

# JUDICIALIZATION OF INTERNAL MARKET LAW: THE ROLE OF THE CJEU IN ADVANCING THE GOODS/SERVICES DICHOTOMY

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## **ABSTRACT**

*Digital, economic, and societal development has prompted the industry to shift its focus from offering products or services to bundles of products and services. Given the breadth of product-service systems in the modern economy, it is becoming increasingly important to consider how they should be regulated at the EU level. This paper investigates whether the traditional distinction between goods and services in EU free movement law applies to product-service systems. To this end, EU primary law, specifically the distinction between goods and services under Article 26(2) of the TFEU, is examined. The argument of this paper builds on the body of case-law of the CJEU where the predominance test was applied to traditional cases of product-service bundles and the medium test to cases with a digital component. It proposes a functional, normative, and constitutional inquiry to determine whether product-service systems fall under the rules governing free movement of goods, services, or a sui generis category. It concludes that coherence of EU law, rather than convergence of the two freedoms, is required to ensure predictability and legal certainty for business owners and consumers.*

**Keywords:** activism, CJEU, convergence, goods and services, internal market, servitization

## **1. INTRODUCTION**

Marketing professor T. Leavitt famously wrote in 1984 that “people don’t want to buy a quarter-inch drill, they want a quarter-inch hole”.<sup>1</sup> In a similar vein, two managements scholars Vandermerwe and Rada wrote in 1988 that it is necessary to move “from the old and outdated focus on goods or services to inte-

<sup>1</sup> Leavitt, T., *The Marketing Imagination*, New York, Free Press, 1984; Freeman, ET., *Buying Quarter Inch Holes: Public Support through Results*, Archival Issues, Vol. 25, Issue 1/2, 2000, p. 92.

grated ‘bundles’ or systems (...) with services in the lead role”.<sup>2</sup> They introduced ‘servitization’<sup>3</sup> and defined the term as increasing the value of the core offering by adding services to product.<sup>4</sup> Thus, to remain competitive, business owners must offer product-service bundles rather than individual elements alone. Examples of servitization models include traditional services being added to the product, like delivery, spare parts provision, maintenance, help desk, renting cars or other transport means instead of buying them, and more advanced services, like subscription models, cloud computing and smart applications.<sup>5</sup>

The success of servitization-like business models is predicated on the assumption that customers are no longer satisfied with purchasing products alone and instead seek results and solutions to their problems.<sup>6</sup> This aligns with the consumer mindset to seek access to products rather than owning them, which has become even more prevalent with the arrival of the internet when economic integration became largely reliant on consumers’ incentives to find the best deal for themselves.<sup>7</sup> Thus, it can be concluded that services have evolved into both drivers and objects of supply chain dynamics.<sup>8</sup>

The shift towards product-service bundles has been acknowledged in scholarly debate<sup>9</sup> as well as both at national and EU level. For instance, the National Board of Trade of Sweden issued a report on The Servicification of EU Manufacturing in which they acknowledged that services elements represent an increasing

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<sup>2</sup> Vandermerwe, S.; Rada, J., *Servitization of Business: Adding Value by Adding Services*, European Management Journal, Vol. 6, Issue 4, 1988, p. 314.

<sup>3</sup> In literature several synonyms were introduced: product-service systems, service infusion, going downstream, tertiarization, extended products, dematerialization etc. Hojnik, J., *The servitization of industry: EU law implications and challenges*, Common Market Law Review, Vol. 53, Issue 6, 2016, p. 1579.

<sup>4</sup> Vandermerwe, S.; Rada, J., *loc. cit.*, note 2., p. 314.

<sup>5</sup> Hojnik, J., *op. cit.*, note 3, p. 1580 – 1582; European Commission, *Innovation for a Sustainable Future – The Eco-innovation Action Plan (Eco-AP)*, Communication, COM(2011) 899 final, 15 December 2011.

<sup>6</sup> *Ibid.*, p. 1601.

<sup>7</sup> Lianos, I., *Updating the EU Internal Market Concept*, in: Amtenbrink, F.; Davies, G.; Kochenov, D.; Justin Lindeboom, J. (eds.), *The Internal Market and the Future of European Integration*, Essays in Honour of Laurence W. Gormley, Cambridge University Press, 2019, p. 526.

<sup>8</sup> Sauv , P., *To fuse, not to fuse, or simply confuse? Assessing the case for normative convergence between goods and services trade law*, Journal of International Economic Law, Vol. 22, Issue 3, 2019, p. 355.

