

**CONSTITUTIONALISATION,
LIBERALISATION
AND PUBLIC HEALTH
IN THE EUROPEAN UNION**

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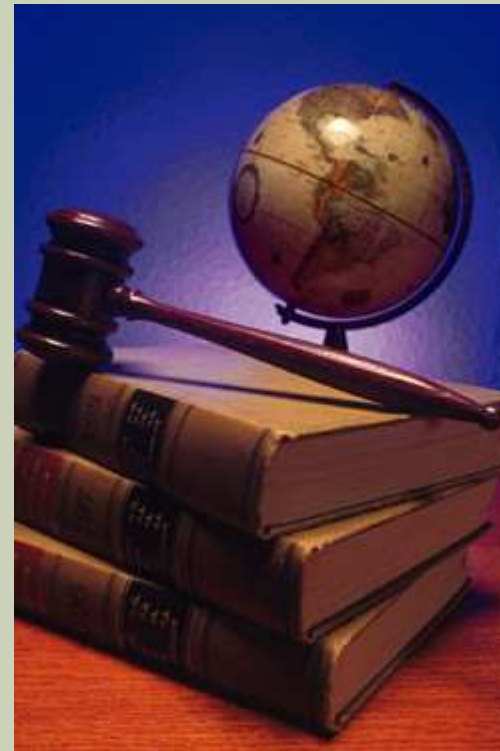
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CONSTITUTIONALISM, TRADE & INVESTMENT

- Rule of law
- Institutionalisation of international norms & governance
- Third party dispute settlement
- A 'spaghetti bowl' of overlapping agreements
- EU: supranational market building



THE EUROPEAN COURT (ECJ/CJEU)

- ‘Negative’ and ‘positive’ integration
- Intergovernmental politics vs supranational law
- ECJ/CJEU as constitutional court: supremacy and direct effect
- Corporations use EU law to remove market obstacles



PROPORTIONALITY TESTING

- Balancing
- 'Least means' testing
- Precedent and case law
- Judicialisation of policy making



HEALTH AND MARKET BUILDING

- Single market = free movement of goods (and services, people and capital)
- Prohibition of measures having an equivalent effect to quantitative restrictions
- Limited EU health competence
 - At EU level: health regulations must harmonise on the basis of single market rules
 - At national level: health regulations must be least restrictive of trade

EU AND TOBACCO CONTROL

- Limited competence in the area of public health: Article 168 TFEU (ex. Article 152 TEC; Article 126 EC)
 - 1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities. Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.
 - 4 (c). incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States (emphasis added).

THE SINGLE MARKET AND TOBACCO CONTROL

- More robust powers to take measures needed to ensure functioning of the single market
- Article 114 TFEU (ex. Article 95 TEC; Article 100a EC)
- Series of directives brought forwards on the basis of this article:
 - Tobacco Advertising Directive (TAD) (98/43/EC)- ANNULLED
 - Tobacco Advertising Directive / (2003/33/EC)
 - First Tobacco Products Directive (TPD1) (2001/37/EC)
 - Second Tobacco products directive (TPD2) (2014/40/EU)

TOBACCO ADVERTISING DIRECTIVES

- Sought complete advertising ban
- Challenged by German government before the ECJ:
 - *Ultra Vires*- public health legislation not single market measures
- Tobacco companies denied legal standing to mount separate challenge
- ECJ agreed with plaintiff and annulled the directive in October 2000
- Gave guidance about what would be acceptable in new Directive
 - Only cross border advertising to be covered

TOBACCO PRODUCTS DIRECTIVE 1

- Consolidated/updated a range of existing directives
- Main issues: ingredient disclosure, maximum tar yields, health warnings and ban on misleading descriptors (e.g. 'light' & 'mild')
- Industry made *ultra vires* arguments and claimed infringement of IP and infringement of proportionality/subsidiarity
- Access case for Commission documents reject by Court of First Instance
- ECJ in 2002 ruled the directive was valid, but permitted continued use of descriptors on export products (i.e. sold outside the SIM)

