Teleological interpretation of the Services Directive

Towards a “genuine” internal market?

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Abstract

In the turbulent process that led to the adoption of the Services Directive, the Member States debated the direction of the EU's economy. They rejected the first Commission proposal because they feared excessive economic liberalism. The final draft, it was assumed, embodied a reconciliation of the Anglo-Saxon model with the Continental Approach. In the case of *Appingedam*, the Court of Justice of the EU articulated its understanding of the aim of the Services Directive. It spoke of a "*genuine* internal market for services" which, "above all", presupposes the elimination of obstacles to the exercise of the freedom of establishment by service providers in another Member State or in their home state. This thesis questions the self-evidency with which the Court portrays its understanding of the aim of the Services Directive that strongly resembles an Anglo-Saxon approach to economic policy.

Although the case-law of the Court is known for its "integrationist" tendency, which is attributed to its frequent recourse to teleological interpretation, the foundations of the teleological interpretation are rarely identified. This thesis offers a methodology for the evaluation of judicial interpretations of legislative aims, intended for teleological interpretation, and subsequently applies this methodology to the Services Directive. It analyses the Court's legal reasoning in the case of *Appingedam* in light of the four methods of judicial interpretation and searches for a justification of the systematic expansion of free movement law in the Union's constitutional framework. Can the internal market narrative justify the application of free "movement" law in situations that are void of any cross-border element? Is integration – "the ever closer Union" – a goal in itself? While this thesis offers an answer to these fundamental questions, it did not find a credible narrative in the Union's constitutional framework to justify the described maximizing tendency. From a combination of (contrary) normative and descriptive theories on teleological interpretation, it deduces outer limits to judiciary discretion, on the basis of which the legitimacy of the Court's interpretation of the aim of the Services Directive is contested.

Index

Chapter 1: Introduction

In the case of *Visser Vastgoed v Appingedam* the Court of Justice of the EU (hereinafter: the Court) articulated its view on the aim of the internal market for services.[1] The Court envisaged a "genuine internal market for services"[2] which requires:

> "*above all* the elimination of obstacles which are encountered by providers in becoming established in the Member States, whether in their own Member State or in another Member State (....)"[3] [Emphasis added]

In light of this broader goal of a "genuine internal market for services" the Court interpreted the aim of Directive 2006/123/EC on Services in the Internal Market (hereinafter: the Directive):

> "Directive 2006/123 (…) lays down *general provisions* intended to *remove* restrictions on the freedom of establishment for service providers *in Member States* (…) in order to contribute to the completion of a *free and competitive internal market.*"[4] [Emphasis added]

There are several reasons why one's attention ought to linger on the implications of these words. The one that stands out most is the Court's assumption that the achievement of a *genuine* internal market presupposes the application of the Directive also in purely internal situations. The internal market is defined in the TFEU as an "area without internal frontiers."[5] It protects the free *movement* of goods, persons, capital and services across borders from being adversely affected by discrimination on the basis of nationality.[6] The recognition that the Directive applies in purely internal situations implies that the Court has formally departed from the principle of non-discrimination on the basis of nationality as the fundamental cornerstone of free "movement" law. Apparently, the pursuit of a *genuine* internal market requires the elimination of barriers to economic activity *per se*.

Whereas the integration of markets in principle leaves Member States' substantive economic policies unaffected, the Court's interpretation of a genuine internal market presupposes the EU-

[1] Joined cases C-360/15 and C-31/16 *Visser Vastgoed v Gemeente Appingedam* [2018] ECLI:EU:C:2018:44.
[2] Ibid, paras 106 and 122.
[3] Ibid, para 105.
[4] Case C-119/09, *Société Fiduciaire* [2011] ECLI:EU:C:2011:208, para 33; Case C-57/12, *Fermarbel v COCOM* [2013] ECLI:EU:C:2013:517 para 31; Joined cases C-340/14 and C-341/14, *Trijber and Harmsen v Amsterdam* [2014] ECLI:EU:C:2015:505, para 44; *Appingedam* (n 1), paras 104 and 122.
[5] Article 26 TFEU.
[6] Article 18 TFEU; Barnard C, *The substantive law of the EU. The four freedoms* (6th edn, OUP 2019) 201.

wide acceptance of a particular economic theory, viz., neoliberalism, that perceives the unhindered pursuit of individual economic rights as the best way to maximize social welfare and, as a natural corollary thereof, the (active) pursuit of a free market by the government as the best economic policy.[7] This neoliberal approach to welfare maximization is put under increasing scrutiny, especially in light of the worldwide threat of climate change and the recent emphasis on the correlation between inequality, well-being, and economic growth.[8] Salient detail: in light of the polemical adoption process of the Directive, the Member States debated the preferred direction of the EU's economy. They rejected the Commission's first draft, commonly referred to as the "Bolkestein Directive," which gravitated towards the Anglo-Saxon economic model based on the classic 18th century liberal ideas of Adam Smith. Member States feared the facilitation of social dumping and the encouragement of excessive economic liberalism, where "low cost, low standard, Eastern European Labour" would undermine state practices of higher levels of consumers' and workers' protection and the European Social Model.[9] Taking the first provision of the Directive at face value, it was assumed that the final version of the Directive embodied a reconciliation of the Anglo-Saxon model with the Continental Approach, which allows for more state interventionism in order to protect of workers and consumers.[10]

In light of the abovementioned context, this thesis questions the self-evidency with which the Court portrays its particular interpretation of the aim of the Directive that strongly resembles an Anglo-Saxon approach to economic policy. In the context of migration law, Thym showed that judicial statements on the aim of a legislative text are rarely a clear-cut pronunciation of a pre-defined policy choice made by the legislature.[11] Unlike specific legal provisions, judicial interpretations of legislative aims are barely accompanied by interpretative guidance.[12] That is unfortunate, especially considering the fact that the interpretation of legislative aims can influence endless judicial outcomes through the teleological interpretation of specific legal provisions, i.e. the interpretation of legal norms in light of their purpose (*telos*).[13] Because

[7] Kaupa C, 'Maybe not activist enough? On the Court's alleged neoliberal bias in its recent labor cases' in: Dawson M, Witte de, B and Muir E, *Judicial activism at the European Court of Justice* (EEP 2013).
[8] Ibid.
[9] Barnard C, 'Unravelling the Services Directive' (2008) 45 CMLR, 323, at 327-330.
[10] Ibid; Article 1 Directive.
[11] Thym D, 'A bird's eye view on ECJ judgments on immigration, asylum and border control cases' (2019) 21 EJML (2019) 166, at 184.
[12] Ibid.
[13] Chalmers D, Davies G and Monti G, *European Union Law* (CUP 2014) 176.

judicial interpretations of legislative purposes transcend the individual case, the methodology underlying the reconstruction of a legislative purpose is all the more relevant.

This thesis aims to construe the Court's hidden legal reasoning underlying its interpretation of the aim of the Directive from the Court's substantiation of its judgment in the case of *Appingedam*.[14] The case of *Appingedam* concerned a patently non-discriminatory measure, a zoning plan rule,[15] in a purely internal situation under the Directive. A Dutch real-estate firm, Visser Vastgoed B.V., wished to lease one of its premises in the municipality of Appingedam in the Netherlands to Bristol B.V., a Dutch discount shop for clothing and shoes. Unfortunately, the zoning plan of the shopping area concerned precluded – among others – this specific kind of retail trade. The local government had noticed an increase in vacant premises in its city center. Through its zoning plan, it wished to seduce small-scaled retail traders to settle in the city center by preventing them from becoming established in the shopping center in its outer areas. In a dispute between the local government and Visser Vastgoed B.V., the latter maintained that the zoning plan violated the Directive and should, therefore, be considered illegal.[16]

What makes the case of *Appingedam* particularly suitable for the intended research is the incredible resemblance between the Directive's aim and the substantive rulings contained in this judgment.[17] On the basis of the Court's substantiation for its ruling in *Appingedam*, the legal reasoning underlying the Court's interpretation of the Directive's aim can be rationally constructed and subsequently critically appraised from the internal perspective in search of an answer to the following research question:

"What are the legal foundations of the Court's interpretation of the Services Directive's objective?"

This thesis aims to identify the methodology and the legal source that led the Court to its particular understanding of the aim of the Directive. Courts are not free to create legal meaning. They have to adjudicate on the basis of the law and provide interpretations in accordance with a judicial methodology.[18] To identify the room for discretion available to the Court to construe

[14] *Appingedam* (n 1).
[15] Both parties agreed on the non-discriminatory nature of the zoning plan. Zaaknummer 201309296/5/R3, *Gemeente Appingedam II* [2018] ECLI:NL:RVS:2018:2062, para 8.
[16] *Appingedam* (n 1) paras 47-52.
[17] See Chapter III.
[18] Article 19(1) TEU.

legislative aims for teleological interpretation, Chapter II contains a theoretical study of the breath of judicial discretion in teleological interpretation in the idiosyncratic EU legal order. It aims to deduce broadly accepted outer limits from (contrary) normative and descriptive theories on judiciary legitimacy. The foundations of the Court's interpretation of the Directive must be found within these outer limits. Based on this theoretical framework, the Court's legal reasoning in the case of *Appingedam* shall be analyzed in Chapter III. This Chapter shall reveal if the Court's interpretation of the Directive's aim is reducible to the text with the conventional methods of judicial interpretation.[19] Because this thesis is built upon the hypothesis that it is not,[20] Chapter IV will evaluate the Court's interpretation in light of a systemic and abstract understanding of Union purposiveness. At this point, we shall speak of a mèta-teleological methodology, and mèta-teloi. Although this thesis conducts a legal analysis of the (interpretation of the) Directive specifically, it aims to contribute to the research of judicial interpretations of legislative aims in general with the methodology developed in the second chapter and the analyses of the Union's mèta-telos in the fourth chapter.