<sup>9</sup> Maduro, M. P., *Harmony and dissonance in free movement*, Cambridge Yearbook of European Legal Studies, Vol. 4, 2001, pp. 315-341; Joined Cases C-158 and 159/04, *AlfaVita Vassilopoulos v Greece*, ECLI:EU:C:2006:562, Opinion of AG Poiares Maduro; Tryfonidou, A., *Further steps on the road to convergence among the market freedoms*, European Law Review, Vol. 35, Issue 1, pp. 36-56; Andenas, M.; Roth, W. H., *Goods and services, two freedoms compared*, M langes en hommage   Michel Waelbroeck, Vol. II, 1999, p. 1377.

proportion of both input and output activities in the manufacturing industry.<sup>10</sup> Similarly, EU Commissioner Elzbieta Bienkowska stressed in her speech in 2015 titled ‘Reindustrialisation of Europe: Industry 4.0 - Innovation, Growth and Jobs’ that “manufacturing and services are two sides of the same coin” and that “in the modern economy, you cannot choose the one or the other . . . . You must do both”.<sup>11</sup> The European Commission has employed a similar stance to the one of Professor T. Leavitt with a saying that people do not want light bulbs, but light.<sup>12</sup>

Additionally, case-law of the Court of Justice of the EU (CJEU) recognizes the growing importance of services in modern economy. In *X BV*<sup>13</sup> the CJEU was asked whether retail constitutes a service and thus falls under the scope of the Services Directive. Advocate General Szpunar agreed and pointed out that with the arrival of the internet retail not only consists of merely selling a product, but also of advising, counselling and offering follow-up services and that as such, it is not an activity which is merely ancillary to a product.<sup>14</sup> Later in 2021 Advocate General Hogan stressed in *KRONE – Verlag*,<sup>15</sup> that it is increasingly difficult to distinguish between products and services due to technological advances.<sup>16</sup> He referred to the Report on the safety and liability implications of Artificial Intelligence<sup>17</sup> which states that “(...) products and the provision of services are increasingly intertwined (...)”.<sup>18</sup>

In the past year the European Commission announced in The Single Market at 30 Communication<sup>19</sup> that it will launch a priority process of addressing jointly

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<sup>10</sup> Kommerskollegium, The National Board of Trade of Sweden, *The Servicification of EU Manufacturing*, Stockholm, 2016, p. 28; Kommerskollegium, The National Board of Trade of Sweden, *Servicification on the internal market: A regulatory perspective: The case of customisation by 3D printing*, Stockholm, 2015, p. 23.

<sup>11</sup> Valero, J., *Brussels to Issue Sharing Economy “Guidelines” in March*, EurActiv, 28 January 2016, [<https://www.euractiv.com/section/digital/news/brussels-to-issue-sharing-economy-guidelines-in-march/>], Accessed 4 April 2024.

<sup>12</sup> Hojnik, J., *Ecological modernization through servitization: EU regulatory support for sustainable product-service systems*, Review of European, Comparative & International Environmental Law, Vol. 27, Issue 2, 2018, p. 173.

<sup>13</sup> 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* ECLI:EU:C:2018:44.

<sup>14</sup> 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* ECLI:EU:C:2017:397, Opinion of AG Szpunar, para. 102. The CJEU agreed with AG.

<sup>15</sup> Case C-65/20 VI v KRONE – Verlag Gesellschaft mbH & Co KG ECLI:EU:C:2021:471.

<sup>16</sup> Case C-65/20 VI v KRONE – Verlag Gesellschaft mbH & Co KG ECLI:EU:C:2021:298, Opinion of AG Hogan, para. 30.

<sup>17</sup> European Commission, *Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics*, COM(2020) 64 final.

<sup>18</sup> *Ibid.*, pp. 13-14.

<sup>19</sup> European Commission, *Single market at 30 Communication*, COM(2023) 162.

with Member States barriers to free movement of services in industrial ecosystems with a high services content.<sup>20</sup> It was stressed in the Communication that priority will be given in particular to construction, retail,<sup>21</sup> tourism<sup>22</sup> and business services.<sup>23</sup> The Communication also proposed an amended tax policy at EU level which would address distortions and ensure the good functioning of the Single Market.<sup>24</sup> In relation to this it included the Value Added Tax (VAT) in the Digital Age proposal.<sup>25</sup>

The increasingly blurred line between goods and services consequents in the increasingly intertwined legislation.<sup>26</sup> This calls for a response to these realities at EU level. Against this backdrop it is necessary to examine whether the existing EU legal framework is fit for the shift towards product-service bundles. In this article emphasis is placed on the primary EU law, namely TEU and TFEU<sup>27</sup> and the rules on free movement of goods and services contained therein. Part 2 looks at the position of goods and services in EU law and the reasons for establishing (and maintaining) the goods/services dichotomy. This is accompanied in Part 3 with the analysis of CJEU case-law which suggests a change in the judicial approach to free movement, but also has constitutional implications. Part 4 addresses the main question of the article and part 5 gives an overview of the alternative options for the facilitation of free movement of product-service bundles in the EU. It concludes that coherence of EU law is necessary rather than convergence of the two freedoms. Only this way predictability and legal certainty for business owners and consumers can be guaranteed.

## 2. FREE MOVEMENT OF GOODS AND SERVICES IN EU LAW

The establishment of the internal market has been a common goal of EU integration since its creation. Article 2 of the 1957 Treaty of Rome already declared that the European Economic Community aimed to establish a common market

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<sup>20</sup> *Ibid.*, p. 16.

<sup>21</sup> Retail is a service based on AG Szpunar Opinion in X BV.

<sup>22</sup> Tourism sector illustrates the shift towards servitization as for example short-term rentals via applications entail both the rental of the product and the associated services (for example use of shared washing machines in the building).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, p. 20.