TOBACCO PRODUCTS DIRECTIVE 2

- Cigarettes and roll your own (RYO) tobacco packaging to contain mandatory graphic and textual health warnings to cover at least 65% of the front, back and top of cigarette packs and at least 50% of the side of packs;
- An explicit recognition that member states could move beyond these minimum packaging requirements through the implementation of standardized (plain) packaging;
- A ban on ‘characterising flavours’ of cigarettes such as menthol but including other flavours (e.g. fruit, vanilla, spice and herbs) which may appeal to young people and facilitate the uptake of smoking by masking tobacco flavour;

TPD 2

- Cigarettes to be sold in cuboid packs of standard dimensions in denominations of at least 20 cigarettes, meaning a ban on 'slim' or 'lipstick' shaped packs;
- Standard packaging shape for RYO tobacco with minimum pack content of 30g;
- Ban on promotional or misleading messaging or packs (e.g. suggestions a product may be less harmful);
- Regulation of e-cigarettes not licenced and sold as medical devices.

TPD 2

- Rationale for TPD 2 centred on the potential barriers to the functioning of the single market which arose from the diverging regulatory regimes which had emerged since TPD (i.e. labelling)
- Need to come into line with the FCTC
- One of the most lobbied pieces of (EU) legislation in history
 - Philip Morris leaked documents
- Lobbying ultimately failed to stop the directive, although it was amended, so legal challenges ensued

PM (& BAT/JTI) LEGAL CHALLENGE IN LONDON

- Legal basis of the directive: public health not trade
- Fundamental Rights: The Directive appears to ban truthful and non-misleading claims on the packaging of tobacco products.
- Delegated Acts: The Directive delegates a number of powers to the Commission to enact rules on essential aspects of the Directive
- Referred to CJEU for a ruling which confirmed the validity on 4 May 2016
- Separate actions by e-cigarette maker *Totally Wicked* and Poland/Romania (on menthol ban) also dismissed

MINIMUM UNIT PRICING (MUP) OF ALCOHOL

- The UK has significant levels of alcohol related harm; Scotland even worse
- Price based interventions are effective (Babor et al 2010) & opposed by industry
- Devolution created an opportunity and a limited mechanism to address this
 - Tax (duty and VAT) are retained competences decided at Westminster
 - but public health is devolved so MUP on explicitly health grounds is possible
- Very few precedents (mainly Canadian provinces) so effectiveness and legality questioned

MINIMUM PRICING OF TOBACCO

- France Austria and Ireland's rules on tobacco pricing challenged by Commission
- Ruled illegal by CJEU in 2010- contravened Directive on tobacco duty as it removes potential competitive advantage for (cheaper) imported products
- Judgement acknowledged importance of protecting public health but suggested this could be done as effectively – and in less trade restrictive way - via tax.

SCOTCH WHISKY ASSOCIATION CHALLENGE TO MUP

- Case filed with Court of Session and referred up to CJEU
- Centres on Article 34 TFEU on measures having equivalent effects to quantitative restrictions to trade
- Opinion of Advocate General in line with tobacco ruling: tax based methods likely to be less trade restrictive *if* they are proven to be as effective as MUP
 - Allow 'the free formation of priced'
- Views of the Advocate General reflected in the CJEU official judgement
- Final judgement left to the Scottish Court of Appeal

REFLECTIONS

- EU level policies (tobacco) versus (sub-)national policies (alcohol);
 - Both challenged under auspices of EU law
- Balance between health and trade within the EU
- The relationship between the supranational, national and sub-national in complex constitutional settings;
 - Scotland can't implement tax based measures. How does EU law account for this?
- The comparison of alcohol and tobacco as regulated products
 - The political nature of judicial decision making
- Set in the context of TTIP/BITs/WTO: multiple veto points