With regard to the delimitation of the scope of this research, it must be underlined that the most remarkable part of the Court's interpretation of the Directive's objective concerns Chapter III on the freedom of establishment for service providers. This thesis is confined to considering the underpinnings of that part of the Directive's aim. Additionally, it should be noted that the judgment *Appingedam* (case C-31/16) was decided together with *X BV* (case C-360/15). The latter concerned a national measure that provided for administrative fees on the installation of electronic networks. This thesis employs the Court's legal reasoning in *Appingedam* only.

[19] Chapter two provides a definition of "conventional methods of interpretation" for the purpose of this research.

[20] For instance, Snell analysed the case of Appingedam and wrote: 'It is certainly not simply driven by the language of the Treaty, as the reasoning suggests.' Snell J, 'Independence day for the Services Directive: Visser' (2019) 56 CMLR 1119.

Chapter 2: A functional approach to teleological interpretation

To be able to reveal and subsequently assess the Court's implied reasoning that led to its specific understanding of the Directive's objective, it is necessary first, to understand the role that legislative objectives play in judicial interpretation. Legislative objectives do not produce rights or obligations by itself.[21] They only become operable in the interpretation of specific legal provisions. Section 2.1 will take a closer look at the function of judicial interpretation in the broad sense. The function of legal reasoning is indissolubly linked to the legitimacy of the exercise of judicial power. Next, section 2.2 focuses on the room for teleological interpretation in the EU legal order. The "autonomous" EU legal order is characterized by, not only constitutional particularities but also an idiosyncratic judicial methodology. Section 3.3 analyses varying normative and descriptive theories on teleological interpretation. This analysis results in the formulation of outer limits to judicial reasoning on the basis of which the Court's implicit legal reasoning on the Directive's objective in the subsequent chapters is assessed.

2.1: A functional understanding of the judicial methodology

As a general rule, courts do not enjoy democratic legitimacy and are not endowed with the power of lawmaking.[22] Under the principle of conferral, the EU institutions are competent only in so far as the Member States have conferred such power upon them.[23] The competences of the Court are defined in Article 19 TEU. Its task is to ensure that "in the interpretation and application of the Treaties, the law is observed."[24] Contrary to the European Parliament, the Council or the Commission, the Court is thus not endowed with the power to make policy decisions.

The legitimacy of judicial decisions depends on the evaluation of the reasons provided to support those decisions.[25] Legal reasoning is generally accepted as legitimate if the legal meaning afforded to specific provisions is supported by convincing argumentation in accordance with a valid judicial methodology. Only on the basis of such valid methods of interpretation, can courts "create" legal meaning.[26] Under the Vienna Convention on the Law

[21] Botman M R, *De Dienstenrichtlijn in Nederland: de gevolgen van richtlijn 2006/123/EG voor de nationale rechtsorde vanuit Europees perspectief* (Boom Juridische Uitgevers 2015) 85.
[22] Schütze R, *European constitutional law* (2nd edn, CUP 2012) 206.
[23] Article 5(1) and 5(2) TEU.
[24] Article 19 TEU; Case C- 64/ 16, *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:11, para. 32.
[25] Article 36 Statute of the Court of Justice EU.
[26] Schütze (n 22) 206.

of Treaties (1992), judicial methodology encompasses four methods of interpretation: literal, historical, systemic, and teleological.[27] Teleological interpretation is the interpretation of a specific legal provision in light of its purpose. When this thesis speaks of the "conventional methods of interpretation" it refers to the four methods of interpretation stated above. This includes teleological interpretation, but only in so far as it employs the purpose of the legislative text under review apparent from its first provisions and preambles.[28]

2.2: Teleological interpretation in the EU legal order

Teleological interpretation in the specific context of the EU legal order transcends the aim of singular legislative instruments. The Treaties of the EU are no ordinary treaties of international law. They established a "new legal order (…) for the benefit of which the Member States thereof have limited their sovereign rights (…)."[29] This "autonomous" legal order is characterized by idiosyncrasies with regard to its constitutional framework, founding principles and its hermeneutic framework of judicial interpretation.[30] Whereas under international law a general principle underlying judicial interpretation prescribes a restrictive interpretation in deference of national autonomy ("*in dubio mitius")*,[31] since the case of *Van Gend & Loos* the Court has placed particular emphasis on the effectiveness ("*effet utile"*) of the Treaties as a whole.[32] To ascertain the meaning of a provision, the Court does not only consider its wording but also "the spirit" and the "general scheme" of the Treaties.[33] Former AG Maduro has described this as mèta-teleological interpretation. It is the interpretation of legal provisions in light of the fundamental purpose, the *raison d'être*, and the effectiveness of the EU legal order.[34] The constitutional foundations of the EU – the principle of direct effect,[35] the autonomy of EU law,[36]

[27] Ibid.
[28] Botman 2015 (n 21) 83 and 84.
[29] Case 26/62, *Van Gend & Loos* [1963] ECLI:EU:C:1963:1, p. 12; Case 6/6, *Costa v Enel* [1964] EU:C:1964:66, p. 593; Opinion 1/09, EU:C:2011:123, para 65.
[30] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, para 282; Opinion 2/13 [2014] ECLI:EU:C:2014:2454, para 158 and 170; Maduro M G, 'Interpreting European law: judicial adjudication in a context of constitutional pluralism' (2007) 1(2) EJLS 5.
[31] Mayr S, 'Putting a leash on the Court of Justice? Preconceptions in national methodology v effet utile as a meta-rule' (2012/2013) 5(2) EJLS 8, 11.
[32] Chalmers, Davies and Monti (n 13) 175 onwards.
[33] *Van Gend & Loos* (n 29) 12.
[34] Maduro (n 30) 5.
[35] *Costa v Enel* (n 29).
[36] E.g. Opinion 2/13 (n 30).

and the primacy of EU law–[37] were allegedly all derived from a mèta-teleological interpretation of the EU legal order.[38]

2.3: Teleological interpretation: its function and its outer limits

The higher the level of abstraction, the more contested the use of the teleological methodology is. The (normative) theories of Conway and Maduro, who are positioned on the opposite sides of the spectrum, represent the debate. Conway dismisses the use of teleological interpretation. He adheres to the originalist approach to judicial interpretation.[39] Under this theory, the uncontestable core of the rule of law and democratic legitimacy requires the judiciary to defer to the original intent of the legislator. Judicial interpretation should be aligned with the ordinary meaning of the words for "the average citizen", the ultimate source of democratic legitimacy. According to Conway, teleological interpretation affords the judiciary an unacceptable level of discretion. Because ordinary citizens do not engage in (mèta-)teleological interpretation Conway finds this methodology at odds with the specific nature of judiciary legitimacy.[40]

Maduro, who is on the other side of the spectrum, advocates the use of the (mèta-)teleological interpretation. He emphasizes the autonomous and peculiar nature of the EU legal order, which is characterized by constitutional pluralism. In his opinion, the highly complex and contested context of EU law requires a particular and systematic understanding of its rules.[41] Whereas Conway emphasized the fact that courts do not enjoy democratic legitimacy, Maduro stresses that, while the legitimacy of the judiciary is distinct from that of the legislature, the former is not inferior to the latter. Effective judicial review demands courts to be able to oppose the democratically made choices in light of the legal order's constitutional framework.[42] In the eyes of Maduro, within the EU legal order teleological interpretation is the most suitable judicial methodology. It accounts for better judgments which moreover contain "broader normative lessons" on the basis of which future cases can be more accurately predicted.[43] Purposive reasoning, he submits, is beneficial rather than detrimental to legal certainty.[44]

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[37] E.g. Case C-399/11, *Melloni* [2013] ECLI:EU:C:2013:107.
[38] Botman 2015 (n 21) 84.
[39] Bengoetxea J, 'Text and Telos in the European Court of Justice.Four Recent Takes on the Legal Reasoning of the ECJ' (2015) 11 ECLR 184, at 193.
[40] Conway G, *The limits of legal reasoning and the European Court of Justice* (CUP 2012), chapter 3.
[41] Maduro (n 30) 1-5.
[42] Ibid 8.
[43] Ibid 9.
[44] Ibid.

