OUTER HOUSE, COURT OF SESSION

[2011] CSOH 80

P576/10

OPINION OF LORD DOHERTY

in the Petition

SINCLAIR COLLIS LIMITED

Petitioners;

for

Judicial Review of the Tobacco and
Primary Health Services (Scotland)
Act 2010, section 9

Petitioner: Jones, Q.C., Gill; McGrigors LLP

First Respondent: Lord Boyd of Duncansby, Q.C.; Scottish Government Legal Directorate

13 May 2011

Introduction

Petition

[1] This Petition for judicial review challenges the legality of an enactment of the Scottish Parliament ("the Parliament"), namely section 9 of the Tobacco and Primary Health Services (Scotland) Act 2010 ("TPHSSA 2010"). The Act received Royal Assent on 3 March 2010. Section 9 has not yet been commenced. I was informed that the Scottish Ministers plan to bring it into force in October 2011. The Petitioners seek declarator that section 9 is invalid and reduction of the section. They contend that the section is outside the legislative competence of the Parliament and is not law because it is incompatible with Convention rights (Article 1 of the First Protocol ("A1P1")) and with Community law (Article 34 of the Treaty for the Functioning of the European Union ("TFEU")) : Scotland Act 1998, section 29(1), (2)(d). In addition, it is averred that section 9 is inapplicable and unenforceable because the United Kingdom has failed to notify

it to the Commission of the European Communities in accordance with Article 8(1) of the Technical Standards Directive (Directive 98/34/EC).

Petitioners

[2] The Petitioners are a wholly owned subsidiary of Imperial Tobacco Limited. They own and operate tobacco vending machines. They are the largest such operator in the United Kingdom. As at 1 August 2010 they owned and operated approximately 18,000 machines at approximately 17,000 sites and employed 148 people. In Scotland they owned and operated 1,708 machines at 1,454 sites and employed 13 people. They import tobacco vending machines from other Member States for use in their business.

Respondents

[3] The Petition was intimated to the Lord Advocate ("the First Respondent") and to the Advocate General for Scotland. The Lord Advocate lodged Answers on behalf of the Scottish Ministers and for the public interest. The Advocate General lodged Answers but subsequently withdrew them.

First Hearing

[4] The matter came before me for a First Hearing. Shortly before the First Hearing the First Respondent lodged a Minute (16 of Process). The Minute stated:

> "... (T)he Scottish Ministers have decided to notify the terms of section 9 to the Commission under the Technical Standards Directive on a protective basis. An Order will be made under sections 2(2) of the European Communities Act 1972 repealing and re-enacting section 9. Before doing so the Order will be notified in draft to the Commission and the procedure under the Directive will be followed in respect of this Order. Scottish Ministers will not make or lay the Order until the resolution of this petition and accordingly section 9 TPHSSA will remain unaffected until that time..."

A copy of the draft Order was produced (7/57 of Process). Parties accepted that in the circumstances described there should be no argument in relation to Article 8(1) of the Directive at the First Hearing. They maintained that the other arguments ought to be capable of being disposed of at the First Hearing.

[5] Extensive Notes of Argument were lodged. The First Hearing took place over a period of nine days. By far the greater part of that period was devoted to the Community law challenge. I do not propose to set out in detail all of the submissions made and authorities referred to. Had I done so it would have added considerably to the length of this Opinion. I will give an outline of the principal arguments which were advanced. The Notes of Argument (11 and 12 of Process) are available for reference if required.

[6] It would be remiss not to record my appreciation of the assistance I have obtained from the thorough and well presented submissions which were made to me. Thanks are also due to those who arranged that copies of the productions and the authorities be available on CD ROMS. This facilitated the hearing in court, my deliberations, and the preparation of this Opinion.

TPHSSA 2010

Introduction

[7] The 2010 Act, according to its long title, is,

> "An Act of the Scottish Parliament to make provision about the retailing of tobacco products, including provision prohibiting the display of tobacco products and establishing a register of tobacco retailers; ... and for connected purposes"

Section 9

[8] Section 9 provides:

> **"9 Prohibition of vending machines for the sale of tobacco products**
>
> (1) A person who has the management or control of premises on which a vending machine is available for use commits an offence.
>
> (2) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 4 on the standard scale.
>
> (3) In this section, 'vending machine' means an automatic machine for the sale of tobacco products (regardless of whether the machine also sells other products)."

[9] The policy underlying section 9 was to improve public health by reducing the availability and attractiveness of cigarettes to children and young people. The aim of section 9 is to prevent tobacco products being sold by automatic vending machines to children and young persons. The section seeks to remove a known source of cigarettes to children and young persons, thereby reducing smoking and improving public health.

Legislative history

[10] In *Adams* v *Scottish Ministers* 2004 SC 665 at paragraph [18] the Second Division succinctly described the Scottish Parliament's legislative procedure:

> "The standing orders of the Scottish Parliament (Scotland Act 1998, sec 22; sched 3) provide for three stages in the legislative process (sec 36; Standing Orders, r 9.5). Stage 1 is the general debate on the Bill at which members have the opportunity to vote on its general principles (r 9.6). Stage 2 involves consideration of, and voting on, the details of the Bill in committee (r 9.7). At Stage 3 the Bill is either passed or rejected by the Parliament (r.9.8). At stage 2 and 3 the Bill can be amended (r 9.7(5); 9.8(3)). Amendments at either stage are admissible only if they are consistent with the general principles of the Bill as agreed by the Parliament at stage 1 (r 9.10(5)(c))."

(Although the Parliament's Standing Orders have been revised and amended since *Adams* (the current edition is the 4th edition (April 2011) and the edition in force at the time the TPHSSA was before the Parliament was the 3rd edition (2007)), the above description remains an accurate one).

[11] On 25 February 2009 the Minister for Public Health and Sport introduced the Bill in the Parliament. The Health and Sport Committee of the Parliament was nominated as the lead committee on the Bill. The Committee received many submissions and heard a good deal of oral evidence which dealt with the prohibition contained in section 9. Interested parties who made submissions and gave evidence included the Petitioners, other representatives of tobacco vending machine businesses, tobacco companies, smoking and anti-smoking pressure groups, local authorities, trading standards officers, representatives of those in the liquor licensed trade, the NHS and other health organisations, and retailers. Full lists of those who made written submissions and those who gave evidence are contained in Annexe B of Vol. 2 to the Stage 1 Report (6/8 of Process). The submissions and the evidence considered *inter alia* the use of age restriction mechanisms with cigarette vending machines, including radio frequency controlled mechanisms. It included a report from NACMO, "Radio Frequency Controlled Cigarette Vending Machines, Preliminary Test Results" (7/26 of Process) and a report "LACORS: Test Purchasing of Tobacco Products; Results from Local Authority Trading Standards" (6/79 of Process).

