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Guns and Tobacco. The effect of interstate trade case law on the vertical division of powers.

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1. Introduction

Can the Council use its power of Article 95 EC, allowing for harmonization of Member States measures 'which have as their object the establishment and functioning of the internal market'[1], to impose on Member States a ban on tobacco advertising? Or the US Congress *its* power to regulate interstate commerce[2] to prohibit the possession of firearms near schools? The European Court of Justice and the United States Supreme Court, respectively, in *Tobacco Advertising*[3] and *Lopez*[4] held that they could not. But for the Supreme Court, this was the first time in almost 60 years it had declared an act to be unconstitutional for exceeding the scope of the Commerce Power. Previously in that period it had allowed the use of this power even when Congress had employed it for social[5] or criminal[6] purposes. The Supreme Court in *Lopez* hence significantly narrowed what will be referred to in this article as the power's 'bandwidth'. Prior to this case, it allowed for a broad use of the power by the United States Congress, but it intervened in *Lopez*, essentially by redefining the power's 'fluctuation margins'.

Article 28 EC prohibits quantitative restrictions between Member States relating to trade and measures having an equivalent effect. The Supreme Court has derived from the Commerce Power a principle similar to Article 28. According to the so-called dormant commerce clause, state legislation is unconstitutional if it places an undue burden on interstate commerce.

In widening or narrowing the bandwidth of both Commerce Power and dormant commerce clause, the Supreme Court has played a vital role in the vertical division of power in the United States. Unlike their European equivalents,

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[1] Article 95 EC grants the Council the power to adopt 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'

[2] Article I, section 8, clause 3 of the United States Constitution, known as the commerce clause, provides that 'Congress shall have the power to regulate commerce … among the several states'.

[3] Case 376/98, *Germany v. Parliament and Council* [2000] ECR 8419.

[4] *United States v. Lopez*, [1995] 514 US 549, 559

[5] See e.g. *Heart of Atlanta Motel v. United States* [1964] 379 U.S. 241, *Katzenbach v. McClung*, [1964] 379 U.S. 294, *Daniel v. Paul*, [1969] 395 U.S. 298 and *Hodel v. Indiana*, [1981] 452 U.S. 314.

[6] See e.g. *Perez v. United States*, [1971] 402 U.S. 146.

the commerce clause and dormant commerce clause principle have been at the core of the jurisprudential (and hence academic) debate on federal-state relations. The commerce clause case law on both the commerce clause and dormant commerce clause demonstrates that the 'Supreme Court' of a composite legal order can play a significant role in the vertical division of powers. In comparing this case law with that of Articles 28 and 95 EC, this article will examine whether the European Court of Justice has played a similar role. Has the European Court of Justice used its interstate commerce case law to influence the vertical division of powers in the European Union? To answer this question, the case law on the Commerce Power will be compared with that of Article 95 (section 2) and the case law on the dormant commerce clause principle with that of Article 28 (section 3).

2. The bandwidth of Article 95

2.1. Introduction

This section will examine whether the European Court of Justice has used its Article 95 case law to influence the vertical division of powers.[7] The Commerce Power case law demonstrates the U.S. Supreme Court clearly has; it for instance changed its case law in 1937 under political pressure from the federal level to allow the implementation of the federal New Deal program (§.2.2.). The modifications in the bandwidth of Article 95 in the case law of three successive political timeframes will be discussed. First, the case law in the period between the Single European Act and the Treaty of Maastricht (§2.3.); secondly, the case law between the Treaty of Maastricht and the Treaty of Amsterdam (§.2.4), in which a distinction will be made between *inner limit* and *outer limit* case law (§2.5); and thirdly, the most recent cases (§2.6).[8] After analysing some of the

[7] It follows from the wording of Article 95 that it is a *lex specialis* of Articles 94. Also see R. Van Ooik, *De Keuze der Rechtsgrondslag voor Besluiten van de Europese Unie* (with a summary in English), (Kluwer, 1999), 137-138. It is also a *lex specialis* of Article 308, as it is settled case law that Article 308 EC may be used as the legal basis only where no other provision of the Treaty gives the Community institutions the necessary power to adopt legislation. See Case 45/86, *Commission v. Council* [1987] ECR 1493, para. 13. Article 95 is a *lex generalis* of some other Treaty provisions. This follows from the wording of Article 95 and also has been held consistently by the Court, e.g. in Case 84/94, *United Kingdom of Great Britain and Northern Ireland v. Council* [1996] ECR 5755, para. 12; and Case 202/88, *France v. Commission* [1991] ECR 1223, para. 25. Also see P. Craig and G. de Burca, *EU law, text, cases and materials*, (Oxford University Press, 1998), 1119. Before the introduction of Article 95 (then Article 100A EC), Article 94 (then Article 100) served as the only legal basis for the harmonization of the common market. It is generally assumed that prior to 1986, Article 94 was interpreted broadly. See e.g. A. Arnull, 'Does the Court of Justice have Inherent Jurisdiction?' (1990) 27 *C.M.L. Rev.* 684, 707; and Usher, 'The gradual widening of European Community policy on the basis of Articles 100 and 235 of the EEC Treaty' in J.G. Schwarze and G. Schermers (eds.), *Structure and Dimensions of European Community Policy*, (Nomos, 1988), 25.

[8] Cases in this subsection are discussed in chronological rather than in numerical order.

differences in the test used by the two Courts (§2.7), the impact of this case law on the vertical division of powers will be examined (§2.8).

2.2. The Commerce Power

Over the course of the United States' history, the Commerce Power has been the focus of a significant body of case law. The Court has time and again examined the meaning of 'commerce', 'among the states' and 'to regulate', respectively, to delineate its bandwidth.

The first time the Supreme Court had to decide on the scope of the commerce power was in *Gibbons v. Ogden.*[9] At issue was the constitutionality of a steamboat monopoly law of the state of New York. Aaron Ogden had acquired a licence based on this monopoly. Gibbons operated a competing ferry under a license granted by an Act of Congress. Ogden argued *inter alia* that since the vessels only carried passengers between two States, they were not engaged in 'commerce' in the constitutional sense, but in 'navigation'. Marshall CJ, writing for the court, rejected this argument. He equated the term 'commerce' with intercourse comprehending all phases of business, including navigation. On the basis of the meaning of 'among the states', he argued that Congress had the authority even to regulate *intra*state trade if it had an impact on interstate activities. Thirdly, he stated that the power 'to regulate' knows 'no limitations, other than are prescribed in the Constitution'.[10] Clearly Marshall CJ construed a broad bandwidth of the Commerce Power; Congress had the authority to regulate all phases of business. The Supreme Court would only intervene if these activities lacked any (indirect) impact on interstate activities. The difficulty, of course, is how to determine which activities affect interstate commerce. This required 'line-drawing and a case-by-case inquiry',[11] which culminated in a substantial divergence of opinion within the Marshall Court – as is revealed in its two subsequent commerce clause cases[12] – which continued within the Taney, Chase and Waite Courts.[13] As a result, the era between *Gibbons* and the adoption of the Interstate Commerce Act and the Sherman Anti-Trust Act in 1887 and 1890, respectively, showed, in the words of Laurence Tribe, 'inconsistent doctrinal themes'.[14] The adoption of these two statutes, however, ushered in a new era of judicial review of commerce clause cases.

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[9] [1824] 9 Wheat. (22 U.S.) 1.

[10] *Gibbons* [1819], 196-197.

[11] E. Chemerinsky, *Constitutional Law, Principles and Policies,* (Aspen Law & Business, 1997), 176

[12] *Brown v. Maryland* [1827] 12 Wheat. (25 U.S.) 419; and *Wilson v. Blackbird Creek Marsh Co.* [1829] 2 Pet. (27 U.S.) 245. See S. Goldman, *Constitutional law, Cases and Essays, (*Harper & Row, New York (etc), 1987), 286

[13] Compare *United States v. Coomb* [1838] 12 Peters 72 and *The Daniel Ball* [1871] 10 Wall. (77 U.S.) 557, with *United States v. DeWitt* [1870] 9 Wall. (76 U.S.) 41, 45 and *The Trademark cases* [1878] 10 Otto (100 U.S.) 82.

[14] L.H. Tribe, *American Constitutional Law,* (The Foundation Press, Inc., 1988), 306. To discuss these themes clearly is outside the scope of this essay.

In the years between 1890 and 1937, the Supreme Court held matters regulated by federal legislation beyond the scope of the Commerce Power in a number of cases.[15] In *United States v. E.C. Knight Company*[16] – the 'springboard for doctrines narrowing Congress' reach under the commerce clause'[17] – the federal government filed a civil challenge under the Sherman Anti-Trust Act against the Knight Company, which had acquired all of the stock of its leading competitors. The Fuller Court held that the Act could not be applied. It explicitly rejected Marshall's opinion in *Gibbons* and argued manufacturing had to be distinguished from commerce.[18] On the meaning of 'among the states', the Fuller Court argued that the resulting restraint on interstate commerce would be 'indirect'; the Court now equated 'among the states' with requiring a *direct* effect upon interstate commerce.[19] Thirdly, the Court in *Hammer v. Dagenhart* stated that the power 'to regulate' entailed nothing more than 'to control the means by which commerce is carried on.'[20] Clearly, the Court – by narrowly defining 'commerce', 'among the states' and 'to regulate' – limited the bandwidth of Congress' power under the commerce clause substantially.

In 1935-36, the Hughes Court used the judicial doctrines articulated by its two predecessor Courts to strike down important pieces of the New Deal legislation,[21] leading to a collision between the judicial and political branches of government. Following his landslide victory in the 1936 elections, Roosevelt therefore proposed to increase the size of the Court. The proposal was rejected, mainly because Roberts J in 1937 bowed to political pressure and changed his position, becoming the fifth judge to uphold several laws on subjects that before had been

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[15] See e.g. *Williams v. Fears,* [1900] 179 U.S. 270; *Diamond Glues Co. v. United States Co.,* [1903] 187 U.S. 611; *Browning v. City of Waycross,* [1914] 233 U.S. 16; *Blumenstock Bros. v. Curtis Publishing Co.,* [1920] 252 U.S. 436; and *Federal Baseball League v. National League of Professional Baseball Clubs,* [1922] 259 U.S. 200.

[16] [1895] 156 U.S. 1, 13.

[17] Goldman, *Constitutional law,* 288

[18] This was followed by a distinction between commerce and mining in *Oliver Iron Company v. Lord,* [1923] 262 U.S. 172 and *Carter v. Carter Coal Company* [1936] 298 U.S. 238.

[19] Later cases confirmed that the Act could only be applied against *direct* restraints on interstate commerce, see e.g. *Addyston Pipe & Steel Co. v. United States* [1899] 175 US 211. In *Northern Securities Company v. United States* [1904] 193 U.S. 197, the Court articulated a comparable distinction between reasonable and unreasonable restraints of trade, which it employed until 1937, e.g. in *Cincinnati, New Orleans and Texas Pacific Railway Company* [1896] 162 U.S. 184; *United States v. American Tobacco Company,* [1911] 221 U.S. 106; *United States v. Winslow,* [1913] 227 U.S. 202; *United States v. Steel Corp,* [1920] 251 U.S. 417; *Houstan, East and West Texas Railway Company v. United States, Texas and Pacific Railway Co. v. United States,* [1914] 234 U.S. 342, *A.L.A. Schechter Poultry Corp. v. United States.* [1935] 295 U.S. 495; and *Carter*.

[20] [1918] 247 U.S. 251, 269-270.