Despite their different standpoints on judiciary legitimacy and the validity of (mèta-)teleological interpretation, both Conway and Maduro appear to agree on one thing: some cases cannot be settled on the basis of the ordinary meaning of legal provisions alone. Conway's solution to what he perceives as a practical hurdle is the acceptance of the (theoretical) possibility of the Court declaring *non-liquet.*[45] This dependence on judicial adjudication in the EU legal order on (mèta)-teleological interpretation can be explained by reference to Beck's descriptive theory on teleological interpretation and, particularly, by reference to his distinction between clear and hard cases.[46]

Beck makes a fundamental distinction between heuristic legal reasoning and scientific legal reasoning. Whereas scientific legal reasoning implies a judicial methodology that leads to one single "right" answer,[47] heuristic legal reasoning implies that there are multiple legally valid outcomes. Under the latter, judges inevitably exercise judicial discretion.[48] Heuristic legal reasoning implies that judgments rely on discernible patterns on the basis of which judicial behavior can be rationally but imperfectly explained. In theory, clear cases can be settled on scientific legal reasoning alone. In practice, the existence of "rule-avoiding norms", which allow judges to escape the rigidity of rules even in seemingly clear-cut cases, causes there to be hardly any clear-cut cases.[49]

Beck's theory concerning hard cases – i.e. in practice all cases – is built upon the oxymoron of judicial adjudication in the context of inescapable legal ambiguity.[50] Judicial adjudication in hard cases is characterized by a multileveled uncertainty. On the primary level, the legal rules are ambiguous as a result of linguistic vagueness[51] and norm uncertainty (or: value pluralism).[52] At the secondary level, the uncertainty concerns the rules of legal interpretation. These doctrinal methods are susceptible to vagueness in a similar way to the legal provisions they purport to interpret.[53] Because different methods of judicial interpretation might lead to varying outcomes, the absence of mèta-rules governing the hierarchical ordering of the methods of interpretation creates a "secondary level vagueness." In light of this multileveled uncertainty, the formalist

[45] Conway (n 40) 144.
[46] Beck G, *The legal reasoning of the Court of Justice of the EU* (Hart Publishing 2012).
[47] Ibid, 18.
[48] Ibid, 24.
[49] Ibid, 4
[50] Beck (n 46) chapter 1.
[51] E.g the open ended nature of legal concepts. Ibid, chapter 2.
[52] E.g. the weighing of incommensurable and non hierarchically ordered values. Ibid, chapter 3.
[53] Ibid, chapter 5.

legal methodology should not be perceived as the sole determinant for judicial adjudication but rather as a judicial constraint. Although there is no "single" right answer and extra-legal factors may in fact influence judicial outcomes as well, judgments have to be *explainable* in accordance with the formal legal methodology and thus derive from legal norms.[54]

Even ardent advocates of teleological interpretation like Maduro accept that the nature of judicial legitimacy presupposes the existence of limits to teleological interpretation beyond which legal reasoning loses its legitimacy:

> "(…) teleological interpretation (…) does not give free reign to the Court neither does it make of its judicial function a function of its members value preferences or an exercise in political discretion. Instead, the Court's interpretation has a very clear set of constraints."[55]

In his opinion, judicial reasoning can never solely rely on a teleological understanding of the law. Purposive reasoning should always be combined with arguments based on the wording, the legislative history, or the context of the provision and/or comparative law methodology and preferably in subsequent order to the application of conventional methods of interpretation.[56] Teleological interpretation should be perceived as an element of accountability within the discretion left by other judicial instruments. Judges will have to respect the logical rules of practical reasoning, characterized by the use of syllogisms, in light of the general requirements of coherence, consistency, legal certainty, and respect for precedent.[57] Teleological interpretation cannot be employed to defend a *contra legem* interpretation.[58]

To justify the way judges exercise the discretion that they inevitably have considering the inescapable ambiguity of the law and the methods of interpretation, the express articulation of underlying normative assumptions – the deeper "constitutional dimension" of the law as Maduro puts it – is of paramount importance. In this way, case law can support and promote public deliberation by offering a (constitutional) rationalization. However, considering the nature of their mandate judges should, as far as possible, prevent the pre-emption of the public debate by case law where the law leaves room for policy choice.[59]

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[54] Beck (n 46) 334.
[55] Maduro (n 30) 12.
[56] Ibid 12-14.
[57] Maduro (n 30) 14.
[58] See e.g. C-350/03 *Schülte* [2005] ECLI:EU:C:2005:637.
[59] Maduro (n 30) 10.

2.4: Summary

In summary, this chapter highlighted the primary function of judicial methodology: the legitimation of the exercise of judicial power by substantiating judgments with valid legal reasoning. Due to the vagueness that is inherent to the use of (legal) language and the interpretation thereof, judicial reasoning implies to some extent that one makes a choice among a range of judicially valid outcomes. Teleological interpretation, i.e. the interpretation of legal provisions in the light of a range of EU purposes, can guide judges in the exercise of their judicial interpretation. It can settle cases that could remain unresolved with a literal interpretation alone. Yet while the room for teleological interpretation, especially within the autonomous EU legal order that is characterized by value-pluralism and multilingualism, is remarkably broad, judgments should always be explainable in accordance with one of the conventional methods of interpretation, "the official judicial language." Teleological interpretation cannot serve as a judicial wild card but should be perceived as capable of enriching adjudication with a "constitutional dimension" in light of which some judicial outcomes appear more likely than others.

Chapter 3: Rationally acceptable reasons and conventional methods of interpretation in *Appingedam*

This chapter aims to extract information about the Court's understanding of the aim of the Directive from the Court's legal reasoning in *Appingedam.*[60] It shows that the Court's ruling in *Appingedam* encompasses three different points of law which, all in their own way, provide valuable information about the foundations of the Court's interpretation of the aim of the Directive. Section 3.1 analyses the Court's legal reasoning that led it to decide that the Directive is not (necessarily) confined by the breath of the fundamental freedoms, but has to be interpreted autonomously. This finding allowed the Court to depart from the formal standpoint that free movement law does not apply in purely internal situations with regard to the provisions of Chapter III of the Directive on the fundamental freedom of service providers. Notably, the Court's ruling on this point completely coincides with the Court's understanding of the aim of the Directive. The Court's substantiation of its judgment, which relies on all four methods of interpretation, is critically appraised in section 3.2 as if it were the Court's formal explanation of its interpretation of the Directive's aim. It will become clear that the Court's understanding of the aim of the Directive, for the purpose of teleological reasoning, is a result of interpretation itself. By analyzing the effect of teleological interpretation on the meaning of specific provisions of the Directive, section 3.3. aims to sketch the contours of the elusive concept of the EU's constitutional dimension that has informed – and determined – the Court's understanding of the Directive's aim.

3.1: Expansion 1: The reorganization of free movement law

At the heart of the first point of law addressed in the case of *Appingedam* lies the legal question: does the activity of retail trade in shoes fall within the scope of the Directive? According to Article 2(1), the Directive applies to "*services* supplied by providers established in a Member State."[61] The legal debate showed different opinions on the categorization of retail trade as either a "service" or an activity that should be reviewable under the fundamental freedom of goods. Under primary law, an activity is considered by the Court in the context of one fundamental freedom only if the one is perceived as predominant and the other as merely

[60] *Appingedam* (n 1).
[61] Emphasis added.

ancillary (the "center of gravity" test).[62] While some legal scholars and also the referring court, maintained that retail should be reviewed under the freedom of goods only,[63] others considered retail trade predominantly as a service-activity.[64] If the Court were to decide that the scope of the Directive coincides with the scope of the free movement of services and the freedom of establishment, an application of the "center of gravity" test could lead to the conclusion that retail trade is reviewable only under the fundamental freedom of goods.

3.1.1 The Court's judgment

In its judgment, the Court did not decide on the relative weight of the services aspect and the goods aspect in the activity of retail trade, nor did it dismiss the relevance of the "center of gravity"-test in the context of primary law. Instead, it held that the case law on the demarcation of the fundamental freedoms under primary law cannot be transposed to the Directive; the Court "decoupled"[65] the Directive from primary law and thus provided it with an autonomous meaning.

Article 4(1) defined a service as a:

> "Self-employed activity, normally provided for remuneration, as referred to in [current: Article 57] of the Treaty."

In the eyes of the Court, the activity of retail trade "unquestionably" meets the definition of a service in Article 4(1) of the Directive: retail trade is a self-employed activity, normally provided for remuneration.[66] Additionally, recital 33 of the Directive mentions "distributive trades" as an example of a service. Although Article 4(1) of the Directive explicitly refers to Article 57 TFEU for the definition of a service, it is the opinion of the Court that the demarcation of the Directive with the fundamental freedoms on the basis of the "center of gravity" test would harm the aim of the Directive. The Court refers to the case of *Rina Services* to indicate that the Directive pursues the harmonization of national measures that regulate the free movement of

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[62] E.g. Case 137/09, *Josemans* [2010] ECLI:EU:C:2010:774, paras 49 and 50; Case C-36/02, *Omega Spielhallen* [2004] ECLI:EU:C:2004:614, para 26.

