Constitutionalizing Tobacco: The Ambivalence of European Federalism

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CONSTITUTIONALIZING TOBACCO: THE AMBIVALENCE OF EUROPEAN FEDERALISM

INTRODUCTION

The Treaty Establishing the European Community announces the principle that the powers of the European Community ("Community") are limited to those specifically conferred on it: "The Community shall act within the limits of powers conferred upon it by this Treaty and of the objectives assigned to it therein." However, experience has shown that, in practice, the allocation of power between the Community decisionmaker and Member States is neither clear nor immutable. For example, there is a traditional perception that it is the responsibility of the Community decisionmaker to implement internal market regulations in order to promote the "free movement of goods" and the "free movement of persons, services, and capital," while individual Member States retain autonomy in regulating public health. The European Constitution has also formally embraced this longstanding private (market regulation) versus public (health regulation) dichotomy, using it to divide competences formally. However, the public/private distinction is hazy, as reflected by the history of the Community decisionmaker's regulation of tobacco. Regulation of the manufacture and advertisement of tobacco products necessarily implicates both free market and public health concerns, and a given regulation may be characterized as a market measure in some circumstances and as a public health measure in others.

In its Treaty Establishing a Constitution for Europe, the Community attempts to clarify the allocation of competences. Article III-278 of the Draft

2. EC TREATY art. 5.1.
3. The "Community decisionmaker" is a term of art that refers to the complex legislative process of the European Community. This process involves participation by the European Council, the European Commission, and the European Parliament, in consultation or co-decisionmaking processes. See generally GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 75 (2d ed. 2002).
4. EC TREATY tit. I.
E.U. Constitution ("Public Health Article") is a public health provision that expressly refers to the regulation of tobacco:

5. European laws or framework laws may also establish incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, as well as measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee.10

To many, the Public Health Article reflects a shift toward European federalism by guaranteeing greater power to Member States over their national health regulations while limiting the power of the Community legislature. We argue that in reality, however, this "constitutionalization" of tobacco does not guarantee Member States' autonomy. As long as the Community decisionmaker can standardize national tobacco laws whenever the functioning of the internal market is at stake, the Community will exercise some degree of control over States' national health standards.

Part I of this Recent Development charts the progress of tobacco regulation through Community-issued directives,11 harmonization,12 and the early jurisprudence of the European Court of Justice ("ECJ").13 Part II describes the struggle over the allocation of competences and the illusory public/private distinction, reflected in Federal Republic of Germany v. Parliament and Council ("Tobacco Advertising Judgment"),14 The Queen v. Secretary of State for Health ex parte British American Tobacco (Investments) Ltd. ("Tobacco Products Judgment"),15 and in cases now pending before the ECJ.16 Part III discusses the constitutionalization of tobacco and the ambiguity it engenders with respect to the Community's federal structure. On the one hand, the Public Health

11. Directives are legal instruments issued by the Community decisionmaker that bind States to a concrete goal. They are distinct from regulations in that States can choose precisely which national instruments to implement in order to achieve that goal. See PAUL CRAIG & GRAINNE DE BÓRCA, EU LAW: TEXT, CASES, AND MATERIALS 114-15 (3d ed. 2003).
12. The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. EC TREATY arts. 94-95.
13. The European Court of Justice has jurisdiction to review the Community decisionmaker's acts and determine whether they are supported by legal competence or legal basis. EC TREATY art. 230.
Article can be used as a sword by the Community legislature, allowing intervention of a complementary and supportive nature. Community action may include "monitoring, early warning of and combating serious cross-border threats to health." On the other hand, the Public Health Article may be used as a shield by States seeking to preserve their disparate public health standards. The Community thus bears the burden of proving that its proposed legislation is actually a market correction measure (rather than a disguised health measure) and does not violate the Subsidiarity Principle. Because of this ambiguity, the provision remains open to interpretation and is susceptible to policy arguments made by either side. Consequently, the constitutionalization of tobacco fails to clarify the allocation of competences and provides little guidance in determining the substantive outcomes of pending disputes.

