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Lukasz Gruszczynski (ed.), *The Regulation of E-cigarettes: International, European and National Challenges*, Edward Elgar Publishing, Cheltenham: 2019, pp. 320

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One of the most important trends in the law studies is connected with the legal evaluation of new economic and/or social phenomena and technological developments. The book edited by L. Gruszczynski[1] refers to a matter which has elements of all of them, although it describes just one group of products. E-cigarettes seem to be a niche subject, perhaps no more interesting than thousands of other products (at least other than water, food and energy). It may however be astonishing for scholars engaged in the traditional way of approaching international law (subjects of law, its sources, responsibility etc.) how many interesting perspectives, unexpected legal conclusions, and real challenges are connected with e-cigarettes. It must be stressed that term "e-cigarettes" is just an everyday shorthand term; the scientific term used in the book is ENDS (i.e. Electronic Nicotine Delivery Systems).[2] For reasons of simplicity the former term will be used here, however.

L. Gruszczynski – both the editor and author/co-author of three contributions (an introduction and two chapters) – is a recognized specialist in international law who has long been engaged in the legal analyses of matters connected with tobacco and cigarettes. His great achievement was to convince eminent authors to cooperate in the making of a publication which is not a loose collection of separate texts, but a systemically organized whole. The book is a product of the work of 18 specialists. It is worth noting that some of them are lawyers, some specialists in medical sciences, and other experts in psychology. The resultant collaboration consists of 11 contributions. Their methodologies differ to a high extent owing to the specialities of the respective authors. The book is divided into three (unequal) parts. The first refers to the interrelationship between science and

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[1] L. Gruszczynski (ed.), *The Regulation of E-cigarettes: International, European and National Challenges*, Edward Elgar Publishing, Cheltenham: 2019.

[2] *Cf.* L. Gruszczynski, *Introduction: Regulating e-cigarettes in the face of uncertainty*, in: Gruszczynski (ed.), *supra* note 1, p. 5.

the law on e-cigarettes. The second part presents the problem of e-cigarettes from the perspective of international and European law. Last but not least the perspective of domestic law is examined in the last part. There is no doubt that the second part is the most important and interesting for international lawyers. It is also the longest, comprising five chapters. They refer to the relationship of e-cigarettes to the Framework Convention on Tobacco Control (Framework agreement, or Convention), to human rights, and to WTO law and EU law (two texts).

It would be neither possible nor wise to try to summarize all the texts (though it will be necessary to refer to some of them in more detail). It may be more interesting to start with the interrelationships among them, which are numerous. One of them deals with the nature of e-cigarettes, which can be looked at from different perspectives. Let us start with the legal qualifications. From this perspective one should ask in particular whether e-cigarettes are tobacco products. If so, the rules on the Framework agreement would be applicable to them. If not however, what should be done, or maybe what are States obliged not to do? The WTO perspective may caution against measures which are discriminatory with respect to e-cigarettes, even if they are not tobacco products but are similar to them. There is nowadays no doubt as to the powers of the EU to regulate these matters (though in the past their strict interrelationship to human health was an obstacle to recognition of such powers on the part of the pre-Amsterdam EC). The perspective of human rights may lead to a much more complex set of possible or even mandatory reactions on the part of States. The comparison of texts adopting those perspectives makes it clear that extra-legal analyses are indispensable for many (even if not all) of the legal qualifications of e-cigarettes. For this reason one should very highly evaluate the decision to devote the entire Part I to natural sciences dealing with e-cigarettes. The authors of chapters on the legal aspects of e-cigarettes may refer to two very valuable contributions contained in Part I, though some of them find it inevitable to adopt some assumptions on their own. The main dilemma visible in several texts is whether e-cigarettes should be deemed a danger to health, or whether they represent an opportunity for smokers to quit smoking. It may be that both answers are true, in which case a weighing of the respective merits and drawbacks would be necessary. In this regard the two main points of reference are the gateway effect, and harm reduction. The gateway effect relates to the risk of e-cigarettes as an element attracting non-smokers to start smoking (or maybe simply using e-cigarettes). Harm reduction is associated with the fact that switching from traditional combustible cigarettes to complete abstinence may be impossible for many smokers, and their switch to e-cigarettes reduces the adverse health effects.