[63] Zaaknummer 201307133/1/A1 Gemeente Veldhoven [2014] ECLI:NL:RVS:2014:2286; Zaaknummer 201309296/4/R4 *Gemeente Appingedam I* [2016] ECLI:NL:RVS:2016:75, para 15; Botman 2015 (n 21) 211 onwards; Gronden, van de J W, 'De invloed van de Dienstenrichtlijn op de bevoegdheden van de decentrale overheden om diensten van algemeen economisch belang te reguleren' in: Hessel B, Perton E and Schiebroek M (eds), *De Dienstenrichtlijn decentraal: de gevolgen van de Dienstenrichtlijn voor decentrale overheden* (Sdu Uitgevers 2009) 130.

[64] Backes Ch W, 'Much ado about nothing of het begin van een nieuwe bestuurscultuur? De omzetting van de Dienstenrichtlijn' (2009) 10 NTB.

[65] Terminology is based on Snell (n 20).

[66] *Appingedam* (n 1), para 88.

services.[67] It is the opinion of the Court, that a case-by-case analysis of the nature of the activity would undermine the harmonization pursued by the Directive. Considering that service activities and the sale and purchase of goods often go hand-in-hand, it is unlikely that the "center of gravity" test will provide a clear solution. To improve legal certainty and to avoid the situation where retail trade is reviewed under both the freedom of goods and the Directive, the Court places the activity under the scope of the Directive.[68]

3.1.2 Analysis: decoupling the Directive from primary law

In short, the decision to "decouple" the Directive was based on teleological reasoning. A literal reading of the text gives ample reasons to assume that the scope of the Directive coincided with the scope of the free movement of services and the fundamental freedom of establishment, but most of these reasons were not addressed in the Courts judgment. For instance, Article 1 of the Directive, holds that:

> "This Directive establishes general provisions *facilitating* the exercise of the freedom of establishment for service providers and the free movement of services (…)" [Emphasis added]

"Facilitation" – "vergemakkelijking" in the Dutch, "faciliter" in the French and "erleichter" in the German language version – implies an ancillary and supportive role of the Directive towards the main objective, i.e. the fundamental freedom of establishment and the free movement of services. Furthermore, Article 4(1) of the Directive explicitly refers to Article 57 TFEU for the definition of a service. Similarly, Article 3(3) of the Directive holds that Member States have to apply the directive "in compliance with the rules of the Treaty on the right of establishment and the free movement of services."

Next to these literal arguments precedent also indicated the congruence of the Directive's scope with the scope of the free movement of services and the fundamental freedom of establishment. In the case of *OSA,* the Court ruled that the concept of service within the meaning of the Directive coincides with Article 57 TFEU:

> "In that respect, it must be noted that, as can be seen from Article 4(1) of Directive 2006/123, the concept of 'service' referred to in that directive is the same as that referred to in Article 57 TFEU."[69]

[67] *Appingedam* (n 1) para 96.
[68] *Appingedam* (n 1) paras 94-97; Opinion of AG Szpunar in joined cases C-360/15 and C-31/16 *Visser Vastgoed v Gemeente Appingedam* [2017] ECLI:EU:C:2017:397, paras 8 and 9.
[69] Case C-351/12, *OSA* [2014] ECLI:EU:C:2014:110, para 58.

The principles of coherence and uniformity indicate congruence between the scope of the Directive and the fundamental freedoms as well. Botman explains that these principles demand primary law and secondary law provisions to be explained uniformly in so far as they pursue the same objective.[70] This remark catches the core of the judgment *Appingedam.* The Court decoupled the Directive from primary law because it believes that the Directive gives effect to an objective that transcends the objective pursued by the fundamental freedoms. The Court perceives the Directive not as ancillary to the freedom of establishment and the free movement of services, but as a continuation of the market-making project that began with the fundamental freedoms. Therefore, when the Court saw itself confronted with a choice to place the activity of retail trade either under the fundamental freedom of goods or under the Directive, it opted for the latter. The argument that the Directive pursues harmonization does not explain why an activity should be drawn into its scope of application. Similarly, the general principle of legal certainty does not entail a preference for primary or secondary law. If anything, one could argue that legal certainty is best protected with an interpretation that prioritizes a literal reading of the text and respect for precedent.

The Court's legal reasoning on the first point of law provides for an excellent example of the Court's discretion in the interpretation of seemingly unambiguous legal norms. While the Court decided in the case of *OSA* that the concept "service" has the same meaning under the Directive and primary law, it could be argued that the meaning of a word does not equal the legal yardstick against which it should be reviewed.[71] Similarly, the words "in compliance with primary law" could be understood as the minimum standard of protection, as opposed to a factor of constrain.[72] Considering the variety of general principles of EU law, the Court can employ them in a way that supports the argument it wants to make. Although it is evident that the Court employs its judicial discretion in light of an elusive higher purpose, none of the abovementioned interpretations goes so strongly against a literal meaning of the words that we could speak of a *contra legem* interpretation.

[70] Botman 2015 (n 21) 97.
[71] The same applies to Article 4(1) Directive.
[72] Article 3(3) Directive.

3.2: Expansion 2: Application in purely internal situations

The second point of law in the case of *Appingedam* concerns the application of Chapter III of the Directive on the freedom of establishment of service providers to cases which are confined in all aspects within the borders of a single Member State ('purely internal situations').[73] Under primary law, the Court has unequivocally held that the fundamental freedom of establishment is not applicable in purely internal situations.[74] Under the Directive (in particular), a trend of *de facto* application in purely internal situations emerged. The Court had applied the Directive in the cases of *Venturini, Libert and Others,* and *Trijber and Harmsen,* to facts that were confined to the borders of one Member State; the Court found sufficient cross-border relevance in the (theoretical) possibility that foreign service providers, as well as foreign recipients of those services, would equally be affected by the contested national measures.[75]

The formal establishment of the application of the Directive in purely internal situations would in practice not bring about a significant change. It would, however, be a pressing reason to reconsider the aim of free movement law and the content of free movement rights. At the heart of the fundamental freedoms lays the principle of non-discrimination on the basis of nationality.[76] Assuming that free movement law entitles non-nationals to a negatively framed right not to be discriminated against, nationals should not have to appeal to these rights.[77] The formal and explicit application of the Directive in purely internal situations implies that it not only shields service providers from discriminatory measures but also grants service providers "positive" rights in the exercise of their economic freedom. It would mark the official shift of focus of EU market law from the (procedural) integration of markets to a (substantive) economic policy that actively promotes deregulation. This narrative could explain why the Court preferred to review retail trade under the Directive and not under the freedom of goods[78].

3.2.1 The Court's judgment

On the basis of literal, teleological, systemic and historic legal reasoning, the Court formally established the application of Chapter III of the Directive on the freedom of establishment for

[73] *Appingedam* (n 1) para 98.
[74] Case C-268/15, *Ullens de Schooten* [2016] ECLI:EU:C:2016:874 .
[75] C-161/12, *Venturini* [2013] ECLI:EU:C:2013:791, para 25; Joined cases C-197/11 and C-203/11, *Libert and Others* [2013] EU:C:2013:288, paras 34 and 35; Joined cases C-340/14 and C-341/14, *Trijber and Harmsen v Amsterdam* (n 4) para 41.
[76] Article 24 TFEU; Barnard 2019 (n 6) 201.
[77] Barnard 2019 (n 6) 201.
[78] See section 3.1.2.

service providers in purely internal situations, thus indicating the (formal) drawback of the principle of non-discrimination as the cornerstone of the internal market.[79]

A literal reading of text leads the Court to its finding that the provisions of the Chapter III Directive do not explicitly mention a cross-border element. In this context, the Court refers to Article 2(1):

> "This Directive shall apply to services supplied by providers established *in a* Member State." [Emphasis added]

Article 2(1) requires service providers to be established *in a* Member State but does not speak of establishment in *another* Member State. The same goes for Article 9(1) on prohibited authorization schemes, Article 14 on prohibited requirements, and Article 15(1) on suspicious requirements.[80] In contrast, the Court emphasizes that the provisions of Chapter IV of the Directive concerning services on a temporary basis, such as Articles 16(1) and 18(1), speak of the exercise of a service activity "in a Member State *other than* that in which they are established." A literal reading of the text combined with syllogistic reasoning leads the Court to believe that the legislature intended to allow for the application of the Directive in purely internal situations also.[81]

A similar style of reasoning defines the Court's systemic understanding of the Directive. The Dutch government had submitted that the legal bases of the Directive, Articles 53(1) jo. Article 62 TFEU, constitute a factor of constraint. These provisions entitle the legislature to adopt directives on the "mutual recognition of diplomas" and alike documents and the "coordination" of national measures for the aim of facilitating the exercise of service activities, either on a temporary basis or through the establishment. The Court dismisses this argument merely by emphasizing that these provisions also do not explicitly require a cross-border element.[82]

For the purpose of teleological interpretation, the Court articulates its understanding of the Directive's aim. On the basis of Article 1 and recitals 2 and 5 to the Directive, in particular, it is the Court's understanding that the Directive contains:

> "general provisions that are intended to remove restrictions on the freedom of establishment for service providers *in* Member States and on the free movement of services between the Member

[79] *Appingedam* (n 1) paras 98-110.
[80] Ibid, para 102.
[81] Ibid, para 100.
[82] Ibid, para 109.