I. REGULATING TOBACCO: FROM FREE MOVEMENT TO PUBLIC HEALTH

A. Blurring Boundaries: Anti-Tobacco Policies and Internal Market Directives

Although the Maastricht Treaty of 1992 formally granted the Community decisionmaker competence to address public health, the Community had been instituting anti-tobacco initiatives since 1986. One such initiative, the "Europe Against Cancer Program," was adopted by the Council and Member States' representatives. It consisted of a three-step fight against misinformation about tobacco consumption to be implemented across three time periods: 1985–1990 (information and public awareness); 1990–94 (prevention of tobacco consumption among targeted groups and in the workplace); and 1996–2001 (information and health education). In addition to addressing public health, the Community also addressed the free movement of tobacco products prior to the Maastricht Treaty. Beginning in the late 1980s, the European Commission drafted a series of to-

17. DRAFT E.U. CONSTITUTION art. III-278, ¶ 1(b).
18. The Subsidiarity Principle was initially enshrined in the Article 5 of the EC Treaty:
   In areas which do not fall within its exclusive Competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives 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 achieved by the Community.
   EC TREATY art. 5. This provides only a procedural approach to determining issues of subsidiarity, rather than substantive criteria to apply. For the complexities generated by this approach, see George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 COLUM. L. REV. 332 (1994) and H. Collins, European Private Law and Cultural Identity of States, 3 EUR. REV. PRIVATE L. 353 (1995).
22. Id.
tobacco directives that harmonized domestic laws that presumably constituted barriers to trade. The explicit goal of these directives, which were subsequently adopted by the Council, was to liberalize and increase the free movement of tobacco products between Member States. Perhaps surprisingly, these internal market directives did not conflict directly with the public health efforts formalized by the Community in its Europe Against Cancer Program. In fact, both initiatives were designed to harmonize the laws for the sale, manufacture, and advertisement of tobacco products within the internal market, while also increasing the level of public health protection for consumers.

The market directives adopted during this period addressed three major tobacco product issues: labeling, manufacturing, and advertising. The European Commission began harmonizing health information and warnings on cigarette labels in 1989 by adopting Council Directive 89/622/EC ("Tobacco Labeling Directive"). This directive required that consumer tobacco products be marked with health warning labels indicating the products' tar and nicotine yields. It was extended in a subsequent directive regulating all tobacco products consumed orally (primarily smokeless and chewing tobacco).

Regarding the manufacture of tobacco products, in 1990 the Commission adopted a directive fixing the maximum tar yield of cigarettes. This measure was later amended by Council Directive 2001/37/EC ("Tobacco Products Directive"), which harmonized the laws, regulations, and administrative provisions of Member States that concerned tobacco products. The Community's regulation of tobacco product advertising began in 1989 with the "Television Without Frontiers" directive, which imposed a general ban on television advertising of tobacco. Subsequently, the Community adopted its well-known "Tobacco Advertising Directive." The ECJ ruled, however, that the Tobacco Advertising Directive was really a disguised public health measure rather than an internal market regulation. In its Tobacco Advertising Judgment, the Court voided the directive for lack of legislative competence. In response to the ruling, the Council approved a new, modified directive that harmonized the advertising and sponsorship of tobacco products. This lat-

23. The Community’s authority to harmonize domestic laws that directly affected the establishment or functioning of the common market can be found in Articles 94-95 of the EC Treaty.
This history of tobacco regulation demonstrates that a clear dichotomy between public health and internal market regulation is untenable. Each directive aimed at promoting the common market by harmonizing the labeling, manufacturing, or advertising of tobacco products inevitably affected public health matters as well.

B. Harmonization Approaches and Community Preemption of Member State Law

In interpreting European directives and the articles of the EC Treaty, the ECJ has generated a body of case law addressing both the extent to which the "Free Movement of Goods" provisions can void Member States' disparate regulations and the power of the Community decisionmaker to harmonize Member States' laws. European lawyers and political scientists have identified two opposite trends in European integration: "positive" and "negative" integration. The process of negative integration through "market-making" measures is advanced by supranational institutions. It consists of market deregulation through the elimination of trade barriers and facilitates the free movement of goods, capital, services, and persons. The pressures of negative integration have severely limited Member States' capacities to protect their social welfare models because they have, according to Fritz Scharpf, limited options to "influence growth and employment in the economies for whose performance they are politically accountable." National laws that oppose the free movement of goods, services, capital, and labor need particularly strong public interest justifications in order to survive ECJ scrutiny. Even when such a justification is found, the Community has the competence to re-regulate, or even take over, that particular field if the national law opposes free movement.

Positive integration through "market-correcting" measures occurs at the Community level. In 1986, the Single European Act expanded the Community's majority voting procedure. In 1992, the Maastricht Treaty expanded the competences of the European Union, making it easier for the Community decisionmaker to adopt harmonization provisions in the areas of social

34. See EC Treaty arts. 28–30.
35. See EC Treaty art. 93.
39. See EC Treaty art. 95.
40. See Craig, supra note 11, at 19–20; EC Treaty art. 95.
The motivation behind the expansion of Community competence was the desire to play a greater role in promoting the public interest of European citizens within the internal market. The ECJ has been at the helm of advancing both processes of negative and positive integration through its interpretation of the core legal provisions of the EC Treaty and European directives. Professor Miguel Maduro notes that two concepts were present in the ECJ's interpretation of Article 28 of the EC Treaty: creating refined criteria to prevent state protectionism, and relying on the general notion of a European Economic Constitution to limit state interventionism and support Community decisionmaking. Through its interpretation, the ECJ affirmed its role as a European federal judiciary and mediated disputes arising from conflict between national welfare regimes and the neo-liberal European Economic Constitution.

