European Journal of Law and Economics, 14: 171–183, 2002


# The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?

GEORGE TRIDIMAS GTridimas@talk21.com
*Reader in Public Policy, School of Public Policy, University of Ulster, Shore Road, Netownabbey, Co. Antrim BT37 0QB, Northern Ireland*

TAKIS TRIDIMAS ptt@soton.ac.uk
*Professor of European Law, Faculty of Law, University of Southampton, Highfield, Southampton SO17 1BJ, UK, and Professor, College of Europe, Bruges, Belgium*

**Abstract**

In Case *C-376/98 Germany v Council* the European Court of Justice annulled a Directive which banned the advertisement and sponsorship of tobacco. The judgment sanctions regulatory policy-making at the national rather than the Community level. The paper examines the legal basis of the annulment, its effect on economic efficiency and the implied role of the Court in the formulation of public policy in Europe. Within the institutional limits of the judicial power to determine policy, the Court focused on whether or not disparate national laws restrict free movement and distort competition and affirmed the primacy of the nation state to regulate economic activity.

**Keywords:** European Court of Justice, internal market, subsidiarity, judicial review, spatial model of collective choice, binary choice

**JEL Classification:** D78: Positive Analysis of Policy-Making and Implementation, F15: Economic Integration, H77: Intergovernmental Relations, K20: Regulation and Business Law

The judgement of the European Court of Justice in *Germany v Council* (*Tobacco Advertisement Directive case*)[1] is one of the most important judgments ever delivered by the Court on the competence of the European Community. The Court annulled Directive 98/43 prohibiting the advertising and sponsorship of tobacco products[2] on the ground that it did not fall within the scope of the internal market. The judgment raises important issues pertaining to European governance. It highlights the evolving allocation of competence between the Community and the Member States. It also illustrates the effect of judicial decisions on the outcome of collective decision making, more specifically, the contribution of the Court in shaping policy-making in Europe.

This paper has a threefold objective. First, it examines the legal basis of the annulment of the Directive. Secondly, it assesses whether the annulment is justified on economic efficiency grounds. Thirdly, it explores the power of the Court, as an unelected body, to reverse the decision of the political authorities of the European Community. The paper is divided as follows. The first part explains the legal background to the dispute and the Court's reasoning. The second part provides a legal critique of the judgment. The third part uses the economic theory of fiscal federalism to examine whether economic efficiency is best served by regulating tobacco advertisement and sponsorship at the national or at the Community level. The fourth part draws on collective choice theory to analyse the effect of the judicial review on policy making in Europe. The final part concludes by putting the annulment in the context of the recent trend of less pro-integrationist Court rulings.

## 1. The judgment of the Court

Directive 98/43 was adopted by the Council and the European Parliament on 6 July 1998 following a long period of gestation.[3] The Directive bans, subject to minor exceptions, the advertising and sponsorship of tobacco products in the Community.[4] The rationale behind its adoption is the following. Inspired largely by health objectives, Member States impose various restrictions on the advertising and sponsorship of tobacco products. Disparities between national laws create barriers to the free movement of the products which serve as the media for such advertising. They also distort competition among advertisers, those sponsored by tobacco companies, and tobacco manufacturers. By banning advertisement and sponsorship, the Directive attempts to facilitate the free movement of goods and services, and remove distortions in competition.

The Directive was adopted by the Council through qualified majority voting on the basis of Articles 57(2), 66 and 100a of the EC Treaty.[5] Article 100a enables the Council of Ministers, acting in accordance with the co-decision procedure,[6] to adopt harmonisation measures which have as their object the establishment and functioning of the internal market. Articles 57(2) and 66 empower the Council, acting under the same procedure, to adopt directives in order to facilitate the exercise of the freedom of establishment and the freedom to provide services. The German government, which voted against the adoption of the Directive, brought an action for its annulment. It put forward several grounds of invalidity but the most important issue in the proceedings was the issue of legal basis. The Court found that Articles 57(2), 66 and 100a EC were not an appropriate legal basis for the adoption of the Directive and annulled it.[7]

The Court started by outlining the scope of Article 100a and gave for the first time a restrictive interpretation to that provision. It held that Article 100a, interpreted in the light of Articles 3(c) and 7a EC (now Articles 3(1)(c) and 14 respectively), enables the Community legislature to adopt measures which are intended to improve the conditions for the establishment and functioning of the internal market. It then continued: "To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5EC) that the powers of the Community are limited to those specifically conferred on it".[8] The Court stated that a mere finding of disparities between national laws and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition are not sufficient to justify the application of Article 100a.