States, in order to contribute to the completion of a free and competitive internal market."[83] [Emphasis added]

Also in this formulation, the Court speaks of establishment *in* Member States without mentioning a cross-border element. Additionally, what is remarkable about this formulation is that the Court speaks not only of an internal market but of a "*free* and *competitive* internal market." The reasoning of the Court continues with the finding that the realization of such a market, alternatively described as a "*genuine* internal market", requires "above all" the elimination of obstacles liable to adversely affect the provision of services in Member States. In light of this broader purpose, the Court holds that a requirement of cross-border activity would harm the Directive's *effet utile*.[84]

From a historical perspective that particularly takes into account the *travaux préparatoires* of the Directive, the Court draws attention to an amendment before the European Parliament which proposed the reformulation of Article 2(1) of the Directive so that it would explicitly limit the Directive's scope to cross-border situations. This amendment was not adopted. For what reason the judgment does not say. In this unsuccessful amendment, the Court finds confirmation for its assumption that the legislature also intended the Directive to apply in purely internal situations.[85]

3.2.4 Analysis: the purpose of the Services Directive

In the eyes of the Court, the recitals and the Directive's first provisions especially prove that the Directive aims to contribute to a specific state of *finalité* of the internal market, namely: a "genuine internal market," which is a "free and competitive internal market." It is the understanding of the Court that the pursuit of a "genuine internal market" presupposes, above all, the elimination of obstacles to the provision of services *per se*. As a natural corollary of this broader aim, the substantive provisions of Chapter III of the Directive on the freedom of establishment speak of establishment *in a* Member State, as opposed to the establishment in *another* Member State. Even the Court's analyses of the legal bases of the Directive were confined to the finding that they did not explicitly require a cross border element.[86]

[83] Ibid, paras 104 and 122; *Société Fiduciaire* (n 4) para 33; *Fermarbel v COCOM* (n 4) para 31; *Trijber and Harmsen v Amsterdam* (n 4) para 44.
[84] Ibid *Appingedam* (n 1) paras 106 and 107.
[85] Ibid, para 108.
[86] For a detailed analysis of the Directive's legal bases: Klamert M, 'Of empty glasses and double burdens: approaches to regulating the services market à propos the implementation of the Services Directive' (2010) 37(2) LIEI 111; Botman 2015 (n 21) 133.

Remarkably, the wording "competitive" and "free market" is found only in recital 2 of the Directive. This recital – and the same goes for the other recitals concerning the state of *finalité* of the internal market – consequently mentions a cross-border element. According to recital 2, the EU pursues a "*free market* which compels the Member States to eliminate restrictions on *cross-border* provision of services (…)."[87] It is clear from recital 1 that, at the moment of drafting, the Commission encountered multiple barriers that hampered the EU in the pursuit of an "internal market" defined as " an area without *internal* frontiers in which the free *movement* of services is ensured." According to recital 2, these barriers prevented service providers from "extending their operations *beyond their national borders."*[88] The cause of these barriers was found in "administrative burdens, legal uncertainty associated with *cross-border activity* and the lack of mutual trust between Member States."[89]

Focusing particularly on the freedom of establishment, a closer look at the preamble of the Directive reveals that only at two points in the recital is establishment mentioned without a cross-border element: in recital 5 and recital 36. Recital 5 holds that it is necessary to "remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States." However, this sentence continues with the following words: "and to guarantee recipients and providers the legal certainty necessary for *the exercise in practice of these two fundamental freedoms of the Treaty,"* thus establishing near undoubtedly the interconnection with primary law. Any remaining doubts as to the weight that should be attached to the absence of the word "another" in the first sentence of recital 5 is swept away by the recitals' last sentence, which speaks of barriers for operators who wish to "become established in *other* Member States as well as those who provide a service in *another* Member State."[90]

A closer look at recital 36 explains the function of the formulation "establishment in a Member State" both in this recital and in the substantive provisions of Chapter III. Recital 36 holds that "the concept of 'provider' should cover any natural person who is a national of a Member State or any legal person engaged in a service activity *in a* Member State, in the exercise of either the freedom of establishment or the free movement of services." The wording "in a Member state" defines the territorial scope of application of the fundamental freedoms; service providers

[87] Recital 2 Directive.
[88] Ibid.
[89] Recital 3 Directive.
[90] Moor-van Vugt, de A J C, 'Case note: ABRvS 201208190/1/A3: zaak C-341/14 (Harmsen) Nr. 16 Dienstenrichtlijn en zuiver interne situaties' (2015) 1 TEER 51.

established in third countries are excluded from the Directive's scope. In the words of recital 36: "under Article 48 of the Treaty, the freedom of establishment and free movement of services may benefit only companies constituted in accordance with the laws of a Member State and having their registered office (…) within the Community."[91]

To deduce from very specific parts of sentences that later on explicitly mention a cross-border element and/or the fundamental freedoms that the Directive applies in purely internal situations is so far-fetched that it becomes implausible. While these technical observations judged in isolation may have fostered confusion, they are not capable of providing a reasonable explanation of the Court's decision to formally abandon the concept of non-discrimination that is at the heart of free movement law. On the contrary, they are strong indications that the Directive is ancillary to the fundamental freedoms and purposive to the establishment of an internal market at the heart of which lies the principle of non-discrimination on the basis of nationality. The fact that the European Parliament did not accept an amendment cannot be accepted as a compelling reason to deviate from these findings. If one assumes that the Directive congrues with the fundamental freedoms, the explicit mentioning of a cross-border element is superfluous. It must thus be assumed that the Court's interpretation of the aim of the Directive in itself gave effect to a higher purpose – the same that influenced its legal reasoning on the first point of law – that is not visible from the text of the Directive.

3.3: Expansion 3: Maximizing the Directive's substantive scope of application

The third point of law in *Appingedam* concerns the material scope of application of the Directive. The Council of State asked the Court if the Directive prohibits a national measure contained in a municipal zoning plan that precludes the activity of retail trade in non-bulk goods in specified zones in the city's outskirts.[92] It can be broken down into two separate legal issues.

The first issue concerns the existence of a *de minimus* rule which excludes certain national rules from the Directive's scope; a "regulatory safe zone" which acknowledges that not all regulatory choices should be reviewable against the economic yardstick of free movement law. For the freedom of goods, the Court held in the case of *Keck* that "certain selling arrangements", non-discriminatory measures that apply to all traders and regulate the sale of the good and not the good itself, fall outside the scope of Article 34 TFEU.[93] Multiple legal scholars investigated the

[91] Recital 36 Directive.
[92] *Appingedam* (n 1) para 112.
[93] Case C-267/91, *Keck and Mithouard* [1993] ECLI:EU:C:1993:90, paras 15 and 16.

possibility that the contested zoning plan legislation in *Appingedam* would have met the requirements of the *Keck*-exception under the freedom of goods as it regulates the sale of a good, applies to every trader and is non-discriminatory.[94] However, as a result of the Court's ruling on the first point of law, the sale of goods (retail trade) is reviewable under the Directive. Unless the Directive leaves room for a similar "regulatory safe zone," national measures that would previously have met the conditions of the *Keck*-exception might be drawn into the scope of free movement law nonetheless.[95] Overall, it would imply a decrease in national regulatory autonomy. Whether the Directive contains a *de minimus* mostly depends on the meaning of recital 9, which sets out the Directive's outer limits based on varying and contradictory indicators. In *Appingedam,* the Court had to interpret recital 9 and, by doing so, it had to decide on the room for a regulatory safe zone under the Directive.

The second issue concerned the legality of the zoning plan legislation at stake in *Appingedam.* Unlike the fundamental freedoms, the Directive does not contain a general prohibition on discriminatory measures or measures that hinder or make less attractive the exercise of economic activity. The Directive lists specific categories of measures that are either absolutely prohibited or should be perceived as "suspect" requirements.[96] Even with regard to "suspect" requirements, the Directive is stricter than the free movement regime under primary law and thus has a stronger deregulatory effect. For instance, both directly and indirectly discriminatory measures are absolutely prohibited and unjustifiable.[97] Additionally, the Directive obliges the Member States to report all "suspect" requirements to the Commission who shall perform a legality review and notify all other Member States of the existence of the "suspect" rule.[98] In *Appingedam,* the Court was asked to interpret Article 15(2) Directive in particular, which defines "quantitative and territorial restrictions" as a suspect requirement.

3.3.1 The Court's judgment

The Court addresses the Council of State's argument concerning recital 9 first. This recital holds that the Directive does not apply to requirements that do not "affect the access to, or the exercise of a service activity." As an example of rules that do not meet this criterium, recital 9 mentions "town and country planning rules" because they do not "specifically" regulate a service activity

[94] See Snell (n 20); Berghe van den P.R., 'De Dienstenrichtlijn – 14 jaar discussie ten einde' (2018) 1 TO 19; Botman M R, 'Dienstenrichtlijn 2.0: bestemming bereikt? Een analyse van het arrest Visser Vastgoed/Appingedam' (2018) 1 TO 8.
[95] Botman 2015 (n 21) 214.
[96] Ibid, 308.
[97] Article 9(1)(a), 14(1) and 15(3)(a) Directive; Botman 2015 (n 21) 314.
[98] Article 15(7) Directive.

and have to be respected by service providers and by "individuals acting in their private capacity." The Council of State had assumed that zoning plan legislation was exempted from the Directive's scope considering the ordinary meaning of the words "town and country planning rules."[99] On the contrary, Barnard and Botman put forward that "town and country planning" also had to meet the conditions of the Directive in so far as they affected a service activity.[100] Because in theory, every rule is capable of "affecting" a service activity, the effect of such a *de minimus* rule would be limited, if not negligible.