The Court, in coordination with the European Commission, elaborated several different approaches to harmonization of Member States' laws. The most well-known approach to harmonization is mutual recognition, whereby a product or service lawfully marketed in one Member State is allowed to circulate in all other Member States. This principle emerged in the early jurisprudence of the ECJ, and it decentralized standard-setting and increased regulatory competition among Member States. European legal scholarship is divided on the economic and political consequences of mutual recognition. One side argues that the approach causes product standards to reach very high levels of protection in fields such as foodstuffs regulations, consumer law, and work safety, because Member States benefit from the opportunity to adapt gradually to non-mandatory regulations and learn from one another. The opposing side argues that mutual recognition legitimizes a trend toward deregulation. A race to the bottom may result from the promotion of free markets and

42. See EC Treaty art. 95 (introducing majority voting for harmonization measures). See also id. arts. 152-53 (expanding the competence of the European Union for consumer protection and public health).
43. See Miguel P. Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution* 58-60 (1998) (describing the European Economic Constitution as “built on the free market, open competition, and a particular view of the kinds of regulation that are acceptable”).
44. Id. at 1-3.
45. See Case 120/78, Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein, E.C.R. 649 (1979) (holding that a German law, which precluded the sale of a French liqueur, was incompatible with Article 28 of the EC Treaty). The Court not only asserted its competence to assess the intrinsic reasonableness of all national . . . product regulations that could have a negative impact on . . . trade, but it also announced the new rule of *mutual recognition*: [with few exceptions] . . . products lawfully marketed in one member state must be admitted in all member states . . . . By judicial fiat, . . . the freedom to sell and to consume . . . achieved constitutional protection . . . .

SCHARPF, supra note 36, at 56.
consumer choice—if lower-quality products are free to circulate among coun-
tries, they will outsell and push out the more expensive, higher-quality goods.47

Other harmonization approaches—for example, comprehensive, optional, and minimum harmonization—generally involve replacing divergent na-
tional rules with a single E.U. regulation. In employing these approaches, the Community decisionmaker must strike a balance between protecting bene-
ficial common interests and liberalizing and improving the functioning of
the single market. Each approach invokes a different type of Community
preemption, and each has faced challenge in some controversy before the
ECJ. The key question the Court had to answer in those cases was whether
Member States could adopt disparate standards—particularly ones higher
than those set by the Community.

For example, comprehensive harmonization by European directives bars
Member States from adopting any type of supplementary regulation. In Pub-
blico Ministero v. Ratti,48 the ECJ clarified that the labeling rules laid down in
a directive regulating the classification, packaging, and labeling of danger-
ous goods49 applied uniformly to domestic and imported products. The ECJ
based its decision on the free-competition argument—namely, that partial
harmonization would lead to discrimination and threaten the free movement
of goods.

In contrast, many harmonization directives addressing environmental, con-
sumer, and employee protection used a minimum harmonization approach
instead. These directives can explicitly or implicitly allow Member States to
adopt tailored rules if they wish to achieve higher standards. However, mini-
imum harmonization remains a questionable approach. ECJ jurisprudence in
this area is controversial, and directives are not uniformly interpreted. When
the interests of markets are at odds with those of public health, as in the case
of tobacco regulation, the Community decisionmaker has achieved, at best,
an uneasy compromise through minimum harmonization.50

C. Conflicting Interpretations of the Tobacco Labeling Directive

The problem of non-uniform interpretation of tobacco regulation har-
monization began with two ECJ cases51 in which the ECJ interpreted two
different provisions of the Tobacco Labeling Directive.\textsuperscript{52} Ironically, although
the ECJ delivered both verdicts on the same day, the judgments rendered
appear incompatible.

