Visser: Independence Day for the Services Directive

Joined Cases C-360/15 and C-31/16, *College van Burgemeester en Wethouders van de gemeente Amersfoort v X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam*, Judgment of the Court (Grand Chamber) of 30 January 2018, EU:C:2018:44

1. Introduction

For a long time, the Services Directive[1] seemed to hold the record in the gap between the ambition of the original proposal and the disappointing final result. The notorious Bolkestein draft could not have been more far-reaching.[2] The aim was to cut the Gordian knot of services liberalization with one stroke, namely by introducing the country of origin principle. The Directive was meant to cover substantially all service activities, not just a few chosen sectors. This was to free the services markets in the EU to a previously unseen degree and to lead to impressive economic results across the Union.[3] As is well known, the proposal was met with fierce resistance and was amended significantly in the legislative process.[4] Numerous exclusions, exceptions and exemptions were introduced and the country of origin principle was deleted from the text. Scholars were left wondering whether anything of significance had been achieved at all. For example, an editorial in Common Market Law Review concluded that the changes reduce the Directive's 'impact on the development of the internal market to practically zero, if not even to a negative effect.'[5] Stephen Weatherill asked whether it would 'have been better to abandon this legislative project once it became clear that it had been fractured by compromise' and talked of 'making a molehill out of a mountain'.[6] Catherine Barnard adopted a more optimistic view but even her endorsement was decidedly lukewarm: 'The Directive we have is better than no directive at all'.[7]

As so often in EU law, the significance of changes to the Treaties or legislation only emerges gradually as a result of the case law of the Court. As the most obvious example, the impact of the provisions on EU citizenship that were introduced in Maastricht only became clear once the Court handed down rulings in cases such as *Martínez Sala* and *Baumbast*.[8] Something similar may now be taking place for the Services Directive. After a slow start, the Court is increasingly being given the chance to rule on the meaning of the obscure political compromises that the Directive contains. The *Visser* judgment[9] is undoubtedly a key step in this process. The Grand Chamber of the Court was faced with a number of classical questions of free

[1] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68.
[2] COM (2004) 2 final.
[3] For example, Copenhagen Economics, *Economic Assessment of Barriers to the Internal Market for Services: Final Report* (Copenhagen, 2005) estimated at 31 an increase in net employment of up to 600.000 jobs.
[4] For an overview, see Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition', 14 JEPP (2007), 682.
[5] 43 CML Rev. (2006), 307, at 308.
[6] Weatherill, 'Promoting the Consumer Interest in an Integrated Services Market', Mitchell Working Paper Series 1/2007, at 1 and 18.
[7] Barnard, 'Unravelling the Services Directive', 45 CML Rev. (2008) 323, at 325. See also Hatzopoulos, 'Assessing the Services Directive (2006/123)', 10 CYELS (2007-8), 215, at 261.
[8] Case C-85/96, *Martínez Sala*, EU:C:1998:217; Case C-413/99, *Baumbast*, EU:C:2002:493. See e.g. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), at 324-325 on the debates that preceded these decisions.
[9] Joined Cases C-360/15 and C-31/16, *College van Burgemeester en Wethouders van de gemeente Amersfoort v X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam*, EU:C:2018:44.

movement law, but in the context of the application of the Services Directive rather than the Treaty freedoms. The answers that the Court provided serve to establish the autonomous significance of the Directive as a liberalizing instrument. It is not just a minor restatement of the Treaty rights, but is independent of them and goes beyond them.

The present article will proceed as follows: I will first describe the facts and the judgment of the Court. This will be combined, given the simplicity of the factual matrix. There will be no separate section on the Opinion of Advocate General Szpunar,[10] as the Court followed it closely. I will then comment on the decision, focusing on two key issues: the impact of the ruling on national regulatory autonomy and the empowerment of the EU legislature. It should be noted that *Visser* was decided together with *X BV*, which concerned the applicability of the Services Directive to administrative fees linked to the installation of electronic networks. This annotation will only examine *Visser*, a case that carries much broader implications.

2. The facts and the ruling

The facts of *Visser* were simple. Appingedam, like so many municipalities in the Western world, has been concerned about shops migrating from the town centre to the outlying shopping areas. This could lead to the town centre losing its vitality – a main street of whitewashed windows and vacant stores - as has happened elsewhere. To combat this, the municipality drew up a zoning plan that designated the outlying commercial zone called Woonplein exclusively for retail trade in bulky goods. Woonplein was supposed to house the garden centres, car showrooms and DIY shops, while retail trade in items such as clothing and shoes took place in the town centre. However, Visser BV, a company owning commercial premises in the Woonplein, wished to lease one of them to Bristol BV, a company operating discount shoe and clothing shops. It challenged the zoning plan under the Services Directive.

