Case No: C1/2016/2607,2624,2612 and 2614

Neutral Citation Number: [2016] EWCA Civ 1182
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Green
[2016] EWHC 1169 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2016

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEATSON
and
SIR STEPHEN RICHARDS

- -

Between :

The Queen on the application of — **Appellants**
Case No. C1/2016/2607
(1) British American Tobacco UK Limited
(2) British American Tobacco (Brands) Inc
(3) British American Tobacco (Investments) Limited
Case No. C1/2016/2624
(1) JT International SA
(2) Gallaher Limited
Case No. C1/2016/2612
Imperial Tobacco Limited
Case No. C1/2016/2614
(1) Tann UK Limited
(2) Tannpapier GmbH
(3) Benkert UK Limited
(4) Deutsche Benkert GmbH & Co KG

- and -
The Secretary of State for Health — **Respondent**

- -

Nigel Pleming QC, Geoffrey Hobbs QC, Philip Roberts, David Scannell and Dan Sarooshi (instructed by **Herbert Smith Freehills LLP**) for the Appellants in Case No. C1/2016/2607 **("BAT")**
David Anderson QC, Emma Himsworth QC and Jennifer MacLeod (instructed by **Freshfields Bruckhaus Deringer LLP**) for the Appellants in Case No. C1/2016/2624 **("JTI")**

David Anderson QC and Lindsay Lane and Jennifer MacLeod (instructed by **Ashurst LLP**) for the Appellant in Case No. C1/12016/2612 **("Imperial")**
Kelyn Bacon QC and **Tim Johnston** (instructed by **Singletons Solicitors**) for the Appellants in Case No. C1/2016/2614 **("the Tipping Appellants")**
James Eadie QC, Martin Howe QC, Ian Rogers QC, Catherine Callaghan, Julianne Kerr Morrison, Nikolaus Grubeck and **Jaani Riordan** (instructed by the **Government Legal Department**) for the Respondent **("the Secretary of State")**

Hearing dates : 18-21 October 2016

- -

Judgment

Lord Justice Lewison:

INTRODUCTION

1. This is the judgment of the court, to which each of its members has contributed, on four linked appeals from an order of Green J dismissing claims for judicial review of The Standardised Packaging of Tobacco Products Regulations 2015 ("the Regulations"). The Regulations were made by the Secretary of State pursuant to section 94 of the Children and Families Act 2014 ('the 2014 Act') and section 2(2) of the European Communities Act 1972, following a lengthy consultation process and with Parliamentary approval by way of affirmative resolutions. They make provision for the retail packaging of cigarettes and hand rolling tobacco to be standardised, substantially limiting the ability of tobacco companies to place branding on the outer packaging or the tobacco products themselves. In part, they implement Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (the Tobacco Products Directive or "TPD", but generally referred to in the appeals as "TPD2" because it replaces a 2001 directive on the subject). But they go further than TPD2 in the restrictions they impose, and it is those additional restrictions that are the subject of the present appeals.

2. The Regulations were challenged by the claimants on numerous grounds. There was a very large volume of evidence in the court below, including 27 witness statements and 30 expert reports; there were 16 bundles of authorities; the skeleton arguments and written submissions ran to many hundreds of pages; the hearing before the judge lasted 7 days; and the exercise undertaken by the judge after the hearing included, as his judgment makes clear, an in-depth review of all the expert evidence in the case. His judgment, extending to 1,000 paragraphs, is on any view a *tour de force* but we consider it to be much longer than was necessary or desirable. For those with the stamina it is available on BAILII (under neutral citation number [2016] EWHC 1169 (Admin)) and in the law reports (see [2016] ETMR 38) and also in Reports of Patent Cases: [2016] RPC 22. In those circumstances we refer to it so far as possible by way of summary and cross-reference rather than by quotation or repetition.

3. The judge grouped the issues before him under 17 grounds, all of which he dismissed, as follows:

    i) Ground 1 (see Green J at [9] and [251]-[275]) was a challenge to the lawfulness of the Regulations on the basis that TPD2 was itself illegal. The issue was resolved against the claimants by the judgment of the CJEU of the European Union ("the CJEU") in (Case C-547/14), *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] 3 WLR 973 ("*Philip Morris*") and is not pursued on the appeals.

    ii) The specific issue in ground 2 (see Green J at [10] and [276]-[404]) was whether the Secretary of State had erred in according only limited weight to the expert evidence served by the tobacco companies during the consultation process. As the judge said at [277], however, "the point *also* resonates in the context of the other freestanding grounds which involve a consideration of the Claimants' evidence such as proportionality and in the context of alleged

violations of property rights". In finding against the claimants, the judge concluded at [404] that "measured against internationally accepted research and evidence standards, that evidence, as a generality, was materially below par".

iii) Grounds 3-5 (see Green J at [11] and [405]-[649], [650]-[679] and [680]-[711]) were separate elements of an overall proportionality challenge to the Regulations, contending that the Regulations would fail to meet their stated objective of improving public health and as such they were not "suitable and appropriate" (ground 3); they were not "necessary", because less extreme measures of equal efficacy could have been adopted (ground 4); and they failed to strike a fair balance between the public interest and the tobacco companies' private rights of property. Proportionality was raised as a free-standing ground of challenge but also played an important part in the grounds alleging breach of Article 1 of Protocol 1 to the European Convention on Human Rights ("A1P1") and article 17 of the Charter of Fundamental Rights of the European Union ("the Charter"), described below. The judge found that the Regulations were proportionate both on the evidence at the time when they were considered by Parliament and on the further evidence before the court.

iv) Grounds 6-8 (see Green J at [12] and [712]-[812], [813]-[843] and [844]-[857]) were that by depriving the tobacco companies of their property, notably trade marks, without compensation or by imposing a disproportionate control on the use of such property without compensation, the Regulations were in breach of A1P1 (ground 6), article 17 of the Charter (ground 7) and the common law (ground 8).

v) Ground 9 (see Green J at [14] and [858]-[864]) concerned an alleged breach of article 16 of the Charter. It is not pursued.

vi) Grounds 10-12 were described by the judge at [15] as a series of technical challenges with the object of establishing that the Regulations were *ultra vires* by reference to TPD2 or broader principles of EU or international law. Ground 10 (see Green J at [865]-[883]) was that the Regulations violated the unitary character of Community trade marks ("CTMs") contrary to Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark ("the CTMR"): the CTMR has since been amended by Regulation (EU) No. 2015/2424 of the European Parliament and of the Council of 16 December 2015, and is referred to in its amended form as "the EUTMR".

vii) Ground 11 (see Green J at [884-904]) was that the Regulations were in breach of article 24(2) of TPD2 by failing to take into account, as required by that provision, "the high level of protection of human health achieved through this Directive".

viii) Ground 12 (see Green J at [905]-[918]) was that, in so far as they went beyond implementation of TPD2, the Regulations were outside the competence of the United Kingdom because measures relating to the commercial aspects of trade marks fall within the common commercial policy of the EU and are thereby reserved to the exclusive competence of the EU. This ground included consideration of the Agreement on Trade-Related Aspects of Intellectual

Property Rights (Annex 1C of the Marrakesh Agreement establishing the World Trade Organisation of 15 April 1994) ("the TRIPs Agreement") and the compatibility of the Regulations with the TRIPs Agreement.

ix) Ground 13 (see Green J at [15] and [919]-[932]) concerned the lawfulness of the consultation process that preceded the making of the Regulations. It is not pursued.

x) Ground 14 (see Green J at [14] and [933]-[934]) was an alleged infringement of article 34 of the Treaty on the Functioning of the European Union ("the TFEU"). It is not pursued.

xi) Ground 15 (see Green J at [15] and [935]-[948]) was a complaint that Parliament acted unlawfully in not awaiting the outcome of the reference to the CJEU in the *Philip Morris* case. It is not pursued.

xii) Grounds 16 and 17 (see Green J at [16], [949]-[979] and [980]-[1000]) were advanced by producers of "tipping paper" (paper for the filter tips of cigarette sticks) and related specifically to the restrictions in regulation 5 on the colour of, and branding on, cigarettes. The contention was that regulation 5 was *ultra vires*, in particular that it was not permitted by article 24(2) of TPD2 (ground 16), alternatively that it was disproportionate (ground 17).

4. The judge granted the tobacco companies in three of the claims permission to appeal on grounds 2-8 inclusive and grounds 10-12 inclusive: those claimants were British American Tobacco UK Limited and associated companies ("BAT"), JT International SA and Gallaher Limited ("JTI"), and Imperial Tobacco Limited ("Imperial"). We will refer to BAT, JTI and Imperial collectively as "the Tobacco Appellants". The judge granted the claimant producers of tipping paper permission to appeal on grounds 16-17: these claimants were Tann UK Limited, Tannpapier GmbH, Benkert UK Limited and Deutsche Benkert GmbH & Co KG. We will refer to them as "the Tipping Appellants". The claimants in a further claim before him, namely Philip Morris Brands SARL and associated companies, did not seek permission to appeal.

5. The hearing of the appeals took 4 very full days, during which we were addressed by Mr David Anderson QC on behalf of JTI and Imperial, Mr Geoffrey Hobbs QC and Mr Nigel Pleming QC on behalf of BAT, Ms Kelyn Bacon QC on behalf of the Tipping Appellants, and Mr James Eadie QC, Mr Martin Howe QC and Mr Ian Rogers QC on behalf of the Secretary of State. We are grateful to all of them and to their juniors and instructing solicitors for the thoroughness and efficiency with which the appeals were prepared and presented. Despite the time allowed for the hearing, some of the oral submissions had to be rushed, but the combination of lengthy skeleton arguments, a small number of additional written notes and a full transcript of the oral submissions has ensured a proper airing of all the issues.

6. At the heart of the appeals are issues concerning the nature of the Tobacco Appellants' trade mark rights, the extent to which the Regulations interfere with such rights and the lawfulness of any such interference. Another substantial area is that of proportionality, which raises general issues as to the correct legal approach in a case such as this, as well as involving consideration of the judge's specific approach to the evidence. We will not attempt, however, to summarise any of those points at this

stage of our judgment. They are more readily explained and understood after a fuller exposition of the factual background and legal context and as part of our detailed consideration of the individual issues.

7. Our judgment proceeds as follows:

   i) First, we give a fuller description of the Regulations themselves, their relationship with TPD2, the provisions of the 2014 Act pursuant to which they were made, the objectives they pursue and the process leading to their promulgation.

   ii) We turn next to the intellectual property aspects of the case, examining the rights in issue and the relevant domestic, EU and international legal framework, before considering the specific case advanced by the Tobacco Appellants under A1P1 (the judge's ground 6), article 17 of the Charter (the judge's ground 7) and the common law (the judge's ground 8), the alleged incompatibility with the CTMR (the judge's ground 10), and the issues of competence and compatibility with the TRIPs Agreement (the judge's ground 12).

   iii) We then deal with the issue of proportionality (the judge's grounds 3-5, but also bringing in matters raised in relation to the judge's ground 2).

   iv) That is followed by consideration of the Tobacco Appellants' case that the Regulations are in breach of article 24(2) of TPD2 (the judge's ground 11).

   v) We turn finally to the distinct issues raised by the Tipping Appellants (the judge's grounds 16-17).

   For convenience, we have set out in the Annex to this judgment a list of the key abbreviations used in it.

8. Although many of the issues concern EU law, none of the Tobacco Appellants invited us to make a reference to the CJEU; and BAT positively discouraged us from so doing. The Tipping Appellants did invite us to make a reference, which for the reasons we give in the section of this judgment dealing with their appeal, we refuse to do.

THE UK REGULATIONS AND THEIR CONTEXT

The Regulations

9. The Regulations were made on 19 March 2015 and came into force on 20 May 2016. They applied from that date to the *production* of tobacco products but, by virtue of a transitional provision, do not apply until 21 May 2017 to the *supply* of tobacco products produced before 20 May 2016.

10. The broad effect of the Regulations is explained as follows at [57] of the judge's judgment:

> "The Regulations standardise the material, shape, opening and content of the packaging of readymade cigarettes. Similar controls are applied

> in relation to roll your own cigarettes. The Regulations also include specific prohibitions in relation to the labelling of tobacco products. The objective of the Regulations is to introduce plain or standardised packaging and, in substantial measure, to restrict the branding permitted on tobacco packaging. The Regulations achieve this end by mandating the design elements of a package. The only permitted colour for the packaging of a tobacco product [is] what is described as "a drab brown with a matt finish". The Regulations prescribe the text that may be lawfully printed on packs. Other than standardised text as to the number of cigarettes and the producer only the brand name and the variant of the cigarette is permitted. And, moreover, this is permitted only in a uniform presentation with a specified Helvetica font, case, colour, type face, orientation, and size (font size 14 for brand name and 10 for variant name). The surface of the packaging must be smooth and flat with no ridges, embossing or similar distinguishing features. The package must contain uniform lining. The appearance of the cigarettes must be plain white with a matt finish with white or imitation-cork coloured tipping paper. Permitted text must adopt a uniform presentation with a specified font, case, colour, type face, orientation and placement identifying the brand and variant name. Packaging which makes a noise, produces a smell or changes after retail sale is prohibited."

11. Further detail, including the text of some of the individual regulations, is to be found at [248]-[250] of the judgment below. Regulations 3 and 4 relate to the permitted colour or shade of packaging of cigarettes and to the material, shape, opening and contents of a unit packet of cigarettes. Regulation 5 relates to the appearance of cigarettes themselves and is the focus of the grounds specifically advanced by the Tipping Appellants. Regulation 6 and schedule 2 make further provision about the packaging of cigarettes. Regulations 7-9 and schedules 3-4 contain provisions which apply only to hand rolling tobacco. Regulations 10-12 contain further provisions which apply to all tobacco products or to both cigarettes and hand rolling tobacco.

12. Regulation 13 concerns trade marks. We set it out in full here because of its significance for submissions considered later:

> "**Regulations not to affect registration of trade marks etc**
>
> 13.(1) For the avoidance of doubt, nothing in, or done in accordance with, these Regulations—
>
> (a) forms an obstacle to the registration of a trade mark under the Trade Marks Act 1994, or
>
> (b) gives rise to a ground for the declaration of invalidity of a registered trade mark under section 47(1) of that Act (grounds for invalidity of registration).
>
> (2) Without limiting paragraph (1), nothing in, or done in accordance with, these Regulations—

(a) causes any trade mark to be contrary to public policy or to accepted principles of morality for the purposes of section 3(3)(a) of that Act (absolute grounds for refusal of registration),

(b) amounts to an enactment or rule of law which prohibits the use of a trade mark for the purposes of section 3(4) of that Act,

(c) amounts to a rule of law by which the use in the United Kingdom of any trade mark is liable to be prevented for the purposes of section 5(4) of that Act (relative grounds for refusal of registration),

(d) causes an application for the registration of a trade mark under that Act to be one which is made in bad faith, or

(e) prevents an applicant for the registration of a trade mark under that Act from having such a *bona fide* intention as is mentioned in section 32(3) of that Act (application for registration of trade mark).

(3) Paragraph (4) applies for the purposes of section 6(3) of the Trade Marks Act 1994 (meaning of "earlier trade mark") if the trade mark there mentioned is a registered trade mark and its use is affected by these Regulations.

(4) A *bona fide* use of the trade mark is to be regarded as having taken place during the two years there mentioned if there would have been such use of the trade mark during that period were these Regulations not in force.

(5) Paragraph (6) applies for the purposes of—

(a) section 6A(3) of the Trade Marks Act 1994 (raising of relative grounds in opposition proceedings in case of non- use), or

(b) section 47(2B) of that Act (grounds for invalidity of registration), if the earlier trade mark there mentioned is a registered trade mark and its use is affected by these Regulations.

(6) If any provision of these Regulations causes any non-use of the trade mark within the period of five years there mentioned, such provision is to be regarded as a proper reason for that non- use, provided that the trade mark would have been put to such genuine use as is there mentioned were these Regulations not in force.

(7) Paragraph (8) applies for the purposes of section 46(1)(a) or (b) of the Trade Marks Act 1994 (revocation of registration) if the use of the registered trade mark there mentioned is affected by these Regulations.

(8) If any provision of these Regulations causes any non-use of the registered trade mark within the period of five years there mentioned, such provision is to be regarded as a proper reason for that non-use,

> provided that the registered trade mark would have been put to such genuine use as is there mentioned were these Regulations not in force.
>
> (9) To the extent that any provision of the Trade Marks Act 1994 mentioned in this regulation (a "relevant provision") applies to international trade marks (UK) (whether by virtue of that Act, the Trade Marks (International Registration) Order 2008 or otherwise, and whether with or without modifications), then provision made by this regulation in relation to that relevant provision shall also apply (with any necessary modifications) to international trade marks (UK)."

Regulation 14 contains similar provisions with regard to registered designs.

13. Regulation 21 requires the Secretary of State to conduct periodic reviews of the Regulations and to set out the conclusions of a review in a published report, the first of which must be published no later than 5 years from the coming into force of the Regulations.

The Tobacco Products Directive (TPD2)

14. As already mentioned, the Regulations are in part an implementation of TPD2, which required Member States to comply by 20 May 2016 with a variety of obligations in respect of, *inter alia*, the labelling and packaging, i.e. the presentation, of tobacco products (see, in particular, articles 13 and 14 of TPD2, set out at [237] of the judge's judgment). TPD2 does not, however, require Member States to introduce standardised packaging as prescribed by the Regulations. Its relevance for the appeals lies in whether the additional restrictions introduced by the Regulations are compatible with the Directive and in the light that the Directive casts on the broader question of the competence of Member States to introduce additional restrictions in this field. In the circumstances it is necessary to refer by way of introduction to only a few features of the Directive. They will be picked up and developed in later sections of the judgment.

15. One of the legal bases of TPD2 is article 114 TFEU, which empowers the EU to adopt measures relating to the internal market. In *Philip Morris*, for reasons considered later in this judgment, the CJEU held that the Directive is a measure of partial harmonisation (harmonising certain aspects of cross-border sales of tobacco products, whilst leaving other aspects of such sales to be determined by Member States) and that article 114 is a valid legal base for it.

16. The judge refers to various of the recitals and articles of TPD2 at [227]-[240] of his judgment. It suffices to set out a small number of recitals and part of one of the articles, as follows.

17. The relevant recitals are these:

> "(7) Legislative action at Union level is also necessary in order to implement the WHO Framework Convention on Tobacco Control ("FCTC") of May 2003, the provisions of which are binding on the Union and its Member States. The FCTC provisions on the regulation of the contents of tobacco products, the regulation of tobacco product

disclosures, the packaging and labelling of tobacco products, advertising and illicit trade in tobacco products are particularly relevant. The Parties to the FCTC, including the Union and its Member States, adopted a set of guidelines for the implementation of FCTC provisions by consensus during various Conferences.

(8) In accordance with Article 114(3) of the Treaty of the Functioning of the European Union (TFEU), a high level of health protection should be taken as a base for legislative proposals and, in particular, any new developments based on scientific facts should be taken into account. Tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco on human health, health protection should be given high importance, in particular, to reduce smoking prevalence among young people.

…

(53) Tobacco and related products which comply with this Directive should benefit from the free movement of goods. However, in light of the different degrees of harmonisation achieved by this Directive, the Member States should, under certain conditions, retain the power to impose further requirements in certain respects in order to protect public health. This is the case in relation to the presentation and the packaging, including colours, of tobacco products other than health warnings, for which this Directive provides a first set of basic common rules. Accordingly, Member States could, for example, introduce provisions providing for further standardisation of the packaging of tobacco products, provided that those provisions are compatible with the TFEU, with WTO obligations and do not affect the full application of this Directive.

…

(59) The obligation to respect the fundamental rights and principles enshrined in the Charter of Fundamental Rights of the European Union is not changed by this Directive. Several fundamental rights are affected by this Directive. It is therefore necessary to ensure that the obligations imposed on manufacturers, importers and distributors of tobacco and related products not only guarantee a high level of health and consumer protection, but also protect all other fundamental rights and are proportionate with respect to the smooth functioning of the internal market. The application of this Directive should respect Union law and relevant international obligations."

18. The relevant article is article 24, which in its first two paragraphs provides:

"Article 24

Free movement

> 1. Member States may not, for considerations relating to aspects regulated by this Directive, and subject to paragraphs 2 and 3 of this Article, prohibit or restrict the placing on the market of tobacco or related products which comply with this Directive.
>
> 2. This Directive shall not affect the right of a Member State to maintain or introduce further requirements, applicable to all products placed on its market, in relation to the standardisation of the packaging of tobacco products, where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this Directive. Such measures shall be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Those measures shall be notified to the Commission together with the grounds for maintaining or introducing them."

The Children and Families Act 2014 ("the 2014 Act")

19. In so far as they introduce the additional restrictions in issue in these proceedings, the Regulations were made pursuant to section 94 of the 2014 Act. It is a lengthy section, set out in full at [241]-[246] of the judgment below. By subsection (1), the Secretary of State may make regulations under subsection (6) or (8) if he or she considers that the regulations "may contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18": subsection (6) empowers the making of regulations about the retail packaging of tobacco products, whilst subsection (8) empowers the making of regulations imposing prohibitions, requirements or limitations relating to the markings on tobacco products, the appearance of such products and related matters. It is provided in subsection (2) that subsection (1) does not prevent the Secretary of State, in making such regulations, from considering whether they may contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people aged 18 or over. Subsections (4) and (5) contain detailed deeming provisions that cast light on the underlying policy:

> "(4) Regulations under subsection (6) or (8) are to be treated for the purposes of subsection (1) or (2) as capable of contributing to reducing the risk of harm to, or promoting, people's health or welfare if (for example) they may contribute to any of the following—
>
> (a) discouraging people from starting to use tobacco products;
>
> (b) encouraging people to give up using tobacco products;
>
> (c) helping people who have given up, or are trying to give up, using tobacco products not to start using them again;
>
> (d) reducing the appeal or attractiveness of tobacco products;
>
> (e) reducing the potential for elements of the packaging of tobacco products other than health warnings to detract from the effectiveness of those warnings;

(f) reducing opportunities for the packaging of tobacco products to mislead consumers about the effects of using them;

(g) reducing opportunities for the packaging of tobacco products to create false perceptions about the nature of such products;

(h) having an effect on attitudes, beliefs, intentions and behaviours relating to the reduction in use of tobacco products.

(5) Regulations under subsection (6) or (8) are to be treated for the purposes of subsection (1) as capable of contributing to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18 if—

(a) they may contribute to reducing activities by such people which risk harming their health or welfare after they reach the age of 18, or

(b) they may benefit such people by reducing the use of tobacco products among people aged 18 or over."

20. Section 135 of the 2014 Act contains ancillary provisions relating to the power to make regulations and provides in subsection (6) that a statutory instrument containing regulations under section 94(6) or (8) is not to be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

The objectives pursued by the Regulations

21. The provisions of section 94 of the 2014 Act lead conveniently into consideration of the objectives pursued by the Regulations. This topic is covered at [60]-[76] of the judgment below. The judge identifies two broad strands, namely (i) the general and broad health policy of seeking to suppress both supply and demand in respect of tobacco products, and (ii) a number of more specific objectives within that broader strategy.

22. As to the general policy, he states:

"61. At base the objective of the Government is plain and obvious and is to improve public health by suppressing the prevalence and use of tobacco. In this connection, "prevalence" refers to the extent to which smoking is widespread and "use" refers to the intensity of use by individual smokers. The expression "consumption" is sometimes used as an alternative to "use". The salient facts were set out in a witness statement prepared by Mr Jeremy Mean, who is presently the Deputy Director for Tobacco Control within the Department of Health. Additional information was set out in the evidence of the Chief Medical Officer, Professor Dame Sally Davies. None of this evidence has been challenged by the Claimants, who unequivocally accept that tobacco products are harmful. I summarise certain of the key facts below.

… [details omitted]

68. The overarching objective of the Regulations is therefore to reduce smoking to the maximum degree in order to improve health. This is the common objective of all tobacco policies or measures. The goal is not to reduce smoking by any particular percentage figure. The control programmes apply a mix of complementary and mutually reinforcing educational, clinical, regulatory, fiscal, economic and social strategies in the effort to reduce smoking prevalence and use. The need for states to adopt multifaceted and complementary approaches is one recognised by the WHO in the FCTC which explicitly encourages the adoption of "comprehensive" anti-smoking strategies, and is also an approach adopted by other jurisdictions across the world, such as Australia. The importance of this is that, as the FCTC reflects, there is a broad consensus at the level of international health policy that to combat smoking requires a portfolio policy approach in which the problem is treated in a variety of different ways."

23. As to specific objectives behind the Regulations, the judge states:

"71. ... These are to eradicate the attractive force of design on cigarette packaging and on the products themselves. Following the introduction over the past 20 years or so of policy measures targeting the impact of advertising, promotion and sponsorship (including the introduction of an advertising ban and display ban), the packaging of tobacco products and the appearance of the cigarettes themselves have become key promotional vehicles for tobacco manufacturers. In 2006, a spokesman for Gallaher (now part of JTI) noted that "*marketing restrictions make the pack the hero*". Branded packaging has been described as the "*silent salesman*" and the manufacturers' "*billboard*". Tobacco companies do not divulge their internal documents and they have not done so in this litigation. But in the course of litigation elsewhere, and especially in the United States, they have been compelled to provide discovery and there is thus a large body of indicative material that gives an insight into the internal thought processes within the manufacturers. This material suggests that a cat and mouse game is employed between the companies and Governments. As the scope for promotion shrinks through successive legislative interventions so the tobacco companies focus increasingly upon the territory that is left. The importance of the present case is that the packaging and the product itself constitute virtually the last opportunity for tobacco companies to promote their product.

72. The Defendant's position is that there is clear evidence establishing a causal relationship between packaging advertising and smoking initiation, especially among the young. Psychology is critical. Brand imagery appeals to the psychological and social needs of the consumer. Over the last decade the tobacco market has seen a proliferation of tobacco brands and brand variants. Colours and branding on packaging and on cigarettes themselves are used to enhance the appeal of products, including to the young, and to communicate different messages to the consumer in relation to the strength, quality and

> harmfulness of the product. The market has also seen the introduction of innovative packaging intended to introduce a 'wow' factor through, for example, 'GlideTec' packs (Imperial) which are designed to embrace the "*sociability of smoking*". Slimmer packs are designed to appeal particularly to women, as fashion statements. Texture and lacquer are used on packs to provide a positive connection between the smoker and the packaging they handle frequently. The packaging company Vaassen said of tobacco packs: "... the real experience [for the smoker] begins when they are holding the pack in their hands." ….
>
> 75. The tobacco industry has sought to argue, in these proceedings and in others, that all of its marketing activity, including packaging, aims solely to persuade existing adult smokers to switch brands rather than to persuade people (including in particular children) to take up smoking. This argument is unsustainable. It is not possible to design a product to appeal to adults (over 18s) without appealing, even inadvertently, to children …."

