Book Review

E-CIGARETTES, PUBLIC HEALTH, AND SCIENTIFIC UNCERTAINTY: A BOOK REVIEW ON LUKASZ GRUSZCZYNSKI (ED.), "THE REGULATION OF E-CIGARETTES: INTERNATIONAL, EUROPEAN AND NATIONAL CHALLENGES"

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ABSTRACT

This paper provides a review of L. Gruszczynski (ed.), The Regulation of E-Cigarettes: International, European and National Challenges, Cheltenham: Edward Elgar Publishing, 2019. After briefing presenting the regulatory problems posed by e-cigarettes, this book review describes the structure and content of the volume, and assesses its contribution to the academic debate. It then focuses on the book chapter addressing e-cigarettes regulation from a WTO law perspective. It concludes that L. Gruszczynski's work constitutes a valid point of reference for both researchers and policy makers facing the challenge of regulating new technologies in the absence of reliable scientific data.

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Since their invention in China in 2003, e-cigarettes (or Electronic Nicotine Delivery Systems, hereinafter "ENDS") have quickly gained popularity worldwide and their market has been expanding at an impressive rate.[1] At the same time, however, they have sparked a heated debate within the tobacco control community: are e-cigarettes a providential technology that will finally put an end to the global tobacco epidemic and save countless human lives? Or are they rather as hazardous for health as tobacco products, preserving the nicotine addiction and attracting new users, especially among adolescents?

This polarisation is mostly due to the lack of compelling science around e-cigarettes: their long-term effects on human health may not be observed yet, and the numerous scientific studies conducted have sometimes reported ambiguous outcomes.

In front of a similar phenomenon, rule-makers are thus faced with some crucial questions: how to regulate a technically complex issue without clear guidance from science? How to estimate the risks that e-cigarettes pose? And how to balance risk regulation with other equally important factors, such as free market and positive incentives to technological innovation?

In the absence of reliable data, a kaleidoscopic regulatory approach has been already observed at the global level. For instance, as of July 2018, thirty-nine countries banned e-cigarettes sales, whereas 101 did not specifically regulate them; several countries classified them as "tobacco products", whereas other defined and treated them as "medical devices".[2]

It is in this unclear context that Professor Gruszczynski's book, *The Regulation of E-Cigarettes: International, European and National Challenges*, finds place. The Editor builds on his expertise on tobacco control regulation to deliver an interdisciplinary collection of high-profile academic contributions, which ultimately tries to define the optimal regulatory model for e-cigarettes. The result is an excellent, multi-faceted study, which not only gathers and systemises scientific and legal knowledge about e-cigarettes, but also provides innovative insights on the regulatory attempts made at both the national and international level. The book thus effectively bridges a gap in legal academic literature, until then mostly focused on the regulation of traditional tobacco products. As a result,

[1] The e-cigarette market was valued at $11.5 billion in 2018 and is anticipated to have an annual growth rate of 21.6% during 2019-2024. *See E-Cigarette Market Research Report: By Product (Cig-a-like, Vaporizer, Vape Mod, T-Vapor), Gender (Male, Female), Age-Group, Distribution Channel (Vape Shops, Online, Hypermarket/Supermarket, Tobacconist), Regional Insight (U.S., Canada, U.K., France, Germany, Russia, Italy, The Netherlands, China, India, Japan, Australia, South Korea, South Africa, Kenya) – Global Industry Size, Share Analysis and Forecast to 2024*, PRESCIENT & STRATEGIC INTELLIGENCE (May 2019), https://www.psmarketresearch.com/market-analysis/e-cigarette-market.

[2] HARRY SHAPIRO, NO FIRE, NO SMOKE: THE GLOBAL STATE OF TOBACCO HARM REDUCTION 2018, at 84 (2018).

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Professor Gruszczynski's work constitutes a valid point of reference for both regulators and researchers, and not only for those specifically interested in the regulation of e-cigarettes. These products may serve as a case study in the vast array of new technologies whose effects on human health are debated within the scientific community and the public opinion.

The book is divided in three parts. Part I provides the reader with the historical context and the scientific background regarding e-cigarettes. In particular, the second chapter, "Review of the scientific evidence relating to electronic cigarettes: where do we stand now?" by C. A. Smith, A. Herbeć and L. Shahab, reports in details and critically analyses the currently available scientific data about e-cigarettes. The Authors conclude that, although further research is needed, there is significant evidence that ENDS are safer than conventional cigarettes and could serve as effective smoking-cessation aids.

Part II addresses the core issue of e-cigarettes regulation at the international level. The first three contributions (namely, L. Gruszczynski, "Taming Schrödinger's cat: E-cigarettes under the Framework Convention on Tobacco Control"; M. E. Gispen and J. D. Veraldi, "A human rights approach to the regulation of electronic cigarettes"; M. Foltea and B. Mercurio, "A ban on electronic nicotine delivery systems: step one in the WTO discrimination analysis") reconstruct the complex, multi-tiered, legal framework that should guide national legal interventions on the ENDS market. As shown in the book, public international law, human rights law, and international trade law all pose international obligations that States are bound to respect when regulating such products. Nonetheless, the Authors also ultimately highlight how the lack of incontestable scientific evidence makes the development of a coherent international strategy highly problematic. The two remaining articles of Part II (A. Pudło and L. Gruszczynski, "Regulating e-cigarettes at the EU level"; G. A. Ferro and C. Nicolosi, "Vaping and the precautionary principle in EU law") focus instead on the European Union (EU) Tobacco Products Directive (TPD) and its regime for e-cigarettes, critically assessing the outcome of a difficult compromise between supporters and opponents of the new technology.