The Court, sitting in the Grand Chamber formation, was essentially faced with three classic questions of free movement law: how do you distinguish between the different freedoms, to what extent do the freedoms apply to internal situations, and what amounts to a restriction? The twist in *Visse*r was that these questions arose in the context of the Services Directive, and therefore could not be answered simply by relying on the established case law developed under the Treaty. The Court, following closely the Opinion of Advocate General Szpunar, provided detailed replies that will shape the application of the Services Directive and the internal market more broadly for years to come.

The first issue was whether the Directive was applicable at all. After all, ultimately the Appingedam zoning plan imposed restrictions on where clothes and shoes could be sold. This, it could be argued, might take it outside the area services and into the realm of goods resulting in the inapplicability of the Services Directive.[11] However, the Court found that retail trade in goods does constitute a service within the meaning of the Directive.[12] It reasoned that retail trade is a self-employed economic activity provided for remuneration, as set out in Article 4(1) of the Directive and referred to in Article 57 TFEU. It drew attention to the recitals of the Directive, which mentioned services provided to consumers, such as distributive

[10] EU:C:2017:397.
[11] See e.g. Case C-20/03, *Burmanjaner*, EU:C:2005:307.
[12] At paras 84-97 of the judgment in *Visser*.

trades, and only excluded requirements 'applicable to goods as such'.[13] Importantly, it distinguished the scope of the Directive from the case law setting out the distinctions between Treaty freedoms. An analysis that followed that case law might frustrate the aims of the Directive by curtailing the application of Chapter III of the Directive on establishment and by undermining legal certainty as a result of the requirement of case-by-case examination of the centre of gravity in light of all the circumstances, as the case law presupposes.[14] Consequently, the Court found that the activity of retail trade in goods constitutes a service for the purposes of the Directive.

The second issue concerned the purely internal nature of the situation.[15] On the facts, there was no inter-State element. Visser was a Dutch company seeking to lease premises to another Dutch company in violation of rules adopted by a Dutch authority. Under well-established case law,[16] which was recently further bedded down in *Ullens de Schooten* ruling of the Grand Chamber,[17] the Treaty freedoms would not be of relevance in such circumstances. Despite this, the Court found that the Services Directive was applicable on the facts, again drawing a clear distinction between the Directive and the Treaty. It noted that Chapter III of the Directive on establishment of service providers was worded differently from Chapter IV on the free movement of services themselves. Chapter III made no references to cross-border elements, while Chapter IV explicitly mentioned them. This was also in line with the objective of the Directive, which was the completion of a free and competitive internal market. In this, the Directive went beyond the reach of the Treaty freedoms. The Court also drew attention to the legislative background of the Directive. It noted that in the legislative process there had been a proposal to limit the Directive to cross-border situations only, but this had not been adopted. Further, Articles 53(1) and 62 TFEU, which constituted the legal basis for the Directive, did not mention a need for a foreign element, unlike the prohibitions contained in Articles 49 and 56 TFEU. As a result, the Court ruled that the provisions of Chapter III of the Directive on establishment of service providers were applicable despite the purely internal nature of the facts of the case.

Having established that the Directive did apply, the Court turned to the issue of whether it had been violated.[18] A particular difficulty was that according to Recital 9 of the Directive it does not apply to requirements of 'town and country planning… which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.' The Court found that in the light of the definitions contained in the Directive, the zoning plan was not an 'authorisation scheme' but a 'requirement'. Recital 9 was not of relevance, since the zoning plan was not addressed to individuals acting in their private capacity but to service providers in the field of retail trade. According to the Court, there was a potential breach of Article 15(2)(a) of the Directive, which concerns territorial restrictions. Although Article 15 speaks of an obligation for Member States to evaluate their requirements, the Court held that the wording imposed an unconditional and sufficiently precise obligation to create direct effect.[19] The

[13] Recital 76 of the Services Directive.
[14] See e.g. Case C-452/04, *Fidium Finanz*, EU:C:2006:631 for an illustration of what this entails.
[15] This was dealt with at paras 98-110 of the judgment in *Visser*.
[16] Case C-175/78, *Saunders*, EU:C:1979:88. For a recent examination, see e.g. Iglesias Sánchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to Be Abandoned?' 14 EuConst (2018), 7.
[17] Case C-268/15, *Ullens de Schooten*, EU:C:2016:874.
[18] This was dealt with at paras 112-136 of the judgment in *Visser*.
[19] This had been apparent already in the earlier rulings, such as Case C‑293/14, *Hiebler*, EU:C:2015:843, annotated by Damjanovic in 54 *CML Rev* (2017), 1535, but in *Visser* the Court dealt with the issue explicitly.

territorial restrictions could potentially be justified by the objective of protecting the urban environment, but the referring national court had to assess their necessity and proportionality.

