Law, Healthy Diets and Obesity Prevention

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Introduction

The WHO Action Plan on the Prevention and Control of Non-Communicable Diseases (NCDs) for 2013-2020 recognizes that legal instruments have a role to play in reaching the 2025 voluntary targets Member States have unanimously endorsed, including the halt in the rise of childhood obesity and Type II diabetes.[1] Even though it does not detail how the law could come into play, it nonetheless identifies a range of areas where regulation may be envisaged, including food labelling, food marketing and food taxation.[2]

Two of the main characteristics of law are that it is binding and subject to enforcement. As such, it imposes a degree of external constraint on its addressees which may not be popular with powerful economic actors, including food businesses. As is well-known, industries have developed a range of tactics to oppose legal rules which would not foster their interests – namely impede their ability to make profits, often to the detriment of public health. In particular, they have not hesitated to engage in costly litigation to have these rules annulled or even delay their entry into force. To ensure that these tactics are not unduly successful, public authorities entrusted with the powers to regulate food labelling, to restrict the marketing of unhealthy food or to impose food taxes, should not be intimated to act where public health so requires.

However, strong political will is not a sufficient condition for the law to be used effectively to promote healthier diets and thereby prevent obesity: policy makers must also learn to anticipate legal challenges and ensure that the legal measures they adopt are able to withstand such challenges. To do so, they need to understand the legal constraints within which they need to operate. Indeed, legal rules do not exist in a vacuum and must be integrated within a pre-existing set of rules. In particular, the hierarchy of legal norms requires that laws on food labelling, food marketing or food taxes comply with higher laws, not least rules of a constitutional nature and those derived from international law. Failure to do so entails significant risks for public authorities: a rule may be challenged before competent courts and tribunals in a judicial review action and may be annulled if non-compliance is established. This could lead to a waste of precious time, as the regulatory process would have to start all over again. Not only would it be costly for the public purse, but it may also have significant regulatory chill effects, deterring from the adoption of further public health measures.

This brief contribution highlights three types of constraints which industry operators have invoked to challenge laws adopted to prevent NCDs: 1) international trade rules, 2) fundamental rights and 3) the allocation of powers between different levels of government. It attempts to demonstrate that if laws are carefully framed by policy makers, they will be more likely to withstand judicial review and contribute to effective NCD and obesity prevention strategies.

International trade rules

As the ongoing dispute on the plain packaging of tobacco products clearly shows,[3] industry operators will not hesitate to challenge laws adopted to protect public health on the basis that these laws have trade restrictive effects. This is facilitated by the fact that the World Trade Organization and the European Union rest on the principle that trade liberalization is conducive to economic growth and prosperity. The premise that goods and services should move freely from one Member State to another may be problematic for obesity prevention policies, whose objective is to durably reduce the consumption of unhealthy food.[4] However, under both WTO and EU law, the principle of free movement is not unlimited: the founding documents of both

legal orders provide for the possibility of derogations on grounds (among others) of public health protection.[5] States may therefore invoke obesity prevention to justify rules restricting the free movement of goods or services. The question therefore becomes how potentially conflicting interests such as free trade and public health can be reconciled. Governments will strike the necessary balance between trade and health by applying the principle of proportionality.

The principle of proportionality is very familiar within legal circles. In essence, it requires that the means used to achieve a specific objective are tailored to the specific objective in question. This implies, firstly, that the measure is suitable to achieve the objective pursued (suitability test) and, secondly, that it does not exceed what is necessary to do so (necessity test). The image often used is that proportionality requires that one should crack a nut with a nutcracker, not with a sledge hammer. Let us take an example to illustrate the practical relevance of this principle. If a measure purports to protect children from the harmful consequences of unhealthy food marketing, it needs to be framed with this aim in mind. As far as the suitability limb of the proportionality test is concerned, a State should invoke the evidence linking children exposure to unhealthy food marketing and their consumption preferences and purchase requests.[6] As far as the necessity test is concerned, a State should establish that the measure is not more restrictive of trade than is necessary to protect children as a group of particularly vulnerable consumers from the harmful effects of unhealthy food marketing. In particular, it will need to determine what falls within the category of unhealthy (as opposed to healthy) food. A ban on the marketing of all foods would be excessive and fail to satisfy the demands of proportionality as it would prevent commercial operators from promoting healthier foods whose consumption should arguably be encouraged and would therefore have trade restrictive effects going beyond what is permitted under EU and WTO law. If the categorization system the Member State has used in order to distinguish healthy from unhealthy food is challenged, it will have to defend its model by demonstrating that it has proceeded on the basis of existing evidence.

