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COMMERCE CLAUSE VS. HARMONISATION CLAUSE – IDEAL TOOL FOR EXPANDING POWERS IN THE FIELD OF MARKET REGULATION? / Igor Sloboda

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Abstract: *The European Union, like the United States, is creating an internal market within its Member States, which it is adopting the necessary coherent framework of measures to ensure the functioning of that market. In both cases, the measures derive their legal basis from provisions of supreme legal force in the form of the Treaty on the Functioning of the European Union or the Constitution of the United States of America. The paper focuses on a comparison of the provisions of Article 114 of the Treaty on the Functioning of the European Union, the so-called Harmonization Clause, and Article 1, Section 8 (3) of the United States Constitution, the Commerce Clause, the application of which poses a problem in some cases and raises several jurisdictional issues. The aim of this paper is to analyse and compare the limits of the legislator's powers in relation to the use of internal market regulatory instruments.*

Key words: *Article 114 TFEU; Commerce Clause; Harmonisation Clause; Market Regulation; European Union; US Constitution*

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1. INTRODUCTION

The area of market regulation and related national and international trade is one of the most discussed topics of legislation, also due to its constant topicality and the necessary reflection of current challenges. The question of extending competences based on application practice has been the subject of professional debate for quite a long time (Eule, 1982, p. 432). Not only nowadays, the highest judicial authorities of the USA and the EU have made significant contribution to this debate through their decision-making activity.[1]

Over the course of nearly three centuries, the U.S. legal order has seen the development of comprehensive rules for the exercise of the powers vested in the legislatures of the states represented in Congress by Article 1, Section 8 (3) of the U.S. Constitution, as well as the limitation of their exercise through the precedent-derived Dormant Commerce Clause (Nagy, 2023, p. 315).

[1] Gibbons v. Ogden, LRD v. Jones & Laughlin Steel Corp, United States v. Darby, C-300/89, C-376/08, C-491/01 and more.

The post-war integration grouping of the European Communities gradually developed, leading to the creation of the Common Market. This has resulted in the establishment of rules that allow the legislature to directly regulate areas within the internal market of the EU (Kaczorowska, 2016, pp. 4-6). Where primary law does not allow the legislator to invoke specific provisions of the Treaty on the Functioning of the European Union (TFEU), it may also use a secondary option, in the form of Article 114 TFEU, in order to achieve the objectives of the internal market.[2] This provision has a wide scope, allowing the adoption of secondary legislation to approximate the legal situation in Member States (MS).[3] This is an ideal instrument for the legislator to eliminate differences between the national laws of the MS. However, this procedure has long been criticised for the gradual expansion of new regulations into areas that fall within the competence not of the European Union but of the MS and have minimal connection with the functioning of the internal market (Kaczorowska, 2016, p. 187, 188).

Over the years, a similar problem has regularly arisen under U.S. law, where Congress has attempted to subsume unrelated regulation under market regulation by flexibly and broadly interjecting a Commerce Clause provision (McGinnis and Somin, 2004, pp. 112-114).

Scientific methods of analysis, synthesis and comparison of available sources will be used to process the paper. The analysis will cover the literature on the subject, legal acts, court decisions of the Court of Justice of the European Union (CJEU) and Supreme Court of the United States (SCOTUS), as well as other relevant sources on the subject. The extent of the legislator's statutory and judicial limits will compare. As a result, it should be assessed whether, also through the decision-making activity of the supreme judicial authorities, conditions are created for the extension of powers into areas that are only minimally related to market regulation.

