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978-1-107-06342-6 - Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets

Edited by Alberto Alemanno and Amandine Garde

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REGULATING LIFESTYLE RISKS

This collection of essays looks at the role the European Union could and should play in promoting healthier lifestyles, in light of the moral, philosophical, legal and political challenges associated with the regulation of individual choices. By tackling the main non-communicable diseases (NCD) risk factors (tobacco consumption, harmful use of alcohol and unhealthy diets), the contributors endeavour to identify common themes and determine whether and, if so, to what extent the lessons learned in relation to each area of EU intervention could be transposed to the others. By focusing on the European Union legal order, the book highlights the opportunities that legal instruments offer for the NCD prevention and control agenda in Europe, as well as the constraints that the law imposes on policy-makers.

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FOREWORD

HOW TO MOTIVATE HEALTHIER LIFESTYLES?

Globally, more than 36 million people die from non-communicable diseases (NCDs) each year, and NCDs have outstripped communicable diseases as the leading cause of death in almost all world regions.¹ Industrialized countries are the most affected: the World Health Organisation estimates that in the European region, 86 per cent of deaths are caused by five major NCDs: diabetes, cardiovascular diseases, cancer, chronic respiratory diseases and mental disorders.² It is an emergency that we are facing.

In addition to the lack of physical activity and environmental pollution, tobacco consumption, excessive consumption of alcohol and unhealthy diets are among the main risk factors of NCDs. By providing a comprehensive analysis of the emergent EU lifestyle policy, that seeks to address these risks, this volume is therefore particularly timely, and it shall have a lasting impact on the next phases of the EU intervention on these issues. I am grateful to Alberto Alemanno and Amandine Garde for providing me with the opportunity to highlight the importance of this debate and the direction it could take in the future.

This collection of essays goes beyond a description of the initiatives adopted by the EU in this area and a critical discussion of their effectiveness. Instead, this mapping of the efforts to address the key risk factors of NCDs in the EU raises fundamental questions concerning the division of roles between the EU and its Member States in the areas concerned; the panoply of regulatory and non-regulatory tools relied on to influence individual behaviour; and the relationship between the autonomy of individuals and interventions that may be seen as paternalistic.

¹ Unhealthy foods, non-communicable diseases and the right to health. Report of the Special Rapporteur on the right of everyone to enjoyment of the highest attainable standard of physical and mental health, Anand Grover, to the 26th session of the Human Rights Council (UN doc. A/HRC/26/31, 1 April 2014), para. 2.

² Data from <http://www.euro.who.int/en/health-topics/noncommunicable-diseases> (last consulted on August 30th, 2014).

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Regulating lifestyle and multi-governance in the EU

The first set of issues concerns the adoption of a lifestyle policy in the multi-governance system of the EU. Two key constitutional provisions define the role of the EU in this regard. First, Article 9 TFEU provides that “in defining and implementing its policies and activities, the Union shall take into account requirements linked”, in particular, to “a high level of . . . protection of human health”. This imposes on the EU a duty to mainstream public health considerations in all policy areas in which it intervenes, consistent with the idea that combating and preventing NCDs requires a multi-sectoral strategy, as recommended in the Political Declaration of the High-level Meeting of the UN General Assembly on the Prevention and Control of Non-communicable Diseases, adopted on 19 September 2011.³ Second, Article 168 TFEU, which reiterates this mainstreaming requirement, also attributes limited (and non-exclusive) powers to the EU to take measures in this area.⁴