Understanding the margin of discretion a Member State derives from WTO and EU rules to protect the health of its citizens is complex and requires that the public health community engages with lawyers to ensure that a Member State has carried out the balancing exercise required, applying the vast case law developed in particular by the WTO Dispute Settlement Body and the Court of Justice of the European Union to the specific circumstances of each case.[7]

Fundamental rights

Similarly, public authorities must ensure that they comply with the fundamental rights enshrined in their legal order.[8]

Industry operators have often invoked fundamental rights to support their claim that measures adopted as part of the NCD agenda should be struck down, arguing more specifically that these measures infringe their right to property, their right to trade or their freedom of (commercial) expression. However, if it is true that these rights are embedded in many countries in the world, not least in EU Member States, none of them is absolute: they can be limited in law on grounds of public health (among others). Here again, it is necessary to determine how potentially competing rights should be balanced against each other – something the principle of proportionality is designed to help public authorities achieve. This nonetheless requires a careful engagement with the relevant case law. The difficulties are compounded by the fact that competent courts and tribunals have adopted different tests of proportionality, depending on the jurisdiction at stake. Thus, the importance given to free expression in the United States has led the US Supreme Court to lay down a very demanding proportionality test which, ultimately, explains why advertising restrictions have not been easily upheld as compatible with the First Amendment.[9] By contrast, courts in Europe[10] and Canada[11] have granted a much broader margin of discretion to the

competent regulatory authorities, on the ground that the decisions as to where the line should be drawn between what is necessary to protect public health and what is not requires complex cultural, social and economic assessments which a regulator is better placed to undertake than a judicial authority.[12] Here again, the public health community must engage with lawyers who have a good understanding of fundamental rights law, if they are to devise effective policies which courts are likely to consider compatible with fundamental rights.

Beyond increasing the chances of defending industry challenges before courts of law, a better awareness of relevant fundamental rights will also allow for the development and implementation of more effective policies. It is indeed striking that industry operators have been at the forefront of the fundamental rights agenda, when fundamental rights are arguably designed to protect vulnerable groups against the misuse of public authority. This extraordinary situation confirms the existence of an enormous legal knowledge gap between the public health community and industry operators. Nevertheless, the fundamental rights narrative that the industry has developed is far too incomplete to convince: the law should be used as a tool to promote the right to health and several other fundamental rights, including the right to life and the right to a clean environment,[13] the right to (nutritious) food,[14] the right to education and the principle that all actions concerning children shall be taken in their best interest. As Anand Grover, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, recently stated: 'Owing to the inherent problems associated with self-regulation and public–private partnerships, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. The responsibility to protect the enjoyment of the right to health warrants State intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people's health. Therefore, States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies. Under the right to health, States are especially required to protect vulnerable groups such as children from violations of their right to health.'[15] Fundamental rights arguments should be not only be used as a shield to oppose industry challenges; they should also be used as a sword to develop more effective obesity and NCD prevention strategies worldwide.[16]

The allocation of powers between different levels of government

There is a clear consensus that effective obesity prevention strategies must be 'multi-level': whilst the global operation of major food businesses calls for a response at global and regional levels, the range of food cultures, circumstances and consumption patterns call for a response at national and local levels. It is therefore necessary to determine not only which regulatory intervention should be adopted to reverse current obesity trends, but also what the most appropriate level for such intervention is. This enquiry, which raises the thorny question of where the competence should lie between different levels of governance, adds a layer of complexity to the regulatory landscape and offers yet another opportunity to food businesses to challenge legal rules intended to help prevent obesity.

A basic principle underpinning the EU legal order is that the EU can only act if it has the required powers to do so. This principle is also known as the principle of conferral or the principle of attributed powers: if the EU Treaties do not provide a legal basis for an EU intervention, action may only be taken by Member States,[17] and if the EU regulates beyond the powers it has been granted by Member States,[18] the measure(s) it has adopted may be challenged and subsequently annulled by the Court of Justice of the EU for lack of competence.[19]

Industry-led challenges have shown how important it is, notwithstanding how difficult it may be, to draw the line between legitimate and non-legitimate EU intervention. The *Tobacco Advertising* litigation is the most notorious illustration of the risks involved for the EU when it exceeds the regulatory powers it

derives from the EU Treaties.[20] In 1998, the EU adopted a directive banning all forms of tobacco advertising and sponsorship.[21] The German government, which took a stance against this directive alongside tobacco manufacturers,[22] argued that it did not comply with, among others, the principle of conferral. The Court of justice of the EU upheld the claim that the EU had exceeded its powers in this particular instance, on the ground that the measure amounted to a disguised public health measure which the EU did not have the competence to adopt as it did not contribute to the establishment and functioning of the internal market.[23]