In short, the result was that the Directive applied to retail trade in goods even in a purely internal situation, and the zoning plan was a potential violation of it. However, the plan could be saved by overriding reasons, subject to the national court finding it proportionate to the objective of protecting the urban environment.

3. Comments

Altogether, the *Visser* case forced the Court to re-evaluate many of the key questions of free movement law in the novel context of the Services Directive. The issues of the applicable freedom, internal situations and the existence of a restriction have been subject to voluminous case law for all four freedoms. In *Visser* the Court opted for an autonomous and expansive reading of the Directive that does not tie it to the case law on Treaty freedoms but allows the Directive an independent and important role in internal market law. Substantively, it represents further inroads into Member State regulatory autonomy. Institutionally, it highlights the ability of the EU legislature to push liberalization beyond the 'bare bones' of the four freedoms.

3.1 Narrowing Member State regulatory autonomy: another nail in the coffin of Keck?

To understand the impact of *Visser* on national regulatory space, it is useful to consider first how the case would have been argued and decided under the Treaty freedoms. The applicable freedom would not have been the freedom to provide services. Under the Treaty, an activity amounts to a service only if it both constitutes a service in substance and if its mode of delivery does not entail permanent establishment in the host state. In this, the Treaty differs from the WTO rules, where all modes of delivery are covered by the General Agreement on Trade in Services, including commercial presence.[20] Given that on the facts Bristol BV was seeking to set up a permanent establishment, Article 56 TFEU would not have been of help. The right of establishment would also have been inapplicable. Article 49 TFEU deals with restrictions on the freedom of establishment in the territory of *another* Member State. Bristol BV was a Dutch company wishing to establish a store in the same country, the Netherlands. The freedom that would have shown the most promise is that of goods. Ultimately the zoning plan had an effect on the sale of shoes and clothing, and at least a potential impact on imports would have been present. However, the rule in issue would have been one concerning selling arrangements in the sense of *Keck*.[21] It regulated where products could be sold.[22] Therefore, some kind of disparate impact to the detriment of imported products would have been necessary to activate Article 34 TFEU.[23] This was not present on the facts.[24] As a result, a Treaty-based challenge would have failed.

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[20] GATS, Article I.
[21] Case C-267/91, *Keck and Mithouard*, EU:C:1993:905.
[22] In Case C-71/02, *Karner*, EU:C:2004:181, para 38 the Court gave the following description of rules concerning selling arrangements: 'provisions concerning inter alia the place and times of sale of certain products and advertising of those products as well as certain marketing methods'.
[23] *Keck*, n 21 above, para 16.
[24] Para 146 of the Opinion of the AG in *Visser*.

The Court got around the limitations of the Treaty in three moves, which in turn involved a number of steps. The first move concerned the definition of services and the second entailed a wide reading of the prohibitions contained in the Directive, while in the third move the Court rejected the requirement of a transnational element for Chapter III of the Directive. The first two moves will be discussed in the present section, the third in the next one.

The first move was the adoption of an autonomous reading of the notion of 'service' for the Services Directive, under which retail trade in goods is now seen as a service. This was somewhat controversial, especially given that the definition of a service in Article 4(1) of the Directive actually makes a cross-reference to Article 57 TFEU, and the Advocate General had to spend a rather large number of paragraphs to deal with the issue.[25] As the first step of this move, the Court drew attention to the recitals which suggest a broad reading of the notion of 'service'.[26] Second, it dismissed a misguided argument of the Government of the Netherlands according to which cases falling under the freedom of establishment under the Treaty are excluded from the scope of the Directive. This was clearly an untenable suggestion. Chapter III of the Directive is entirely about establishment of service providers, and a reading that the Directive does not apply to establishment would have rendered the whole Chapter devoid of purpose, as the Advocate General and the Court were quick to point out.[27] Further, the legal bases of the Directive lie in the Treaty provisions on services *and* establishment, and the recitals of the Directive talk of the need to promote both freedoms.[28] The aim of the Directive was to liberalize service activities in the substantive sense, regardless of the mode of delivery. Permanent presence is covered just like more temporary movements.

