 50 per cent of EU GDP based on consumption,[409] but the pandemic also showed that stopping consuming is not (yet) a 'sustainable' strategy to move towards sustainability. The drop in consumption volumes caused a humanitarian crisis in countries like Bangladesh, where the export economy relies heavily on consumption in foreign markets such as the European one. Secondly, but not less importantly, the pandemic showed that contracts as legal tools are not neutral means of bringing economic relationships into the legal world. The contract is a tool governed by rules of its own, such as those relating to termination and suspension of contract. Usually, these rules remain valid unless agreed otherwise.[410] Contractualisation is therefore not merely the 'glue' holding parties together in the production process, but it has a meaning of its own involving a form of 'governance'. This is a key aspect emerging from the findings of the thesis which needs to be further developed in future research. This not only holds true for the field of GVCs but also, more broadly, for global production networks, of which GVCs are considered to be an example for the purposes of this contribution, as has been clarified multiple times. The task required in this sense is however to try not to remain focused on the single contractual elements forming GVCs and production networks in general, but to conceive contract law, with its own specific rules, as an opening for looking at the broader structure which support global production. As enunciated in this dissertation, contract law represents a portion of the framework within which networks unfold: Contract law meanders through the system consisting in national laws, international economic law, private regulation, tort law, private international law, and company law. It contributes to the overall results which are those enounced in this

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[408] M Anner, 'Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains' [2020] Penn State Center for Global Workers' Rights (CGWR); ML McNamara, 'World's Garment Workers Face Ruin as Fashion Brands Refuse to Pay $16bn' *The Guardian* (8 October 2020).

[409] Household consumption by purpose - Statistics Explained (europa.eu)

[410] What happens in practice is impossible to confirm without obtaining access to the contracts. However, the situation during the Covid pandemic leads to the conclusion that, whatever the arrangement, the agreements include the option to suspend payment or to terminate contracts in exceptional circumstances.

dissertation for externalities of production: ineffectiveness of remedies and exercise of epistemic authority with regard to the legal relevance of externalities of production.

Similarly, the role of consumer contracts has a broader reach than the one which is reflected in the still dominating conception of consumer law: In this sense, the dissertation suggests that focusing on information duties as a form of post-interventionist regulation is not enough if the objective is that of giving the consumer more space in the structures of GVCs and production networks at large. Seemingly still the preferred regulatory tool to provide consumers with regulatory impact as shown in the European Green Deal,[411] information duties treat the consumer contract in production networks as a part of the broader structure whereby reducing the consumer contract to a precipitate of this broader structure. This approach conceals effects such as those here described as an exercise of epistemic authority, which is the outcome of the interaction between consumer law and contractualisation of private regulation.

However, an understanding of consumer law as a constitutive means of the existing overall framework structuring global production suggests that consumer law can be studied in its further potential. Therefore, some projections can be made on institutional, substantive and procedural configurations of GVCs and production networks.

From the institutional point of view, this dissertation has revealed that epistemic authority depends on the lack of a commonly agreed definition on what sustainability should entail whereby the content and scope of the term depend on the definition which it assumes in the sustainability policy voluntarily adopted by the single leading enterprise which is contractualised in the GVC. The contractualised structure of GVCs and networks only requires for these voluntary obligations to be incorporated into contracts with suppliers along the chain in order to be fulfilled in the eyes of consumers. Once incorporated, these private regulations overlap with contract rules, creating a combination of which the outcome is difficult to predict. Future research can be directed towards further elaboration on the relationship between overlapping systems of private regulation in order to acknowledge the political reach of the contract emerging both within the bounds of, and beyond the single contractual relationships constituting the networks. While this relationship is clear in GVCs due to the presence of a leading company which determines

[411] 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640 Final' (n 196).

the substance of the political reach of the contract for the entire chain, in contract networks, the overlapping between private regulation and contract may be concealed by their decentralised structure on account of the lack of a leading company. The possible result of so called network liabilities has been extensively discussed but still calls for a solution. [412] At the same time, from a consumer perspective, future research on networks and their institutional design between private regulation and contract might provide consumers with a different stance for their inclusion as actors of contract networks.

From the substantive point of view, the dissertation has explored how contractualisation opens the way to the exercise of epistemic authority. This is the effect created by the combination of the communication paradigm with self-regulation insofar as the voluntariness of sustainability policies leaves the authority on whether to adopt a sustainability policy in the first place, and to decide what to include and exclude from this policy, in the hands of the corporation. In other words, contractualised voluntary self-regulation combined with the communication paradigm results in a broad exercise of epistemic authority in relation to the requirements of sustainability and the relevance of externalities of production for consumers. The exercise of epistemic authority is the essence of the substantive consequences created by contractualisation of production and the communication paradigm: This dissertation has only provided a glance at the dynamics which link contractualisation, communication and legal knowledge by focusing on GVCs. However, epistemic authority derives from contractualisation, which is a phenomenon that extends beyond GVCs and includes contract networks. This means that the findings of this work can hopefully lead to a stronger perception of the interrelation between contract and epistemic authority in areas where factual circumstances having normative implications have not been substantively incorporated in the law.

From the procedural perspective, consumers are not involved in the process of drafting sustainability policies and are only able to accept what is voluntarily included by the corporation. In this sense, the notion of sustainability which is valid for consumers is the one emerging from the private sustainability policies, and not a definition resulting from an inclusive process for the development of a definition of sustainability which addresses externalities of production in accordance with the standards of EU law.

[412] Witting (n 7); Christian A Witting, *Liability of Corporate Groups and Networks* (2018).

Looking at consumer law as part of the framework, rather than as a self-standing body of rules, allows reconsideration of not only the role which consumers may take on in opposing externalities of production but also the connection between private self-regulation and state legal orders: Consumer law may provide the connection to a territorial dimension which GVCs and production networks seem to neglect. Instead of focusing on the single contractual relationship, consumer law opens the way to a more complex interrelation between network actors, state legal orders and individual consumers which can be addressed by the involvement of the judiciary as suggested in this work. However, this should not be the only possible solution, even if it is at present the most realistic. The example of technical standards for product safety[413] with, albeit non-binding, consultation of consumer representatives such as ANEC and CEN-CENELEC offers a different possible outlook. Today, it may be constrained by trade law, yet it may be able to direct future research towards a different understanding on how networks execute their activities in relation to externalities of production.

At the intersection of these three frameworks lies contractualisation's potential for looking at production networks through a holistic lens capable of considering global production without falling into a fragmented analysis, while not forgetting the specific political reach of the contract in globalised production networks. The hope is that this dissertation has taken the first steps in this direction and provided a starting point for future research to build on in order to engage with a matter which lies at the heart of normative principles and values in the EU legal order.

[413] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation 2012; Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety 2002.

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