In relation to public health, the Court held that Article 129(4) of the Treaty excludes any harmonisation of national laws designed to protect and improve human health. It thus foreclosed any possibility of a prohibition of tobacco sponsorship and advertisement being based on that provision. It confirmed however that directives adopted on the basis of other Treaty provisions may well have an impact on health protection. Having established the outer boundaries of Article 100a, and consequentially of Articles 57(2) and 66, the Court proceeded to examine whether the Directive was adopted on the correct legal basis. It sought in particular to verify whether, in accordance with its avowed objectives, the Directive actually contributed to (a) eliminating obstacles to the free movement of goods and services and (b) removing distortions of competition.

### *1.1. Free movement*

The Court accepted that disparities between the laws of Member States on the advertising of tobacco products gave rise to actual and potential obstacles to the free movement of certain goods and services. This was the case, for example, in relation to periodicals, magazines and newspapers. In principle, therefore a directive prohibiting the advertising of tobacco in such products could be adopted on the basis of Article 100a.[9] The Court concluded however that the need to ensure free movement of goods and services did not justify the adoption of the Tobacco Directive. First, the prohibition imposed by the Directive was too general. It extended to all forms of advertising even though, in relation to some of them, there was no risk of obstacles to trade. This was true, in particular, with regard to the so-called static advertising media, i.e. advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafes and advertising spots in cinemas. Secondly, the Directive did not in fact ensure free movement of products which were in conformity with its provisions. This is because, under Article 5, Member States retain the power to lay down stricter requirements concerning the advertising and sponsorship of tobacco products. In contrast to other directives, the Directive did not take any measures to ensure the free movement of products which conformed with its provisions.[10]

### *1.2. Distortions of competition*

The Court then turned to examine the issue of distortions of competition. It held that, in determining the lawfulness of a directive adopted on the basis of Article 100a, it is required to verify whether the distortions of competition which the measure purports to eliminate are appreciable. In the absence of such a requirement, the powers of the Community legislature would be practically unlimited. The Court accepted that advertising agencies and producers of advertising media established in Member States which impose fewer restrictions are at an advantage in terms of economies of scale and profitability. It held however that the effects of such advantages on competition are remote and indirect and do not constitute appreciable distortions. The Court pointed out that some appreciable distortions did arise. The fact that tobacco sponsorship is prohibited in some Member States and authorised in others leads to certain sports events being relocated with considerable repercussions on the conditions of competition for undertakings associated with those events. The Court conceded that such distortions could be a basis for recourse to Article 100a in order to prohibit certain forms of sponsorship but held that they could not justify an outright prohibition.

As regards the sale of tobacco products, the Court found that the Directive was not apt to eliminate appreciable distortions of competition. Admittedly, in Member States which have restrictive legislation, producers resort to price competition to influence their market share. That is however not a distortion of competition but rather a restriction of forms of competition applicable equally to all producers.

In sum, the Community legislature could not rely on the need to eliminate distortions of competition either in the advertising sector or in the sale of tobacco products in order to adopt the Directive. Clearly, the reason why the Court considered the regulatory intervention of the Community unjustifiable was because of the general nature of the prohibition.[11] It emphasised that a directive prohibiting certain forms of advertising and sponsorship could have been adopted on the basis of Article 100a.[12] Given, however, the general nature of the prohibition, the Court annulled the Directive in its totality. Partial annulment was not possible because it would entail amendment by the Court of the provisions of a directive which is a matter for the Community legislature and not the judiciary.

## 2. A legal critique of the Court's reasoning

The *Tobacco* case adopts a narrow interpretation of the internal market. Traditionally, one of the main ways in which the Court has influenced the development of the Community legal order and contributed towards the constitutionalisation of the Treaties has been through an expansive interpretation of Community competence.[13] In recent years, there are signs that this expansive interpretation has been halted.[14] In Opinion 2/94, the Court interpreted narrowly Article 235 (now 308) holding that the Community did not have competence to accede to the European Convention of Human Rights.[15] The *Tobacco* judgment goes a step further because it challenges the Community institutions in the exercise of their core economic functions. The judgment is carefully drafted: It is not the banning of tobacco advertising and sponsorship as such that the Court objects to, but the sweeping generality of the ban. It is therefore, strictly speaking, not a question of lack of competence of the Community but of overstepping the mark. Seen in this light, the *Tobacco* judgment follows the traditional judicial posture of finding measures as being in excess of the authority of the institutions rather than beyond the competence of the Community.[16]

