

EU Lifestyle Risks Policy: Between Potentialities and Constraints

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Executive Summary

- ▶ The EU plays a major role in the regulation of lifestyle risks (tobacco, alcohol and unhealthy diets) and has adopted various measures to limit their hazardous impact on the health of consumers.
- ▶ The EU record in this field appears highly contrasted across the different substances.
- ▶ More can be done to protect consumers, for instance through stricter labelling or advertising rules, in relation especially to alcoholic beverages and the protection of minors.
- ▶ However, the limited competence of the EU in the field of public health limits its capacity to take further action for rules that do not pursue economic integration.

The growing burden of non-communicable diseases (NCD's) among the world's population has become a major public health challenge. NCD's, such as cancer, diabetes or cardiovascular diseases, are closely linked to the (over)consumption of three kind of products: tobacco, alcohol and unhealthy food. These can be regrouped under the term 'lifestyle risks' (Alemanno and Planzer, 2010), which underlines two of their defining features. These consumptions are part of our lifestyles, sometimes deeply embedded in our daily lives and cultures. At the same time, especially when taken in excess, they can have harmful consequences for the individual and for society as a whole.

The fight against NCD's and the related regulation of lifestyle risks are of particular importance for Europe. Two thirds of premature deaths in the region are indeed caused by four major NCDs: cancer, diabetes, cardiovascular and chronic respiratory diseases

(WHO, 2016).

Governments are increasingly active in seeking to limit the excessive consumption of harmful products while letting them broadly available to the public. Under this 'permit but discourage' approach (Bogart, 2010), states use a regulatory mix composed of a wide range of measures: tax incentives, warnings, advertising restrictions, sales ban for minors, etc.

While being originally an economic community, the EU plays a growing role in the protection of public health and the regulation of lifestyle risks. Its health programme 2014-2020 sets out the objective 'to promote health, prevent diseases, and foster supportive environments for healthy lifestyles (...) by addressing in particular the key lifestyle-related risk



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Co-funded by the
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factors with a focus on the Union added value' (art. 3(1), Regulation 282/2014).

The EU has taken various measures, with different binding effects, in the three key areas of lifestyle risks. However, the picture appears heavily contrasted. The EU leads an ambitious and far-reaching tobacco control policy and has introduced some general regulations on foodstuffs but has not enacted any strong rules on alcohol beverages. More can surely be done to protect Europeans from the harm related to these consumptions.

It remains nonetheless that the EU does not enjoy a fully-fledged competence in public health matters and that its lifestyle risks policy is limited by the European Treaties. Indeed, under its current constitutional framework, the EU in this field can only "carry out actions to support, coordinate or supplement the actions of the Member States" (art. 6 TFEU), "excluding any harmonisation of the laws and regulations of the Member States" (art. 168(5) TFEU).

To adopt legislation, the EU had to use its general internal market competence contained in article 114 TFEU, enabling the adoption of harmonisation measures 'which have as their object the establishment and functioning of the internal market'. Tobacco products, alcoholic drinks and foodstuffs may give rise to health risks, but they are also tradable goods and can therefore be the subject of measures aimed at harmonizing their regulatory environment and improving their trading conditions throughout the EU.

However, to be lawfully adopted under article 114 TFEU, EU harmonisation measures must remove obstacles to freedom of movement or appreciable distortions of competition (Case C-376/98, paras 84, 95, 108). This means that any measure designed to address the public health dimension of the consumption of a product must necessarily be tied to the achievement of the internal market and the goal of economic integration. As will be shown subsequently, this limits the range of policy options available to the EU legislator.

To illustrate this point, this policy brief will explore three of the most common techniques used to regulate lifestyle risks: packaging requirements, advertising restrictions and rules pertaining to the selling and consumption of products. In each of these areas the potentialities for further EU action, as well as its limitations, will be highlighted.

Packaging requirements

Packaging (or labelling) requirements (warnings, mandated disclosure of information, etc.) are widely used to limit excessive consumption for a number of

reasons. They impact the product itself and are liable, at least in theory, to have a strong impact on consumer behaviour. They fit the paradigmatic view according to which individuals need to be properly informed in order to make the right choices, a view that, as we shall see, has been seriously put into question. Finally, because they are comparatively less burdensome than other types of rules, they can be better accepted by the industry.

At the EU level, several pieces of legislation have introduced packaging requirements for the marketing of tobacco products, alcoholic beverages and foodstuffs. Regulation 1169/2011 (the Regulation on food information to consumers) requires for instance the disclosure of ingredients and the presence of a nutrition declaration on the packaging of foodstuffs. Tobacco products are strictly regulated by Directive 2014/40 (the Tobacco Products Directive) and required to carry a combination of textual and pictorial warnings covering most of their packaging.