The third step was the most consequential.[29] It involved a more general declaration of independence for the Services Directive, in particular towards goods. The Court reasoned that the case law on distinguishing between the different freedoms cannot be transposed to the Directive. Here the Court drew particular attention to the need for legal certainty. The way goods and services are classically distinguished in the case law has relied on the centre of gravity. The *Schindler* ruling offers a good illustration.[30] The case involved the provision of gambling services across borders, which also entailed the mailing of physical lottery tickets. The Court found that the provision of service was the main element on the facts, and the movement of physical items was merely a means to deliver the primary service. As a result, the relevant restrictions were analysed purely from the perspective of the rules on services. The goods element was entirely secondary. By contrast, in cases such as *De Agostini* both goods and services have been subject to separate analyses, as neither element was secondary on the facts.[31] For the Services Directive this kind of case-by-case evaluation would not do, said the Court. It would be particularly difficult to decide on the dominant freedom in the case of retail trade where services and goods are closely intertwined. Further, if national measures need to be examined under both the Treaty freedoms and the Services Directive, this would undermine the targeted harmonization created by the Directive, reasoned the Court.

The potential importance of the move to decouple the definition of service in the Directive from that in the Treaty should not be underestimated. It offers a way to activate the Directive in circumstances where the Treaty would not be of help. The Advocate General offered a broader justification for this autonomous

[25] Paras 63-104 of the Opinion of the AG in *Visser*.
[26] Paras 86-91 of the judgment in *Visser*.
[27] Para 93 of the judgment and para 76 of the Opinion of the AG in *Visser*.
[28] See e.g. recitals 1, 5 and 6 of the Services Directive.
[29] Paras 94-96 of the judgment in *Visser*.
[30] Case C-275/92, *Schindler*, EU:C:1994:119.
[31] Case C-34/95, *De Agostini*, EU:C:1997:344.

reading.[32] He argued that the internal market law has always been characterized by its dynamism – it has responded to changed economic circumstances. This is needed also today, he reasoned. The arrival of the internet has imposed new competitive pressures on retailers and has forced them to transform from simple sellers of goods at the time of *Keck* to service providers offering advice before the sale as well as follow-up services.

Altogether, there is much to agree with here. The case law on the borderline between the freedoms has always been difficult and casuistic, and in an ideal world profound legal consequences should not follow from the classification of an activity under one or another Treaty freedom, given how arbitrary such distinctions may prove in the context of multifaceted economic activities.[33] Further, the different freedoms serve the same aim of creating the internal market and, in the words of the Court, the Treaty seeks to 'ensure that all economic activity falls within the scope of the fundamental freedoms'.[34] In fact, one may wonder whether separate provisions would be written for different types of economic activity if the Treaty was drafted today, or whether there would just be one market freedom.[35]

However, the Advocate General may be guilty of overplaying how everything has changed since *Keck* due to the internet. The importance of pre- and after-sales services in the context of sale of goods has for long been understood in the field of competition law. For example in 1977 the US Supreme Court overturned its previous *per se* approach to vertical restrictions after recognizing that 'manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.'[36] In the same year, the Court of Justice accepted that selective distribution systems involving vertical restraints may fall outside Article 101 TFEU and that they may promote 'improved competition inasmuch as it relates to factors other than prices.'[37] In other words, having specialist sellers would carry benefits in terms of pre- and after-sale services, in particular for technically complex products. Since the late 1990s, the importance of maintaining pre- and after-sale services has been a key feature also in the Commission's approach to vertical restraints.[38] Further, on the facts of *Visser* the relevance of such service elements appears doubtful. Bristol BV is described as running a chain of self-service discount shoe and clothing stores. Typically such chains, in particular if operating from out-of-town commercial zones, do not specialise in high quality service provision.

The second move the Court makes is to adopt a broad reading of the demands of the Directive. The Directive contains a unique response to the old problem of the outer limits of the freedoms,[39] which *Keck* had sought to solve for goods.[40] In recital 9 the Directive provides that:

> This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning

[32] See paras 1-8 and 101-103 of the Opinion of the AG in *Visser.*
[33] Profound legal consequences however do arise if the free movement of capital is involved, as it alone among the freedoms has an *erga omnes* effect. As a result, the Court sought to provide more precise instructions in Case C-35/11, *Test Claimants in the FII Group Litigation (2)*, EU:C:2012:707.
[34] *Fidium Finanz*, n 14 above, para 32.
[35] Compare 'commerce' in Article I, Section 8, Clause 3 of the US Constitution.
[36] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), at 55.
[37] Case 26/76, *Metro*, EU:C:1977:167, para 21.
[38] See Green Paper on vertical restraints in EC competition policy, COM (96) 721, para 59.
[39] See generally e.g. Snell, 'The Notion of Market Access: A Concept or a Slogan?', 47 CML Rev. (2010), 437.
[40] Joliet, 'The Free Circulation of Goods: The *Keck and Mithouard* Decision and the New Directions in the Case Law', 1 Columbia J of Eur L (1995), 436.

> the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.