This outcome stems from the fact that the Treaty provision dealing specifically with public health does not allow the EU to harmonize Member State laws in this field.[24] EU powers are said to be 'supportive' only: if the EU can issue recommendations and opinions, engage in EU-wide public health campaigns, establish discussion fora[25] or finance research programmes, it is not empowered to regulate through regulations or directives on health grounds (except in narrowly defined areas). At the same time, however, the EU Treaties also mandate the EU to adopt a high level of public health protection in all its policies, including the policy areas in which it has regulatory powers.[26] Thus, if the EU cannot adopt binding rules intended to prevent childhood obesity invoking exclusively a 'public health' rationale, it can do so by relying on the Treaty provisions which allow the EU to legislate in other defined policy areas. In particular, the EU is empowered to adopt common rules to ensure the establishment and the proper functioning of the internal market.[27] It is precisely on this basis that the EU has adopted a range of measures regulating the labelling, the packaging or the marketing of tobacco, alcohol and (unhealthy) food. Even though the internal market legal basis does not have health as its primary focus, it nonetheless requires that the EU should adopt a high level of public health protection as part of its internal market policy.[28]

Bearing the limits which the EU Treaties place on EU powers in the field of public health, the EU had no option but to redraft the 1998 tobacco advertising directive in such a way that it was no longer a 'disguised public health measure' but contributed to the establishment or the functioning of the internal market: according to the Court of Justice's established case law, it is only if a measure affects cross-border trade or distorts competition that it can lawfully be adopted at EU rather than at national level – a very difficult question which has given rise to a significant body of case law and academic commentaries.[29] Thus, if the EU has the powers required to regulate the sponsorship of sports events with an international appeal, it is not empowered by the EU Treaties to regulate the sponsorship of local sports events. The annulment of the first tobacco advertising directive did allow the tobacco industry to postpone the entry into force of an EU-wide ban on all forms of cross-border advertising and sponsorship for years: the second tobacco advertising directive was adopted in 2003[30] and its validity – challenged once again before the Court of Justice of the EU – was only upheld in December 2006.[31]

Conclusion

The contribution that the law can make to the NCD and obesity prevention agenda has recently started to attract growing attention from legal scholars.[32] It is necessary to continue develop legal capacity and ensure that the public health and the legal communities refine their understanding of each other and their ability to work more systematically and more effectively together. Without framing the relevant issues in legal terms, on the basis of existing evidence, the public health community will not succeed in using the law effectively.[33] History has shown that the tobacco, the alcohol and the food industries systematically challenge laws adopted as part of the NCD prevention and control agenda. These industries will be far more likely to succeed if the laws they challenge have been adopted without sufficient concern for international trade, fundamental rights and constitutional laws.