<sup>25</sup> *Ibid.*

<sup>26</sup> Shin-yi, P., *A New Trade Regime for the Servitization of Manufacturing: Rethinking the Goods-Services Dichotomy*, *Journal of World Trade*, Vol. 54, Issue 5, 2020, p. 707.

<sup>27</sup> Consolidated version of the Treaty of the European Union and the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, pp. 1–388.

between the Member States.<sup>28</sup> Back then the CJEU reiterated in its *Schul*<sup>29</sup> judgment what is now Article 26 of the TFEU that the internal market involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.<sup>30</sup> Thus, the aim was to create a market that functions as if all Member States are one country.<sup>31</sup> The legacy of this process is seen in the second paragraph of Article 26 of the TFEU which introduces the four fundamental freedoms of the internal market, namely free movement of goods, persons, services and capital.<sup>32</sup>

When the EU internal market was established, goods accounted for more than 70% of the European economy.<sup>33</sup> Therefore, goods formed the primary focus when the Treaty rules on free movement were drafted.<sup>34</sup> Today, it is the reverse. It is claimed that services constitute over 70% of the European economy.<sup>35</sup> Part III of the draft EU Constitution acknowledged that services which were of scarcely any economic importance in 1957 in relation to goods have come into their own.<sup>36</sup>

Despite the importance of establishing the internal market, Treaties contain almost no definitions of goods and services. Much of the internal market law is thus case law developed by the CJEU<sup>37</sup> and its active role in interpreting concepts has a direct impact on trade and business with and within the EU.<sup>38</sup>

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<sup>28</sup> Cuyvers, A., *The EU Common Market*, in: East African Community Law, Brill Nijhoff, 2017, p. 294.

<sup>29</sup> Case 15/81 Gaston Schul Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen Roosendaal ECLI:EU:C:1982:135.

<sup>30</sup> *Ibid.*

<sup>31</sup> Cuyvers, A., *The EU Common Market*, in: East African Community Law, Brill Nijhoff, 2017, p. 294.

<sup>32</sup> Kellerbauer, M.; Klamert, M.; Tomkin, J. (Eds.), *The EU Treaties and the Charter of Fundamental Rights: a commentary*, Oxford University Press, 2019.

<sup>33</sup> Cuyvers, A., *Free Movement of Goods in the EU*, in: East African Community Law, Brill Nijhoff, 2017, p. 326.

<sup>34</sup> *Ibid.*

<sup>35</sup> Cuyvers, A., *Freedom of Establishment and the Freedom to Provide Services in the EU*, in: East African Community Law, Brill Nijhoff, 2017, p. 376.

<sup>36</sup> Draft Treaty Establishing a Constitution for Europe, Adopted by Consensus by the European Convention on 13 June and 10 July 2003, 2003/C 169/01.

<sup>37</sup> Schütze, R., *European Union Law*, Cambridge: Cambridge University Press, 2015; Derlen, M.; Lindholm, J., Is It Good Law? Network Analysis and the CJEU's Internal Market Jurisprudence. *Journal of International Economic Law*, Vol. 20, Issue 2, 2017, p. 258.

<sup>38</sup> Derlen, M.; Lindholm, J., *Is It Good Law? Network Analysis and the CJEU's Internal Market Jurisprudence*, *Journal of International Economic Law*, Vol. 20, Issue 2, 2017, p. 258.

## 2.1. Defining goods and services

The CJEU is bound by the limits imposed in the Treaties and is thus required to apply the distinction between goods and services. The differentiating characteristic for the CJEU has been that goods are material objects, whereas services are not.<sup>39</sup> The CJEU has defined goods as ‘products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.’<sup>40</sup> In this respect, the CJEU applies a broad definition of goods.<sup>41</sup> Rules on free movement of goods are applied for example to waste,<sup>42</sup> coins no longer in circulation,<sup>43</sup> animals,<sup>44</sup> and medicinal products for human use (human blood, plasma).<sup>45</sup> Despite the lack of tangibility and the ability to store them, TFEU rules on goods apply also to electricity<sup>46</sup> and natural gas.<sup>47</sup> Fishing rights, on the other hand, as intangible rights do not qualify as goods.<sup>48</sup> The CJEU also develops its case-law on goods in line with legal and cultural development. In *Josemans*<sup>49</sup> the CJEU excluded marijuana (as a narcotic) from the application of free movement rules, while they were applied in 2020 in a similar case.<sup>50</sup>

While goods are not defined in the Treaties, Articles 56 and 57 TFEU provide guidance in the pursuit of defining services as including all economic activities that are normally provided for remuneration and that are not covered by the other freedoms.<sup>51</sup> The CJEU applied rules on free movement of services to importation and distribution of lottery tickets,<sup>52</sup> donations in kind,<sup>53</sup> transmission of a TV

<sup>39</sup> Snell, J., *Goods and Services in EC Law: A Study of the Relationship between the Freedoms*, Oxford University Press, 2002, p. 4; Hojnik, *op. cit.*, note 3, p. 1621; Case 155/73 Giuseppe Sacchi ECLI:EU:C:1974:40, paras. 6–7.

<sup>40</sup> Case 7/68 Commission of the European Communities v Italian Republic ECLI:EU:C:1968:51.