The recital is problematic in a number of ways. First, it is not clearly reflected in the actual articles of the Directive. As such, it is not binding,[41] and goes against the principles of good law-making.[42] Instead of clarifying the reasons for the precise rules of the Directive, as recitals are supposed to do, it adds a further complicating factor. Second, it is in itself difficult to understand and not fully reflective of the various formulations found in the case law of the Court.[43]

In *Visser*, the Court engages head-on with recital 9.[44] It understands the recital as drawing a line between those national requirements that are true restrictions on service activity and therefore covered by the Directive, and those that are not. The rules at issue specifically determined geographic zones where retail activities may be established. They were not addressed to individuals acting in their private capacity. As a result, they did constitute requirements the Directive applies to.

The Court's approach in *Visser* is very different from that in *Keck*. There is no consideration of a potentially discriminatory impact of the rules. All that matters is whether they are specifically directed at or specifically affect service providers, or whether they are more general rules that even private individuals are subject to. It should be noted that the Advocate General was even more expansive in his reading of the reach of the Directive. He held that 'any rule, regardless of its origin, which has as its effect higher establishment costs for service providers, falls, in principle within the scope of Directive 2006/123.'[45]

However, these very broad readings are tempered in the context of the establishment of service providers by the fact that Articles 14 and 15 of the Directive contain lists of prohibited and suspect measures. They do not cover all possible requirements that establishment may be subject to, but only those specifically enumerated in the text of the Directive. As a result, the approach adopted under *Visser* for recital 9 of the Services Directive is not necessarily of relevance for the broader debate of the outer limits of the internal market. The fact that under *Visser* rules such as those governing shop opening hours would not be saved by recital 9, as they specifically address providers of retail services, does not mean that they now need to re-emerge as restrictions under free movement of goods.[46] Under the Services Directive such rules would escape Articles 14 and 15 of the Directive due to not being listed in them; they do not need to be saved by recital 9.

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[41] See Case C-215/88, *Casa Fleischhandel*, EU:C:1989:331, para 31: 'Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.'

[42] According to Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation, [1999] OJ C73/01, para 10: 'The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations.'

[43] For analysis, see Barnard, n 7 above, 336-339.

[44] Paras 122-124 of the judgment in *Visser*.

[45] Para 137 of the Opinion of the AG in *Visser*.

[46] Contrast e.g. the earlier Case C-145/88, *Torfaen*, EU:C:1989:593 with the subsequent Joined Cases C-401/92 and C-402/92, *Tankstation*, EU:C:1994:220.

As the next step, the Court finds that the zoning plan involves a territorial restriction in the sense of Article 15(2)(a).[47] This is a broad reading of the provision. It is entirely justified if one simply considers the words 'territorial restriction'. After all, the zoning plan sets out an area where certain service providers may not establish themselves. However, the overall context could also have led to a narrower reading. First, the text actually talks of 'quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers'. It associates territorial with quantitative restrictions and gives as an example requirements that inevitably reduce the number of service providers. This has been interpreted by the Commission as rules limiting 'the overall number of service providers, thus hindering new operators from entering the market, and [which] seriously restrict or even impede the freedom of establishment.'[48] The effects of the zoning plan of Appingedam were not of this nature. It did not determine how many retailers could operate in the municipality, but where they should set themselves up.[49]

The immediate practical result of *Visser* is that town and country planning rules of Member States can be challenged more readily than before. This does not mean that the challenges will always be successful. The Member States maintain their ability to offer justifications for their rules. The Court, and in particular the Advocate General, were clearly predisposed to accept the arguments of the municipality and in the end left the matter for the national court.[50] Nevertheless, Member State planning authorities are now under an obligation to take into account the requirements of the Services Directive when making decisions that specifically affect service providers, including retailers. This entails ensuring that their decisions are justified by general interest objectives that are not purely economic.[51] It also requires the consideration of proportionality. A new avenue of attack is now open for firms and companies dissatisfied with zoning decisions. Further, as a result of the third move, discussed in the next section, this is open also for domestic businesses – restrictive rules cannot be maintained for them.

Altogether, *Visser* represents a move away from the ideas that led to the decision in *Keck*.[52] It continues a trend in the case law that has left some scholars wondering whether it still is good law.[53] Although even-handed rules that concern selling arrangements may fall outside Article 34 TFEU, this does not save them from the Services Directive. A national rule establishing where a product may be sold is lawful under free movement of goods in the absence of discrimination, but does now require justification under the Services Directive. This undoubtedly represents a narrowing of Member State regulatory autonomy. However, the important difference to *Keck* is that the source of the rule is not 'just' the Treaty as interpreted by the Court. Instead, it is the Union legislature that has decided to go above and beyond the requirements of the Treaty freedoms. It is this aspect of the case that I now turn to.