Although the judgment makes no express reference to subsidiarity and proportionality, the Court's reasoning is imbued by those principles. The principle of subsidiarity states that in areas which do not fall within its exclusive competence, the Community may take action, "only if and in so far as the objective of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better advised by the Community".[17] The judgment complies with the principle of subsidiarity. Also the objections of the Court to the Directive mirror the two aspects of proportionality, namely the necessity and suitability of governmental intervention. On the one hand, the Directive over-regulates and therefore fails the test of necessity. On the other hand, it is not capable of attaining its avowed objective, i.e. to facilitate free movement of goods and services, and therefore fails the test of suitability. It is unusual, however, for the Court to apply such a strict test of proportionality. More commonly, in assessing the scope of Community powers, it is content to defer to the discretion of the Community legislature.[18]

By drawing a distinction between the establishment and functioning of the internal market, on the one hand, and its regulation, on the other hand, the Court placed emphasis on the finite nature of Community competence. The judgment appears to sanction Community intervention to facilitate integration but regulatory powers strictly understood remain in the preserve of the nation state. This distinction between facilitating and regulating at the supranational level however is not easy to make. First, whether the distortions which arise from the lack of harmonisation are appreciable is a question of degree and, as such, difficult to determine. One would have thought that empirical evidence is here of crucial importance. Little concrete empirical evidence, however, appears to have been presented to the Court. The difficulties are compounded in relation to measures which seek to eliminate potential distortions. Secondly, the requirement that the distortions of competition must be appreciable is a new one.[19] The Court appears to introduce a *de minimis* requirement in the application of Article 100a which had not been spelt out in previous case-law. Notably, the Court has not introduced a *de minimis* requirement as a prerequisite to the application of the Treaty articles on fundamental freedoms. One wonders whether the *Tobacco* judgment signals perhaps a cautious attempt to introduce such a requirement as a general condition for the application of Community norms relating to the internal market.

An interesting question which arises in this context is whether it would have been possible to adopt the *Tobacco* Directive under another legal basis. Although a detailed examination of this question is beyond the scope of this paper, it may be appropriate to make the following points. There are two possible alternatives, namely Article 100 (now Article 94) and Article 235 (now Article 308) of the EC Treaty.[20] It is submitted that neither provision could provide a legal basis. Article 100 can only be used for the harmonisation of national laws which "directly affect the establishment or functioning of the common market". It therefore runs into the same obstacles as those outlined in the *Tobacco* case in relation to Article 100a. Article 235 provides residual authority. It mandates the Council to adopt appropriate measures if, in the course of the operation of the common market, action by the Community proves necessary to attain one of the objectives of the Community and the Treaty has not provided the necessary powers. Article 235 can be used only if there is no other more specific legal basis.[21] Because of the residual nature of that Article the Court's reasoning in the *Tobacco* case applies *a fortiori*. It is difficult to see how Article 235 could authorise the Community legislature to adopt a harmonisation measure which neither contributes to the elimination of appreciable distortions of competition nor facilitates free movement. In short, the reasoning of the Court in the *Tobacco* judgment is fatal and appears to exclude the possibility of the *Tobacco* directive being validly adopted, in the precise form in which it was introduced, under any other legal basis.

## 3. Economic efficiency and the annulment of the Directive

The economic analysis of fiscal federalism suggests a number of efficiency perspectives[22] to decide whether or not disparate national regulations are justified. The arguments in favour of policy centralisation are that disparate national regulations jeopardise free trade and distort competition, whilst centralisation can achieve economies of scale, correct externalities and eliminate inefficient non co-operative behaviour. By contrast, the arguments in favour of decentralisation emphasise that allowing for disparate national regulations satisfies diverse consumer preferences and protects the rights and political freedoms of citizens by curbing excessive interference from Community government.

As already explained, the *Tobacco* judgment rejected the argument that different national regulations jeopardised free trade and gave rise to distortions in competition. The Court held that the damage to the internal market arising from disparities in national laws was not significant and more harm would be caused by a complete ban than by allowing differentiation. Also, it acknowledged that cost disparities resulting from incongruous regulatory arrangements may result in cost advantages for firms operating under lighter regulatory regimes and thereby locational inefficiencies. It ruled however that the risk was not significant. Obviously, the less mobile is the regulated activity across different Member States, the smaller the probability that differential regulatory arrangements will affect the choice of its location.[23] The Court's reasoning accords well with economic intuition and it would be difficult to argue against it.