[21] E.g. in *Schechter Poultry* and (under other congressional powers); *Panama Refining Company v. Ryan,* [1935] 293 U.S. 388; *Louisville Joint Stock Bank v. Radford,* [1935] 295 U.S. 555; and *United States v. Butler,* [1936] 297 U.S. 1.

held beyond the Commerce Power's scope. Three cases illustrate in particular this 'Constitutional Revolution'[22] of 1937.[23]

In *NLRB v. Jones & Laughlin Steel Corp.*,[24] the Court upheld the Wagner Act of 1935, which aimed to protect the right of employees to organize into labour unions both in businesses operating in interstate commerce, as well as in those the activities of which affected interstate commerce. Jones & Laughlin – one of the United States' major steal manufacturers – had fired ten leaders of the local labour union at one of its plants. The National Labour Relations Board, established by the Wagner Act, ordered the company to rehire the men. The defendant argued the act had no application, *inter alia*, because it affected manufacturing and not commerce. Hughes CJ, writing for the Court, however argued commerce *included* manufacturing.[25] He also implied a direct effect upon interstate commerce was no longer required; Congress could regulate all activities, which *substantially affected* interstate commerce.[26] Thirdly, he stated: 'the power to regulate commerce is the power to enact *all* appropriate legislation for its protection or advancement. ... That power is *plenary*'.[27] The Court upheld the authority of the NLRB and the validity of the Wagner Act.

The Fair Labor Standards Act of 1938 set minimum wages and maximum hours for all employees 'engaged in commerce or in the production of goods for commerce'.[28] In *United States v. Darby Lumber Co.*,[29] the Darby Lumber Company was charged with violating Section 15 of this Act, which prohibited the shipment by interstate commerce of goods produced by the employment of workers at wages or hours contrary to the Act. Stone J, writing for a unanimous Court, not only stipulated that manufacturing was part of commerce,[30] but also gave an unprecedented width to the definition of the power 'to regulate'; the statute fell within the scope of Congress' Commerce Power, because:

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[22] H.W. Chase, *Edward S. Corwin's The Constitution and what it means today*, (Princeton University Press, 1978), 62

[23] But also see e.g. *Kentucky Whip & Collar Co. v. Illinois Central R.R.*, [1937] 299 U.S. 334; *Mulford v. Smith*, [1939] 307 U.S. 38; *United States v. Rock Royal Cooperative*, [1939] 307 U.S. 533; and *United States v. Wrightwood Diary Co.*, [1942] 315 U.S. 110.

[24] [1937] 301 U.S. 1.

[25] This was confirmed in two companion cases; see *NLRB v. Fruehauf Trailer Company*, [1937] 301 U.S. 49 and *NLRB v. Friedman- Harry Marks Clothing Company*, [1937] 301 U.S. 58.

[26] This return to the *Gibbons*-doctrine was confirmed in later cases upholding the authority of the NLRB, in which this 'substantial affect' test was applied to permit broad federal regulation of labour relations. See *Associated Press v. Labor Board*, [1937] 301 U.S. 103; *Santa Cruz Company v. Labor Board* [1938] 303 U.S. 453; *Consolidated Edison Co. v. NLRB*, [1938] 305 U.S. 197; *Labor Board* v. *Fainblatt*, [1939] 306 U.S. 601; *Polish Alliance v. Labor Board* [1944] 322 U.S. 643; *Guss v. Utah Labor Board*, [1957] 353 U.S. 1; *NLRB v. Reliance Fuel Oil Corp.* [1963] 371 U.S. 224.

[27] *Jones & Laughlin*, 36-37. Citations omitted. Emphasis added.

[28] Cited in C.H. Pritchett, *The American Constitution*, (McGraww-Hill, 1977), 196.

[29] [1941] 312 U.S. 100; also see *Opp Coton Mills v. Administrator*, [1941] 312 U.S. 126.

[30] Stone J did make some sort of distinction between manufacturing and the shipment of manufactured goods, but this was significantly eroded in later case law concerning the FLSA. See e.g. *Kirschbaum v. Walling*, [1942] 316 U.S. 517 and *Borden Co. v. Borella* [1945] 325 U.S. 679.

> the motive and purpose of a regulation … are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.[31]

In *Wickard v. Filburn,*[32] Jackson J, writing for the Court, even argued that home grown wheat, of which none was sold on the open market, still could have an effect upon interstate commerce. He made clear that the Court would no longer follow any of the doctrines it had hitherto adopted: 'Questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect"'.[33]

In sum, the Court now construed an extremely wide bandwidth of the Commerce Power, as Congress could now 'legislate on' and 'govern' all phases of business, provided the activity concerned had a substantial effect on interstate commerce. In *Heart of Atlanta Motel Inc. v. United States*[34] the Court even erased the word 'substantial' from this test. The Civil Rights Act, which prohibited discrimination in places of public accommodation, could be applied to a motel refusing to provide accommodation to Black Americans. It was rightfully adopted under the commerce clause, since 'Congress had a rational basis for finding that racial discrimination by motels affected commerce'. This rational basis test was confirmed in the companion case of *Katzenbach v. McClung.*[35]

In *United States v. Lopez,* school officials at a High School in Texas had caught the 12th grade student Alfonso Lopez carrying a concealed .38 calibre handgun. When sentenced to six months in prison for violating the Gun-Free Zones Act prohibiting the possession of firearms within 1000 feet of school grounds, he appealed on the ground that the statute was an unconstitutional exercise of the Commerce Power. Rehnquist CJ, writing for the Court, stated Congress could, under the Commerce Power, regulate three categories of activity: 'the use of the channels of interstate commerce', 'instrumentalities of, … or persons or things in interstate commerce, even though the threat may come only from intrastate activities' and 'those activities having a substantial relation to interstate commerce'.[36] He argued that the activity regulated did not fall within either the first or second category, so went on to consider the third. Clearly

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[31] *United States v. Darby Lumber Co.* [1941] 312 U.S. 100, 114. He thus construed an even broader definition than Marshall had used in *Gibbons.* Stone J also reiterated the *Gibbons* or 'substantially affect' doctrine (*Ibid*.,118).

[32] [1942] 317 U.S. 111.

[33] Ibid., 129

[34] *Heart of Atlanta Motel v. United States* [1964] 379 U.S. 241, 258-259.

[35] The Court found that the Act could regulate the racially discriminatory seating practices of Ollie's Barbecue, a small restaurant in Alabama, since Congress had rationally concluded that discrimination by restaurants cumulatively had an impact on interstate commerce. Also see *Hodel v. Indiana,* [1981] 452 U.S. 314.

[36] *Lopez,* 559

departing from the rational basis doctrine, Rehnquist CJ stated that, within this third category, 'the proper test requires an analysis of whether the regulated activity *substantially* affects interstate commerce'. He argued it did not, because, *inter alia*, the Act was 'a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise'.[37]

Five years after *Lopez*, the Supreme Court in *Morrison v. United States*[38] and the companion case of *Bronzkala v. Morrison,*[39] held a section of the Violence Against Women Act of 1994 beyond the scope of the Commerce Power. Bronzkala had filed suit against Morrison and Crawford, alleging they had raped her at a party. Section 13891 of the Act allowed the victims of gender-motivated violence to sue for compensatory and punitive damages, but Morrison and Crawford questioned its validity. Rehnquist CJ, writing for the Court, found the section could not be considered a regulation of an activity that substantially affected interstate commerce,[40] because, *inter alia*, this activity was a question of non-economic, criminal conduct.[41]

Overall, it is clear that the case law on the scope of the bandwidth of the Commerce Power directly affects the vertical division of powers. After *Gibbons*, Congress could regulate all phases of business provided it had an impact on interstate activities, whereas between 1890 and 1937, the Court significantly narrowed the power's scope, drastically curtailing powers at the federal level. Then, after 1937, the Supreme Court under political pressure seemed to maximize the bandwidth – the Court would not intervene as long as Congress had (some

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[37] Ibid.

[38] [2000] 120 S. Ct. 1740.

[39] Case No. 99-25, decided 15 May 2000.

[40] He reiterated the three categories of activity articulated in *Lopez*. Both petitioners contented the act was based on the third.

[41] The Court has also applied a narrow construction of the Commerce Power in other case law following *Lopez*, as a tool not to invalidate the federal act concerned, but to substantially limit the scope thereof by giving a narrow interpretation to certain provisions or terms. In *Jones v. United States* [2000] 529 US 848 – decided a week after *Morrisson* – Jones had thrown a Molotov cocktail into his cousin's home and was convicted of violating federal legislation. The Supreme Court reversed the decision. Ginsburg J, writing for a unanimous court, argued that the disputed legislation covered 'only property currently used in commerce or in an activity affecting commerce'. *FDA v. Brown & Williamson* (98-1152) concerned the Food, Drug and Cosmetic Act, which established the Food and Drug Administration (hereinafter: FDA) and granted it the authority to regulate, among other items, 'drugs' and 'devices'. The FDA asserted jurisdiction to regulate tobacco products. Brown & Williamson successfully challenged this jurisdiction. In *SWANCC* v. *United States Army Corps Of Engineers*, [2001] 531 U.S. 159, a municipal corporation had purchased a site for disposing of waste but was denied a permit required under the Clean Water Act by the Corps, which asserted jurisdiction on the grounds that use of the area as habitat for migratory birds substantially affected interstate commerce. Referring to *Lopez* and *Morrison*, Rehnquist CJ argued that this contention raised 'significant constitutional questions'. In *Pierce County v. Guillen*, [2003] 537 US 129, the Court did hold the federal act concerned within the scope of the Commerce Power, but it unambiguously confirmed the *Lopez* judgement. In a short argument, Thomas J, writing for a unanimous court again, reiterated the first two categories of activity outlined in *Lopez*. Since the disputed legislation purported to improve the safety of the United States highways, Thomas J argued it was, 'aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce'.

kind of) a rational basis for believing that the legislation concerned had an effect on commerce – whereas *Lopez* and *Morrison*[42] mark the return to a narrow(er) one and thus restrict the scope of Congress' power to regulate.

2.3. Article 95 before Maastricht

Before Maastricht, the ECJ had to decide on the scope of Article 95 in *Titanium Dioxide* and *Chernobyl*, both of which involved the question of whether the disputed measure was adopted under the proper provision of the Treaty or should have been based on an alternate one. In such cases involving a choice of legal basis, the ECJ had previously articulated the so-called centre of gravity-doctrine, according to which the measure concerned must be based on the provision related to the measure's main subject. This choice of legal basis 'must be based on objective factors which are amenable to judicial review'.[43]

In *Titanium Dioxide,* the Commission brought an action for annulment of Directive 89/428/EEC on waste from the titanium dioxide industry. It claimed the Directive, which was adopted under Article 130S,[44] should instead have been based on Article 100A.[45] The Court repeated the centre of gravity theory and found 'objective factors' to include in particular the aim and content of the measure.[46] Since the Directive was aimed 'indissociably, [at] both the protection of the environment and the elimination of disparities in conditions of competition',[47] the Council, in principle, should have based the directive on *both* provisions.[48] However, the Court regarded this as impossible in the present case, since these provided for two conflicting legislative procedures; Article 100A provides for qualified majority voting (hereinafter: QMV), whereas Article 130S at the time required unanimity.[49] The Court argued that sufficient account could be taken of environmental requirements under Article 100A and because, therefore, this was the appropriate legal basis, it annulled the Directive. In *Chernobyl*,[50] the European Parliament claimed that Article 100A was the proper legal basis for a Regulation adopted under Article 31 of the European Atomic Energy Community Treaty (hereinafter: 'EAEC') on the protection of health. This was an attempt by Parliament to defend its prerogatives, as Article 31 of the EAEC Treaty provides that Parliament has only to be consulted, whereas Article

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[42] And related commerce clause case law as discussed in previous note.

[43] Case 45/86, *Commission v. Council* [1987] ECR 01493 (*Tariff Preferences*), para. 11. See Van Ooik, *Keuze der Rechtsgrondslag*, 83 *et seq.*; also see the opinion of AG Tesauro in *Titanium Dioxide*, paras. 4 and 8.