In \textit{Gallaher Ltd.},\textsuperscript{53} the British government had adopted regulations man-
dating that indications of tar and nicotine levels and health warnings cover
six percent of the surface area of the packet, exceeding the four percent direc-
tive requirement.\textsuperscript{54} However, in accordance with the directive's free movement
clause,\textsuperscript{55} the U.K. regulations provided that imported cigarettes from an-
other Member State were acceptable if they carried warnings in English that
met the requirements of their state of origin. Plaintiffs argued that this un-
equal treatment between British and non-British retailers led to reverse dis-

\begin{itemize}
\item Discrimination in favor of non-British tobacco manufacturers.\textsuperscript{56}
\item The ECJ dismissed this argument, holding the U.K. regulations valid in light of "the
degree of harmonization sought by the provision in question, which laid down
minimum requirements."\textsuperscript{57}
\end{itemize}

In \textit{Philip Morris},\textsuperscript{58} the ECJ's interpretation of another provision of the To-
bacco Labeling Directive used a very different approach to harmonization.
Article 4(2) of the Tobacco Labeling Directive required that a large portion
of each tobacco packet carry warnings to be selected from those on a specific
list.\textsuperscript{59} The Italian government interpreted the plural word "warnings" in
Article 4(2) as enabling it to require the printing of multiple warnings whose
total surface area met the four percent requirement.\textsuperscript{60} Several foreign tobacco
manufacturers challenged this interpretation because allowing Italian to-
bacco manufacturers to split the four percent surface area between two smaller
warnings gave them a competitive advantage. The ECJ held that Italy was
not implementing the directive correctly and rejected a minimum harmoni-
ization approach, in light of "a number of interpretative criteria based on the
literal meaning of Article 4(2) of the directive and on its context."\textsuperscript{61} The
Court recognized that not all of the provisions of the Tobacco Labeling Di-
rective set minimum standards. Some set exact standards (as in the maxi-

\begin{itemize}
\item mum harmonization approach). Contrary to the interpretation offered by the
Italian government, the ECJ held that Article 4(2) "provides only for the use
of a single specific warning."\textsuperscript{62}
\end{itemize}

\begin{footnotes}
\item Case C-222/91, Ministero delle Finanze and Ministero della Sanita v. Philip Morris Belgium SA, 1993
E.C.R. I-3469.
\item 55. \textit{Id.} art. 8.
\item 57. \textit{Id.} at I-3566, ¶ 22.
\item 58. Case C-222/91, Ministero delle Finanze and Ministero della Sanita v. Philip Morris Belgium SA, 1993
E.C.R. I-3469.
\item 60. Philip Morris, 1993 E.C.R. at I-3505, ¶ 3.
\item 61. \textit{Id.} at I-3509, ¶ 24.
\item 62. \textit{Id.} at I-3510, ¶ 28.
\end{footnotes}
These two cases demonstrate that the implementation of European directives may give rise to conflicting interpretations by the same court. The Italian government's actions in Philip Morris challenge the widespread perception that a minimum harmonization approach, which gives greater leeway to Member States to implement the directive, will result in stricter public health standards. Moreover, in order to achieve similar substantive results (i.e., protecting foreign manufacturers, and thus free movement), the ECJ supported minimum harmonization in one case but not in the other. Taken together, the two decisions do not conclusively advocate for Member State autonomy nor for greater Community power.

II. THE STRUGGLE OVER THE ALLOCATION OF COMPETENCES BETWEEN THE COMMUNITY AND ITS MEMBER STATES

A. Tobacco Advertising Judgment: ECJ Adjudication Decentralizes E.U. Power

The Tobacco Advertising Judgment,63 handed down in 2000, marked an important shift in the evolution of E.U. law. For the first time, the ECJ struck down a European directive for lacking a legal basis. The Court, which had actively expanded the power of the Community legislature in areas where its competences were relatively weak,64 surprisingly annullled the Tobacco Advertising Directive65 and deferred to Member States' powers.66 European legal scholars wrote extensively about the Tobacco Advertising Judgment. They emphasized that it signaled an important shift in European federalism and altered the balance of competences between the European Union and its Member States.67

The difficulty with which the Tobacco Advertising Directive was passed—the process took almost ten years—explains why this ECJ judgment proved so contentious. Tobacco regulation at the Community level was first proposed in 1984.68 Although the European Parliament amended this proposal in 1990 with the goal of a “total ban on tobacco advertising,” the Commis-

67. See Geraint G. Howells, Federalism in USA and EC—The Scope of Harmonised Legislative Activity Compared, 5 EUR. REV. PRIVATE L., 601, 604–05 (2002); Craig, supra note 41, at 32–33; Stephen Weatherill, The Commission’s Options for Developing EC Consumer Protection and Contract Law: Assessing the Constitutional Basis, 13 EUR. BUS. L. REV. 497, 503–05 (2002) (explaining that in annulling the tobacco advertising directive, the ECJ reaffirmed that “there is no carte blanche to harmonise national laws, but rather only a power to harmonise to achieve defined ends,” id. at 504).
sion "viewed a complete ban as premature." However, a second, modified directive drafted in 1991 did propose a total ban on advertising. When the European Council considered the ban, minority interests blocked its adoption. The Legal Service of the Council also opposed the proposal on the grounds that the Community clearly lacked competence. Fourteen consecutive Health Councils could not arrive at a compromise. Finally, the parties reached a breakthrough in 1997 when Greece agreed to vote in favor of the directive. Once the directive was published in the Official Journal, Germany, fearing the expansion of Community competence at the expense of Member States' autonomy, challenged it before the ECJ.