These types of product requirements undoubtedly fulfil the conditions for recourse to Article 114 TFEU. As expressed by the Court of Justice, 'national rules laying down the requirements to be met by products, in particular those relating to their designation, composition or packaging, are in themselves liable, in the absence of harmonisation at Community level, to constitute obstacles to the free movement of goods' (C-491/01, para 64). Having harmonised standard for the packaging of products undoubtedly helps removing these obstacles and is beneficial to the free circulation of these products throughout the internal market.

The problem is that packaging requirements tend to be based on assumptions that appear at odds with the scientific findings on consumer behaviour. The consumer is not a diligent and rational individual but is rather a busy person with limited cognitive capacities and difficulties to foresee the long-term consequences of his actions. He does not necessarily read labels and product information and in any case does not always have the capacity to act upon it. As a result, there have been calls for a better and more behaviourally informed regulation, for instance through the use of nudging techniques, to help individuals make better choices (see Alemanno and Sibony, 2015).

The information requirements imposed on foodstuffs are a concrete example of this discrepancy. In order to be properly processed, information must be presented in a simple, clear and intelligible manner. A nutrition declaration written in small letters at the back of a product is unlikely to be read or understood by an average consumer and its impact on the diet habits of the population is therefore likely to be limited.

For these reasons, several Member States have favoured the introduction of simple front-of-pack nutritional labelling schemes. The French 'Nutri Score' system consists of a logo with five letters and colours (from dark green A –healthy– to red E –unhealthy–) which signals in an easy manner to the consumer the nutritional qualities of products.

The European Commission has given a green light to the initiative and is currently itself exploring further harmonisation of nutritional information. EU action in this regard would be welcomed, in order to make these information schemes mandatory. Not only would such action be beneficial to consumers' health, especially because the presence of different labelling systems can create confusion and run contrary to the very rationale of such systems, but it would limit the risks of a regulatory fragmentation of the food market in Europe (see Alemanno and Garde, 2015: 46-67).

The current rules applicable to tobacco products appear less problematic. The presence of pictorial warnings figuring particularly repulsive images of tobacco-related diseases is aimed at affecting consumers' emotions and is probably likely to be more effective than simple textual warnings.

The EU could go one step further and impose the plain packaging of tobacco products, as several Member States have already done, something that has been discussed during the last revision of the Tobacco Products Directive. While being fiercely opposed by the industry, it appears to be an effective tool for stripping tobacco products of the appeal arising from the use of colours and brand image.

Advertising restrictions

Advertising restrictions are a key aspect of the lifestyle risks regulatory mix. They directly limit the inducing effect of advertising on consumers' behavior and the possibility to promote harmful products in a positive way. For this reason, they also tend to be strongly resented by manufacturers which have tried, unsuccessfully, to oppose them by claiming that they constitute a restriction of their commercial freedom.

The EU has set up several bans on tobacco advertising. Directive 2010/13 (the Audiovisual Media Services (AVMS) Directive) bans the advertising for tobacco products on television (Art. 9) while Directive 2003/33 (the Tobacco Advertising Directive) extends this prohibition to the press, radio, and to the sponsorship of events having a cross-border dimension, such as sport events (Art. 3 to 5). No such restrictions exist for food and alcoholic beverages: the AVMS Directive contains only general guidelines

for the audiovisual advertising of these products (Art. 9 and 22).

The competence of the EU to regulate advertising is not as straightforward as it is for packaging requirements and has been subject to legal actions before the European Court of Justice. The resulting two judgements *Tobacco Advertising I* and *II* (Cases C-376/98 and C-380/03) provide a useful guide to understanding when the EU enjoys a competence to adopt advertising restrictions.

The various prohibitions on tobacco advertising enacted by the EU do not raise any concerns as to their legality since these can facilitate the free circulation of the product or service to which they are associated. They improve the cross-border movement of press products or audiovisual programmes by removing the differences in legislation that affects them. In the absence of harmonisation, TV or radio channels containing advertising for tobacco products would probably not be permitted to broadcast in countries where such rule exists.

On the other hand, the prohibition of more static forms of advertising, affecting for instance posters or advertising spots in cinemas, is not possible at the EU level. Contrary to press or audiovisual products, billboards or movie theatres are indeed not mobile once they are built. Diverging advertising rules between Member States can therefore not affect their free circulation. Furthermore, and as pointed by the Court in the *Tobacco Advertising I* judgement, such differences in advertising regulation between member states cannot be considered as appreciable distortions of competition (for a detailed assessment of these judgements see Delhomme, 2018).