2. MARKET REGULATION THROUGH THE COMMERCE CLAUSE

For several years before the present Constitution of the United States was ratified, the regulation of commerce was within the power of the states. Rather than as a unit, the states viewed each other as commerce rivals. The result of the rivalry between the states was the imposition of various barriers, mainly in the form of tariffs or similar charges or quantitative restrictions. This led to many problems and weakened the state externally as well as internally, alternating crises culminating in demands for the adoption of market regulations, which eventually manifested itself in the adoption of the provision of Article 1, Section 8, Clause 3 of the Constitution, under which the powers of Congress include the following: "*To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*,". The predominant interest of market regulation, especially at the beginning, was international trade and the area of internal trade was left only in relation to ports. Only later, with the massive development of industries in different areas of the country, did the approach begin to change and attention began to turn towards domestic trade, which was becoming increasingly important (Egan, 2015, p. 80, 81). Thus, the main intention in including the said clause in the Constitution was to prevent the emergence of similar impediments to admissions.

From the adoption of the Constitution to the present day, we can identify several interpretive periods in the Court's interpretive practice (Chemerinsky, 2015, p. 371; Schütze, 2014). For the purpose of this paper, we will use the division into only two

[2] Article 114 (1) TFEU.

[3] CJEU, judgement of 10 December 2002, British American Tobacco (Investments) and Imperial Tobacco, C-491/01, ECLI:EU:C:2002:741.

periods – before and after 1995. The question of choosing the most appropriate interpretive method reflects these periods quite accurately. The ones most encountered are originalism, textualism, precedentialism and constitutionalism but also structuralism (Pushaw, 2003). Considering these periods, despite the different approaches in interpreting the provisions, the court has maintained consistency in the issues that have been examined in each case. The three questions are as follows:

1. What is commerce?
2. What does it mean among the states?
3. Has Congress acted in accordance with or in violation of the Tenth Amendment? (Chemerinsky, 2015, p. 371)

The first case heard by the SCOTUS dealing with the Commerce Clause was Gibbons v. Ogden from 1824, when the Court evaluated the above issues as follows. For the purposes of that case, the court dealt with the first issue as follows: "*……The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse…"*[4] Thus, the court rejected one of the parties´ arguments and did not agree with the proposed narrower interpretation, instead leaning towards the idea that "there is something more at stake," and so on that basis we can understand commerce in all its forms (Chemerinsky, 2015, p. 373). In seeking an answer to the second question, the court was faced with a choice between three options. Under the first opinion, the court considered interpreting "among the several states" in several ways, ultimately settling on the following interpretation: "The *word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. … Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States that one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose, and the enumeration of the particular classes of commerce to which the power to every description."*[5] This option, unlike the other two, did not present a clearer definition as it is necessary to examine the substantive impact on a case-by-case basis (Chemerinsky, 2015, p. 374). On the final issue, concerning the potential compliance with or exceedance of the Tenth Amendment's limitation on congressional power, the court concluded that, despite the constitutional limits, Congress has sufficient authority to regulate, commerce to the fullest extent possible.[6]

2.1 Interpretation Until 1995

Several years after Gibbons vs. Ogden, there gradually comes a period in the Court´s decision-making when it begins to move away from its extensive interpretation and instead begins to lean toward the idea of the least possible congressional intrusion. As early as 1870, the Court struck down a federal statute on the ground that it exceeded the application clause´s limits; it was followed shortly thereafter by another statute. Several factors played a role in the Court ´s change in position. In the late 19th and early

[4] SCOTUS, Gibbons v. Ogden, 22 U.S. 1 (1824) paras. 189-190.
[5] Ibid., paras. 194-195.
[6] Ibid., paras. 196-197.

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20th centuries, Congress began to gradually enact several federal statutes. During this period, legislation that has a broad economic scope, including overlap with competition law, also begins to be enacted under the Commerce Clause. The Great Depression posed a challenge not only to the government but also to Congress, requiring the adoption of several reforms that would ultimately "restart the economy". The SCOTUS proved to be a powerful counterweight to Congress during this period, with many regulations being declared unconstitutional, particularly for encroaching on the powers of the states. It was during this period that the SCOTUS decision-making developed the concept of "dual federalism", which it invoked in striking down acts. Under that concept, it rejected an expensive interpretation of the term "commerce" such as that in Gibbons, but limited it to its narrowest meaning, leaving all other phases of commerce to national regulation. The Court took an equally restrictive approach to the interpretation of "interstate commerce, recognising Congress´s power to legislate with respect to commerce only of it presented a substantial impact on the operation of interstate commerce, leaving all other cases to the discretion of the individual states to enact legislation. In the case of a Tenth Amendment violation, the Court was inclined to hold, as in the case of the interpretation of the term "commerce", that some part of the regulation of commerce was within the exclusive power of the States, and that where a federal statute was enacted interfering with that power, it constituted an unconstitutional encroachment (Chemerinsky, 2015, pp. 375-383).