A contribution by Ch. A. Smith, A. Herbeć and L. Shahab analyses the scientific evidence concerning e-cigarettes. It takes as a point of departure the risks connected with the constituent elements of e-cigarettes, namely nicotine, propylene glycol, glycerine, and flavours. Subsequently the authors report on several tests dealing with the effects of e-cigarettes. They examine the health effects of e-cigarettes and their impact on tobacco use and harm reduction. There are two common elements in their reports. The first

is that they all underscore the need for further studies. The second is a prima facie conclusion that e-cigarettes are less harmful than combustible cigarettes. It seems that the co-authors are impressed by the words of M. Russell: "People smoke for nicotine but they die from the tar."[3]

A slightly different perspective is adopted by the authors of a chapter on 'e-cigarettes as a disruptive technology in the history of tobacco control.' While the very title suggests a legal perspective, in fact it is a brilliant contribution by two eminent specialists in public health and the history of medicine – M. Zatoński and A. M. Brandt. They look at e-cigarettes from the perspective of their inventors and producers. There is still one more perspective which cannot be ignored, which contains a message both convincing and inspiring. E-cigarettes are looked at as an instrument in the game of Big Tobacco (leading producers of tobacco products) vs. national regulators. This can be seen as a source of confusion for the latter, with some of them being confronted even with claims to treat e-cigarettes as a medicinal product.

The value of the conclusions and observations from Part I can be easily seen in the legal analyses of the remaining two parts. One should very highly appreciate the discussion concerning the application of the Framework Convention on Tobacco Products to e-cigarettes (by L. Gruszczynski). The basic underlying question is whether e-cigarettes are tobacco products. If so, several obligations provided in the Convention would be applicable to them. The analysis takes as a point of departure the technical properties of e-cigarettes and confronts them with the conventional definition of tobacco products. Gruszczynski's text is insightful in and of itself, but its added value is as an illustration of the classification problems encountered in analyses of this type. The initial conclusion, i.e. that e-cigarettes are not tobacco products because they do not contain tobacco leaf must be confronted with the fact that a slight widening of the meaning of the basic terms can also lead to a contrary conclusion (as e-cigarettes contain nicotine obtained from tobacco leaf). The same applies to the adoption of the teleological interpretation of the Convention. This well illustrates the dilemma for regulators, the possible victory of Big Tobacco and the potential of future disputes (rather "show no mercy" disputes if we take into consideration that Big Tobacco means big money). One should add to this that it would be naive to expect the fourth generation of e-cigarettes to be the last word. On the contrary, the game has just started. For example, what are the legal implications if nicotine is obtained from products other than tobacco? Would such nicotine not be similar to nicotine obtained from tobacco leaves?

The analyses of e-cigarettes from the perspective of the WTO rules should also be greatly appreciated. Though one might expect that the main point of reference would be Art. XX of GATT 1994, the authors of the chapter decided to take as a point of departure the prohibition of discrimination. This refers first of all to the situation of e-cigarettes as compared to traditional combustible cigarettes. This analysis is applied both with respect to Art. III of GATT, the Agreement on Technical Barriers to Trade, as

[3] Ch. Smith, A. Herbeć, L. Shahab, *Review of the Scientific Evidence Relating to Electronic Cigarettes: Where do we stand now?*, in: Gruszczynski (ed.), *supra* note 1, p. 53.

well as to Art. XX of GATT. The co-authors (M. Foltea and B. Mercurio) try to predict the future decision of panels/the Appellate Body with respect to a possible ban of e-cigarettes. One can only regret that the analysis is not extended to cover matters other than the similarity between traditional and electronic cigarettes. It seems to me that the main reason for this is the fact that the exact influence of e-cigarettes on human health is still unknown (although they are suspected to be much less harmful than the that of combustible tobacco).

