

This is a post-peer-review, pre-copy edited version of an article published in the European Journal of Public Health. The definitive publisher-authenticated version of Health, alcohol and EU law: understanding the impact of European single market law on alcohol policies (Baumberg and Anderson 2008). European Journal of Public Health, 18(4):392-398.

is available online at <http://dx.doi.org/10.1093/eurpub/ckn026>

HEALTH, ALCOHOL AND EU LAW: Understanding the impact of European Single Market law on alcohol policies

Baumberg, Ben¹ and Anderson, Peter²

¹ Policy and Research Officer, Institute of Alcohol Studies, UK (www.ias.org.uk) and Centre for the Analysis of Social Exclusion (CASE), London School of Economics and Political Science, UK.

² International public health consultant, Spain.

Correspondence for this article should be addressed to:

Ben Baumberg

Centre for the Analysis of Social Exclusion (CASE)

Department of Social Policy

London School of Economics and Political Science

Houghton Street

London WC2A 2AE

Email: bbaumberg@ias.org.uk

Phone: 0044 207 222 4001

Source: the preliminary work carried out for this article was conducted under a grant from the European Commission, as part of the process of writing the report 'Alcohol in Europe – a public health perspective' (Anderson and Baumberg 2006). Further analysis, updating and re-writing was supported by the Institute of Alcohol Studies.

Running head: Health, Alcohol and EU law

Wordcount: 3,908 including abstract but not acknowledgements or references.

Abstract with Keywords

Background: many professionals in the alcohol field see the role of the the European Court of Justice (ECJ) as negative for health. This review examines ECJ and EFTA case law in the context of two broader debates: firstly the extension of EU law into alcohol policy (the 'juridification' of alcohol policy), and secondly the extent to which alcohol policy is an example of the dominance of 'negative integration' (the *removal* of trade-distorting policy) over 'positive integration' (the *creation* of European alcohol policies)..

Methods: a comprehensive review of all ECJ/EFTA Court cases on alcohol, with interpretation aided by a secondary review on alcohol and EU law and the broader health and trade field.

Results: from looking at taxation, minimum pricing, advertising and monopoly policies, the extension of the scope of the these courts over alcohol policy is unquestionable. However, the ECJ and EFTA Court have been prepared to prioritise health over trade concerns when considering alcohol policies, providing certain conditions have been met.

Conclusion: while a partial juridification of alcohol policy has led to the negative integration of alcohol policies, this effect is not as strong as sometimes thought; EU law is more health-friendly than it is perceived to be, and its impact on levels of alcohol-related harm appears low. Nevertheless, lessons emerge for policymakers concerned about the legality of alcohol policies under EU law. More generally, those concerned with alcohol and health should pay close attention to developments in EU law given their importance for public health policy on alcohol.

Keywords: *alcohol policy; EU law; trade agreements; juridification; negative integration.*

Introduction

Despite burgeoning links among advocates and researchers from across Europe, the alcohol field has been slow to warm to the European Union (EU) institutions. This review seeks to look at one of the key areas of discontent: the judgements of the European Court of Justice (ECJ). In a consultation we conducted among key stakeholders [1], such concerns – either in the prioritisation of trade over health in the EU, or the specific examples of EU trade law – matched the actions of the alcohol industry as the greatest perceived barrier to action at the EU level. The same concerns have also emerged in academic discussions of the impact of EU membership on alcohol policies, particularly in the Nordic countries [2-6].

This review uses ECJ case-law to examine two aspects of this concern. Firstly, it considers the *scope* of ECJ judgements, to see if the law extends into areas that were previously the domain of politics. This could be described as the ‘juridification’ [7, 8, 9:114] of alcohol policy in the EU. Secondly, it considers whether legal judgements systematically prioritise economic factors above social and health considerations. This is explored in the context of the long-standing debate over the dominance of negative rather than positive integration in the EU [10-12].

Firstly, however, it is necessary to provide some basic contextual information and a description of the methodology used.

Background

The primary obligations of Member States come from the series of EU treaties signed by national leaders. These treaty obligations are interpreted through the European Court of Justice (ECJ) in specific cases brought by either the European Commission or by interested parties, with the decisions in these cases setting precedents for subsequent jurisprudence [see 9 for further details, 13:117]. Norway, Iceland and Lichtenstein lie outside the EU, but have signed the European Economic Area (EEA) agreement, which places them inside the EU's internal market. They are therefore bound the same laws as the EU countries on internal market issues, and their disputes go to the European Free Trade Association (EFTA) Court working in parallel with the ECJ.