[44] Now Article 175 EC. In this section, old numbering is used when case law prior to the ToA is discussed.

[45] Now Article 95.

[46] Case 300/89, *Commission v. Council* [1991] ECR 2867, para. 10.

[47] Ibid. para. 13.

[48] See Case 165/87, *Commission v. Council* [1988] ECR 5545.

[49] Article 175 was amended by the ToM and the ToA and now also requires QMV, save when a measure is adopted under Article 175 (2) EC.

[50] Case 70/88 *Parliament v. Council* [1990] ECR 2041

100A requires its cooperation.[51] The Court, examining the aim and content of the measure, admitted that the Directive indeed prohibited the placing on the market of foodstuffs and therefore had an effect on the functioning of the internal market. But since this effect was only 'incidental',[52] the Directive was validly adopted on the sole basis of Article 31 EAEC.

2.4. From Maastricht to Amsterdam

The remarkable result of *Titanium Dioxide* implied the Council could now legislate on environmental matters by QMV, even though Article 130S EEC required unanimity, which led to strong opposition by several Member States during the Treaty of Maastricht negotiations to the implication that they had surrendered their veto right in this area. After 1992, the legal question of *Titanium Dioxide* returned in *Waste Directive*, in which the Commission – supported by the Parliament – sought to annul a Directive on waste disposal based on Article 130S. The Commission argued that since the Directive had as its object both the protection of the environment and the establishment and functioning of the internal market, it should have been based – solely – on Article 100A EC. The Court rejected this argument. It held that the Directive was concerned primarily with the protection of the environment and had only 'ancillary effects'[53] on the internal market. Accordingly, it found the contested Directive was validly adopted under Article 130S EEC exclusively. *Transfer of Waste* also involved the choice between Article 100A and 130S EEC. The Court again held that Article 130S was the proper legal basis.[54]

Two other cases of this era - *Business Registers* and *GATT* - involved a choice of legal basis too,[55] but from 1993 onwards, the Court also had to deal with a different kind of question, namely whether the Community had the legislative authority *whatsoever*, to base a measure on Article 95.

[51] Both provisions require QMV.

[52] *Chernobyl*, para. 17.

[53] Case 155/91, *Commission v. Council* [1993] ECR 939, para. 20. On this case in general, see Wachsmann, (1993) 30 *C.M.L. Rev.* 1051.

[54] See e.g. Case 187/93, [1994] ECR 2857, para. 25.

[55] In Case 426/93, [1995] ECR 3723 (*Business Registers*), the German Government claimed a Council Regulation adopted under Article 213 EEC (now Article 284 EC) should have been adopted under Article 100A. Its primary argument was that Article 213 could not constitute an autonomous legal basis for a measure of the Council. The Court, however found it could. It argued that Article 100A EEC could not be used as the legal basis since the effects of the Regulation were 'merely ancillary to the aim of the Regulation'. In Case 360/93, [1996] ECR 1195 (*GATT*) the European Parliament claimed two council Decisions concerned with the conclusion of an Agreement between the EU and the USA should have been adopted on the basis not only of Article 113, but also of Articles 57, 66 (Now Article 133 EC) and 100A EC, which at the time, unlike Article 113, required the cooperation procedure. The Court found Article 47, 55, 100A and 113 the proper legal bases and consequently, held both decisions void.

Product safety[56] concerned a Directive – adopted under Article 100A – which purported to ensure a certain degree of safety for products placed on the internal market. The German Government sought to annul Article 9 of the Directive, which conferred upon the Commission the power to adopt decisions requiring individual Member States to take measures on a particular product. It argued this provision had no legal basis as the Council lacked the legislative authority to confer such power on the Commission. Essentially, it argued the provision was *ultra vires.*[57] There was no mention of a choice of legal basis.[58] The Court held that Article 9 did fall within the scope of Article 100A. In *Certificate for medicinal products,*[59] the Government of Spain sought to annul a Council Regulation based on Article 100A concerned with the creation of a supplementary protection certificate for medicinal products. The Court had consistently held in earlier case law that the Community had no power to regulate substantive patent law.[60] The Government of Spain therefore argued principally that the Regulation was *ultra vires*; that 'in the allocation of powers between the Community and the Member States, the latter have not surrendered their sovereignty in industrial property matters'.[61] Contrary to *Product Safety,* reference was made to Articles 100 and 235 EC, yet only in the Government's subsidiary argument;[62] if the Court were to hold that the Community did have such power, the only possible legal bases for such a Regulation were Articles 100 and 235, since both require unanimity and therefore do not affect the sovereignty of Member States. The Court again found the Regulation was *intra vires*.

2.5. Intermezzo: the inner and outer limit of Article 95

The cases discussed so far illustrate Article 95 is bordering both on other Treaty provisions which grant the Council - different kinds of - regulatory powers, as well as on Member States' sovereign powers. In other words, Article 95 essentially has two limits. First, *Titanium Dioxide* and *Chernobyl*, as well as -

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[56] Case 359/92, *Germany v. Council* [1994] ECR 3681.

[57] Also see the opinion of AG Jacobs in this case, esp. paras. 14-16 (and 28-33). Council and Commission argued that the legal basis of Article 9 of the Directive was Article 100A *in conjunction with* Article 145 third indent. Also see *Product safety,* para. 40

[58] This is also manifest in the arguments of the Court.

[59] Case 350/92, *Spain v. Council* [1995] ECR 1985.

[60] See e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig v. Commission* [1966] ECR 450; Case 24/67, *Parke, Davis and Co. v. Centrafarm* [1968] ECR 82; Case 78/70, *Deutsche Grammophon v. Metro* [1971] ECR 487; Case 4/73, *Nold v. Commission* [1974] ECR 491; Case 30/90, *Commission v. United Kingdom* [1992] ECR 829.

[61] *Certificate for medicinal products,* para. 12

[62] Case 271/94, [1996] ECR 1689 (*Edicom*) represented the opposite situation. The European Parliament, supported by the Commission, sought to annul a Council Decision adopted under Article 235 EC. Parliament argued it should have been based on [then] Article 129D(3) (now Article 155, it now provides for the co-decision procedure). The Commission claimed Article 100A was the proper legal basis. The Court disagreed. Although the decision also served objectives of the internal market, it found those objectives 'merely ancillary in relation to [its] main objective' (para. 32).

after 1992 - *Waste Directive, Transfer of Waste, Business Registers, GATT* and *Edicom*, concern what could be described as the *inner limit* of Article 95. These cases involve a choice of legal basis between Article 95 and an alternate provision. In analysing the aim and content of the measure concerned, the Court 'in particular' examines its effects; for example to conclude that it only has an 'ancillary' or 'incidental' effect on interstate trade. Secondly, the *Product safety* and *Certificate for medicinal products* cases concern the *outer limit* of Article 95.[63] The question here is whether a measure is properly based on Article 95 or is *ultra vires*.

2.6. After the Treaty of Amsterdam

In the case law from after the adoption of the Treaty of Amsterdam, it is clear that *Beaf and Veal*[64] and *Administrative Assistance*[65] concerned the inner limit of Article 95. In the former case, the European Commission sought to annul a Council Regulation - based on Article 43 EC[66] - which established a system for the identification and registration of bovine animals. The Commission claimed that the correct legal basis was Article 100A (and 43 EC) and therefore should have been adopted in accordance with the co-decision procedure. The Court held Article 43 to be the proper legal basis. *Administrative assistance* concerned a Council Regulation, which established an automated Customs Information System (hereinafter: CIS). The Commission claimed it should have been based on 100A (and 43) EC. The Court held it was properly based on Article 235 EC (and 43). This was rather remarkable, since the CIS did have a harmonizing effect; the Member States had to adopt certain legislation in order to take part in the CIS.[67] The Court argued however that 'the CIS did not *itself* harmonise national laws' and that harmonisation was 'only an incidental effect of the legislation'.[68]

Tobacco advertising, Biotechnological inventions and *Imperial Tobacco*, involved the outer limit of Article 95. In *Tobacco advertising*,[69] the Court for the first time held that a measure based on Article 95 was *ultra vires*. Directive 98/43/EC prohibited all forms of advertising and sponsorship of tobacco products. The German Government claimed the banned activities lacked interstate effect.[70] The Government also argued that the decision could not have been based on

[63] Also see note 90

[64] Case 269/97, *Commission v. Council* [2000] ECR 225.

[65] Case 209/97, *Commission v. Council* [1999] ECR 8067.

[66] Now, after amendment, Article 37 EC.

[67] See e.g. Article 34(1) of the disputed Regulation.

[68] *Administrative Assistance*, paras. 36-37

[69] This case is a clear example of an outer limit case and does not involve -in the words of AG Fennelly- 'a choice between possible legal bases', since '[i]t is abundantly clear that Article 129 (4) of the Treaty does not constitute an alternative basis for the Advertising Directive, by virtue of its exclusion of harmonising measures.' (Opinion, para. 69). On this case in general and its background, see Usher, in (2000) 38 *C.M.L. Rev.* 1519; Khanna, 'The Defeat of the European Tobacco Advertising Directive: A Blow for Health' (2001) 20 *Y.E.L.* 113.

[70] Id., para. 13

Article 95, since its centre of gravity was concerned not with promoting the internal market, but with protecting public health. Article 129(4) EC[71] expressly prohibited harmonizing measures to be adopted under that provision.[72] Consequently, the Community did not have the legal authority to adopt the Directive by recourse to a legal basis, which was merely incidental to its true aim and content. The Court agreed and annulled the Directive. It argued that Article 95 could not be used as a legal basis to circumvent the express exclusion of Article 129(4). The Court stated that: 'a measure adopted on the basis of Article 100a ... must *genuinely* have as its object the improvement of the conditions for the establishment and functioning of the internal market.'[73] Considering the strict criteria now articulated by the Court, which must be met in order to base a measure on Article 95, *Tobacco Advertising* marked a clear break with previous case law, in which a much wider interpretation of Article 95 had been used.[74]

Little more than a year later however, the Court in *Biotechnological inventions* held that Directive 98/44/EC - which aimed at requiring the Member States, through their patent laws, to protect biotechnological inventions - was properly based on Article 95. In an ambiguous argument, the Court held:

> [T]he aim of the Directive is to promote research … *the way in which it does* so is to remove the legal obstacles within the single market that are brought about by differences in national legislation … Approximation of the legislation of the Member States is *therefore* not an incidental or subsidiary objective of the Directive but is its essential purpose.[75]

This argument appears inherently contradictory; because harmonization is the means by which the aim of the Directive is pursued, it is also aimed at harmonization. Even if the Directive did indeed have two equally important objectives, the Court should have examined - since Articles 95 and 154 provided for different legislative procedures[76] - whether sufficient account could be taken of scientific and technological requirements under Article 95, but it did not even refer to *Titanium Dioxide.*

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[71] Now Article 152 EC. The ToA has substantially amended this article.

[72] Hence, this case also showed characteristics of an inner limit case.

[73] *Tobacco Advertising*, para. 84. Emphasis added. Compare e.g. with para. 37 of *Product Safety*, in which the Court 'merely' states that '[t]he measures which the Council is empowered to take under that provision are aimed at the establishment and functioning of the internal market.'

[74] Mortelmans and Van Ooik, 'Het Europese verbod op tabaksreclame: verbetering van de interne markt of bescherming van de volksgezondheid', [2001] *AA* 50:2, 114, 120. For an outline of these criteria, see Crosby, 'the new Tobacco Control Directive: an illiberal and illegal disdain for the law', (2002) 27 *Eur. L. Rev.* 177, 179-180.