24. The judge concludes the section, at [76], by setting out the specific aims identified by the Secretary of State within the context described. Those aims, which are said to have been identified during the pre-legislative consultation exercise, are substantially the same as the factors listed by Parliament in section 94(4) of the 2014 Act, quoted above.

25. The judge states at [2] that the decision to introduce the Regulations was in large a measure in furtherance of the policy laid down by the World Health Organisation ("the WHO") in the 2004 Framework Convention on Tobacco Control ("the FCTC"), to which the EU and the individual Member States are parties. He gives a detailed account of the FCTC and its associated Guidelines at [151]-[175] of his judgment. We have already quoted the reference to the FCTC in recital (7) of TPD2, which implemented the mandatory provisions of the FCTC within the EU, and the judge's reference to it at [68] of his judgment; and it will be necessary to make further reference to it in various contexts later in this judgment. We confine ourselves here to developing the judge's point about the policy laid down in the FCTC. He states at [18]-[19] that one of the propositions at the heart of the FCTC is that "tobacco use is an '*epidemic*' of global proportions which exerts a catastrophic impact upon health" and that this is the premise for most of the substantive provisions of the FCTC. Although those provisions include obligations relating to the packaging and labelling of tobacco products (article 11) and tobacco advertising, promotion and sponsorship (article 13), they do not extend to standardised packaging of the kind introduced by the Regulations. Article 2, however, encourages the parties to implement measures going beyond those required by the FCTC, and the Guidelines to the FCTC include recommendations that do extend to the subject-matter of the Regulations.

26. Thus, paragraph 46 of the Guidelines on article 11 (though the paragraphs are not numbered in the copy provided to this court) states:

> "**Plain packaging**
>
> Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on

> packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others."

27. In a similar vein, paragraphs 15-17 of the Guidelines on article 13 lead to a recommendation that "Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, individual cigarettes or other tobacco products should carry no advertising or promotion, including design features that make products attractive".

The process leading to promulgation of the Regulations

28. The main stages of the process leading to promulgation of the Regulations are described by the judge at [90]-[149] of his judgment. Although the ground of challenge relating specifically to the consultation process has fallen away, the process is still relevant by way of background to other issues, notably proportionality. The stages were, in summary, as follows:

    i) In 2011 the Secretary of State commissioned a review by researchers at the University of Stirling ("the Stirling Review"), which examined a large number of pre-existing studies.

    ii) In April 2012 the Government published a consultation paper on standardised packaging of tobacco products ("the 2012 Consultation").

    iii) In July 2013, following an internal assessment of the available evidence, the Government published a summary report on the 2012 Consultation responses. By this time plain packaging legislation had been enacted in Australia, coming into force in October 2012 with full (albeit staged) implementation required by December 2012. In a ministerial statement to Parliament on the same date as the report on the 2012 Consultation was published, it was stated:

    > "Having carefully considered these differing views, the Government has decided to wait until the emerging impact of the decision in Australia can be measured before making a final decision on this policy. Currently, only Australia has introduced standardised packaging, although the Governments of New Zealand and the Republic of Ireland have committed to introduce similar policies. Standardised packaging, therefore, remains a policy under consideration ...."

    iv) In November 2013, during the passage of the 2014 Act through Parliament, the Government appointed Sir Cyril Chantler to review the evidence previously considered and any new evidence. The report on the review ("the Chantler Review") was published on 3 April 2014. It did not repeat the exercise conducted by the Stirling Review but sought to build upon it. The report summarised the arguments for and against standardised packaging. Its final

conclusion was that standardised packaging would, on balance, advance public health:

> "6.11 In conclusion research cannot prove conclusively that a single intervention such as standardised packaging of tobacco products will reduce smoking prevalence. For various reasons as cited it is not possible to carry out a randomised controlled trial. Even if it was possible it would be extremely difficult to control for all the various confounding factors which are known to affect smoking. However after a careful review of all of the relevant evidence before me I am satisfied there is sufficient evidence derived from independent sources that the introduction of standardised packaging as part of a comprehensive policy of tobacco control measures would be very likely over time to contribute to a modest but important reduction in smoking prevalence especially in children and young adults. Given the dangers of smoking, the suffering that it causes, the highly addictive nature of nicotine, the fact that most smokers become addicted when they are children or young adults and the overall cost to society, the importance of such a reduction should not be underestimated."

v) The Government's response to the Chantler Review was announced in a ministerial statement on 4 April 2014:

> "In light of [Sir Cyril Chantler's] report and the responses to the previous consultation in 2012 I am therefore currently minded to proceed with introducing regulations to provide for standardised packaging. However, before reaching a final decision and in order to ensure that that decision is properly and fully informed, I intend to publish the draft regulations, so that it is crystal clear what is intended, alongside a final, short consultation, in which I will ask, in particular, for views on anything new since the last full public consultation that is relevant to a final decision on this policy. I will announce the details about the content and timing of that very shortly but would invite those with an interest to start considering any responses they might wish to make now."

vi) The further consultation ("the 2014 Consultation") was duly announced 6 weeks later. The consultation document was accompanied by a draft of the Regulations.

vii) In August 2014 the United Kingdom notified the draft Regulations to the European Commission in accordance with Directive 98/34 of 22 June 1998 ("the Technical Standards Directive") and article 24(2) of TPD2. It did so on a contingency basis and independently of the final substantive decision whether to introduce standardised packaging. The Commission responded in November 2015, indicating that it had assessed the evidence submitted in the context of the free movement of goods, that it would monitor implementation and would follow international developments, particularly at the level of the WHO. Thereafter, detailed opinions were submitted by other Member States pursuant to the Technical Standards Directive, to which the United Kingdom

responded in a submission to the Commission in February 2015. All this was incidental to the steps taken within the domestic context towards the making of the Regulations.

viii) In December 2014 a submission was placed before Ministers seeking directions on whether or not to proceed with standardised packaging. It presented a balanced account of the competing arguments. Ministers were also provided with a further impact assessment ("the 2014 Impact Assessment"). The impact assessment considered three options: (a) to do nothing and await the introduction of TPD2, (b) to adopt standard standardised packaging, or (c) to defer the decision again. It concluded in the light of a detailed cost/benefit analysis that the expected societal benefits from reduced smoking prevalence and the resultant lives saved would be materially larger than the expected costs to society from reduced taxation revenue and costs to businesses: the total quantified benefits were put at £30 billion, with total quantified costs of £5.2 billion and therefore a net benefit to the public of about £25 billion. At [138] of his judgment the judge sets out, in full, paragraphs 1-38 of the impact assessment, which he describes at [137] as representing in summary form "the most comprehensive statement of reasons which it might fairly be said reflected the view of the Secretary of State when laying draft regulations before Parliament and … the reasons upon which Parliament acted". The passage quoted by the judge occupies over 7 printed pages of his judgment. It is unnecessary to repeat it here.

ix) Upon receipt of the December 2014 submission and advice from the Chief Medical Officer, the decision was made to proceed with the Regulations. The decision was announced on 21 January 2015. Subsequently, on 12 February 2015, the Government published a summary report on the 2014 Consultation, together with the 2014 Impact Assessment and other materials. The draft Regulations themselves were laid before Parliament on 23 February 2015 and were made on 19 March 2015 following the requisite affirmative resolutions. The judge makes the point at [90] that the ultimate decision maker was Parliament and that the affirmative resolution procedure necessitated Parliament addressing itself specifically to the measures; and that "[it] is abundantly clear from Hansard that Parliament engaged in depth with the merits and demerits of the arguments".

THE RELEVANT TRADE MARK RIGHTS: GENERAL CONSIDERATIONS AND LEGAL FRAMEWORK

Introduction

29. It is not in dispute that a registered trade mark is a species of property. Nor is it in dispute that although one cannot "possess" a trade mark in the sense that one can possess a chattel or a piece of land, it counts as a "possession" for the purposes of the ECHR, the Charter and similar provisions. However, before one can say that a person's proprietary rights have been affected, it is necessary to identify what those proprietary rights are. Thus before going any further it is necessary to consider what a trade mark is, and what rights the registration of a trade mark confers, because there is a fundamental difference between the parties. BAT says that the registration of a trade mark gives it a positive right to use the mark on the goods in the class for which it has

been registered. JTI and Imperial do not go that far, but say that restrictions on their ability to use their registered trade marks in consumer-facing situations are an interference with the rights or freedoms conferred by a registered trade mark. The Secretary of State on the other hand says that the rights conferred by a trade mark are purely negative rights: that is to say the right to stop someone else doing things. If those rights continue in being, and the Secretary of State has not done one of the prohibited acts, there is no interference.

30. Traders have attached signs to their goods to denote their origin since antiquity. Roman potters often stamped their amphorae with their names, initials or symbols; and mediaeval masons left distinguishing marks on the stones with which they built cathedrals. Goldsmiths and silversmiths applied distinguishing marks to their wares as early as the fourteenth century. They needed no registered trade mark to be able to do this. At common law, subject to the law of passing off which depends on misrepresentation, rival traders were entitled to use similar marks.

31. One of the key features of intellectual property, unlike corporeal property, is that infringement of intellectual property rights does not exhaust the property itself. If A takes possession of B's land, or borrows his car, B is deprived of the use of his land or his car, at least temporarily. But if A works B's invention, that does not prevent A from working it too, although it may affect the profitability of exploiting it. Likewise if A marks his goods with a sign that is confusingly similar to B's registered trade mark, that will not prevent B from continuing to use his own registered mark. In addition, registered trade marks, like other intellectual property rights but unlike land or chattels, do not exist in nature. They are the products of legislative intervention. So the legislation must be a good starting point to examine their characteristics. Trade marks exist at two levels: national marks and what were called CTMs. It is convenient to begin with national marks.

National marks

32. National marks are governed by the Trade Marks Act 1994, which implements the Trade Mark Directive (2008/95/EC) ("the TMD"). The European Parliament and Council have adopted Directive (EU) 2015/2436 which recasts the TMD ("the recast TMD"). The recast TMD is in force, although the period for transposition into national law will not expire, in general, until 14 January 2019. However, it was not in force when the impugned Regulations were made, and we do not consider that any difference between that and the TMD affects the subject-matter of these appeals.

33. The TMD begins with recitals which are important to an understanding of its scope. Recital (7) makes it clear that the TMD is only a partial approximation of trade mark law. Recital (7) provides:

> "This Directive should not exclude the application to trade marks of provisions of law of the Member States other than trade mark law, such as the provisions relating to unfair competition, civil liability or consumer protection."

34. Recital (8) says:

> "Attainment of the objectives at which this approximation of laws is aiming requires that the conditions for obtaining and continuing to hold a registered trade mark be, in general, identical in all Member States."

35. Recital (9) says:

> "In order to reduce the total number of trade marks registered and protected in the Community and, consequently, the number of conflicts which arise between them, it is essential to require that registered trade marks must actually be used or, if not used, be subject to revocation."

36. The TMD applies to every registered trade mark (article 1). A trade mark may consist of any sign capable of being represented graphically and capable of distinguishing goods or services of one undertaking from those of other undertakings (article 2). Article 3 contains certain absolute grounds for refusal to register a sign, or for declaring registration of such signs to be invalid. Article 3 (2) provides:

> "Any Member State may provide that a trade mark is not to be registered or, if registered, is liable to be declared invalid where and to the extent that:
>
> (a) the use of that trade mark may be prohibited pursuant to provisions of law other than trade mark law of the Member State concerned or of the Community"

37. Article 5 of the TMD is headed "Rights conferred by a trade mark". It begins:

> "1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:
>
> (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;
>
> (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark.
>
> 2. Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the

> Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark."

38. Article 5 (3) expands on the activities which may be prohibited by article 5 (1) and (2); and article 5 (5) enables Member States to protect the proprietor against "use of a sign other than for the purposes of distinguishing goods or services" where certain conditions are satisfied. A number of provisions of the TMD embody what both Mr Anderson and Mr Hobbs called the "use it or lose it principle". Article 10 provides that if within a period of five years following registration of a trade mark the proprietor "has not put the trade mark to genuine use in the Member State in connection with the goods or services in respect of which it is registered, or if such use has been suspended during a continuous five-year period" then certain sanctions apply "unless there are proper reasons for non-use". The sanctions include an inability to use the registration as a defence in opposition or infringement proceedings (article 11) and revocation of the registration (article 12). In each case the application of the sanction for non-use is qualified by reference to there being no "proper reasons for non-use".

39. These provisions are reproduced in the recast TMD.

Community trade marks

40. CTMs were governed by the CTMR ((EC) 207/2009) ("the CTMR"). The CTMR has been amended by the EUTMR. The main change that is relevant for present purposes is that CTMs have been renamed EU trade marks ("EUTMs"), but otherwise the amendments are not material for present purposes. The EUTMR entered into force on 23 March 2016 after the close of the hearing before the judge but before he gave judgment. The judge's discussion thus dealt with CTMs. The purpose of the CTMR was to improve the functioning of the single market. Recital (1) states:

> "For those purposes, trade marks enabling the products and services of undertakings to be distinguished by identical means throughout the entire Community, regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal."

41. This is repeated in Recital (2) of the EUTMR. Article 1(2) of the CTMR provides:

> "A Community trade mark shall have a unitary character. It shall have equal effect throughout the Community: it shall not be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be prohibited, save in respect of the whole Community. This principle shall apply unless otherwise provided in this Regulation."

42. Article 9 is part of a section of the CTMR headed "Effects of a Community trade mark" and is itself headed "Rights conferred by a Community trade mark". It begins:

> "A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:
>
> (a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered;
>
> (b) any sign where, because of its identity with, or similarity to, the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;
>
> (c) any sign which is identical with, or similar to, the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Community and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark."

43. Article 9 has been redrafted in the EUTMR but without relevantly affecting its substance. Section 3 of the CTMR deals with use of a CTM. Article 15 paves the way for the application of sanctions if a CTM has not been put to "genuine use" for five years "unless there are proper reasons for the non-use." As with the TMD those sanctions include an inability to rely on the CTM in opposition proceedings (article 42) and revocation (article 51). These provisions are repeated in the corresponding articles of the EUTMR.

44. Article 110 (2) provides:

> "This Regulation shall, unless otherwise provided for, not affect the right to bring proceedings under the civil, administrative or criminal law of a Member State or under provisions of Community law for the purpose of prohibiting the use of a Community trade mark to the extent that the use of a national trade mark may be prohibited under the law of that Member State or under Community law."

45. This is repeated in the EUTMR.

Negative or positive rights?

46. So far as the rights of a trade mark proprietor are concerned, the structure of the TMD (article 5) and the CTMR (article 9) is thus to state a general proposition that the mark confers exclusive rights, and then to describe what those rights are. The rights conferred by the legislation are all expressed in negative terms.

47. That these kinds of rights are negative in character is certainly consistent with domestic jurisprudence. In *Inter Lotto (UK) Ltd v Camelot Group plc* [2003] EWHC 1256 (Ch), [2004] RPC 8 Laddie J said at [35]:

> "The section does not stipulate that the proprietor of the registered mark has an 'exclusive right to use' the mark. It stipulates that he has the 'exclusive rights in the trade mark which are infringed by use of the trade mark in the United Kingdom without his consent'. In other words, registered trade marks, like all other statutory intellectual property rights do not give a right to the proprietor to use, but give him the right to exclude others from using."

48. Arnold J said the same in *Pinterest Inc v Premium Interest Ltd* [2015] EWHC 738 (Ch), [2015] FSR 27 at [36], in which he said that the same principle applied to a CTM, and that the contrary was not even arguable. This approach is not confined to English law. It was accepted as correct in *JT International SA v Commonwealth of Australia* [2012] HCA 43, (250) CLR 1 at [36] (French CJ), [76] (Gummow J), [248] (Crennan J), and [348] (Keifel J). In (Case C-491/01) *R v Secretary of State for Health ex p British American Tobacco (Investments) Ltd* [2003] 1 CMLR 14 Advocate General Geelhoed said at [266] that "the essential substance of a trademark right does not consist in an entitlement as against the authorities to use a trademark unimpeded by provisions of public law. On the contrary, a trademark right is essentially a right enforceable against other individuals if they infringe the use made by the holder".

49. This way of describing the rights conferred by the registration of a trade mark is also found in article 16 of the TRIPs Agreement which provides:

> "The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use."

50. In a ruling by the WTO Dispute Settlement Panel on a complaint by Australia (WT/DS290/R 15 March 2005) the Panel said at [7.246]:

> "These principles reflect the fact that the [TRIPs Agreement] does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights

> and no do not require an exception under the TRIPS Agreement."

51. In the same ruling at [7.610] the Panel specifically rejected an argument that there was a positive right to use a trade mark.

52. Nor are these principles confined to trade marks. It is the same in the case of copyright. In *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2002] Ch 149 Lord Phillips MR said at [30] that:

> "… copyright is essentially not a positive but a negative right. No provision of the 1988 Act confers in terms, upon the owner of copyright in a literary work, the right to publish it. The Act gives the owner of the copyright the right to prevent others from doing that which the Act *recognises* the owner alone has a right to do." (Emphasis in original)

53. In the field of patents Lord Cranworth LC said in *Steers v Rogers* [1893] AC 232, 235 (cited in *JT International SA v Commonwealth of Australia*):

> "What is the right which a patentee has or patentees have? It has been spoken of as though a patent right were a chattel, or analogous to a chattel. The truth is that letters patent do not give the patentee any right to use the invention - they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all; only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way, and using a particular invention."

54. Cornish et al put the matter thus in Intellectual Property (8th ed.) at para. 1-04:

> "The fact that intellectual property gives a right to control the activities of others has a number of implications, often inadequately understood. The right owner does not need the right in order to exploit a market for its goods or services: a patent is not a pre-condition to exploiting one's own invention. By way of corollary, the right gives no liberty to ignore the rights of other individuals … or to override public liabilities: a trade mark registration does not justify its use to advertise illegal goods."

55. In order to register a sign as a trade mark it is necessary that the sign possesses a distinctive character. Some signs have a character that is inherently distinctive. But other signs may be registered if they have acquired a distinctive character before registration. A sign will only have acquired a distinctive character in that way if it has been used in the course of trade or business. It makes little sense to say that a trader who has in fact distinguished his goods or services by the use of an unregistered sign, thus acquiring distinctiveness, had no right or freedom to use that sign in the course of his trade or business before registering it as a trade mark. Plainly he had every right or

freedom to do so (provided that no one else had the right to stop him). Thus in our judgment a right or freedom to affix a distinguishing sign to goods or to designate services by a distinctive sign exists independently of the registration of any trade mark. When a trader registers that sign as a trade mark the registration does not confer on him any right to use the sign that he did not have before. What the registration gives him is the right to stop other people from using a confusingly similar sign (and the other things that the proprietor of a trade mark is entitled to prevent).

56. The Tobacco Appellants seek to counter this analysis by reliance on two main lines of argument. First, they say that all the essential functions of a trade mark depend on actual use. Mr Hobbs argued that the description of a registered trade mark as conferring only negative rights was a relic of the common law; and had been superseded by the creation of a positive right in EU law. Second, they say that if a trade mark is not used it is vulnerable to revocation and cannot be relied on to oppose the registration of a similar sign. In its origin a trade mark was a sign of the origin of goods or services. But as the law has developed the courts have recognised that use of a distinguishing sign in relation to goods or services has other functions too. It has done so in the context of determining what functions the exclusive rights conferred by the registration of a trade mark are intended to protect. It does not appear to be in dispute that the rights conferred by a registered trade mark are intended to protect:

    i) Use of the mark as an indicator of origin;

    ii) Use of the mark as an indicator of quality;

    iii) Use of the mark as an instrument of commercial strategy for advertising purposes, or to acquire a reputation in order to develop customer loyalty.

    These functions are described in judgments of the CJEU in (Case C-487/07) *L'Oréal SA v Bellure NV* [2010] Bus LR 303 at [58] and (Case C-323/09) *Interflora Inc v Marks & Spencer plc* [2012] Bus LR 1440 at [38] to [39].

57. This description of the functions of a registered trade mark applies equally to the use of an unregistered sign. Traders designate their goods and services by distinctive signs for these purposes whether or not their signs have been registered as trade marks. The fact that a sign fulfils all these functions does not entail the proposition that the positive right to use a sign for these functions is conferred *by registration* of the sign as a trade mark. What it does mean is that the negative rights conferred by the registration may be used to protect these functions.

58. In addition it is important to recall how the description of the functions of a trade mark evolved in EU law. In (Case C-206/01) *Arsenal Football Club plc v Reed* [2003] Ch 454 the CJEU invoked the functions of a trade mark as a *limitation* on the reach of the negative rights conferred by the TMD. The Court explained:

> "[51] It follows that the exclusive right under article 5(1)(a) of the Directive was conferred in order to enable the trade mark proprietor to protect his specific interests as proprietor, that is, to ensure that the trade mark can fulfil its functions. The exercise of that right must therefore be reserved to cases in which a third party's use of the sign affects or is liable to affect

> the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods.
>
> [52] The exclusive nature of the right conferred by a registered trade mark on its proprietor under article 5(1)(a) of the Directive can be justified only within the limits of the application of that article."

59. In the same case Advocate General Ruiz-Jarabo Colomer said at [45]:

> "The proprietor of a registered trade mark is granted an assortment of rights and powers in order that, by means of the exclusive use of the distinctive sign and the resultant identification of the goods and services he provides, a fair, undistorted system of competition may be established from which those who seek to take advantage of or profit from the reputation of others are excluded. That is why those legal advantages must extend only so far as strictly necessary in order for that essential function to be performed. Furthermore, it is evident that there is no reason for the proprietor of a given distinctive sign to be seen as having an exclusive use *erga omnes* and in any circumstances, but only vis-à-vis those who seek to profit from its status and reputation … passing it off or using it in such a way as to mislead consumers with regard to the origin as well as to the quality of the goods or services it represents."

60. Since that case the CJEU has expanded the recognised range of functions that a registered trade mark performs; but it has done so in the context of evaluating which specific acts falling within the description of those which the trade mark proprietor is entitled to protect count as infringements. That is exactly how the CJEU approached the case before it both in *L'Oréal SA v Bellure NV* and *Interflora Inc v Marks & Spencer plc*. In the latter case the Court said in terms at [38] that the expansion of the recognised functions of a trade mark was no more than a clarification of the decision in *Arsenal Football Club plc v Reed*.

61. Mr Hobbs drew our attention to the statement of the court in (Case C-533/06) *O2 Holdings Ltd v Hutchison 3G UK Ltd* [2008] 1 CMLR 397 at [66]:

> "Once a mark has been registered its proprietor has the right to use it as he sees fit so that, for the purposes of assessing whether the application for registration falls within the ground for refusal laid down in that provision, it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier mark in all the circumstances in which the mark applied for might be used if it were to be registered."

62. It is, however, important to appreciate the context of that statement. The court was considering article 4 (1)(b) of Directive 89/104 (now to be found in article 4 (1)(b) of the TMD). That provides for the refusal to register a mark if because of its identity with, or similarity to, an earlier registered trade mark and the identity or similarity of

the goods or services covered by the trade marks, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark. All that the court was saying was that in considering the likelihood of confusion between a mark and a sign in use, the analysis must concentrate on the context in which the sign was actually used, whereas in considering the likelihood of confusion between a registered trade mark and a candidate for registration, the question of confusion must be analysed on a broader basis. Moreover, the proposition that registration gives the proprietor a right to use the mark cannot stand with the decision of the court in (Case C-561/11) *Fédération Cynologique Internationale v Federación Canina Internacional de Perros de Pura Raza* [2013] ETMR 399 in which it held that the registered proprietor of an earlier mark was entitled to prevent confusingly similar use of a later mark even though the later mark was itself registered. At [41] the court specifically rejected the argument that registration of a trade mark conferred on its owner a right that could only be called into question by an action for invalidity or by a counterclaim for invalidity in infringement proceedings. Although it is true that Advocate General Mengozzi discussed both positive and negative rights, that discussion did not find its way into the court's judgment.

63. Mr Hobbs was also able to point to statements made by other Advocates General which suggested that the registration of a trade mark did confer positive rights of use. In (Case C-2/00) *Hölterhoff v Freisleben* [2002] ETMR 7, for example, Advocate General Jacobs said at [33]:

> "The first sentence of [article 5 (1) of the TMD] states that a registered trade mark confers exclusive rights on the proprietor. The remainder of the paragraph, to which the national court's question explicitly relates, is expressed essentially in negative terms, in that it specifies what the trade mark proprietor may prevent others from doing. However, such negative rights of prevention should in my view be considered in the light of the positive rights inherent in ownership of a trade mark, from which they are inseparable."

64. This observation was not endorsed by the court. The judge quoted part of the opinion of Advocate General Sharpston in (Case C-348/04) *Boehringer Ingelheim KG v Swingward Ltd (No 2)* [2007] Bus LR 1100 (a case about the repackaging of pharmaceuticals for parallel importation) in which she said at [9]:

> "The specific subject matter of a trade mark thus has two components. First, there is the right to use the mark for the purpose of putting products protected by it into circulation for the first time in the EC, after which that right is exhausted. Secondly, there is the right to oppose any use of the trade mark which is liable to impair the guarantee of origin, which comprises both a guarantee of identity of origin and a guarantee of integrity of the trade-marked product."

65. However, the court itself took a much narrower view at [14]:

> "It must be borne in mind that the specific subject matter of a mark is to guarantee the origin of the product bearing that mark and that repackaging of that product by a third party without the authorisation of the proprietor is likely to create real risks for that guarantee of origin."