[12] The Committee's Stage 1 Report was in favour of the general principles of the Bill including the prohibition of tobacco vending machines. It concluded:

> "78. The Committee also notes the alternative proposal put forward by operators of vending machines for a radio-controlled system based on age verification by bar staff in licensed premises. However, the Committee remains to be convinced that this system could be made to work in practice across the range of situations in which a vending

> machine might be installed - for example, in crowded city-centre pubs where there are many distractions for bar staff."

[13] On 24 September 2009 there was an extended debate on the Stage 1 report. There were differences of view in relation to the proposed prohibition. The Parliament agreed to the general principles of the Bill. In its detailed consideration at Stage 2 a member of the Committee proposed an amendment to the prohibition to allow radio frequency controlled vending machines to remain on licensed premises. On a division the amendment was not agreed to. On 27 January 2010, during Stage 3, the Parliament debated a similar proposed amendment. It was rejected with 14 MSPs voting for it and 105 voting against it (Official Report, 6/13 of Process).

Incompatibility

[14] The Scotland Act 1998, section 29 provides:

> "(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply -
>
> > (d) it is incompatible with any of the Convention rights or with Community law..."

The Community law challenge: Articles 34 and 36

Introduction

[15] Article 34 is one of the articles of the Treaty for the Functioning of the European Union (TFEU) which regulates the free movement of goods between Member States. It provides:

> "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states."

[16] Quantitative restrictions under Article 34 are measures which amount to a total or partial restraint on imports or goods in transit. The phrase "measures having equivalent effect" to quantitative restrictions is broader in scope and covers "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" (Case 8/74 *Procureur du Roi* v *Dassonville*, [1974] ECR 837). Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept (Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 37; Case C-142/05 *Åklagaron* v *Mickelsson and Roos* [2009] ECR I-4273, paragraph 24). A national measure which hinders imports from another Member State is caught by Article 34 even if it applies to national and imported products equally (Case C-120/78 *Rewe-Zentral ("Cassis de Dijon")* [1979] ECR 649, paragraphs 6,14 and 15).

[17] Article 34 is qualified by Article 36 which, so far as relevant, provides:

> "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants ... Such

> prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Members States."

[18] Measures having equivalent effect to quantitative restrictions may be justified under Article 36 or by "mandatory requirements" in the general interest (Case 8/74 *Procureur du Roi* v *Dassonville, supra,* at paragraph 8). Such mandatory requirements include the protection of health. Whether reliance is placed on an Article 36 justification or a mandatory requirement the criteria for justification are the same (*viz.* those discussed in relation to Article 36). Accordingly, although the First Respondent relied upon the mandatory requirements as well as Article 36, the critical issue in relation to justification turned on Article 36.

The Petitioners' contentions: *Article 34*

[19] The Petitioners own and operate tobacco vending machines in Scotland. They import tobacco vending machines and spare parts from other member states - Spain and Germany - for use in their business. The effect of section 9 coming onto force would be that the tobacco vending machine industry in Scotland would be destroyed. It was contended that the actual effect of section 9 would be to restrict the importation of tobacco vending machines into the United Kingdom. The ban would prevent the machines being used for the purpose for which they were designed. It would be equivalent to a ban on the machines themselves. They could not be converted in an economically viable manner for re-use dispensing other products. With the ban in force the Petitioners would have no interest in importing tobacco vending machines or parts and importing of them would cease.

[20] It was submitted that this is not a case where the ban in section 9 is a "selling arrangement" which falls outside the scope of Article 34 (Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097; Case C-110/05 *Commission* v *Italy, supra,* at paragraphs 25, 57 and 58; Case C-387/93 *Criminal Proceedings* v *Giorgio Domingo Banchero* [1995] ECR I-4663, at paragraphs 34 and 35; Case C-142/05 *Åklagaron* v *Mickelson and Roos*, *supra,* paragraphs 26-28: Case C-265/06 *Commission* v *Portugal* [2008] ECR I-2245, paragraph 35; Case C-65/05 *Commission* v *Greece* [2006] ECR I-10341; Case C-188/04 *Alfa Vassilopouos AE* v *Elliniko Dimosio, Nomarchiaki Aftodiikisi Ioanninon* [2006] ECR I - 8135, paragraph 19; *R (Countryside Alliance)* v *Attorney General* [2008] 1 AC 719, per Lord Bingham of Cornhill at paragraph 30 (cf. Lord Hope of Craighead at paragraph 68); *R (Lunt)* v *Liverpool City Council* [2009] EWHC 2356 (Admin), paragraphs 65 - 74). In order to come within the *Keck* exception the measure in question has itself to constitute a selling arrangement. A selling arrangement regulates trade in cross-border goods *after* they had been imported. A measure which operates to prevent imports - as here - could not qualify as a *Keck* selling arrangement. A selling arrangement is "associated with the marketing of the good rather than the characteristics of the good" (EU Commission, Free Movement of Goods - Guide to the Application of Treaty Provisions Governing Free Movement of Goods, page 17). The relevant quantitative restriction on imports concerns tobacco vending machines - not tobacco. While the ban might arguably have been categorised as a selling arrangement relating to tobacco if the complaint had been that it was a quantitative restriction on imports of tobacco, it is not a selling arrangement relating to tobacco vending machines. It has nothing to do with retail arrangements for such machines: rather, it is a prohibition on their use.

[21] The Petitioners maintained that following the Grand Chamber's judgment in *Commission* v *Italy*, *supra,* and the decision in *Åklagaron*, *supra,* it is *acte clair* that Article 34 is engaged by

section 9, and that there is no need to seek a preliminary ruling from the ECJ on the issue. It is unsurprising that in the judicial review challenge to the analogous English legislation counsel for the Attorney General had conceded that Article 34 was engaged (*R (Sinclair Collis Limited*) v *Secretary of State for Health and The Members of the National Association of Cigarette Machine Operators* [2010] EWHC 3112 (Admin) at paragraph 16. (Judgment in that case was delivered after I had taken this case to *avizandum*. The parties provided me with a copy of the Judgment, but neither considered there to be any need to make further submissions in light of it)).