The issues of scale economies, externalities, non co-operation, consumer preferences and political freedoms did not feature in the judgment. Policy centralisation is favoured when the policy making process itself is characterised by economies of scale. For example, adoption of a single currency and a centralised exchange rate policy (by one rather than fourteen central banks) achieves significant savings in foreign reserve management costs. However, the significance of scale economies may differ in various fields of policy, while the possibility exists that after some level of centralisation diseconomies of scale may be experienced diminishing the usefulness of centralisation. Externalities or spillover effects occur when an economic activity undertaken in a particular geographical jurisdiction affects negatively or positively the economic well being of citizens living in other jurisdictions. This has as a result that the actual level of the activity differs from its socially optimum. Contrary to other areas of EC law (like environmental protection), externalities appear to be of little practical significance in relation to the advertisement and sponsorship of tobacco products and therefore would not justify supranational regulation.

When, instead of aligning their policies, national authorities compete against each other a "race to the bottom" may result. In the attempt to attract business in their own jurisdiction some Member States may introduce lighter regulatory regimes thus triggering successive rounds of lighter regulations by other states, resulting in regulatory laxity that hardly protects the interests of consumers. Although the risk cannot be dismissed outright, it appears to be of little practical relevance in the case of tobacco advertisement, especially since all Member States operate stringent restrictions. They all have, for example, banned television advertisement of tobacco pursuant to Community legislation.[24] All in all, while not completely absent, scale economies, externalities and regulatory competition appear to be of little practical significance to justify centrally imposed regulation on advertisement and sponsorship of tobacco products.

In so far as consumer tastes differ and the national authorities are better informed about them than the supranational ones, decentralised policy making allows Member States to introduce their own regulations in accordance to the preferences of the consumers under their own jurisdiction. Advertising strategies are put into effect at the national level reflecting national consumer preferences, domestic cultural sensitivities and the like. Given the heterogeneity of tastes, allowing for different national regulatory regimes results in bigger utility benefits for a larger number of consumers across the EU countries.[25] Clearly, the uniformity implied by the ban would result in important efficiency losses. However, no reference to this argument was made by the Court. Finally, regulatory policy making at the decentralised level is advocated by scholars in the public choice tradition, because it is better suited to protect individual freedoms.[26] The reason is that at the lower level of government voters are better placed to express their preferences, assess the direct and indirect costs of policy and monitor the behaviour of politicians and bureaucrats. They will then be able to restrain the ability of overpowering governments to restrict economic and civil liberties and provide excessive levels of public expenditures financed by equally excessive levels of taxation.

The *Tobacco* judgment did not deal with the issues of externalities, economies of scale and satisfaction of heterogeneous consumers. The reason is that the Court concentrated in examining whether the Directive was justified in the light of its declared objectives. Its underlying rationale was to promote free movement and remove distortions in competition. In adopting the Directive neither the Council nor the Commission made reference to the issues covered by the rest of the efficiency criteria. The judgment however withstands an economic analysis. The Court found against the ban reasoning that the losses from disparate national restrictions are small. In fact our discussions shows that the case against the ban is even stronger because the national authorities are better placed to satisfy divergent consumer preferences, while scale economies, externalities and regulatory competition impose few, if any, significant efficiency losses.

## 4. The role of the European Court of Justice in policy decision making

Under the constitutional framework of the EU, in order to introduce legislation, two conditions must be met, namely consent by the decision-makers to a policy measure and competence to adopt it. The rules governing the decision-making process and the passing of legislation in the EU are laborious, complex, and have no parallel in the national legal systems.[27] Obtaining consent and establishing a collective choice outcome in this context can often be a tortuous and time-consuming process of striking deals across different national interests, partisan objectives and institutional players with different motives. But consent on a policy measure is not in itself sufficient, since competence, that is power to adopt it, is also required. The Community is governed by the so-called principle of enumerated competencies. This means that the presumption of competence lies with the Member States. The Community only has those powers which are expressly or by implication granted to it by the Treaty.[28] In reality, however, the Treaty grants to the Community wide ranging powers in diverse areas. One may note that there is a conflict between the principle of enumerated competencies, on the one hand, and the broad formulation of Articles 2 and 3 of the Treaty which lay down the aims and the activities of the Community, on the other.[29]

In accordance with the principle of the separation of powers, the validity of policy measures and outer limits of Community competence are determined by the European Court of Justice.[30] Clearly, in the case of the *Tobacco* directive, although the condition of political consent had been met, the Court invalidated the Directive because the (logically prior) condition of competence was not satisfied. Effectively, the judicial review undertaken by the Court cancelled the policy decision made by the political authority.[31] There is no denying that the Court has a significant effect on policy outcomes and that rulings which ascertain the limits of lawful government have profound political implications.