In the second half of the 1930´s, there was again a change in the Court´s approach to interpreting the provision, and within few years, it handed down judgements in which it reconsidered its previous approach, abandoning a restrictive interpretation and reverting back to an expensive interpretation the cases of NLRB v. Jones & Laughlin,[7] United States v. Darby[8] and Wickard v. Filburn,[9] by which it gradually abandoned his previous doctrine. Even with the return to an expensive interpretation and broader construction of the Clause, it was relatively easy for the legislature to subsume several enactments under the Commerce Clause over the course of the twentieth century, and so its application was gradually extended to civil rights[10] or criminal law as well (Chemerinsky, 2015, pp. 390-395)[11].

2.2 Interpretation After 1995

The United States v. Lopez case represented a major turning point, when the SCOTUS once again departed from its previously expansive interpretation of Commerce Clause, after more than half a century, and once again returned to its original, restrictive interpretation. At issue in Lopez was a case in which a student was convicted under the Gun-Free School Zones Act of 1990 for bringing a gun to school. The legislature justified the statute in question primarily by arguing that endangering a place intended for educational activity, that process could be negatively affected resulting in fewer productive citizens. This has a negative impact on economic activity and hence on society´s prosperity, which in turn has a significant direct impact on trade.[12] That argument was rejected by the court.

Based on a review of its previous decisions, the SCOTUS concluded that they could not be used to justify the act in question, since the test of substantial effects was

[7] SCOTUS, NLRD v. Jones & Laughlin Steel Corp., 301 U.S. 1(1937).
[8] SCOTUS, United States v. Darby, 312 U.S. 100 (1941).
[9] SCOTUS, Wickard v. Filburn, 317 U.S. 111 (1942).
[10] SCOTUS, Katzenbach v. McClung, 379 U.S. 294 (1964).
[11] SCOTUS, Perez v. United States, 402 U.S. 146 (1971).
[12] SCOTUS, United States v. Lopez, 514 U.S. 549 (1995), para. 654.

limited to economic activity only.[13] The court also confirmed that: "*The possession of a gun on a local school zone is no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce."*[14]

So, what conclusions does the decision ultimately draw for the application of the Commerce Clause rules? The significance of the judgement is not only highlighted by the fact as mentioned above, that a federal law has been struck down after a long time, but also by the fact that Court has gone further than in the past and, in addition to tying it to economic activity, has established new rules for invoking the Commerce Clause. In addition to providing that the legislature may proceed to enact new regulations only within the scope of those powers expressly granted to it by the Constitution, the court delineated three specific areas where Congress may invoke the Commerce Clause as a basis for regulation. First, Congress may proceed to enact legislation only if the regulation "*channels of interstate commerce*".[15] In the latter case, Congress may proceed to enact legislation to "*protect the instrumentalities of interstate commerce, or persons or thing on interstate commerce, even though the threat may come only from interstate activities*[16] Lastly, Congress has the power to regulate "*those activities having a substantial relation to interstate commerce respectively those activities that substantially affect interstate commerce*[17] ". Although on the one hand the Court returned to the pre-1937 interpretation, it went further than in the past and delineated for the legislature three specific areas in which legislation enacted by Congress must be deemed constitutional.