The First Respondent's contentions: *Article 34*

[22] The First Respondent submitted that section 9 falls outside the scope of Article 34 because it is a "selling arrangement" of the sort described in *Keck and Mithouard, supra*. It was conceded that if it is not a "selling arrangement" section 9 would be within the scope of the Article.

[23] In *Keck and Mithouard* the ECJ stated:

> "[15] It is established by the case law beginning with '*Cassis de Dijon*' ... that, in the absence of harmonisation of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30 [*then Art 30 EEC, subsequently Art 28 EC, now Article 34 TFEU*]**.** This is so even if those rules apply without distinction to all products unless their application can be

> justified by a public-interest objective taking precedence over the free movement of goods.
>
> [16] By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74) so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States."

[24] The First Respondent argued that the necessary conditions are satisfied in relation to section 9. Section 9 is one of a series of measures concerning the sale and ancillary marketing of tobacco. It governs the ways in which tobacco could be sold or marketed. It regulates the points of sale of tobacco. It is not aimed at restricting imports of tobacco vending machines from other Member States. It is not discriminatory - it applies equally to persons from the United Kingdom and to persons from other Contracting States. It is a selling arrangement relating to tobacco. When one examines *Keck and Mithouard* and other cases where selling arrangements had been excluded from the scope of Article 34 it could reasonably be inferred that there would also have been other economic interests which had been incidentally affected by the selling arrangement, but that had not prevented it being treated as a selling arrangement outwith the scope of Article 34 (e.g. Joined Cases C-69/93 *Punta Casa* v *Sindaco del Comune di Capena* and C258/93 *PPV Comune di Torre di Quartesolo* [1994] ECR I-2355; Case 387/93 *Giorgio Domingo Banchero*, *supra*). While in *Commission* v *Italy*, *supra,* and *Åklagaron*, *supra*, the

Court had not been prepared to extend the *Keck and Mithouard* exception to arrangements for the control of use of products, that was not the same issue as arose here. The authorities relied upon by the Petitioners do not vouch the proposition that the *Keck* exception applies to goods only after they have been imported. In any event section 9 is not a prohibition on tobacco vending machines entering the market: it is a restriction on use.

[25] The First Respondent maintained that it is *acte clair* that section 9 falls within the *Keck* exception. There is a selling arrangement for the sale of tobacco which impacts on the freedom of movement of other goods (tobacco vending machines). The exception also covers tobacco vending machines (either incidentally, or by necessary extension of *Keck*). If I was not disposed to accept the First Respondent's primary argument, I should not hold that section 9 engaged Article 34. That was not *acte clair*. Accordingly, if it was essential to the disposal of the Petition to decide whether section 9 engages Article 34, the appropriate course would be for me to refer the question to the ECJ for a preliminary ruling. It would not be necessary to do that if the First Respondent satisfied me that section 9 was justified under Article 36.

Discussion and conclusion: *Article 34*

[26] The Petitioners' arguments that section 9 is not a "selling arrangement", and that it falls within the scope of Article 34, have considerable force. However, I do not think that the issue is *acte clair*. While I am very far from persuaded by the First Respondent's primary contention, the ECJ does not appear to have had to consider a scenario similar to that in the present case. In those circumstances the contention is not beyond the bounds of reasonable argument. If it was necessary to decide the matter in order to determine this aspect of the Petitioners' challenge to

section 9, I agree with the First Respondent that a reference to the ECJ would be appropriate. But no good purpose would be served by seeking a preliminary ruling on this matter if it is clear that I would be bound to hold that section 9 is justified and proportionate (cf. *R (Countryside Alliance)* v *Attorney General*, *supra,* paragraphs 35, 50, 73, 88).

The Petitioners' contentions: *Article 36*

[27] The Petitioners submitted that the burden is on the First Respondent to show section 9 is justified. They accepted (for the purposes of these proceedings) that the Parliament's aim in enacting section 9 is to protect the health and life of humans. However, section 9 could not be justified under Article 36 or as a mandatory requirement. It is not proportionate. It goes beyond what is necessary. It is not the least restrictive measure capable of achieving the Parliament's aim (Case C - 14/2 *ATRAL SA* v *Belgian State*, CJEU 8 May 2003, at paragraphs 64 - 69; Case C - 261/81 *Walter Rau Lebensmittelwerke* v *De Smedt PvbA* [1982] ECR 3961, at paragraphs 2, 12,16 and 17; Case C- 3/99 *Cidrerie Ruwet SA* v *Cidre Stassen SA* [2000] ECR I-8749 at paragraph 50; *Åklagaran*, *supra,* paragraphs 30 - 34). There was not a proper factual basis justifying section 9, and the Parliament had not sought to achieve its aim in a consistent and systematic manner. While there is no authority in the context of Article 36 which vouches a requirement for restrictions to be consistent and systematic, such a requirement should be inferred by reading across from establishment cases under Article 43: Case C-169/07 *Hartlauer Handelsgesellschaft mbH* v *Wiener Landesregierung* [2009] ECR I-1721 at paragraphs 55 and 63; Case C-500/06 *Corporación Dermoestética SA* v *To Me Group Advertising Media* [2008] ECR I-5785 at paragraph 35. There was no evidence that the Parliament considered, or was even

aware of, the fact that the restriction in section 9 engaged Article 34 and required to be justified under Article 36. There is a less restrictive alternative to a tobacco vending machine ban that could achieve the aim of preventing children and under eighteens from having access to cigarettes from machines, namely putting age control measures in place, and, in particular, permitting vending of tobacco from radio frequency controlled machines. That alternative had not been given proper consideration. Section 9 did not seek to achieve the legislative aim in a consistent and systematic manner because radio frequency controlled machines were no worse a source of cigarettes to under eighteens than independent newsagents, yet the latter were not prohibited from selling cigarettes. Both methods rely on face to face verification of age by staff, and the incidence of illegal sales to under eighteens from each source is similar (23% for independent newsagents according to the LACORS Test Purchase Report (6/79 of Process); and 20% for remote controlled machines according to the NACMO Preliminary Test Results for Radio Frequency Controlled Cigarette Machines (7/26 of Process)). Further, it was said to be inconsistent and unsystematic that tobacco vending machines are to be banned but that machines may be used for cigarette storage behind bars.