It is the rulings from these two courts that provide the most detailed picture as to the effect of EU law on alcohol policymaking, and which make up the focus of this review. However, the decisions of the courts do not automatically change a country's entire policy; governments can change their behaviour for the individual case in question without revising an entire policy [14], and can also avoid complying with the judgement – although this can eventually be overcome through fining procedures [15]. Despite these possibilities, the importance of ECJ rulings are not seriously in question [16] and have had real impacts on alcohol policy in the EU.

Methods

This article is based on a comprehensive review of all ECJ and EFTA cases on alcohol, identified by a search on relevant keywords (alcohol, beer, wine, spirits, gin etc.) in the EUR-Lex database of European Community law (<http://eur-lex.europa.eu>), supplemented by a search of the ECJ website for recent cases. Interpretation of these and other cases, treaties and surrounding context was aided by a secondary review of academic and grey literature using the Web of Science, PubMed, EconLit, Google Scholar and the Institute of Alcohol Studies' library. This involved both a narrow keyword search ('alcohol' and various specific terms such as 'trade law') and a wider search (e.g. using 'trade' or 'ECJ' + 'alcohol' as search terms).

Cases in the text are identified using the standard notation whereby 'C' indicates an ECJ case and 'E' an EFTA one; cases available from <http://curia.europa.eu/en/content/juris/index.htm> (ECJ) and <http://www.eftacourt.lu/default.asp?layout=article&id=270> (EFTA).

Results 1 – the scope of EU law

That EU law is relevant for domestic alcohol policies comes as something of a surprise to many, given that the EU may only act in those areas in which its member states have chosen to confer powers through the EU treaties. While the current framework places a duty on the EU to achieve a ‘high level of human health protection’ (EC Treaty Article 152; see also Articles 3 and 95(3)), it does not provide any powers for binding health-motivated legislation (although see below). Despite this, because the EU has created a European single market, alcohol policies fall under the scope of EU law insofar as they *distort* this market. Cases to date have focused on four types of distortion: advertising, minimum pricing, taxation, and monopolies.

Advertising and minimum pricing

Although advertising and minimum pricing policies may appear to health professionals to avoid distorting the market, they have unambiguously been seen as trade-distorting by the courts. This is because Article 28 prohibits any behaviour that is seen as ‘equivalent to quantitative restrictions’, and this is interpreted broadly (cf. *Dassonville* C-8/74). It therefore encompasses advertising restrictions, which make it more difficult for new foreign products to break into the market, and also minimum prices, if these are sufficiently high that foreign products with lower production costs cannot undercut domestic products on price (as occurred for minimum prices for gin in the Netherlands; C-82/77).

Taxation

Alcohol taxation contains perhaps the most obvious example of a market distortion where ‘like’ products from different countries are not treated identically. Where EU law (in the form of Article 90) goes further than may be expected is to say drinks that are merely ‘competing’ with each other can only have different taxes to the extent that this is not indirect protectionism. In the plethora of cases that have followed [17, 18], the ECJ has generally decided that nearly all spirits are potentially in competition with one another and therefore ruled against protectionist policies benefiting a domestic spirit over foreign ones (see Figure 1).

Insert Figure 1 about here (see end)

This becomes more significant when considering the ubiquitous tax differentiation of beer, wine and spirits. The first Wine & Beer case established the precedent that wine and beer were potentially in competition with one another. Crucially, the court ruled that the actual use of the product was not relevant, arguing that *“the tax policy of a member state must not crystallise existing consumer habits so as to be biased in favour of the competing national industries”* (para 14). More recently, the preliminary ruling on the Swedish differential between wine and beer found that they were illegal (C-167/05). The issue here is not that all types of drinks must be taxed equally, but that the Commission complains that the taxes appear disproportionate on any available criteria.

Confusingly though, similar policies in different countries may receive different treatment from the courts, depending on which drinks are produced in the country in question. The

Johnny Walker case found that there is no protectionist effect “*if a significant proportion of domestic production of alcoholic beverages falls within each of the relevant tax categories*” (para 23). The earlier Reverse Discrimination case also found that EU law “*does not prohibit the imposition on national products of internal taxation in excess of that on imported products*” (para 38). This means that a beer-producing country that taxes wine more than beer will have to be mindful of the relevant case law when setting tax rates, while it is perfectly free to tax beer more than wine [19].

Monopolies

Ever since the original Treaty of Rome (and now in Article 31 EC), countries have been allowed to keep their monopolies as long as they are non-discriminatory. The extension of EU law into this area, however, has come about because only those aspects that are *integral* to the monopoly are exempt from the strictures of the treaties. As far back as the Manghera case on the Italian tobacco monopoly (C-59/75), the ECJ had established that exclusive import rights were *not* an integral part of these monopolies. The Commission pointed this out during the negotiations for the Nordic countries accession to the single market in 1994 [6]. Yet beyond small changes, the Nordic countries simply made a declaration without legal standing noting that their monopolies were “*based on important health and social policy considerations.*” As Uglund has put it, they seemed to decide to “*tread lightly, and hope for the best*” [cited by 4] – and soon afterwards, the EFTA court ruled against the exclusive import rights of the Finnish alcohol monopoly in the Restamark case [see also 20].