Germany alleged that the primary goal of the directive was not market harmonization but public health, an area of regulation belonging to Member States. The ECJ ruled that the Community legislature could not use Article 95 of the EC Treaty as a legal basis for harmonizing Member States' laws:

[T]he measures referred to in Article 100a(1) [now Article 95(1)] of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. 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 [Articles 3c and 7a (now 3(1)(c) and 14, respectively)] but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.

The Court found that since tobacco advertising was predominantly local, non-standardized advertising presented no appreciable obstacle to trade or unfair competition. The ECJ judgment embraced the opinion of Advocate-General Nial Fennelly, who claimed that differences among the tobacco advertising regulations of Member States did not justify a total ban on tobacco advertising. The complete ban on "all forms of advertising and sponsorship" included banning modes of advertising that were only local in scope, such as advertising on posters, ashtrays, and parasols, and publicity at non-major sporting events. Eradication of those types of advertising did not address large-scale, cross-border effects that might have caused appreciable distortions of competition. Consequently, the ECJ annulled the Tobacco Advertising

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69. Id. at I-8429, ¶ 16.
71. This is the office of general counsel for the Commission. See generally The European Commission—Legal Service, at http://europa.eu.int/comm/dgs/legal_service/index_en.htm (last visited Apr. 20, 2005).
73. See id. at I-8512, ¶¶ 31–32.
74. Id. at I-8524, ¶ 83.
75. Id. at I-8495–96, ¶¶ 177–179.
Directive for its lack of legal basis on the grounds that the directive was a disguised health measure rather than an internal market provision. The Tobacco Advertising Judgment seemed to be a clear signal that the Court would allow Member States greater discretion in the regulation of public health at the expense of the Community legislature’s power.

Nevertheless, the ECJ ruling left an opening for a new directive in case future barriers to cross-border trade arose from tobacco advertising in periodicals and at sponsorship events. Not surprisingly, a few months after the Tobacco Advertising Judgment, the Community drafted a new directive that banned tobacco advertising for all printed publications, Internet services, radio broadcasting, and sponsorship events with cross-border effects. It explained that “differences in national legislation” would probably pose “barriers to the free movement” of products and services, and that such “barriers should be eliminated.” It stated that in the case of press advertising and sponsorship of “major sporting and cultural events,” such barriers had in fact “already been noted.” This new tobacco advertising directive was approved and published in 2003.

B. Tobacco Products Judgment: An Unclear Shift in European Federalism

Following the Tobacco Advertising Judgment, the Tobacco Products Directive, which aimed at harmonizing various aspects of the manufacture, sale, and presentation of tobacco products, was swiftly challenged because of its apparent incompatibility with the ECJ ruling. The case was brought by several tobacco manufacturers before a U.K. tribunal and referred to the ECJ. The Tobacco Products Directive contained three main areas of legislation. First, the directive reduced and harmonized the maximum tar, nicotine, and carbon monoxide yields in cigarettes to 10mg, 1mg, and 10mg, respectively, in addition to prohibiting the manufacture of products in Europe that did not comply with these established yields. Second, the directive harmonized labeling requirements and mandated the printing of conspicuous warnings regarding tar, nicotine, and carbon monoxide content. Third, it prohibited...
the use of adjectives, such as "mild" or "light," which might give the im-
pression that certain tobacco products were less harmful than others. 87

British American Tobacco (Investments) Ltd. ("BAT"), Imperial Tobacco,
and Japan Tobacco ("JT") sought U.K. judicial review of the British govern-
ment's intention to incorporate the directive into domestic law, arguing that
the directive was incompatible with E.U. law. 88 The national court sought
guidance from the ECJ on the validity of the measure's legal basis, its com-
patibility with certain fundamental rights and principles, and its scope of
application.

