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)
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
A MEASURE MUST BE NECESSARY

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

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’
Framing policies in legal terms is paramount for public health.

Let us embrace:
- Interdisciplinarity
- Regulatory challenges

And let us think creatively!