66. Mr Hobbs also placed heavy reliance on (Case C-277/10) *Luksan v Van Der Let* [2013] ECDR 5. This concerned copyright directives that provided for "exclusive rights to authorise or prohibit" reproduction of works or communication of works to the public. They also provided for in whom such rights should vest. Austrian national law, transposing those rights, described them as "exploitation rights", and they were so referred to in the question that the national court posed to the CJEU. The relevant issue before the court was whether these rights were validly conferred by the national legislation on the director of a film or on its producer. In the course of its judgment the court undoubtedly used the expression "exploitation rights" and "the right to exploit" a cinematographic work both in the context of the national legislation and also EU legislation. But the nature of the rights was not in issue; the only issue was: who was entitled to them? Moreover the rights were expressed in the legislation as the right to authorise or prohibit reproduction or communication to the public. The legislation did not purport to confer on the person entitled to the rights the positive right himself to reproduce the work or communicate it to the public.

67. The next step in the first line of argument was reliance on article 17 of the Charter. That provides:

> "Right to property
>
> 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
>
> 2. Intellectual property shall be protected."

68. Building on the common ground that a registered trade mark is a "possession", the argument is that the right to "use" the mark is a right expressly conferred by article 17. The official explanation accompanying article 17 emphasises the importance of intellectual property and says that "The guarantees laid down in paragraph 1 shall apply *as appropriate* to intellectual property". We accept that article 17 of the Charter protects proprietary rights in intellectual property. However we do not accept that article 17 changes the nature of those rights. If (for example) the rights conferred by a trade mark are only negative rights, we cannot see that article 17 creates positive rights. Second, the way in which a person uses property is by exercising the proprietary rights inherent in ownership of that property. If the proprietary rights are negative rights to prevent others from infringing the mark, the owner exercises those rights by preventing infringement. Third, the explanation says that the guarantees in article 17(1) shall apply "as appropriate" to intellectual property. This explanation

recognises that some adaptation of the language of article 17 (1) may be necessary in its application to intellectual property.

69. We do not consider that either the case law of the CJEU or the Charter has turned negative rights into positive rights arising *by virtue of the registration*. Such positive rights as there are are independent of the registration. We do not therefore consider that the first strand in the argument carries the day.

70. The second line of argument relies on the proposition that an unused trade mark is liable to be revoked and cannot be used to oppose the registration of a competing sign. Mr Hobbs also argued that it made no sense for the law to insist upon actual use of the registered trade mark in order to maintain its validity on the one hand, and yet to prohibit its use vis-à-vis consumers on the other.

71. It is true that, in normal circumstances, EU law insists on actual genuine use of the registered trade mark in order to maintain its validity. We were shown many examples, of which one will suffice to make the point. In (Case C-40/01) *Ansul BV v Ajax Brandbeveiliging BV* [2005] Ch 97 Advocate General Ruiz-Jarabo Colomer said at [41] that it was obvious that "trade marks exist in order to be used" and continued at [42]:

> "Trade mark registers cannot simply be repositories for signs hidden away, lying in wait for the moment when an unsuspecting party might attempt to put them to use, only then to be brandished with an intent that is at best speculative. The opposite is true: they must faithfully reflect the reality of indications used by undertakings in the market to distinguish their goods and services. Only marks that are used in commercial life should be registered by offices with responsibility for industrial property matters. As the Commission says in its written observations, "defensive" and "strategic" registrations must be refused."

72. Neither the TMD nor the CTMR specify what amounts to relevant use or non-use. In (Case C-409/12) *Backaldrin Österreich The Kornspitz Company GmbH v Pfahnl Backmittel GmbH* [2014] ETMR 30 the CJEU held that the perception of a trade mark among consumers is likely to be decisive, although depending on the trade the perception of those in the trade, such as intermediaries, may also be relevant. In (Case C-495/07) *Silberquelle GmbH v Maselli-Strikmode GmbH* [2009] ETMR 28 the proprietor owned a mark registered for a number of classes. It applied the mark to goods in one of those classes which were given away as promotional gifts on the sale of goods in a different class. The court held that such use did not fulfil the essential function of a trade mark which was "to create or preserve an outlet for the goods or services that bear the sign of which it is composed". Thus the court said at [19] that the rights conferred by a registered mark in relation to a particular class of goods or services could only be maintained "where that mark has been used on the market for goods or services belonging to that class."

73. The Tobacco Appellants also relied on the decision of the CJEU in (Case C-234/06P) *Il Ponte Finanziaria Spa v OHIM* [2008] ETMR 242. The appellants in that case had opposed registration of a CTM on the ground that it was likely to cause confusion

with an earlier registered mark which they owned. However, the earlier mark had not in fact been put to genuine use. Rather, it was one of a series of marks one other of which had been put to genuine use. Italian law permitted a registration to be maintained if the proprietor was also the proprietor of one or more similar marks at least one of which had been actually used. The CJEU in effect held that that national provision was incompatible with EU law. At [72] the court pointed out that there is genuine use of a trade mark where it is used in accordance with its essential function which is to guarantee the identity of goods or services; and that token use for the sole purpose of maintaining the registration is not enough. At [88] to [101] the court discussed so-called "defensive marks" and held that such marks were incompatible with EU law. It is pertinent to note, however, that at [102] the court referred to "proper reasons" for non-use, to which we will return.

74. (Case C-445/12P) *Rivella International AG v OHIM* EU:C:2013:826 was another case dealing with genuine use. Rivella was the proprietor of a CTM. It opposed the registration of a mark which, it said, would lead to a likelihood of confusion with its registered CTM. However, Rivella's CTM had not been used within the EU, although it had been used in Switzerland. It relied on the terms of a convention between Germany and Switzerland which predated the CTMR, and which provided that a mark was not liable to revocation in Germany if it had been used in Switzerland. The CJEU held, in effect, that deemed use did not count for the purposes of the CTMR or its predecessor directive. The court pointed out at [48] that the CTMR was an autonomous system which applied independently of any national system. At [49] it referred to the decision in *Il Ponte Finanzaria* outlawing defensive marks and at [52] held that the concept of use of a CTM "is exhaustively and exclusively governed by EU law."

75. The final point to make in this section of our judgment is that the CJEU has held that, so far as CTMs are concerned, genuine use does not require use in the whole of the EU and that in some circumstances even use in a single member state will suffice: (Case C-149/11) *Leno Merken BV v Hagelkruis Beheer BV* [2013] Bus LR 928 at [50].

76. We are, of course, bound by all these decisions. We accept that, all other things being equal, non-use of a trade mark in what Mr Anderson called "consumer-facing situations" will normally lead to the revocation of the mark or the other sanctions laid down in the TMD and the CTMR. However, the bald proposition that non-use in "consumer-facing situations" leads to revocation of a mark or other sanctions is not sustainable either in terms of the CTMR or the TMD.

77. Article 15 of the CTMR says that a CTM which has not been put to genuine use for a period of five years is liable to sanctions "unless there are proper reasons for non-use". Article 51 provides for the revocation of a CTM if it has not been put to genuine use "and there are no proper reasons for non-use". Article 42 deals with opposition to an application for registration based on the existence of an earlier CTM. It provides that an opponent must prove that during the five years preceding the application for registration the earlier CTM has been put to genuine use "or that there are proper reasons for non-use." There are similar provisions in the TMD dealing with sanctions in article 10 ("unless there are proper reasons for non-use") and revocation in article 12 ("and there are no proper reasons for non-use"). Article 11 provides that a trade mark must not be declared invalid on the ground that there is an earlier

conflicting mark if the latter "does not fulfil the requirements of use set out in Article 10 (1)" but the requirements of use in article 10 (1) expressly include proper reasons for non-use. Likewise article 11 (3) envisages that a trade mark may not be successfully invoked in an infringement action if "the trade mark could be revoked under article 12 (1)". But a trade mark cannot be revoked under article 12 (1) if there are proper reasons for non-use.

Proper reasons for non-use

78. So the next question is: what counts as a proper reason for non-use? The starting point here is article 19 (1) of the TRIPs Agreement, the second sentence of which provides:

> "Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark shall be recognized as valid reasons for non-use."

79. The CJEU applied this definition to EU law in (Case C-246/05) *Häupl v Lidl Stiftung & Co KG* [2007] ETMR 61. It said at [55] that:

> "… obstacles having a direct relationship with a trade mark which make its use impossible or unreasonable and which are independent of the will of the proprietor of that mark constitute "proper reasons for non-use" of the mark."

80. On the face of it a legislative prohibition on the use of a trade mark (either a national mark or a CTM) satisfies this definition. The TRIPs Agreement emphatically requires "government requirements" for goods to be recognised as valid reasons for non-use. The Tobacco Appellants counter this by arguing (among other things) that the Regulations are inconsistent with (a) the TRIPS Agreement (b) the TMD and (c) the CTMR. We return to these arguments later. At this stage we are concerned simply with the question of whether the registration of a trade mark gives rise to a positive legal right to use it. We answer that question: "No".

REGISTERED COMMUNITY DESIGNS

81. BAT and Imperial, but not the other Tobacco Appellants, also rely on registered community designs for packaging, of which one example was Imperial's design called "Glide Tec". Community designs are governed by Council Regulation (EC) No 6/2002 on Community Designs ("the CDR"). The CDR covers two types of design: registered and unregistered. In the case of an unregistered design the only right conferred by the CDR is a right to prevent copying. However, in relation to a registered design, the rights are more extensive. They are described by article 19 (1) as follows:

> "A registered Community design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using of a product in which the design

> is incorporated or to which it is applied, or stocking such a product for those purposes."

82. On the face of it this description of the rights conferred on a registered design appears not to be limited to negative rights. The positive rights conferred by a registered design include the right to put on the market a product in which the design is incorporated. Article 1 (3) provides:

> "A Community design shall have a unitary character. It shall have equal effect throughout the Community. It shall not be registered, transferred or surrendered or be the subject of a decision declaring it invalid, nor shall its use be prohibited, save in respect of the whole Community. This principle and its implications shall apply unless otherwise provided in this Regulation."

83. The scope of the protection is given by article 10 (1) which says that:

> "The scope of the protection conferred by a Community design shall include any design which does not produce on the informed user a different overall impression."

84. Article 36(2) lays down that an application for registration must give an indication of the product in which the design is intended to be incorporated, but article 36 (6) goes on to say that the indication does not affect the scope of the protection. So if you register a design for a car you can stop use of the design for a brooch or a cake or a toy, or if you register a textile design you can stop its use on wallpaper, a shirt or a plate: *Green Lane Products Ltd v PMS International Group plc* [2008] EWCA Civ 358; [2008] Bus LR 1468 at [27]. Nor does it matter what size the infringing design is. It can be the same size as the registered design, or much larger or smaller.

85. The argument is that since there is a positive right to use a registered Community design, and since its use cannot be prohibited in part only of the EU, the Regulations are in breach of the CDR.

86. However, in the first place we do not consider that the description of the rights in article 19 (1) can be taken as being an absolute right. For example in (Case C‑488/10) *Celaya Emparanza y Galdos Internacional SA v Proyectos Integrales de Balizamiento SL* the CJEU held that the fact that a design had been registered did not give the holder of the registration the right to use the design in the face of a complaint by the holder of a prior registered design. Although it is subject to all the limitations of a previous consistent statement, we think that Mr Howe in his authorial/editorial capacity is probably right to say in *Russell-Clarke and Howe on Industrial Designs* (9th ed.) at para 2-124 that, compatibly with other forms of intellectual property, a registered Community design gives no more than negative rights. Second, and more importantly, the *use of the design* has not been prohibited in any part of the EU. It has only been prohibited for the *packaging of cigarettes* in part of the EU. BAT is free to use its designs throughout the EU (including the UK) to package anything else.

87. Third, article 96 of the CDR provides:

> "The provisions of this Regulation shall be without prejudice to any provisions of Community law or of the law of the Member States concerned relating to unregistered designs, trade marks or other distinctive signs, patents and utility models, typefaces, civil liability and unfair competition."

88. This article must be interpreted in accordance with Recital (31) which states:

> "This Regulation does not preclude the application to designs protected by Community designs of the industrial property laws or other relevant laws of the Member States, such as those relating to design protection acquired by registration or those relating to unregistered designs, trade marks, patents and utility models, unfair competition or civil liability."

89. In our judgment the "other relevant laws" of the member state, of which examples are given in the remainder of the recital, includeslaws for the protection of public health.

90. We do not, therefore, consider that the Regulations are in breach of the CDR.

A1P1

91. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

92. The European Court of Human Rights ("ECtHR") has repeatedly said that A1P1 contains three related rules. We take as representative the well-known formulation in *Sporrong and Lönnroth v Sweden* (1983) 5 EHHR 35 at [61]:

> "That Article comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."

93. One of the critical distinctions, therefore, is between a deprivation on the one hand and control of use on the other. Plainly one highly relevant factor in considering whether an interference amounts to a deprivation or a control of use is whether the complainant has retained legal title to the possession in question. But even if the complainant has retained legal title the ECtHR has recognised that there can be what it has called a "*de facto* expropriation". The Tobacco Appellants criticised the judge for using the expression "expropriation" rather than deprivation, but since the ECtHR itself uses that expression we do not consider that it is a valid criticism.

94. Mr Anderson relied on the decision of the ECtHR in *Yildirir v Turkey* App No 21482/03. We note from [38] of the court's judgment that it considered that the case law had been summarised in *NA v Turkey* (2007) 45 EHRR 9; and from [39] that it was not in dispute in *Yildirir* that the demolition of the complainant's house amounted to a deprivation. The question of what amounted to a deprivation was not therefore in issue in *Yildirir*. We turn then, to *NA v Turkey*. The complainants in that case had built a hotel with the benefit of certificates from two Turkish ministries. Their title was registered at the Turkish Land Registry. A year later an expert reported that the hotel was part of the coastline and could not be the subject of a registration. In consequence the District Court ordered the cancellation of the registration and the demolition of the hotel. On the face of it, it seems to us to be clear that this was a deprivation because not only was the hotel demolished, but the complainants lost their title to it. The court said at [37]:

> "The Court reiterates that in determining whether there has been a deprivation of possessions within the second "rule", it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether the situation amounted to a *de facto* expropriation."

95. At [39] the court also noted that the complainants were the owners of the property until the registration at the Land Registry was forfeited to the state; so this was a classic case of deprivation. Quite why it was common ground in *Yildirir* that there had been a deprivation even though it appears that title to the land itself remained with the complainant is by no means clear. As we have said it was common ground in *Yildirir* that what had happened did amount to a deprivation, so the court did not need to discuss that issue. Another case of a *de facto* expropriation is that of *Papamichalopoulos v Greece* (1993) 16 EHRR 440. The complainant owned land in Greece for which he had a construction permit. However, without formally divesting him of title, in 1967 the land was transferred to the Greek Navy Fund, which built a naval base and holiday resort for naval officers on the land. The Greek state in effect refused to return use of the land to the complainant and although some offers of alternative land were made, they came to nothing. At [45] the court concluded:

> "The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants *de facto* to

have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions."

96. One part of the test for deprivation as opposed to control of use is whether, following the interference, the complainant has retained any meaningful use of the possession in question. If the answer to that question is "yes" then the interference is unlikely to amount to a *de facto* deprivation or expropriation: *Pine Valley Developments Ltd v Ireland* (1991) 14 EHHR 319 at [56], *Hauer v Land Rheinland-Pfalz* [1980] 3 CMLR 42 at [19]. The rights may lose some of their substance, but provided that they do not disappear it is unlikely that the interference will be treated as a *de facto* expropriation: *Elia Srl v Italy* (2003) 36 EHHR 9 at [56].

97. On the other side of the line, even where the complainant does lose his legal title to the possession in question, that loss does not necessarily amount to a deprivation as opposed to a control of use. In *JA Pye (Oxford) Ltd v United Kingdom* (2008) EHRR 45 the complainant was the owner of land, which had been in the possession of squatters for over twelve years. In consequence, under the system of land registration then in force, it was deemed to hold its registered title on trust for the squatters. (Had the land been unregistered land, title would have been extinguished at the end of that period.) The loss of title was held not to have amounted to a deprivation because it took place under the general law regulating questions of title to land: see [66]. Likewise in *AGOSI v United Kingdom* (1997) 9 EHRR 1 the complainant sold gold coins subject to a retention of title clause. Before title had passed to the buyers they attempted to smuggle the coins into the UK. They were caught and the coins were forfeited. The sellers, who were wholly innocent, complained about the loss of the coins which were still their property. The court held that the prohibition on the importation of gold coins into the UK was a control of use. Since the forfeiture was a measure for the enforcement of that aspect of control of use, it too was a control of use rather than a deprivation. Thus even though the forfeiture of the coins did involve a deprivation of property as far as the sellers were concerned it still fell to be treated under the provisions of A1P1 dealing with control of use.

98. We were also referred to a series of cases which dealt with the removal or cancellation of licences, or the banning of the sale of goods that were vital to the continuing viability of a business. In *Pinnacle Meat Processors v United Kingdom* (1998) 27 EHRR CD 217 the ban in question was a ban on the sale of meat deboned from the heads of cattle, which was introduced following the BSE crisis. Although the complainant was forced out of business, and thus lost its goodwill, the Commission nevertheless treated the interference as a control of use. One of the points that it made was that it was still open to the complainant to use its tangible assets in an alternative business. In *Ian Edgar (Liverpool) Ltd v United Kingdom* (Application 37683/97) the ban was a ban on firearms following the Dunblane massacre. The complainant suffered a large drop in turnover and claimed for the loss of goodwill. Again it was held that this amounted to a control of use rather than a deprivation. In *R (Eastside Cheese) v Secretary of State for Health* [1999] 3 CMLR 123 an order was made prohibiting dealing in cheeses which were thought to be unsafe. The effect of the order was to paralyse two businesses which processed cheeses. The Court of Appeal held that the case should be regarded as a control of use rather than a deprivation of property, not least because the order did not transfer ownership and was made with the object of restraining the use of property in the public interest.

99. The Tobacco Appellants placed most reliance on *Vékony v Hungary* [2015] ECHR 5. The complainant in that case was a shopkeeper. His business was a grocery business but he also sold tobacco products under an excise licence. Hungary introduced a new licensing scheme. The complainant was entitled to apply for a new licence, but he did not get one. In consequence he was forced to stop selling tobacco products with the result that the business was no longer profitable and was wound up. At [29] the court noted that the subject matter of the case was "the statutory cancellation of the applicant's former licence to sell tobacco, instead of which he was not awarded another one in the tender procedure." It went on to say:

> "For the Court, it is hardly conceivable not to regard this licence, once guaranteeing an important share of the applicant's turnover… , as a "possession" for the purposes of Article 1 of Protocol No. 1 … It further recalls that the withdrawal of a licence to carry on business activities amounts to an interference with the right to peaceful enjoyment of possessions as enshrined in Article 1 of Protocol No. 1…. Given the obvious economic interests connecting tobacco retail with the applicant's business in general, the Court is satisfied that the statutory removal of the applicant's long-standing tobacco licence amounted to an interference with his rights under Article 1 of Protocol No. 1… and this notwithstanding the harmful consequences of smoking as facilitated by tobacco retail."

100. However, in the following paragraph it characterised the interference as a control rather than a deprivation. It is true that the court went on to find that Mr Vékony was entitled to compensation but that was because of deficiencies in the process by which the new licences were awarded. We thus accept the submission of Mr Eadie, on behalf of the Secretary of State, that whether the alleged interference is part of a general scheme of regulation is of significance in deciding whether the interference amounts to a deprivation or merely to a control of use.

101. Before considering into which category the Regulations fall it is necessary to consider what use of the trade marks remains available to the Tobacco Appellants following the making of the Regulations.

102. We begin with the CTMs. Subject to the point about the incompatibility of the Regulations with the CTMR, the Tobacco Appellants are free to use their registered CTMs throughout the EU, except in those Member States which have introduced domestic legislation about plain packaging. Apart from the UK, we were told that France has introduced such legislation, and that Ireland is likely to do so. There are at present, therefore, at least 25 Member States in which the CTMs may be used on the packaging of cigarettes. In those circumstances we regard it as unarguable that, even if the CTMs give rise to a positive right to use, the Tobacco Appellants have been deprived of that use for the purposes of A1P1.

103. So far as the national marks are concerned, there has been no formal deprivation in the sense that the marks remain on the register. The negative rights conferred by the registration remain enforceable, and the marks remain capable of sale. The Secretary

of State accepts that these rights are less valuable than they were, but argues that nevertheless they remain of some utility. For example:

i) The negative rights may be used to prevent the use of identical or similar but confusing signs on e-cigarettes;

ii) The negative rights may be used against counterfeiters;

iii) The negative rights may be used against unauthorised parallel importers from outside the EEA.

104. The marks can, in addition, be used at the wholesale level and in trade magazines.

105. In these respects the residual rights and uses are common to all the marks; but in addition the word marks may be used in the typeface permitted by the Regulations in a "consumer-facing" situation. Although the judge was criticised for considering the marks collectively rather than individually, we do not consider that considering them individually would lead to any different conclusion since each of the marks (individually) retains the utility we have described. The Secretary of State also submitted that the Tobacco Appellants cannot have it both ways: when they wish to stress the value of the marks they look to what they say is the underlying reality of how they are used, but when it comes to the question of interference with property they wish to have the marks considered one by one, even though that is not how they are used in reality. We also consider that there is force in that submission. The case law of the ECtHR stresses the need to look at the reality of the situation; and the reality is that the marks are not used individually. We agree with the judge at [747]:

> "In reality in this market the word and figurative marks are used in conjunction with each other to convey a collective message to consumers. In this case in the context of A1P1 it is necessary to consider the use of the property rights in the round and collectively."

106. The Tobacco Appellants argue, no doubt rightly, that the Regulations make these rights far less valuable than they were before. They also argue, again no doubt rightly, that in cases involving smuggling or counterfeiting other agencies (such as HMRC or the police) may take the lead in enforcement. But the fact that there is a residual utility in these negative rights coupled with the retention of legal title means, in our judgment, that it cannot be said that the Tobacco Appellants have been *deprived* of their national marks.

107. The Tobacco Appellants also relied on the goodwill generated by the use of the marks, although Mr Anderson accepted that if his clients did not succeed on the basis of the registered marks, they could not succeed on the basis of goodwill alone. It is not in dispute that marketable goodwill can amount to a possession for the purposes of A1P1. Although the distinction between marketable goodwill and the prospect of earning future income (which does not count as a possession) may be difficult to draw, the legal distinction remains.

108. The difficulty facing the Tobacco Appellants in advancing this line of argument is an evidential one. At [752] to [753] the judge referred to the evidence of Professor Keller

which was relied on by all the Tobacco Appellants below. Professor Keller discussed the concept of branding. At [752] the judge quoted Professor Keller to the following effect:

> "The combined effect of brand elements is far greater than the sum of the individual parts. Perceptually, the various brand elements of a successful brand will combine to create a "gestalt" effect: consumers develop an impression of a brand's identity through the collective contribution of the brand elements."

109. And at [753]:

> "The combined effect of brand elements is critical to the success of a branded product."

110. These quotations give added weight to the judge's conclusions on goodwill at [730]:

> "A difficulty in the present case is that the [Tobacco Appellants] have not particularised their claim for goodwill upon the basis of their individual positions nor, in particular, analysed the goodwill said to be attached to individual marks. The claims were advanced at a high level of generality and there is no supporting documentation or disclosure or evidence to buttress these claims."

111. None of the Tobacco Appellants sought to displace the judge's conclusion on this aspect of the evidence in the hearing before us. In addition, as the Secretary of State pointed out, ever since the ban on the display of tobacco products in shops the brand name (still permitted to be used by use of the word marks) when used orally is likely to have become the dominant feature in maintaining and generating goodwill. We do not consider that the Regulations can be said to have been shown to have deprived any of the Tobacco Appellants of goodwill.

112. Lastly, we turn to the Community registered designs. As we have said they have only been prohibited for the packaging of cigarettes in the UK. In the UK they can be used to package anything else, and in the majority of Member States they may still be used for packaging cigarettes. There is no warrant for concluding that BAT has been deprived of its registered community design.

113. It follows, in our judgment, that the question of whether the interference with the marks and designs requires the payment of compensation in order to avoid a breach of A1P1 falls to be determined on the basis that the Regulations amount to a control of use, not a deprivation. We accept that even if an interference amounts to a control of use rather than a deprivation, it is possible in principle for compensation to be required if the control is sufficiently severe. An illustration of this in the domestic context is *R (Mott) v Environment Agency* [2016] EWCA Civ 564. In practice, however, a requirement for compensation is rare in a case of control of use. The question in each case is one of proportionality: is compensation required in order to achieve a "fair balance" between the public interest pursued and the private property interests affected?

114. In the present case the judge considered the question of compensation on the alternative bases that the Regulations amount to (i) a control of use or (ii) a deprivation. The main thrust of the challenge to his reasoning relates to the second basis and does not now arise for consideration. The judge's reasoning on the basis of control of use is at [791]-[799]. In finding that the Regulations do strike a fair balance in the absence of compensation, he relies primarily on his conclusions in relation to the main proportionality challenge (his ground 5), limiting himself to some additional observations by reference to cases such as *Vékony v Hungary* and *Booker Aquaculture Ltd v Scottish Ministers* (Joined Cases C-20/00 and C-64/00) [2003] ECR I-7411.

115. The judge's conclusions on fair balance in the context of the main issue of proportionality are not the subject of specific challenge, and in a later section of this judgment we uphold his conclusions on those aspects of the main proportionality issue that are the subject of challenge. We see no legal error in the additional observations he makes in relation to A1P1. In short, we consider that he was entitled to conclude that the Regulations strike a fair balance for the purposes of A1P1.

ARTICLE 17 OF THE CHARTER

116. We have quoted article 17 of the Charter at [67] above. We have already rejected the submission that article 17 changes the nature of property rights. It is said, however, that article 17 goes further than A1P1 in protecting the right to possessions because whereas under A1P1 there can be exceptional situations where compensation need not be paid even in the case of a deprivation, under article 17 of the Charter the right to compensation is absolute in the case of a deprivation.