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[47] Para 131 of the judgment in *Visser*.
[48] Commission Handbook on Implementation of the Services Directive (2007) at 33.
[49] The territorial restrictions condemned in *Hiebler*, n 19 above, had been more restrictive and already potentially in violation of Art 10(4) of the Directive.
[50] Paras 133-136 of the judgment and paras 145-150 of the Opinion of the AG in *Visser*.
[51] On this notion, see Arrowsmith, 'Economic Justifications under the EU's Free Movement Rules', 68 CLP (2015), 307 and Snell, 'Economic Justifications and the Role of the State' in Koutrakos, Nic Shuibhne, and Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing, 2016).
[52] Note 21 above.
[53] See e.g. Oliver and Martínez Navarro, 'Free Movement of Goods' in Barnard and Peers (eds), *European Union Law* (2nd edn, Oxford University Press, 2017), at 352.

3.2 Empowering the EU legislature: Staying off Tobacco

The ruling in *Visser* answers one of the key questions concerning the Services Directive: [54] does it apply in purely internal situations?[55] The previous case law had left the question open, in particular with the Court in *Trijber* deciding to emphasize the cross-border implications of the relevant national law rather than ruling on the issue,[56] contrary to the advice of the Advocate General.[57] However, in *Visser* the answer turns out to be a clear and resounding 'yes' when it comes to Chapter III of the Directive on the freedom of establishment for service providers.[58] Again, this goes beyond the requirements of the Treaty freedoms, which do not apply if all the circumstances of a particular case are confined to a single Member State - a long-standing doctrine recently and emphatically reaffirmed in *Ullens de Schooten*.[59] The Court bases its reasoning on the perceived will of the legislature. The wording of the Directive makes no reference to cross-border establishment, unlike in the case of the movement of services. The Directive aims to 'contribute to the completion of a free and competitive internal market in services' and 'to achieve a genuine internal market in services' and extends beyond the requirements of the four Treaty freedoms.[60] The Court also notes that in the course of the parliamentary debates an attempt was made to limit the Directive to cross-border situations only, but that this was rejected. The result is that the Directive is again decoupled from the Treaty freedoms and given an independent meaning with important practical consequences.

The style of reasoning in *Visser* that relies on the wording, the objectives and the legislative history of the Directive is in line with the Court's usual approach and does not contain any big surprises.[61] However, more generally there may be a need to exercise some caution when it comes to the reliance on the legislative history of the Services Directive given the convoluted, politically fraught and on occasion even somewhat chaotic context of its adoption.[62] Otherwise some striking, probably unintended and frankly odd results could arise – including the narrowing of the free movement of services.[63] The legislative history of the Directive reveals that the original aim for free movement of services was to establish the 'country of origin' principle.[64] The European Parliament resisted this, and for a while considered suggestions that it should be replaced by a principle of 'mutual recognition'.[65] In the end, this too was rejected due to the extent of the

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[54] See e.g. van den Brink, 'The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU-Member State Relations', 19 CYELS (2017), 211, at 231.

[55] For an early argument in favour, see Davies, 'The Services Directive: Extending the Country of Origin Principle and Reforming Public Administration' 32 EL Rev. (2007), 232, at 241-243.

[56] Joined Cases C‑340/14 and C‑341/14,*Trijber*, EU:C:2015:641, para 41.

[57] The Opinion of AG Szpunar in Joined Cases C‑340/14 and C‑341/14,*Trijber*, EU:C:2015:505, in particular at paras 47-49.

[58] By contrast, the Court rules this out for Chapter IV of the Directive on the free movement of services at para 102 of the judgment in *Visser*.

[59] Note 17 above.

[60] Paras 104-107 of the judgment in *Visser*. Delimatsis, 'From *Sacchi* to *Uber*: 60 Years of Services Liberalization, Ten Years of the Services Directive in the EU' 37 YEL (2018), 188, argues at 229 more broadly that the main thrust of the case law under the Directive has been a broad interpretation faithful to the the ambition expressed in its recitals.

[61] See e.g. Komárek, 'Legal Reasoning in EU Law' in Arnull and Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), at 45-46.

[62] See generally Flower, 'Negotiating European Legislation: The Services Directive', 9 CYELS (2006-7), 217.

[63] See e.g. House of Lords European Union Committee, 'The Services Directive Revisited', 38th Report of Session 2005–06, which takes at para 24 the view that the Directive enshrines 'a Country of Destination Principle'.

[64] Note 2 above.