<sup>41</sup> Goods and products are synonyms in the case-law of the CJEU.

<sup>42</sup> Case C-2/90 *Commission of the European Communities v Kingdom of Belgium* ECLI:EU:C:1992:310.

<sup>43</sup> Case 7/78 *Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwis* ECLI:EU:C:1978:209.

<sup>44</sup> C-67/97 *Criminal proceedings against Ditlev Bluhme* ECLI:EU:C:1998:584.

<sup>45</sup> Case C-296/15 *Medisanus d.o.o. v Splošna Bolnišnica Murska Sobota* ECLI:EU:C:2017:431.

<sup>46</sup> Case 6/64 *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66

<sup>47</sup> C-159/94 *Commission of the European Communities v French Republic* ECLI:EU:C:2005:444.

<sup>48</sup> Cuyvers, A., *Free Movement of Goods in the EU*, in: East African Community Law, Brill Nijhoff, 2017, p. 327.

<sup>49</sup> Case C-137/09 *Marc Michel Josemans v Burgemeester van Maastricht* ECLI:EU:C:2010:774.

<sup>50</sup> Case C-663/18 *Criminal proceedings against B S and C A* ECLI:EU:C:2020:938

<sup>51</sup> Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* ECLI:EU:C:1974:131, para. 26.

<sup>52</sup> Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* ECLI:EU:C:1994:119.

<sup>53</sup> Case C-318/07 *Hein Persche v Finanzamt Lüdenscheid* ECLI:EU:C:2009:33.

signal, including those in the nature of advertisements,<sup>54</sup> while trade in materials (tapes, file etc.) used for television programmes were defined as goods.<sup>55</sup> Based on the body of CJEU case-law we find that goods include tangible or intangible entities to which ownership rights can be assigned, while services require an intervention by the service provider rather than ownership transfer.<sup>56</sup>

## 2.2. Legal relevance of the dichotomy

The abovementioned distinction is often criticized. Marengo writes that ‘the distinction between goods and services is largely formal and has no real economic significance. This distinction is sometimes awkward and normally ought not to entail legal consequences’.<sup>57</sup> Similarly, Jukka Snell considers that because of the significant convergence between the freedoms, it will usually also not make a real difference, in terms of outcome, which freedom applies.<sup>58</sup>

However, this article stresses that several legal consequences demand the distinction between goods and services to be preserved.<sup>59</sup> Those include: horizontal direct effect (HDE), applicability of the *Keck* exception, intensity of regulation, role of nationality and origin, cross-border element and specific EU-third party mechanisms.

In *Luisi and Carbone*<sup>60</sup> the CJEU held that not just service providers but also service recipients may rely on Article 56 TFEU.<sup>61</sup> Thus, if the transaction falls within the scope of the rules on services, Article 56 TFEU is binding not only on the Member States but also on private operators<sup>62</sup> which means that in horizontal relationships, rules on free movement of services have direct effect. On the other

<sup>54</sup> Case 155/73 Giuseppe Sacchi ECLI:EU:C:1974:40, paras. 6–7.

<sup>55</sup> Case 155/73 Giuseppe Sacchi ECLI:EU:C:1974:40, paras. 6–7.; Cuyvers, A., *Freedom of Establishment and the Freedom to Provide Services in the EU*, in: East African Community Law, Brill Nijhoff, 2017, p. 376.

<sup>56</sup> Gadrey, J., *The Characterization of Goods and Services: An Alternative Approach*, Review of Income and Wealth, Series 46, Number 3, 2000, p. 378.

<sup>57</sup> Hojnik, J., *Regulatory implications of servitization in the EU: Can lawyers follow the suit of digitised industry?*, EU law discussion group, Faculty of Law University of Oxford, 2016.

<sup>58</sup> Snell, J., *op. cit.*, note 39, p. 4.

<sup>59</sup> Hojnik, J., *op. cit.*, note 3., p. 1612.

<sup>60</sup> Joined Cases 286/82 & 26/83 Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro ECLI:EU:C:1984:35.

<sup>61</sup> *Ibid.*, p. 390.

<sup>62</sup> Case C-159/00, Sapod Audic v Eco-Emballages SA ECLI:EU:C:2002:343; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan in Svenska Elektrikerförbundet ECLI:EU:C:2007:809; C-384/93 *Alpine Investments BV v Minister van Financiën* ECLI:EU:C:1995:126; Krenn, C., *A Missing Piece in the Horizontal Effect “Jigsaw”*: *Horizontal Direct Effect and the Free Movement of Goods*, Common Market Law Review, Vol. 49, Issue

hand, this is not applicable to the Treaty provisions on free movement of goods,<sup>63</sup> meaning that consumer, employees and other individuals may not rely on the provisions of the TFEU against (private) business owners before national tribunals. It is also worth mentioning the different approach to horizontal direct effect of provisions on services in TFEU (which have HDE) and the Services Directive (which, as a directive, lacks HDE). This disparity is often criticized in literature.<sup>64</sup> Interestingly, the agenda of the European Commission for the digital internal market shows a trend towards proposing more regulations rather than directives,<sup>65</sup> which might address and solve the issue of the lack of horizontal direct effect of directives in the future.<sup>66</sup>