Similar to many harmonization measures promoting the common mar-
ket, 89 the Tobacco Products Directive stated in its preamble that "[t]here
[were] still substantial differences between the Member States' laws, regula-
tions and administrative provisions on the manufacture, presentation, and
sale of tobacco products which impeded the functioning of the internal
market." 90 However, it offered little proof of such disparities, even when pre-
sented with evidentiary requests by the Legal Affairs Committee of the Euro-
pean Parliament during the legislative process. 91

However, in the Tobacco Products Judgment, the Court upheld the To-
bacco Products Directive, stating:

"[A]s regards the question whether the Directive was adopted in keeping
with the principle of subsidiarity, it must first be considered whether
the objective of the proposed action could be better achieved at Com-
munity level . . . . [The] Directive's objective is to eliminate the barriers
raised by the differences which still exist between the Member States' laws
. . . . on . . . tobacco products, while ensuring a high level of health
protection . . . . Such an objective cannot be . . . achieved by the Mem-
ber States individually and calls for action at Community level, as dem-
onstrated by the multifarious development of national laws in this case.
It follows that, in the case of the Directive, the objective of the pro-
posed action could be better achieved at [the] Community level." 92

The ECJ's position in the Tobacco Products Judgment was somewhat sur-
prising in light of the Tobacco Advertising Judgment. Here, the ECJ held
that Article 95 of the EC Treaty was a valid legal basis for the directive and
could be deployed against threats to the market that had already emerged or
were "likely to emerge" at the time of its adoption. 93 The fact that the regu-

87. For a more detailed analysis of the provisions of the directive, see Scott Crosby, The New Tobacco
91. See Crosby, supra note 87. Crosby stresses that the Commission failed to prove that there was a fa-
vorable internal market purpose or effect.
93. Id. at I-11575, ¶ 65. It was therefore sufficient that distortions were likely to emerge. In contrast,
lation also protected public health did not undermine its validity, since intra-
Community trade was at stake. The ECJ accepted the argument of Advocate-
General Leendert Geelhoed, who claimed that if the conditions triggering
Article 95 of the EC Treaty (the removal of probable obstacles to trade and
risks of distorted competition) were met, the protection of public health
could be a legitimate factor in adopting a Community directive.

The ECJ’s holding also relied on other economic arguments. For example,
cigarettes manufactured for export had to conform to European requirements
because there was a risk of re-importation of non-compliant products. Re-
garding the ban on misleading descriptors, the Court held that the right to
property is not absolute and “its exercise may be restricted, provided that
those restrictions in fact correspond to objectives of general interest pursued
by the Community and do not constitute a disproportionate and intolerable
interference, impairing the very substance of the rights guaranteed.”

Many commentators believed that after the Tobacco Advertising Judgment,
the Community legislature would be forced to interpret Article 5.1 of the
EC Treaty narrowly and redefine requirements for minimum harmonization.
That judgment seemed to enforce the idea that deference to European feder-
alism varied depending on the public health or free market context. How-
ever, the Tobacco Products Judgment casts doubt on the decentralization of
power in the European Union. Furthermore, the judgment undermines the
idea that the Community decisionmaker is mostly driven by a free market or
deregulatory rationale, employing only negative integration.


The ECJ has yet another opportunity to interpret a tobacco directive and
clarify the allocation of competences in the European Union. On September
10, 2003, Germany submitted an application to the ECJ requesting annul-
ment of Articles 3 and 4 of the second tobacco advertising directive, which
banned tobacco advertising and sponsorship in print media, on the Internet,
and on the radio. Germany does not challenge the ban on sponsorship events
with cross-border effects. As in the first challenge, Germany argues that the
Community does not have sufficient legal basis for the prohibition on adver-
tising and sponsorship contained in Articles 3 and 4. Germany claims that

in the Tobacco Advertising Judgment, the ECJ said that the market distortions had to be “appreciable.”

95. The judgment “appear[ed] to insist that a harmonisation measure must ensure access to the market
of conforming imported goods, and confine[d] the application of stricter rules to domestic goods
alone.” Stephen Weatherill, Pre-emption, Harmonisation and the Distribution of Competence to Regulate the
Internal Market, in The Law of the Single European Market 41, 61 (Catherine Barnard & Joanne
Scott eds., 2002).
97. See Information Note from the Legal Service of the Council of the European Union on Case C-
Article 95 of the EC Treaty cannot be used as a legal basis, since the contested provisions relate "almost exclusively [to] . . . factual situations with no cross-border effect" and that therefore "there are neither actual impediments to trade or any discernible distortion of competition." Germany argues that given this, "the contested provisions do not in fact pursue the goal of improving the internal market but rather the protection of health." As such, they constitute an "infringement of the prohibition on harmonization in Article 152(4)(c)" of the EC Treaty.

Germany also claims that "the substantive amendments made by the Council following the Opinion of the Parliament give rise to a claim that the Parliament’s rights under the co-decision procedure under Article 251 EC were infringed." During the directive’s adoption, the Council made changes to the text of the directive but failed to send the revised text to the European Parliament for a second reading. Instead, following the political agreement in the Council on the Parliament’s text, the legal and linguistic experts reviewed the different language versions and decided on numerous unilateral changes. Most of these changes were clearly based on linguistic considerations. However, the final draft agreed upon by the legal and linguistic experts included a new provision. This addition required Member States to "communicate to the Commission the text of the main provisions of national law which they adopt[ed] in the field covered by this Directive" and entered the directive into force "on the day of its publication." The revised directive was adopted without discussion in the Council on March 27, 2003 and published in the Official Journal of the European Union on June 20, 2003.