One could examine the judicial function by applying the rational choice theory and modelling the Court as a self-interested actor which maximises its own utility by pursuing its most preferred policy outcome subject to the relevant institutional constraints.[32] The Court however is not an elected political actor. Its legitimacy in shaping policy outcomes derives from upholding the rule of law, that is, interpreting the founding treaties and ensuring that the Community institutions and the Member States act within the limits of their powers.[33] Unlike elected politicians, in exercising its power of judicial review the Court does not pursue electoral objectives, partisan agendas or sectoral financial interests. Rather it is considered as pursuing the ideal of the rule of law and the "deeply internalised" notion of justice as perceived by the judges subject to the relevant constraints. But what are these constraints?

First, the Court's power is constrained by the interests of other political actors of government, notably, the Member States, with whom the ultimate power to revise the founding treaties and alter the mandate of the Court lies. Accordingly, a self-interested Court will not reach decisions that provoke such responses.[34] Secondly, there are limits to the jurisdiction of the Court. In exercising judicial review, the Court may not choose different policies from those introduced by the legislature. The latter would have rendered it equivalent to an (unelected) political body. It can only rule on whether or not the policy proposed by the politicians can stand. That is, the Court is limited to binary choices.

The essence of the constrained maximising behaviour of the Court and its binary choice is illustrated graphically in figure 1, which adopts the standard spatial model of collective choice. The degree of restrictions on tobacco advertisement and sponsorship is represented along the horizontal line, with the origin O standing for a regime without restrictions. Policies that allow for few restrictions and light regulatory arrangements are depicted by points on the left side of the line, while policies which impose severe restrictions are depicted by points on the right side of the line. The government of each Member State is assumed to have an ideal or most preferred policy represented by a point on this line, so that the various governments can be ordered from left to right on the line. Each government prefers to implement policies that are as close as possible to its ideal point, that is, its utility decreases for deviations from its ideal point and other things being equal, it would vote against proposals that result in such deviations.

Let S represent the ideal point of Germany which is the Member State favouring the minimum degree of regulation. In the presence of disparate national regulations (that is, before the Directive), S is the status quo. Under the voting rule of unanimity in the Council

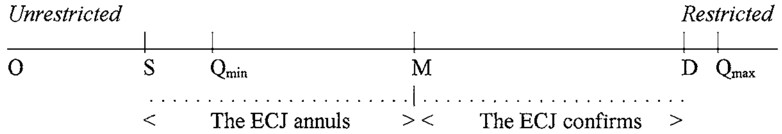


*Figure 1.* ECJ decision making power under binary choice.

the effective veto power that Germany enjoys implies that only point S can be established as an equilibrium collective choice (since all points to the right of S, when proposed, will be rejected by Germany and defeated). Let $Q_{min}$ denote the point to the left of which there is a minimum number of votes that prevents a proposal from receiving a qualified majority, (that is, a qualified majority fails to exist to the left of $Q_{min}$). Similarly, let $Q_{max}$ denote the point to the right of which there is a minimum number of votes that prevents a proposal from receiving a qualified majority. Under qualified majority voting the Council will enact legislation anywhere between $Q_{min}Q_{max}$.[35] Finally, let D denote the level of restrictions on tobacco advertisement and sponsorship resulting from the Directive binding to all Member States (for simplicity but without loss of generality it is also assumed that the policy preferences of the European Parliament have also been taken into account in arriving at a point like D).

The Court may also be said to have a most preferred policy position derived from its notion of justice that can be graphically represented by a point on the line. The Court however does not have the power to impose it in practice. The essence of binary choice is that the Court is restricted to either accept the policy position D implied by the Directive or reverse it implicitly endorsing the status quo S; it cannot choose a different point that it may prefer to both alternatives. Whether it annuls or confirms the Directive will depend on its own most preferred point and its relative distance from S and D. If the preferences of the Court are such that they are represented by points to the left of mid point M of the segment DS the Court will annul the Directive, for although it may fall short of its ideal point the shortfall is still smaller than it would have been if it had confirmed the Directive. On the other hand, if the Court's preferences are represented by any point to the right of M, it will uphold the Directive. In the present circumstance the Court opted for S implying an ideal point to the left of M.