117. Since we have concluded that this case is one of control of use rather than deprivation, this point does not arise.

118. In conjunction with article 17 it is also necessary to consider article 52 of the Charter which provides:

> "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

119. The argument under this head is that even if the Regulations are not a deprivation, they are nevertheless a limitation on the rights and freedoms recognised by the Charter, with the result that any limitation, as well as being proportionate, must respect the "essence of the rights and freedoms". If it does not, then the limitation is contrary to the Charter and unlawful under EU law. The Tobacco Appellants therefore argue that the requirement that any limitation must respect the essence of the rights is a separate legal requirement from the requirement of proportionality. We have been referred, among other cases, to the decision of the CJEU in (Case C-477/14) *Pillbox 38 (UK) Ltd v Secretary of State for Health* [2016] 4 WLR 110. That concerned the

legality of TPD2 which prohibited the advertising of e-cigarettes. At [164] the court held:

> "In so far as Pillbox relies on an interference with the management of its commercial property, including its brand name, it is sufficient to note that Article 20 of Directive 2014/40 in no way hinders the use of its intellectual property in connection with the marketing of its products, with the result that the essence of its property right essentially remains intact. Moreover, for reasons analogous to those set out in paragraphs 109 to 118 of the present judgment, that interference does not exceed the limits of what is appropriate and necessary to achieve the legitimate objectives pursued by Directive 2014/40."

120. The Tobacco Appellants submit that the fact that the court dealt with the "essence" of the right separately from the question of proportionality shows that the two tests are separate and cumulative. They also rely on the observations of Advocate General Geelhoed in *R v Secretary of State for Health ex p British American Tobacco (Investments) Ltd* at [266] where, having described a trade mark right as essentially a right enforceable against infringers, he went on to say:

> "It is only if normal usage is no longer possible as a result of provisions of public law that a situation can arise in which the substance of the right is affected by reason of those provisions."

121. In our judgment this argument fails for a number of reasons. First, as we have explained the *essence* of the right created by registration of a trade mark is a series of negative rights; and those remain in being. The judge made this point at [838]. So far as BAT's registered community designs are concerned, it remains free to use them for the packaging of anything except cigarettes in the UK, and for packaging cigarettes in the majority of Member States. Second, the right to property recognised by the Charter includes the provision that the use of property may be regulated by law in so far as is necessary for the general interest. This is borne out by (Case C-56/13) *Érsekcsanádi Mezőgazdasági Zrt v Bács-Kiskun Megyei Kormányhivatal* [2015] 2 CMLR 12. In that case the lessee of a turkey farm was prevented by an EU Directive from keeping turkeys on the farm because of an outbreak of avian flu not far away. The argument was that article 17 of the Charter (among other articles) required the payment of compensation. The CJEU rejected that argument. Similarly in (Joined Cases C-120/06 P and C-121/06 P) *FIAMM SpA v Council of the European Union* EU:C:2008:98; EU:C:2008:476 the court stated at [183]:

> "With regard, more specifically, to the right to property and the freedom to pursue a trade or profession, the Court has long recognised that they are general principles of Community law, while pointing out however that they do not constitute absolute prerogatives, but must be viewed in relation to their social function. It has thus held that, while the exercise of the right to property and to pursue a trade or profession freely may be restricted, particularly in the context of a common organisation

> of the market, that is on condition that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."

122. The court repeated this in *R v Secretary of State for Health ex p British American Tobacco (Investments) Ltd* at [149]. We do not consider that in the quoted extract from his opinion Advocate General Geelhoed was saying that if "normal use" were to be prohibited the substance of the right *would* be affected; all that he was saying was that it *could* be. In fact the court's decision in that case was that the use of a particular trade mark (e.g. a mark containing the description of a cigarette as "light" or "mild") could lawfully be prohibited. One of the factors that led the court to this conclusion was that tobacco companies could still distinguish their products by other distinctive signs. Since the Regulations permit the use of the word marks, we consider that they do not fall foul of the ruling in *British American Tobacco*. It is also notable that in that case (a) the court considered the question of trade marks in the round, rather than mark by mark; and (b) that whether the restrictions were lawful was treated simply as a question of proportionality.

123. Third, as the judge noted at [825] to [830], rights guaranteed by the Charter may conflict with one another. In such a case the court must balance the relative importance of one right against another in order to achieve a fair balance between the conflicting rights. The CJEU made this clear in (Case C-275/06) *Productores de Musica de Espaňa v Telefonica de Espaňa* [2008] 2 CMLR 17 at [65] to [68]. We see this process at work in *Philip Morris* in the opinion of Advocate General Kokott at [179] and [193] and in the judgment of the court at [152]. In that case it was held that the economic interests of tobacco companies were secondary to the protection of human health whose value is recognised in articles 9, 114 (3) and 168 (1) of the TFEU and article 35 of the Charter.

124. We agree with the judge that the question of whether a restriction such as those under consideration in the present case complies with the Charter is resolved by an assessment of proportionality in the context of the objectives pursued by the impugned measure, the importance of the rights that they affect, and the extent of the interference. The Charter adds nothing material in this respect to the issue of proportionality under A1P1 which we have already considered. Just as he was entitled to find that the Regulations are compatible with A1P1, so too the judge was entitled to find that they are compatible with the Charter.

THE COMMON LAW ISSUE

125. The Tobacco Appellants argued that even if they were not entitled to compensation under A1P1 or article 17 of the Charter, they were nevertheless entitled to compensation at common law. Since the Regulations made no provision for any compensation they were invalid on that ground.

126. In support of this argument the first of the cases on which they relied was *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508. That concerned the requisition under statutory powers of a London hotel for the use of the Royal Flying

Corps during the First World War. The House of Lords held that the statutory provisions did not exclude the Crown's obligation to pay compensation. As Lord Atkinson put it at 542:

> "The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."

127. In *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 the same principle was applied to an order made by virtue of the royal prerogative during the Second World War requiring the deliberate destruction of oil installations and stocks of petrol in Burma in order to prevent them from falling into the hands of the advancing Japanese army. A deliberate destruction of property was held to be tantamount to a taking of property.

128. However, this case is not about the taking or destruction of property, for the reasons that we have explained. It is about control of use. The right to use property in a particular way is not itself property for the purposes of the common law: *Belfast Corporation v OD Cars Ltd* [1960] AC 490, 517 per Viscount Simonds. Thus, for example, the introduction of town planning legislation which prohibits or restricts rights of use falls outside the principle just described: *Belfast Corporation v OD Cars Ltd*, 523-4 per Lord Radcliffe.

129. We therefore agree with the judge (although for slightly different reasons) that the common law does not assist the Tobacco Appellants in their attack on the validity of the Regulations.

THE ALLEGED INCOMPATIBILITY WITH THE CTMR AND THE TMD

130. As mentioned, the TMD has now been recast, and the EUTMR has replaced the CTMR. Although we are required to consider the compatibility of the Regulations with EU law as it now stands, we do not consider that any change of substance has been made which would affect the analysis. We will therefore discuss compatibility, as the judge did, by reference to the CTMR. Although we have already quoted article 1(2) of the CTMR we set it out again for convenience:

> "A Community trade mark shall have a unitary character. It shall have equal effect throughout the Community: it shall not be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be prohibited, save in respect of the whole Community. This principle shall apply unless otherwise provided in this Regulation."

131. The argument for the Tobacco Appellants is that the Regulations are in breach of this article, because they deny the CTMs their unitary character and effect across the EU. Moreover they prohibit use of the CTMs in only one member state thus creating a direct conflict with article 1 (2) which says that the use of a CTM "shall not be prohibited" save in respect of the whole of the EU.

132. The purpose of the unitary character of the CTMs is explained by a number of recitals in the CTMR:

> "(2) It is desirable to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion by completing an internal market which functions properly and offers conditions which are similar to those obtaining in a national market. … For those purposes, trade marks enabling the products and services of undertakings to be distinguished by identical means throughout the entire Community, regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal.
>
> (4) The barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States cannot be removed by approximation of laws. In order to open up unrestricted economic activity in the whole of the internal market for the benefit of undertakings, trade marks should be created which are governed by a uniform Community law directly applicable in all Member States."

133. In *Leno Merken* the court explained at [40]:

> "… it is apparent that the regulation seeks to remove the barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States by enabling undertakings to adapt their activities to the scale of the Community and carry them out without restriction. The Community trade mark thus enables its proprietor to distinguish his goods and services by identical means throughout the entire Community, regardless of frontiers."

134. As the Tobacco Appellants point out they will be forced to use completely different tobacco packaging for the UK from that used in other EU Member States (with the possible exceptions of France and Ireland). They will be prohibited from using a graphic CTM at all on any retail packaging. They will be prohibited from using a word-only CTM on any of their retail packaging, except in the form, including the standardised font and size, prescribed by the Regulations, which is entirely different from the ways in which it can be used in almost all other EU Member States. The Tobacco Appellants also point to regulation 13 which, they say, creates a difference in treatment as between national marks on the one hand and CTMs on the other. The former are protected against revocation on the ground of non-use whereas the latter are not. Moreover, regulation 13 (2) (b) says in terms that:

> "…nothing in, or done in accordance with, these Regulations… amounts to an enactment or rule of law which prohibits the use of a trade mark for the purpose of section 3(4) of [the Trade Marks Act 1994]".

135. It is also argued that regulation 13 (and in particular regulation 13(4) which contains a provision deeming use to have taken place when it has not), is inconsistent with the TMD. The TMD provides for sanctions in the event that there has been no genuine use; and a national provision deeming use to have taken place when it has not must give way to the TMD which has approximated national trade mark law: *Rivella International AG v OHIM* at [51].

136. There are, in our judgment, at least three answers to this point. First, article 110(2) (which we have quoted) entitles a member state to use its civil, administrative or criminal law to prohibit the use of a CTM to the extent that the use of a national trade mark may be prohibited under the law of that member state. It is pertinent to note in this connection that article 110(2) authorises the prohibition of the use of the CTM itself, whether or not the goods or services distinguished by the CTM are prohibited. Mr Hobbs argued that article 110(2) was directed at specific marks rather than classes of marks, but we cannot see any indication in the text of article 110(2) which would support that submission. The Regulations prohibit both CTMs and national marks from being used except in ways permitted by the Regulations. In our judgment this is precisely the kind of measure that article 110(2) permits. So far as the TMD is concerned, it effected an approximation of law rather than a harmonisation; and Recital (7) to the TMD (which we have quoted) left the way open to Member States to apply law other than trade mark law to national marks. Again it is pertinent to note that Recital (7) envisages the application of national law to marks rather than to the underlying goods or services.

137. The Tobacco Appellants next argue that because of the wording of regulation 13(2)(b) use of the national marks has not been prohibited for the purposes of national trade mark law. Thus the Regulations discriminate between national marks and CTMs with the consequence that the Regulations fall outside article 110(2). We consider that this argument has lost all touch with reality. The whole purpose of the Regulations is to prohibit the use of both national marks and CTMs on retail packaging of cigarettes, and that is precisely what the Tobacco Appellants complain about. To suggest that the Regulations do not have this effect is pure Alice in Wonderland. In addition the argument mischaracterises the effect of regulation 13(2)(b). It relates only to section 3 (4) of the Trade Marks Act which deals with grounds on which *registration* of a trade mark may be refused. The Regulations leave the registrations intact and, as we have explained, there are circumstances in which the exercise of the rights conferred on national marks by registration is permitted.

138. Second, we consider that regulation 13 merely makes explicit that which would anyway be implicit, namely that compliance with the Regulations would amount to "proper reasons" for non-use both under the CTMR and the domestic legislation. In addition, the protection given to the national marks is confined to the UK, so that there is no prospect of reliance on the negative rights conferred by registration outside the UK. By contrast the CTMs may be used on retail packaging in almost all other Member States, which in itself will protect them against sanctions for non-use. We pause to note at this point that we were told that there were two brands which are sold exclusively within the UK and that there is no market for them in other Member States. However, it is clear from the jurisprudence of the CJEU that the proprietor of a trade mark need not distort its ordinary commercial activities in order to be able to rely on "proper grounds" for non-use.

139. Third, the judge held at [878] that if there is a legal flaw in the Regulations it lies in regulation 13 which is clearly severable from the rest of the Regulations; and that in that event the remedy would be to strike down regulation 13, leaving the remainder of the Regulations intact. Although regulation 14 was barely touched on in argument, it may be that like reasoning would apply to that regulation too. None of the Tobacco Appellants challenged that reasoning.

ALLEGED INCOMPATIBILITY WITH THE TRIPs AGREEMENT

140. BAT argued that the Regulations are incompatible with the TRIPs Agreement which forms part of the legal order of the EU and by which the UK is independently bound in international law. BAT accepted, however, that an alleged breach of the TRIPs Agreement by the UK was not separately justiciable in the national courts. Rather, the argument was that obligations under the TRIPs Agreement informed the interpretation of other legislation both at EU and national level.

141. In arguing this point for BAT Mr Hobbs emphasised that the TRIPs Agreement requires equal treatment to be given to all trade marks, whatever their form and irrespective of the nature of the goods or services which they serve to distinguish. Word marks must be treated in the same way as graphic marks and vice versa. There is no category of goods recognised by the TRIPs Agreement as "lawful but lethal". Although the sale of lethal products could be banned by legislation, with the result that the mark could in practice not be used, it was not possible to ban the mark alone while leaving the sale of the underlying product intact. Thus it was incompatible with the TRIPs Agreement to discriminate against marks associated with tobacco products by outlawing them except in the very limited circumstances permitted by the Regulations.

142. The following provisions of the TRIPs Agreement are relevant to this issue:

> "*Article 8*
>
> *Principles*
>
> 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
>
> *Article 15*
>
> *Protectable Subject Matter*
>
> 1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be

eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

Article 16

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

Article 17

Exceptions

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Article 19

Requirement of use

> 1. If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.
>
> *Article 20*
>
> *Other Requirements*
>
> The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking."

143. Since the TRIPs Agreement is an international treaty it must be interpreted in accordance with the Vienna Convention on the Law of Treaties. Article 31(3) of that Convention provides that any subsequent agreement between the parties about the interpretation of a treaty must be taken into account. In this regard, the WTO declaration on the TRIPs Agreement known as the Doha Declaration is of importance. It provides:

> "We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health… we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to promote public health."

144. Although the immediate context of the Doha Declaration was the availability of pharmaceutical products, we do not consider that it was confined to that situation. This was made clear by the Punta del Este Declaration, which was made in the specific context of the FCTC, and which says:

> "In the light of the provisions contained in Articles 7 and 8 of the TRIPS Agreement and in the Doha Declaration, Parties may adopt measures to protect public health including regulating the exercise of intellectual property rights in accordance with national public health policies, provided that such measures are consistent with the TRIPS agreement."

145. In any event, even without the Punta del Este Declaration, article 8 of the TRIPs Agreement explicitly permits members to adopt measures necessary to protect public health. We have already referred to the ruling of the WTO Disputes Panel on the complaint by Australia. The Panel's acceptance of the right of a member to pursue public health policies without the need for an exception under the TRIPs Agreement supports our view that the Regulations do not infringe the TRIPs Agreement.

146. Underlying much of BAT's argument on this point was the proposition that the TRIPs Agreement recognises a right to use a trade mark. We have already rejected this argument, not least because article 16 of the TRIPs Agreement itself defines the rights in a negative way; and because the WTO Disputes Panel so ruled. In addition article 19 does not require use as a condition for registration: it begins with the words "*If* use is required", which appears to give members the option not to require use. Mr Hobbs referred to part of the drafting history of the TRIPs Agreement and its predecessors, notably the Paris Convention. As Mr Hobbs pointed out, the principle that the nature of the goods to which the mark is applied should not be an obstacle to registration was formulated to cover cases in which the placing of the goods on the market was itself unlawful. It seems to us that this is another reason why the TRIPs Agreement does not provide for registration of a trade mark to carry with it a positive right to use. How could it, if a mark can be validly registered for goods that cannot be placed on the market? BAT also accepts that the TRIPs Agreement would not in fact be breached by a subsequent ban on the sale of goods for which a mark had already been registered. But if that is so (and we agree that it is) it makes little sense to say that a member cannot control the circumstances in which a mark may be used in a "consumer-facing" situation. Moreover, article 19(2) specifically contemplates that a *trade mark* may not be capable of being used because of "government requirements" for *goods*. This is an entirely general provision which does not entail that the goods themselves must be banned.

147. We also consider that the Secretary of State is correct to say that the Regulations do not prevent registration of a mark by reference to the goods to which it is to be applied. If the mark is distinctive, it may be registered. That is in our view the limit of article 15 and in particular article 15 (4). Nor do we consider that article 17 of the TRIPs Agreement is contravened by the Regulations. The rights conferred by registration are those described in article 16, and the Regulations leave those rights intact.

148. Article 20 deals with encumbrance of the use of a trade mark in the course of trade. However, that only prohibits encumbrances if they are unjustified. Having regard both to article 8 and also to the Doha Declaration, as supplemented by the Punta del Este Declaration, the question whether the restrictions on use laid down by the Regulations are unjustified falls to be considered in the context of proportionality.

149. We do not therefore accept that the Regulations are *a priori* incompatible with the TRIPs Agreement. We therefore agree with the judge's summary of his conclusions about the TRIPs Agreement at [916]. If, contrary to our view, there is a right to use a registered mark conferred by registration, then an interference with its use depends on the proportionality of the interference, which we consider below.

ISSUES OF COMPETENCE

150. The judge gave three reasons for his conclusion that the UK did not act in a way that was outwith its competence (jurisdiction) under EU law in adopting the Regulations and that the Regulations were not therefore *ultra vires*. The first reason (see [909]) is that the Regulations "are primarily and overwhelmingly health measures", and "it is this characteristic that governs legislative competence, not the fact that tangentially or secondarily the Regulations affect international trade and trade marks".

151. His second reason (see [910]) is that, as confirmed in *Philip Morris*, since the power under Article 24(2) TPD related to the internal market and public health, the area was one of shared competence between the EU and Member States.

152. His third reason (see [911] and [913] – [914]) is that he did not accept that, even in an area of exclusive competence, the effect of the decision of the Grand Chamber of the CJEU in (Case C-414/11) *Daiichi Sankyo Co Ltd, Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* [2014] Bus LR 1 *("Daiichi*"), a case concerned with the rules on patentable subject matter in article 27 of the TRIPs Agreement, reversed "the overwhelming conclusion to be drawn from the extensive array of international and EU legislative measures" to which he had referred "which confer upon Member States the competence to restrict trade mark use in furtherance of public health". It therefore remained open to the EU to legislate in the area of the internal market in a manner which impacts upon intellectual property provided that the legislation is consistent with the TRIPs Agreement, and the EU is permitted to exercise its exclusive power by delegating certain measures to Member States, and thus leaving it open to them to decide what to do. He concluded that this is what had happened in TPD2.

153. There are several strands to BAT's appeal based on the lack of competence of the UK Parliament to adopt the Regulations. We have rejected what can be described as the "intellectual property" strand, which proceeds on the basis that the Regulations are incompatible with the TRIPs Agreement at [140] above. We now turn to the other strands.

154. In summary, BAT submitted that the judge should have determined that Member States are precluded by TFEU Article 2(1) and/or Article 2(2) from legislating or adopting legally binding measures having effects upon the availability, scope and use of intellectual property rights of the kind imposed by the UK Regulations. It submitted that the TRIPs Agreement in its entirety falls within the field of the common commercial policy and hence the exclusive competence of the EU under TFEU Article 3(1)(e) within the meaning of TFEU Article 207(1).

155. TFEU Article 2(1) provides:

> "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

156. Article 2(2) provides:

> "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

157. BAT's argument proceeded as follows. The CJEU in *Daiichi* held (see [43], [45]-[48] and [52]-[55]) that the TRIPs Agreement as a whole relates to "commercial aspects of intellectual property" with the result that the Agreement in its entirety now falls within the field of the common commercial policy and hence the exclusive competence of the EU. The fact that the EU is a contracting party to the WTO in its own right necessarily requires fully co-ordinated implementation of the obligations that the TRIPs Agreement prescribes. Where the provisions of the TRIPs Agreement are binding in their entirety upon the EU and its Member States, the effect is to preclude Member States from legislating or adopting legally binding measures having effects upon the availability, scope and use of intellectual property rights of the kind imposed by the Regulations. Accordingly, Member States retain no competence to legislate independently of the EU in relation to the common rules concerning the scope, availability and use of intellectual property rights prescribed by the TRIPs Agreement. BAT's fallback submission was that, even if some national legislative competence could be said to have survived, Article 2(2) cannot be relied on where the matters belong to "fields in large measure covered by" existing EU legislation relating to trade marks and designs.

158. We have concluded that the judge did not err in concluding that the basis of the Regulations is the internal market, which is an area of shared competence between the EU and Member States, that the EU has not "occupied" the entire field, and that BAT is not assisted by the decision in *Daiichi*. There are a number of difficulties with BAT's submissions.

159. The first difficulty is that it is clear that in principle there is shared competence to regulate the internal market. TFEU Article 4(2) provides:

> "Shared competence between the Union and the Member States applies in the following principal areas:
>
> (a) internal market"

160. The second difficulty is that it is clear from *Daiichi* and TFEU Article 207(1) that the common commercial policy applies to "the Union's external action". In *Daiichi,* the Grand Chamber stated at [50] that the common commercial policy "relates to trade with non-member countries, not to trade in the internal market". Also, as the judge noted at [914], TFEU Article 207(6) explicitly provides:

> "The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of

> legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation."

161. It does not follow that because the EU has exercised external competence in relation to the TRIPs Agreement that the internal competences of the Member States have been limited. Neither does it follow that there must be "fully co-ordinated implementation" of the obligations in the TRIPs Agreement simply because the EU is a party to that agreement in its own right. If the EU, as a contracting party, considers it appropriate to leave certain aspects of the obligations to Member States, then it is entitled to do so. We have earlier stated (at [145]) that the TRIPs Agreement itself makes clear that the scope and effect of intellectual property rights may be subject to limitations on grounds of public health.

162. The third difficulty for BAT's position is that it is clear from *Philip Morris* that TFEU Article 114, which provides for the establishment and functioning of the internal market, is a valid basis for Article 24(2) of TPD2 provided it is not given too broad a construction (*Phillip Morris* at [73]-[83]). In *Philip Morris* the CJEU drew a distinction between permitting the introduction by Member States of further requirements in relation to all aspects of the packaging of tobacco products, including those which have been harmonised by the TPD2, and further requirements in respect of matters not harmonised by TPD2. It stated (at [71] – [72]) that the former would amount, in essence, to undermining the harmonisation effected by the TPD2 and such an interpretation would render Article 24(2) incompatible with Article 114, but that permitting further requirements in respect of matters not harmonised by TPD2 would not have this effect. It concluded (at [83]) that an interpretation of Article 24(2) of TPD2 that "permits the Member States to maintain or introduce further requirements solely in relation to aspects of the packaging of tobacco products that are not harmonised by the Directive renders [it] consistent with [A]rticle 114 TFEU", and adopted that interpretation.

163. The CJEU thus adopted an interpretation consistent with different degrees of harmonisation in the TPD2. The question is whether TPD2 has occupied the whole ground so as to remove any competence from Member States. BAT relied on a passage of the opinion of Advocate General Bot in *Scotch Whisky Association v Lord Advocate* (Case C-333/14) [2016] 1 WLR 2283 ("*Scotch Whisky*") at [27]:

> "What is a shared competence by nature can therefore become an exclusive competence by exercise when the EU adopts measures in the relevant area and, accordingly, deprives the Member States of their power to legislate owing to the pre-emptive effect associated with the 'occupation of the ground' by the measures adopted at EU level."

164. Regulations which deal with plain packaging of tobacco products fall squarely within the subject matter of TPD2. But we do not consider that TPD2 has "occupied" the whole ground. Article 24(2) expressly provides that it "does not affect" the right of a Member State to introduce further measures standardising the packaging of cigarettes where this is justified on grounds of public health and thus enables it to do so. TPD2 thus only partially harmonises regulation and law in this area. In relation to packaging, within the interpretation given to article 24(2) by *Philip Morris* to render it compatible with TFEU Article 114, that provision therefore empowers Member States

to escape from the prohibition on restricting free movement in article 24(1). We deal with the Tobacco Appellants' case as to breach of article 24(2) and the Tipping Appellants' case on the impact of article 24 on the legality of restrictions on the appearance of the tobacco product itself and whether regulation 5 falls within the scope of TPD2 in later sections.

165. BAT is not in our view assisted by the passage at [59] of the judgment of the Grand Chamber in *Daiichi* in which it stated:

> "it remains altogether open to the EU, after the entry into force of the TFEU Treaty, to legislate on the subject of intellectual property rights by virtue of competence relating to the field of the internal market."

We observe that BAT's argument that this means that once the EU does legislate on a matter or an area it has "occupied" the field and pre-empted Member States is an argument from silence.

166. In that paragraph the Grand Chamber was dealing with the position of the EU rather than the delimitation of competencies as between the EU and Member States. It was concerned with the need for any EU legislation on intellectual property to comply with the rules concerning the availability, scope and use of the rights in the TRIPs Agreement where the EU is acting pursuant to its powers relating to the internal market, an area of shared competence. The interpretation of [59] for which BAT argues is moreover inconsistent with the passage from [50] which we quoted at [160] above.

167. Furthermore, we do not consider that it follows from the fact that in the context of external action a matter or area is within the exclusive competence of the EU that internally it is not empowered to choose to legislate so as to leave part of that matter or area to Member States. That would be in accordance with the principle of subsidiarity, which aims to guarantee that action is taken at a local level where it proves to be necessary. The area of the internal market is an area of shared competence save where the EU has occupied the field. It would be surprising for the Grand Chamber to have made such a major departure from that established position by implication and without an express statement. We consider that it necessarily follows that if the EU has competence to further legislate in the area of the internal market, to the extent that the EU has not occupied the field, Member States also have competence. There is nothing inconsistent with this conclusion in either *Daiichi* or *Philip Morris*, and indeed both decisions support it. In substance this may not be different to the judge's third reason, although we have not used the term "delegate" which he used at [914]. The term may not be problematic in the precise way the judge used it, i.e. in relation to internal legislation for the internal market, but since the common commercial policy applies to external action, the suggestion that in relation to such action there can be delegation of a power the TFEU gives exclusively to the EU may be inconsistent with the principle that a power should be exercised by the authority upon whom it is conferred: delegatus non potest delegare.

168. We have therefore concluded that the Regulations fall within the shared competence of the EU and Member States because they concern the functioning of the internal

market. To the extent that the EU has not "occupied the ground", the UK is therefore entitled to regulate the packaging of cigarettes. The EU has not "occupied the ground". Article 24(1) and (2) of TPD2 are partially harmonising measures, so that the UK has competence to legislate in so far as it is allowed by Article 24(2) or in so far as the matter falls outside the scope of the TPD2. We consider the provisions in the Regulations relating to plain packaging fall squarely within Article 24(2) and therefore within the competence of the UK.