Beyond these provisions, however, it is primarily in its consumer policy and in the adoption of rules for the establishment of the internal market that the EU has moved in recent years towards a “lifestyle policy”. It is thus the very competences that the EU has been attributed to promote the internal market (and, in particular, to facilitate the movement of cigarettes, alcohol and food products across the EU Member States, as well as cross-border advertising of products), that also have been most extensively relied upon in order to move towards a “health-promoting” environment in the EU. The paradox is only apparent. As regards products regulation, the promotion of the objectives of the free movement of goods and the cross-border provision of services (in the context in particular of audiovisual media services), on the one hand, and the protection of the consumer from unhealthy products or forms of advertising that encourage unhealthy forms of consumption, on the other hand, are in fact complementary: indeed, in the absence of sufficiently strong minimum standards at EU level, the Member States may be tempted, acting individually, to impose restrictions in the name of public health considerations that could lead to a fragmentation of the internal market. At the same time, the contributions in this volume highlight the limitations of the current approach: when it is combined with a duty of mutual recognition (or with a “country of origin”

³ UN doc. A/RES/66/2, Annex, para. 45.

⁴ Art. 168 TFEU is the sole article in Title XIV of Part Three of the TFEU, on the Union policy in the area of public health.

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principle), the imposition of minimum standards at EU level may provide an insufficient level of protection for the individual consumer, and one that is lower, at least, than what individual Member States may otherwise have sought to impose; moreover, whether or not it is combined with mutual recognition, the adoption of minimum EU-wide standards could be used as a pretext by some domestic legislators to lower the standards in place at national level, in order to better align themselves with the common denominator.

Choosing among the tools available to the EU

A second set of questions relate to the range of regulatory and non-regulatory tools relied on to influence individual behaviour. The traditional approach in this regard has been to distinguish between measures that focus on the individual (encouraging the individual to behave more “responsibly”, for instance by improving the quality of the information concerning the impacts of certain choices) and measures that seek to change the environment (the context in which the choices are made), in order to make it more supportive of individual efforts. More recently, taking into account advances in behavioural economics and social psychology that highlight the limitations to human rationality, policy-makers have sought to move beyond this dichotomy by acknowledging that even perfectly informed individuals could misinterpret the information at their disposal (as their judgment could be affected by various biases), or adopt forms of behaviour that are myopic or guided by habit or addiction, and therefore make the “wrong” choices.⁵ The result has been a new emphasis on “nudging”, understood as a way to encourage the individual to make “better” choices and to protect him from such “errors” by changing the “choice architecture”. Thus conceived, “nudging” is politically seductive both to Conservatives (and particularly the Libertarians among them) who are suspicious of governmental

⁵ The most influential works in this regard have been by the psychologist Daniel Kahneman, by the economist Richard Thaler, and by the lawyer Cass Sunstein. See in particular R. Thaler and C. Sunstein, *Nudge: Improving decisions about health, wealth, and happiness* (Yale Univ. Press, 2008); D. Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011). One illustration of the impact of this approach to policy making has been the establishment within the United Kingdom government of a “Behavioural Insights Team”, colloquially known as the “Nudge Unit”. See <https://www.gov.uk/government/organisations/behavioural-insights-team> (last consulted on August 30th, 2014).

interventions that deny individuals the “freedom to choose”, and to Progressives who have greater trust in the benevolence of the State and in its ability to bring about the common good.

In chapter 14 of this volume, Alberto Alemanno provides an insightful assessment of the potential of the “nudging” approach to bring about behavioural change sufficient to reduce the burden of chronic disease at the population level. It is important to note, however, that the political attractiveness of “nudging” lies in precisely what constitutes its main limitation: focusing on the “choice architecture” alone, it leaves the background incentives – including the price incentives, that taxation or subsidies can influence – unaddressed.⁶ This may be naïve as a matter of political philosophy, since it presumes that the individual is well-equipped to resist to market forces and that the background to individual choices as it is shaped by the market somehow provides a “neutral” baseline to such choices. It also may be ineffective as a matter of public policy. Research shows the extent to which, for non-essential goods such as tobacco, alcohol or HFSS foods such as snacks, candies or sugary drinks, prices are a decisive factor explaining consumers’ choices⁷: does it follow that by deliberately refraining to seek to influence this factors among the range of factors that push individuals into making certain choices, “nudging” is condemning itself to being, in fact, irrelevant?

