

# “On the Rocks? A few sobering thoughts on the growing EU alcohol problem”

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## I. Introduction

The consumption of alcoholic beverages has been an important part of European culture for centuries.<sup>1</sup> Alcoholic beverages are important commodities that are widely traded across frontiers.<sup>2</sup> Alcohol is, however, a toxic substance whose excessive consumption is one of the four leading risk factors for the development of non-communicable diseases (NCDs),<sup>3</sup> which account for around 86% of deaths in the European Union.<sup>4</sup>

The prevention of alcohol related harm and NCDs is complex, not least because multiple factors influence alcohol consumption and various policy tools of differing effectiveness are available to address them.<sup>5</sup> This chapter analyses the issues that this complexity poses for both Member States and the EU. For Member States this comprises balancing the global commitments they have made to reduce alcohol related harm as members of the World Health Assembly, while respecting their obligations under the EU Treaties to protect the free circulation of goods. For the EU this comprises fulfilling their own Treaty obligations – supporting the Member States in developing their public health policies and alleviating cross-border health problems, while respecting the principles of conferred powers, subsidiarity and proportionality.

We will begin by analysing the effect of EU law on the adoption of alcohol control measures by the Member States, first placing the adoption of these measures in their international public health context, then discussing the way in which the Court of Justice of the European Union (CJEU) has assessed the compatibility of these measures with Articles 34 and 36 TFEU on the free movement of goods. We will argue that the CJEU’s analysis has not fully captured the complexity of alcohol control, nor the fact that Member States must balance trade and public health interests in light of the international commitments they have made, and that this potentially threatens the multisectoral, evidence-based approach that all Member States have committed to. We will then analyse the direct contribution of EU law to preventing alcohol related harm, examining key EU legislative and policy measures. We will

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<sup>1</sup> P Anderson and B Baumberg, *Alcohol in Europe* (Institute of Alcohol Studies: London 2006); R Room and K Makela, “Typologies of the cultural position of drinking” (2000) 61(3) *Journal of Studies on Alcohol* 475; T Babor et al, *Alcohol: No Ordinary Commodity* (2<sup>nd</sup> ed, OUP 2010).

<sup>2</sup> P Anderson and B Baumberg, *ibid.* See the figures on the quantity of beer, wine and spirits exported each year at [www.trademap.org/itc/market-info-tools/statistics-export-product-country](http://www.trademap.org/itc/market-info-tools/statistics-export-product-country).

<sup>3</sup> *Status report on alcohol and health in 35 European countries 2013* (WHO 2013); *Alcohol in the European Union: consumption, harm and policy approaches* (WHO 2011).

<sup>4</sup> *Action Plan for implementation of the European Strategy for the Prevention and Control of Noncommunicable Diseases 2012-2016* (WHO 2012), 1.

<sup>5</sup> See A Alemanno and A Garde, ‘The Emergence of an EU Lifestyle Policy: The case of Alcohol, Tobacco and Unhealthy Diets’ (2013) 50(6) *Common Market Law Review* 1745

conclude that the EU has failed to use evidence effectively to discharge its responsibilities to ensure a high level of public health protection in all EU policies. Ultimately, we argue that if the EU does not seize the opportunities that the EU Treaties offer, Member States will continue to face problems in negotiating the dual nature of alcoholic beverages as they seek to find effective solutions to an inherently complex issue.

## **II. EU judicial scrutiny of national alcohol control measures**

The Court's case law assessing the compatibility of national laws with EU free movement Treaty provisions (2) must be first be contextualised (1).