Large parts of the alcohol monopolies in Finland, Norway and Sweden were therefore removed, leaving primarily the off-premise retail monopolies. Yet a set of later cases – Wilhelmsen, Gundersen and Franzén – explicitly allowed the revised Nordic retail monopolies to be maintained (see Figure 2), confirming the permissibility of “*restrictions on trade which are inherent in the existence of the monopolies in question*” (Franzén para 39). This is despite the court finding against certain relatively unimportant but discriminatory aspects of the monopolies in all three cases. More recently, the courts again ruled against a discriminatory aspect of a monopoly (treating foreign alcopops more harshly than primarily Norwegian beer even at the same alcoholic strength) while accepting the basis of the monopolies more generally.

Insert Figure 2 about here (see end)

While these rulings appeared to confirm the legitimacy of the alcohol monopolies, the Commission repeatedly questioned Sweden [21], and ultimately the recent Rosengren case found that it was not integral to a *retail* monopoly to have a monopoly over *imports*, as the import ban does not relate to how alcohol was sold in Sweden (judgement para 24). This is a very narrow interpretation indeed, and came as something of a surprise given that two Advocate General’s (AG) preliminary opinions had argued that the import and retail monopolies were ‘not separable’ (AG opinion para 6, 47).

Conclusion

It is clear that EU law has expanded further into these areas of alcohol policy than may have been expected. Decisions previously only subject to political pressures in some member states are now also subject to legal pressures at EU level. This is not to suggest that the law is itself fully apolitical – the preservation of the court's legitimacy requires the balancing of legal consistency with the political acceptability of its decisions [16, 22, 23] – but rather that legal considerations play a far greater role than before. We can describe as one type of the 'juridification' that has been observed for the EU more generally [7, 9:114], alongside the 're-framing' of these policies from health/social policy to competition policy [24].

Results 2 – deference to health

A long-standing way of characterising European integration has been to divide ‘negative integration’ (where national policies are *removed* because they distort the single market) from ‘positive integration’ (where EU policies are *created*) [9, 10]. The latter are particularly difficult for health, because – as noted above – the EU’s main competencies are in creating a single European market rather than making health policy (notwithstanding the specific mention of the ‘abuse of alcohol’ in the amended EC Treaty Article 152 that will be added when the Treaty of Lisbon is ratified). We may therefore expect that alcohol policy has seen the dominance of negative over positive integration, and of economic over health interests [5].

There are two minor reasons why this might be a simplistic picture, and a third more substantive reason. Firstly, negative integration does not always equate to economic interests [11] – e.g. EU law forbids gender pay discrimination (EU Treaty Article 141). Nevertheless, as applied in the alcohol field and most other areas [13], the two usually come together. Secondly, there is not a complete absence of positive integration in alcohol policies at EU level. This occurs because (as mentioned above) the EU is obliged to take health into account when making economically-focused policies, with television advertising in particular taking health into account [see ch8 in 25]. Furthermore, the EU has the potential to act on health in a non-legislative way and has therefore recently produced a strategy on alcohol – which can be seen as a landmark, even though its direct impact on legislation for alcohol policies is likely to be minimal [26].

Much more importantly, negative integration can also take account of health. This is not to suggest that it will *advance* the cause of alcohol policy; rather, that it may not *damage* it if it gives a sufficient weight to health in the EU courts. As a previous study has put it, the crucial factor is how far trade-distorting health policies can be categorised as health policies in cases brought about because of their economic impacts [24]. To understand the power of negative integration, then, we must look closely at EU case law.

Advertising

It is possible to defensibly violate EC Article 28 on the grounds of protecting health, with EC Article 30 stating that “the provisions of Articles 28...shall not preclude prohibitions or restrictions...justified on grounds of...the protection of health and life of humans.” However, this exclusion is interpreted strictly (Restamark para 56); to qualify, policies cannot be a disguised restriction on trade and must be *‘proportionate’*. In other words, countries using this defence have a burden of proof to show that (i) the policy can be justified on grounds of health; and more stringently, that (ii) there is no less trade-restrictive alternative available.

The courts have shown a consistent line of reasoning since 1980 that “*it is in fact undeniable that advertising acts as an encouragement to consumption*” (EC vs. France para 17; see Figure 3 for more recent cases) and is therefore relevant to public health. Furthermore, they have also repeatedly stressed that “*it is for the Member States to*

decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved” (Aragonesa para 16).