While noting its (often underestimated) potential, Alberto Alemanno fully recognizes such limitations in his discussion of “nudging” as a mode of policy intervention. Chapter 14, which he dedicates to this issue, should therefore be read together with chapter 4 on the regulation of marketing practices for tobacco, alcohol and HFSS foods, by Amandine Garde and Marine Friant-Perrot, as well as with chapter 5, co-authored by Franco Sassi, Annalisa Belloni, Chiara Capobianco and

⁶ “Nudges”, in the definition provided by its main advocates, include “any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding an options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting the fruit at eye level counts as a nudge. Banning junk food does not” (R. Thaler and C. Sunstein, *Nudge: Improving decisions about health, wealth, and happiness*, cited above, p. 6). For critiques of “nudge” as an effective policy option, see for instance J. Wise, “Nudge or Fudge? Doctors debate best approach to improve public health”, *British Medical Journal*, (2011), 342:d580; G. Rayner and T. Lang, “Is nudge an effective public health strategy to tackle obesity? No”, *British Medical Journal*, (2011), 342:d2177.

⁷ T. Andreyeva et al., “The Impact of Food Prices on Consumption: A Systematic Review of Research on the Price Elasticity of Demand for Food,” *American Journal of Public Health*, 100(2)(2010): 216–222.

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Alberto Alemanno, who review the potential use of taxation and economic incentives. Together, these chapters capture the full range of tools (short of the imposition of a ban on harmful products) that can influence the individual consumer's choice. Beyond these tools, however, two further options would deserve to be explored.

Social innovations and social integration

A first option is that of social innovations that provide opportunities for individuals, often at the local level of the neighbourhood or the town, to rethink their ways of consuming, of producing, or of moving from one place to another. Such social innovations are very diverse: they include initiatives such as urban gardening, direct producer-to-consumer marketing of fruits and vegetables or other short food chains, collective cooking or, as in the Transition Network, the establishment of fora in which people discuss how to reduce waste or to save energy. Such bottom-up, citizens-led initiatives have been growing at a remarkable speed in recent years.⁸ They differ from the classic tools relied on by regulators in three significant ways.

First, by definition, to encourage such initiatives is to encourage innovation: the search for new solutions, that do not follow the usual repertoire that regulators rely on. In his important contribution to this volume, Stephen Sugarman discusses in chapter 15 the use of Performance-Based Regulation (PBR), as a regulatory strategy that encourages private industry operators to achieve certain specified goals, through mechanisms which these operators shall have to come up with, building on the unique knowledge they have of the products and services they provide. One of the advantages of this approach is that it may lead to broaden our political imagination: the range of tools that can be used to achieve the desired outcomes can expand endlessly, limited only by the inventiveness of social actors. Given the complexity and multi-factorial nature of lifestyle choices, this presents a considerable advantage over classic top-down approaches. The same inventiveness, and the same gains in terms of diversity of solutions and the acceleration of collective

⁸ See, for instance, *Europe in Transition: Local Communities Leading The Way To A Low-carbon Society*, compiled by the European Association for Information on Local Development (AEIDL), available at: <http://www.aeidl.eu/en/news/whats-new-at-aeidl/539-leurope-en-transition-quand-le-local-ouvre-la-voie-vers-une-societe-sobre-en-carbone.html> (last consulted on August 30th, 2014).

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learning, can be expected from initiatives led by citizens, that lead to encourage healthier lifestyles.

Second, whereas these more traditional tools typically seek to influence choices by relying on *extrinsic* incentives such as the fear of sanctions (as when harmful substances are banned) or economic incentives (as when such substances are taxed at high rates or when the healthier options are subsidized), social innovations that put individuals in the driver's seat – allowing them to reshape the immediate environment which they inhabit – take into account another set of (*intrinsic*) motivations, that coexist with the first: rather than relying on the presumption that individuals are purely self-interested and focused on short-term improvements along their utility function, these initiatives build on the potential of motivations that are more altruistic and focused on long-term considerations, in other terms, that care about the broader collectivity and future generations.