Besides the different possibilities of individuals to claim rights under internal market rules (horizontal direct effect), *Keck*<sup>67</sup> decision provides for another reason why the distinction between goods and services pertains. In the framework of free movement of goods, the CJEU decided in *Keck* that it is left to the Member States to lay down detailed marketing rules when and how the goods can be sold.<sup>68</sup> On the other hand, Member States' autonomy to regulate selling arrangements under the *Keck* exception has so far not been applied outside the freedom of goods and thus does not apply to services.<sup>69</sup>

Other factors weigh in the legal relevance of the distinction. When it comes to the intensity of regulation, it is claimed that more regulating measures are to be justified on the grounds of consumer protection in the case of services. Therefore,

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1, 2012, pp. 177 – 215; Leczykiewicz, D.; Weatherill, S., *The Involvement of EU Law in Private Law Relationships*, Bloomsbury Publishing, 2013.

<sup>63</sup> Hojnik, J., *Technology neutral EU law: digital goods within the traditional goods/services distinction*, International Journal of Law and Information Technology, Vol. 25, Issue 1, 2017, p. 73.

<sup>64</sup> Criticism can be found for example: Luzak J., *Time to Let Go of the Services/Goods Distinction? - CJEU in X (C-360/15 & C-31/16)*, Blog Recent developments in European Consumer Law, 1 February 2018, [<https://recent-ecl.blogspot.com/2018/02/time-to-let-go-of-servicesgoods.html>], Accessed 4 April 2024.; Hojnik, J., *op. cit.*, note 3, p. 1588.

<sup>65</sup> For instance, the Batteries Directive was amended by the Batteries Regulation in 2023 (Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC [2023] OJ L 191/1). Digital Services Act, Digital Markets Act, Data Act, AI Act, Proposal for a Regulation on data collection and sharing relating to short-term accommodation rental services also illustrate the shift from directives to regulations.

<sup>66</sup> On the other hand it may pose questions about the compatibility of this approach with the principles of subsidiarity and proportionality.

<sup>67</sup> Joined cases C-267/91 and C-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard ECLI:EU:C:1993:905.

<sup>68</sup> *Ibid.*, para 18.

<sup>69</sup> Hojnik, J., *op. cit.*, note 63, p. 73.



the harmonization process in the service sector would be more intense than in the case of goods.<sup>70</sup> Moreover, only nationals of Member States may rely on the provisions on the free movement of services, however, for the application of the provisions on goods, the criterion is the origin of the product, not the nationality of the owner.<sup>71</sup> Cross-border element is also interpreted and applied differently. The compatibility of the restriction with the EU law may be tested, in the absence of a cross-border element, only with regard to the free movement of goods.<sup>72</sup> Finally, the EU–Turkey association regime fully liberalizes trade in goods and essentially applies Article 34 TFEU between the EU and Turkey, but does not grant such status to services.<sup>73</sup>

The aforementioned factors indicate that the application of rules on free movement of goods and services has a direct impact on the rights of business owners and consumers under EU law, as well as the legal certainty. Thus, the goods/service dichotomy must be preserved and applied carefully.

### 3. TRADITIONAL APPROACH OF THE CJEU TO PRODUCT/SERVICE BUNDLES

As flagged above in reference to professors Leavitt, Vandermerwe and Rada, the blurry line between goods and services is not new. The CJEU has developed a special approach to address the issue in cases of product-service systems brought before it. To illustrate, in *18/84, Commission v France*<sup>74</sup> the CJEU decided that printing work cannot be described as a service, since it leads directly to the manufacture of a physical article.<sup>75</sup> Thus, rules on free movement of goods were applied. On the other hand, in *Van Schaik*<sup>76</sup> a contract on repair services for a car presented performance of services and not goods as the supply of spare parts was only ancillary to the service provision.<sup>77</sup> In *Omega*<sup>78</sup> the CJEU explained with regard to mar-

<sup>70</sup> Snell, J., *op. cit.*, note 39, p. 19.

<sup>71</sup> Greaves, R., *Advertising Restrictions and the Free Movement of Goods and Services*, European Law Review, Vol. 23, Issue 4, 1998, p. 305.

<sup>72</sup> *Ibid.*

<sup>73</sup> Snell, J., *op. cit.*, note 39, p. 15; Vilímková, V., *The concept of goods in the case law of the Court of Justice*, The Lawyer Quarterly, Vol. 6, Issue 1, 2016, p. 40.

<sup>74</sup> Case 21/84 *Commission of the European Communities v French Republic* ECLI:EU:C:1985:184.

<sup>75</sup> Case 21/84 *Commission of the European Communities v French Republic* ECLI:EU:C:1985:184, para. 12.

<sup>76</sup> Case C-55/93 *Criminal proceedings against Johannes Gerrit Cornelis van Schaik* ECLI:EU:C:1994:363.

<sup>77</sup> Case C-55/93 *Criminal proceedings against Johannes Gerrit Cornelis van Schaik* ECLI:EU:C:1994:363.