### **1. The international public health context for Member State alcohol control**

All EU Member States are parties to the UN Political Declaration of September 2011 on the prevention and control of non-communicable diseases.<sup>6</sup> They have all also committed to the WHO Global strategy to reduce the harmful use of alcohol<sup>7</sup> and the WHO Global Action Plan on the Prevention and Control of NCDs for 2013-2020.<sup>8</sup> Furthermore, within the WHO European Region, the Member States have committed to a European action plan to reduce the harmful use of alcohol.<sup>9</sup>

All these strategic documents recognise the severity of alcohol related harm. The Political Declaration states plainly that NCDs are 'one of the major challenges for development in the twenty-first century'.<sup>10</sup> According to the WHO Global strategy, harmful use of alcohol alone accounts for 3.8% of global deaths and 4.5% of the global disease burden.<sup>11</sup> The burden of alcohol related harm is especially pressing in Europe, which has the highest levels of alcohol consumption and thus the highest levels of alcohol related harm in the world.<sup>12</sup> In response to the critical need to address alcohol related harm, WHO members have committed to evidence-based action on alcohol control, recognising that 'countries that are most active in implementing evidence-based and cost effective alcohol policies and programmes will profit from substantial gains in health and well-being'.<sup>13</sup>

There is international recognition however that, despite the available evidence, responses to alcohol related harm are currently insufficient at both global and European level. According to the Global strategy, 'policy responses are often fragmented and do not always correspond to the magnitude of the impact on health'.<sup>14</sup> The European action plan more explicitly

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<sup>6</sup> Document A/66/L 1.

<sup>7</sup> Resolution WHA 63.13.

<sup>8</sup> Resolution WHA 66.10.

<sup>9</sup> *European action plan to reduce the harmful use of alcohol 2012-2020* (WHO 2012)

<sup>10</sup> UN Political Declaration, para 1.

<sup>11</sup> *Global strategy to reduce the harmful use of alcohol* (WHO 2010), 5.

<sup>12</sup> n9, *European action plan*, v.

<sup>13</sup> n9, *European action plan*, 4.

<sup>14</sup> n11, *Global strategy*, 6.

recognises that ‘alcohol policies still do not reflect the gravity of the health, social and economic harm resulting from the harmful use of alcohol’.<sup>15</sup> In particular, the Global strategy emphasises that addressing the ‘multifaceted determinants of alcohol-related harm’<sup>16</sup> requires ‘comprehensive action across numerous sectors’.<sup>17</sup> The European action plan similarly encourages ‘coherence and “joined-up” action’.<sup>18</sup>

Accordingly, the Global alcohol strategy provides ‘a portfolio of policy options and interventions that should be considered ... as integral parts of national policy’.<sup>19</sup> These options are organised into ten action areas, which broadly cover leadership, research, treatment and prevention. The action areas relating to prevention contain suggestions for a range of legal interventions. The following paragraphs highlight a range of specific examples recommended by the European action plan, which mirrors the portfolio established by the Global strategy. First, ‘the implementation of even small reductions in the availability of alcohol can bring health gain[s]’,<sup>20</sup> so Member States are encouraged to strengthen laws on alcohol outlet density and maintain government retail monopolies where they exist.<sup>21</sup> They are furthermore encouraged to set minimum purchase ages at 18 years and develop strong systems for licensing the sale of alcohol. Secondly, Member States should ‘have systems in place to prevent inappropriate and irresponsible alcohol advertising and marketing that targets children and young people’,<sup>22</sup> and are encouraged to consider the following options: regulating the content of advertising, regulating sponsorship by alcohol brands, regulating alcohol marketing in new media, and restricting or banning promotions that target children. The European action plan specifically notes that supranational action is needed with respect to commercial communications that cross borders.<sup>23</sup> Member States are reminded that ‘action in drinking environments is also fundamentally important’,<sup>24</sup> and that ‘labelling should be introduced like that used for other foodstuffs ... on the content and composition of the product for for the protection of [consumer] health and interests’.<sup>25</sup> Finally, ‘of all alcohol policy measures, the evidence is strongest for the impact of alcohol prices as an incentive to reduce heavy drinking occasions and regular harmful drinking’.<sup>26</sup> States are encouraged to both increase alcohol taxation and consider imposing minimum prices for alcohol.