We may debate endlessly about the respective weight, in any individual's choice structure, of these different motivational factors. What does seem clear is that, at present, the potential of relying on citizens-led initiatives by creating the necessary space for such initiatives to develop and by designing the governance mechanisms that could encourage them, remains seriously untapped. This may be a missed opportunity. As social psychologists such as Richard Ryan and Edward Deci have demonstrated, consumer decisions that are made on the basis of “autonomous” motivations (i.e., out of a sense that this is the “right thing to do”, and that it corresponds to the kind of person one wants to be) are more robust and have more lasting impacts than choices that are made simply as a response to external constraints.⁹

Third, this route may also allow to move forward the debate on the dangers of state paternalism, which I referred to earlier as the third set of questions around which the essays collected in this volume revolve. The issue is discussed in a number of the contributions that follow: it refers to the risk that the protection of the individual, even when well-intended

⁹ See, in particular, R. Ryan and E. Deci, “Intrinsic and Extrinsic Motivation: Classic Definitions and New Directions”, *Contemporary Educational Psychology*, vol. 25(1) (2000): 54–67; R. Ryan and E. Deci, “Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being”, *American Psychologist*, vol. 55(1) (2000): 68–78. For an example of how this approach could be used in the context of the debate on how to influence lifestyle choices, see A. Moller, R. Ryan and E. Deci, “Improving the Quality of Consumer Decisions Without Using Coercion”, *American Marketing Association*, vol. 25(1) (2006): 104–116.

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and ostensibly justified by that individual's own interest, ends up denying that individual's freedom to choose and imposing on him one particular conception of the "good life". However, whereas regulation or economic incentives (the traditional tools through which individual behavior is influenced) immediately meet the objection of paternalism, which explains in part why "nudging" behaviour appears so attractive to policymakers and commentators alike (as "nudging" is of course less "paternalistic" than the exclusion of certain options), social innovations that rely on citizens' own initiatives are immune to this critique. Perhaps, if we set aside the huge social costs that irresponsible lifestyle choices impose on the collectivity,¹⁰ it may be seen as paternalistic to impose on consumers certain ways of eating, or to encourage them to reduce alcohol consumption or to abstain from smoking. But where the government empowers individuals to join efforts to invent new social practices that encourage such behaviour, it is their autonomy, instead, that is enlarged.¹¹ Empowerment thus conceived provides opportunities for people to shape their own environment and thus experiment with alternative lifestyles. As such, it goes beyond the "New Paternalism" cogently advocated for by Alberto Alemanno, who describes it as a form of paternalism that respects individuals' choices but takes into account the inability of many individuals to actually act in accordance with the choices they have ("While it is true that people may know what their ends are, sometimes they go wrong when they choose how to attain them"). By encouraging reflexivity about choices, i.e., creating incentives

¹⁰ I have always found strange that, in the objections raised against the regulation of lifestyle risks in the name of "anti-paternalism", the major negative externalities caused by NCDs are hardly acknowledged, or only paid lip service. Perhaps the fact that diseases such as diabetes or cancers are "non-communicable" plays a role in such collective denial. It is however trivial to note that this "non-communicability" of such diseases does not mean that the individual's behavior is without society-wide impacts, both because of the social norms which the individual behavior contributes to shaping and because of the costs associated with the treatment of such diseases and with productivity losses.

¹¹ Indeed, the individual's freedom to choose is broadened thanks to the spread of social innovations that provide individuals with different lifestyle options, far more than it would by merely "respecting" such freedom as when the State abstains from any interference. Individual freedom ultimately depends on the creation of conditions that allow an individual to reflect on the reasons why he or she entertains certain desires, or as expressed by Gerald Dworkin, to "reflect upon one's motivational structure and to make changes in that structure" (Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), p. 108): only by being confronted with a plurality of life options and with various understandings of the "good life" can an individual make a fully informed choice as to which life he or she wants to lead.