[65] See Committee on the Internal Market and Consumer Protection, 'Draft Report on the proposal for a directive of the European Parliament and of the Council on services in the internal market' PE 355.744v04-00, Amendment 111.

opposition.[66] Instead the final Directive talks of a 'right to provide services'. In the light of the legislative history of the Directive, the idea that service providers are as a rule only subject to the requirements and supervision of their home country in matters related to the access to and exercise of service activity was rejected. This of course amounts to a challenge by the Union political institutions to the very foundations of the case law on free movement of services under the Treaty, which has been based on the notion of mutual recognition or home country control since 1979.[67]

After the considerations relating to the wording, aims and legislative history, the Court in *Visser* turned to the issue of competence. The Netherlands Government had argued that the legal basis of the Directive, Articles 53(1) and 62 TFEU, covered cross-border situations only. The Court disagreed. It pointed out that although Articles 49 and 56 TFEU creating the right of establishment and the freedom to provide services do require a foreign element, the subsequent provisions setting up the legal bases for harmonization do not mention a cross-border requirement.[68] Advocate General Szpunar added an additional argument in this context. He noted that in the legislative practice of the EU, in particular in the field of financial services, numerous instruments have been based on Article 53 TFEU without being confined to transnational situations.[69]

The Court's ruling to extend the scope of harmonization is an important policy decision. It is certainly not simply driven by the language of the Treaty, as the reasoning suggests. The legal bases exist within the Treaty Chapters that concern the right of establishment and the freedom to provide services, which are expressly confined to cross-border situations. It would be entirely possible to understand the legal bases to be similarly limited.[70] Further, the Services Directive itself is by its nature closely tied to Articles 49 and 56 TFEU: it essentially seeks to codify and develop the detail of the requirements found in those Treaty provisions and the case law on them.

It is illuminating to contrast *Visser* with the seminal *Tobacco Advertising* ruling,[71] which concerned the legality of a directive based on Articles 53, 62 and 114 TFEU that banned tobacco advertising.[72] Here the Court started from a strict approach to the principle of conferral, which is today located in Article 5 TEU. It reasoned that the principle ruled out a general EU power to regulate the internal market and also meant that abstract risks of obstacles or the smallest distortions of competition could not justify harmonization. On the facts, the Court noted that the prohibition could not be accepted for 'advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and… advertising spots in cinemas' as the prohibitions 'in no way help to facilitate trade in the products concerned.'[73] The Court

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[66] Nicolaïdis and Schmidt, 'Mutual Recognition "On Trial": The Long Road to Services Liberalization' 14 JEPP (2007), 717, at 729.

[67] Case C-110/78, *Van Wesemael*, EU:C:1979:8. See also Case C-76/90, *Säger*, EU:C:1991:331. For discussion, see Snell, 'Free Movement of Services and the Services Directive: The Legitimacy of the Case Law' in van de Gronden (ed), *EU and WTO Law on Services: Limits to the realization of General Interest policies within the services markets* (Kluwer Law International, 2008).

[68] Para 109 of the judgment in *Visser*.

[69] Para 113 of the Opinion of the AG in *Visser*. AG Szpunar had discussed the issue in more depth in Joined Cases C‑340/14 and C‑341/14, *Trijber*, EU:C:2015:505, paras 50-57.

[70] See e.g. Barnard, n 7 above, 352.

[71] Case C-376/98, *Germany v European Parliament and Council*, EU:C:2000:544.

[72] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 1992 L 213, p. 9.

[73] Para 99 of the judgment.

admitted that not all rules in the Directive needed to eliminate 'obstacles to exercise of the fundamental freedoms provided that they are necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not circumvented. It is, however, quite clear that the prohibitions mentioned… do not fall into that category.'[74] Further, the Court emphasized that the Directive did not provide for free trade in the products that did comply with it and that the Member States remained at liberty to impose tougher rules. Ultimately the Directive was annulled by the Court.

Altogether, the driving force in the *Tobacco Advertising* judgment was a strict delimitation of the competences of the EU to protect the principle of conferral. This resulted in the Court rejecting a general EU regulatory power over markets and insisting that the Directive must actually contribute to the elimination of concrete obstacles to trade,[75] while other provisions could be added for reasons of anti-circumvention. The basic ethos in *Visser* was very different. The principle of conferral was not mentioned. The driving force was not the protection of Member State competences but rather the achievement of a genuine market in services. For this to be ensured in full, it was legitimate to deal with all obstacles to the establishment of service providers, not just the cross-border ones. The Court did make a half-hearted effort to draw a connection to transnational situations: it did mention that the ease of establishment in the provider's own State would ultimately contribute to cross-border supply of services, but this seems rather abstract and far-removed from the battle against concrete obstacles to trade in services. Here the Court also did not pay attention to the fact that in the actual dispute there was likely to be very little cross-border retail service going on. The company in question was planning to set up a self-service discount shoe and clothing outlet that presumably would mostly service local shoppers. Ultimately, there was no concern that setting down the conditions for the establishment of service providers in purely internal situations might be viewed as an exercise of a general power to regulate the market that *Tobacco Advertising* emphatically denied.