Finally, Part III takes a comparative turn and presents four case studies: Taiwan, China, the United States, and Australia. This selection helps to describe the variety of regulatory models adopted by different jurisdictions worldwide, as the four countries have all opted for different approaches: Taiwan for a total ban; China for deregulation; the United States and Australia for a legal regime similar to that already in place for traditional tobacco products.

While it raises problems at every level of jurisdiction, scientific uncertainty seems to pose the toughest challenges to international trade law practitioners. As M. Foltea and B. Mercurio's explain in their contribution,

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a hypothetical dispute at the World Trade Organisation (hereinafter "WTO") concerning a ban on e-cigarettes would confront adjudicators with a tangle of questions. Given that at least thirty-nine countries ban ENDS while permitting the sale of traditional cigarettes, a WTO dispute does not seem an unlikely scenario.

In their article, the Authors address one crucial problem, i.e. whether e-cigarettes and conventional tobacco products may be considered "like products" for the purpose of Arts. I and III of the General Agreement on Tariffs and Trade (hereinafter "GATT"). From their thorough analysis, it clearly emerges how the scarcity of relevant data on consumers' practice and ENDS' effects on health make the adjudicators' decision substantially unpredictable: according to the Authors, a finding of likeness may well be "possible", but the odds are unknown.

As the outcome of a WTO dispute depends on a wide variety of factors, and on the parties' submissions most of all, the Authors rightfully decide to give an open answer to their research question, trying to predict what conclusion WTO panels *may* reach. At the same time, however, it would have been equally interesting to assess what conclusion WTO adjudicators *should* reach, for example on the basis of the best available science and choosing a case study. In other words, the Authors' opinion on the best possible outcome of a scrutiny under Art. I or III of the GATT 1994 would have also given a precious contribution to the academic debate.

The regulation of e-cigarettes under WTO law is such a delicate issue that it opens many avenues for further research. As the Authors envisage, regulatory measures concerning e-cigarettes may also be challenged under the Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement"), if such measures amount to technical regulations. Nonetheless, it should be recalled that, in *EC — Asbestos*, the Appellate Body clarified that, if a measure bans a given product as such, then such a measure does not constitute a technical regulation.[3] The TBT Agreement would become applicable only when a given class of products is accorded market access by virtue of the existence or absence of a certain characteristic.[4] Therefore, a ban on e-cigarettes *as such* seems unlikely to fall under the purview of the TBT Agreement.

Most importantly, the Authors also ask whether such a ban may be justifiable under Art. XX(b) of the GATT 1994, providing an exception for discriminatory measures "necessary to protect human, animal or plant life or health". In this regard, the thorniest issue seems to be whether a ban on e-

[3] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 71, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).
[4] Ming Du, *What Is a "Technical Regulation" in the TBT Agreement?*, 6 EUR. J. RISK REG. 396, 398 (2015); ERICH VRANES, TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUES IN INTERNATIONAL LAW, WTO LAW, AND LEGAL THEORY 291 (2009).

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cigarettes would amount to "arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade", if the respondents imports or produces conventional tobacco products.[5] Given that e-cigarettes are largely considered within the scientific community as less harmful than traditional cigarettes, it seems reasonable to ask whether a more trade-restrictive answer to a more limited risk does not disguise protectionist intents. But should such an argument find place in WTO panellists' legal reasoning? Similar questions seem to reopen old wounds of the dispute settlement system, such as the level of deference that adjudicators should adopt. More research on this issue would help to shed light on one of the most delicate systematic questions in WTO law.

In conclusion, the Authors of this chapter, as well as the other contributors to Professor Gruszczynski's volume, succeed in pinpointing and tackling the major problems that e-cigarettes pose to both national and international rule-makers. They offer accurate and well-argued answers, and their sometimes diverging opinions contribute to make the book even more thought-provoking.[6]

It is thus difficult to find grounds to criticise Professor Gruszczynski's work. Perhaps, one way to improve the final result would have been to increase the "dialogue" among the different Parts of the book. For instance, it would have been interesting to read the Authors' opinions on the compliance with human rights law or WTO law of the national legal regimes chosen as case studies. This exercise is instead mostly left to the reader. Nonetheless, the book still manages to provide food for thoughts for policy makers faced with such regulatory challenges, giving at the same time a strong input for further research in a constantly developing area.

[5] General Agreement on Tariffs and Trade *chapeau* of art. XX, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194.

[6] For instance, A. Pudło and L. Gruszczynski's opinion on the EU TPD collides with G. A. Ferro and C. Nicolosi's on the same topic. The former argues that the TPD represents a fair balance between risk prevention and enhancing the development of a relatively new product, whereas the latter conclude that the EU regime for e-cigarettes, as it relies too heavily on the precautionary principle, ultimately curbs technological innovation that could benefit public health.

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