Of the above three possibilities, the third one garnered the most attention. This is because its broad language could be used to justify statutes in a wide range of situations. The court was aware of this, and acknowledged the ambiguity in its ruling, but it is also clear from previous decisions that, despite its broad interpretation, the court has never concluded in its decisions that Congress has found the trivial impact on commerce sufficient to permit it to proceed to enact a regulation invoking the Commerce Clause. [18] It will therefore be necessary to approach to so-called substantial impact test. "*Admittedly, a determination whether an interstate activity is commercial or non-commercial may in some cases result in legal uncertainty. But so long as Congress authority is limited to those powers enumerated in the Constitution, and so long those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty"*.[19] As Boykin points out, the Court´s elaboration of the substantial effects doctrine undermines the principles upon which federalism is built by allowing, under the guise of regulating interstate commerce, the creation and expansion of regulations whose primary objectives are non-commercial (Boykin, 2012, p. 114).

The Lopez case set a real precedent in previous decisional activity how the SCOTUS would approach its consideration of the legality of acts derived from the Commerce Clause in the years to come, as it did in the United States v Morrison[20],

[13] Ibid., paras. 559-562.
[14] Ibid., para. 567.
[15] Ibid., para. 568.
[16] Ibid., para. 568.
[17] Ibid., para. 568 and 569.
[18] Ibid., para. 559, SCOTUS, Maryland v. Wirtz, 392 U.&s. 183 (1968), footnote 27.
[19] Ibid., para. 566.
[20] SCOTUS, United States v Morrison, 529 U.S. 598 (2000).

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Gonzales v. Raich[21], National Federation of Independent Business v. Sebelius[22] or Tennessee Wine and Spirits Retailers Association v. Thomas.[23]

3. MARKET REGULATION THROUGH THE HARMONISATION CLAUSE

The creation of a common internal market was the main idea on which the European Community was built. The completion of the internal market was to be achieved in two ways. The first was to remove all barriers to free trade based on the legislation contained in the Treaties. The second was to gradually approximate and the harmonise the rules of the MS (Schütze, 2014).

Under the principle of conferral of powers, the EU can only legislate within the scope of the Treaties.[24] Any legislative act adopted must have its legal basis in the Treaties.[25] The correct choice of legal basis is therefore crucial for the choice of legislative procedure.[26] As the CJEU has also stated: "*It must first be observed that in the context of the organisation of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution´s conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure.*"[27] The choice of an incorrect legal basis may result in the annulment of the legal act by the CJEU.[28]

Under the ordinary legislative procedure, the legal basis for the proposed legislation can only be derived from specific provisions of the Treaty. Article 114 can only be invoked by as an alternative by the legislator if the legal basis cannot be "subsumed" under another specific provision. The scope of Article 114 TFEU is relatively broad, but even in principle it is not unlimited.

When Article 114 TFEU is invoked, the legislator must, in the first instance, deal with the limitations arising both from the Article itself and from other provisions of the TFEU.[29] Provisions relating to fiscal policy, the free movement of persons and the rights and interests of the employees are excluded from the scope of the Article.[30] If the proposed legislation does not fall within one of the above-mentioned areas, the legislator can only apply Article 114 TFEU in the alternative if there is no other provision of the TFEU which provides a specific legal basis for the proposed legislation and which can be invoked. The subsidiary nature of the provision is clear from the first sentence of Article 114 TFEU itself: "*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26*." As the previous sentence implies, it is essential to link the proposal to the achievements of the objectives of the internal market. The process of adopting a new legislative act must then be carried out through the ordinary legislative procedure,[31] which is less likely to be abused due to the involvement of the Parliament and the Committee (Kaczorowska, 2016, p. 187).