PROPORTIONALITY

Introduction

169. It is common ground that the Regulations must be justified by reference to the EU principle of proportionality, whether by virtue of article 24(2) of TPD2 or pursuant to the general provisions of article 36 TFEU as a restriction on the free movement of goods. That was the general issue of proportionality addressed by the judge in his grounds 3-5. The focus of this section of our judgment is BAT's appeal against the judge's findings on that issue. The matters discussed are also relevant, however, to the issues of proportionality that arise in the context of A1P1 and article 17 of the Charter, the scope of the TRIPs Agreement and in the context of the Tipping Appellants' challenge to regulation 5. They also cover certain of the points raised in an "overarching" ground of appeal advanced by JTI, which is relied on not as a self-standing ground but as background to JTI's specific grounds of appeal.

170. There is relatively little dispute between the parties as to the relevant legal principles, which it is agreed can be derived primarily from *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2015] 3 WLR 121 ("*Lumsdon*"), *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39, [2014] AC 700 ("*Bank Mellat*"), and *Scotch Whisky*.

171. The judgment in *Scotch Whisky* is particularly important, as an up to date statement by the CJEU of the principles to be applied by a national court. The judgment post-dated the hearing before the judge but was published in time to be taken into account in his judgment. Addressing questions as to the extent of the review of proportionality under article 36 TFEU which the national court must carry out when it examines national legislation in the light of a public health justification, the court stated:

> "52. It must be observed that … it is for the member state to decide on the level of protection of human life and health which they propose to provide, for the purposes of article 36 TFEU, while taking into consideration the requirements of the free movement of goods within the European Union.
>
> 53. Since a prohibition such as that which arises from the national legislation at issue amounts to a derogation from the principle of the free movement of goods, it is for the national authorities to demonstrate that the legislation is consistent with the principle of proportionality, that is to say, that it is necessary in order to achieve the declared objective, and that that objective could not be achieved by prohibitions or

restrictions that are less extensive, or that are less disruptive of trade within the European Union ….

54. In that regard, the reasons which may be invoked by a member state by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that state, and specific evidence substantiating its arguments ….

55. It must however be stated that the burden of proof cannot extend to creating the requirement that, where the competent national authorities adopt national legislation imposing a measure such as the MUP [minimum price per unit of alcohol], they must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions: *Commission v Italian Republic* [2009] All ER (EC) 796, para 66.

56. In that context, it is for the national court called on to review the legality of the national legislation concerned to determine the relevance of the evidence adduced by the competent national authorities in order to determine whether that legislation is compatible with the principle of proportionality. On the basis of that evidence, that court must, in particular, examine objectively whether it may reasonably be concluded from the evidence submitted by the member state concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods.

57. In this case, in the course of such a review, the referring court may take into consideration the possible existence of scientific uncertainty as to the actual and specific effects on the consumption of alcohol or a measure such as the MUP for the purposes of attaining the objective pursued. As Advocate General Bot stated in point 85 of his opinion, the fact that the national legislation provides that the setting of an MUP will expire six years after the entry into force of the 2013 Order, unless the Scottish Parliament decides that it is to continue, is a factor that the referring court may also take into consideration.

…

59. It follows from the foregoing that article 36 TFEU must be interpreted as meaning that, where a national court examines national legislation in the light of the justification relating to the protection of the health and life of humans, under that article, it is bound to examine objectively whether it may reasonably be concluded from the evidence submitted by the member state concerned that the means chosen are appropriate for the

> attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods and of the CMO [common market organisation]."

172. Those principles have been applied recently by the CJEU in (Case C-148/15) *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2016] All ER (D) 174 (Oct).

173. It is also helpful to set out what the CJEU said in *Scotch Whisky* about the date at which compliance with EU law must be assessed, and the evidence to be taken into account:

> "62. It must be stated at the outset the requirements of EU law must be complied with at all relevant times, whether that is the time when a measure is adopted, when it is implemented, or when it is applied to the case in point: *R v Secretary of State for Employment, Ex p Seymour-Smith* (Case C-167/97) [1999] 2 AC 554; [1999] ECR I-623, para 45.
>
> 63. In this case, it is clear that the national court is called on to examine the compatibility of the national legislation at issue with EU law although that legislation is not in force within the national legal order. Consequently, that court is bound to assess the compatibility of that legislation with EU law on the date on which it gives its ruling.
>
> 64. In that assessment, the referring court must take into consideration any relevant information, evidence or other material of which it has knowledge under the conditions laid down by its national law. Such an assessment is all the more necessary in a situation such as that of the main proceedings, where there appears to be scientific uncertainty as to the actual effects of the measures provided for by the national legislation the legality of which is to be reviewed by the referring court."

174. Whilst the judge pointed to the different formulations of the test of proportionality under EU law and ECHR law, the appellants do not suggest that he erred in treating the differences as insignificant for the purposes of the case or in examining proportionality by reference to three broad questions, namely (i) whether the Regulations were suitable or appropriate to achieve the public health objective pursued, (ii) whether they were necessary to achieve that objective or whether there were equally effective but less restrictive alternatives, and (iii) whether they struck a fair balance between the interests of public health and the private property rights of the claimants. There is no dispute as to the legitimacy or importance of the objective of protecting public health, though we should note that a significant aspect of the Secretary of State's case is that the Regulations pursue not just a unitary public health objective but the general and specific objectives to which we have referred above in the section describing the Regulations themselves.

175. Before examining the respects in which the judge is submitted to have fallen into error in his application of the legal principles, we need to set the context for those submissions by giving a fuller account of the relevant parts of his judgment. He divided his consideration of proportionality into sections on appropriateness (ground 3), necessity (ground 4) and fair balance (ground 5). In addition, the conclusions he had reached about the weight to be given to the tobacco companies' evidence (ground 2) fed into his analysis. His exposition of those various grounds takes up a large part of the judgment, with an introductory summary at [18]-[37] and the detailed analysis at [276]-[711]. What follows is a highly digested account, keeping direct quotation and detail to a minimum. Reference can be made to the judgment itself for a fuller understanding of the reasoning.

176. As a preliminary, we should explain the sequence of expert evidence in the case, referring in particular to some of the experts whose evidence features in the appeal submissions. We have already summarised the stages of the process leading to promulgation of the Regulations, including the Stirling Review, the 2012 Consultation, the Chantler Review, the 2014 Consultation and the 2014 Impact Assessment. BAT submitted 11 expert reports in the course of the consultations: they included reports by Professor Viscusi and Mr Dryden. At the time when the claim forms were filed, in May 2015, BAT served its consultation evidence but did not serve any fresh expert evidence, whilst the Philip Morris claimants served a fresh report by Professor Mulligan. In response to the claims, the Secretary of State served reports by Professor Hammond and Professor Chaloupka. This led to second reports from, among others, Professor Viscusi and Mr Dryden on behalf of BAT and from Professor Mulligan on behalf of the Philip Morris claimants. Yet further exchanges followed, from Professor Hammond and Professor Chaloupka on behalf of the Secretary of State and from Professor Viscusi on behalf of BAT.

Green J's judgment

Assessment of the claimants' evidence

177. At [18]-[28] the judge summarises his assessment of the intrinsic value of the claimants' evidence submitted during the consultation and also in the course of the judicial review. He states that a remarkable feature of the FCTC is that it marks out the tobacco companies as entities which have deliberately sought to undermine national health policies. That is based upon the experience of the US courts in litigation in the course of which certain tobacco companies were required to divulge stupendous quantities of internal documentation which has since been placed in the public domain and is searchable on-line. The material shows *inter alia* that the outward facing public statements of those certain tobacco companies are contradicted by their own inward facing private deliberations and analyses. In the circumstances the FCTC requires that contracting states should exercise vigilance when dealing with the tobacco companies and should ensure that they act with accountability and transparency. The conclusions of the WHO and the US courts bear upon the dispute between the Secretary of State and the tobacco companies as to the reliability of the evidence submitted by the tobacco companies. The conclusions from the US courts are so far-reaching and the evidence so compelling that it is not surprising that the WHO concluded that there was an evidence base upon which to found their recommendations to apply vigilance and demand accountability and transparency in their dealings with the tobacco companies.

178. The judge goes on, however, to state that he has not applied any *sui generis* rule which singles out the tobacco companies for particular and adverse treatment. The requirement that experts should act with transparency and accountability is the cornerstone of "best practice" regimes applied by regulators worldwide when seeking to evaluate empirical evidence advanced by companies under investigation. The approach now adopted by the international research community and by regulators represents common sense rules of evaluation. Further, these principles are consistent with the obligations which experts and parties owe to the court and which are required under the Civil Procedure Rules ("the CPR"). The judge states that he has sought to apply these principles to *all* of the evidence before him, from whatever source. The essence of his findings in relation to the tobacco companies' evidence appears in the following passages of his summary:

> "23. … As a generality, the Claimants' evidence *is* largely: not peer reviewed; frequently not tendered with a statement of truth or declaration that complies with the CPR; almost universally prepared without any reference to the internal documentation or data of the tobacco companies themselves; either ignores or airily dismisses the worldwide research and literature base which contradicts evidence tendered by the tobacco industry; and, is frequently unverifiable. I say "largely" because the quality of the evidence submitted to this Court (which included all of that tendered during the consultation) was sometimes of remarkably variable quality. Some of it was wholly untenable and resembled diatribe rather than expert opinion; but some was of high quality, albeit that I am still critical of it, for instance, because it ignores internal documents or was unverifiable.
>
> …
>
> 26. In this case the evidence submitted by the Claimants' experts is not capable of being verified nor its underlying assumptions tested. It has been subjected to sustained criticism by the experts instructed by the Secretary of State and these criticisms extend not only to the substantive conclusions but *especially* to its methodological integrity.
>
> 27. Nonetheless, I endeavoured to conduct an exercise for myself in order to determine whether the methodological criticisms launched at the Claimants' experts were justified. This entailed taking each criticism (for instance that a piece of research was not peer reviewed, or was outside the expert's normal field of competence, or included assumptions which were not backed up with evidence, or which ignored the existing literature base, or which appeared to arrive at a conclusion which ran counter to internal documents of the tobacco companies) and checking its accuracy against the other documents in the voluminous Court file. My conclusion was that, where I was able to conduct a proper cross-check, it was a

> validly made criticism. It is notable that the Claimants have not materially challenged the detailed and highly particularised methodological criticisms made of their expert evidence. Rather they attack the criticism at source, contending that the "best practice" principles advocated by the Secretary of State are irrelevant, misguided or flawed and that accordingly criticisms based upon these principles simply do not strike home.
>
> 28. In my judgment the best practice principles are just that - "best" practice. They are tried and tested across the international scientific, medical, social science, legal and economic communities. These principles fall, neatly, under the broad heading of "transparency" referred to in the FCTC; and they are logical forensic tools to be applied by a Court to evaluate evidence. Applying these standards I have rejected the Claimants' challenge to the manner in which their evidence has been treated."

179. That is developed in the judge's detailed treatment of ground 2, at [276]-[404]. In relation to basic methodological principles, he explains at length the importance of independence, of the process of peer review, of being able to benchmark the claimants' expert opinions against the internal documents generated by the claimants themselves, of addressing the existing literature base, and of transparency and the ability to verify. He examines the Secretary of State's criticisms of the claimants' evidence and finds in particular that Professor Hammond's methodological critique of the claimants' expert evidence should be taken as essentially accurate. He then summarises the claimants' submissions and details their criticisms of evidence relied on by the Secretary of State. At [368]-[376] he sets out his general conclusions, which are reflected in the summary passages we have already quoted. He goes on to examine particular criticisms of the methodologies used by BAT's experts. For that purpose he takes his general conclusions as the starting point; he refers to Professor Hammond's criticisms but makes clear that he has come to his own conclusions about particular pieces of expert evidence relied on by BAT and that his own cross-referencing of Professor Hammond's methodological criticisms substantially bears out the professor's conclusions about methodology. He applies his overall conclusion, at [404], both to the generality of the tobacco companies' expert evidence and to the evidence specifically relied on by BAT.

Proportionality: the appropriateness issue

180. The judge's summary of the issues arising under the head of proportionality is at [29]-[36] of his judgment. He starts by referring to recent decisions of the Supreme Court and CJEU to the effect, as he expresses it, that in relation to proportionality challenges the courts must consider the most up to date evidence and must engage in detail with that evidence, that the actual intensity of review may be variable and may depend upon the margin of appreciation to be afforded to the decision-maker, but that nonetheless the court must form its own conclusion about the evidence, even though the assessment might be of evidence that was not before the original decision-maker. He points to the difficulties arising in a case such as this, where the claimants have

launched a root and branch attack upon the suitability and appropriateness of the Regulations and have adduced a very substantial body of new expert economic, econometric and other evidence concerning the position in Australia which was not considered during the process leading up to the promulgation of the Regulations.

181. The shape of the case before him on the appropriateness issue is set out at [31]-[34] of his judgment. He refers to the claimants' submission that their new evidence is utterly compelling: the evidence relied upon by Parliament was essentially qualitative and "soft", whereas post-implementation of the Australian legislation there is now "hard" evidence of how standardised packaging will actually work in a market which is similar to that of the United Kingdom. Put shortly, the claimants argue that the evidence now generated in Australia proves that measures of this sort will harm but not improve public health and that accordingly the Regulations are neither suitable nor appropriate. They advance a theory which, in very simplified terms, works like this: standardised packaging will by its very nature wipe out the attractiveness of branding. As such all tobacco packaging and products will become uniformly drab. Brand loyalties will in consequence weaken and consumers will "downtrade" to the lower priced products. In further consequence they will, on average, spend less on tobacco products than before. All things being equal, if prices go down demand tends to go up, so that downtrading will lead to an increase in use of tobacco. This increase will not be counterbalanced or netted off by the demand depressing effects of standardised packaging because there is no proper evidence that factors such as the increased saliency of health warnings and/or the reduction in appeal of tobacco packets and products will exert any serious demand depressing effects. As such they will not counteract the stimulant effect on demand of downtrading.

182. The judge then refers to the Secretary of State's contention to the contrary, that standardised packaging will generate modest but significant reductions in prevalence. The Secretary of State relies upon the substantial corpus of qualitative research worldwide conducted over more than two decades which analyses, from a wide variety of perspectives, how different consumers react to different advertising, promotional and branding techniques and he says that this type of evidence is powerful and one directional and that it remains cogent and relevant even in a world where data relating to prevalence and use from Australia is becoming available. The Secretary of State also relies upon quantitative regression analyses conducted by his own instructed experts and by experts instructed by the Australian Government based upon the actual experience in Australia which it is said, and notwithstanding that it is still early days, shows that standardised packaging is working in Australia.

183. The judge explains that the response of the claimants is to adopt three broad lines of attack: (i) they adduce expert evidence which challenges the worldwide qualitative evidence and research base upon the basis that it is simply illogical and adopted flawed and unreliable techniques; (ii) they adduce expert economic evidence to establish that the economic theory of downtrading leading to increased demand is logical and consistent with normal principles of market economics; and (iii) they adduce new quantitative regression analyses to establish that in actual fact their prediction that downtrading would cause demand to increase has been borne out by experience and events in Australia.

184. The summary continues with a statement of the judge's own approach and conclusion on this issue:

> "35. I have reviewed in depth all of the expert evidence in this case. I do not, by any means, refer to all of it in this judgment. I have found that the Secretary of State has adduced ample evidence to support the suitability and appropriateness of the Regulations. I accept that in accordance with internationally accepted best practice the qualitative and quantitative evidence has to be examined as a whole, and in the round. I have found that the econometric regression analyses conducted by the experts instructed by the Secretary of State is consistent and in line with the qualitative evidence and also consistent with a detailed post-implementation review conducted by the Australian Government (2016) which included new quantitative analysis. I reject the submission of the tobacco companies that their evidence is compelling; it is far from such. I accept the thrust of the methodological criticisms levelled by the Secretary of State at the Claimants' evidence, though I emphasise that my conclusion on proportionality is independent of my findings on methodological quality. My core conclusion is that the Secretary of State has simply proven his case and my conclusion about methodological flaws simply reinforces my prima facie conclusion."

185. In the development of his reasoning, at [405]-[649], the judge first outlines the claimants' case that the Secretary of State has failed to discharge the burden of proving that the Regulations are a suitable measure for improving public health. He considers the test to be applied to the evidence and its practical application. He then considers the applicable principles of law and identifies a number of relevant considerations, including the point that health is an area of legislative activity to which immense importance is attached and where decision-makers are habitually accorded a wide margin of appreciation (see [438]-[441]); the prospective nature of the decision-making exercise, in seeking to predict the health outcomes in a future counter-factual market where advertising or branding on packaging and on products is substantially outlawed (see [443]-[445]); the existence of a margin of appreciation in the area of partially harmonised health measures (see [446]-[447]); that the complexity of the economic, social or scientific evaluation feeds into the breadth of the margin of appreciation (see [448]-[449]); the fact that the Regulations were approved by Parliament under the affirmative resolution procedure (see [450]-[454]), picking up a point also made at [149], albeit the force of the point is said to be somewhat diluted by the requirement for the court to assess evidence that was not before the decision maker; the fact that there is to be a mandatory review of the Regulations within 5 years (see [455]-[460]); the absence of objection from the European Commission (see [461]-[463]); the existence of an international consensus that standardised packaging would contribute to enhanced public health (see [464]); and the applicability of what the judge describes as "the precautionary principle" (see [465]-[472]).

186. What follows in the judgment is an analysis of some of the expert evidence. The judge starts with the components of the claimants' economic case (see [473]-[482]). He then explains, at [483]-[488], some of the terminology, including the distinction between "quantitative" evidence (which refers generally to observations and research results expressed in numbers) and "qualitative" evidence (which is based on matters other than numbers, such as surveys or comments of focus groups or reports of human reactions to scientific or psychological experiments). He examines the qualitative evidence relied upon by the Secretary of State, both as to whether there would be "intermediate effects" (i.e. reduced prevalence due to the increased efficacy of health warnings and/or the reduced appeal of packaging) and, if so, whether they would be of sufficient magnitude to offset any negative effects flowing from downtrading. This involves consideration of Professor Hammond's evidence (see [491]-[500]). There is also an account of qualitative evidence from Australia as to the effect of the standardised packaging legislation in that country (see [501]-[508]). The judge then moves to the quantitative evidence relied upon by the Secretary of State, in particular the evidence of Professor Chaloupka, a post-implementation report ("the PIR") prepared by the Government of Australia, and a report by Dr Chipty relied upon in the PIR (see [509]-[534]).

187. The judge turns to the quantitative evidence submitted by the claimants, in particular the regression analyses of Professor Mulligan and Mr Dryden, and the claimants' critique of the PIR and of Dr Chipty's report (see [535]-[560]). He then considers the claimants' criticisms of the Secretary of State's reliance on the pre-existing literature (see [561]-[568]), followed by consideration of the Secretary of State's challenge to the assumptions underpinning the claimants' criticisms of the quantitative evidence relied upon by the Secretary of State (see [569]-[574]). This leads to an analysis of what were alleged by the claimants to have been "hard-edged" errors undermining Professor Chaloupka's own research analysis and his criticisms of Professor Mulligan (see [575]-[584]). The judge makes repeated findings to the effect that the dispute between the experts in this area is not capable of resolution by the court: that, for example, "This is, in my judgment, *par excellence* an area where reasonable experts can disagree" (see [556]); that "it is virtually impossible to say who is right and who is wrong" (see [579]); and that "this is a point over which there is reasonable disagreement between the experts" (see [583]).

188. The judge then moves to the analysis that leads to his conclusion that the Regulations represent an appropriate and suitable means of achieving the legitimate health objective, a conclusion which is expressed to apply both in relation to the evidence upon which Parliament acted and to the up to date evidence before the court (see [587]-[588]). He describes his approach as follows:

> "590. I have adopted the approach of forming a prima facie conclusion about the adequacy of the Defendant's evidence without applying any latitude to the Secretary of State on account of margin of appreciation or any discount to the Claimants' evidence for methodological weaknesses. My approach is thus conservative and favours the Claimants. When I apply factors relevant to margin of appreciation and methodological consideration it will be seen that my *prima facie* conclusions are reinforced."

189. He goes on to say at [591] that the first issue is to consider, "taking all the evidence at face value", whether the Secretary of State has placed before the court sufficient evidence to establish that the Regulations are appropriate and suitable. He finds that the *qualitative* evidence relied upon by the Secretary of State is "cogent, substantial and overwhelmingly one-directional in its conclusion, which is that various types of advertising and branding *are* effective in influencing consumer reactions" (see [592]). As to the Secretary of State's quantitative evidence, he refers to the regression analysis conducted by Professor Chaloupka and to the challenge by Professor Mulligan and Mr Dryden to that evidence, and finds that "the disputes represent reasonable differences between reasonable experts" (see [595]). This leads to the *prima facie* conclusion at [596] that the evidence base clearly establishes that the Regulations are suitable and appropriate as measures designed to achieve the stated objective of reducing prevalence and use of tobacco. He then turns to consider whether this *prima facie* conclusion "is affected by other factors relating to the probative value of the claimants' quantitative evidence and other margin of appreciation factors" (*ibid.*). His consideration of those factors, at [597]-[629], sets out some of the main reasons why in his opinion the claimants' quantitative regression analyses do not have the probative value claimed for them; applies the conclusions he had reached under ground 2 on the relevance of adherence to proper methodological standards; and refers to the considerations he had identified as indicating that he should apply "a relatively broad latitude to the evidence adduced by the Secretary of State".

190. At that point in his judgment the judge makes some observations, under the heading "The limits of judicial decision making", about the process of evidence collection and presentation in cases such as the present (see [630]-[648]). We will come back to those observations later in this judgment.

191. The judge's conclusion on the issue of appropriateness is then expressed as follows:

> "649. The qualitative and quantitative evidence submitted by the Secretary of State during the litigation establishes prima facie a proper basis for demonstrating the suitability and appropriateness of the Regulations. That conclusion is supported and reinforced by my analysis of the Claimants' evidence. The quantitative (econometric) evidence adduced by Professor Mulligan and Mr Dryden was sophisticated and thorough. It does not however serve to exclude the competing quantitative evidence relied upon by the Secretary of State. The Claimants' evidence was not benchmarked against potentially inconsistent internal documents from the Claimant tobacco companies, it had not been through any verification process (whether peer review, or regulatory evaluation, or a pre-hearing process such as that described above), and the assumptions which provided its bedrock were opaque. Furthermore, there are serious doubts as to whether the data which is relied upon is, as yet, sufficiently voluminous or longstanding to be robust and reliable. Ultimately, the disagreements between the experts were no more than reasonable experts disagreeing over the nuts and bolts of the regression analysis. There were no "hard

> edged" errors identified of a type which would lead a Court to conclude that the Secretary of State's quantitative evidence was so flawed that it should be discounted or ignored. My conclusion is further supported by various factors which indicate that a relatively broad margin of appreciation must be applied to Parliament even when viewed through the up to date evidential optic of the proceedings before this Court. For all of the above reasons, and on the basis of the most up to date evidence, I reject the Claimants' submission that the Regulations are disproportionate because the measures are not appropriate or suitable."

Proportionality: the issues of necessity and fair balance

192. In his summary, at [36], the judge states that he has come to similar conclusions in relation to the second and third parts of the proportionality challenge, i.e. necessity and fair balance, as in relation to appropriateness. He says:

> "36. … I reject the submission that there is a less intrusive but equally effective way of addressing the Government's health concerns, namely by an increase in tax, and for this reason the Regulations are a (proverbial) sledgehammer to crack a nut when a nut-cracker would have done and hence unnecessary (Ground 4). I also reject the submission that applying a "*fair balance*" test of proportionality and balancing the public and private interests the Regulations are disproportionate. As to this latter point the submission of the tobacco companies was that there was nothing exceptional about tobacco which was a lawfully marketed product. The companies had a powerful private interest in their property rights (mainly trade marks) which trumped the public interest arising. Counsel for the Secretary of State reformulated the argument as a claim that the tobacco companies had the right to maximize their profits for the benefit of shareholders by promoting a product that shortened lives and caused a health epidemic of colossal proportions and which imposed upon the state a vast financial cost. If one examines the issue purely by comparing the monetary losses the tobacco industry assert that they will incur against the costs which would be saved to the public purse by the Regulations, the balance comes out very clearly indeed on the side of the public purse. Yet it is wrong to view this issue purely in monetised terms alone; there is a significant moral angle which is embedded in the Regulations which is about saving children from a lifetime of addiction, and children and adults from premature death and related suffering and disease. I therefore reject the Claimants' case that the Regulations are disproportionate."

193. The judge's detailed reasoning on the issue of necessity is at [650]-[679]. He starts by describing the claimants' submissions, observing at [657] that he has had some difficulty in assessing this ground of challenge: the claimants initially pointed to a

range of possible control measures which it was said were all equally effective but less restrictive; the Philip Morris claimants in their written submission on behalf of the claimants as a whole abandoned any reliance on measures other than tax; but BAT maintained its initial broad position and contended that in addition to tax, numerous alternatives would be equally effective but less restrictive, including increasing the minimum age at which people can buy tobacco, educational campaigns and improved health warnings. In relation to none of the submissions had much if anything by way of supporting evidence been adduced.

194. At [659]-[665] the judge considers the law, referring in particular to passages in the judgments of the CJEU in *Scotch Whisky* and of the Supreme Court in *Lumsdon*.