In its judgment, the Court ignores the fact that recital 9 mentions "town and country planning rules" as an example. In light of the purpose of the Directive – the elimination of barriers to established in order to achieve a genuine market in services – the Court held that only measures that do not "regulate or do not specifically affect the taking up or the pursuit of a service activity" fall outside the Directive's scope.[101] Despite the general nature of a zoning plan, the Court finds that the contested zoning plan rule specifically regulates the exercise of a service activity. Neither the subject matter nor the aim of the national measure – to protect the viability of the city center – were capable of altering that finding.[102]

Subsequently, the Court analyses the zoning plan rule in the context of Article 15(2)(a) of the Directive. In one paragraph, the Court rules that the national measure at stake falls within the scope of the Directive as it constitutes a "territorial restriction" within the meaning of Article 15(2)(a) of the Directive.[103] As a consequence, it has to be evaluated on its conformity with the conditions of non-discrimination, necessity, and proportionality laid down in Article 15(3) of the directive.[104]

3.3.2 Analysis: judicial discretion and open-ended norms

With regard to recital 9, it was obvious that the wording would foster confusion. The recital contained multiple indicators whose simultaneous application could indicate different results. On this point more than on the points discussed hereabove, it was evident that the Court enjoyed judicial discretion. The decisive factor in the exercise of this discretion was, yet again, purposive reasoning in light of the Court's (contestable) understanding of the Directive's

[99] See e.g. Zaaknummer 201303704/1/R4 *Vereniging van Eigenaren Meubelcentrum Elisabethhof en anderen* [2014] ECLI:NL:RVS:2014:1298; *Gemeente Appingedam I* (n 63) paras 15.1, 17.3 – 17.10
[100] Barnard 2008 (n 9) 339 and 340; Botman 2015 (n 21) 223 onwards.
[101] Appingedam (n 1) para 122.
[102] Ibid, para 124.
[103] Ibid, para 131
[104] Ibid, para 132.

aim.[105] In so far as the Directive contains a *de minimus* rule, it certainly is more curtailed than the *Keck*-exception under the freedom of goods. Certain selling arrangements that previously met the exemption established in *Keck and Mithouard* might be drawn into the scope of free movement law nonetheless.[106]

The Court's terminology concerning recital 9 implies that some measures might still be excluded from the Directive's scope if it can be proven that they do not "regulate" or do not "*specifically* affect" a service activity. At the same time, it is clear that this threshold is not easily met. A zoning plan is of a general nature in the sense that everyone has to comply with its rules. Within this general obligation of compliance, the methodology of a zoning plan requires the usage of subcategories that define specific rules for specific activities. Depending on the scope of the lens through which one observes a zoning plan, it will appear either general or specific. Botman suggested that the Court should draw inspiration for the interpretation of recital 9 from the case of *Pelckmans Turnhout* which indicates a *de minimus* rule based on causality.[107] In *Pelckmans Turnhout, t*he Court held that a national measure concerning Sunday trading should be excluded from the scope of the freedom to provide services because its effect was "too uncertain and too indirect" to take into account.[108] Although such a threshold would give some leeway for a "regulatory safe zone", the language used in *Appingedam* provides no reason to assume that the Court is willing to read a *de minimus* rule based on causality in recital 9.

With regard to Article 15(2)(a) of the Directive, this legal question is an excellent example of the open-ended nature of ostensibly unambiguous legal norms. This provision labels "quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers" as suspect requirements. By placing territorial restrictions on a par with quantitative restrictions, the wording suggests that those territorial restrictions must have the effect of limiting the total amount of service providers in a specified area. The Commission's Handbook on Implementation of the Directive supports this finding:

[105] Section 3.2.2.
[106] Botman 2015 (n 21) 214.
[107] Botman 2018 (n 94).
[108] Case C-483/12, *Pelckmans Turnhout* [2014] ECLI:EU:C:2014:304, para 25. See also Case C-190/98, *Graf v Filzmozer Maschinenbau* [2000] ECLI:EU:C:2000:49, para 24.

> "Quantitative and territorial restrictions limit the overall number of service providers, thus hindering new operators from entering the market, and seriously restrict or even impede the freedom of establishment."[109]

The zoning plan rule of the municipality did not limit the overall number of service providers, it posed conditions to the location of the establishment. The Commission's Handbook is not legally binding, but the Court described it as a valuable source of information in previous case law. But in *Appingedam,* the Court makes no mention of this policy document. It interpreted the words "territorial restrictions" neither in light of the sentence in which they are placed nor with the purpose for which they were drafted.

In summary, this section exemplifies the "secondary level vagueness" that results from the lack of mèta-rules governing the hierarchical ordering of the methods of interpretation when they point in the direction of different results. It shows how the Court's understanding of the aim of the Directive guides the Court in the exercise in its judicial discretion: teleological interpretation unmistakably leads the Court towards an expansive reading of the Directive's scope.

3.4: Conclusion

This chapter showed that a literal reading of the Directive combined with the precedent set in the case of *OSA* and the general principles of uniformity and coherence provided ample reason to assume that the Directive aligns with the free movement of services and the fundamental freedom of establishment. Nonetheless, the Court ruled in *Appingedam* that the limitations anchored in the Court's case-law on the fundamental freedoms can confine neither the Directive's material scope nor the Directive's personal scope, among which the issue of the application in purely internal situations. Whereas Maduro described teleological interpretation as a judicial instrument that can be wielded (only) within the discretion left by other methods of interpretation that show greater deference to a literal meaning of the text, this chapter exemplified how judicial discretion can be found in almost every word as a result of the – in the words of Beck – inescapable and multileveled uncertainty which characterizes judicial methodology. What in theory looks like a considerable limitation of the room for teleological reasoning is in practice more accurately described as an explanatory hurdle.

[109] European Commission, *Handbook on implementation of the Directive* (Office for Official Publications of the European Commission 2007) 33.

The Court's substantiation of the judgment in *Appingedam* almost completely depends on teleological interpretation in light of a peculiar understanding of the Directive's purpose. The Court's articulation of the aim of the Directive is not a clear-cut recognition of legislative intent, but a result of interpretation in itself. The aim of the Directive, it must thus be assumed, was constructed with a mèta-teleological *methodology*. Yet the (legal) *source* which is the subject of this methodology – the mèta-telos itself – can be described only in general terms by considering its effect on the outcome of legal analysis; the analysis of the Court's interpretation of the Directive's *de minimus* rule and the list of "suspect" requirements unequivocally revealed a preference for an interpretation that enlarges the Directive's scope and increases the overall reach of free movement law. While this Chapter thus identified a discernible pattern,[110] the foundation of this pattern is elusive.

[110] Beck (n 46) 4.

Chapter 4: Purposive *towards what?*

Legal literature, when considering the Court's case-law, frequently speaks of an "in-built *communautaire* tendency,"[111] or an "integrationist effect"[112] without questioning the legal source of this discernible pattern. Although mèta-teleological interpretation undisputedly exists – the constitutional foundations of the EU were all derived from mèta-teleological interpretation –[113] it is to easy to accept this pattern as legitimate merely "because it is." The Court adjudicates on the basis of the law.[114] Every purpose in light of which legal provisions are interpreted thus has to be reducible to the constitutional objectives of the Union, albeit in a form that transcends the scope of a singular objective.[115]

The legal problem with the aim of Chapter III of the Directive – the elimination of barriers to establishment *in* Member States – is that it transcends the constitutional objective of the internal market. The internal market aims to "merge national markets into a single market bringing about conditions as close as possible to those of a genuine [domestic] market."[116] It is about integration and the abolition of measures that – either directly or indirectly – discriminate on the basis of nationality. The "genuine internal market" that the Court envisages in its interpretation of the aim of the Directive presupposes not only the removal of obstacles to establishment in another Member State but the removal of barriers to establishment *per se*.

This chapter evaluates the two rare narratives that are provided by legal scholars to legitimize the Court's application of free movement law on national measures that have no discriminatory effect and the discernible patters that leads the Court to wield its judicial discretion in favor of an expansive rather than a restrictive interpretation of EU law: the "ever closer Union" as mèta-telos (section 4.1) and regulatory efficiency (section 4.2).