Figure 3 about here (see end)

While the policies are therefore seen as relevant to health, their proportionality is only clear for targeted advertising restrictions and is less certain for broad-brush ones. For example, the famous French ‘loi Evin’ allowed multiple-country events to be broadcast with alcohol advertising, but banned the more France-targeted transmission of two-country events. Similarly, the Catalan advertising ban on drinks above 23% alcohol by volume (abv) in the media, along streets, in cinemas and on public transport, was explicitly noted to target motorists and young people. The only policy that has been rejected outright by the courts has been the earlier French ban that was clearly a disguised restriction on trade, although other policies have been referred back to national courts to rule on proportionality (see Wilhelmsen and Gourmet in Figure 3), which has resulted in advertising bans being struck down after consideration of the local context.

Minimum pricing and taxation

Minimum prices for tobacco still exist in some EU member states [27], a ‘minimum price’ for alcohol has also been widely debated in the UK [28, 29]. However, while minimum pricing policies are subject to the same legal considerations as advertising policies, they have fared less well in rulings on proportionality. As a recent judgement on tobacco put it, *“the objective of protecting public health may be adequately attained by increased taxation of manufactured tobacco products, which would safeguard the principle of free formation of prices”* (C-216/98 para 31; see also C-302/00). The European Commission has therefore referred Austria and Ireland to the ECJ to try and force them to remove their minimum prices [30].

Such judgements do, however, suggest that health-motivated taxation policies may be upheld. Unlike the other policies, taxation is subject to the strict disciplines of Article 90 that allows no explicit defence on grounds of protecting health. Nevertheless, differential taxation for different types of drinks can be defended on health grounds by arguing that such drinks are not ‘alike’, or (if nonetheless in a competitive relationship) that the differential does not constitute indirect protectionism. Alongside this, we should bear in mind the courts views in the judgements above that the differentials were unreasonable in respect to *any* reasonable criterion.

There is also a – very small – possibility that minimum prices could be successfully defended in future minimum prices could be successfully defended in future. The Office of Fair Trading in has suggested that *“any measures taken need to be proportionate, targeted to particular localities and premises and consequently to particular types of promotions and taken by the right people”* [31], which implicitly suggests that they believe the ECJ would find such targeted policies permissible. Furthermore, large retailers (such as supermarkets) increasingly retail alcohol below cost price and could therefore absorb future tax rises. Given that recent research suggests that it is the price of the cheapest beverage that has the greatest influence on levels of consumption [32],

a case can be made that minimum prices achieve important health goals that taxes cannot achieve. Nevertheless, how persuasive this is to the courts remains to be seen, and it seems strongly likely that minimum pricing for alcohol will not be seen as permissible.

Monopolies

Recent cases ruling that import restrictions are not an integral part of monopolies (see above) bring these restrictions under Article 28, and therefore also allow a health defence. However, in the recent Rosengren case, the ECJ decided that an import ban was not proportionate to the stated goal of ‘the general need to limit the consumption of alcohol’, given that the Swedish monopoly would fulfil any import orders placed with it (paras 45-6). Neither were they sympathetic to the goal of preventing underage sales, given that the monopoly already delegates such checks to food shops (para 53) – again conflicting with the original Advocate General’s ruling, who felt increasing such delegated checks would be slightly less effective (para 81).

This was confirmed in an almost identical and even more recent case among the same parties (C-186/05) on the same grounds. These both offer less leeway to the monopolies than the slightly earlier Ahokainen-Leppik case, where an import licensing system for alcohol above 80% abv in Finland was seen as *potentially* justifiable, but was still referred back to the national court to rule on proportionality. A further sign of proportionality comes from the Finnish restriction on alcohol imports from non-EU countries less than 20 hours of travel away, which was noted to be more targeted than a blanket policy (C-343/97; ‘Heinonen’) – although the case itself does not relate to trade *within* the single market.

Conclusion

The extent to which the EU courts’ growing role in alcohol policy defers to health interests is mixed. On the one hand, a number of policies have failed proportionality tests in the EU courts (import restrictions, minimum pricing), while others have failed tests after being referred back to national courts (complete advertising bans). On the other, the ECJ has explicitly confirmed when judging advertising restrictions that targeted policies that contravene single market requirements are permissible. Negative integration is therefore stronger than positive integration in the case of alcohol, but by less than may be expected from simply comparing the health and economic competencies in the EC Treaty.

Discussion

While this article has concentrated on negative integration, and has suggested that explicit positive integration of alcohol policies is unlikely, we must remember that there are also indirect impacts of Europeanisation [33]. This is particularly through the power of EU citizens who physically accompany their purchases to bring back unlimited amounts of alcohol for their personal use, paying the taxation of the purchase country rather than their home country (a power that was almost extended in C-5/05 before the AG preliminary opinion was overruled by the ECJ). Although not considered here, this has a considerable impact on the ability of nation states to maintain control of alcohol taxation [3, 5, 25, 33].