195. At [666]-[679] he sets out his analysis and conclusions. He gives a series of reasons why in his view the claimants' argument does not succeed. He refers to "the absence of quantitative or indeed any evidence as to the actual level of tax increase that the claimants submit would be sufficient to achieve the objective of standardised packaging", expressing the view that the claimants' argument amounts to mere assertion. He notes the linkage between excise duty increases and the incentive for duty unpaid products to be imported, but he states that the claimants have conducted no material analysis or evidence of the impact on illicit trade of a significant further rise in excise duty. He points to a core tenet of the FCTC that contracting states should use a range of different measures to attack tobacco supply and demand from all angles; that tobacco control policies should be comprehensive. He observes that one aspect of the justification for standardised packaging is the removal of health inequalities and that using tax as the sole or dominant method of control risks placing a disproportionate burden on the socially and financially disadvantaged, whereas standardised packaging does not have this financial effect. Under the heading of consistency with international law, he states that the FCTC specifically identifies advertising on packaging and products as causative of a health risk, with no hint of a suggestion that the same suppressive effect as an advertising ban could or should be achieved through tax. He states that if, as was accepted, the precise effect of the Regulations is not quantifiable, then it is impossible to modulate tax so as to achieve the same effect, and that all that could be done is "to err on the side of caution and impose a tax increase which was of a magnitude which would safely exceed any possible effect of the Regulations", but this risks being a blunt instrument and "highlights why tax and advertising restrictions are part of a complementary suite of measures rather than substitutes for each other". He says that no evidence has been adduced to support BAT's assertion that other measures would suffice. He indicates that it is not possible to analyse relative restrictiveness, stating that in the light of the fact that the core objection of the claimants concerns the impact upon their property rights and their ability to use those to maximise profit, "it is hard to see how a tax which reduces the profits of the tobacco companies is more or less restrictive than advertising restrictions which achieve the same end". He refers finally to the margin of appreciation, stating that in *Scotch Whisky* the CJEU did not say how the margin of appreciation translated into an actual test but had wrapped everything up in a test of objective reasonableness, which the judge says he has applied. He concludes:

> "679. For all of these reasons I do not accept this ground of challenge. In my judgment, objectively, Parliament acted reasonably in concluding that there was no equally effective

> less restrictive measure which met the aims and objectives of standardised packaging and that conclusion still holds true in these proceedings."

196. The judge's detailed reasoning on the issue of fair balance is at [680]-[711]. He states that he must balance the interests of the claimants with those invoked by the State. As to the latter, the protection of public health is recognised in law as one of the highest of all public interests that can be prayed in aid, and the unchallenged facts about the specific adverse health consequences of tobacco consumption place the suppression of tobacco usage towards the top end of the public health category. To be set against this are the rights of the tobacco manufacturers in their trade marks and other property rights to use those rights to promote the consumption of tobacco, their bottom line interest being profit. The judge examines the financial figures in the 2014 Impact Assessment and the claimants' expert evidence as to the losses the tobacco companies are likely to sustain. He refers in addition to non-monetary factors relating to quality of life. He concludes:

> "708. It would in my view be wrong to ignore these significant non-monetary factors which must also be placed on the scales. Since the Claimants' interest is essentially a money interest it can be said, with confidence, that the balance lies heavily in favour of the state. But had it been more finely balanced I would have attributed significant weight to these non-monetised considerations.
>
> …
>
> 711. In my judgment the application of an overall proportionality/"fair balance test leads, overwhelmingly, to the conclusion that the Regulations are justified and proportionate in the public interest."

The grounds of appeal against the judge's conclusions

197. The case advanced by BAT is that in conducting the proportionality exercise the judge fell into error in the following respects, which are relied on individually or cumulatively as establishing that the judge's conclusion on proportionality cannot stand:

i) in failing to assess the proportionality of the Regulations from the correct intellectual property standpoint;

ii) in discounting, downgrading or disregarding the claimants' expert evidence, and applying different standards to the evidence submitted by the claimants and the Secretary of State, including:

a) wrongly carrying through a misunderstanding of the construction and effect of the FCTC and its guidelines; and

b) unfairly relying on the comments of the US District Court judge in *United States of America (and Tobacco-Free Kids Action Fund et Ors, Intervening) v Philip Morris USA Inc et al* ("the US Judgment");

iii) in applying the precautionary principle at all, alternatively wrongly;

iv) in misunderstanding the limits of a margin of appreciation approach, if applicable at all;

v) in failing properly to analyse the question of "incremental benefits" and alternatives to standardised packaging; and

vi) in applying the wrong proportionality analysis and assessment to the empirical evidence emanating from Australia.

198. When examining those grounds of challenge it is important to keep in mind that the assessment of proportionality was an evaluative exercise on the part of the first instance judge and that the function of this court on appeal is to review the judge's decision, not to make our own independent evaluation. An appellate court will be extremely slow to interfere with the conclusions of a first instance judge in relation to an issue of this kind unless they are shown to be vitiated by error of law. All this was acknowledged by counsel for BAT, who took the position that each of the points advanced on the appeal in respect of proportionality involves legal error on the part of the judge.

199. We will examine each of BAT's points (i) to (vi) in turn, before making some additional comments on the judge's observations about the procedure to be followed in cases of this kind.

(i) Assessment from the correct intellectual property perspective

200. The argument for BAT under this heading was advanced by Mr Hobbs and was by way of cross-over from his submissions on the trade mark issues considered above. It was to the effect that if, contrary to his primary submissions, it is open to a member state to impose limitations upon the tobacco companies' use of their intellectual property rights, full and proper effect must be given to article 52(1) of the Charter and article 8(1) of the TRIPs Agreement when assessing the proportionality of any such limitations. Article 52(1) of the Charter, which we have already quoted in full at [118] above, provides that such limitations must "respect the essence" of the rights and may be made "only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". Article 8(1) of the TRIPs Agreement, also quoted in full at [142] above, provides that the parties "may adopt measures necessary to protect public health and nutrition … provided that such measures are consistent with the provisions of this Agreement". It is submitted that those provisions must be read together and that if the judge had given full and proper effect to them he would have found that the Regulations failed the test for proportionality under them. It is further submitted that any assessment of proportionality must be made upon the footing that the tobacco products themselves are entirely lawful, that from the perspective of EU law the FCTC is not intended to create a competition-free market for tobacco products, and

that trade mark rights are an essential element in the system of undistorted competition which the TFEU seeks to establish and maintain.

201. In our judgment, that line of argument gets the Tobacco Appellants nowhere. In previous sections we have rejected the Tobacco Appellants' case that the Regulations fail to respect the essence of their intellectual property rights and that they are inconsistent with the provisions of the TRIPs Agreement. Neither article 52(1) of the Charter nor article 8(1) of the TRIPs Agreement requires the principle of proportionality to be applied otherwise than in the normal way. Each of them allows limitations to be imposed where necessary for the protection of public health. The judge was entitled to place the weight he did on the public health objectives of the Regulations: his approach was in line with the high level of human health protection provided for in EU law (see, for example, *Philip Morris* at [60]-[61] and [153]-[157]). He gave detailed consideration to the necessity test: separate criticisms of his approach to that issue are considered below. He understood and took properly into account the impact of the Regulations on the Tobacco Appellants' use of their intellectual property rights, whilst at the same time recognising the insignificant effect this would have on competition between them: as he put it at [2], "The manufacturers can still place the brand name and variant name upon the box and in this way they can still communicate their identities to consumers and differentiate themselves from their competitors". In short, we see nothing in his analysis of proportionality to support the contention that he approached it from an incorrect intellectual property perspective.

(ii) The judge's approach to the evidence

202. There are several strands to the argument under this heading, as set out in BAT's skeleton argument and developed orally by Mr Pleming. The essence of the case is that the judge wrongly disregarded or marginalised the expert evidence placed before the court by the claimants.

203. The first point to consider concerns the judge's references to article 5(3) of the FCTC and the related guidelines. Article 5(3) provides that in setting and implementing their public health policies with respect to tobacco control, "Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law". The guidelines on it include a recommendation to "Require that information provided by the tobacco industry be transparent and accurate". The surrounding context and further detail are set out by the judge at [168]-[175]. For example, at [170] he states that the guidelines "take as their starting point what may fairly be described as an expression of profound distrust about the motives of the tobacco industry in their submissions to Government about health and environmental issues relating to tobacco".

204. BAT picks out two passages in the judgment below as showing that the judge was misled by article 5(3) and the guidelines into failing to give fair consideration to the claimants' evidence and to apply the correct weight to that evidence. The passages are these:

> "280. The question of the intrinsic quality of the evidence is a fundamental one, not least because of Article 5(3) FCTC and the WHO guidelines … to the effect that the tobacco industry should be treated as having adopted a deliberate policy of

> subverting public health policy through, *inter alia*, the deployment of its substantial capital and organisational resources to generate evidence designed to contradict the established policy consensus. The premise behind art.5(3) FCTC is that, to put the point in unvarnished form, this evidence is unreliable, i.e. false."
>
> "331. … I should add a few observations about the principle of "transparency" endorsed in the FCTC and Guidance. Article 5(3) FCTC and the Guidelines appear to be unique in international law. No one has identified any other Treaty or Convention which adjudges an entire industry to be guilty of subverting the public interest and which sets out an international consensus that the evidential output of that industry should be treated with the greatest circumspection and that contracting states should ensure transparency and accountability in all of their dealings with tobacco companies …."

The gist of the criticism of those passages is that article 5(3) and the guidelines (which in any event contain only non-binding policy recommendations) say nothing about the "intrinsic quality" of evidence produced by the tobacco industry or by researchers sponsored or otherwise affiliated to the industry; let alone do they require national decision-makers (including the courts) to treat such evidence with the greatest circumspection or as unreliable or false.

205. We do not accept that the judge fell into any legal error in relation to article 5(3) of the FCTC or the guidelines. He was entitled to treat them as telling in favour of subjecting the evidence of the tobacco companies to rigorous scrutiny. In any event, however, they did not cause him to disregard or marginalise the claimants' evidence. He makes clear in his judgment that he has reviewed *all* the expert evidence in the case and that he has done so by reference to methodological principles recognised internationally as "best practice"; he has not applied any *sui generis* rule which singles out the tobacco companies for particular and adverse treatment, but has applied the same principles of best practice to the Secretary of State's evidence as to the claimants' evidence. Moreover, his findings as to best practice are not dependent on what is said in the FCTC. Separate criticisms of his approach are considered below; but in so far as the criticism concerns his use of the FCTC and the guidelines, we reject it.

206. Similar considerations apply to the judge's use of the US Judgment. It is true that he makes repeated reference to it, in particular as supporting what is said in the FCTC about the tobacco companies having set out deliberately to subvert attempts by government to curb tobacco use and promote public health and as showing the importance of cross-reference to the internal documentation of the tobacco companies. BAT complains that no submissions were made or invited in relation to the US Judgment; that it was not even included in the bundle of authorities; and that if submissions had been solicited by the judge, BAT would have explained that the judgment did not address the issues before the judge, that the parties were not the same as in the present case (save for British American Tobacco (Investments) Limited, which was ultimately released from the US proceedings), that the UK is a

different market with a different regulatory regime, and that the judgment covered a different time period from that at issue in the present case. JTI makes similar criticisms as part of its "overarching" ground of appeal.

207. We see no force in any of those criticisms. The US Judgment may not have been included in the bundle of authorities but it had been referred to and commented on in the expert evidence (see, for example, paragraph 6.9 of the Chantler Review, quoted by the judge at [113], and paragraph 6.2.10 of Professor Hammond's first report). Its findings were in line with the conclusions reached by the WHO, and reflected in the FCTC and the guidelines, on the basis of the vast quantity of internal documentation disclosed in various US court proceedings (see, for example, Green J at [300]-[310]). In the circumstances, the judge was plainly entitled not just to refer to the US Judgment but to deploy it more extensively than the parties had done in argument. Procedural fairness did not require him to invite specific submissions on it. Moreover, the points that BAT says it would have made if submissions had been invited do not go to the heart of the judge's use of the judgment, and we are satisfied that an opportunity to make such submissions would not have affected his essential reasoning or the conclusions he reached.

208. In introducing its further submissions under this heading, BAT makes clear in its skeleton argument that it does not seek to reopen to this court the volumes of expert evidence submitted in the course of the 2012 and 2014 consultations or introduced into evidence during the judicial review proceedings, but that it seeks instead to identify specific failings which are said to demonstrate that the judge's proportionality conclusions are unreliable and should be set aside. In summary, it is contended that the judge (a) disregarded important expert evidence from BAT which should have demonstrated to his satisfaction that the Secretary of State had failed to discharge the burden of proof that standardised packaging would be likely to achieve a reduction in tobacco consumption and prevalence that could not be achieved by less restrictive means; and (b) applied different standards so that the expert evidence upon which the Secretary of State primarily relied was given considerable weight and accepted although not independent, not peer reviewed and not compliant with the CPR, whereas BAT's evidence attracting the same or similar criticisms was dismissed or given little or no weight.

209. In support of the contention that the judge wrongly disregarded important expert evidence, BAT places particular emphasis, both in its skeleton argument and in Mr Pleming's oral submissions, on the judge's treatment of the evidence of Professor Viscusi. The point arises in this way:

    i) Professor Viscusi's first report was one of many reports submitted by BAT to the Secretary of State in response to the 2014 Consultation. It was the subject of heavy criticism by Professor Hammond in a section of his extensive first report, served by the Secretary of State in September 2015 in response to the judicial review claims. Another section of Professor Hammond's report examined the evidence on the impact of standardised packaging in Australia, making reference *inter alia* to studies that relied on the Cancer Institute's Tobacco Tracking Survey ("CITTS") and the National Tobacco Plain Packaging Tracking Survey ("NTPPTS"). In October 2015 Professor Viscusi produced a second report, which reviewed the CITTS and NTPPTS data then available, critiqued studies relying on those data and other post-

implementation studies referred to by Professor Hammond (and by Professor Chaloupka), and responded to specific criticisms in Professor Hammond's first report. In early November 2015 Professor Hammond produced a second report which included trenchant criticisms of Professor Viscusi's analyses of the CITTS and NTPPTS data and took issue with other aspects of Professor Viscusi's second report. This prompted a third report from Professor Viscusi, rejecting Professor Hammond's criticisms, to which Professor Hammond responded in a third report of his own.

ii) In a section of his judgment beginning at [379], the judge summarises some of Professor Hammond's main objections as regards the methodology adopted by BAT's experts. The professor's criticisms of Professor Viscusi are dealt with at [385]-[387]: the essential criticism relates to selective reliance on the evidence. The judge quotes various extracts from Professor Hammond's first report. He ends the passage with this sentence: "For the sake of completeness it is right to record that Professor Viscusi responded to Professor Hammond's criticisms, rejecting them".

iii) It is submitted that the judge's treatment of Professor Viscusi's evidence is unfair and demonstrates that the professor's second and third reports were disregarded or that the evidence was misunderstood or wrongly given no weight. The second and third reports were not addressed at all, save in the single sentence quoted above. One of the judge's general complaints about BAT's experts was the lack of reference to BAT internal documents, but Professor Viscusi was responding to Professor Hammond's reliance on real-world Australian data and could not fairly be criticised for reviewing the data, forming his own expert view on them and reviewing and responding to the studies discussed by Professors Hammond and Chaloupka. Professor Viscusi's evidence was important because, *inter alia*, he addressed the literature base that formed one of the main elements of the qualitative evidence relied on by the Secretary of State; and if the professor's evidence had been accepted, the judge could not have concluded that the Secretary of State's qualitative evidence was "overwhelmingly one-directional in its conclusion" (see [592]).

210. The first question raised by those submissions is whether the judge *disregarded* part of Professor Viscusi's evidence, in particular his second and third reports. The judge stated in terms at [35] that he had reviewed in depth *all* the expert evidence in the case even though he had not by any means referred to all of it in the judgment. In similar vein, when introducing the facts, he stated at [48] that although he had read and absorbed the *totality* of the voluminous material before the court, it had not been necessary to record or refer to it all in the judgment. We have no reason to doubt those statements. It cannot be inferred that because the judge does not discuss or mention particular parts of the evidence, he disregarded that evidence or failed to take it into account. In any event, at the end of [387] the judge does mention Professor Viscusi's response to Professor Hammond's criticisms, thereby showing his awareness of Professor Viscusi's second and third reports; and he makes further express reference to those reports at [604], where he refers to the limitations in the CITTS and NTPPTS data used by Professor Viscusi. The contention that the evidence was disregarded is untenable.

211. The next question is whether the judge misunderstood Professor Viscusi's evidence or wrongly gave it no weight or treated it so unfairly as to justify intervention by an appellate court. As to that, the fact that Professor Viscusi's second and third reports related in part to a review of the CITTS and NTPPTS "real-world" data does not touch the methodological criticisms that Professor Hammond made of Professor Viscusi's first report and adhered to in the subsequent exchanges. The judge said at [403] that he had not simply accepted Professor Hammond's criticisms without verification but had come to his own conclusions as to the applicable best practice standards and the extent to which the BAT evidence matched up to those standards. The judgment does not deal expressly with Professor Hammond's separate and additional criticisms of Professor Viscusi's review of the CITTS and NTPPTS data (see e.g. paragraph 6.23 of Professor Hammond's second report, where he opines that "Professor Viscusi's analyses of the CITTS and NTPPTS data violate the most basic standards of data analysis"), but the judge was plainly not persuaded by Professor Viscusi's evidence. These were all matters for assessment by him. It cannot be concluded that he misunderstood the evidence or that he wrongly gave it no weight or that he treated the evidence unfairly.

212. In addition to complaining about the judge's treatment of Professor Viscusi's evidence, BAT complains that the judge makes no mention of Mr Crookshank's evidence concerning the impact of standardised packaging on illicit trade. Mr Crookshank's evidence consisted of a first report submitted in response to the 2014 Consultation, and a second report served in October 2015 in the judicial review proceedings. The subject of illicit trade was addressed by the judge at several points in his judgment (see e.g. [132]-[133], [261]-[263] and [669]), although he observed that the subject was raised only lightly in the written submissions to the court and that the risk of the Regulations increasing illicit trade was not seriously pursued by the claimants at the oral hearing (see [261] and [609]). It was not necessary for him to refer expressly to Mr Crookshank's reports, and again there is no basis for an inference that he disregarded them or failed to take them into account.

213. We turn to consider the argument that the judge applied different standards to the expert evidence relied on by the Secretary of State from those applied to the expert evidence relied on by BAT. It is put forward as a separate argument but in practice it has some overlap with the matters just considered. It is submitted that whereas the judge downgraded and dismissed BAT's expert evidence on the basis of lack of independence, lack of compliance with CPR Part 35, lack of expertise in smoking behaviour and failure to account for addiction, and lack of peer review, such criticisms applied equally to the Secretary of State's expert evidence. Sir Cyril Chantler, who carried out the Chantler Review, was a retired paediatrician with no claimed expertise in relation to smoking behaviour, addiction, psychology or marketing and his report does not purport to be compliant with the CPR, does not address the impact of addiction on consumer behaviour, and is not peer reviewed. Professor Hammond is an advocate of tobacco control generally and of standardised packaging in particular; his reports in these proceedings are not peer reviewed; and his separate report for the Irish Department of Health, relied on by the Secretary of State, is not compliant with the CPR and does not address the impact of addiction upon consumer behaviour. A study by Pechey and others which was relied on in the 2014 Impact Assessment was based on subjective judgments elicited from experts on tobacco control. The Chipty report, relied on in the Australian PIR, was unverifiable,

did not address the impact of addiction upon consumer behaviour and was neither compliant with the CPR nor peer reviewed.

214. It is further submitted that the Pechey study was the sole basis advanced by the Secretary of State in support of the quantitative assessment of the benefits of standardised packaging but that there is no mention in the judgment of BAT's extensive criticisms of the study, in consultation responses, in its statement of facts and grounds and, for example, in the expert reports of Mr Gibson and Professor Klick and the witness statement of Mr Silva (who obtained information about the interviews undertaken for the purposes of the study). It is submitted that if, as should have been found, the value of the Pechey study was seriously undermined, there was no sound basis for the quantification of alleged benefits in the 2014 Impact Assessment, and Parliament was presented with incomplete information. In this context, BAT also seeks to make much of the point that in July 2013, after the date of the Pechey study, it was stated in a Prime Ministerial statement that "there isn't yet sufficient evidence" for going ahead with standardised packaging.

215. We do not accept that the judge applied differential standards to the evidence. On the contrary, as already mentioned, he stressed at [22]-[23] that he had not singled out the claimants' evidence for particular and adverse treatment but had applied the same "best practice" principles to *all* the evidence before him, from whatever source. The focus of his ground 2 was inevitably the claimants' evidence, since the central issue in that ground was whether the Secretary of State had acted unlawfully by according only "limited weight" to the claimants' evidence during the consultation process. But the judge was well aware of the need to apply the same principles to the Secretary of State's evidence. For example, having referred to Professor Hammond's criticisms of the claimants' evidence, he continued:

> "278. The Claimants have retaliated. They have launched an attack upon the independence of the experts relied upon by the Secretary of State complaining that they are biased because they adhere to the "tobacco control" lobby and, for instance in relation to Professor Hammond, accept substantial research grant money from tobacco control interests. In their written submissions on proportionality in relation to the Pechey Elicitation review (see paragraphs [139]–[142] above) they refer to: "The Pechey Study, which consisted of asking 33 anonymous (but far from impartial) "experts" in anti-tobacco research for their "best guess estimates" of the likely impact of standardised packaging over a two year period from which an average prediction was calculated (the "Pechey Estimate")".

The same paragraph continues by describing the claimants' attack, e.g. in the evidence of Professor Klick, on the methodological best practice rules for research that were held up as the appropriate benchmark by the Secretary of State.

216. There is no reason to believe that the judge failed to take into account whatever specific points were made at the time by the claimants as regards the weight to be given to the Secretary of State's own expert evidence in the light of the best practice principles put forward by the Secretary of State and accepted by the judge. The evaluation of these points was a matter for the judge. We are not persuaded that he

erred in placing the weight he did on the Secretary of State's expert evidence relative to that of the claimants, let alone that his criticisms of the claimants' expert evidence resulted from the application of differential standards.

217. We note, moreover, that in reaching his conclusions on suitability and appropriateness, the judge first took all the evidence at face value, concluding on that basis that the Secretary of State had placed before the court sufficient evidence to discharge the burden of proof, before reinforcing that conclusion by reference to his findings concerning the methodological weaknesses of the claimants' evidence (see [590]-[591]); so that even if BAT's complaint about the application of differential standards to the evidence were well founded, it would not serve to undermine the judge's conclusion.

218. As regards the Pechey study, it will be clear from what we have said above that the absence of express reference to evidence criticising the study does not mean that the judge disregarded such evidence or failed to take it into account. Further, the judgment contains several references to the evidence of Professor Klick (in addition to [278] to which we have just referred, see [355], [392]-[400] and [561]) as well as references to the evidence of Mr Gibson (see [561]) and Mr Silva (see [691]-[698]). Whilst those paragraphs do not address the authors' criticisms of the Pechey study, they do serve to illustrate the judge's awareness of the authors' reports. The evaluation of the evidence was a matter for him. He did not fall into legal error in rejecting the argument that the Pechey study was seriously undermined by the claimants' evidence. We should add that the Prime Ministerial statement as to the insufficiency of evidence in July 2013, i.e. post-Pechey, does not appear to us to give any material assistance to BAT's case.

219. A further aspect of BAT's complaints under this heading is that the judge was wrong to criticise, on grounds of lack of peer review and non-compliance with CPR Part 35, expert evidence which had been submitted by the claimants in response to the 2012 and 2014 consultations and within a tight time-frame. We agree that it was inappropriate to apply CPR Part 35 to expert reports submitted in response to the consultations: that is a point to which we will return in our comments on the judge's observations as to the procedure to be adopted in a case such as this. It may also have been unrealistic to expect that reports prepared within the tight time-frame of a consultation (or indeed that of expedited judicial review proceedings) should themselves be peer reviewed, though the same consideration does not apply to the studies on which such reports were based. But the judge's concerns about the methodological deficiencies of the claimants' evidence went wider than failure to comply with CPR Part 35 or absence of peer review: see e.g. the passage quoted above from [23]-[27] of his judgment. Having regard to those concerns, coupled with the fact that he relied on methodological considerations only as supporting the *prima facie* conclusion he had already reached about the adequacy of the Secretary of State's evidence, we are not persuaded that the point is sufficient to undermine his conclusions.

(iii) The precautionary principle

220. The judge considered the application of the precautionary principle at [465]-[472]. He concluded:

> "472. In my view the precautionary principle applies and it therefore magnifies the margin of appreciation. I can briefly summarise the main reasons: (i) the objective of the measures is public health; (ii) the aim is to reduce the prevalence and use of a product that is recognised at the international law level to be causative of a health epidemic (so the risk of causation is high); (iii) the Secretary of State acknowledges that there are uncertainties about the way in which the Regulations will work in practice and as to their impact but, on balance, considers that, upon the basis of the evidence as it stands the number of young lives saved or improved will be significant and that this societal gain warrants the introduction of the curative measures now rather than later. In such cases the margin of appreciation extends "... not only in choosing an appropriate measure but also in deciding on the level of protection to be given to the public interest in question" (*Lumsdon* (ibid) paragraph [64])."

221. BAT contends that the judge was wrong to apply the precautionary principle at all and/or to apply it in a manner which in BAT's contention operated to widen the margin of appreciation at all stages of the analysis. It is submitted that none of the reasons given by the judge is a good reason for applying the principle. The principle applies only where there is a difference of scientific opinion as to whether particular goods present a risk to human health or the environment; it has no application where there is no uncertainty as to whether the goods present a risk. For a classic statement of its applicability, see (Case C-41/02) *Commission v Netherlands* [2004] ECR I-11397 at [49]-[54]. The mere existence of a public health objective is not sufficient to bring it into play: for example, judgments in (Case C-358/14) *Poland v Parliament and Council*, *Pillbox 38 (UK) Limited* and *Philip Morris* were all handed down on the same date and concerned the same public health measure, TPD2, but the CJEU applied the precautionary principle in only one of them, *Pillbox 38 (UK) Limited*, and did so because it concerned a product in respect of which there remained significant differences of scientific opinion as to the risks presented. Similarly, the fact that the product is recognised to be "causative of a public health epidemic" is not a good reason: if goods are known to present a risk, as in the case of tobacco products, the legislature may intervene on the basis of *prevention* of harm, not on the basis of the precautionary principle. Mere uncertainty as to whether a legislative measure will be effective in restricting products known to present such a risk is not enough: see, for example, the opinion of Advocate General Geelhoed in (Case C-434/02) *Arnold André GmbH & Co KG v Landrat des Kreises Herford* [2004] ECR I-11829, at [95]-[107], and the opinion of Advocate General Szpunar in (Case C-148/15), *Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (Opinion of 2 June 2016) at [69]-[71]. It is submitted that the judge's erroneous application of the precautionary principle fed into each stage of his analysis, rendering it legally unsound. Even where the principle does apply, its effect is to enable the legislature to proceed as if the relevant product does present a risk; it does not fundamentally alter the proportionality analysis applied to test the validity of the ensuing measure. Yet the judge applied it in a haphazard fashion across all assessments falling to be made, widening unjustifiably the Secretary of State's discretion and distorting the judge's review of the Regulations.