In the light of the above it may be argued that the contribution of the ECJ to decision making has a negative aspect in the sense that the Court can reject or confirm a policy position, but it cannot introduce a policy of its own. Nevertheless, in practice rejection of the policy measure may not necessarily lead to a return to the status quo, especially if the political authorities are keen on revising the original policy. An unusual feature of the *Tobacco* judgment, is that the Court offered guidelines as to what would be acceptable intervention with regard to banning the advertising and sponsorship of tobacco at Community level. These may provide the starting point for the renegotiation of a new policy by the political actors. Thus, the Court may not only reject a policy position but also demarcate an area of permissible policy outcomes. Through the prescriptive effect of its rulings, it makes not only a negative but also a positive, albeit an indirect, contribution to decision making.

## 5. Conclusion

The *Tobacco* judgment is important because it interprets narrowly the powers of the Community legislature to adopt measures for the attainment of the internal market. In doing so, it reverses a long trend towards the expansive interpretation of the legislative competence of the Community, reasserts the authority of the Member States and makes clear that the powers of the Community institutions are finite: Community legislation for the establishment of the internal market may supplement but not replace state regulatory intervention. By drawing the distinction between the Community as a facilitator of free trade and as a regulator, it circumscribes the limits of supranational intervention and asserts the regulatory power of the nation state. In effect, the Community is commended for empowering private operators to trade on a level playing field but condemned for encroaching on their economic freedoms. Returning to the question of the title of this paper, and reducing the answer to a simple "black or white", the judgment unveils the Court as a friend of national sovereignty. Public health concerns are left to be dealt with by the national authorities rather than their supranational counterparts. The judgment may be seen as anti-integrationist but activist. From the standpoint of European integration, it is a judgment which favours restraint rather than expansion of Community competence. From the point of view of decision-making power in Europe, however, it is an activist judgment because it asserts the power of the Court vis-à-vis the other organs of government.

The annulment of the Tobacco Directive signals a mood favouring deceleration of integration and greater deference to nation states. But why is that withdrawal? A more favourable attitude towards the sovereignty of Member States may be seen as a response to a discernible sentiment of Euro-scepticism in the electorate and criticisms that the Community polity lacks legitimacy, a feeling that had already been evident in *Keck*.[36] As the completion of the internal market is in sight, the Court may find that the political and economic costs of greater integration outweigh its benefits and decide to take a more critical stance. In general, this would lead to a less communautaire approach and greater deference to national sovereignty. Having seen their sovereignty diluted by the rulings of the Court from the mid 60s to the mid 90s, the national governments clipped its powers by keeping it out of the Common Foreign and Security Policy and restricting its engagement in Justice and Home Affairs. The more cautious approach of the Court is perhaps a recognition of this uneasiness on the part of national governments.

**Acknowledgments**

We wish to thank two anonymous referees for various useful comments and suggestions. The usual disclaimer applies.

**Notes**

1. Case C-376/98 (2000) ECR I-8419.
2. Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1992 L 213, p. 9).
3. For the legislative antecedents of the Directive, see the opinion of Advocate General Fennelly of 15 June 2000 in the Tobacco Advertisement Directive case, op. cit., n.1. See also Khana (2001) for a review of the actions taken by the various interest groups in support and against the ban.
4. See Directive 98/43, Article 3(1).
5. Following the Treaty of Amsterdam, these Articles have now been renumbered 47(2), 55 and 95 respectively. For the purposes of convenience, the old numbering will be followed in the text since it was also followed in the judgment.