Nevertheless, the analysis above suggests that – as observed for social policy more generally – ECJ and EFTA Court judgements have extended far into the domain of health and social policy. As has been argued for world trade law, such a partial ‘juridification’ involves passing the authority for national health policies to international courts which some civil society groups find concerning [34, 35] – although less so in the more transparent European context. Furthermore, this extended scope is *potentially* biased towards economic rather than social interests in its structure, and *in practice* the cases above show that it sometimes puts economic considerations above health interests.

Yet the pessimistic interpretation of most commentators on the role of EU law in alcohol policy should be tempered. The courts have established that retail monopolies are permissible, and confirmed since 1980 the right of national governments to make health-motivated alcohol policies that distort the EU single market. It can even be argued that the impact of negative integration on national alcohol policy has been small. Abolishing the wholesale, import and export monopolies in the Nordic countries is unlikely to impact on alcohol-related harm as long as the retail monopoly is maintained [3:406, 24:162], a view taken in the mid-1990s by the Swedish and Finnish governments [24]. Import restrictions may have been lifted, but the Swedish Government has stated that “*Swedish alcohol policy stands firm*” given that private importers will still have to pay Swedish alcohol taxes [36]. And the sale of alcopops outside the Norwegian monopoly seems to have had no measurable impact on alcohol-related harm [3].

This leaves two lessons for policymakers in making EU law-compliant alcohol policy. Firstly, broadly-focused policies have more difficulty in passing proportionality tests, and policymakers should recognise that even a slight targeting of a generally broad policy – as seen within the loi Evin – could make a significant difference. Secondly, alcohol policies have historically often resulted from entwined economic and health concerns, but this has become much more problematic. Policies must therefore be explicitly targeted on health and social concerns, which means that a potential ally for alcohol policy (national alcohol producers) is removed at a stroke.

EU law is not the threat for health that some alcohol professionals appear to believe – yet neither does it have no health consequences. Perhaps the strongest conclusion

here is that EU law is unquestionably relevant to alcohol policy, and must be closely watched as case law and any future treaty negotiations continue to develop.

Funding

European Commission; Institute of Alcohol Studies to BB.

Acknowledgements

This paper presents a more detailed perspective on research more simply summarised in chapter 8 of the report *Alcohol in Europe: a Public Health Perspective* [25], which was commissioned by the European Commission to summarise the evidence base on alcohol in Europe for the alcohol strategy of 2006. Many thanks also to the Institute of Alcohol Studies for allowing BB the time to develop and update the ideas in this paper, and particularly to Phil McComish for some valuable comments.

Conflicts of interest

Ben Baumberg was paid during this project by the Institute of Alcohol Studies, who are primarily funded by the Alliance House Foundation (formerly the UK Temperance Alliance). Full details of the Institute's operation and funding are available from www.ias.org.uk/aboutus/who_we_are.html. Peter Anderson is a consultant paid by a number of governmental organisations and European Commission co-financed projects. Until 2006, he was a policy advisor to Eurocare (the European Alcohol Policy Alliance), an NGO which included amongst its members some country based organisations with a temperance background. Both authors are writing in a personal capacity, and the views expressed in this article should not be interpreted as the official position of either the Institute of Alcohol Studies or Eurocare.

Key-points

- EU alcohol policy has been 'juridified', in that the scope of the ECJ and EFTA Court has expanded and now encompasses numerous fields of alcohol policy.
- While the structure of the EU can be argued to prioritise economic over health interests, the courts themselves are prepared to prioritise health over trade concerns, providing certain conditions are met.
- Confirmation that trade-discriminatory alcohol policies can be successfully defended on health grounds is not simply a new development, instead dating back to 1980.
- There is nevertheless a constraining effect in that health-motivated policies must pass the test of proportionality, and even the slight targeting of a generally broad policy will make a significant difference if the policy is challenged in the courts.
- Those concerned about alcohol policy in Europe must pay close attention to ongoing case law and any treaty negotiations to avoid an unexpected narrowing of the policy space in future.

References

Note that all references to EC Treaty articles refer to the numbering in the 2006 consolidated version of the EU Treaty.