222. We accept that in its paradigm application the precautionary principle operates to justify the taking of restrictive action where there is scientific uncertainty as to the existence or extent of the risks at which the action is aimed, not where the risks are known and certain. It is far from clear to us, however, that the principle (or a close equivalent) has no permissible application in a case where the risks are known but there is uncertainty as to whether a measure will be effective in preventing or reducing them. It is true that the Advocate General's opinions in the *Arnold André* and *Deutsche Parkinson* cases tend to support BAT's argument that the principle cannot be applied in that situation. On the other hand, Advocate General Kokott took a different approach in *Philip Morris*. In that case there was no scientific uncertainty about the health risks presented by mentholated tobacco products but there was uncertainty as to how a prohibition on menthol cigarettes would affect consumer habits. It is plain from [155]-[159] of her opinion that the Advocate General considered the precautionary principle to be applicable in those circumstances. The judge refers to that passage at [269] of his judgment, where he also states that the judgment of the CJEU in the case "did not refer to the precautionary principle in terms, but it did refer to the discretion of the EU in terms which are redolent of the precautionary principle". We note too that the CJEU in *Scotch Whisky* stated at [57] that "the referring court may take into consideration the possible existence of scientific uncertainty as to the actual and specific effects on the consumption of alcohol of a measure such as the MUP for the purposes of attaining the objective pursued".

223. It is unnecessary to reach any concluded view on that issue, however, because we are satisfied that even if the judge was wrong to rely on the precautionary principle in the way he did, the error had no material effect on his overall reasoning or his conclusions. We say that for two main reasons. First, the precautionary principle was only one of many factors referred to by the judge as justifying a wide margin of appreciation. We have (at [185] above) already summarised the passage in his judgment, at [438]-[472], in which he set out those factors. Exclusion of reference to the precautionary principle would not have altered the judge's essential reasoning on the margin of appreciation, especially given that the first of his reasons for holding the precautionary principle to apply, namely the public health objective of the measure, echoes his separate and plainly valid point, at [438]-[441], that public health is an area where decision-makers are habitually accorded a wide margin of appreciation.

224. Secondly, as the judge made clear at [590], also quoted above, he reached a *prima facie* conclusion that the Secretary of State's evidence was adequate to establish the suitability and appropriateness of the Regulations without applying any margin of appreciation. His application of the margin of appreciation simply reinforced the *prima facie* conclusion he had already reached on careful examination of that evidence. He would evidently have reached the same conclusion without it.

225. In considering this issue, we have left to one side BAT's separate criticisms of the judge's approach to the margin of appreciation, to which we now turn.

(iv) The margin of appreciation

226. We have referred, in common with the judge, to a "margin of appreciation", but we bear in mind the observations of Lord Mance in *In re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016, at [44] and [54] that the

concept of margin of appreciation, as such, operates at the international rather than the domestic level:

> "At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court …. However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis …."

Referring to that passage, Lord Wilson stated in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250, at [25], that "this court has at last helpfully recognised that the very concept of a "margin of appreciation" is inapt to describe the measure of respect which, albeit of differing width, will always be due from the UK judiciary to the UK legislature".

227. We do not think that the judge's references to a margin of appreciation led him into substantive error. To the extent that he factored in a margin of appreciation (or a "margin of discretion", as he described it at [408] when referring to common ground between the parties), he was in substance attaching appropriate weight to the informed legislative choices of the Secretary of State in laying the draft Regulations before Parliament, and of Parliament in approving them. In any event, as we have already indicated, he brought in the margin of appreciation in relation to the issue of appropriateness only as a factor reinforcing the *prima facie* conclusion he had already reached, after careful examination of the Secretary of State's evidence, that such evidence was adequate to establish that the Regulations were suitable and appropriate to achieve the public health objective pursued. When dealing with the issue of necessity, which we consider under the next heading, he applied a test of objective reasonableness rather than margin of appreciation as such.

228. BAT also takes issue under this heading with what the judge said at [420]-[421] about the approach of the court:

> "420. At base the Court is assessing the reasonableness of the evidence advanced by the State to justify the disputed measure. This is not classic broad brush "*Wednesbury*" reasonableness; it is a rationality challenge the intensity of which is calibrated according to a range of variable policy factors which are context specific but it is a challenge which nonetheless requires detailed judicial engagement with the facts.
>
> 421. The margin of appreciation is not ignored in this process. Factors relevant to it are fed into the assessment of rationality/ reasonableness …."

229. It is submitted that the judge appears thereby to impose an enhanced rationality obstacle for the claimants to overcome and that this is an erroneous approach, akin to applying a test of manifest inappropriateness to the evidence: such a test, in the national court, has the effect either of impermissibly diluting the standard of proof

imposed on the Secretary of State or of reversing the burden of proof. The judge referred to the test of manifest inappropriateness at [448]-[449]. He should have rejected it.

230. On our reading of [448]-[449], however, the judge *did* reject the test of manifest inappropriateness. Having referred to the "manifestly disproportionate" test applied by the CJEU in certain cases, he continued:

> "448. … The Supreme Court in *Lumsdon* was doubtful whether a manifest error approach was proper. There is an inconsistency in the way that the Courts have labelled the test to be applied. As I have explained above in my view, a far more helpful approach is to adopt a fact and context sensitive approach as the Supreme Court in *Lumsdon* recognised was in fact the way to proceed."

231. Furthermore, what the judge said at [420]-[421] was part of a longer passage beginning at [408] in which he considered the test to be applied to the evidence; and it must be read in the context of the passage as a whole. The judge pointed out at [410] that the claimants eschewed any test of manifest inappropriateness. At [412] he noted that he had asked the parties how the court was to be expected to absorb and then process material of the volume and complexity faced by the court in this case, and that this question had resulted in helpful analysis from the parties of how the overarching principles of judicial review translated into practical forensic analysis. The claimants had put the focus on the Australian evidence. He said at [413]-[415] that the claimants were not asking the court to decide what the effect of standardised packaging had in fact been in Australia but were inviting the court to accept Professor Mulligan's quantitative econometric analysis and to reject Professor Chaloupka's quantitative evidence on the basis that it was flawed and the Secretary of State had no reasonable answer to the evidence of Professor Mulligan; that there were certain errors in the analysis and reasoning of Professor Chaloupka that were so obvious as to be "hard edged" and capable of being categorised as such by the court. At [416] he said that the claimants had explained further what they meant by a "hard edged" error of reasoning and had done so in terms which provided a broader set of terms of reference for a judicial review in this area:

> "Our case is that, at the very least, if we have raised a question or identified a flaw which (i) appears to the Court to be reasonable, and (ii) is material to the proportionality of the Regulations, then the Court must require that the Defendant provide a response to that point and must review the reasonableness of that response. If there is no (adequate) response or the response is not reasonable, then the Court must quash the measure. This is what we mean by a hard edged point. Anything less than that is no judicial review at all."

232. The judge stated at [417] that the claimants' approach had much to commend it, at least as a starting point; it reflected the fact that the State had the initial burden of proof; and it also accepted that the court could not be asked to decide the merits or demerits of the underlying dispute save where there were clear and unequivocal black/white, right/wrong answers. He said at [419] that the Secretary of State did not

significantly disagree with that overall approach. This led in to [420]-[421]. Read in its proper context, those paragraphs can be seen not to be introducing an enhanced rationality obstacle or a test of manifest inappropriateness, but to be accepting in substance the approach contended for by the claimants themselves as a practical means of assessing expert evidence of this nature in the context of judicial review. This did not involve any error of law by the judge, and in any event it is not a point about which BAT can properly complain in this appeal. We come back to this point under the next heading, when considering the judge's application of a test of objective reasonableness in relation to the necessity limb of proportionality.

233. The next of BAT's points under this heading concerns the judge's reliance at [464] on "a consensus formed at the broadest of international levels … that standardised packaging *will* contribute to enhanced public health" (the judge's emphasis) as a factor broadening the margin of appreciation. This is said to have been wrong in law (as being inconsistent with *In re Medical Costs for Asbestos Diseases (Wales) Bill*, supra) and in fact.

234. As to the facts, the judge makes clear at [464] that he is referring to the consensus underlying the recommendations in the FCTC guidelines for the adoption of standardised packaging. He says that it is true that the FCTC did not mandate standardised packaging but that the message conveyed by the guidelines is clear: "standardised packaging *is* a positive step in the fight to reduce smoking" (the judge's emphasis). Whether or not he is strictly correct to refer to this as a consensus that standardised packaging *will* contribute to enhanced public health, we see nothing wrong with the broad point he makes by reference to the guidelines. Nor do we find any error of law in his reliance on the consensus underlying the guidelines. As he says in the same paragraph, the CJEU has in its consistent case law attached considerable weight to the views and opinions of the WHO on health issues. In *Philip Morris*, for example, the court states at [111]-[113] that the guidelines are intended to assist the parties in implementing the binding provisions of the FCTC; they are based on the best available scientific evidence and the experience of the parties, and have been adopted by consensus; and they are intended to have a decisive influence on the content of the rules adopted in the area under consideration. BAT's assertion that the judge's conclusion at [464] is inconsistent with *In re Medical Costs for Asbestos Diseases (Wales) Bill* is unparticularised and unpersuasive.

235. In so far as BAT advances under this heading the further and more general contention that the judge failed to give adequate consideration to the evidence before him, or failed to consider it on the basis that the Secretary of State carried the burden of proof, we reject the contention.

(v) Incremental benefits and alternatives

236. BAT's case under this heading concerns the necessity limb of proportionality. As regards relevant principles, BAT emphasises that a measure is disproportionate if a less restrictive measure could have been adopted, provided that it would have attained the objective pursued (*Lumsdon* at [103]; see also *Bank Mellat* at [74]); but it accepts that the burden of proof placed on the state to establish that a measure is necessary does not require it to exclude hypothetical alternatives (*Lumsdon* at [63]) or to prove positively that no other conceivable measure could enable the objective to be attained (*ibid.*, citing Case C-518/06 *European Commission v Italy Republic* [2009] ECR 1-

3491; see also the same citation at [55] of the judgment of the CJEU in *Scotch Whisky*).

237. The argument set out in BAT's skeleton argument is along the following lines. It is submitted that the judge was wrong to accept the Secretary of State's argument that suggested alternatives to standardised packaging were not true *alternatives* but were additional measures that could be adopted as part of the government's comprehensive anti-tobacco strategy, and that the alleged benefits of the Regulations relative to other alternatives did not have to be quantified. The ultimate objective pursued is a reduction in smoking, including youth smoking, and it is no answer to the contention that there are more proportionate or effective means of achieving the objective to say that the alternative does not fall to be considered as an alternative at all but merely as an additional measure. The approach taken by the judge to the comprehensive tobacco control strategy empties the concept of proportionality review of all substance. Further, TPD2 requires that any "further requirements" that may be introduced by Member States must take into account "the high level of protection of human health achieved through this Directive", which is an exercise that can only logically be performed on a case by case basis whereby the incremental benefit to public health of each "further requirement" is assessed against the benefit achieved by TPD2. In addition, by accepting that there were temporal uncertainties in assessing the impact of the Regulations and that the goal was not to reduce smoking by any particular percentage figure (these are references to other parts of the judgment, at [614] and [68] respectively), the judge effectively removed the burden on the Secretary of State to establish that the Regulations would deliver *any* identifiable benefit. The judge erred in concluding that there were no less restrictive measures which met the objectives of standardised packaging. He should have concluded that there were multiple means open to the Secretary of State and Parliament to achieve those objectives.

238. BAT's skeleton argument continues by listing a range of alternatives that it had proposed during the consultation process: more targeted youth education programmes, tax/excise increases, measures to prevent illicit trade, enforcement of existing laws forbidding sales to children, a prohibition on proxy purchasing, more targeted warnings to address any perceived information deficit, and use of existing laws to address claims that particular trade marks or colours on packaging misled consumers. It is said that those alternatives were wrongly dismissed by the judge on the basis that they did not address the specific objectives of the Regulations and that BAT's submissions were not supported by evidence and were mere assertions which did not impose upon the state a burden to disprove them. The burden of proof as to the value and impact of the alternatives identified by BAT lay on the Secretary of State, not BAT. BAT had discharged its burden by identifying them, including the provision of some supporting explanation and reference to research; it did not have to go further and produce evidence to demonstrate that the alternatives would in fact reduce smoking consumption or prevalence or initiation. No one suggested that the identified alternatives were absurd or hypothetical or incapable of having an impact on the objectives of the Regulations. It was for the Secretary of State to demonstrate that the objectives could not be met by one or more of them. He had not done so. The judge ought to have concluded that the Secretary of State had failed to discharge the burden of proving that the Regulations were necessary.

239. In his oral submissions Mr Pleming developed matters in a somewhat different way, whilst not abandoning anything in the skeleton argument. He said that BAT's focus is on tax. He attacked a sentence in the Secretary of State's skeleton argument which corresponds in part to a passage at [671] of the judgment where the judge states:

> "Taxation further does little, or at least far less, to deter new uptake amongst the young, *as yet*, irregular smoker, who will not be spending as much on tobacco but promotion and branding restrictions are targeted at this cohort. Equally, increased taxation does nothing to change attitudes about smoking or to "denormalise" a product which for decades has been perceived as normal" (the judge's emphasis).

Mr Pleming submitted that there is a mass of evidence (see e.g. the guidelines on article 6 of the FCTC, at [1.2], and Professor Mulligan's first report, at [118]) that taxation is an effective method not only for reducing tobacco consumption and prevalence generally but also for reducing initiation among younger smokers, and the judge's analysis should have proceeded on that basis.

240. Other passages in the judgment that attracted specific criticisms from Mr Pleming include the following. The judge states at [662] that "[in] the absence of a sensible case advanced by a party challenging the State's decision the State can confine itself to explaining why in its view the measure it has adopted was necessary". BAT does not disagree but submits that its alternative of taxation *was* a sensible case, supported by evidence. The judge refers at [667] to the absence of a case as to the *level* of any tax increase and finds at [668] that the claimants "have not modelled the relative benefits of any particular measure of tax increase against the benefits of the new advertising regime" and that their argument "amounts to mere assertion". It is submitted that this reasoning is bad. The judge states at [670] that "no WHO contracting state has adopted a tax only policy"; but it was not part of BAT's case that there should be a "tax only" policy without any restrictions on advertising etc. At [673] the judge sets out his view that a tax increase would have to be of a magnitude which would safely exceed any possible effect of the Regulations, which would risk being a blunt instrument "and highlights why tax and advertising restrictions are part of a complementary suite of measures rather than substitutes for each other"; which again fails to treat tax as a true alternative. At [674] the judge wrongly treats other measures put forward by BAT as "mere assertion" which do not impose upon the State a burden to disprove them.

241. We accept that aspects of the judge's reasoning on this issue are not entirely satisfactory, but we think it important to stand back and consider the case from the perspective of what was said in *Scotch Whisky*, by reference to which the judge directed himself and to which Mr Rogers drew particular attention in his submissions on behalf of the Secretary of State on this issue. We have quoted the relevant part of the judgment at the beginning of this section. We note in particular what the court said at [54]-[56], that the reasons invoked by a member state by way of justification of a measure must be accompanied by "appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that state, and specific evidence substantiating its arguments"; that the burden of proof does not extend to proving positively that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions; and that the

national court must "examine objectively whether it may reasonably be concluded from the evidence submitted by the member state concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods". In reaching his conclusion on the issue of necessity, the judge applied the test of objective reasonableness laid down in *Scotch Whisky*. In our judgment, he was correct to do so and he was entitled to reach the conclusion he did in the application of that test.

242. A witness statement of Mr Jeremy Mean (Deputy Director, Tobacco Control, at the Department of Health) sets out at [256]-[292] the consideration given by the government to the various alternatives put forward in the course of the consultations, including tax increases and the other measures relied on by BAT. It refers to the multiple policy objectives pursued by the Regulations: as we have previously explained, those objectives went beyond the "overarching" objective of reducing smoking to the maximum degree in order to improve health, and encompassed a range of specific aims which were substantially the same as the factors listed by Parliament in section 94(4) of the 2014 Act. Mr Mean states:

> "257. Although there are a number of complementary measures available under the other strands of tobacco control, it is the Department's assessment that none of the suggested alternatives, either alone or in combination with one another, are capable of achieving *all* the policy objectives in the same way that standardised packaging of tobacco products is able to achieve them. For this reason, they are not true alternatives to the policy standardising the packaging of tobacco products.
>
> 258. … Many of the suggestions received in consultation responses in respect of alternative measures to standardised packaging policy have or are already being implemented. Although a combination of the other proposed measures, not already being implemented, may address some of the policy objectives for standardised packaging, they cannot be considered 'reasonable alternatives' as none are capable of targeting the particular objectives relating to the promotional effect of tobacco products, particularly on children and young people."

He proceeds to examine each of the various alternatives identified, before concluding at [292] that none of them is capable of achieving *all* of the objectives either at all, or in the same manner and to the same extent as a policy of standardised packaging; and many of them already form part of the UK's "comprehensive tobacco control strategy" and would be regarded as complementary, not alternatives, to a policy of standardised packaging.

243. The judge plainly had this evidence well in mind. His analysis took into account both the general policy and the various specific objectives of the Regulations (see e.g. the language of the passage at [671] criticised by Mr Pleming). We do not accept Mr Pleming's submission that the specific objectives are to be treated simply as the means by which the overarching objective of a reduction in smoking is to be

achieved: effect should properly be given to their separate identification in section 94 of the 2014 Act and in the Secretary of State's account of the policy pursued by the Regulations. The existence of those objectives makes the exercise much more nuanced than allowed for in BAT's submissions; and the existence of evidence that increased taxation discourages smoking, or even that it discourages initiation of smoking by the young, is not enough to get BAT home. The judge was entitled to accept the Secretary of State's evidence that none of the claimed alternatives, including increased taxation, would achieve *all* of the objectives pursued by the Regulations and that they should be regarded instead as complementary measures forming part of a comprehensive tobacco control strategy, an approach supported by the FCTC. The Secretary of State's evidence dealt sufficiently with the case put forward (in fairly general terms) by the claimants as to possible alternatives, and the judge was entitled to find that the Secretary of State had done enough in the circumstances to discharge the burden of proof upon him. We do not accept that the judge's approach emptied the concept of proportionality review of all substance or removed the burden of proof on the Secretary of State. It was in line with the approach laid down in *Scotch Whisky*.

(vi) The Australian evidence

244. The essence of BAT's case under this heading is that the judge applied the wrong test to evidence concerning the empirical data generated in Australia following the implementation of standardised packaging in that country. In particular, there was a serious dispute between, on the one hand, Professor Mulligan and Mr Dryden on behalf of the claimants and, on the other hand, Professor Chaloupka on behalf of the Secretary of State with regard to the use and interpretation of the Australian data. The judge found the dispute to be incapable of resolution, on the basis that it was an area of reasonable disagreement between the experts. BAT contends that this amounted to the erroneous application of a test akin to the "reasonable body of professional opinion" test in the context of medical negligence (see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583 and *Bolitho v City and Hackney Health Authority* [1998] AC 232). It is submitted that the judge should either have resolved the dispute or have held, in the light of the evidence of Professor Mulligan and Mr Dryden, that the Secretary of State had failed to discharge the burden of proof that rested on him.

245. That line of argument is covered in part by what we have said, when considering margin of appreciation, about BAT's argument that the judge imposed an enhanced rationality obstacle for the claimants to overcome. As there explained, it was the claimants themselves who invited the court to approach the expert evidence (with the focus on the Australian evidence) by determining whether the Secretary of State's evidence was flawed by "hard-edged" errors or amounted to a reasonable response to the claimants' evidence. The judge followed that approach. His assessment was that the Secretary of State's evidence was not vitiated by hard-edged errors and that the differences between the experts fell within an area of legitimate disagreement. It followed, in effect, that the Secretary of State's evidence amounted to a reasonable response to the claimants' evidence.

246. In any event we do not accept that the judge's approach involved the erroneous importation of a "reasonable body of professional opinion" test from the context of medical negligence. It was compatible with the general approach of the court in

judicial review (where it is exceptional for the court to be drawn into the resolution of factual disputes, let alone complex disputes between technical experts) and with the particular role of the court in assessing the proportionality of a measure of this kind. It is not in doubt that the court is required to make its own assessment of whether a measure satisfies the proportionality test and that, as Lord Sumption put it in *Bank Mellat* at [20], "the question depends on an exacting analysis of the factual case advanced in defence of the measure". It is also common ground, as previously noted, that the court's assessment is not limited to the evidence before the decision maker but also has to take account of any additional evidence before the court. That is the effect of [63]-[64] of the judgment of the CJEU in *Scotch Whisky*. But the same judgment, at [54]-[59], places the emphasis on assessment of the evidence adduced *by the member state* and an objective examination of whether "it may reasonably be concluded from the evidence submitted by the member state concerned" that the appropriateness and necessity tests are met. We do not read this as in any way excluding consideration of evidence submitted by those opposing the measure: on the contrary, such evidence may help to test the analysis and evidence adduced by the state. But the passage focuses on the evidence adduced by the state and applies a test of objective reasonableness to it. It seems to us that in expressing the matter in that way, the CJEU was not requiring the national court to go so far as to resolve disputes between technical experts. In finding in relation to the Australian evidence that reasonable experts may differ, and factoring that in to his assessment of proportionality, the judge in the present case was adopting an approach that in our view fits well with that laid down in *Scotch Whisky.*

247. In the course of his oral submissions Mr Pleming disavowed any attempt to persuade this court that the judge was wrong in any event not to accept the evidence of Professor Mulligan and Mr Dryden and to reject that of Professor Chaloupka; he put the focus on his submission that the judge had adopted the wrong legal test. That was an entirely realistic position for him to adopt. The assessment of the evidence was a matter for the judge and, as we have said, this court would be extremely slow to interfere with his assessment in the absence of an error of law. We doubt very much, in any event, whether the dispute between the experts with regard to the Australian data could sensibly have been resolved on the basis of the written reports alone. We were told that at a case management conference prior to the hearing of the claims, the Philip Morris claimants made an application for cross-examination of experts, but this was refused by the judge and his refusal was not appealed. BAT itself did not even make an application for cross-examination. It was correct in our view not to pursue the question of cross-examination, but the absence of cross-examination serves to underline the difficulty of determining which of the experts was right and which was wrong in relation to the issues in question.

248. BAT's skeleton argument under this heading advances various other contentions about the qualitative and quantitative evidence relied on by the Secretary of State and taken into account by the judge. Those matters are directed primarily towards elevating the importance of the Australian data and of the judge's treatment of the dispute between the experts on that subject. We think it unnecessary to deal with the detailed points, which are the subject of convincing rebuttal in the Secretary of State's skeleton argument. Suffice it to say that we are not persuaded that the judge erred in relation to any of the matters referred to.

249. In conclusion, we reject the contention that the judge fell into legal error in relation to the Australian evidence and we are satisfied that, on the findings he made in relation to that evidence and the expert evidence as a whole, he was entitled to conclude that the Secretary of State had discharged the burden of proof.

The judge's observations on the limits of judicial decision making

250. As we have already mentioned, the judge interrupted his analysis of the appropriateness issue to make some observations, at [630]-[648], under the heading "The limits of judicial decision making". The first part of his observations concern what he describes as a constitutional point arising out of the requirement on the court to take into account evidence that was not before the decision maker. He states that the approach he has adopted seeks to reconcile the need on the authorities to review the new evidence and form his own judgment on it with the need to pay proper respect to the fact that he is assessing, in a judicial review, the legality of legislation promulgated by a democratically elected Parliament. This is obviously a difficult and sensitive area, though the present case is likely to be exceptional in its character and complexity. We have rejected the specific challenges to the judge's approach and we have focused attention on the guidance given by the judgment of the CJEU in *Scotch Whisky*. We think it unnecessary and unwise to make any further comment on the judge's approach or to seek to provide any more general further guidance.

251. The judge goes on to refer to the problem for the court of coping with complex technical evidence in judicial review proceedings, and to set out a process which in his judgment should be adopted for cases of this kind: it includes early mutual engagement of experts; identification by the experts of areas in dispute and of the materiality of areas of dispute; identification and articulation of reasons for disagreement and the listing of assumptions; identification of evidence relevant to outstanding disputes; articulation of a road map to resolving the dispute; creation of a proper record; compliance with CPR Part 35; case management, judicial supervision and disclosure; cross-examination; and appointment of experts or of assessors to assist the court.

252. Although the judge had the best of intentions in putting forward such a process, we consider that he was unwise to do so and we do not endorse what he says. It is wrong to apply to judicial review, even the rarefied and intensive form of judicial review with which we are here concerned, the kind of procedure that would be appropriate for the resolution of expert disputes in the context of commercial litigation. In particular:

    i) Where expert reports form part of the material taken into account by the primary decision-maker in making the impugned decision (in this case by the Secretary of State and Parliament in making and approving the Regulations), including material that formed the basis of a consultation and material provided by way of response to the consultation, those reports can be placed before the court (subject of course to considerations of relevance) without their having to comply with CPR Part 35. The court can take them into account in the same way as it takes into account any other material before the decision-maker when assessing whether the requirements of proportionality have been met.

ii) If further expert evidence is filed in the judicial review proceedings, such evidence must comply with CPR Part 35 and there may well be scope for identifying and narrowing any disagreements between experts and for assisting the court to digest the evidence and to understand how it bites on the assessment to be made. But it should be clear from what we have said above that in our view the court will not normally need to be drawn into the resolution of technical disputes between experts and that the detailed procedural steps, including cross-examination, that might be required for the resolution of such disputes will not normally be needed.

253. Those comments are intended to make clear our disapproval of the judge's observations, not to replace those observations by a prescriptive code of our own. First instance judges will have to reach their own decisions on the appropriate procedural steps in cases of this kind, having regard to the guidance in *Scotch Whisky* and to the particular features of the case before them.

Conclusion on proportionality

254. Those criticisms of the judge's observations about procedure do not affect our conclusion that, for the reasons given above, BAT's challenge to the judge's conclusion on the general issue of proportionality fails.

255. Our rejection of that challenge feeds into the conclusions set out elsewhere in this judgment concerning the proportionality aspects of the Tobacco Appellants' appeals in respect of A1P1 and article 17 of the Charter, and the Tipping Appellants' appeal in respect of regulation 5.