References

1. Resolution WHA 66.10: http://www.who.int/nmh/events/ncd_action_plan/en/.
2. One could also envisage measures regulating food composition or portion size. For a taxonomy of the legal instruments relevant to NCD prevention and control, see A. Alemanno and A. Garde, *Regulating Lifestyles in Europe: How to prevent and control non-communicable diseases associated with tobacco, alcohol and unhealthy diets?* Report for the Swedish Institute for European Policy Studies (SIEPS, December 2013): http://sieps.se/en/publikationer/regulating-lifestyles-in-europe-how-to-prevent-and-control-non-communicable-diseases-associated-with-.
3. Dispute opposing Australia to Ukraine, Honduras, Dominican Republic, Cuba and Indonesia before the WTO Dispute Settlement Body (Complaints DS434, DS435, DS441, DS458 and DS467
   respectively): http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm?id=G16 6#selected_subject.
4. Perhaps not surprisingly, a high proportion (around 30%) of trade concerns currently raised at WTO level involves health protection, and food labelling more specifically: http://www.wto.org/english/news_e/news14_e/tbt_18jun14_e.htm.
5. See Article XX GATT and Article XIV GATS, and Article 36 and Article 52 of the Treaty on the Functioning of the EU.
6. See in particular the review which served as a basis for the set of WHO recommendations on the marketing of food and non-alcoholic beverages to children (unanimously adopted by Resolution WHA 63.14 in May 2010): G. Hastings et al., *The Extent, Nature and Effects of Food Promotion to Children: A Review of the Evidence to December 2008*, WHO, 2009: http://www.who.int/dietphysicalactivity/Evidence_Update_2009.pdf.
7. The scope of the principle of proportionality has been defined incrementally by competent courts, tribunals and dispute settlement bodies.
8. Fundamental rights can be defined as rights requiring a high degree of protection from government encroachment.
9. See in particular *44 Liquormart v Rhode Island* (1996) 517 US 484; and *Lorillard Tobacco Co et al v Reilly, Attorney General of Massachusetts, et al* (2001) 533 US 525, in which the US Supreme Court ruled that a challenge to a ban on advertisements providing information about the prices of alcoholic drinks and a challenge to tobacco advertising and sales practices intended to recruit children as new customers respectively infringed the free speech clause contained in the First Amendment to the US Constitution..
10. See the *Tobacco Advertising Litigation* referred to above where the Court of Justice of the EU held that the EU could legitimately impose a ban on all forms of advertising and sponsorship which have a cross-border impact or distort competition within the EU. Similarly, the EU ruled that the imposition of a ban on the use of descriptors such as 'light', 'mild' or 'low tar' was legitimate proportionate restriction on the freedom of commercial operators to promote their goods, services and brands to ensure a high level of public health protection across all EU Member States: see Case C-491/01 *British American Tobacco* [2002] ECR I-11453.
11. See in particular the decision of the Supreme Court of Canada in *Irwin Toy Ltd v Attorney General of Quebec* [1989] 1 SCR 927 upholding the Quebec ban on all forms of advertising to children under 13.
12. On the relationship between freedom of expression and public health and a comparison of the different standards of review imposed in the US, the EU and Canada, see A. Garde, 'Freedom of Commercial Expression and the Protection of Public Health in Europe' (2010) 12 *Cambridge Yearbook of European Legal Studies* 225.
13. On the relationship between tobacco control and fundamental rights, see O. Cabrera and L. Gostin, 'Human Rights and the Framework Convention on Tobacco Control: Mutually

Reinforcing Systems', (2011) *International Journal of Law in Context* 285; C. Dresler and S. Marks, 'The Emerging Human Right to Tobacco Control', (2006) 28 *Human Rights Quarterly*, 599; and M. Crow, 'Smokescreen and State Responsibility Using Human Rights Strategies to Promote Global Tobacco Control', (2004) 29 *Yale Journal of International Law* 209.

14. Olivier de Schutter, the UN Special Rapporteur to the right to food (2008-2014), has interpreted this right as including the right to nutritious food, which has led him to argue forcefully that legally binding measures (as opposed to voluntary measures) should be adopted to restrict the marketing of unhealthy food to children: *The right to an adequate diet: the agriculture-food-health nexus***,** Report presented at the 19th session of the UN Human Rights Council, 26 December 2011, A/HRC/1/9/59.
15. *Unhealthy foods, non-communicable diseases and the right to health*, Report presented at the 26th session of the UN Human Rights Council, 1st April 2014, A/HRC/26/31, at paragraph 25.
16. This point is discussed more fully in A. Alemanno and A. Garde, *Regulating Lifestyles in Europe: How to prevent and control non-communicable diseases associated with tobacco, alcohol and unhealthy diets?* Report for the Swedish Institute for European Policy Studies (SIEPS, December 2013): http://sieps.se/en/publikationer/regulating-lifestyles-in-europe-how-to-prevent-and-control-non-communicable-diseases-associated-with-.
17. Article 5(1) of the Treaty on the EU. The consolidated version of the EU Treaties is available at: http://europa.eu/eu-law/decision-making/treaties/pdf/consolidated_versions_of_the_treaty_on_european_union_2012/consolidated_versions_of_the_treaty_on_european_union_2012_en.pdf
18. The principle of conferral derives from the seminal judgment in the *Van Gend en Loos* case, where the Court of Justice held that 'the [EU] constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, *albeit within limited fields*, and the subjects of which comprise not only Member States but also their nationals' (emphasis added): Case 26/62 *Van Gend en Loos* [1963] ECR 3.
19. Article 263 of the Treaty on the Functioning of the EU.
20. On the scope of EU powers and how they can be exercised to promote healthier lifestyles, see A. Alemanno and A. Garde, 'The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets', *Common Market Law Review* 50 (2013) 1745. On obesity prevention more specifically, see A. Garde, *EU Law and Obesity Prevention*, Kluwer Law International, 2010.
21. Directive 98/43 on tobacco advertising and sponsorship, OJ 1998 L 213/9.
22. The adoption of the Directive notwithstanding the stance of a Member State against it results from the fact that internal market measures can be adopted by qualified majority voting (i.e. without the unanimous agreement of Member States). Article 238 of the Treaty on the Functioning of the EU provides that qualified majority voting is the rule, except when otherwise provided.
23. Case C-376/98 *Germany v Council and European Parliament (Tobacco Advertising I)* [2000] ECR 1-8419.
24. Article 168(5) of the Treaty on the Functioning of the EU.
25. See for example the EU Platform on Diet, Physical Activity and Health: http://ec.europa.eu/health/nutrition_physical_activity/platform/index_en.htm, and the High Level Group on Nutrition and Physical Activity: http://ec.europa.eu/health/nutrition_physical_activity/high_level_group/index_en.htm.
26. Article 168(1) and Article 9 of the Treaty on the Functioning of the EU.
27. Article 114 of the Treaty on the Functioning of the EU. The internal market is defined in Article 26 of the same Treaty as an area where people, goods, services and capital shall move freely, subject to the limits defined in the EU Treaties.
28. Article 114(3).