1. Anderson, P and Baumberg, B. Stakeholders' view of alcohol policy. *Nordisk Alkohol- & Narkotikatidskrift (Nordic Studies on Alcohol and Drugs)*, 2006. 23: p. 393-414.
2. Ziegler, D. International trade agreements challenge tobacco and alcohol control policies. *Drug and Alcohol Review*, 2006. 25(6): p. 567-579.
3. Nordlund, S. The influence of EU on alcohol policy in a non-EU country. *Journal of Substance Use*, 2007. 12: p. 405-418.
4. Holder, HD, Kühlnhorn, E, Nordlund, S, Österberg, E, Romelsjo, A, and Ugland, T. *European integration and Nordic alcohol policies: changes in alcohol controls and consequences in Finland, Norway and Sweden, 1980-1997*. 1998, Aldershot: Ashgate.
5. Ugland, T. Impact of Europeanization on Nordic alcohol control policies: a discussion of processes and national differences. *Journal of European Social Policy*, 2000. 10(1): p. 58.
6. Österberg, E. Implications for monopolies of the European integration. *Contemporary Drug Problems*, 1993. 20: p. 203-227.
7. Blichner, LC and Molander, A. Mapping Juridification *European Law Journal*, 2008. 14: p. 36-54.
8. Rehder, B. What Is Political about Jurisprudence? Courts, Politics and Political Science in Europe and the United States, in *MPIfG Discussion and Working Papers #5*. 2007, Max Planck Institute for the Study of Societies.
9. Dehousse, R. *The European Court of Justice*. 1998, London: Macmillan Press.
10. Scharpf, F. Negative and positive integration in the political economy of European welfare states. In: *Governance in the European Union*, G. Marks, et al., Editors. 1996, SAGE: London.
11. Majone, G. The common sense of European integration *Journal of European Public Policy*, 2006. 13(5): p. 607-626.
12. Vink, MP. Negative and Positive Integration in European Immigration Policies in *European Integration online Papers (EIoP) Vol. 6 (2002) N° 13*. 2002.
13. Hix, S. *The political system of the European Union [2nd edition]*. 2005, New York: Palgrave Macmillan.
14. Alter, KJ. The European Union's legal system and domestic policy: Spillover or backlash? *International Organization*, 2000. 54(3): p. 489-+.

15. Lenaerts, K and Heremans, T. Contours of a European social union in the case-law of the European Court of justice. *European Constitutional Law Review*, 2006. 2(1): p. 101-115.
16. Luedtke, A. Law, politics and the European Court of Justice: Broadening the debate. *Journal of European Public Policy*, 2004. 11(6): p. 1128-1137.
17. Lubkin, GP. Is Europe's glass half-full or half-empty? The taxation of alcohol and the development of a European identity. 1996.
18. Germer, P. Alcohol and the single market: juridical aspects. *Contemporary Drug Problems*, 1990. 17: p. 461-479.
19. Elinder, LS, Joossens, L, Raw, M, Andréasson, S, and Lang, T. Public health aspects of the EU Common Agricultural Policy: developments and recommendations for change in four sectors (fruit and vegetables, dairy, wine and tobacco). 2003, National Institute for Public Health: Sweden.
20. Alavaikko, M and Österberg, E. The influence of economic interests on alcohol control policy: a case study from Finland. *Addiction*, 2000. 95(Supplement 4): p. S565-S579.
21. Kühlnhorn, E, Trollidall, B, and Holder, HD. The process of change during Sweden's integration into the European Union. In: *Sweden and the European Union*. 2000, Almqvist & Wiksell International: Stockholm. p. 43-61.
22. Carrubba, CJ. The European Court of Justice, democracy, and enlargement. *European Union Politics*, 2003. 4(1): p. 75-100.
23. Kelemen, RD. The limits of judicial power - Trade-environment disputes in the GATT/WTO and the EU. *Comparative Political Studies*, 2001. 34(6): p. 622-650.
24. Ugland, T. Adaptation and Integration through Policy Re-categorization. *Journal of Public Policy* 2003. 23: p. 157-170.
25. Anderson, P and Baumberg, B. *Alcohol in Europe: a public health perspective*. 2006, Institute of Alcohol Studies: London.
26. Baumberg, B and Anderson, P. The European Strategy on Alcohol: a landmark and a lesson [editorial]. *Alcohol and Alcoholism*, 2007. 42(1): p. 1-2.
27. European Commission. Excise duties/cigarettes: The European Commission alerts Member States on minimum retail selling prices [IP/06/483]. 2006.
28. House of Commons Home Affairs Committee. *Anti-Social Behaviour*. 2005, The Stationery Office: London.
29. SHAAP. *Alcohol: Price, Policy and Public Health*. Report on the findings of the expert workshop on price convened by SHAAP. 2007, Scottish Health Action on Alcohol Problems (SHAAP): Edinburgh.