<sup>78</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614.

keting and sales that ‘where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it’.<sup>79</sup>

Against this background the CJEU adopted the „dominance approach“<sup>80</sup> to determine whether within a certain product-service bundle goods or services dominate. In the *Burmanjer* case,<sup>81</sup> which has developed as the main reference for the test, the CJEU wrote that an economic activity should be examined in the context of either free movement of goods or freedom to provide services, if one of these elements ‘is entirely secondary in relation to the other and may be considered together with it’.<sup>82</sup> Based on the test, the production of goods was categorised under goods, not services.<sup>83</sup> The dominance approach was also applied in subsequent case-law.<sup>84</sup> For instance in *Berlington Hungary*<sup>85</sup> Hungarian legislation, which prohibited the operation of slot machines outside casinos, was decided on the basis of free movement of services provisions, not goods.<sup>86</sup> Additionally, inaccurate health advice included in a printed newspaper copy did not constitute a ‘(defective) product’.<sup>87</sup>

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<sup>79</sup> *Ibid.*, para. 26; see also for example Case C-275/92 *Her Majesty’s Customs and Excise v Gerhart Schindler and Jörg Schindler* ECLI:EU:C:1994:119, para. 22; C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português* ECLI:EU:C:2003:446, para. 55.

<sup>80</sup> The examined approach of the CJEU in the *Burmanjer* case was marked as ‘dominance approach’ by Hojnik, J., *op. cit.*, note 3, p. 1611.

<sup>81</sup> Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong* ECLI:EU:C:2005:307.

<sup>82</sup> *Ibid.*, para. 43.

<sup>83</sup> *Ibid.*, paras. 34, 35.

<sup>84</sup> Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* ECLI:EU:C:2006:631, para. 34; Case C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* ECLI:EU:C:2006:525, para. 36; Case C-108/09 *Ker-Optika bt v ÁNTSZ Dél-dunántúli Regionális Intézköz* ECLI:EU:C:2010:725, para. 54; 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*, ECLI:EU:C:2018:44, Opinion of the AG, para. 85 ; Joined Cases C-407/19 and C-471/19, *Katoen Natie Bulk Terminals NV and General Services Antwerp NV v Belgische Staat and Middlegate Europe NV v Ministerraad*, ECLI:EU:C:2021:107, Opinion of the AG, para. 36.

<sup>85</sup> C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* ECLI:EU:C:2015:386.

<sup>86</sup> C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* ECLI:EU:C:2015:386.

<sup>87</sup> Case C-65/20 *VI v KRONE – Verlag Gesellschaft mbH & Co KG* ECLI:EU:C:2021:471.

The wide acceptance of the dominance approach is seen from the fact that the CJEU applied it also to service-service bundles. In the *Uber Spain* case<sup>88</sup> the CJEU excluded intermediation services (as transport services) from the scope of free movement of services as the purpose of an intermediation service is to connect non-professional drivers using their own vehicle with persons who wish to make urban journeys.<sup>89</sup> This purpose, in the opinion of the CJEU, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of EU law.<sup>90</sup>

#### 4. FREE MOVEMENT FOR PRODUCT-SERVICE BUNDLES?

What remains to be answered is how the dominance approach translates in the digital era. It seems that the application of the approach is more problematic since it is harder to establish, which part is ‘entirely secondary’ to the other;<sup>91</sup> for example, the applications or cloud system on the phone are equally important to consumers as the ownership and access to a physical phone.<sup>92</sup> Of course, each case must be assessed individually, but with product-service systems in place for quite some time, legal certainty should strengthen in unison.

In its jurisprudence, the CJEU primarily dealt with a special category of product-service bundles, digital goods, which can serve as guidance when interpreting broader issue of product-service systems. It held in *Dynamic Medien Vertriebs*<sup>93</sup> and *Football Association Premier League*<sup>94</sup> that the answer as to which freedom applies depends on the medium: if digital goods are not related to a tangible entity, rules on services will apply; if they do, rules concerning goods will apply.<sup>95</sup>

<sup>88</sup> Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981.

<sup>89</sup> Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981.

<sup>90</sup> Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981; Hojnik, J., *Servitization, IoT and Circular Economy. Need for Regulatory Intervention at EU Level?*, in: Keirsbilck, B.; Terryn, E. (eds.), *Servitization and circular economy: economic and legal challenges*, Intersentia, 2023, pp. 33-68.

<sup>91</sup> Hojnik, J., *op. cit.*, note 3, p. 1612.

<sup>92</sup> See research from Belgium, the Netherlands and the UK mentioned in: Slachmuylders, H., *iPhone as a Service? Some thoughts on Apple's rumoured hardware subscription service*, April 2022, CCM Blog, [[https://kuleuven.limo.libis.be/discovery/fulldisplay?docid=lirias3717154&context=SearchWebhook&vid=32KUL\\_KUL:Lirias&lang=en&search\\_scope=lirias\\_profile&cadaptor=SearchWebhook&tab=LIRIAS&qquery=any,contains,LIRIAS3717154&offset=0/](https://kuleuven.limo.libis.be/discovery/fulldisplay?docid=lirias3717154&context=SearchWebhook&vid=32KUL_KUL:Lirias&lang=en&search_scope=lirias_profile&cadaptor=SearchWebhook&tab=LIRIAS&qquery=any,contains,LIRIAS3717154&offset=0/)], Accessed 4 April 2024.