6. Under the co-decision procedure, the agreement of the European Parliament is necessary to adopt a measure. The Parliament enjoys effectively the power of veto: see Article 251 (ex Article 189b) EC.
7. The Directive was also challenged by private litigants via the preliminary reference procedure but, in view of its annulment in the action brought by Germany, the Court did not deliver a ruling on the question referred by the national court: Case C-74/99 *The Queen v Secretary of State for Health ex parte Imperial Tobacco Ltd*, judgment of 5 October 2000; not yet reported.
8. *Germany v Council*, op. cit. para 83.
9. Op. cit., para 98. Notably, a similar restriction has been introduced by Directive 89/552 (Television without frontiers Directive, OJ 1989 L 298/23, as amended). Article 13 of that Directive prohibits television advertising of tobacco products with a view to promoting free movement of television broadcasting.
10. Op. cit., para 104. The Court referred by way of example to Council Directive 90/239 on the approximation of national laws concerning the maximum tar yield of cigarettes (OJ 1990 L 137/36), Article 7, Council Directive 89/622 on the approximation of national laws concerning the labelling of tobacco products (OJ 1989 L 359/1), Article 8(1).
11. Op. cit., para 117.
12. Namely, provisions prohibiting the advertising of tobacco products in periodicals, magazines and newspapers and the sponsorship of certain sports events: see paras 98 and 111.
13. See e.g. Case 22/70 *Commission v Council (ERTA Case)*(1971) ECR 263. For detailed documentation of the instrumental role of the ECJ in establishing the constitutionalisation of the EU Treaties see Weiler (1999), Tridimas (1999) and Mancini (1989).
14. For a discussion, see Mattli and Slaughter (1998).
15. Opinion 2/94 *Accession to the ECHR* (1996) ECR I-1759.
16. See e.g. Joined Cases 281, 283-285, 287/85 *Germany v Commission* (1987) ECR I-3203; see also Weiler (1999).
17. Article 5(2) (ex Article 3b(2)) of the Treaty.
18. See e.g. Case C-84/94 *United Kingdom v Council* (*Organisation of the Working Time Directive*) (1996) ECR I-5755.
19. For a previous but very indirect hint, see Case C-300/89 *Commission v Council* (*Titanium Dioxide*) (1991) ECR I-2867, para 23.
20. Note that both provisions require the Council to act by unanimity and not by qualified majority. The Tobacco Directive therefore could have been adopted under either of them only if all Member States agreed. This, in turn, would have made a challenge to its validity by a government highly unlikely but there would still be a possibility of a challenge by a tobacco company via the preliminary reference procedure.
21. See e.g. Case 45/86 *Commission v Council* (*Generalised Tariff Preferences*) (1987) ECR.
22. See Rubinfeld (1987) for a useful survey. For fiscal federalism in Europe see amongst others Commission of the European Communities (1990), Inman and Rubinfeld (1992) and Van Den Bergh (1996).
23. Staging sport events and especially Formula One car races is thought to be more vulnerable to this relocation risk, since organisers prefer countries with lighter regulations on sponsorship by tobacco companies. However, it is interesting to note that opposition to the Directive by the Formula One lobby had waned before the Directive was adopted as alternative sources of sponsorship were secured; on this issue see Khana (op. cit.).
24. See Directive 89/552, op. cit.
25. Note that in developing this argument it is implicitly assumed that consumer tastes are homogeneous within a given geographical jurisdiction, but differ across different jurisdictions.
26. For the benefits of political competition in a federation see Frey and Eichenberger (1996).
27. The main institutional players are the Commission, which represents the Community interests; the Council, which represents the interests of the national governments of the Member States; and the European Parliament, which in an embryonic form represents directly the interests of the peoples of Europe, and whose powers have increased dramatically since its inception. For a recent critical account of the shift in the balance of powers between those three sets of decision makers see Tsebelis and Garrett (2000).
28. This principle is enunciated in Article 5 (ex Article 3b(1)) EC which states that "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein".
29. For details see Barents (1993).

30. Borrowing from the economic theory of institutional design, the Court is perceived as an agent appointed to lower the transaction costs and secure the benefits of international co-operation among the member states. This is done by interpreting the relevant international treaties (which are viewed as "incomplete contracts") and monitoring whether or not member states comply with their treaty obligations.
31. In our analysis the ECJ is treated as a single decision maker. This simplified assumption is made for convenience and clarity and it is also justified in the present context, since Court decisions are taken secretly and neither actual votes nor dissenting views are published. However, in truth, the ECJ is a collective body whose members are appointed by the national governments and may not share the same view of justice.
32. For an analysis of the behaviour of courts in policy making using the rational choice theory see for example McNollgast (1990), Gely and Spiller (1990) and Ferejohn and Weingast (1992). For applications of the rational choice theory to the impact of the European Court of Justice on the design of public policy, see Cooter and Drexl (1994) and Bednar, Ferejohn, and Garrett (1996).
33. See Pollack (1997) for an account of the autonomy of ECJ decision making using the economic theory of the principal-agent relationship.
34. This constraint follows from viewing the Court as an organ of governance separate from the legislative and executive authorities. In such a setting, "if a court's decision fails to reflect external political reality, it cannot stand for long. In this sense, interpretation [of the law by the Court] is inevitably political whether consciously or not" (Ferejohn and Weingast, 1992, p. 263).
35. Qualified majority voting at the Council requires a 5/7 majority or 62 votes out of the total of 87, see Art. 205(2) of the EC Treaty.
36. Cases K-267 and K-268/91 (1993) ECR I-6097. This was captured by the late judge Joliet speaking extrajudicially, "Can we the thirteen judges pretend to be wiser and more intelligent than all the governments and the national parliaments of the Community?", p. 145 in R. Joliet "La Libre Circulation des Merchandises: L'arrêt Keck et Mithouard et les nouvelles orientations de la jurisprudence", Journal des Tribunaux, Droit Européen, 1994, 145–151, (translated by the authors). Similarly, Mattli and Slaughter (op. cit.) also detect a "trend [where] the Court is retrenching ... and slapping down the Commission for exceeding its powers under the Treaty" (p. 205); see also Tridimas (2001).