Importantly, the manner by which the directive became law is contrary to the established practice of involving the European Parliament in the legislative process. This process has come to "reflect[] a fundamental democratic principle." In fact, it has become so central to the promulgation of E.U. law that it has been argued that a disregard of the EC Treaty’s rules regarding the participation of the European Parliament in the legislative process justifies an action for annulment.

This was a strong argument undermining the directive’s validity. When the Council’s Office of Legal Service realized the extent of the unapproved changes and the likelihood that Germany would win the case on these procedural grounds, the Council rushed to amend the directive by deleting Article 10(2)

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99. Id.
100. Id.
101. Id., at 32.
103. Id.
and modifying Article 11. It remains unclear, however, whether the Court will deliver a ruling on the basis of the amended text or on the basis of the text as challenged by Germany.

Private parties claiming individual and direct interest have also challenged the directive in its entirety. For example, in a 2003 filing, Nürburgring GmbH requested, pursuant to Article 230 of the EC Treaty, that the Court annul the directive because its adoption violated the procedure set out in Article 251. The applicant alleged that the directive was adopted with procedural irregularities because Article 95 of the EC Treaty did not provide an adequate legal basis, and that the legal basis that did exist was used merely to circumvent the prohibition on harmonizing health policy laid down in Article 152(4)(c) of the EC Treaty. Moreover, the applicant alleged that the wording of Article 5(1) of the directive (which banned tobacco advertising in sponsorship events with cross-border implications) contravenes the principle of certainty and that the directive infringes on both the Subsidiarity Principle and the applicant's right to property.

By the end of 2005 the ECJ should deliver judgments on the challenges to the new directive. The rulings will elucidate the scope of Community competence on public health regulation and, more importantly, will confirm or deny the shift in European federalism suggested in the Tobacco Products Judgment.

III. THE EUROPEAN CONSTITUTION AND ITS PUBLIC HEALTH PROVISION

A. The Constitutionalization of Tobacco

The Laeken European Council in December 2001 asked the European Constituent Assembly responsible for drafting the E.U. Constitution to address and clarify the competence issue once and for all: "The important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States." Unfortunately, the Draft E.U. Constitution and its ambiguous public health provision do not clarify whether European federalism has entered a new phase. However, it may be premature to draw any definitive conclusions. By the time the Constitution is ratified by all of the Member States, new scenar-

112. DRAFT E.U. CONSTITUTION, art. III-278.
ios could emerge, especially in light of the recent E.U. enlargement. Given that many of these countries will hold referenda in the near future on the Draft E.U. Constitution, and that their citizens may demand alterations to the document before giving their assent, the text has not been finalized. The Public Health Article nevertheless marks the first occurrence of tobacco in a constitutional text. It is in accordance with the Subsidiarity Principle and the general trend of setting firm, constitutional limits on the European Union's legislative competence as enumerated in Part I, Title III of the Constitution.

At least on its face, the Public Health Article seems to ensure that public health will remain an area in which E.U. intervention will only be of a complementary and supportive nature. The constitutional provision that explicitly excludes harmonization appears to duplicate the wording of Article 152(4)(c) of the current EC Treaty. Thus, very limited powers are given to the Community to harmonize health legislation. Only one of these powers appears applicable to tobacco. Article III-278(4)(d) of the Draft E.U. Constitution empowers the Community to harmonize legislation relating to "monitoring, early warning of and combating serious cross-border threats to health." Although tobacco may be considered a "serious cross-border threat to health," it is unlikely that Article III-278(4)(d) will provide the Community with a general power to harmonize tobacco legislation on public health grounds. Informal talks with drafters of the Constitution suggest that the provision was intended to address new health threats—outbreaks of communicable diseases, such as Severe Acute Respiratory Syndrome, and contaminations of the food chain, such as Bovine Spongiforme Encephalopathia. If this interpretation is correct, then Article III-278 will not give the Community power to adopt harmonizing tobacco legislation unless disparities in the functioning of the internal market are first identified.