THE TOBACCO APPELLANTS' CASE UNDER ARTICLE 24(2) OF TPD2

256. Article 24 of TPD2, which we have set out at [18] above, states that the TPD2 "shall not affect" the right of a Member State to maintain or introduce further requirements in relation to the standardisation of the packaging of tobacco products where that is justified taking account of the "high level of protection of human health achieved through this Directive". The issue is whether, in proposing and promulgating the Regulations, the government and Parliament failed properly to take into account this test. The judge held that they did not fail to do so. The Tobacco Appellants submit that they did.

257. There are two limbs to this part of the case. The first concerns the nature of the test under article 24(2). The second concerns the application of the test in this case. As to the test itself, the judge stated (at [892] – [893]) that the duty on Member States to "take into account" the high level of protection provided for by TPD2 "cannot act as a duty to prove with exactitude that TPD2 *will* be effective and/or that standardised packaging measures *will* provide incremental efficacy" because it is a predictive exercise. He considered (at [889] and [891]) that it was impossible for Parliament to know, with any degree of certainty, what the effect of TPD2 would be, and that the Tobacco Appellants' submissions would impose an impossible standard of proof on a Member State which wished to enact measures standardising the packaging of tobacco products. What is required by the term "taking into account the high level of protection" is (see [895]) that the Member State must address itself to the issue and it must factor it into its analysis of the evidence. Member States have a broad margin of

appreciation and the level of the standard of proof must recognise that the exercise is precautionary, predictive and related to public health.

258. As to the application of the test, the judge considered (at [897] – [898], [901]) that the evidence showed that Parliament took TPD2 and the high level of protection under it into account. The 2014 Impact Assessment (which referred to an impact assessment by the European Commission) showed that the legislator took into account the level of protection set out in TPD2 because one of the three options in it was to do nothing and to wait for the introduction and coming into force of TPD2.

259. The Tobacco Appellants submitted that the judge failed to construe article 24(2) in the strict way that is required for a provision that derogates from the right of free movement of goods. Relying on, in particular, the decision in (Case T-198/12) *Germany v Commission* (14 May 2014) which concerned derogation under article 114(4) TFEU, they maintained that it is clear from the language and purpose of article 24(2) and the principle of the effective protection of EU rights that the high level of health protection achieved by the introduction of TPD2-compliant packaging is a mandatory relevant consideration under article 24(2). They argued that it is also clear from article 36 TFEU, read together with article 24(2) TPD2, that there must be evidence that the measures taken by a Member State will achieve a higher level of health protection than that achieved by TPD2.

260. As to the application of the test, the Tobacco Appellants submitted that the judge had erred because the UK's 2014 Impact Assessment and the earlier impact assessment by the European Commission referred to in the UK assessment did not address the relevant questions. The attempt in the 2014 Impact Assessment to compare the health benefits of TPD2 packaging with standardised packaging was fundamentally flawed. They argued this was so because the comparison made was between standardised packaging and pre-TPD2 packaging rather than with TPD2-compliant packaging. Without the proper comparative evidence, the Secretary of State could not discharge his obligation to take into account the high level of protection of health achieved through TPD2. There was no relevant comparative evidence when the Regulations were made. Even if, by the date of the hearing before the judge, such evidence had been provided (which it had not) that could not have cured the defects that existed at the material time.

261. We reject the Tobacco Appellants' submissions. We consider that those concerning the test itself are not consistent with a fair reading of article 24(2) or the decision of the CJEU in *Philip Morris,* and we do not regard the reasoning in *Germany v Commission* as applicable to article 24. Article 24(2) expressly preserves the right of a Member State to maintain or introduce further requirements to those in TPD2 provided they are justified on grounds of public health, are proportionate, and "take account of" the high level of protection of human health achieved through TPD2. For the reasons we give at [163] ff. above, *Philip Morris* makes it clear that article 24 is a partially harmonising measure. The reasoning in *Germany v Commission* is not applicable because it was concerned with article 114. That provision empowers the EU to adopt measures relating to the internal market (see article 114(4) and (5)) but also allows Member States to seek to maintain or introduce measures despite the adoption of a harmonisation measure which "fills the field". It is for this reason that we do not consider that any appropriate analogy can be drawn between article 114 and

the partial harmonisation measure in article 24(2). The judge was correct in refusing to deploy the reasoning in *Germany v Commission* when interpreting article 24(2).

262. We are fortified in our rejection of the submission (e.g. by Mr Anderson, Day 1 page 136, lines 15-17) that "what is necessary is specific evidence on which it may be concluded that plain packaging would achieve health benefits over and above those achieved by TPD2" by the predictive nature of the assessment. We consider that it is unreal and possibly even illogical to maintain that an evidence-based comparison is required to "take into account" the high level of protection of TPD2. We do not find anything in the wording of article 24(2) to suggest that there must be a direct comparative exercise based on specific evidence addressing the relative health benefits of TPD2 packaging and standardised packaging. Indeed, we consider that its language points away from such a construction. As the judge stated (at [889]), the word "maintain" in article 24(2) contemplated such measures which predated TPD2. The fact that, as the judge also stated, the effects of the measures in TPD2 might take quite a long time to become evident after it came into effect also points away from such a construction. There is no suggestion in article 24(2) that the right of a Member State to introduce further requirements is one that will only exist and be exercisable in the future after evidence as to the effect of TPD2 becomes available.

263. We also reject the submission that the Secretary of State's approach to the evidence was flawed. We consider that there was sufficient evidence available to the Secretary of State to conclude that standardised packaging would be more effective than the measures prescribed under TPD2**.** We agree with the judge (at [897]) that "it is evident from, *inter alia*, the terms of the 2014 Impact Assessment that consideration *was* in fact given, at a point of time prior to the promulgation by Parliament, to the existence of the level of protection set out in the TPD" (the judge's emphasis). That assessment was the method which the Secretary of State used to quantify the predictions as to the effect of standardised packaging in the earlier reports, in particular Sir Cyril Chantler's review (see [28(iv)] above) and the Pechey study to which we have referred (see [213]-[214] above). Moreover, considering additional factors does not mean that an expert did not take into account the high level of protection achieved by TPD2.

264. Sir Cyril Chantler had concluded that standardised packaging would result in a modest but important reduction in smoking prevalence. The Tobacco Appellants criticised the use in the 2014 Impact Assessment of Sir Cyril's review on the ground that he had regard to factors which were subsequently banned by TPD2 and that he and the earlier Stirling Review did not compare the post-TPD2 position with the position under plain packaging requirements. We consider that these criticisms and the criticism of the Secretary of State's reliance on the 2014 Impact Assessment are misplaced and flawed. This is because they are based on the premise that the only way to "take into account" the level of protection achieved by TPD2 is to conduct an evidence-based comparison with the measures in the Regulations, which we have rejected. We agree with the judge that that would involve imposing an impossible burden of proof on a Member State.

265. The Tobacco Appellants also criticised the reliance by the Secretary of State on the FCTC guidelines. They argued that it is fanciful to rely on them as specific evidence. As well as proceeding on the premise that we have rejected, that submission overlooks the usefulness of the FCTC guidelines. They explain that one of the

problems is branding on cigarette packaging and presentation of the product. Packaging that complies with TPD2 will retain logos which are branded, whereas standardised packaging will not. Standardised packaging is a way of overcoming the problem of branding. It is therefore wrong to say that the Secretary of State did not consider evidence on the difference between what will be achieved by TPD2 and standardised packs.

266. For these reasons, we reject the criticisms of the judge's approach to the test under article 24(2) and to the evidence in this case. Specific comparative evidence of the impact of TPD2 and the standardised packaging measures under consideration is not required by article 24(2). This is because, when the Secretary of State promulgated the Regulations in 2015, it would be impossible for him to know, with any degree of certainty, what the effect of TPD2 would be. We consider that the judge correctly analysed the evidence taken into account by the Secretary of State and that that evidence shows that the Secretary of State considered the benefits of standardised packaging, which is plainly an aspect of tobacco regulation that is not covered by TPD2.

THE ISSUES RAISED BY THE TIPPING APPELLANTS

267. The Tipping Appellants are producers of the tipping paper that wraps around the filter of a cigarette and joins the filter to what was described as the tobacco rod. The judge summarises the nature of tipping paper and its production at [954]. Regulation 5 of the Regulations restricts the permissible colour of the tipping paper and prohibits all branding save for the identification of the cigarette brand and variant if the conditions in Regulation 5(5) are met.

268. The material parts of Regulation 5 are:

> **"Appearance of cigarettes**
>
> 5.—(1) No person may produce or supply any cigarettes in breach of any of the provisions of this regulation.
> (2) The only colour or shade permitted on or for the paper, casing, filter or other material forming part of a cigarette (apart from the tobacco contained in it) is plain white with a matt finish, but this is subject to the following provisions.
> (3) Any paper or casing that surrounds the end of a cigarette that is not designed to be lit may be coloured in such a way as to imitate cork.
> (4) A cigarette may have text printed on it to identify the brand name and variant name of the cigarette but only if each of the following conditions is met.
> (5) Those conditions are—
>
> (a) that the text appears parallel to, and not more than 38 millimetres from, the end of the cigarette that is not designed to be lit,
> (b) that the text does not contain any character which is not alphabetic, numeric or an ampersand,
> (c) that the first letter of any word is in upper-case type or lower-case type,
> (d) that the rest of any word is in lower-case type,
> (e) that the text is printed in Helvetica type,

(f) that the colour of the text is black,
(g) that the text is in a normal, weighted, regular typeface, and
(h) that the size of the text is no larger than 8 point".

269. The relevant provisions of TPD2 are Articles 13 and 24. Article 13 provides:

> "**Product presentation**
>
> 1. The labelling of unit packets and any outside packaging and the tobacco product itself shall not include any element or feature that:
>
> (a) promotes a tobacco product or encourages its consumption by creating an erroneous impression about its characteristics, health effects, risks or emissions; labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product;
>
> (b) suggests that a particular tobacco product is less harmful than others or aims to reduce the effect of some harmful components of smoke or has vitalising, energetic, healing, rejuvenating, natural, organic properties or has other health or lifestyle benefits;
>
> (c) refers to taste, smell, any flavourings or other additives or the absence thereof;
>
> (d) resembles a food or a cosmetic product;
>
> (e) suggests that a certain tobacco product has improved biodegradability or other environmental advantages.
>
> 2. The unit packets and any outside packaging shall not suggest economic advantages by including printed vouchers, offering discounts, free distribution, two-for-one or other similar offers.
>
> 3. The elements and features that are prohibited pursuant to paragraphs 1 and 2 may include but are not limited to texts, symbols, names, trade marks, figurative or other signs."

270. We have set out Article 24 of TPD2 at [18] above. It is only necessary to state here that Article 24(1) provides that Member States may not prohibit or restrict the placing on the market of tobacco or related products which comply with the Directive but that Article 24(2) provides that the Directive "shall not affect the right of a Member State to maintain or introduce further requirements… in relation to the standardisation of the packaging of tobacco products, where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this directive" provided the measures are proportionate and do not constitute a means of arbitrary discrimination or a disguised restriction on trade.

271. We have considered whether the additional restrictions introduced by the Regulations as to the external packaging of tobacco products are compatible with TPD2 and have concluded that they are. The Tipping Appellants submit that Regulation 5 is unlawful and *ultra vires* TPD2. First, tipping paper is not "packaging" as defined in Article 24(2) of TPD2. Secondly, the field is covered exclusively by TPD2 so that, if cigarettes comply with the appearance requirements in Article 13 of TPD2, further restriction by Member States is prohibited. Alternatively they maintain that Regulation 5 is a disproportionate interference with their rights because the Secretary of State had not produced any evidence that standardising the appearance of cigarettes would have any kind of health benefit by encouraging people to stop smoking. The material before Parliament when it considered the regulation specifically addressed the packaging of tobacco products but not the issue of cigarette design.

272. The judge dealt with the challenge to Regulation 5 at [949]-[999]. In considering the submission that it is *ultra vires* at [966]-[978] of the judgment, he analysed four questions:

i) Whether the purpose of the FCTC includes the suppression of advertising, including trade marks, on the tobacco products themselves;

ii) If so, whether the FCTC's policy was adopted by the EU and is contained in TPD2;

iii) Whether, construed in the light of the legislative purpose, the substantive measures of TPD2 embrace restriction on advertising and promotion on tobacco products; and

iv) Whether, even if Article 24(2) is to be narrowly interpreted, Member States nonetheless have competence to regulate advertising on the product.

273. The judge's summary of the conclusions which he reached on these 4 questions is at [965]. He concluded that the phrase "packaging" in the Regulations and TPD2 is undefined and ambiguous, but when read purposively in the light of the FCTC, it means all that covers, surrounds or encases tobacco, which includes tipping paper. He stated that, even if that is wrong, nothing in EU law would prevent Member States from introducing a further restriction on advertising and branding on tobacco products as an anti-avoidance measure to increase the *effet utile* of the restrictions on packaging. The fourth question he analysed was whether the field was covered exclusively by TPD2 or whether it only partly harmonised the law. He stated that this question only arose if his conclusions on the other matters are wrong.

274. The judge concluded at [979] that TPD2 is a measure of partial harmonisation and it was therefore open to Member States to introduce restrictions going beyond TPD2, including restrictions on the tobacco products themselves. He relied on the judgment of the CJEU in *Philip Morris* that TPD2 is a measure of partial harmonisation leaving other aspects to be determined by Member States. Kokott A-G considered (at [110]-[111] of her opinion), which on this point was essentially adopted by the court, that TPD2, in the words of Article 1(b), seeks only "to approximate the laws, regulations and administrative provisions of the Member States concerning aspects of the labelling and packaging of tobacco products". She also relied on Recital 53 in the preamble. It states that "in light of the different degrees of harmonisation achieved",

the directive merely "provides a first set of basic common rules" "in relation to presentation and the packaging".

275. The judge also rejected the alternative argument of the Tipping Appellants, that the Secretary of State had not produced evidence establishing to the requisite standard the purported public health benefits of introducing Regulation 5, so that it was a disproportionate interference with rights. After making preliminary observations (at [981]-[986]) on the need for additional evidence, he considered the evidence on tipping at [987]-[994]. He stated that once there is a proportionate need to regulate the outer packaging of cigarette boxes, there arises a proportionate need to regulate the product itself on anti-avoidance grounds. This, he stated, is because of the inference from the acceptance by tobacco companies that the importance of particular surfaces increases as the scope for other forms of advertising decreases, evidence as to the correlation in design strategies between packaging and the stick and tip, and the unchallenged point that the only difference between advertising on the outer packaging and product was physical location: see [986] of the judgment.

276. The judge's consideration of the evidence led him also to conclude that there was specific research evidence of direct relevance to the attractive force of advertising upon the product itself. He refers (at [987] ff.) to studies that show the characteristics and appearances of the cigarette itself affect perception of the attributes of the cigarette. He refers to studies by Borland and Savvas; Ford, Moody, MacKintosh and Hastings cited by Professor Hammond and by Mr Mean; a further study by Moody, Ford, Mackintosh and Purves; and qualitative research conducted on behalf of the Australian Government: see [987]-[991]. The judge also referred at [992]-[993] to internal documents by Philip Morris in 1989 and RJ Reynolds in 1985 which demonstrated that colour and brand imagery placed upon the cigarette sticks themselves operated in a manner which is similar to that upon the outer packaging.

277. The judge (at [995]) accepted the submission on behalf of the Secretary of State that the Tipping Appellants took too narrow a view of the public health objective in arguing that the evidence must show that Regulation 5 will reduce smoking. It suffices to show that there were and are reasonable grounds for believing that there will be a beneficial effect on public health as a result of implementing the entire range of measures, of which Regulation 5 is just one: see [242] – [243] on the range of policy objectives and the range of complementary measures forming part of a comprehensive tobacco control strategy. He considered and rejected submissions by the Tipping Appellants that the introduction of product restrictions will increase the incidence of illicit tobacco (see [996]-[997]) and the counterfeiting of tipping paper (at [998]), and that an increase in counterfeiting could result in uncontrolled substances being included which would be injurious to public health: see [999].

278. The Tipping Appellants relied on four grounds of appeal. Three concerned the *ultra vires* ground. The fourth concerned the rejection of the submission that Regulation 5 is not justified on public health grounds and is disproportionate. The starting point of Ms Bacon's oral submissions was that the judge erred in finding that, even if Article 24(2) did not provide a basis for Regulation 5, it would fall within the competence of Member States because TPD2 only partially harmonised an aspect of the presentation of the products. She started with this because, if the Secretary of State is correct on partial harmonisation, whatever the meaning of the word "packaging" in Article

24(2), Member States would be entitled to legislate beyond the provisions of TPD2 provided that the measures adopted do not conflict with or replace measures in it.

279. The first two stages of the Tipping Appellants' argument are that the basic prohibition in Article 24(1) of TPD2 prevents Member States from restricting free movement of products that otherwise comply with the Directive and that tipping paper is not "packaging" within the meaning of Article 24(2), and therefore that provision does not permit the United Kingdom to legislate for plain cigarettes. We consider the second point below but here assume it is correct. The third stage of the argument is that because the appearance of cigarettes is regulated by Article 13 of TPD2, if cigarettes comply with the requirements of that provision their free movement cannot otherwise be restricted, and that it is only possible to escape from the prohibition on restriction of free movement in Article 24(1) if it is possible to rely on Article 24(2).

280. Ms Bacon submitted that the judge erred in using analysis at [265] from the part of the judgment in *Philip Morris* that was concerned with Article 24(3) in his consideration of Article 24(2). She argued that the CJEU's discussion of Article 24(3) is irrelevant because that provision covers matters that are not harmonised by the Directive. Article 24(2), by contrast, has legal effect and is not purely declaratory. The CJEU in *Philip Morris* at [71]-[72] considered that permitting Member States to maintain or introduce further requirements in relation to packaging would render it incompatible with TFEU Article 114 and concluded that the provision permits Member States to do so "only in relation to aspects of the standardisation of the packaging of tobacco products which have not been harmonised by the Directive". Ms Bacon also submitted that the judge erred in referring to "pre-existing rights" (for example in [265](i)(v)(vi)) because the question is not what rights Member States would or might have had absent the Directive, but what rights they have in the light of the Directive.

281. It is true, as Ms Bacon submitted, that the passage at [114]-[119] of Advocate General Kokott's opinion in *Philip Morris* relied on by the Secretary of State was not in fact adopted by the CJEU. We are also not persuaded by Mr Rogers' argument that the CJEU in *Philip Morris* at [76] stated that there is nothing in TPD2 which stops the Member States from regulating colour. That paragraph specifically refers to packaging and its logic is not necessarily transferable to the products themselves given that Article 24(2) specifically provides for further regulation of "packaging".

282. The key point of the decision of the Court in *Phillip Morris*, however, is that TPD2 is a partial harmonisation Directive. The fact that Article 13 contains some regulation of the tobacco stick does not mean that the EU has occupied the entire field and that Article 13 has defined the extent of the permitted regulation. Article 13 regulates the appearance of a very limited category of marks, designs and features and does so only if they mislead or create a false impression about a tobacco product. We do not consider that by implementing Article 13 of FCTC, which is silent on the topic of plain cigarettes, the EU in Article 13 of TPD2 made a positive choice to prevent Member States from standardising the colour of cigarettes more generally. The fact that Article 13 did not explicitly outlaw coloured cigarette papers has to be seen in its context. It is a provision that is aimed at preventing novelty packs and its limited restrictions on the appearance of cigarettes do not in our judgment mean that the EU has "occupied the field" as to all aspects of the appearance of cigarettes. There is also a certain inconsistency in arguing, as Ms Bacon did, that the purpose of the FCTC and therefore of the Directive is not to provide for plain cigarettes or to regulate the

appearance of cigarettes, but then to maintain that all aspects of the appearance of cigarettes must fall within the ambit of the Directive.

283. For these reasons, even if there was some eliding of parts of the judgment in *Philip Morris* concerned with Article 24(3) into the analysis of Article 24(2), we do not consider that the judge's overall conclusion on this point was wrong. In view of our conclusion on the "partial harmonisation" point, it is not strictly necessary to consider the other grounds of appeal. We, however, do so relatively briefly.

284. The first ground is that the judge erred in deciding that the word "packaging" in TPD2 is ambiguous. Ms Bacon submitted that on its ordinary meaning the term "packaging" does not encompass the product that is being packaged and pointed to the distinction drawn in Article 1 of TPD2 between tobacco products and "labelling and packages" of such products. As the Judge recognised (at [977 (ii)]) the fact that there is a definition of "outside packaging" in Article 2 (29) suggests that are different types of packaging. But, contrary to the view of the Judge that the concept has a wide remit embracing all that surrounds the tobacco and is capable of being used to promote it whatever guise or form, the fact that there are different types of packaging does not mean that the term includes the tobacco product itself. The distinction between the tobacco product and "labelling and packaging" is also seen in Recital 27, Article 13 and section 94 (4) of the Children and Families Act 2014 which authorises the Regulations, including Regulation 13. Moreover the definition of tobacco products in Article 2 of TPD2 includes all the components of it, such as paper. If the paper is part of the tobacco product, it cannot be part of the packaging of that product.

285. On behalf of the Secretary of State it was argued that "packaging" could be interpreted as including the appearance of the tobacco product as well as its external packaging. The natural and ordinary meaning of the word clearly has two potential meanings. The first is the packet in which the tobacco is sold. The second is the external components of a tobacco product. Reliance was placed on the distinct definitions of "unit packets" and "outside packaging" in Article 2 and the Recitals, in particular Recital 53.

286. On this point we reject the Secretary of State's submissions. Although he, like the Judge, is able to point to parts of the Directive which suggest that "packaging" might bear multiple meanings, as Ms Bacon submitted, the fact that there are different types of packaging does not mean that the term includes the tobacco product itself. Accordingly, the definitions relied on do not in our judgement assist the Secretary of State. We consider it strange to argue that the ordinary meaning of the term "packaging" can cover the external parts of the product itself. Article 24 (2) was designed to enable Member States to take plain packaging further than the Directive but the provision is plainly targeted at only plain packaging. It was implementing the FCTC which did not recommend plain cigarettes. Accordingly we consider that the Judge erred in using a purposive approach because it is well established in case law of the EU that a purposive approach can only be used where a provision is ambiguous.

287. We do not consider that the doctrine of *effet utile* can undermine an unambiguous EU legislative provision. We accept Ms Bacon's submission that the *effet utile* argument adds nothing to the Secretary of State's case if Article 24(2) is not ambiguous.

288. Finally, we turn to the proportionality argument. We refer to the approach to proportionality in our consideration of the Tobacco Appellants' appeals. We consider that the Tipping Appellants' arguments overlook the multiplicity of aims pursued by the Regulations and proceed on the basis of an erroneous and unnecessary requirement of very specific targeted evidence. The evidence before Parliament concerned the impact of tobacco consumer behaviour generally and the Tipping Appellants' submissions neglect the evidence of the benefit of standardising more broadly. We consider that there was sufficient material before the judge and taken into account by him, to justify his conclusion that there were reasonable grounds for believing that there will be a beneficial effect on public health as a result of implementing the entire range of measures including the restrictions on tipping paper.

289. For the reasons we have given we have concluded that the appeal against Regulation 5 should be dismissed because the Tipping Appellants have failed to show that the Judge erred in regarding TPD2 as a partial harmonisation measure and in rejecting the argument that Article 13 has occupied the field for regulating the appearance of tobacco products. The Tipping Appellants have requested that the matters arising under the *ultra vires* part of their appeal should be referred for a preliminary reference to the CJEU. In oral submissions, when asked about this, Ms Bacon stated that she was not asking us to make a reference before making a decision but that she would be asking for a reference if she did not succeed. We have considered this question and have concluded that, notwithstanding the fact that this part of this case is concerned with the tobacco product itself, in circumstances in which the CJEU has recently given a detailed judgment on the interpretation of Article 24 (2) of TPD2 in *Phillip Morris*, a case in which the Tipping Appellants participated as interveners, we should not make a reference. The CJEU has indicated that courts should be slow to make a second reference concerning a provision of EU law that has already been considered in a first reference: see (Case C-388/95) *Wiener SI GmbH v Haputzollamt Emmerych* [1997] ECR 6495 and *R v Secretary of State for Social Services, Ex Parte Bomore Medical Supplies Ltd* [1986] 1 CMLR 229.

OVERALL CONCLUSION

290. We dismiss the appeals.

ANNEX
LIST OF ABBREVIATIONS

Abbreviation	Description	First referred to in judgment
2014 Act	The Children and Families Act 2014	[1]
A1P1	Article 1 of Protocol 1 to the ECHR	[3(iii)]
BAT	British American Tobacco UK Limited and associated companies	[4]
Charter	Charter of Fundamental Rights of the European Union	[3(iii)]

CDR	Council Regulation (EC) No. 6/2002 on Community designs	[81]
CITTS	Cancer Institute's Tobacco Tracking Survey	[209(i)]
CJEU	CJEU of the European Union	[3(i)]
CPR	Civil Procedure Rules	[178]
CTM	Community trade mark	[3(vi)]; and see [40]
CTMR	Council Regulation (EC) No.207/2009 on the Community trade mark	[3(vi)]; and see [40]
ECHR	European Convention on Human Rights	[3(iii)]
ECtHR	European Court of Human Rights	[92]
EUTMR	The CTMR as amended by Regulation (EU) No. 2015/2424	[3(vi)]; and see [40]
FCTC	The WHO's Framework Convention on Tobacco Control	[25]
Imperial	Imperial Tobacco Limited	[4]
JTI	JTI International and Gallaher Limited	[4]
NTPPTS	National Tobacco Plain Packaging Tracking Survey	[209(i)]
PIR	Post-implementation Report prepared by the Government of Australia	[186]
Recast TMD	Directive (EU) No. 2015/2436 which recasts the TMD	[32]
TFEU	Treaty on the Functioning of the European Union	[3(x)]
Tipping Appellants	TANN UK Limited, TANNPAPIER GmbH, Benkert UK Limited and Deutsche Benkert GmbH & Co KG	[4]
TMD	Directive 2008/95/EC (the Trade Mark Directive)	[32]
Tobacco Appellants	BAT, Imperial and JTI	[4]
TPD or TPD2	Directive 2014/40/EU (the Tobacco Products Directive)	[1]
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights	[3(viii)]
WHO	World Health Organisation	[25]
WTO	World Trade Organisation	[3(viii)]