<sup>93</sup> Sale of DVDs or video cassettes with cartoons without an age-limit labels are goods. Case C-244/06 *Dynamic Medien Vertriebs* ECLI:EU:C:2008:85.

<sup>94</sup> Importation of foreign decoding devices were considered as services. Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) ECLI:EU:C:2011:631.

<sup>95</sup> Hojnik, J., *op. cit.*, note 63, pp. 63 – 84.

It explained for example in *Football Association Premier League* that ‘the national legislation is not directed at decoding devices, but deals with them only as an instrument enabling subscribers to obtain the encrypted broadcasting services’ and thus, rules on free movement of goods do not apply.<sup>96</sup> This approach of the CJEU to assess the medium of the bundle based on the functional equivalence of its elements (the functional equivalents approach)<sup>97</sup> seems more in line with the servitization movement.<sup>98</sup> If we apply it to the example of 3D printing, free movement of goods rules will apply under the condition that the trader will send the customer already printed products; but if only a digital design is sent and the purchaser prints the product himself, rules on services will apply.<sup>99</sup> The application of this approach, which derives from only a handful of cases, however, remains limited, as the current position of the CJEU still relies on the understanding that tangible objects are goods and intangible objects are services.

In her research<sup>100</sup> Hojnik analyses the approaches to digital goods in different areas of EU law, namely taxation, copyright and consumer protection and finds that those approaches are clearly opposing. In copyright law, the CJEU supports a functional equivalents approach between digital and physical goods;<sup>101</sup> from a taxation standpoint, digital goods are considered as services and more favourable VAT treatment is afforded to traditional paper books and newspapers but not to e-books and e-media;<sup>102</sup> and when it comes to consumer protection, digital goods are neither considered as goods nor as services, but as a *sui generis* ‘product’.<sup>103</sup>

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<sup>96</sup> Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) ECLI:EU:C:2011:631; Hojnik, J., *Digital Content as a Market Commodity Sui Generis: EU Lawyers (Finally) Moving from Newton Physics to Quantum Physics?*, Economic and Social Development: Book of Proceedings, 2017, p. 74.

<sup>97</sup> Marked as such by Hojnik, J., *op. cit.*, note 5, p. 1613.

<sup>98</sup> Hojnik, J., *loc. cit.*, note 95, p. 74.

<sup>99</sup> *Ibid.*, p. 73.

<sup>100</sup> *Ibid.*, pp. 73 – 84.

<sup>101</sup> Case C-128/11 *UsedSoft GmbH v Oracle International Corp* ECLI:EU:C:2012:407, para. 47: free movement of goods principles applied although it referred solely to the downloading and storing of software on customers’ computers; C-174/15 *Openbare Bibliotheken* ECLI:EU:C:2016:459, Opinion of AG Szpunar, para. 30: lending of electronic books is a modern equivalent of the lending of printed books.

<sup>102</sup> C-479/13 *Commission of the European Communities v French Republic* ECLI:EU:C:2005:444, C-502/13 *European Commission v Grand Duchy of Luxembourg* ECLI:EU:C:2017:333: VAT is applied to books, not e-books (digital goods are considerably different from books on physical means of support).

<sup>103</sup> For example Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive

Thus, while the new, functional equivalents approach dependent on the medium of the product-service bundle is indeed a departure from the traditional, dominance approach, towards the direction of the servitization movement, however, in different areas of law, different understanding to digital goods applies, which can lead to dispersion of EU law as a whole. Therefore, this article builds on the previously conducted research and stresses the importance of general principles of EU law to solve the question of goods/services dichotomy in the digital age.

## 5. FUNCTIONAL, NORMATIVE AND CONSTITUTIONAL EVALUATION

As noted, the distinction between goods and services as set out in EU primary law (TFEU) relates to the legal reasons behind the introduction of the distinction. It was also emphasised that in practice the line between goods and services is increasingly blurred. The CJEU has dealt with traditional cases of product-service bundles based on the dominance approach, while in cases brought about digitalisation the CJEU applied the functional equivalents approach. However, we have also seen that the application of the tests varies in different areas of law. With the lack of clear legislation and the disparities within the EU legal order, the CJEU plays an important role in preserving coherence and legal certainty.

To answer the main question of this article, that is how product-service systems should be interpreted under the EU internal market law, a three-fold evaluation is proposed. The first layer relates to the functional aspect, in which the CJEU looks at the characteristics of both freedoms without reference to any legal rules. This layer gathers both the dominance and the functional equivalents approaches since they are based on the examination of characteristics of the bundle (namely which part is predominant or the medium) without considering any rules behind goods and services. This approach offers a possibility to subsume the case under a specific freedom, but as a first step aims to find the relevant connecting factor to the legal rules. This makes the approach of the CJEU more practical and interdisciplinary, and answers the possible critique of the excessive recourse by jurists to abstract legal terms.<sup>104</sup>

The second layer brings about more challenges. It relates to the normative aspect which looks at the relevant rules, namely the substance of the tests applied and

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97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22 November 2011, pp. 64–88.