29. On the scope of EU powers to adopt obesity prevention measures, see in particular A. Garde, *EU Law and Obesity Prevention* (Kluwer Law International, 2010), chapter 3. On the EU NCD agenda more broadly, see A. Alemanno and A. Garde, *Regulating Lifestyles in Europe: How to prevent and control non-communicable diseases associated with tobacco, alcohol and unhealthy diets?*, Report for the Swedish Institute for European Policy Studies (SIEPS, December 2013), available at: http://sieps.se/en/publikationer/regulating-lifestyles-in-europe-how-to-prevent-and-control-non-communicable-diseases-associated-with-.
30. Directive 2003/33 on tobacco advertising and sponsorship, OJ 2003 L 152/16.
31. Case C-380/03 *Germany v Council and European Parliament (Tobacco Advertising II)* [2006] ECR I-11573.
32. Apart from the references already cited in this chapter, see also: B. Thomas and L. Gostin, 'Tackling the Global NCD Crisis: Innovations in Law and Governance', (2013) 41 *Journal of Law, Medicine and Ethics* 16; T. Voon, A. Mitchell and J. Liberman (eds), *Regulating Tobacco, Alcohol and Unhealthy Foods* (Routledge, 2014); A. Alemanno and A. Garde, *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press, December 2014).
33. It is not argued that the law is a panacea; rather, it is merely argued that it has a significant role to play in promoting healthier lifestyles.

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Amandine Garde is Professor of Law at the University of Liverpool. She previously lectured at King's College London where she obtained her PhD, at the Faculty of Law in Cambridge where she was also a Fellow of Selwyn College, at the University of Exeter and at the University of Durham. Her research interests lie in the fields of EU Internal Market, Consumer, Advertising, Food and Public Health Law. In particular, she has developed an expertise on the legal aspects of obesity prevention and other risk factors for non-communicable diseases such as tobacco and excessive alcohol consumption. Her book *EU Law and Obesity Prevention* (Kluwer Law International, 2010) is the first to offer a critical analysis of the EU's Obesity Prevention Strategy, and she is co-editor (with Alberto Alemanno) of *Regulating Lifestyle Risks: the EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press, forthcoming, December 2014). As one of the few legal experts on the prevention of non-communicable diseases, she has been invited to take part in a broad range of policy initiatives. Most notably, her work has attracted the attention of the World Health Organization, for whom she has co-authored reports on food marketing to children and has provided a series of training sessions on the role of legal instruments in the prevention of non-communicable diseases. She currently is a member of the Ad Hoc Working Group on Science and Evidence to the WHO Commission on Ending Childhood Obesity. She has also been involved in projects for the Directorate General of the European Commission for Health and Consumers, the UK Government, the Scottish Government, the Swedish Institute for European Policy Studies, as well as the National Institute for Health Education and Promotion (INPES) and the National Institute for Health and Medical Research (INSERM) in France. She regularly lends her advice to a broad range of public health and consumer organizations worldwide, and she has contributed to several training initiatives intended to help the public health community maximize the opportunities that the law offers for the prevention and control of non-communicable diseases. Amandine Garde also spent a year as a postdoctoral Jean Monnet Fellow at the European University Institute in Florence in 2005-2006 and is a qualified solicitor having trained at Simmons & Simmons in their London and Paris offices.

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