30. European Commission. Excise duties/Minimum retail sale prices for cigarettes: the Commission refers Austria and Ireland to the Court of Justice in IP/08/148. 2008.
31. Office of Fair Trading. Select Committee on Home Affairs Written Evidence: 23. Memorandum submitted by the Office of Fair Trading. 2005.
32. Gruenewald, P, Ponicki, W, Holder, H, and Romelsjö, A. Alcohol prices, beverages quality, and the demand for alcohol: quality substitution and price elasticities. *Alcoholism: Clinical and Experimental Research*, 2006. 30: p. 96-105.
33. Kurzer, P. Cultural diversity in post-Maastricht Europe. *Journal of European Public Policy*, 2001. 8(1): p. 144-161.
34. Gould, E. Trade Treaties and Alcohol Advertising Policy. *Journal of Public Health Policy*, 2005. 26: p. 359-376.
35. Sinclair, S. GATS: How the World Trade Organization's new "services" negotiations threaten democracy. 2000: Canadian Center for Policy Alternatives.
36. Sweden to defend state alcohol monopoly after EU ruling [5 June 2007], in *EU Business*. 2007.

Figure 1: ECJ cases on alcohol taxation

<i>Case</i>	<i>Description</i>
Reverse discrimination (C-86/78)	Bizarrely, a French producer challenged the taxation system after it had been changed to ensure that the French alcohol monopoly complied with relevant EU legislation. The ECJ ruled that nothing prevented member states from taxing domestic producers more than foreign producers.
Whisky and cognac (C-168/78) <i>Plus others</i>	The Commission argued that France unfairly placed an extra tax on grain-based (whisky) as opposed to grape-based (cognac) drinks. The ECJ ruled that they were partly in competition and the protective tax was therefore ruled illegal. Italy lost similar cases around the same time for protecting grape over grain- [C-216/81] or sugar-based (rum) drinks [C-169/78], and for putting 'luxury' VAT on sparkling wines [C-319/81; C-278/83], while Greece lost a case for protecting ouzo through VAT [C-230/89] – although recently the ECJ defended a separate derogation for ouzo that was written into the original taxation directives [C-475/01].
Wine and beer (C-170/78) <i>Plus C-356/85</i>	The Commission objected to the UK's increased wine excise tax after accession to the EU. Despite complications arising from the fact that wine was untaxed in many countries (see below), the ECJ accepted that the tax was high relative to all relevant criteria (e.g. alcohol content, volume, and price) even though they didn't specify a particular comparison method. In contrast, a superficially similar case on VAT in Belgium [C-356/85] upheld the differential tax as no protective effect had been demonstrated in practice.
Aquavit (C-171/78, C-68/79)	Denmark was challenged for a lower tax on the domestic spirit aquavit compared to other spirits, with Denmark claiming consumers treated it as a different product. The ECJ rejected this, deciding all spirits are in potential competition.
Johnny Walker (C-243/84) <i>Plus others</i>	Denmark was challenged for placing a differential tax on fruit wines and Scotch whisky. The ECJ ruled that a system discriminating between competing products but based on objective criteria "does not favour domestic producers if a significant proportion of domestic production of alcoholic beverages falls within each of the relevant tax categories", as occurred here. Several later cases involving Denmark come to similar conclusions about grape wine rather than Scotch whiskey [C-106/84], although national courts were left to decide if champagne was also similar [C-367/93 to C-377/93]
Wine and beer II (C-166/98)	The minimum rates for wine and beer in the EU Directives were challenged. The ECJ ruled against the challenge on two counts – firstly, that the difference was not a Council measure but a consequence of parallel harmonizations for wine and beer; and secondly, that Member States have sufficient discretion to avoid protectionism in their domestic tax systems.
EC vs. France (C-434/97)	The Commission argued that France was violating the directives on tax structures by having a special tax implemented on drinks over 25% abv. The ECJ found in favour of the tax on a technicality, but also confirmed that taxes for specific purposes are allowed if they are in accordance with the general scheme of either VAT or excise techniques for taxation.
Joustra (C-5/05)	Mr Joustra who imported wine on a non-profit basis for a wine circle claimed that he should pay tax for the country of purchase, not the circle's country of residence. After the Advocate General ruling scared many into believing that Joustra's claim would be upheld on a technicality, the normal consensus on interpreting 'commercial' and 'personal' use was reaffirmed in the final ruling.