[75] Case 377/98, *Netherlands v. Parliament and Council* [2000] ECR 6229, para. 27-28. Emphasis added. On this case in general and its background see Gold and Gallochat, 'The European Biotech Directive: Past as Prologue' (2001) 7 *E.L.J.* 331.

[76] Article 157 EC requires unanimity.

The recent *Imperial Tobacco* case provided more clarity.[77] The Court had to decide on the question whether a directive on tobacco products[78] was validly adopted under Articles 95 and 133. The Court found it was. This outcome was to be expected; to again strike down a directive on tobacco products - only two years after *Tobacco Advertising* - would of course have been highly controversial.[79] However, it is important to point out that the Court did articulate several strict criteria required for basing a measure on Article 95. First - in line with *Tobacco Advertising* - the measure must be intended and genuinely have as its object the improvement or 'establishment and functioning of the internal market'. Secondly, it must actually contribute 'to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition'. Thirdly, its aim must be 'to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws'. Finally, 'the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.'[80] As in *Tobacco Advertising*, the Court seemed to emphasize the importance of the first and second criteria.[81] The strict criteria confirm that *Tobacco Advertising* indeed marked a shift towards a narrower reading of Article 95 EC.

2.7. The differences in the tests used

The Supreme Court and ECJ *prima facie* seem to be using comparable tests in deciding on the bandwidth of the powers: both courts focus on the effects on interstate trade. However, when the courts employ a narrow interpretation of the Commerce Power and Article 95, respectively, the conditions used by the Supreme Court are more flexible than those of the ECJ are. In *Tobacco Advertising*, the ECJ argued tobacco products advertising could not be legislated, because it lacked interstate effect. The Supreme Court however - when it uses a narrow scope of the Commerce Power - *does* allow the regulation of intrastate trade.[82] The conditions used by the Supreme Court when a broad interpretation is

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[77] Case C-491/01, ECR [2002] I-11453, *The Queen v. Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*

[78] Directive 2001/37/EC, O.J. L94

[79] Just as striking down the directive in *Biotechnological inventions* would have been, which was decided only a year after *Tobacco Advertising*

[80] *Imperial Tobacco*, paras. 60-61, 63.

[81] As is also apparent from the Court's conclusion at para. 75: 'It follows that the Directive genuinely has as its object the improvement of the conditions for the functioning of the internal market and that it was, therefore, possible for it to be adopted on the basis of Article 95 EC'. Also see Joined cases C-465/00, C-138/01 and C-139/01 (ECR [2003], I-04989), para. 41, in which the Court held: 'Wie … der Gerichtshof bereits festgestellt hat [in *Tobacco Advertising* and *Imperial Tobacco*] … kommt es für die Rechtfertigung der Heranziehung von Artikel 100a EG-Vertrag als Rechtsgrundlage entscheidend darauf an, dass der auf dieser Grundlage erlassene Rechtsakt tatsächlich die Bedingungen für die Errichtung und das Funktionieren des Binnenmarktes verbessern soll'.

[82] In the United States context, legislation on tobacco advertising will in all probability fall within either the second or third category articulated in *Lopez*.

used are also more flexible than those of the ECJ are. The ECJ repeatedly emphasises the importance of the aim and content of the measure. In contrast, after 1937, the Supreme Court has held that Congress has no constitutional limits as regards the motive and purpose of legislation and it is therefore not up to the Court to decide on these. Furthermore, the Supreme Court in *Wickard* stated that it would not apply doctrines distinguishing *inter alia* between direct and indirect effect. The ECJ does seem to do so, distinguishing between a direct and 'incidental' (or 'ancillary') effect on interstate trade.[83] Overall, the Supreme Court uses relatively more flexible conditions, hence allowing for a wider bandwidth of the power to regulate interstate trade.

2.8. The impact of Article 95 on the vertical division of powers

Because of the distinction between inner and outer limit case law, the impact of Article 95 case law on the vertical division of powers is a bit more difficult to determine than the Commerce Power case law. The outer limit case law has an effect on the similar to that on the Commerce Power. Following *Tobacco Advertising,* legislation which does not '*genuinely* have as its object the improvement of the conditions for the establishment and functioning of the internal market'[84] cannot be adopted under Article 95.[85] This unexpected outcome of *Tobacco Advertising* clearly curtailed the Council's broad use of Article 95 as allowed in cases such as *Titanium Dioxide, Product safety* and *Certificate for medicinal products.* In redefining the bandwidth of Article 95, the Court asserted a similar role as the Supreme Court had done in *Lopez,* which can be regarded as a clear attempt by the Supreme Court to halt the Congress' broad use of the Commerce Power for all kinds of (non- commercial) legislation after cases such as *Laughlin, Darby, Wickard, Heart of Atlanta Motel* and *Katzenbach.* But it could also be compared to *Knight,* which narrowed the wide bandwidth as allowed before by the Marshall Court.

One could of course argue that when the ECJ finds a measure beyond the outer limit of Article 95, this does not necessarily imply that the Community lacks legislative authority; the Council could possibly re-adopt the same measure under an alternate treaty provision. However, it is inherent in the structure of the EC Treaty that this provision will in all probability require unanimity.[86] Since the Council is composed of Member States representatives, the sovereignty of the Member States remains unaffected when a legal basis requiring unanimity is chosen instead of one providing for simple or qualified majority voting.[87] The EC

[83] Hence, this is also more stringent than the test used by Marshall CJ, which essentially held that an Act of Congress based on the Commerce Power could only be held void if the activity it regulated did not have *any* effect on interstate trade.

[84] That is, after *Imperial Tobacco,* does not meet the requirements articulated in that case.

[85] Also see von Bogdandy and Bast, 'The European Union's Vertical Order of Competences: the Current Law and Proposals for its Reform' (2002) 39 *C.M.L. Rev.* 227, 244

[86] E.g. when resource is made to Article 94, 175 or 308.

[87] Also see K. Lenaerts, *Constitutie en Rechter* (Kluwer, 1983), e.g. 518 *et seq.*

Treaty sometimes even prohibits harmonization of legislation on a particular subject matter.[88] Furthermore, when a legal basis is chosen requiring for relatively more involvement of the Parliament - e.g. its cooperation instead of its consultation - the legislative process 'reaches a higher degree of decisional autonomy from the Member States'.[89] These effects of course also apply to the inner limit case law, since this involves a choice between Article 95 and an alternate provision.[90]

In sum, changes to the bandwidth of Article 95 have an effect on the vertical division of powers when (1) a measure was found to be either *ultra* or *intra vires*, (2) a legal basis requiring QMV instead of unanimity is chosen or contrariwise; and/or (3) a legal basis requiring either relatively more or less involvement of the Parliament is chosen.

In its inner limit case law, the ECJ distinguishes between direct and incidental effects on interstate trade. This distinction 'is very much a question of degree'[91] and is 'a matter … of subjective judgment'[92], although 'objective factors' of course suggests otherwise. Why were the prohibition against placing foodstuffs on the market in *Chernobyl*, the management of waste in *Waste Directive*[93] or the harmonizing effect of the CIS in *Administrative Assistance* regarded as only incidental effects, whereas the management of waste from the titanium dioxide industry apparently affected interstate trade directly?[94]

What then are the other decisive factors the Court takes into account? It is submitted that the impact on the vertical division of powers is a crucial one. This is most apparent in *Titanium Dioxide*, in which the procedure of Article 95 in my view was the decisive factor in the ECJ's choice of this provision as the legal basis. First, according to the Court '[t]he essential element of the cooperation procedure would be undermined'[95] if the Council had to act unanimously as a result of a dual legal basis of Articles 100A and 130. Secondly, 'the very purpose of the cooperation procedure, which is to increase the involvement of the European Parliament in the legislative process would … be jeopardized'.[96] But

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[88] E.g. Article 129 (4) EC, referred to in *Tobacco Advertising.*

[89] Lenaerts, 'Some Thoughts About the Interaction Between Judges and Politicians in the European Community' (1992) 12 *Y.E.L.* 1, 26-27.

[90] It could be argued that when a measure is found *intra vires*, there is no need for the Court to discuss other provisions, hence it does make an implicit choice between Article 100A and an alternate provision. According to this argument, only *Tobacco Advertising* could be regarded as a true outer limit case. However, it is important to stress that the consequences for the vertical division of powers remain the same.

[91] Geradin, 'Trade and Environmental Protection: Community Harmonization and National Standards' (1993) 13 *Y.E.L.* 151, 171.

[92] Dashwood, 'The Limits of European Community Powers' (1996) 21 *Eur. L. Rev.* 113, 121.

[93] This had 'ancillary effects' on the internal market. The ECJ even admitted waste constituted goods in the sense of Article 28. Also see: C-2/90 *Commission v Belgium* [1992] ECR I-4431

[94] According to Dougan ('Minimum Harmonization and the Internal Market' (2000) 37 *C.M.L. Rev.* 853, 882), the test 'creates serious problems of legal certainty; the only way to be sure whether a measure … has been adopted under the correct legal basis is to ask the Court.'

[95] *Titanium Dioxide*, para. 19.

[96] Id., para. 20.

what about the essential element of the legislative procedure of Article 130S? Was not the Member States' right to veto legislation on environmental matters undermined, now that resource was made to Article 100A exclusively? As Crosby points out:

> Directive 89/428/EEC did seem to be primarily concerned with the protection of the environment. Competition concerns did seem secondary: they were not even addressed in the recitals. However, in [Titanium Dioxide] this secondary and faint competition element was sufficient for the Court of Justice to justify resource to Article 100a EEC alone. … Insufficient respect is being paid to the rule of law. Article 100a EEC is being misused.[97]

Titanium Dioxide illustrates 'the legal basis litigation [at the time was] highly influenced by … the promotion of majority voting … and the strengthening of the intervention of Parliament',[98] both of which have direct consequences for the vertical division of powers. It indeed seemed that '[p]erhaps the Court's fundamental desire [was] to support QMV, since it effectively prevents a state from exercising the power of veto'.[99] It is important to point out that the result of the Court's choosing Article 95 was that the Council now had 'an almost free choice to legislate', as it could harmonize 'all national legislation which … may exercise an effect on intra-Community trade… a factual *Kompetenz- Kompetenz* to the Community'.[100] During the same period in which the Court in *Titanium Dioxide* and *GATT* preferred Article 95 (QMV, cooperation with Parliament) as the legal basis to Article 174 (unanimity, consultation),[101] it in *Product Safety* and *Certificate for Medicinal Products* seemed reluctant to find the disputed measures to be *ultra vires.* In *Waste Directive* and *Transfer of Waste* the Court preferred a provision requiring unanimity to Article 95, but these cases must be seen against the backdrop of the strong opposition to the result of *Titanium Dioxide*.[102] *Product Safety, Certificate for medicinal products* and *GATT* demonstrate these two environmental cases could not halt the initial impetus set by *Titanium Dioxide*.

Before *Tobacco Advertising,* Article 95 power was used by the Council for all kinds of non-commercial activities, which was 'largely the result of the ECJ's

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[97] Grosby, 'The Single Market and the Rule of Law' (1991) 16 *Eur. L. Rev*. 451, 464-465.

[98] Wachsman, [1993] *C.M.L. Rev.* 30, 1052

[99] Barnard, 'Where politicians fear to tread?' (1994) 57 *Eur. L. Rev* 127, 133.

[100] Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30 *C.M.L. Rev.* 85, 106-107.

[101] *Business Registers* is 'the odd one out', since the Court had to decide whether the absence of any rule on voting in Article 213 meant that this provision could not constitute an autonomous legal basis for a measure of the Council, as the German Government had claimed. *Edicom* concerned the question whether the Council Decision -adopted under Article 235 EC - had to been based on Article 129 D or 100A. These provisions provide, respectively, for the cooperation and co-decision procedures, whereas Article 235 merely provides for the Parliament to be consulted. The Court held that 129 D was the proper legal basis.