[28] The Petitioners recognised that it is not enough for them to point to the absence of explicit consideration of Articles 34 and 36 by the Parliament, and that the task of the Court is to determine objectively whether section 9 is justified under Article 36. The Petitioners accepted that the Court required to allow the Parliament a margin of discretion, but maintained that the width of the margin is context specific. A greater margin of discretion would normally be attributable to a legislature than to other decision makers: but it was important to remember the nature of the Scottish Parliament. It is a creature of the Scotland Act 1998. That Act defines, and limits, its competence. Give its nature as a subordinate legislature with limited competence it

ought not to be accorded as wide a margin of discretion as would be accorded to the United Kingdom Parliament. While with legislation involving social policy or moral issues the appropriate margin is wider than with measures dealing with ordinary commercial activities, it was contended that that did not assist the First Respondent because Section 9 is simply a measure directed towards the regulation of trading activity. This was not the sort of case where the court could only interfere if it concluded that section 9 was manifestly unreasonable or manifestly without foundation. Rather, there had to be a close and careful examination of the facts in order to see if there was justification for section 9 (*R (Countryside Alliance)* v *Attorney General*, *supra,* per Lord Hope of Craighead at paragraph 78; *R* v *Shayler* [2003] 1 AC 247 per Lord Hope of Craighead at paragraph 61). There was not a proper factual basis for banning vending machines. The less restrictive course of permitting machines with age restriction measures - in particular, requiring them to be fitted with radio frequency controlled mechanisms - was appropriate and would be effective. The Regulatory Impact Assessment ("RIA") (7/9 of Process) had contained errors. These meant that it was useless. It was not capable of providing anything by way of justification. The number of machines in Scotland had been underestimated and the proportion of cigarettes obtained from machines by under eighteens had been overestimated. The RIA had assumed, as had the Parliament, - without any relevant research or other proper factual basis - that some of the under eighteens who would have obtained cigarettes from machines would not obtain them from other sources (such as illicit dealers). Section 9 was not justified and was not proportionate.

The First Respondent's contentions: *Article 36*

[29] In justifying section 9 counsel for the First Respondent reminded me that the health and life of humans ranks foremost among the interests protected by Article 36. It is for Member States to decide the degree of protection for children and young people they wish to assure, and the way in which that degree of protection is to be achieved. Member States enjoy a margin of appreciation in deciding what level of protection is appropriate, and in the context of the protection of health and life the margin of appreciation is a wide one. The Court should be careful to observe the boundaries between its role and the role of the legislature. Given the subject matter of section 9, its aim, the nature of the lawmaker, and the legislative history, the margin of discretion enjoyed by the Parliament was wide. The margin applied not only to the Parliament's choice of policy aims, but also to the choice of measures taken in furtherance of those aims. The measures had to be proportionate. They had to be appropriate and not go beyond what was necessary. The court ought only to interfere if the measures were manifestly inappropriate or manifestly in error. If there was material which was capable of providing justification the Court should not second guess the Parliament. Reference was made to Case C-322/1 *Deutscher* v 0800 *Doc Morris* [2003] ECR I-14887 at paragraph 103; *Commission* v *Italy*, *supra,* paragraphs 65, 67; Case C-491/01 *R (British American Tobacco Investments Ltd and Imperial Tobacco Ltd)* v *Secretary of State for Health* [2002] ECR I -11453 at paragraphs 122 -123 of the Judgment and at paragraphs 103-106 and 119-121 of the Advocate General's Opinion; *R* v *Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 CMLR 123 at paragraphs 41, 43-46, 48.

[30] In exercising their judgment MSPs had a great deal of evidence before them. As well as the evidence of witnesses, they had the representations of diverse interest groups, the views of

constituents, and their own knowledge and experience. They were entitled to consider all of this. They were also entitled to have regard to social, economic and political considerations.

[31] The Parliament was not obliged to positively prove that there was no other conceivable course which would be as effective as a ban in reducing access by children and young people to cigarettes. The fact that the measure chosen is clear and simple to enforce was a relevant consideration.

[32] The Petitioners exaggerated the significance of the RIA and ignored the great deal of other material at MSPs' disposal which supported a ban. The RIA was not a document which the Parliament had required to have. It was just one piece of evidence within the very large amount of material - evidence, views and other considerations - which had been before the Parliament. It was plain from the proceedings of the Parliament and from the wealth of material before it that the RIA had not been central to MSPs' deliberations. In so far as the RIA was criticised, for the most part these were criticisms which had been canvassed during the course of the Bill. Section 9 is a very recently enacted measure which was very fully considered by a democratically elected legislature. In light of the material available to the Parliament it could not be said that there was no objective justification for section 9. It pursued the protection of life and health. It was appropriate. It was proportionate. The Parliament was wholly entitled to take (and had taken) the view that the suggested less restrictive measure would not be as appropriate or effective as section 9.

Discussion and conclusions: *Article 36*

Introduction

[33] In ATRAL, *supra,* the Court of Justice stated (in relation to what were formerly Articles 28 and 30 EC, and are now Articles 34 and 36 TFEU):

> "64. A national provision which is contrary to Article 28 EC may be justified only by one of the public-interest reasons laid down in Article 30 EC or by one of the overriding requirements referred to in the judgments of the Court (see, in particular, Case 120/78 *Rewe-Zentral ("Cassis de Dijon")* [1979] ECR 649, paragraph 8). In either case, the national provision must be appropriate for securing the attainment of that objective and not go beyond what was necessary in order to attain it (see *Canal Satellite Digital,* cited above, paragraph 33 and Joined Cases C-388/00 and C429/00 *Radiosistemi* [2002] ECR I-5845, paragraphs 40-42).
>
> 69. ... (I)t is for the Member State which claims to have a reason justifying a restriction on the free movement of goods to demonstrate specifically the existence of a reason relating to the public interest, the necessity for the restriction in question and that the restriction is proportionate in relation to the objective pursued."

[34] In *R (Countryside Alliance)* v *Attorney General*, *supra,* Lord Hope of Craighead observed (at paragraph 79):

> "It is well understood that measures which are liable to constitute restrictions on the free movement of goods and services may be justified if they pursue legitimate aims and they are proportionate to those aims."