In addition to the limitations arising directly from Article 114 TFEU, the legislator must comply with several conditions laid down by the CJEU. On the one hand, the CJEU

[21] SCOTUS, Gonzales v. Raich, 545 U.S. 1 (2005).
[22] SCOTUS, National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).
[23] SCOTUS, Tennessee Wine and Spiritis Retailers Association v. Thomas, 588 U.S. (2019).
[24] Article 5 (1) TEU.
[25] Article 5 (2) TEU.
[26] Article 289 (1) and (2) TFEU.
[27] CJEU, judgement of 11 June 1991, Commission/Council, C.300/89. ECLI:EU:C:1991:244, para.10.
[28] CJEU, judgement of 22 October 2013, Commission/Council, C-137/12, ECLI:EU:C:2013:675, para.77.
[29] For example, Article 168 (5) TFEU.
[30] Article 114 (2) TFEU.
[31] Article 114 (1) TFEU.

has adopted a rather flexible interpretation, but on the other hand, in order to establish certain rules of harmonisation and approximation, it has also expressed limits to its application. It can therefore be said, that to a certain extent, its rulings have given the Commission effective margin of manoeuvre. The proposal must therefore realistically aim to achieve the objectives of the internal market[32] and if the aim of the legislation to be adopted is to prevent the creation of (potential) barriers, the legislator must demonstrate the likelihood of the adoption of such a "crash" measure.[33] If the mere identification of disparities between the national laws of the MS is not sufficient to invoke Article 114 TFEU, the legislator may invoke it directly in the case of disparities that constitute an obstacle to the four fundamental freedoms and which directly affect the internal market and its functioning[34] or competition.[35] However, these risks cannot be abstract.[36] Where the removal of barriers to trade in a harmonised area has already been achieved by an act adopted based on Article 114 TFEU, the legislator cannot be restricted in its ability to reflect any changes in circumstances or (scientific) knowledge by amending the act, all on accordance with the task of safeguarding the interests recognised by the Treaty.[37] It should be noted that, depending on the circumstances and context of the harmonised area, the legislator has a certain degree of discretion in choosing the most appropriate method of approximation, which is particularly true in areas requiring the adoption of rules containing complex technical details.[38]

Furthermore, Article 114 TFEU cannot be used to replace or circumvent the procedure laid down in Article 352 TFEU and thus create a new rule superior to the national law of the MS.[39] The higher tendency to use Article 114 TFEU, despite the potential appropriateness of Article 352 TFEU, is mainly due to the fact that, while the ordinary legislative procedure is sufficient for Article 114 TFEU, the unanimity of the Council of the European Union is necessary for the adoption of an act when Article 352 TFEU is used.[40] The legislator tends to avoid adopting acts under this procedure, partly because of the difficult negotiations involved in reaching a consensus and then obtaining assent.

When the legal basis in Article 114 TFEU is invoked, the problem is often one of preventive harmonisation, which the Commission resorts in some cases. Not so long ago, it used the argument of the potential adoption of several legislative proposals in some MS as one of the reasons for invoking Article 114 TFEU. As the present proposal shows, one of the reasons for recourse to preventive harmonisation was the potential risk of

[32] CJEU, judgement of 8 June 2010, The Queen, Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd/Secretary of State for Business, Enterprise and Regulatory Reform, C-58/08, ECLI:EU:C:2010:321, para. 32.
[33] Ibid., para. 33.
[34] CJEU, judgement of 12 December 2006, Germany/Parliament and Council, C-380/03, ECLI:EU:C:2006:772, para. 37.
[35] CJEU, judgement of 5 October 2000, Germany/Parliament and Council, C-376/08, ECLI:EU:C:2009:808, para. 84 and 106.
[36] Ibid., para. 84.
[37] CJEU, judgement of 8 June 2010, The Queen, Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd/Secretary of State for Business, Enterprise and Regulatory Reform, C-58/08, ECLI:EU:C:2010:321, para. 34.
[38] CJEU, judgement of 6 December 2005, United Kingdom/Parliament and Council, C-66/04, ECLI:EU:C:2005:743, para. 45.
[39] CJEU, judgement of 2 May 2006, Parliament/Council, C-436/03, ECLI:EU:C:2006:277, paras. 37-46.
[40] Article 352 (1) TFEU.