[102] And in *Chernobyl,* the Court preferred a provision requiring consultation with Parliament to one requiring its cooperation. Both provisions required QMV.

wide interpretation of open- ended powers in the EC treaty',[103] of which Article 95 is one of the most important examples, since 'it is there, if anywhere, that a risk of the creeping extension of Community powers might lie'.[104] This is apparent of course in cases such as *Titanium dioxide,* but also for example in *Certificate for medicinal products.* As mentioned, this case marked a clear move away from the Court's previous case law on industrial property. The ECJ attempted to curtail this broad authority in *Tobacco Advertising*, as it stated:

> To construe [Article 95] as meaning that it vests in the Community legislature a general power to regulate the internal market would … be incompatible with the principle embodied in … Article 5 EC that the powers of the Community are limited to those specifically conferred on it.[105]

It is clear that, like *Lopez, Tobacco Advertising* can be seen as part of a backlash against the 'creative' use of a commerce power to achieve non-commercial results, and specifically 'the expanding use and the broad interpretation of Community competences'.[106] *Tobacco Advertising* demonstrates it 'w[ill] give assurance to the Member States that it will regard its own constitutional role … as an institution defending the Member States and their competences against encroachments by the Community.'[107] The Court finally 'becomes serious on the *limits of competence*',[108] as a result of which it in *Imperial Tobacco* formulated stringent conditions required for basing a measure on Article 95. Furthermore, at the end of 1999, the Court held - in *Administrative assistance* - that Article 308 (unanimity, consultation) was the proper legal basis instead of Article 95, and subsequently on 4 April 2000 - in *Beef and veal* - Article 37 (QMV, consultation) rather than Article 95. It is submitted that the two cases together can be seen as a prelude to the Court's volte-face in *Tobacco Advertising*.[109]

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[103] Edwards, 'Fearing Federalism's Failure: Subsidiarity in the European Union.' (1996) 44 *American Journal of Comparative Law* 537, 583.

[104] Dashwood, (1996) 21 *Eur. L. Rev.* 113, 126.

[105] *Tobacco Advertising*, para. 83.

[106] Editorial Comments, (2000) 37 *C.M.L. Rev.* 1301, 1303.

[107] Id., 1302

[108] Ibid. Original emphasis. Or, as Von Bogdandy and Bast, (2002) 39 *C.M.L. Rev.* 227, 237-238, write: '[In *Tobacco Advertising*], the ECJ confirmed that it is both willing and able to assert itself as the highest court in a constitutional order adjudicating on competences.'

[109] *Tobacco advertising* was decided on 5 October 2000.

2.9 Conclusion

The similarities with the Supreme Court's influence on the vertical division of powers are remarkable. Whereas in its case law until recently - in both its inner and outer limit case law - the ECJ employed a broad bandwidth of Article 95 - allowing the Council to use this provision as a legal basis for all kinds of non-commercial legislation - the Court clearly intervened in 1999 (inner limit) and 2000 (outer limit) by significantly curtailing this power. This intervention of the Court appears to be a reaction to the shift in powers to the central level following the Single European Act. The Court narrowed the bandwidth of Article 95 in order to shape the vertical division of powers in the European Union. As demonstrated in §2.7, the ECJ allowed a smaller bandwidth of Article 95 when compared to the Commerce Power, which means that it has allowed to the central level relatively less power to regulate interstate trade.

3. The bandwidth of Article 28

3.1. Introduction

Has the European Court of Justice used its case law on the bandwidth of Article 28 to affect the vertical division of powers in the European Union? The Supreme Court in its dormant commerce clause case law clearly has - alongside the case law on the Commerce Power (§3.2). This section will examine the scope of Article 28, or - more specifically - to 'measures having an equivalent effect to a quantitative restriction' since its introduction.[110] A distinction can be made between the case law before (§3.3) and after (§3.4) the *Keck*- case. Although, again, there are some differences in the tests used (§3.5.), it will be demonstrated that the effect on the vertical division of powers of Article 28 case law is comparable to that on the dormant commerce clause (§3.6.).

3.2. The dormant commerce clause

The principle that state legislation is unconstitutional if it places an undue burden on interstate commerce was first articulated in 1852 by the Taney Court in *Cooley v. Board of Wardens of the Port of Philadelphia.*[111] This case involved a

[110] The focus of this essay will be on the interpretation of MEQR's. The notion of a 'quantitative restriction' was defined broadly in the Case 2/73, *Geddo v. Ente Nazionale Risi* [1973] ECR 865, para. 7, also see e.g. Case 34/79, *R. v. Henn and Darby* [1979] ECR 3795 and Case 288/83 *Commission v. Ireland* [1985] ECR 1761.

[111] [1852] 12 How. (53 U.S.) 299, 319. The Marshall court had rejected the existence of this principle in *Gibbons*, and in *Wilson v. Blackbird Creek Marsh Co* [1829] 2 Pet (27 U.S.), seemed to reject the notion of its exclusiveness. Similar to its case law on the Commerce Power, the Taney Court's early dormant commerce clause case law is rather inconsistent. E.g., in the *License Cases* (*Thurlow v. Massachusetts; Fletcher v. Rode Island; Peirce v. New Hamspire*, [1847] 5 How. (46 U.S.) 504, it delivered nine separate opinions written by six different justices. In the *Passenger Cases* (*Smith v. Turner; Norris v. Boston*, [1849] 7 How. (48 U.S.) 283, the reasoning of the ma-

Pennsylvania statute, which stipulated that any vessel entering or leaving the port of Philadelphia was required to either engage local pilots or pay a fee that went into a fund for the relief of infirm pilots and pilots' widows and orphans. Since this affected interstate commerce, the statute was challenged as an interference with the Commerce Power. Curtis J, writing for the Court, adopted the so-called principle of selective exclusiveness, which differentiated between subject matter that is national, in which case state laws are held void under the dormant commerce clause, and subject matter that is local, in which case state laws are allowed. Curtis J regarded pilotage laws as regulating local subject matter and upheld the Pennsylvania statute.

The Taney, Chase and Waite Courts employed this test until 1890.[112] The Fuller Court, however, soon[113] realised it was 'more conclusory than explanatory'[114] and therefore sought more precise approaches to the dormant commerce clause principle. It made a distinction between state laws that 'directly burden[ed] interstate commerce'[115] and were invalidated and those that had only an indirect effect and thus were to be allowed.[116] This test, however, was criticized for being 'too mechanical'.[117] Indeed, as a result of this mechanical application, the Supreme Court, during the same period in which it limited the scope of the Commerce Power (1890-1937), simultaneously also narrowed that of the dormant commerce clause principle.[118] The Supreme Court often upheld state legislation on subjects such as transportation[119] and state taxation,[120] later overruling such decisions when it adopted the 'modern approach' after 1938.[121]

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jority of five was so diverse that the Court's reporter found it impossible to cull out a majority opinion. In *Cooley*, the Taney Court for the first time was able to achieve a coherent resolution on the issue.

[112] See *Welton v. Missouri* [1875] 91 US 275, *Wabash, St. Louis & Pacific Ry. Co. v. Illinois.* [1886] 118 U.S. 557, *Henderson v. Mayor of New York*, [1875] 92 U.S. 259); *Chy Lung v. Freeman*, [1875] 92 U.S. 275; and *People v. Compagnie Generale Transatlantique*, [1882] 107 U.S. 59.

[113] That is, after it had used the *Cooley* test in *Western Union Telegraph Company* v. *Pennsylvania*, [1888] 128 U.S. 39; *Western Union Telegraph Company v. Alabama Board of Assessment* [1889] 132 U.S. 472; *McCall v. California* [1889] 136 U.S. 104; *Norfolk and Western Railroad Company v. Pennsylvania* [1889] 136 U.S. 114; *Minnesota v. Barber* [1889] 136 U.S. 313; *Brimmer v. Rebman* [1890] 138 U.S. 78; *Voight v. Wright* [1890] 141 U.S. 62; *Harman v. Chicago* [1893] 147 U.S. 396; *Brennan v. Titusville* [1893] 153 U.S. 289; and *Illinois Central Railroad Company v. Illinois* [1895] 163 U.S. 142.

[114] Tribe, *Constitutional law*, 408.

[115] McKenna J, in *Seaboard Air Line Ry. v. Blackwell* [1917] 244 U.S. 310, 314.

[116] See *Smith v. Alabama* [1888] 124 U.S. 465; *Erb v. Morasch* [1900] 177 U.S. 584; *Chicago, R.I. & Pacific Ry. Co v. Arkansas* [1911] 219 U.S. 453; *Atchison T. & S.F. Ry. Co. v. Railroad Comm.* [1931] 283 U.S. 380; *DiSanto v. Pennsylvania* [1927] 273 U.S. 34.

[117] Stone J in his dissenting opinion in *DiSanto*, 44

[118] See Hughes CJ, in *Atchison*, 292-293; and in *South Carolina State Highway Dept.* v. *Inc*. [1938] 303 U.S. 177, 184-185

[119] Compare e.g. *Buck v. Kuykendall* [1925] 267 U.S. 307 and *Barnwell Bros.*; with *Southern Pacific Co.* v. *Arizona* [1945] 325 U.S. 761 (discussed below); *Raymond Motor Transportation, Inc.* v. *Rice* [1978] 434 U.S. 429 and *Kassel* v. *Consolidated Freightways Corp.* [1981] 450 U.S. 662.

In a nutshell, the main question posed under the modern approach is whether the state statute concerned affects interstate commerce. If so, it is prohibited under the dormant commerce clause principle. If not, the question that follows is whether the state law discriminates against interstate commerce. This is sometimes clear from the statute itself,[122] but the Court has also found that a state statute which itself is neutral can be discriminatory if it has a substantial discriminatory effect or protectionist purposes.[123] According to the so-called *Pike*-test, the Court will, if it finds a state statute not discriminatory, balance the law's burdens on interstate commerce against its benefits and will declare the concerned statute void when it finds the burdens it creates to exceed the benefits.[124] State legislation is often declared unconstitutional when this test is used and permitted only if it is proven that the law is necessary to achieve a 'legitimate local purpose',[125] that is, has a non-protectionist intention.[126] Recent case law does not reveal any intention of the Court to deviate from this approach. For example, in *Oklahoma Tax Commission v. Jefferson Lines*,[127] the Supreme Court used the well-established *Complete Auto* four-part test it has used ever since 1977[128] to find the disputed tax to be consistent with the dormant commerce clause.

With the exception of the recent volte-face in *Lopez*, the Commerce Power case law has coincided with that of the dormant commerce clause as regards its

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[120] Compare e.g. *Maine v. Grand Trunk R. Co.* [1891] 142 U.S. 217 and *United States Express Co. v. Minnesota* [1912] 223 U.S. 335, 346 with *Complete Auto Transit* v. *Brady*, [1977] 430 U.S. 274.

[121] This, of course, also implies that the articulation of the modern approach led to a broader scope of the dormant commerce clause.

[122] See e.g. *Reynoldsville Casket Co. v. Hyde* [1995] 514 US 749.

[123] See e.g. *Milk Control Bd. v. Eisenberg Farm Prod.*, [1978] 306 U.S. 346; *Hunt v. Washington State Apple Advertising Commission*, [1977] 432 U.S. 333 and *C&A Carbone, Inc. v. Town of Clarkstown*, [1994] 114 S.Ct. 1677.

[124] The Court articulated this test in *Pike v. Bruce Church, Inc*. [1970] 397 U.S. 137, 142, but it used comparable balancing tests ever since 1939, e.g. in *Parker v. Brown* [1943] 317 U.S. 341; and *Southern Pacific Co. v. Arizona* [1945] 325 U.S. 761.