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for individuals to reflect about where their preferences come from (thus identifying, for instance, the social norms or advertising campaigns they may have been influenced by), such empowerment supports individuals' not only in their desire to act according to their choices, but also in questioning the genealogy of these choices themselves.

This is not peripheral to the discussion on the regulation of lifestyle risks. In a well-known metastudy averaging the results of a total of 148 studies involving altogether 308,849 participants, Julianne Holt-Lunstad and her collaborators concluded that participants with stronger social relationships had a 50% increased likelihood of survival. In other terms, by the time half of a hypothetical sample of 100 people will have died, the surviving half will include five more people with stronger social relationships than people with weaker social relationships, a finding which remains consistent across age, sex, initial health status, cause of death, and follow-up period. Conversely, social isolation – the absence of strong social links – increases the risk of death in ways that are comparable with well-established risk factors for mortality such as smoking and alcohol consumption, and it has a greater influence than other risk factors such as physical inactivity and obesity.¹² This points towards the need to treat social exclusion as a public health problem, and to put in place mechanisms that will encourage people to build strong social relationships. A form of governance that empowers people to invent their own solutions at the local level may be one way to achieve this.

The question of inequalities

Social exclusion is relevant to public health and the reduction of lifestyle risks in another way. There is now strong evidence suggesting that unequal societies result in ill-health, reduced life expectancy, and (as a risk factor contributing to both outcomes) higher rates of obesity. It should come as no surprise that we owe the most powerful indictment of the rise of inequalities in almost all OECD countries since the mid-eighties to two public health specialists, who highlight the strong (statistically significant) correlation between inequality and poor public health outcomes.¹³

¹² J. Holt-Lunstad, T.B. Smith and J.B. Layton, "Social Relationships and Mortality Risk: A Meta-analytic Review", *PLoS Med* 7(7) (2010): e1000316. doi:10.1371/journal.pmed.1000316, available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000316> (last consulted on August 30th, 2014).

¹³ Richard Wilkinson and Kat Pickett, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (Bloomsbury Press, 2009), chapters 6 and 7.

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These researchers emphasize that it is not only the poorest groups of society whose health is negatively affected by rising inequality: rather, all segments of the population, *including those that are relatively better off*, suffer such impacts.¹⁴ The reason for this, in short, would seem to be that more unequal societies are also societies with lower levels of trust between people, and more stress and violence; this in turn provokes physiological responses (the body system protects itself from what it decodes as a constant threat) that has damaging impacts in the long run.

It is therefore welcome that the European Commission has acknowledged in recent years the influence of socioeconomic determinants on smoking, on the harmful use of alcohol, on unhealthy eating habits and on the lack of physical activity,¹⁵ and that it has set up an Expert Group on Social Determinants and Health Inequalities. Indeed, as part of a comprehensive strategy to reduce lifestyle risks, the fight against inequalities may provide an additional benefit. It may significantly facilitate the reliance on classic economic incentives, such as the taxation of unhealthy products in order to discourage consumption, since the potentially socially regressive impacts of such measures will constitute much less of an obstacle in a society that has reduced the gap between the rich and the poor.¹⁶

* * *

This volume maps the efforts of the EU in reducing lifestyle risks. It shows the considerable gap that exists between what has been done to discourage the consumption of tobacco, and the comparatively weak efforts that, in contrast, have characterized action of the EU in tackling

¹⁴ See also R. Wilkinson and K. Pickett, "Income inequality and population health: a review and explanation of the evidence", *Social Science and Medicine*, vol. 62(7) (April 2006): 1768–1784 (reviewing evidence across 155 papers on the relationship between income inequality and public health outcomes, and finding that 70 per cent of the studies conclude that health is less good in more unequal societies); see, however, S.V. Subramanian and I. Kawachi, "Income inequality and health: what have we learned so far?", *Epidemiologic Review*, vol. 26 (2004): 78–91 (showing the need for further studies to confirm the relationship between income inequality and health outcomes, and shed light on the most likely causal explanation).