[35] The general aim of section 9 is the protection of health and life of humans. More particularly, the aim is to reduce the attractiveness and availability of cigarettes to children and young people by removing vending machines as a source of cigarettes for them, and thereby reducing the incidence of under-age smoking.

Margin of discretion

[36] Both parties acknowledged that the court should accord a margin of discretion to the Parliament's judgment: they were in dispute as to the ambit of that margin. In this connection I find the following observations of Lord Bingham of Cornhill to be instructive:

> "... The margin of appreciation for a decision maker (which includes, in this context, a national legislature) may be broad or narrow. The margin is broadest where the national court is concerned with primary legislation enacted by its own legislature in an area where a general policy of the Community must be given effect in the particular circumstances of the Member State in question. The margin narrows gradually rather than abruptly with changes in the character of the decision-maker and the scope of what has to be decided ...."

(*R* v *Secretary of State for Health, ex parte Eastside Cheese Co*, *supra*, at paragraph [48]).

> "... The degree of respect to be shown to the considered judgment of a democratic assembly will vary according to the subject matter and the circumstances. But the present case seems to me pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question

> of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."

(*R (Countryside Alliance)* v *Attorney General*, *supra,* paragraph 45)

[37] The Scottish Parliament is not a sovereign legislature. It was constituted by the Scotland Act 1998 and its powers derive from that Act (*Whaley* v *Lord Watson* 2000 SC 340, per Lord President Rodger at pages 348 - 9). For the purposes of the Human Rights Act 1998, Acts of the Scottish Parliament are "subordinate legislation" not "primary legislation" (Section 21(1)). More generally, there has been judicial consideration as to the nature and proper characterisation of enactments of the Scottish Parliament. (There has also been much academic discussion: see e.g., McHarg, "What is Delegated Legislation?" [2006] P.L. 539; Craig and Walters, "The Courts, Devolution and Judicial Review" [1999] P.L. 274; Burrows, "Devolution", Chapter 3; Hadfield, "The Foundations of Judicial Review, Devolved Power and Delegated Power" (Chapter 9 in Forsyth, "Judicial Review and the Constitution"); Mullen, "The AXA Insurance case: challenging Acts of the Scottish Parliament for Irrationality", 2010 SLT (News) 39 at pp. 43-44). In *Adams* v *Advocate General for Scotland* 2003 SC 171 Lord Nimmo Smith (at paragraph [62]) suggested that Acts of the Scottish Parliament were *sui generis*, but that they were "of a character which has far more in common with a public general statute than with subordinate legislation". In another Outer House decision, *AXA General Insurance Limited*, Petitioners, 2010 SLT 179, Lord Emslie was inclined to agree with Lord Nimmo Smith's description of them being *sui generis*: he characterised them as "in the nature of primary legislation for Scotland" (at paragraph [142]). Authoritive guidance has now been provided by

the Inner House (*AXA General Insurance Limited* v *Lord Advocate and Others* [2011] CSIH 31). In paragraph 87 (of the Opinion of the Court) the First Division opined:

> *"Acts of the Scottish Parliament* - *legislation sui generis?*
>
> [87] We, like the Lord Ordinary (paragraph [142]), are inclined to agree with Lord Nimmo Smith's description - at paragraph [62] of his Opinion in *Adams* v *Advocate General* - of legislation enacted by the Scottish Parliament as *sui generis*. Notwithstanding its classification for the purposes of the Human Rights Act 1998 as "subordinate legislation" (section 21(1)), it is "law" essentially of a primary nature. The processes which lead to its enactment include parliamentary procedure which involves scrutiny at various stages by democratically elected representatives who ultimately vote on whether the Bill in question should be enacted and, if so, in what terms. Having passed through these stages the Bill then receives the Royal Assent. These procedures, taken together, distinguish legislation so enacted from acts or instruments subject to judicial review on traditional grounds, including from executive acts of the Scottish Ministers and from subordinate legislation - even subordinate legislation or other instruments which have been approved by the Westminster Parliament. They are much more proximate to Acts passed at Westminster. Other features of the Scotland Act support that proximity: the exclusion of procedural challenge (section 28(5)) and the provision for judicial notice (section 28(6)). On the other hand, there is nothing, in our view, either expressly or impliedly in the Scotland Act which gives to enactments of the Scottish Parliament the status of Acts of the Parliament of the United Kingdom. That is not to ignore the significance of the Scotland Act as of real constitutional importance. But it is to recognise that, however wide-ranging the powers conferred on the Scottish

> Parliament, its establishment did not involve the ceding to it of "sovereignty" (whatever precisely that may mean) even within its restricted statutory field of competence: its legislation is open to abrogation or supersession by Acts of the Westminster Parliament (section 28(7))."

[38] It is unnecessary for present purposes to reach a concluded view as to the proper nature and characterisation of Acts of the Scottish Parliament. It is clear that they have few of the characteristics of secondary legislation. They are " "law" essentially of a primary nature" (*AXA General Insurance Limited* v *Lord Advocate, supra,* paragraph [87]). They are the product of a democratically elected legislature and its full and democratic parliamentary processes, rather than being an exercise of delegated rule making according to truncated procedures for scrutiny and enactment (*AXA General Insurance Limited* v *Lord Advocate*, *supra,* paragraph [87]; see also Mullen, *supra*, p. 44). On devolved matters the Parliament exercises plenary powers to legislate - subject only to abrogation or supersession by Acts of the Westminster Parliament. It seems to me to be beyond argument that Acts of the Scottish Parliament share most of the characteristics of primary legislation and are far more proximate to it than to ordinary subordinate legislation. On the spectrum of decision-makers the Scottish Parliament occupies a place close to that of the national legislature. In my opinion an enactment of the Scottish Parliament should be accorded a margin of discretion similar to, and approaching, that which would have been accorded to the measure had it been enacted by Parliament at Westminster.

[39] I find unpersuasive the Petitioners' contention that section 9 should be regarded simply as a measure regulating trading, and which involves no considerations of social policy or social reform. In my view that is a blinkered and erroneous approach. Section 9 is motivated by health

concerns about smoking, and a resultant policy of reducing the availability and attractiveness of tobacco to children and young persons. Its aim is to prevent tobacco products being sold by automatic vending machines to children and young persons. It seeks to remove a known source of cigarettes for children and young persons, thereby reducing smoking and improving public health. I think it clear that section 9 gives effect to a social policy choice by the Parliament and implements a social reform.