<sup>104</sup> Mańko, R., *The Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on Aziz v CatalunyaCaixa (CJEU, 14 March 2013, Case C-415/11)*, Law and Forensic Science, Vol. 10, 2015, pp. 7 – 26.

the legal threshold. Here the main question is whether there should be another freedom for product-service bundles with its own rules. In literature there are different opinions that can be summarized into three groups: to maintain (i) separate freedoms and separate sets of rules and subsume product-service systems under one of them, (ii) separate freedoms with another set of rules for product-service systems, and (iii) to introduce a new freedom of movement of product-service systems with its own set of rules.<sup>105</sup>

The prevailing opinion in literature on EU internal market law is that there should be a separate category of product-service systems. Hojnik suggests that in order to avoid oversimplification and improper legal solutions it is safer to treat digital goods as a legal category *sui generis* with specific characteristics and legal consequences rather than classifying them categorically into one or the other group.<sup>106</sup> Luzak supports this categorization and favours the extinction of goods/services dichotomy when it comes to product-service systems.<sup>107</sup> She explains that the level of consumer protection and legal certainty would drastically increase if we had one framework for trade contracts, encompassing both trade in goods, in services and in digital content, as there would be no reason to first establish which element of the contract was the predominant one in mixed transactions, in order to decide which rules to apply.<sup>108</sup> In respect of the normative layer, the role of the CJEU is limited as the legislature and Member States govern these questions, while the CJEU follows the limits imposed by them in the Treaties, currently in the form of distinction between goods and services under TFEU.

The last layer of the inquiry relates to the constitutional implications of the product-service systems in the EU internal market. In this layer both substantive rules and institutional aspects are analysed. It is in this context worth examining the role of general principles of EU law in the digital internal market.<sup>109</sup> In the current state of EU affairs where old rules are being reconsidered and where fresh rules may be forthcoming as addressed in this paper, reference to general principles becomes omnipresent.<sup>110</sup> One could compare this situation to the story of the

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<sup>105</sup> Shin-yi, P., A New Trade Regime for the Servitization of Manufacturing: Rethinking the Goods-Services Dichotomy, *Journal of World Trade*, Vol. 54, Issue 5, 2020, pp. 699 – 726.

<sup>106</sup> Hojnik, J., *op. cit.*, note 63, p. 73.

<sup>107</sup> Luzak, J., *Digital Age: Time to Say Goodbye to Traditional Concepts*, *Journal of European Consumer and Market Law*, Vol. 7, Issue 4, 2018, p. 135.

<sup>108</sup> *Ibid.*

<sup>109</sup> Hatzopoulos, V., *General Principles of EU Law for the Collaborative Economy*, in: Bernitz, U.; Groussot, X.; Paju, J.; de Vries, Sybe A.; (eds.), *General Principles of EU Law and the EU Digital Order*, Wolters Kluwer, 2020, pp. 133-134.

<sup>110</sup> *Ibid.*

fox and hedgehog.<sup>111</sup> During the period when definitions are unclear, but also when technology-neutral solutions are desperately sought, it makes sense to refer to general principles, namely the coherence of EU law, effectiveness of EU law and legal certainty and predictability.<sup>112</sup> The balance of powers under Article 13(2) of the TEU and sincere cooperation under Article 4(3) of the TEU should be examined as well. In this inquiry the role of the CJEU is pervasive as its interpretation of rules furthers coherence of EU law, especially if Member States do not reach a consensus to the definition and legal application of servitization models.

To summarize, product-service bundles should be examined from the perspective of their functional characteristics (if predominant element is not satisfied, other tests apply) together with general principles of EU law to ensure coherence of EU internal market law and legal certainty for consumers and business owners. The second layer is up to the EU legislature and Member States.

## 6. CONCLUSION

The purpose of this article is not to predict the future application of free movement rules nor to criticize the existing case-law of the CJEU. It is to emphasise the legal gaps that currently exist in the regulation of product-service systems in the EU internal market and to highlight the alternative ways to tackle the issue.

The internal market system is not prone to technological changes. In order to enforce technology-neutral solutions, recourse must be made beyond the traditional rules. This article stresses that this is only possible through general principles of EU law and thus the constitutional layer of the EU legal order becomes increasingly important in the digital age. Thus, we can project that with the development of the digital internal market the degree of judicialization will increase. It is still however to be determined the substance of principles when dealing with free movement of product-service systems on a case-by-case basis and to align different areas of EU (secondary) law in this respect. It is with the current state of affairs appropriate to conclude that the issue as multi-layered and complex deserves the attention of both the legislature, Member States and the CJEU. It should be in the spirit of EU integration that all relevant stakeholders apply EU rules with a view on coherence of EU law.

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<sup>111</sup> “*The fox knows many things, but the hedgehog knows one big thing. The fox, for all his cunning, is defeated by the hedgehog’s one defence*”. Berlin, I., *An Essay on Tolstoy’s View of History, The Proper Study of Mankind: An Anthology of Essays*, 1997.

<sup>112</sup> Shuibhne, NN., *The Coherence of EU free movement law: constitutional responsibility and the Court of justice*, Oxford University Press, 2013; Duić, D., *The Concept of Coherence in EU Law*, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 65, Issue 3-4, 2015, pp. 537 – 553.

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