Figure 2: ECJ cases on alcohol monopolies

<i>Case</i>	<i>Description</i>
Hansen (C-91/78)	This case on the German spirits monopoly provides some early explicit reasoning that monopolies can be maintained providing “they be so adjusted as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States” [Para 8].
Restamark (E-1/94)	The Restamark company attempted to import alcoholic drinks without passing on the details of who it intended to sell the drinks to, and the Finnish monopoly Alko refused to release the drinks for sale. The EFTA Court found that the import licensing by the monopoly was both discriminatory and not necessary to protect human health.
Franzén (C-189/95)	In the only early monopoly case to be brought under EU (rather than EEA) law, Harry Franzén deliberately broke the Swedish retail monopoly by selling wine in his shop. The ECJ ruled in 1997 that the monopoly was permissible, although part of the licensing system imposed additional costs on foreign drinks and was therefore struck down.
Wilhelmsen (E-6/96)	A Norwegian shopkeeper appealed to the EFTA Court after being turned down for a strong beer retail licence by the state monopoly Vinmonopolet (medium beer being available from normal traders, but strong beer being the preserve of Vinmonopolet). The Court found some aspects of the licensing procedure for wholesalers were unjustified, and left it to the national court to decide if certain day-to-day practices were discriminatory. However, it supported the monopoly on strong beer as a proportionate measure.
Gundersen (E-1/97)	Very similarly to the Wilhelmsen case and following the Franzén ruling, Fritjof Gundersen asked the EFTA Court to allow him to sell wine in his store. Again, the EFTA Court found against the monopoly on a small point (that wine between 2.5% and 4.75% abv could not be sold outside the monopoly), but defended the Norwegian policy overall.
Alcopops (E-9/00)	The case ruled against a restriction on (foreign-produced) alcopops being sold outside monopoly stores when (domestically-produced) beer of the same strength can be bought from grocery stores, given that enforcement of a minimum purchase age could protect young people in a less restrictive way. This was also a follow-up to the Gunderson case, as Norway had not changed its policies in the light of that ruling.
Rosengren (C-170/04)	Rosengren was appealing the confiscation of a box of Spanish wine obtained via a Danish website, which fell foul of the Swedish ban on private imports. The ECJ AG ruled in 2006 that the private import was intrinsically linked to the functions of the monopoly (as reiterated by the succeeding AG later in 2006) and would also have been proportionate to the goal of protecting public health. However, the final ruling in 2007 contradicted this on both counts, finding that an import monopoly was separate from a retail monopoly, and that the policy could not be justified as part of either limiting consumption or preventing underage sales.
Ahokainen (C-434/04)	Mr Ahokainen and Mr Leppik were prosecuted for smuggling nearly 10,000 litres of alcohol into Finland, but imaginatively appealed to the ECJ. In late 2006, the court found that the system of import licensing could potentially be defended on the grounds of health, but left it to the national court to determine whether it was proportional in this case.

Figure 3: ECJ cases on alcohol advertising

<i>Case</i>	<i>Description</i>
<i>EC vs. France</i> (C-152/78)	In this case a clearly discriminatory ban on advertising grain-based spirits (mainly foreign) while allowing advertising of wine-based spirits (mainly French) was struck down. However, the ECJ here set out for the first time the legitimacy of alcohol advertising restrictions to protect health.
<i>Aragonesa</i> (C-1/90 & C-176/90)	In these two joined cases, the ECJ defended Catalonia's fines for two companies who violated a billboard advertising ban for drinks stronger than 23% abv.
<i>Wilhelmsen</i> (E-6/96)	Although the main thrust of the case is unrelated to advertising (see Figure 2), Wilhelmsen also argued that the prohibition of advertising was discriminatory [para 72 and 109]. The ECJ left it to the national court to decide whether this was justifiable to protect human health.
<i>Gourmet</i> (C-405/98)	The Swedish consumer ombudsman attempted to take out an injunction against Gourmet magazine, after they included alcohol adverts in a special supplement. The ECJ affirmed the previous legal reasoning but left it to the national courts to determine whether the advertising ban was proportional. Ultimately the Swedish Market Court found against the ban, and new legislation was passed outlawing print advertising for products over 16% alcohol volume, followed in January 2005 by compulsory warning labels on all print advertisements.
<i>Bacardi-Martini</i> (C-318/00)	Just before a televised Newcastle-Metz football game, French TV companies panicked that they would be breaking the loi Evin (below) so removed any alcohol adverts around the pitch, violating their contractual commitments to the advertisers. The ECJ ruled that there was no need to refer this case to the ECJ, as it could be simply settled based on UK contract law.
<i>loi Evin</i> (C-262/02 & C-429/02)	The 'loi Evin' is the French law – drafted partly in response to C-152/78 above – that bans alcohol advertising on television. This includes bilateral sporting events, but not multinational ones that are outside French control (such as the football World Cup). The ECJ defended the law as proportionate to its aims.
<i>Pediceel</i> (E-4/04)	The Norwegian magazine Vinforum (a speciality magazine for wine connoisseurs) appealed a fine after publishing an alcohol advertisement. Based on a technicality (that agricultural products, which includes wine, are not covered by the relevant part of the EEA), the EFTA Court found that the relevant articles did not apply, but reaffirmed the reasoning in previous cases.