[40] Accordingly, the nature of the decision maker, and the subject matter and context of the legislation, call for a wide rather than a narrow margin of discretion being accorded by the Court to the Parliament's judgment that section 9 should be enacted. I do not think that in the present context the sort of close and exacting scrutiny discussed in *R* v *Shayler*, *supra*, is appropriate. That would be too intensive a standard of review in the circumstances of this legislation.

Proper factual basis?

[41] The Petitioners contend that examination of the materials before the Parliament discloses no proper factual basis capable of justifying the enactment of section 9. I disagree.

[42] I bear in mind the observations of the Second Division in *Adams* v *Scottish Ministers, supra,* paragraphs [38] and [39]:

> "[38] Counsel for the petitioners submitted ... that the Parliament had reached its decision on this question on insufficient evidence or, at best, on evidence that was outweighed by other more authoritative evidence.

> [39] In our opinion, counsel for the petitioners have taken a wrong approach to this question. The factual basis upon which a legislature decides to enact a specific provision is not governed by the rules of sufficiency and admissibility of evidence that would apply in a court of law. A legislator is entitled to bring to bear on his decision his personal knowledge gained from his experience of life and from the representations that he may receive on current political topics from informants, pressure groups, committee witnesses, and so on. It is entirely for the judgment and experience of the individual legislator to decide which competing factual account he prefers. He is entitled to accept any account that in his judgment is reliable, no matter that it may be contradicted from other sources."

[43] In my opinion the material available to the Parliament provides sufficient objective justification for section 9. I have already briefly described the legislative history and the wide variety and nature of the representations made to, and considered by, the Parliament. Some of that material was summarised by the First Respondent in the Appendices to her Note of Argument.

[44] I agree with the First Respondent that the Petitioners overstate the significance of the RIA in the legislative process. It was not a document the Parliament required to have. It was one piece of evidence within a very much larger corpus of material before the Parliament. Whether its contents were wholly accurate or not appears to me to be of marginal importance in determining whether the enactment of section 9 is justifiable and proportionate: it is very far from being the determinative issue.

[45] However, it is appropriate that I say something about the criticisms which were advanced, not least because I do not concur with the Petitioners' submission that errors in the RIA resulted in it being flawed and useless. The RIA did overestimate the number of tobacco vending machines in Scotland, and the number of people employed here in the tobacco vending industry was underestimated. These were matters which were very clearly brought out before the Parliament, as were the more accurate figures. The RIA assumed that 10% of current sales to under eighteens were from vending machines, based on data from a SALSUS study: whereas in fact the SALSUS study showed that 10% of under eighteens indicated vending machines were *a* usual source of cigarettes (not their *only* source of cigarettes). Thus, it was argued, taking that percentage from SALSUS overstated cigarette machine usage. I recognise this point has some force. Using the 10% figure made no adjustment for the fact that at least some of those with machines as a usual source also had other usual sources. Nevertheless, I consider that the SALSUS figure provided a legitimate, if imperfect, proxy for usage of cigarette machines by under eighteens; and that, as with the criticisms previously mentioned, this criticism was a matter the Parliament was aware of when exercising its judgment. In addition, even if use of the SALSUS percentage in the RIA overstated sales to under eighteens from machines, the overstatement was common to both Option 2 (Introduction of Age Restricting Mechanisms) and Option 3 (Ban Sale of Tobacco from Vending Machines). Comparison of those two options still provided guidance as to their relative costs and benefits. Under Option 3 the reduction in cigarettes sold to under eighteens is significantly greater than under Option 2 (four point two five million as opposed to 3.2 million), with resultant improvement in health and saving of lives.

[46] Further, I do not accept the Petitioners' argument that the authors of the RIA, and the Parliament, were wrong to proceed on the basis that not all of the purchases currently made by

under eighteens would be displaced to other sources: and that there required to be clear and positive research or other empirical evidence showing that would be the effect of the ban before section 9 could be enacted. In my opinion it was (and is) a reasonable assumption, open to the authors of the RIA and to the Parliament, that if children are prevented from using cigarette machines some under-age smokers will smoke fewer cigarettes (cf. *R (Sinclair Collins Limited)* v *Secretary of State for Health, supra,* paragraph 92; *R (Countryside Alliance)* v *Attorney General, supra,* paragraph 42 (at page 755*B-C*)). The actual displacement assumption used by the RIA was informed by the SALSUS data and the reporting of recent test purchasing. It was in line with assumptions as to displacement made by the Department of Health in England and Wales. Moreover, the displacement assumed (70%) did not take account of the effect which any of the other provisions of the 2010 Act would tend to have in increasing compliance with the law prohibiting sale of cigarettes to, and the purchase of cigarettes by, under eighteens. Increased compliance would be likely to reduce displacement.

<u>Least restrictive measure?</u>

[47] Both parties accepted that the application of the proportionality test included consideration of whether the measure was the least restrictive measure which could achieve the aim. The difference between them was a matter of emphasis. The Petitioners' position was that it is essential that the measure was the least restrictive available. The First Respondent contended that whether it was or not is a factor to be taken into account but it is not necessarily determinative.

[48] If the position had been that a satisfactory less restrictive measure was available which would have been equally effective in achieving the Parliament's aim, section 9 would have been

a disproportionate exercise of the Parliament's legislative power: see *Commission* v *Italy, supra,* para. 59 (and the case-law cited) and the recent decision in *Ker-Optika bt* v *ANTSZ Del-dunantuli Regionalis Intezete*, [2010] EUECJ C-108/09 (Third Chamber) (2 December 2010).

