

LAW AND OBESITY PREVENTION

MAXIMIZING OPPORTUNITIES BY UNDERSTANDING CONSTRAINTS

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The Law as a Tool for Obesity Prevention

- ▣ Law as part of a broader mix of policy interventions
- ▣ **Law is not a panacea but it is a key instrument** in the development and implementation of effective obesity prevention strategies:
 - can compensate for information asymmetries
 - can help shape our environment to make the healthy choice a healthier choice
 - can help rectify market failures
 - can help reduce health inequalities
 - can help educate people

Key Question

- ▣ Not so much *whether* the law can play an important role in promoting healthier lifestyles
- ▣ Rather, the question is how the law can be designed to support effective obesity prevention strategies
- ▣ Good laws should be **able to withstand legal challenges** as much as can possibly be anticipated
- ▣ Without framing the relevant issues in legal terms, the public health community will not succeed in using the law effectively

Three Main Types of Constraints

- ▣ Trade restrictions
- ▣ Fundamental rights
- ▣ Constitutional arrangements (allocation of powers between the different levels of government)

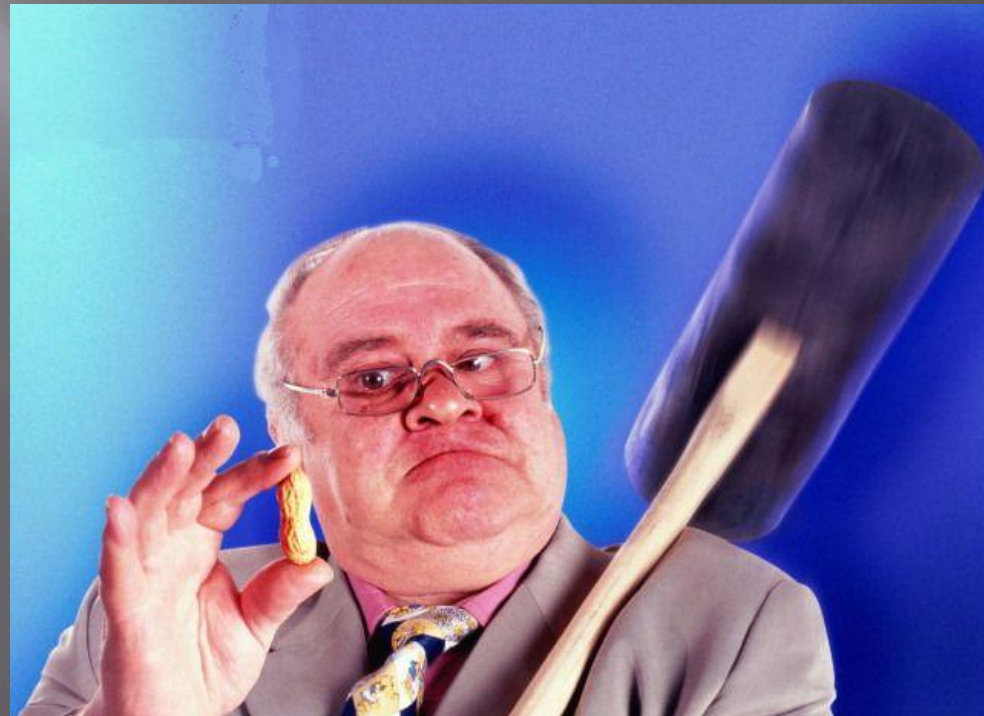
Trade and Health

- ▣ The trade-health nexus
- ▣ Overarching principles of WTO and EU law:
 - in the absence of common rules
 - Member States are entitled to protect public health
 - provided:
 - 1) they do **not discriminate against imports**;
and
 - 2) they adopt **proportionate** measures

Proportionality as a Key Legal Principle

A MEASURE MUST BE
NECESSARY

AND IT MUST NOT EXCEED
WHAT IS REQUIRED TO
ACHIEVE A GIVEN OBJECTIVE



Fundamental Rights and Industry Operators

- ▣ Right to property, right to trade and freedom of (commercial) expression
- ▣ All protected in Europe, but none of them is absolute
- ▣ **Balancing exercise required between competing interests: PROPORTIONALITY yet again!**
- ▣ **Standard of review** can only be determined on the basis of a thorough engagement with case law
- ▣ **!!!** It will vary from one legal system to another
 - EU Courts leave a broad margin of discretion to regulatory authorities

Fundamental Rights: Shifting the Paradigm!

- ▣ Right to health
- ▣ Also right to life, right to information, right to education, right to adequate (nutritious) food
- ▣ Umbrella principle requiring that all actions concerning children shall be taken in their best interest
- ▣ Growing interest of UN bodies
- ▣ **Fundamental rights should be used not only as a shield to oppose industry challenges, but also as a sword to regulate food industry operators**

EU Powers and Public Health

- ▣ Article 168(5) TFEU does not grant any regulatory powers to the EU in the area of health (subject to narrowly defined exceptions)
- ▣ BUT public health **mainstreaming** obligation:
 - Article 9, Article 114(3) and Article 168(1) TFEU
 - multi-sectoral intervention required to prevent NCDs effectively
- ▣ Several EU policy areas are relevant to the development of an EU NCD prevention strategy:
 - e.g. 1: Article 114 TFEU on the Internal Market
 - e.g. 2: Article 113 TFEU on Indirect Taxation

Learning from the *Tobacco Advertising* Litigation

- ▣ 1998: adoption of the First Tobacco Advertising Directive
- ▣ Directive challenged by Germany and by tobacco manufacturers
- ▣ 2000: Directive annulled by the CJEU for lack of sufficient EU powers
- ▣ 2003: adoption of the Second Tobacco Advertising Directive (of narrower scope)
- ▣ Directive challenged by Germany
- ▣ December 2006: validity of the Directive upheld by the CJEU
- ▣ **!!! TIME, RESOURCES, 'DOMINO EFFECT'**

Brief Concluding Remarks

- ▣ Framing policies in legal terms is paramount for public health
- ▣ Let us embrace:
 - Interdisciplinarity
 - regulatory challenges
- ▣ And let us think creatively!