4.1: The ever closer union as mèta-telos

In legal literature, it seems, the terminology "mèta-teleological interpretation" is used as a synonym for judicial purposive reasoning in light of the Union's alleged mèta-telos: the "ever closer Union." For instance, Bengoetxea speaks of the "ever closer Union" objective as a self-

[111] Beck (n 46) 318.
[112] Chalmers, Davies and Monti (n 13) 175-177.
[113] See section 2.2.
[114] Article 19(1) TEU.
[115] Beck (n 46) 322.
[116] Article 26 TFEU; Case 15/81, *Gaston Schul* [1982] ECLI:EU:C:1982:135, para 33.

explanatory truth. Bengoetxea suggests that those who oppose the Union's preference for teleological interpretation confuse legal methodology with their personal opinions on European integration.[117] Conway dismisses mèta-teleological interpretation, among others, because he believes that the Court falsely perceives never-ending integration as the Union's uncontestable meta-telos.[118] Beck's findings led him to describe an "in-built Communutautaire tendency" present in the Court's case-law which he attributes to the "closer Union objective."[119]

Within the Treaties, a foundation for the "ever closer Union" objective is found in the preambles of the TEU and the TFEU and in Article 1 of the TEU which states that the TEU "marks a new stage in the process of creating an ever closer Union." Beck analyzed the Court's case-law from 1997 to 2012 and found only ten cases in which the Court invokes the phrase "ever closer Union" explicitly. Among them, he highlights the case of *Pupino* as the most evident example.[120] However, the value of the "ever closer Union" in the Court's case-law, he submits, should be judged in light of the Court's referral to the "spirit of the Treaties," – a less contentious synonym for the more explicit terminology of the "closer Union."[121] In light of the "spirit of the Treaties" the Court found, among others, the general principles of direct effect, primacy and harmonious interpretation.[122] The general principles permeating EU law also, Beck adds, could be perceived as more specific norms giving effect to the same overarching value: the ever closer Union.[123] Beck concludes that, irrespective of its form, the application of the "ever closer Union" dogma consistently leads the Court to favor an expansive over a restrictive interpretation of EU law and uniformity over pluralism.[124]

What remains unclear after reading Beck's theory is the meaning of integration, the function of the "ever closer Union" in the Union's constitutional framework, and its place in the hierarchy among other Union objectives and values listed in Article 2 and 3 TEU. Is integration a goal in itself, a never-ending process that can only and irreversibly manifest itself in an upwards curve, as Davies suggests,[125] or should integration be perceived as, in the words of Commission-President Barosso "not an end in itself, but a means to a higher end"?[126] When integration is

[117] Bengoetxea (n 37) 185.
[118] Conway (n 38) 274 and 275.
[119] Beck (n 46) 318.
[120] Case C-105/03, *Pupino* [2005] ECLI:EU:C:2005:386.
[121] Beck (n 46) 321.
[122] *Van Gend & Loos* (n 29); *Costa v ENEL* (n 29), *Pupino* (n 120).
[123] Beck (n 46) 320.
[124] Ibid.
[125] Davies G, 'Democracy and legitimacy in the shadow of purposive competence' (2015) 21(1) ELJ 2, at 18.
[126] Rompuy, Van H and Barroso J M, 'From war to peace: a European tale.' Nobel peace prize lecture on behalf ot the Union, Oslo 10 December 2012.

perceived as an end in itself it could, in theory, justify every act that has a unifying effect and result in the harmonization of almost every aspect of life. In some way, every difference between nations – be it in regulation, language, or culture – negatively affects the integration of peoples.[127] The list of measures that could be justified on the basis of this mèta-telos is endless. Although the Court's interpretation of the Directive does not only encourage the merging of national markets but has a deregulatory effect as well, the argument could be made that (complete) deregulation, in the end, serves integration best. On the contrary, if integration is perceived as a means towards the pursuit of constitutional objectives, the reference of the "ever closer Union" in the (preambles of the) TEU and the TFEU has no self-standing effect. As Larik writes, not every constitutional objective will benefit from deeper integration.[128]

In my opinion, the case-law of the Court gives no reason to assume that integration is a goal in itself. For example, in *Van Gend & Loos,* the Court considered that it would interpret the Treaties in light of their "spirit".[129] Yet, the first sentence of the Court's analysis starts with the consideration that "the objective of the EEC Treaty, which is to establish a Common Market (…)'.[130] Notwithstanding the far-reaching effect of the judgment, the Court thus departed from a constitutional objective. Similarly, considering the Court's judgment in *Costa v Enel*, it is hard to imagine how the Union could have effectively pursued an internal market, which presupposes the integration of markets,[131] if EU law would not have enjoyed primacy over national law.[132] Neither of these groundbreaking judgments, that lay at the heart of the "ever closer Union" dogma, depend on an overarching mèta-telos of deepening integration; they are explainable in light of the pursuit of a constitutional objective which on itself benefitted from a solution *communautaire*.

The most salient argument against the perception of the "ever closer Union" as a goal in itself can be found in the case of *Pupino.*[133] This case concerned the obligation to interpret national law in conformity with a European framework decision in the field of judicial and police cooperation in criminal matters. Under (old) Article 34(2)(b) EU, framework decisions are binding for the Member States but do not have a direct effect. The Italian government argued

[127] Davies (n 125) 18.
[128] Larik J, 'From specialty to a constitutional sense of purpose: on the changing role of objectives of the European Union' (2014) 63(4) ICLQ 935.
[129] *Van Gend & Loos* (n 29).
[130] Ibid.
[131] Article 24 TFEU.
[132] *Costa v ENEL* (n 29).
[133] *Pupino* (n 120).

that framework decisions do not place national courts under an obligation of harmonious interpretation and, therefore, the Court should declare the question inadmissible.[134] Ancillary to its interpretation of (old) Article 35 EU, on the Court's jurisdiction regarding framework decisions, the Court considered that

> "*Irrespective of the degree of integration* envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe (…) it is perfectly comprehensible that the authors of the [TEU] should have considered it useful to make provision (…) for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to *contribute effectively to the pursuit of the Union's objectives*."[135] [Emphasis added]

Next, and ancillary to its analysis of the principle of loyal cooperation, the Court held that:

> "The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union, (…) shall be to organise (…) *relations between the Member States and between their people*s."[136] [Emphasis added]

What stands out from *Pupino* first, is that the Court refers to the "ever closer Union" dogma only in the context of other recognized legal norms. This implies that integration is not a self-standing argument. Second, from the wording "irrespective of the degree of integration," it becomes clear that the degree of European integration was defined by the Member States in the Treaties through the conferral of power upon the Union. Under the principle of conferral in Article 5(2) TEU, the Union's task is to organize relations between the European peoples within the boundaries of the Treaties in the form of tailored legal instruments and for the purpose of specific policies contained therein. Third, the Court makes a clear distinction between the Union's objectives on the one hand and the "degree of integration envisaged by the Treaty" on the other. Overall, these three points indicate that the Court perceives integration as a means towards an end, and not as a goal by itself.

This thesis is premised on the idea that there are limits to teleological interpretation. Even former AG and ardent advocate of (mèta-)teleological interpretation Maduro accepts that judicial discretion is not unrestrained. Because in theory, every difference between nations is capable of negatively affecting the integration of peoples, the acceptance of the "ever closer

[134] Ibid, para 25.
[135] Ibid, para 36.
[136] Ibid, para 41.

Union" as mèta-telos would effectively equal affording the Court with a judicial wild card. It would go against the fundamental assumption that judiciary powers are limited and create un unacceptable tension with Article 3(6) TEU which prescribes the pursuit of EU objectives "by appropriate means commensurate with the competences which are conferred upon it in the Treaties." In the absence of a compelling argument to accept the "ever closer Union" as the Union's mèta-telos it must be assumed that integration is not an end in itself. While the framework of the EU, including its general principles, might imply a unifying approach to EU law, their usage must be beneficial to the pursuit of the Union's goals laid down in Article 3 TEU, which reflects the *degree of integration* envisaged by the drafters of the Treaty.

4.2: An economic right to regulatory efficiency

Because there are no compelling reasons to assume that ever-more integration is a goal in itself, the Court's purposive understanding of the aim of the Directive must be reducible to one of the Union's constitutional objectives. Spaventa puts forward an interesting narrative.[137] She suggests that a dynamic reading of the internal market objective has led the Court to assume that the focus of EU market law has shifted from the integration of markets to the establishment of a "competitive market" –[138] the resemblance with the Court's terminology to describe the aim of the Directive is remarkable.[139] Spaventa suggests that citizenship, "the fundamental status of EU nationals",[140] could serve as an additional legitimizing factor for the extension and evolution of free movement law.