[125] See e.g. *Hughes v. Alexandria Scrap Corp.* [1976] 426 U.S. 794, 804; *Maine v. Taylor* [1986] 477 U.S. 131, 138; *Sporhase v. Nebraska* [1982] 458 U.S. 941, 954.

[126] See e.g. *Wyoming v. Oklohoma*. Two exceptions to this doctrine have emerged. Firstly, according to the market participant doctrine the dormant commerce clause does not apply when a state is a participant in – instead of a regulator of – the market (*Hughes v. Alexandria Scrap Corp.* [1976] 426 U.S. 794). Secondly, state laws burdening interstate commerce are allowed if Congress has approved them (see e.g. *Western & Southern Life Ins. Co. v. State Bd.* [1981] 451 U.S. 648 and *Northeast Bancorp. v. Board of Governors* [1985] 472 U.S. 159.

[127] [1995] 514 US 175.

[128] In *Complete Auto Transit*, the Court held (at 279) that a state tax would be valid under the commerce clause if it 'is applied to an activity with a substantial nexus with the taxing state, is fairly proportionate, does not discriminate against interstate commerce and is fairly related to the services provided by the state'. This test has often been used ever since, see, e.g. *Goldberg v. Sweet* [1989] 488 U.S. 252; *Commonwealth Edison Co. v. Montana* [1981] 453 U.S. 609; *D. H. Holmes Co. v. McNamara* [1988] 486 U.S. 24*; Container Corp. v. Franchise Tax Board* [1983] 463 U.S. 159; *Commonwealth Edison Co. v. Montana* [1981] 453 U.S. 609.

effect on the vertical division of powers in the United States. The Court in *Cooley* articulated a broad bandwidth for the dormant commerce clause – and hence limited the states' legislative powers – as state legislation on federal subject matters was not or no longer allowed. The legislating powers of the individual states increased when the Fuller Court adopted a less stringent test, prohibiting only state legislation that directly interfered with interstate commerce, and were curtailed again when the Court began using the less 'mechanical' modern approach.

3.3. Dassonville, Cassis and *Cinéthèque*

The next two subsections will examine the modifications of the bandwidth of Article 28 since its introduction. The case of *Dassonville* concerned Belgian legislation, which provided that goods bearing a designation of origin could only be imported if they were accompanied by a certificate of authenticity issued by the government of the exporting country. Dassonville was prosecuted for importing Scotch whisky into Belgium from France without being in possession of such a certificate from the British authorities. He argued that the Belgian law constituted a measure having an equivalent effect to a quantitative restriction (hereinafter: MEQR). The ECJ held that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as [MEQR's]'.[129] With this famous formula, the Court appeared to maximize the bandwidth of Article 28.[130] First of all, the crucial factor in deciding whether a Member State measure constituted a MEQR was its discriminatory *effect* on interstate trade; a discriminatory intention was not (even) required.[131] Secondly, the Court, in subsequent 'Dassonville' type case law, clarified that this principle was not affected by any *de minimis* rule; *any* possible effect, however indirect, was sufficient to constitute a MEQR.[132] Thirdly, the Court stipulated that the use of Article 28 was not restricted to trading rules, but covered all state measures.[133] Fourthly, as a result of *Dassonville*, the number of cases in which the Member States were obliged to justify their measures under Article 30 increased considerably. Consequently, the Court held that exceptions to Article 28 were

[129] Case 8/74, *Procureur du Roi v. Benoit and Dassonville* [1974] ECR 837, para. 5

[130] As one commentator asked, 'Are there any trading rules enacted by Member States which are not at least potentially and indirectly capable of hindering intra-Community trade?' White, 'In search of the limits to Article 30 of the EEC Treaty?' (1989) 26 *C.M.L. Rev.* 235, 235.

[131] Also see Craig and de Burca, *EU law*, 585.

[132] See e.g. Joined Cases 177 and 178/82, *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV* [1984] ECR 1797; Case 16/83, *Prantl (Karl*) [1984] ECR 1299.

[133] See e.g. Case 4/75, *Rewe- Zentralfinanz Gmbh v. Landwirtschatfskammer* [1975] ECR 843*;* Case 104/75, *Officier van Justitie v. de Peijper* [1976] ECR 613.

possible but had to be narrowly construed[134] and were in particular subject to the principle of proportionality.[135]

Cassis de Dijon involved the intended import into Germany from France of a fruit liqueur with an alcohol content of between 15 and 20 per cent. German authorities refused to allow the importation, because German legislation only allowed the marketing of fruit liqueurs with a minimum alcohol content of 25 per cent. The importer submitted that this rule constituted a MEQR. The German government argued that the legislation was discriminatory in neither a formal nor a material sense; any obstacles to trade were merely the result from the fact that France and Germany had different rules for the minimum alcohol contents of fruit liquors. The Court stated that when goods had been legally marketed in a Member State, they should be admitted into any other Member State without restriction; known as the principle of *mutual recognition*. Member States were allowed, however, to regulate on certain matters which did not fall within the scope of Article 28, if these measures were, 'recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.' [136]

Although the articulation of these mandatory requirements *prima facie* seems to limit the bandwidth of Article 28, the Court in *Cassis* essentially expanded it by bringing in a much wider category of national measures – i.e. measures which do not discriminate between domestic and imported products – within the ambit of Article 28. The Court stated that the *Cassis*-formula doctrine applies to measures that affect *without discrimination* both domestic and imported products,[137] whereas Article 28 previously did not apply to national measures unless these measures had in some way a discriminatory effect.[138]

It is important to point out that this formula – which has been applied repeatedly in subsequent case law[139] – concerns the question of how to deal with obstacles created by disparities between national laws; goods produced in one Member State and complying with the national rules of that State, also have to

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[134] See Weiler, 'The Constitution of the Common Market Place' in P. Craig and G. de Burca, *The Evolution of EU Law*, (Oxford University Press, 1999), 363.

[135] See P. Oliver, *Free Movement of Goods in the European Community* (Sweet and Maxwell, 1996), 182-189. Furthermore, a national authority invoking Article 30 bears the burden of proving that the contentious measures are justified under that provision (Case 251/78, *Denkavit Futtermittel v. Minister für Ernährung* [1979] ECR 3369. Also see Case 227/82, *Van Bennekom* [1983] 3883).

[136] Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para. 8.

[137] This is implied in *Cassis*, but was enunciated more explicitly in *Italy v. Gilli & Andres* [1980] ECR 02071, para. 6.

[138] Also see A. Arnull, *et al*, *Wyatt and Dashwood's European Union Law*, (Sweet and Maxwell, 2000), 323; A. Arnull, *The European Union and its Court of Justice* (Oxford University Press, 1999), 265.

[139] See e.g. *Gilli and Andres*; Case 130/80 *Kelderman* [1981] ECR 527; Case 6/81 *Industrie Diensten Groep v. Beele* [1982] ECR 707; Case 94/82 *De Kikvorsch* [1983] ECR 947; Case 176/84,*Commission v. Greece* [1987] ECR 1193; and Case 90/86 *Zoni* [1986] ECR 4285.

submit themselves to a *second* set of – albeit non-discriminatory – regulations of the State of importation in order to be marketable in that State. These measures are referred to as dual burden rules. The impact of *Cassis* is to render these measures incompatible with Article 28 except when justified by a mandatory requirement (or Article 30 EC). By contrast, equal burden rules are measures that have an *equal* impact on imports and domestic products. They are not designed to be protectionist and may have an impact on the *overall* volume of trade, but have no greater impact on imported products than they do on domestic ones.[140] Important examples of these rules are measures that regulate the selling arrangements within a Member State. Six years after *Cassis*, in *Cinéthèque* and the *Sunday Trading cases*, the Court found these measures to be within the bandwidth of Article 28 too, even though, as the Court admitted, their impact on interstate trade was 'purely speculative'.[141]

The case of *Cinéthèque* concerned a French law prohibiting the sale or rental of videocassettes of any film during the first year in which the film was released. The Advocate General argued that the measure fell outside Article 28, since it applied equally to imported and domestic videos. The Court took the opposite view and held that Article 28 caught equal burden rules such as the French prohibition (unless they were justified).[142] This was confirmed in the *Sunday Trading Cases*. *Torfaen*, the first of these cases, concerned the United Kingdom's Shops Act of 1950, which prohibited retail shops from opening for business on Sundays.[143] Echoing its approach in *Cinéthèque,* the Court held that the rule was *prima facie* caught by Article 28, but could be justified in the present case by reference to the mandatory requirements and provided it also satisfied the requirement of proportionality.[144] The *Torfaen*-judgment was confirmed in the other *Sunday Trading* judgments.[145] It is clear that *Cinéthèque* and subsequent case law on equal burden rules marked a further widening of the scope of Article 28.[146]

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[140] S. Weatherill and P. Beaumont, *EU law,* 1999, 608 et seq.; Craig and de Burca, *EU law,* 610-616; and Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45 *I.C.L.Q.* 82, 92-93.

[141] Case 169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v. B&Q plc* [1992] ECR 6635, para. 15.

[142] Joined Cases 60 and 61/84 *Cinéthèque SA and others v. Fédération Nationale des Cinémas Français* [1985] ECR 2605, para. 21.

[143] Except for certain types of products, such as meals or refreshments.

[144] Case 145/88 *Torfaen BC* v. *B & Q plc* [1989] ECR 3851, paras. 12-14. See Arnull, 'What Shall We Do On Sunday?' (1991) 16 *Eur. L. Rev.* 112; and Gormley, 'Case 145/88. Torfaen Borough Council *v.* B&Q Plc' (1990) 27 *C.M.L. Rev.* 141.

[145] Case 306/88 *Rochdale BC v. Anders* [1992] ECR 6457 ; Case 312/89 *Union Departementale des Syndicats CGT de l'Aisne v. Conforama* [1991] ECR 997; Case C-332/89 *Minisère Public v. Marchandise*[1991] ECR 1027; *Council of the City of Stoke-on-Trent*; Case 304/89 *Reading BC v. Anders* [1991] ECR 2283. See generally Barnard 'Sunday Trading: A Drama in Five Acts' (1994) 57 *Mod. L. Rev.* 449 and Arnull, *Court of Justice*, 282-286.

[146] The ECJ has however been somewhat inconsistent in its case law on equal burden rules. E.g. in Case 155/80 *Oebel* [1981] ECR 1993, the Court held a ban on the delivery of bread during the night to be compatible with Article 28, because it applied (para. 20) 'to the same extent to all producers, wherever they are established'. Similarly, in Case 75/81 *Belgian State v. Blesgen* [1982] ECR 1211, the Court considered that a legislative provision that concerned the sale of strong spir-

3.4. The Court's volte-face in Keck

Although some commentators supported the formulas adopted in *Dassonville*, *Cassis* and *Cinéthèque*, many criticized the Court for overstretching Article 28.[147] The wide construction of MEQR's as articulated in *Dassonville, Cassis* and *Cinéthèque* had moved significantly beyond the text of Article 28. In an influential article in 1989, White suggested, in line with other commentators, to limit the scope of Article 28. He proposed a distinction between those measures that required certain characteristics of imported products and those concerned with the circumstances in which products were allowed to be sold. By excluding the latter from its scope, Article 28 would no longer cover equal burden rules.[148] The Court in the seminal case of *Keck* adopted an approach largely similar to this test.