The contribution on the human rights perspective seems to me the most controversial. In my opinion the main underlying human rights-related question concerning smoking (assuming that the use of e-cigarettes is smoking[4]) is whether there is a human right to smoke and possibly a human right not to be a passive smoker against one's will. While the latter could be easily associated with the right to health, it is much more difficult to find human rights terminology for the former. Perhaps it should be associated with the right of personal freedom. In any case this important perspective is completely outside the scope of interest of the co-authors of the respective chapter. This seems all the more unsatisfactory given that the process of prohibiting smoking in more and more places was referred to in the book.[5] What is more doubtful is the adoption of the right to health as a main point of reference. The co-authors seem to treat this second generation right as if it constitutes the basis for a claim. What is even more striking are the sets of obligations of States advocated by the co-authors. On one hand they speak in favour of taking a strict attitude toward e-cigarettes as products harmful to health. At the same time, they also assert a need to guarantee access to e-cigarettes if they are to be treated as medicinal product.

EU law is the topic of two chapters. Both describe Directive 2014/40 and the ECJ ruling in case C-477/14 Pillbox, in which the Court upheld its provisions on e-cigarettes. A systemic presentation of both elements can be found in the chapter by L. Gruszczynski and A. Pudło. What is of special value is their review of domestic law solutions. They compare the solutions adopted by Member States with respect to e-cigarettes before the adoption of the Directive with those adopted on the basis of express empowering provisions of the Directive. The co-authors decide to analyse the elements of the Pillbox case point-by-point. One can wonder if there is sense to devote so much space to the subsidiarity principle, taking into consideration that the EEC/EC/EU has harmonized product after product since the 1960s. One can guess that the true reason for devoting such an amount of space to this issue is the fact that the provisions on e-cigarettes were absent in the Commission's proposal and found their place in the Directive on the basis of an amendment of the European Parliament. This gives rise to serious doubts as well as to a feeling of helplessness – legal arguments can be easily used to justify almost every product of possible lobbying. The co-authors try to be as dip-

[4] For more on this dilemma *see* M.E.C. Gispen and J.D. Veraldi, *A human rights approach to the regulation of electronic cigarettes*, in: Gruszczynski (ed.) *supra* note 1, p. 91.

[5] *Cf.* M. Zatoński and A.M. Brandt, *Divide and Conquer? E-cigarettes as Disruptive Technology in the History of Tobacco Control*, in: Gruszczynski (ed.) *supra* note 1, p. 25.

lomatic as possible toward the ECJ. A much more critical attitude is adopted by G.A. Ferro and C. Nicolosi in their text on the precautionary principle in the EU law. They do not hesitate to call the attitude of the ECJ as mistaken.

The comparison of several texts makes it possible to offer a few more general observations. One of them refers to attitudes toward the sources of law. Some authors show a tendency to treat several non-binding acts as sources of law. I take a very critical attitude to argumentation of this kind. One of the main virtues of lawyers is their ability to distinguish between law and non-law. In fact combining the two is becoming a very widespread and far-reaching tendency, which can be easily traced in the works of the International Law Commission as well. Non-binding resolutions start to be treated as sources of "unwritten law", while in fact they are "written non-law." That is why I highly appreciate the perceptiveness of L. Gruszczynski in pointing out this matter.

The texts on the EU law are a natural introduction to the analyses of domestic provisions. The editor did not adopt the simple method of presenting one legal order prohibiting e-cigarettes, one regulating them heavily, and one adopting a laissez-faire attitude. On the contrary three texts are devoted to the provisions in place in, respectively, the USA, China (and Taiwan), as well as in Australia. They show the subtleties and difficulties of domestic laws dealing with e-cigarettes.

This book is a very useful tool for both theoreticians and practitioners of law. It is also a sign of the times. I hope that the future will bring with it similar contributions on new products with important legal implications.