[49] I am clear that on the material before it the Parliament was entitled to - and did - decide that the suggested alternative of permitting machines with age restriction mechanisms - whether radio frequency or other devices - would not be as satisfactory or effective as section 9 would be in achieving the aim of reducing under-age smoking. I do not rehearse all of the relevant material. Some of it is set out in Schedule 4 to the First Respondent's Note of Argument. It included a report from NACMO, "Radio Frequency Controlled Cigarette Vending Machines, Preliminary Test Results" (7/26 of Process) which indicated that in premises using such machines there was still a 20% failure rate, even though the survey tests were not carried out during times when premises were busy. It was plain to MSPs that radio frequency controlled machines would depend upon verification by bar staff that the person wishing to use the machine was eighteen or over *and* also upon the staff being attentive as to whom the cigarettes were actually dispensed. MSPs were aware that in busy licensed premises in Scotland there are many demands upon staff's attention. In such premises it is not difficult to envisage circumstances where there would be failure to seek verification of age; and where staff would not, or could not, take time from attending to customers' orders to observe to whom cigarettes were dispensed. MSPs will have been aware that in many busy premises there are often times when staff behind the bar cannot physically see past the throng of customers pressing at the bar or standing in front of the bar area. MSPs were fully entitled to, and did, draw on their experience of conditions in licensed premises in Scotland in enacting section 9 and in considering and rejecting the suggested alternative measure. Other relevant considerations (within the material that MSPs were entitled to have

regard to) were that if tobacco vending machines were to continue to be permitted their effect would be to advertise or display (or at the very least draw attention to) cigarettes for sale; and that a ban would be much clearer and simpler to operate and enforce than the proposed alternative.

Consistent and systematic approach?

[50] I was referred to no authority dealing with Article 36 which vouches it is an *essential* requirement of justification and proportionality that in imposing restrictions a lawmaker must always seek to achieve its object in a consistent and systematic manner (and *cf*. Lord Bingham of Cornhill's observations (in a different context) at page 754*H* of *R(Countryside Alliance)* v *Attorney General, supra*). I accept that whether an aim is pursued in a consistent and systematic manner *may* be relevant when considering the proportionality of a restriction. However, I am not persuaded that the matters adverted to by the Petitioners show that the Parliament was not pursuing its aim in such a manner.

[51] I think it disingenuous to equiparate sales from machines with sales by independent newsagents. With sales by newsagents verification of age and delivery of cigarettes occur contemporaneously in a single transaction between the seller and the purchaser: not so with sales from radio frequency controlled machines. Comparison between the compliance/failure rates for independent newsagents in the LACORS report and for radio frequency controlled machines in the NACMO report does not appear to me to be helpful or illuminative. Material before the Parliament indicated very clearly that the failure rate with machines generally (e.g. 41% in the LACORS report) was higher than that with independent newsagents: and, for the reasons

discussed above, the 20% failure rate disclosed in the NACMO report is likely to significantly understate the problem.

[52] I reject the suggestion that allowing machines to be used for cigarette storage behind bars gives rise to inconsistency. I think it plain that such storage machines would not be used as tobacco vending machines - the contract of sale would be between the purchaser and the publican, with delivery of the cigarettes being made by bar staff to the purchaser.
Where machines are used as tobacco vending machines the contract of sale is with the vending machine operator and the cigarettes are delivered by the machine to the purchaser. A storage machine would not be "available for use" as "an automatic machine for the sale of tobacco products" (section 9).

Proportionality

[53] The protection of public health and life is a very important objective which carries great weight in the balancing exercise (see e.g. *R* v *Secretary of State for Health, ex parte Eastside Cheese Co*, *supra*, paragraph [43]).

[54] While it is not necessary that an impediment to the free movement of goods be direct and intended for a measure to be prohibited by Article 34, the absence of such circumstances may be material, as may be the extent of the restriction.

> "... (T)he extent of the restriction has a part to play in the assessment of proportionality...So too is the fact that it is not discriminatory ... There is no indication whatever that the restrictions that have been enacted in this case were aimed at intra-

> Community trade. They were aimed entirely at activities carried on within our own member state, as a measure of social policy. Such interference as there has been and is likely to be with the free movement of goods and the free provision of services between other member states is purely incidental. It is trivial in comparison with the widespread interference in these respects within the domestic market."

(*R (Countryside Alliance)* v *Attorney General*, *supra*, per Lord Hope of Craighead at paragraph 87). There are *dicta* of Lord Bingham (paragraph 50) and Baroness Hale (paragraph 131) to similar effect.

[55] In my opinion those observations may be applied *mutatis mutandis* to the present case. Section 9 was not directed towards restricting imports of cigarette machines and parts. Its aim was to prevent under eighteens from having access to cigarettes from vending machines. Any interference with the free movement of goods is incidental to the interference with the operation of cigarette vending machines in the domestic market.

[56] As I have said, the context is that the foremost of the public interest reasons for derogation exists - the protection of life and health of humans. I have already discussed the large body of material at MSPs' disposal. Within it was material indicating that there was a significant problem with children and under eighteens obtaining cigarettes from machines; that age-restriction mechanisms would not resolve the problem, and, in particular, that radio frequency controlled machines would not be as satisfactory or effective as a ban in preventing children and under eighteens from obtaining cigarettes from machines. Criticisms could be - and were - made of this material. It was primarily for the Parliament to judge whether they were well founded or not.

[57] I am satisfied that section 9 struck a fair balance between the public interest and the interests of those affected by the restriction on the free movement of goods which it gave rise to. Neither the measure employed, nor the disadvantages caused by the restriction on free movement of goods, are disproportionate to the aim pursued.

Conclusion: Article 36

[58] I have reached the clear view that the Community law challenge is not well founded. I am satisfied that there is sufficient objective justification for section 9, and that the section is appropriate and proportionate. It was open to the Parliament to enact it.

The Convention rights challenge: Article 1 of the First Protocol, ECHR ("A1P1")

Introduction

[59] 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".

[60] The ECtHR has explained the relationship between the first and second paragraphs of A1P1:

> "55. As the Court has often held, Article 1 guarantees in substance the right of property. It comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

(*Gasus Dosier und Fordertechnik GmbH* v *The Netherlands* (1995) EHRR 403).

[61] In *SRM Global Master Fund LP & Others* v *The Commissioners of Her Majesty's Treasury* [2009] EWCA Civ 788 the Court of Appeal identified three principles in applying A1P1:

> "As it seems to me the jurisprudence has established three governing principles....They are (1) the need for a fair balance to be struck between public interest and private right; (2) the principle of proportionality; (3) the doctrine of the margin of appreciation."

(Laws LJ at paragraph 43).