Spaventa recognizes that the internal market objective is not capable of justifying the application of free movement law on measures that no discriminatory effect – neither directly nor indirectly. Additionally, she observes that under a "market access test", i.e. a test which allows the review of every national measure capable of hindering or making less attractive the exercise of economic activity,[141] potentially every rule could come within the scope of free movement law.[142] Within the context of the freedom of establishment and the free movement of services, any service provider that experiences an "unjustly" interference with their economic

[137] Spaventa E, 'Leaving Keck behind? The free movement of goods after the rulings in Commission v. Italy and Mickelsson and Roos' (2009) ELR 34; Spaventa E, 'From Gebhard to Carpenter: Towards a (non-) Economic Constitution', (2004) 41 CMLR 743.
[138] Ibid.
[139] *Appingedam* (n 1) para 125.
[140] Article 20 TFEU; Case C-184/99, *Grzelczyk* [2001] ECLI:EU:C:2001:458, para 31.
[141] Case C-55/94, *Gebhard* [1995] ECLI:EU:C:1995:411, para 37; Case C-76/90, *Säger* [1991] ECLI:EU:C:1991:331.
[142] Spaventa 2009 (n 137).

freedoms could demand a judiciary review of the proportionality of the restrictive national measure.[143] From this perspective, free "movement" law grants protection against disproportionate regulation of economic freedom. In the exercise of economic rights, citizens of the EU have a right to regulatory efficiency.[144]

The most compelling argument against this "citizenship-approach" is that citizenship especially presupposes equal rights for every national of a Member State.[145] Citizenship has been employed to expand the *ratione materiae* of migration law also to purely internal situations, but for the purpose of furthering equality. In the case of *Ruiz Zambrano,* the Court held that a third-country national who was a parent of two minor children with the nationality of a Member State was entitled to a derived right of residence even though the children had not left their home state and had thus not "activated" European law.[146] Under the flag of European citizenship, the Court effectively dissolved a situation of reversed discrimination, i.e. the situation when a national is disadvantaged in its own Member State because he or she cannot rely on a protective provision of Union law.[147] In contrast, the fundamental freedoms and Chapter III of the Directive contain negatively framed rights that shield service providers from certain conduct and/or regulation, but do not entitle them to a "positive" right – or at least this was assumed. In the context of free movement law, suffering from reversed discrimination should be an oxymoron. The creation of the right to regulatory efficiency for economic citizens exclusively would not dissolve but rather create inequality – albeit not between citizens with a different nationality but between economic and non-economic citizens.

This imbalance between economic and non-economic interests is strengthened even further by the impartiality of the proportionality test towards the individual freedom on the one hand and the general interest on the other. Whereas Spaventa envisaged a proportionality test that is impartial towards the interests it weighs,[148] in practice the proportionality contains an inherent and objectified "preference" for individual freedom. Scharpf analyzed that a proportionality review in the context of free movement law affords the individual (economic) freedom considerate evidentiary benefits over the protection of the general interest.[149] Reynolds

[143] Spaventa 2004 (n 137) 764 and 765.
[144] Spaventa 2009 (n 137).
[145] Article 20(1) TFEU.
[146] Case C-34/09, *Ruiz Zambrano* [2011] ECLI:EU:C:2011:124, para 43.
[147] Opinion of AG Sharpston in C-34/09, *Zambrano* [2010] ECLI:EU:C:2010:560; Case C-212/06 *Government of French Community and Walloon Government v Flemish Government* [2008] ECLI:EU:C:2008:178.
[148] Spaventa 2004 (n 137) 765.
[149] Scharpf F W, 'Legitimacy in the multilevel European polity' (2009) 1(2) EPSR 173.

elaborated on his theory and showed that the impartiality of the proportionality review is inherent to its methodology. A proportionality test builds upon a "two-stage breach/justification methodology."[150] Where a restriction on the fundamental freedom is established (in the first stage), the public interest has to "defend" itself at the (second) stage of justification.[151] In a one-sided application of the proportionality test, the national authority has to prove firstly that the national measure is suitable to achieve the pursued objective and secondly that the objective could not have been achieved with measures less restrictive on the freedom of establishment.[152] By contrast, while the restriction is hardly susceptible to a *de minimis* rule[153] the national measure will encounter a multitude of evidentiary bars. The party defending the national measure has to be able to prove, sometimes in remarkable detail, that there were no available measures that were less intrusive on free movement.[154] For example, after the preliminary ruling in *Appingedam*, the Council of State required the municipality of Appingedam to provide the Court with in-depth statistical data to justify the proportionality of its zoning plan-measure.[155]

4.3: Conclusion

Maduro emphasized that judgments should preferably not pre-empt public deliberation when the law leaves room for policy choice. The depiction of the "ever closer Union" as an unalterable mèta-telos that outweighs every other constitutional objective implies that the development of the EU is a one-way street of increasing uniformity. This predestination theory does not only pre-empt public deliberation, it rejects every meaningful debate on the degree and appropriate form of integration.[156] In the absence of compelling proof that never-ending integration is a goal in itself, it must be assumed that it is not. Mèta-teleological interpretation can, at most, justify the interpretation of legislative texts in light of a systemic and generalized reading of constitutional objectives. Spaventa suggests that a joint reading of the constitutional objectives citizenship and the internal market might be able to justify the *economic* right to a general proportionality review of national law that is emerging in the Court's case-law. This chapter dismissed citizenship as capable of bridging the justificatory gap that emerged when

[150] Reynolds S, 'Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights' (2016) 53(3) CMLR 643.
[151] Ibid 644 and 647.
[152] Article 15(3) Directive.
[153] See e.g. Joined cases 177/82 and 178/82, *Van de Haar* [1984], ECLI:EU:C:1984:14; Case 269/83, *Commission v France* [1985], ECLI:EU:C:1985:115; Reynolds (n 150) 667.
[154] Davies (n 123) 12.
[155] *Gemeente Apingedam II* (n 15) para 13.2; Zaaknummer 201309296/6/R3 *Gemeente Appingedam III* [2019] ECLI:NL:RVS:2019:2569, para 9.1.
[156] Davies (n 125).

the Court held that the Directive transcends the objective of the internal market. Considering the objectives listed in Article 3 TEU, it is hard to imagine any objective that can.

Chapter 5: Conclusion

The problem with legal research on judicial interpretations of legislative intent is that they are portrayed as clear-cut recognitions of predefined policy choices made by the legislature and therefore, they lack substantiation. Although the Court is known for its frequent recourse to teleological interpretation, the effect of which on judicial outcomes is often described as "integrationist", the purpose encapsulated in the teleological methodology is rarely identified. This thesis offers a methodology for the evaluation of judicial interpretations of legislative aims. In essence, the common saying "the interpretation is the result of the result" says it all.[157] Where judicial outcomes coincide with interpretations of legislative aims, the substantiation of the former can be employed to reconstruct – and subsequently appraise – the methodology and legal sources underlying the latter. This thesis applies this methodology to the Court's interpretation of the aim of Directive 2006/123/EC on Services in the Internal Market.

In the case of *Appingedam* the Court found that the Directive aims to contribute to the establishment of a "*genuine* internal market for services",[158] which, "above all", presupposes the elimination of obstacles to the exercise of the freedom of establishment by service providers in another Member State or in their home state.[159] The Court portrayed the Directive as the next step in the piecemeal development towards a "free and competitive market"[160] in which every national measure liable to adversely affect economic activity can become the subject of a judiciary proportionality review, the methodology of which contains a deregulatory tendency. The Member States had rejected a first draft of the Directive because they feared excessive economic liberalism. Ironically, the Court's interpretation of the aim of the Directive resembles a classic neoliberal approach to market-making. This should be reason enough to research the legal foundations of the Court's interpretation of the Directive's aim through the Court's substantiation of the case of *Appingedam*.

This thesis is premised on the idea that judgments have to be explainable with a recognized judicial methodology, employing legal sources. The finding that legal language is inescapably ambiguous explains why judicial adjudication cannot be evaluated as if it concerned an arithmetical problem to which there is only one right solution. Judiciary discretion is a "fact" and legal reasoning might best be understood in terms of discernible patterns. However, none

[157] Schütze (n 22) 207.
[158] *Appingedam* (n 1) paras 106 and 122.
[159] Ibid, para 104 and 105.
[160] Ibid. para 104.

of these semantic hurdles dissolve the obligation to adjudicate on the basis of the law; every discernible pattern permeating strains of case law should be reducible to the EU's constitution.

Concerning the aim of the Directive, employed in the teleological interpretation of singular legal norms, it is evident that the Court construed it with a (mèta-) teleological *methodology* itself. It certainly does not flow from the text of the Directive interpreted in accordance with the conventional methods of interpretation. The Court employed its judicial discretion in light of an elusive concept of a higher purpose that benefits from the expansion of free movement law and active deregulation. However, this thesis was unable to identify a constitutional purpose as the *source* of the Court's interpretation. The internal market rationale cannot justify the application of free "movement" law in purely internal situations, citizenship is an unlikely narrative to justify a right for economic citizens only and there are no reasons to assume that integration is a goal in itself.

In a field of research that dismisses the existence of the one right answer, it is nearly impossible to pinpoint when it is justified to conclude that the reason one has failed to identify a legal source is that there is none. From that perspective, the answer to this thesis' research question is as open-ended as the norms, the interpretation of which it tried to explain. At the same time, even Maduro, who encourages the use of the (mèta-)teleological methodology, suggests that teleological interpretation should be applied in subsequent order to other judicial instruments that are more deferent to the text. In contrast, it seems that an elusive higher purpose has motivated the Court to look for judiciary discretion in ostensibly clear-cut norms of the Directive. While judges should, as far as possible, prevent pre-empting the democratic debate where the law leaves room for policy choice, it seems the Court has failed to do so in its interpretation of the aim of the Directive.

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