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The CJEU's Pricing Case Law: The changing role of evidence in the proportionality analysis

TAXATION AND OTHER ECONOMIC INCENTIVES AS HEALTH-PROMOTING TOOLS: 17 JANUARY 2017
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Proportionality previously...

- ▶ Had focused on whether MS had exceeded margin of discretion
- ▶ Limited direct review of evidence
- ▶ CJEU adjudicates general principles, Member States review and satisfy CJEU on evidence

Proportionality in recent pricing case law...

- ▶ CJEU begins to review evidence directly as part of proportionality analysis
- ▶ Takes responsibility for interpreting fact in addition to law

Shifting institutional responsibility

- ▶ By increasing their scrutiny of evidence, CJEU has altered balance of institutional responsibility.
- ▶ Court takes more over role in policymaking process than ever before
- ▶ Efficacy of public health policymaking process...
- ▶ Democratic legitimacy...
- ▶ Legal reasoning...

A cautious (pessimistic?!) view of the consequences...

- ▶ The CJEU is a court, constrained by the free movement of goods legal framework.
- ▶ The CJEU may factor factual inaccuracies into legal proportionality analysis, may end up applying EU law rather than advising on its application.
- ▶ Policy experimentation stifled, Member States unable to meet WHO level commitments...?