## References

Barents, R. (1993). "The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation." *Common Market Law Review*. 30, 85–108.

Bednar, J., Ferejohn, J., & Garrett, G. (1996). "The Politics of European Federalism." *International Review of Law and Economics*. 16, 279–294.

Commission of the European Communities (1992). *Stable Money—Sound Finances*, European Economy, Luxembourg.

Cooter, R. D. & Drexl, J. (1994). "The Logic of Power in the Emerging European Constitution: Game Theory and the Division of Powers." *International Review of Law and Economics*. 14, 307–326.

Ferejohn, J. A. & Weingast, B. R. (1992). "A Positive Theory of Statutory Interpretation." *International Review of Law and Economics*. 12, 263–279.

Frey, B. S. & Eichenberger, R. (1996). "FOCJ: Competitive Governments for Europe." *International Review of Law and Economics*. 16, 315–327.

Gely, R. & Spiller, P. T. (1990). "A Rational Choice Theory of Supreme Court Statutory Decision with Applications to the State Farm and Grove City Cases." *Journal of Law, Economics and Organization*. 6, 277–300.

Inman, R. P. & Rubinfeld, D. L. (1992). "Fiscal Federalism in Europe." *European Economic Review*. 46, 654–660.

Inman, R. P. & Rubinfeld, D. L. (1997). "The Political Economy of Federalism." In D. C. Mueller (ed.), *Perspectives on Public Choice. A Handbook*, Cambridge: Cambridge University Press, pp. 73–105.

Khana, D. (2001). "The Defeat of the European Tobacco Advertising Directive: A Blow for Health." *Yearbook of European Law*. 20, 113–138.

Mancini, G. F. (1991). "Institutional Change in Europe in the 1980s." In R. O. Keohane & S. Hoffmann (eds.), *The New European Community. Decision Making and Institutional Change*, Boulder, CO: Westview, pp. 177–194.

Mattli, W. & Slaughter, A.-M. (1998). “Revisiting the European Court of Justice.” *International Organization*. 52, 177–209.

McNollGast (McCubbins, M., Noll, R. G., & Weingast, B. R.). (1990). “Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures.” *Journal of Law, Economics and Organization*. 6, Special Issue, 307–332.

Pollack, M. A. (1997). “Delegation, Agency, and Agenda Setting in the European Community.” *International Organization*. 51, 99–134.

Rubinfeld, D. L. (1987). “The Economics of the Local Public Sector.” In A. J. Auerbach & M. Feldstein (eds.), *Handbook of Public Economics*, vol. II, North Holland, pp. 571–645.

Tridimas, T. (1999). *The General Principles of EC Law*, Oxford: Oxford University Press.

Tridimas, T. (2001). “Judicial Review and the Community Judicature; Towards a New European Constitutionalism?” In J. Wouters & J. Stuyck (eds.), *Principles of Proper Conduct for Supranational, State and Private Actors in the EU*. Essays in honour of Walter Van Gerven, Intersentia, pp. 71–83.

Tsebelis, G. & Garrett, G. (2000). “Legislative Politics in the European Union.” *European Union Politics*. 1, 9–36.

Van den Bergh, R. (1996). “Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy.” *International Review of Law and Economics*. 16, 363–383.

Van den Bergh, R. (2000). “Towards an Institutional Legal Framework for Regulatory Competition in Europe.” *Kyklos*. 53, 435–466.

Weiler, Joseph, H. H. (1999). *The Constitution of Europe*, Cambridge: Cambridge University Press.