Advertising is a good illustration of the limitations imposed by the primarily economic competence of the EU. If public health objectives alone could prevail, further action could be taken at the EU level to restrict the presence of tobacco advertising on billboards, in cinemas or at points of sale (bearing in mind that most EU countries already prohibit these promotional techniques).

Yet, this does not mean that more could not be done in this area if one considers the relative absence of rules concerning alcoholic beverages or unhealthy food or drinks. In particular, as shown by Bartlett and Garde, the AVMS Directive fails to effectively protect minors from advertising despite the evidence of its harmful effects (Bartlett and Garde, 2013). The case for protecting minors, and especially young children, from advertising is particularly strong since they do not enjoy the necessary means to make fully enlightened choices about their consumption. Letting them being



targeted by advertising appears highly problematic and morally contestable.

Selling and consumption environment

Beyond product regulation and advertising restriction, another part of the regulatory mix involves rules on the selling and consumption environment of products: rules affecting the way these products are sold and where they can be consumed. These measures are useful in limiting the availability of products or their appeal, and are mostly used in relation to tobacco and alcohol: prohibition of sales to minors, licensing requirements for shops and restrictions on their opening hours, prohibition of consumption in certain places, etc.

In the case of tobacco, smoke-free environments have been put in place in many countries and cover an increasing number of public spaces: workplaces, bars and restaurants, parks, etc. They are primarily intended to protect non-smokers from second-hand smoking but also have the benefit to 'de-normalise' tobacco consumption and hence to 'shift social norms away from the acceptance of smoking in everyday life and promote public rejections of cigarettes' (Alemanno, 2012: 33).

In relation to this, the only instrument currently in force at the EU level is the Council Recommendation on smoke-free environments (OJ C 296/2009), a type of Union legal act without any binding force (art. 288 TFEU). This text recommends that Member States 'provide effective protection from exposure to tobacco smoke in indoor workplaces, indoor public places, public transport and, as appropriate, other public places as stipulated by Article 8 of the WHO Framework Convention on Tobacco Control (FCTC)'.

The non-binding character of this document and its limited impact appear quite clearly if one judges the recent decision by Austria to scrap a total ban on smoking in bars and restaurants that it had previously enacted. There are still stark differences in the protection against second hand smoking in Europe due to the variety of rules and the extent to which they are being properly enforced by Member States

(European Commission, 2013).

Concerning methods of sales, two types of regulation can be cited: the prohibition of vending machines to limit the availability of products and retail display bans which applies in particular to tobacco. These last rules require stores to keep the products invisible to the consumer inside their premises in order to limit their appeal. No such rule is currently in place at the EU level.

If the EU were to envisage the introduction of this type of measures, it is also quite clear that it would find itself constrained by its lack of competence (Delhomme, 2017 and 2018). One thing would be to consider the national rules on smoke-free environments or display bans at point of sale as obstacles to trade between Member States, which is far from obvious if one considers the case law of the European Court of Justice on the free movement of goods. However, the European legislator would anyway only be competent under Article 114 TFEU to remove these rules and not generalise the bans.

Conclusion

The EU has adopted various measures aiming at reducing the excessive consumption of tobacco, alcohol and unhealthy foodstuffs and reducing their hazardous impact on the health of Europeans. There is however room for further action, especially in relation to alcohol, and for smarter and more behaviourally informed regulation.

The EU action suffers nonetheless from inherent limitation due to its constraining competence framework and the predominance of economic objectives over non-market interests in its internal market legislative powers. From this situation arises a fundamental interrogation: should the competence of the EU in the field of lifestyle risks arise from its general competence to ease trade between Member States, in which case the current state of play is satisfactory, or should the EU enjoy an autonomous competence that would enable it to pursue a broader public health agenda?



Further reading

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Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services

Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products

Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers

Case C-376/98, *Federal Republic of Germany v European Parliament and Council*, ECLI:EU:C:2000:544

Case C-380/03, *Federal Republic of Germany v European Parliament and Council*, ECLI:EU:C:2006:772

Case C-491/01, *British American Tobacco*, ECLI:EU:C:2002:741

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GGPB N° 10/2019

Vincent DELHOMME, EU Lifestyle Risks Policy: Between Potentialities and Constraints, Geneva Global Policy Briefs No 10/2019, pp. 1-6.

Publications in the Series should be cited as:
AUTHOR, TITLE, Geneva Global Policy Brief No ./YEAR [URL]

ISSN 2624-8603



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GGPB N° 10/2019