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fragmentation of internal market legislation, as some MS were considering the adoption of legislation which could (partially) cover the content of the present proposal.[41]

4. COMPARISION OF THE LEGISLATIVE AND JUDICIAL LIMITS ON THE APPLICATION OF THE PROVISIONS UNDER REVIEW

In the last chapter of this paper, we will compare the different conditions set by the legislator in the US and the EU legal order, as well as the limits set by the decisions of the highest judicial authorities.

4.1 Legal Limits

In the case of legislative limits, the TFEU provides a clearer definition of the conditions under which the legislator may invoke the legal basis in Article 114 TFEU. As already explained in Chapter 3, the provision itself implies limits of application within which the use of the Article as a legal basis is explicitly excluded. It can only be applied in the alternative where no legal basis can be derived from any other provisions of the Treaty. The main substantive difference with the US Constitution is, in particular, the number of provisions relating to the regulation of the internal market. Whereas in the case of the Treaty, the legislator has several specific provisions at its disposal in order to achieve the objectives of Article 26 TFEU, and Article 114 together with Article 352 are intended to serve only as "secondary crutches".

Congress can only rely on the Commerce Clause, the only statutory limitation of which is found in the Tenth Amendment to the Constitution. Unlike a Treaty, the US Constitution contains no specific provisions for regulating various market freedoms; thus, the legislature is to some extent free to a much broader interpret the clause much more broadly, which in this case is limited at most by the Constitution's enumerated distribution of powers.

4.2 Judicial Limits

SCOTUS has altered its approach to interpreting the Commerce Clause and the powers of the legislature under it multiple times over the years. Currently, an originalist approach to interpretation is evident. The first major limit imposed on the legislature was the derivation of the Dormant Commerce Clause, which prevents the legislature from creating barriers to commerce. Over the years, in addition to the substantial effects test, the Court has developed three conditions that the legislature must meet for legislation to be adopted is to be achieved.

CJEU has repeatedly confirmed the Commission's obligation to demonstrate the likelihood of the adoption of different legislation at national level and that the objective of the measure adopted was to avoid fragmentation. However, subsequent decisions and practice have confirmed that the mere possibility that MS might consider adopting a regulation is sufficient for the legislator to argue in this regard. This can be an effective way of subsuming almost any adopted regulation, provided that the proposal also meets the other conditions, not only the Treaty conditions.

[41] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15.12.2020, point 1.

5. CONCLUSIONS

Based on the facts presented in the previous chapters, it can be concluded that both in the United States and in the European Union, the legislator tends to go beyond the limits set by the provisions of the highest legal force and, on the pretext of regulating commercial and market rules, to enter directly into areas that are of a minimal or purely non-commercial nature.

In the case of both the TFEU and the US Constitution, there are certain legal and judicial limits to the use of the legal basis of the provisions in questions. In most cases, it has been the legislature whose approach to the interpretation of both provisions has served as a significant incentive for the supreme courts to subsequently, during their adjudicative activity, proceed to consider the scope of the powers conferred on the legislature. The reasons for the legislatures approach may vary from case to case.

Over the years, we have seen the different approaches taken by the courts in their interpretation and construction. It is, of course, a matter for consideration whether strict adherence to an expansive or restrictive interpretation is also beneficial in the light of social developments or vice versa. It is also a question of whether the highest courts should be the ones to lay down rules for the legislature based on which it can adopt certain laws. The cases compared above show how, in certain circumstances, the courts can act as an effective brake on the legislature, especially when it resorts to an overly broad interpretation of its powers.

In the case of the CJEU, we can expect it to remain in the current discourse, where it is likely to continue with a flexible interpretation. In the case of the SCOTUS, there is no indication that its approach to constitutional interpretation is likely to change in the near future, and so it is likely to remain restrictive interpretation. Whether the approach of one court or the other will change is, of course, a matter for the future and, as with the cases under review, may come unexpectedly. Personally, I am inclined to believe that both the legislator and Court should stick to the letter of the Treaty and not use the instruments of internal market regulation to regulate areas where there is little or no impact on trade or commerce.

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