¹⁵ European Commission, White Paper "Together for Health: Strategic Approach for the EU 2008–2013", COM(2007) 630 final.

¹⁶ In chapter 5 by Franco Sassi, Annalisa Belloni, Chiara Capobianco and Alberto Alemanno, the authors identify such socially regressive impacts as a major objection raised against the taxation of unhealthy products: how to tax sugary drinks, for instance, without taking into account the fact that it is the budget of the poorest families that will be hardest hit?

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FOREWORD

the problems of alcohol consumption or unhealthy diets.¹⁷ It would already be highly illuminating if it had limited itself to that ambition alone. But it does much more. By highlighting how little has been achieved in some areas, it points to the way forward, and it makes a convincing call for further EU intervention in the areas addressed. Even more importantly, this volume introduces a debate on some fundamental issues raised by such intervention and the different modalities in could espouse. To significantly address the consumption of tobacco, the abuse of alcohol and unhealthy eating habits, however, we may need more than sound regulations and to put in place the right set of economic incentives. These are important tools, and they are far still from having been used to their full potential. But they may have to be complemented by new governance tools that encourage citizens to join efforts to invent more sustainable and healthier lifestyles, in order for them to truly own the solutions that will emerge from this collective search and to allow them to question the social norms that encourage practices that are damaging both to the individuals concerned and to society as a whole. And without more robust redistributive policies and greater efforts to reduce the gap between the rich and the poor, we may address some of the symptoms, while failing to tackle the root causes of unhealthy lifestyles. I am grateful to Alberto Alemanno and Amandine Garde for providing such an outstanding set of materials to launch this debate.

Olivier De Schutter

United Nations Special Rapporteur on the right to food (2008–2014)

Member, Committee on Economic, Social and Cultural Rights

(2015–2018)

¹⁷ This is illustrated in particular in chapter 4, where Amandine Garde and Marine Friant-Perrot compare the approach towards advertising of tobacco products with the approaches towards advertising of alcohol or HFSS foods.

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This volume finds its origins in the 2nd Workshop on Regulation devoted to lifestyle regulation which HEC Paris hosted on 21–22 September 2012. It also builds upon the work that we have developed over the years, both on the ground as experts to the World Health Organization, the European Commission and a range of public health NGOs, and in academia as researchers who have published several articles and a policy report for the Swedish Institute for European Studies focusing on the regulation of lifestyle risks in the EU. We would like to thank the many individuals we have been interviewing over the last few years as well as the contributors to this edited collection for agreeing to share their expertise with us.

We are particularly indebted to Cliff Wirajendi for his assistance throughout this editorial project.

Alberto Alemanno and Amandine Garde

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ABBREVIATIONS

AVMS	audiovisual media services
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
ECHR	European Convention of Human Rights and Fundamental Freedoms
EFTA	European Free Trade Area
EU	European Union
FCTC	Framework Convention on Tobacco Control
FSA	UK Food Standards Agency
GATT	General Agreement on Tariffs and Trade
HFSS	high in fat, sugar and salt
ICAP	International Center for Alcohol Policies
ICESCR	International Covenant on Economic, Social and Cultural Rights
IP	Intellectual Property
MERCOSUR	Mercado Común del Sur
NAFTA	North American Free Trade Area
NCD	non-communicable disease
NGO	non-governmental organization
PBR	performance-based regulation
RTA	regional trade agreement
SPS	sanitary and phytosanitary
TBT	technical barriers to trade
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WHO	World Health Organization
WTO	World Trade Organization