Keck and Mithouard were prosecuted for selling goods at prices below the actual purchase price, an act prohibited by French law. The Court stated that it was necessary to reconsider and to clarify the case law on Article 28 in view of the 'increasing tendency of traders to invoke [ex] Article 30'.[149] It differentiated between national rules laying down requirements to be met by goods themselves and rules that regulate the selling arrangements. The *Cassis* principle applied to the former category of product requirements, but the Court held in *Keck* that 'contrary to what had previously been decided' in cases such as *Cinéthèque* and *Torfaen,*[150] Article 28 did not cover national provisions regulating selling

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its for consumption on the premises in all places open to the public, was not in breach of Article 28, since these restrictions made (para. 9) 'no distinction whatsoever based on their nature or origin'. And in Case 148/85 *Directeur- Général des Impôts v. Forest* [1987] ECR 565, nationally imposed flour-milling quotas fell outside the scope of Article 28, because these quotas applied in the same way to imported and domestic wheat. Yet, as Gormley points out, ('Obstacles to Free Movement of Goods' (1989) 9 *Y.E.L.* 197, 200) '[a]lthough these cases do not present a model of clear reasoning, it is … clear that they do not represent a narrowing of the concept of what constitutes a MEQR' and it is apparent from the Court judgement in Joined Cases 267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR 6097 that *Cinéthèque* and *Torfain* indeed intended to widen the scope of Article 28 (see text accompanying note 150).

[147] Marenco ('Pour une interprétation traditionnelle de la notion de mesure d'effet equivalent á une restriction quantitative' (1984) *Cah. Dr. Eur.* 291, 312) proposed that Article 28 should regulate only those measures that concern situations in which 'des importations [sont] moins favorable que celle ou se trouve la production interne'. Mortelmans ('Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?' (1991) 28 *C.M.L. Rev*. 115, 130) argued that Article 28 should be restricted to two categories of market circumstances rules: 'First the rules which apply distinctly to national and imported products and secondly the indistinctly applicable rules without a territorial element'. Steiner ('Drawing the line: Uses and Abuses of Article 30 EC' (1992) 29 *C.M.L. Rev.* 749) has suggested a narrowing of the scope of Article 28 as well whereby it regulates only those measures that are capable of *hindering* trade and not measures that have an *effect* on trade.

[148] White, (1989) 26 *C.M.L. Rev.* 235, note 130, 246-247. For an analysis of White's proposed test, see e.g. Gormley, (1989) 9 *Y.E.L.* 197, 204-207.

[149] *Keck*, para. 14.

[150] Although the Court did not mention these cases explicitly, subsequent case law, especially on the subject of Sunday trading (see note 152) support the presumption that this was the case law the Court was referring to.

arrangements,[151] since they *per se* do not have an effect an interstate trade the Court, even if they reduce the volume of sales. This is the case providing, however, that the measure concerned applies equally to all affected traders within the Member State territory and neither *de jure* nor *de facto* discriminates between imported and domestic products. Furthermore, the purpose of the national rule must not be the regulation of trade in goods between Member States.[152]

3.5. The differences in the tests used

The modern approach towards the dormant commerce clause doctrine appears *prima facie* comparable to the *Dassonville* and *Cassis*-principles. According to this approach, this dormant commerce clause principle may only be applied when the state statute concerned affects interstate commerce.[153] This, *mutatis mutandis*, is similar to the *Dassonville*-formula that Article 28 concerns all rules capable of hindering intra-Community trade. The second question is whether the state legislation concerned is discriminatory. If not, the Supreme Court will use the balancing test articulated in *Pike*. Similarly, since *Cassis*, the ECJ has balanced

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[151] Even though the Court speaks of '*certain* selling arrangements', subsequent case law confirms that all types of selling arrangement fall outside the scope of Article 28. See Oliver, 'Some further Reflections on the Scope of Articles 28-30 (Ex. 30-36) EC' (1999) 36 *C.M.L. Rev.* 783, 794.

[152] *Keck*, para. 15 –16. Also see J. Snell, *Goods and Services in EC Law. A Study of the Relationship Between the Freedoms*, (Oxford University Press, 2002) 78-80. Thus, the Court has now found - meeting these conditions - that Article 28 does not apply to restrictions on Sunday opening hours of shops (Joined Cases 69 and 258/93 *Punto Casa SpA v. Sindaco del Commune di Capena* [1994] ECR 2355; Joined Cases 401 and 402/92 *Criminal Proceedings against Tankstation 't Heustke vof & JB.E. Boermans* [1994] ECR 2199; and Joined Cases 418-421, 460-462 and 464/93, 9-11, 14-15, 23-24 and 332/94 *Semeraro Casa Uno Srl v. Sindaco del Commune de Erbusco*[1996] ECR 2975), nor to other selling arrangements such as a national rule prohibiting television advertising in a particular sector (Case 412/93 *Société d'Importation Edouard Leclerc-Siplec v. TFI Publicité SA and M6 Publicité SA* [1995] ECR 179), to legislation prohibiting advertising certain products outside pharmacies (Case 292/92 *Hunermund (R) v. Landesapthekerkammer Baden- Württemburg* [1993] ECR 6787), to a prohibition of misleading advertisement and advertisement aimed at children less than 12 years of age (Joined cases 34-36/95 *Konsumentombudsmann (KO), v. De Agostine (Svenska) Forlag AB & TV- Shop i Sverige AB* [1997] ECR 3843), and to a national rule stipulating that processed milk for infants be sold exclusively in pharmacies (Case 391/92 *Commission v. Greece* [1995] ECR 1621, also see Case 387/93 *Banchero* [1995] ECR 4663). In contrast, measures such as a restriction as to the designation of certain products (Case 315/92 *Verband Sozialer Wettbewerb v. Clinique Laboratoires SNC* [1994] ECR 317), and a prohibition on the sale of ice-cream bars in wrappers marked with the symbols '+10%', according to the Court, constituted product requirements and therefore fell within the scope of Article 28 (Case 470/93 *Verein gegen Unwesen im Handel v. Mars* [1995] ECR 1923). On the (precise) meaning of selling arrangements, see Oliver, *Reflections*, 794; Higgins, 'The Free and Not so Free Movement of Goods since Keck' (1997) 6 *Irish Journal of European Law* 166, 168-172; and Picod, 'La nouvelle approche de la Cour de Justice en matière d'entraves aux échanges' (1998) 34 *Revue Trimestrielle de Droit Européen* 169, 173-177.

[153] The Cooley doctrine is largely similar to the 'modern approach', including the balancing test as articulated in *Pike*. Also see Mason and Stephenson's description of the Cooley doctrine (*American Constitutional Law*, 1996, 211). Therefore, in this section, only the modern approach will be compared with Article 28 case law.

the Member States' non- discriminatory (dual-burden) rules' burdens on interstate commerce against their benefits as expressed in the mandatory requirements.[154]

There is an important difference, however, in how the balancing tests are applied.[155] Under the *Pike* test, non-discriminatory legislation is only permitted if it can be demonstrated that it has a non-protectionist intention. Hence, contrary to the ECJ, 'the Supreme Court has introduced an element of discrimination into the concept of a burden on trade'.[156] The ECJ in *Cinéthèque* and *Torfaen* held Article 28 covered even equal-burden rules. The ECJ – where it, before *Keck*, used a broad construction of Article 28 – thus used a broader scope than the Supreme Court did in the periods prior to 1890 and after 1938.

The ECJ also used relatively more flexible conditions where the two Courts used a narrow construction of the two prohibitions. The conditions stipulated in *Keck* allow for a broader bandwidth than the direct-indirect test – used between 1890 and 1938 – which only prohibited direct burdens on interstate trade. The purpose of *Keck* was to exclude from the scope of Article 28 those rules that do not have *any* effect on interstate commerce. The ECJ stated that Article 28 did not concern selling arrangements, since they *per se* did not burden interstate commerce and provided the Member State legislation concerned applied equally to affected traders within the Member State territory, and neither *de jure* nor *de facto* discriminates between imported and domestic products. If the *proviso* was not met, the legislation would – indirectly – affect interstate trade. In other words, the result of *Keck* is that Article 28 *can* cover indirect burdens on interstate commerce.[157] Overall, when compared to case law on the dormant commerce clause, the ECJ has allowed Article 28 a relatively broader bandwidth.

3.6. The impact of Article 28 on the vertical division of powers

It is clear that modifications in the bandwidth of Article 28 have a similar effect as those on that of the dormant commerce clause. The ECJ in *Dassonville* limited the Member States' legislative powers – Article 28 now prohibited all trading legislation 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.[158] These were further limited by the Court in *Cassis.* After *Cinéthèque* and the *Sunday Trading*-cases, the Member States could no longer adopt equal burden rules, but they regained this authority with *Keck.* The constitutional tension that underlies the case law on Article 28 is that between centralisation and

[154] See M.P. Maduro, *We the Court. The ECJ and the European Economic Constitution*, (Hart Publishing, 1998), 90; also see Stein, 'On Divided-Power Systems; Adventures in Comparative Law', (1983) 1 *L.I.E.I.* 27, 32-34.

[155] Also see Lackhoff, 'Restrictions on state interference with commerce in the U.S.A. and the E.C.' (1996) 2 *Colum. J. Eur. L.* 313.

[156] Maduro, *We the Court*, 91

[157] Also see Arnull, *Court of Justice*, 289.

[158] Unless when justified under Article 30. Yet, as mentioned, exceptions were narrowly construed and subject to the principle of proportionality

decentralisation.[159] Underlying the case law on the scope of Article 28 'is the balance of powers between the Member States and the Community.'[160] According to Reich, 'there is no doubt about the constitutional impact of different readings of [ex] Article 30 … The broader the reading of [ex] Article 30, the smaller the powers which remain with the Member States.'[161]

Again, it is submitted that the impact on the vertical division of powers is a crucial factor in the decision of the ECJ to alter the bandwidth of Article 28.[162] In the words of Maduro:

> the extent of the regulatory powers left to Member States will largely depend on the scope given to Article 28 … the decision to review [through Article 28] national regulations and, if so, according to which criteria, implies choices regarding the division of competences between the Member States and the Union… Article 28 and the rules on free movement are essential instruments in the distribution of power within the constitutional order of the union. The review of States' regulatory measures distributes power … between Member States and the European Union political process.[163]

The Court used Article 28 to encourage centripetal developments in cases such as *Cassis* and *Cinéthèque*, whereas *Keck* marked 'a general move towards a more decentralised system.'[164]

These effects on the vertical division of powers are intensified by what could be called the *cross-pollination effect* between Articles 28 and 95. When the ECJ holds a Member State measure *prima facie* to fall within the scope of Article 28, but justified under Article 30,[165] it allocates the competence to regulate on the subject matter to the Community level – *inter alia* under Article 95[166] – and hence widens the scope of the European Union's legislative competence under this provision.[167] According to Gerstenberg, '*Keck* … responded to the fear that the

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[159] Snell, *Goods and Services*, 33; Maduro, *We the Court*, 67-68; Wils, 'The Search for the rule in Article 30 EEC: Much Ado About Nothing?' (1993) 18 *Eur. L. Rev.* 475, 478- 9.

[160] Bernard, (1996) 45 *I.C.L.Q.* 82, 82.

[161] Reich, 'Europe's Economic Constitution, or: A New Look at Keck' (1999) 19 *O.J.L.S.* 337, 341.

[162] Following the overstretching of the scope of Article 28 in cases such as *Cinéthèque* and *Torfaen*, Wils ((1993) 18 *Eur. L. Rev.* 475, 478) even advocated that the Court develop a test which 'should reflect the balance between the desire for integration, that is, the desire to limit the influence of national governments … and the desire for governmental intervention'.

[163] M.P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution; Economic Freedom and Political Rights' (1997) 3 *E.L.J.* 55, 72.

[164] Snell, *Goods and Services*, 80.

[165] If the Court finds a national measure unjustified under Article 30, it thereby determines the policy choices of Member States and hence also limits their authority. See Snell, *Goods and Services*, 33-35.

[166] But also under Article 94 and 308.

