

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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Two views of Proportionality in *SWA*: The CJEU and the Lord President

- The Court's analysis of proportionality strongly suggested that, on the basis of their reading of the evidence presented, that an increase in general taxation was most the proportionate measure.
 - But in the context of an Art 267 case this was essentially 'obiter'.
- Arguably the most important thing the Court did was to indicate the correct 'temporal frame' for proportionality analysis.
 - This played the ball back to the Inner House – they should re-examine the question.
- The Lord President relied on the Lord Ordinary's analysis and the new evidence available, and took the view that only MUP could address the aim of the measure.

Is the CJEU as active outside Art 267 TFEU?

- It is not apparent that the Court requires stringent evidential proof where it is the disposing court.
 - The 1st mention of evidence is not until 2014 in *Commission v Poland & Commission v Lithuania*.
 - In the Art 267 cases there is a mention of ‘information available’ in 2007 (*Rosengren*), and ‘evidence in the case file’ in 2010 (*Ladbrokes*)
- In all of the cases the reference to evidence was not found in the ‘operative part’, but was discussed as the parties had introduced it.
 - Cf. *DPV*, where the question of evidence appears in the restatement of the law, and the Court states the domestic courts ‘must examine’ – ‘statistical data’ or ‘other means’.

Is Healthcare a Special Case?

- The role of evidence in relation to proportionality is clearly a new element of the Court's case law.
 - And it has appeared in two cases both dealing with pricing and health justifications.
- Is this simply a coincidence?
- Or is it related to the nature of policy making in the health sphere?
 - Evidence based policy making is central to healthcare – has this had an impact on the way that the Court undertakes its task?

Thank You ...

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