The Petitioners' contentions: *A1P1*

[62] The Petitioners argued that a ban on tobacco vending machines infringes their right to peaceful enjoyment of their assets, *viz*. their tobacco vending machines and, ultimately, their business and goodwill. A1P1 was engaged. It was accepted that the Parliament had a discretion as to how to strike the balance between the public interest and the private interests of the Petitioners. However, for much the same reasons as the Petitioners advanced in relation to the issue of justification in the EC claim, in enacting section 9 the Parliament had failed to strike a fair balance between those interests. It was incumbent on the First Respondent to demonstrate that there was a clear and proportionate justification for section 9 (*R (Laporte)* v *Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 at paragraphs 38 and 106). A close and penetrating examination of the factual basis of the justification was needed (*R* v *Shayler*, *supra,* paragraphs 61, 67-71). The circumstances here were to be contrasted with those in *R (Countryside Alliance)* v *Attorney General*, *supra,* and those in *Adams* v *Scottish Ministers*, *supra*. In each of those cases at least part of the justification was based on a moral judgment by legislators. That was not the case here. It was submitted that there was no sufficient evidential basis for the Parliament to have struck the balance in favour of a ban. The solution of having radio frequency controlled machines could equally have prevented access to cigarettes from machines by under eighteens. It would have been less restrictive of, and less damaging to, private rights. The fact that no compensation had been offered to the Petitioners for the interference with their property rights was a matter which ought to be taken into account when considering the fairness of the balance struck (*Draon* v *France* (2006) 42 EHRR 40 at paragraphs 79 and 85). In the circumstances the Parliament's judgment was "manifestly without reasonable foundation" (*Jahn and Others* v *Germany* (2006) 42 EHRR 49 at paragraph 91).

The First Respondent's contentions: *A1P1*

[63] The First Respondent submitted that the interference with the Petitioners' possessions is a control of use not a deprivation of possessions (*Sporrong and Lönnroth* v *Sweden* (1983) 5 EHRR 35 at paragraphs 62, 63; *JA Pye (Oxford) Ltd* v *United Kingdom* (2008) 46 EHRR 45 at paragraphs 64 - 66). The control of use is in the general interest - directed to the protection of health and life. In control of use cases the absence of compensation is a relevant factor but a fair balance could be struck between public and private interests without compensation being offered (*James* v *United Kingdom* (1986) 8 EHRR 123 at paragraph 54; *JA Pye (Oxford) Ltd* v *United Kingdom*, *supra,* paragraphs 75, 79). Here a fair balance was struck without the offer of compensation. For essentially the same reasons founded upon in response to the Community law challenge, it was well within the Parliament's margin of discretion to strike the balance in favour of the public interest and to enact section 9. It could not be said that the Parliament's judgment was "manifestly without reasonable foundation" (*James* v *United Kingdom*, *supra,* at paragraph 46; *Jahn and Others* v *Germany, supra,* at paragraph 91).

Discussion and conclusions on Convention rights challenge

[64] It is common ground that A1P1 is engaged by section 9. The contentious matter is whether the interference with the Petitioners' possessions is justified in the public interest. There is a legitimate public interest in preventing under eighteens from having access to cigarettes from vending machines. The issue is whether section 9 is an appropriate and proportionate means of achieving that aim.

[65] For largely the same reasons as led me to reject the Community law challenge I am satisfied that the interference with the Petitioners' right to peaceful enjoyment of their possessions is justifiable in the public interest and is proportionate. It is not necessary to repeat those reasons. There was material at the Parliament's disposal which provided a sufficient basis to justify section 9's enactment. On the basis of that material the Parliament was entitled to strike the balance in favour of the public interest. Neither the means employed, nor the disadvantages caused by the interference with the Petitioners' right to peaceful enjoyment of their possessions, are disproportionate to the aim pursued. The Parliament's judgement to enact section 9 was not manifestly without reasonable foundation (*JA Pye (Oxford) Ltd* v *United Kingdom,* supra, at paragraph 75).

[66] In reaching those conclusions I take account of the fact that no offer of compensation has been made to the Petitioners: that is plainly a matter which is relevant to the balancing exercise. However, in a control of use case - which I accept this is (see e.g. the observations of Lord Bingham of Cornhill in *R (Countryside Alliance)* v *Attorney General*, *supra,* at paragraph 20) - compensation is not a prerequisite of proportionality. In such cases whether (and if so, to what extent) compensation should be provided is normally a matter for the discretionary area of judgment of the legislature (*Adams* v *Advocate General*, *supra,* at paragraph 130; *Adams* v *Scottish Ministers*, *supra,* at paragraphs [50], [96], [103], [104]); and the margin of discretion is a wide one (*JA Pye (Oxford) Ltd* v *United Kingdom*, *supra*, paragraphs 75, 79; *AXA General Insurance Limited* v *Lord Advocate*, *supra,* paragraph [147]; *R* v *Secretary of State for Health, ex parte Eastside Cheese Co, supra,* paragraphs [57]-[59]). In the whole circumstances of this case I am satisfied that the Parliament was entitled to proceed as it did. Those circumstances include the fact that the interference results from a measure designed to implement a social reform with a

view to protecting health and life; and the fact that there were within the material before the Parliament indications of potential alternative uses of vending machines and possible avenues for business diversification. I do not overlook the fact that the suggested alternative uses and business diversification were the subject of considerable criticism. While it seems to me to be likely that resort to such options would, at best, mitigate, rather than avoid, losses to the Petitioners, I do not think that the Parliament was bound to disregard them. In any event, it is not for me to substitute my own views for the Parliament's judgment, but to review the basis of that judgment and decide whether it is manifestly without reasonable foundation. I am not persuaded that Parliament exceeded or misapplied its discretionary area of judgment.

Decision

[67] It follows that neither the Community law challenge nor the Convention rights challenge is well founded. Section 9 is not outside the legislative competence of the Parliament (Scotland Act 1998, section 29(1), (2)(d)).

[68] As I have held that section 9 is justified under Article 36 TFEU it is neither necessary nor appropriate to seek a preliminary ruling from the ECJ on the question whether section 9 falls within the scope of Article 34.

Disposal

[69] I shall sustain the third plea-in-law for the First Respondent and repel the first plea-in-law for the Petitioners. The effect is to refuse the Petition in so far as it is founded on section 9 being

outside the Parliament's legislative competence. All that remains of the Petition is the challenge founded on the Technical Standards Directive.