[167] Weiler, in Craig and de Burca, *Evolution*, 362. Also see Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?' (1991) 28 *C.M.L. Rev.* 115, 129; and Snell, *Goods and Services*, 34.

broader the normative scope of Article 28, … the broader would also become the legislative competencies.'[168] Timmermans' multiplier effect applies to the reversed situation. The adoption of a harmonization measure under Article 95 – which, when upheld, widens its scope – has as a direct consequence that a Member State is no longer able to use one of the exceptions of Article 30, and hence *automatically* also widens the scope of the prohibition of Article 28.[169] This is also known as the *Tedeschi*-principle.[170] This cross-pollination- effect between Articles 28 and 95 amplifies the impact of their case law on the vertical division of powers. It does not apply however, when the Court narrows the scope of one of these provisions.[171] Logically, when Article 95 is *not* used to harmonise national legislation of Member States, this does not *automatically* imply that the scope of Article 30 has become wider. Furthermore, a Member State measure falling outside the scope of Article 28 – e.g. selling arrangements – *could* still constitute a 'measure laid down by law, regulation …etc.' in the sense of Article 95 EC.[172] It is however unlikely that the Council would adopt harmonizing measures on a topic that the European Court of Justice finds not to burden interstate trade.

3.7. Conclusion

Again, the parallels with the Supreme Court's case law are striking. Whereas in its case law till 1996 the ECJ employed a broad bandwidth of Article 28 – hence increasingly curtailing the Member States powers – the Court clearly intervened in *Keck* to limit the scope of this prohibition, thus allowing for controlling legislation at the Member State level. The ECJ uses the bandwidth of Article 28 to play an important role in the vertical division of powers in the European Union. As demonstrated, the ECJ allowed a relatively broad bandwidth of Article 28 in comparison with that of the dormant commerce clause, thus allowing relatively less power at the state level.

4. Concluding remarks

In this article, it has been suggested – by comparing the tests used by the Supreme Court and the ECJ – that the latter allowed a relatively smaller bandwidth of Arti-

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[168] O. Gerstenberg, 'Expanding the Constitution Beyond the Court: The Case of Euro-Constitutionalism' (2002) 8 *E.L.J.* 176.

[169] Save when recourse is made to Article 95 (4) or 95(5). C. Timmermans, *Het recht als multiplier in het Europese integratieproces*, (Kluwer, 1978), 10-11, 19-20. Timmermans used Article 94 instead of Article 95 (which was not yet introduced), but *mutatis mutandis* this effect of course also applies to the relation between Articles 28 and 95.

[170] Case C-5/77 *Tedeschi v. Denkavit* [1977] ECR 1555. It is clearly outside the scope of this essay to discuss this principle's requirements (and exceptions). For a recent example see: Case C-322/01 *Deutscher Apothekerverband NV v. 0800 DocMorris NV and Jacques Waterval*, Judgement of 11 December 2003, not yet reported, para. 64.

[171] On *Tobacco Advertising vis-à-vis* the scope of Article 28, see Mortelmans and Van Ooik, (2001) 50 *A.A.* 114.

[172] See Friedbacher, 'Motive Unmasked: The ECJ, the Free Movement of Goods and the Search for Legitimacy' (1996) 2 *E.L.J.* 226, 241-243.

cle 95 when compared to the Commerce Power case law and a relatively broad bandwidth of Article 28 when compared to that of the United States dormant commerce clause. The ECJ has hence allowed relatively less power to both central and state level. The European Court of Justice modified the bandwidth of Articles 28 and 95 EC in *Keck*, *Administrative Assistance, Beef and veal* and *Tobacco Advertising*, in order to halt the centripetal consequences of the prior case law. Overall, the ECJ has – like the United States Supreme Court – played an important role in the vertical division of powers in the European Union constitutional order. Since these provisions are at the core of the European Union's legal framework, the significance of the role of the ECJ in this regard should not be underestimated.

Some things remain unclear, however. Why has there for instance been a period of six years between the Court's change of direction in *Keck* and that in its case law on Article 95? Some commentators suggest that the *volte-face* in *Keck* was an attempt to restore its legitimacy as the overstretching of Article 28 'was beginning to damage the … legitimacy of the European Court'.[173] Since the cross-pollination effect as outlined in the previous section, does not apply when the scope of either Article 28 or 95 is narrowed, '*Keck* [did not] divest the Commission of the right to act within the scope of Article 100a … [which] limits the legitimacy impact of *Keck* for the Court.'[174] *Administrative Assistance, Beef and veal* and *Tobacco Advertising* can therefore be seen as a further attempt to restore or preserve the legitimacy of the Court. Nevertheless, this only seems to partially explain the six year gap. Furthermore, why has the Supreme Court not (yet) extended its turnabout in *Lopez* to its dormant commerce clause case law? And why has the ECJ allowed a relatively smaller bandwidth of Article 95 when compared to the Commerce Power case law and a relatively broader bandwidth of Article 28 when compared to that of the dormant commerce clause?

Overall, it appears that when attempting to influence the vertical division of powers, the Supreme Court focuses on positive integration through the Commerce Power, whereas the ECJ's focus is on negative integration through Article 28. A possible explanation for this could be found in a mixture of some important differences between the (dormant) commerce clause and Articles 28 and 95 EC, and more generally, between the constitutional orders of which these provisions are a part.

Firstly, the principle of pre-emption plays a much more significant role in the case law of the Supreme Court than it does in that of the European Court of Justice, *inter alia*, because the Supreme Court has adopted a rather wide scope of this principle.[175] Federal legislation adopted for instance under the Commerce

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[173] Weatherill, 'After *Keck*: Some thoughts on How to Clarify the Clarification' (1996) 33 *C.M.L. Rev.* 885. See Friedbacher, (1996) 2 *E.L.J.* 226, 238, Gormley (1989) 9 *Y.E.L.* 197, 199.

[174] Friedbacher, (1996) 2 *E.L.J.* 226, 243.

[175] On this principle in the United States, see e.g. Chase, *The Constitution*, 273-277; Tribe, *Constitutional Law*, 479-481; R. Berger, *Congress v. The Supreme Court*, (Harvard University Press, 1969), 242. For examples of this doctrine in early case law of the ECJ, see Jacobs and Karst, 'The 'federal' legal order: The U.S.A. and Europe Compared. A Juridical Perspective' in M. Cappelletti *et al*, *Integration Through Law, Europe and the American Federal Experience*, (Walter de Gruyter, 1986), 169, 237-238. In the last two decennia, the significance of this principle seems to

Power will pre-empt inconsistent state legislation, even when Congress has not completely displaced state regulation.[176] Also, Article 95(4) and 95(5) EC essentially erode the meaning of this principle in this specific context.[177] Secondly, in contrast to the Commerce Power, Article 95 is a concurrent power;[178] Member States are permitted to regulate on interstate trade as long as the Union has not made use of its competence. Member States would run the risk of such legislation being incompatible with Article 28, but the legislation could also be allowed under Article 30 or under the mandatory requirements (or could be found not to contravene Article 28 at all). Furthermore, contrary to Article 28, the dormant commerce clause applies only when no legislation has been adopted under the Commerce Power, or, where it has, no pre-emption has been found. Further elaborating these differences, four different situations can be discerned.

1a. When the Supreme Court broadens the scope of the Commerce Power, it allows for more federal legislation to be adopted – resulting in the increase of federal regulatory power – which will pre-empt inconsistent state legislation, as a result of which the state regulatory powers decrease. When no federal legislation is adopted or no pre-emption is found, state legislation can still be challenged as unduly burdening interstate trade, since the Commerce Power is regarded as an exclusive one.[179] These corollaries amplify the centripetal effect of a broader scope of the Commerce Power, whereas widening the scope of the dormant commerce clause instead will not produce any of these 'side-effects'. When the Supreme Court attempts to encourage centripetal developments, it is therefore more important to construe the bandwidth of the Commerce Power broadly than that of the dormant commerce clause.

1b. When the ECJ broadens the scope of Article 95, it allows more Community legislation to be adopted. Although according to the cross-pollination effect, the scope of Article 28 will automatically be widened as well, this effect will *only* apply when Community legislation is actually adopted, and even then the Member State legislation could possibly be allowed under Article 95 (4) or 95 (5). This mitigates the cross-pollination effect. Since Article 95 is a concurrent power, Member State legislation is still allowed as long as the

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have been in decline; see e.g. Weiler, 'The Dual character of Supranationalism' (1981) 1 *Y.E.L.* 267, 278.

[176] See *Pennsylvania v. Nelson* [1956] 350 U.S. 497.

[177] Also D. Geradin, *Trade and the environment, A Comparative Study of EC and US law*, (Cambridge University Press, 1997), 135-136. For further discussion of 95(4) and 95 (5) see: De Sadeleer, 'Procedures For Derogations From the Principle Of Approximation Of Laws Under Article 95 EC' (2003) 40 *C.M.L. Rev.* 889.

[178] Although states share certain powers with the federal government (e.g. the power to tax their citizens), the Commerce Power is an exclusive power, or at least – according to the *Cooley*-doctrine - a selective exclusive one.

[179] It is possible that Congress uses it Commerce Power to approve a state act burdening interstate trade and even to overrule a Supreme Court decision in which a state act is held void under the dormant commerce clause. Yet this only confirms the exclusive character of the Commerce Power.

Union has not made use of its competence. This national legislation would not necessarily be incompatible with Article 28, since it could be allowed under Article 30 or under the mandatory requirements, or not be incompatible with Article 28 at all. When – conversely – the ECJ broadens the scope of Article 28 instead, this automatically results in a wider scope for Article 95; the cross-pollination effect amplifies the centripetal effect of a broader scope of Article 28 and will not have any of the side-effects that a broadening of the scope of Article 95 has. Therefore, when the ECJ attempts to encourage centripetal developments, it is relatively more important to construe the bandwidth of Article 28 broadly than that of Article 95.

2a When the Supreme Court narrows the bandwidth of the Commerce Power, it will hold void relatively more federal legislation – decreasing the federal regulatory power – which before would have pre-empted inconsistent state legislation, hence increasing the states' regulatory power. Since the Commerce Power is regarded as exclusive, narrowing its scope by striking down federal legislation could even lead to the adoption of more state legislation on corresponding topics. These corollaries amplify the centrifugal effect of a broader scope of the Commerce Power, whereas narrowing the scope of the dormant commerce clause instead will not produce any of these effects. When the Supreme Court attempts to encourage centrifugal developments, it is therefore more important to construe the bandwidth of the Commerce Power narrowly than that of the dormant commerce clause.

2b. When the ECJ limits the scope of Article 95, the Council's regulatory power decreases. Since the cross-pollination effect does not apply, the scope of Article 28 will not be limited automatically (no multiplier effect). It is in fact unlikely that Article 95 will lead to a smaller scope for Article 28. It is highly improbable that corresponding Member States legislation – for instance adopted because the Council had not yet made use of its legislative competence under Article 95 – will fall outside the scope of Article 28 or (still) constitute an exception to this provision. Just so, it is likely that Member State legislation which was allowed under 95 (4) or 95 (5) will constitute an exception to Article 28. In other words, it is probable that once the ECJ construes a narrower scope of Article 95, the scope of Article 28 remains unchanged. When the ECJ adheres to a more decentralist philosophy, it is therefore relatively more important to construe the scope of Article 28 narrowly than that of Article 95. Although this would not automatically lead to a smaller scope of Article 95, as mentioned, it seems difficult to imagine the Council adopting harmonizing measures on a certain topic that according to the ECJ do not burden interstate trade. In other words, narrowing the scope of Article 28 would probably also lead to a smaller scope for Article 95.

In the area of interstate trade, the Court has played - and of course still plays - an important role in the vertical division of powers in the European Union. Further

research of course is necessary to examine whether similar developments occur in other areas.