It is well known that the case law that followed the *Tobacco Advertising* ruling has not been characterized by an equally strict approach to competences;[76] the judgment was not in practice a start of a new major trend but increasingly looks like an isolated exception that may be invoked in the abstract but has limited relevance *in concreto*.[77] *Visser* fits into this pattern. It is also in line with the subsequent rulings on Article 114 TFEU, which have established that directives based on that provision can be applied even in the absence of a cross-border dimension on the facts.[78] This is not to say that the *Tobacco Advertising* judgment is dead. It still serves as a useful reminder that there are limits to harmonization. However, the case law now clearly demonstrates that *Tobacco Advertising* needs to be read in the light of its specific facts.[79] Individual statements found in the judgment should not be taken out of that context and viewed as generally applicable rules setting the competence limits once and for all.

The approach in *Visser* is to be welcomed from the broader perspective of the dynamic development of the internal market, which the Advocate General had emphasized in the context of the changing nature of

[74] Para 100 of the judgment.
[75] Or to the removal of appreciable distortions of competition.
[76] See e.g. Case C-210/03, *Swedish Match*, EU:C:2004:802.
[77] See generally e.g. Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"', 12 GLJ (2011), 827.
[78] Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, EU:C:2003:294, paras 41-42.
[79] Weatherill, 'The Several Internal Markets', 36 YEL (2017), 125 writes at 146: 'the Court held, sub silentio, that the EU legislature was in truth pursuing a programme of public health protection camouflaged as market-making harmonization'.

retail activities, discussed above. The key priority for the Union is no longer just the opening of trade channels between countries, but the creation of a genuine economic union that can support the single currency.[80] Thus for example the 2015 Five Presidents' Report[81] argues that there is a need for a greater convergence between Member States. While this can partially be achieved through the deepening of the single market, the Report maintains that 'convergence also requires a broader set of policies that come under the heading of "structural reforms", i.e. reforms geared at modernising economies to achieve more growth and jobs. That means both more efficient labour and product markets and stronger public institutions.'[82] In the medium term, the Report envisages common legally binding standards focussing 'primarily on labour markets, competitiveness, business environment and public administrations, as well as certain aspects of tax policy'.[83] In other words, the creation of a genuine economic union represents a step-change from the single market. At issue is not just free trade but the need to ensure that all euro countries have modern and similarly resilient economies. This calls for EU legislative action that is not limited just to cross-border situations but penetrates far deeper into their business environments. In effect, *Visser* ensures that Articles 53 and 62 TFEU are available for such an endeavour. Here the reference of Advocate General Szpunar to the legislative practice especially in the field of financial services is illuminating. It is precisely in this sector that the regulatory paradigm has changed most visibly from mutual recognition and home country control to a single rulebook and increasingly centralized supervision, [84] and much of the relevant legislation is based on Article 53 TFEU. The clear and uncompromising stance of the Court on the applicability of the Directive even in the absence of a cross-border element and the availability of free movement legal bases for the harmonization of purely internal situations will prove an important and lasting practical and constitutional legacy of the ruling.

4. Conclusion

The judgment in *Visser* represents the Independence Day for the Services Directive. It gains autonomy from the Treaty freedoms. Its scope is not to be interpreted in the same way as the distinctions between the freedoms. It can prohibit matters that the Treaty would allow. Its rules on establishment apply to purely internal situations, unlike the four freedoms. Litigants challenging national measures will be incentivized to see whether their case could be argued under the Services Directive rather than just relying on the Treaty.

In general, *Visser* is to be welcomed. The Treaty freedoms should not be seen as the upper limit of EU's ambitions. Rather, they are the starting point, the bare minimum that the EU judiciary protects and enforces. The Union legislature can go further. It has a democratic mandate that the judges lack. Given the need to move from an incomplete single market towards a genuine economic union, this mandate may have to be exercised also in situations that are internal to the Member States and involve not just trade but national business environments more broadly.

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[80] See generally e.g. Baldwin and Giavazzi (eds), *How to fix Europe's monetary union: Views of leading economists* (CEPR Press, 2016), especially the chapters of Sapir, Micossi, and Papaioannou.

[81] The report, titled 'Completing Europe's Economic and Monetary Union', was authored by Commission President Juncker in close cooperation with the presidents of the European Council, Eurogroup, European Central Bank and European Parliament, and is available at https://ec.europa.eu/commission/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en.

[82] Ibid. at 7.

[83] Ibid. at 9.

[84] For the big picture, see e.g. Moloney, ''EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?', 47 CML Rev. (2010), 1317.

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