Taming Schrödinger’s cat: e-cigarettes under the Framework Convention on Tobacco Control

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Plan of the presentation

• Introductory remarks on the FCTC
• E-cigarettes in the practice of the Secretariat and COP
• Understanding the existing heterogeneity in e-cigarettes classification
• Conclusions

• Research questions:
  • Does the FCTC applies to e-cigarettes? Through which provisions?
  • Can the FCTC COP regulate them as a part of its mandate?
• Entered into force in 2005, currently 181 State Parties (countries + EU)
• Sets certain tobacco control standards – both demand and supply side reduction measures
• Framework treaty, details determined in technical (non-binding but important) guidelines
• In principle the FCTC only applies to tobacco and tobacco products:
  “products entirely or partly made of the leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing”
• FCTC is silent on e-cigarettes, but they may fall within the scope of some of its provisions
E-cigarettes addressed by the COP for the first time in 2010, since then several reports prepared by the WHO/FCTC Secretariat + COP decisions

2014: COP invited Parties to consider prohibiting or regulating ENDS as tobacco products, medicinal products, consumer products, or other categories; provided some general regulatory guidelines.

Position of the FCTC Secretariat – the Convention applies to e-cigarettes if they are regarded as:
- tobacco products
- objects in the form of tobacco products which appeal to minors
- products contributing to nicotine addiction (Art. 5.2(b))
- an indirect form of advertising (Art. 13.2)
E-cigarette - the Schrödinger cat

• Depending on the classification of e-cigarettes under the FCTC, different regulatory responses are required.

• How to explain the existing heterogeneity:
  • interpretative declaration by State Parties? [none]
  • different interpretations of the relevant provisions by State Parties, e.g. “tobacco product” = discrepancies could be eliminated in the dispute settlement or by a COP decision (non-binding but relevant for interpretation) [none]
  • basing e-cigarettes policies on Art. 5.2(b) and classifying them as tobacco products or otherwise
  • deciding on specific policy on the basis of inherent sovereign powers of states
Conclusions

- Regulatory heterogeneity will persist because of:
  - formulation of the relevant FCTC provisions
  - complex nature of ENDS
  - COP’s unwillingness to take a decisive stance
- Such situation is perfectly legal/normal from the perspective of international law
- Eventually the COP will need to take a decision
- Preferable approach – sui generis category with its own standards (COP decisions adopted so far are good starting point)
Thank you for your attention!

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