The expression "serious cross-border threats to health" is repeated in Paragraph 1(b). Some believe this paragraph could cause concern for the tobacco industry. Although the application of the precautionary principle in the field of public health has already been accepted for a long time, as shown by ECJ caselaw regarding various food-scare cases, this provision seems to go a step further. In fact, expressions such as "prevention" and "early warn-

115. Id. art. III-278(4)(d).
116. Id. art. III-278(1)(b).
117. The precautionary principle states that "where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation." European Environment Agency—Glossary—precautionary principle, at http://glossary.eea.eu.int/EEAGlossary/P/precautionary_principle (last visited Apr. 20, 2005).
ing” could possibly be used as justification for intervention at a very early stage, when the level of scientific doubt on the existence of a certain risk is higher than the level accepted by law. In practice, this could mean a further shifting of the burden of proof from the legislator to the challenging parties and a weakening of the Subsidiarity Principle. Health Commissioner David Byrne has already said that “[t]he new Constitution reflects this concern, by specifically providing for EU measures to address tobacco smoking.” Consequently, it is possible to envisage a situation in which the legislature adopts measures to counter a “serious cross-border threat” to health without submitting any proof as to the scientific certainty of the threat.

Furthermore, the requirement that the threats be cross-border did not exist under the former Article 152, pushing the legislature to use Article 95 instead. Although this appears to reduce E.U. competence—since intervention in purely national situations is not possible—it could prove troubling for the industry. The cross-border effect requirement in Article 95 was meant to serve as a legal basis for establishing the internal market, but in practice was used to circumvent Article 152(4)(c) of the EC Treaty. Institutions in the future may attempt to use a combination of internal market provisions and Paragraph 1(b) of the Public Health Article as a legal basis for harmonizing public health.

Lastly, the language of Paragraph 5 of the Public Health Article is somewhat indefinite. It first mentions “incentive measures” designed to protect public health, but then refers only in general terms to “measures” that should have as their “direct objective” the protection against tobacco abuse. This ambiguity may reflect a sentiment that mere incentive measures are insufficient when addressing tobacco use. Because harmonization remains legally impossible, the ECJ will again be forced to clarify this point.

B. Conflicting Scenarios in Interpreting the European Constitution

Although the Draft E.U. Constitution has yet to be finalized, it is already evident that the document’s public health provisions attempt to reaffirm the limits of tobacco regulation harmonization. They reinforce the widespread perception that institutional competence is tied to the policy objectives pursued by each regulatory measure. This perception is highly problematic because, as ambivalent ECJ jurisprudence demonstrates, harmonization of tobacco advertising, labeling or manufacturing in order to promote the free market necessarily affects national public health and social goals. Both free market and social welfare claims can be made at either the Community or the Member State level.121

120. DRAFT E.U. CONSTITUTION, art. III-278, ¶ 5.
121. For an analysis of the relation between different policy arguments in adjudication, see DUNCAN
Furthermore, the rationale behind the public health/free market dichotomy is untenable. The perception that only granting greater Member State power will result in higher public health standards, and that only expanding Community competence will result in a more liberal market, is implausible. There are at least two distinct scenarios that can emerge from the interpretation of the Public Health Article that are incompatible with this perception.

In one scenario, the Community may still legislate on tobacco in areas that enhance the free market, even though it will have to demonstrate that its proposed legislation is truly a market corrective. But as in the Tobacco Products Directive scenario, once this burden is satisfied, the Community may consider public health as a factor in setting regulations. If this happens, the constitutional provision backfires. Disgruntled minorities, concerned about the proper limits of Community competence, will then challenge Community legislation, relying on the express constitutional prohibition against harmonizing tobacco regulation.

In the second scenario, the constitutionalization of tobacco may allow Member States to maintain idiosyncratic public health standards, even if they are forced to operate under the doctrines of mutual recognition and maximum harmonization. These Member States could employ the constitutional prohibition on harmonization as a shield, impeding such harmonization and suppressing public health standards.

**CONCLUSION**

In 2001, the Laeken Declaration reiterated Member States' concerns about the increasing power of the Community legislature. The subsequent incongruity between the Tobacco Advertising Judgment and the Tobacco Products Judgment underscores the tension between harmonization of Member States' laws and the allocation of competences in the European Union.

Although the Draft E.U. Constitution attempts to resolve these tensions, it has not succeeded. Instead, the nebulous nature of the Public Health Article has set the stage for future struggles over the allocation of competences. On the one hand, it calls for "incentive measures" to address cross-border health scourges and "measures" to protect public health from tobacco consumption and alcohol abuse, and demands that these measures be achieved without "any harmonisation of the laws and regulations of the Member States." On the other hand, it leaves undetermined exactly how much power the Community members will allocate to Brussels and how much they will reserve for themselves. Moreover, in prohibiting the Community from harmonizing public health, the Draft E.U. Constitution reinforces the belief in a public health/private market dichotomy—a dichotomy that the history

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of tobacco regulations and corresponding ECJ jurisprudence reveal as illusory. By maintaining this separation, the Constitution does little to resolve European federal struggles.

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