States are encouraged to take primary responsibility for adopting as broad a range of the above measures as possible, but they are not expected to do so unaided. The European action plan therefore declares that ‘international frameworks should enable, rather than hinder,

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<sup>15</sup> n9, *European action plan*, 4.

<sup>16</sup> n11, *Global strategy*, n X above, 9.

<sup>17</sup> n11, *Global strategy*, 6.

<sup>18</sup> n9, *European action plan*, 5.

<sup>19</sup> n11, *Global strategy*, 3.

<sup>20</sup> n9, *European action plan*, 20.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*, 22.

<sup>23</sup> *ibid.*, 23.

<sup>24</sup> *ibid.* 26.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*, 25.

individual countries to be bold and innovative in taking evidence-based approaches to reducing the harmful use of alcohol'.<sup>27</sup> Although such bold pursuit of public health interests must be balanced against other competing policy interests, such as free trade, the Global strategy notes that free trade agreements recognise the right of countries to adopt justifiable, non-discriminatory public health measures. Therefore it is noted that, 'national, regional and international efforts should take into account the impact of harmful use of alcohol'<sup>28</sup> in the balancing process.

Member States must also be mindful of the economic and political power of the global alcohol industry. Multinational alcohol corporations recorded profits in 2005 totalling USD 26 billion, and the top ten alcoholic beverage manufacturers accounted for 48% of branded sales.<sup>29</sup> For particular alcoholic beverages, the concentration of economic power is even greater, with 50% of the global beer market belonging to only five corporations.<sup>30</sup> The largest multinational alcohol corporations therefore have considerable market leverage, especially in Europe from which 70% of the world's alcohol is exported.<sup>31</sup> As a result, these corporations are also powerful political players and attempt to influence policy making through a number of overt and covert tactics, including: the manipulation of evidence;<sup>32</sup> the direct lobbying of policymakers and politicians;<sup>33</sup> the promotion of personal responsibility through social marketing campaigns;<sup>34</sup> and the co-opting of policymaking processes,<sup>35</sup> often through front groups.<sup>36</sup> Member States must therefore be aware of the tactics of the alcohol industry, and take steps to avoid conflicts of interest which would limit the effectiveness of their alcohol control policies.

## **2. The compatibility of Member State alcohol control policies with EU internal market law**

Since the Member States have committed at WHO level to implementing a range of legislative alcohol control measures, and since free trade interests and public health interests

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<sup>27</sup> *ibid*, 5.

<sup>28</sup> n11, *Global strategy*, 9.

<sup>29</sup> D Jernigan 'The global alcohol industry: an overview' (2009) 104(s1) *Addiction* 6; D Miller and C Harkins, 'Corporate strategy, corporate capture: food and alcohol industry lobbying and public health' (2010) 30(4) *Critical Social Policy* 564.

<sup>30</sup> A Ulstein, 'Alcohol trends – markets and innovations: Analyses and Forecasts, compiled from Business Insights 2008/9 reports' (Eurocare 2009), 4.

<sup>31</sup> n1, Anderson and Baumberg, 51.

<sup>32</sup> J McCambridge et al, 'Industry use of Evidence to Influence Alcohol Policy: A Case Study of Submissions to the 2008 Scottish Government Consultation' (2013) 10(4) *PLoS Med* 1001431.

<sup>33</sup> n29, Miller and Harkins.

<sup>34</sup> R Moodie et al 'Profits and pandemics: prevention of harmful effects of tobacco, alcohol, and ultra-processed food and drink industries' (2013) 381 *Lancet* 670674.

<sup>35</sup> O Bartlett and A Garde, 'The EU Platform and the EU Forum: new modes of governance or a smokescreen for the promotion of conflicts of interest?' in A Alemanno and A Garde, *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press 2015), 283.

<sup>36</sup> P Anderson, 'The beverage alcohol industry's social aspects organizations: a public health warning' (2004) 99(11) *Addiction* 1376.

are often at opposite ends of the spectrum of conflicting interests involved in alcohol control,<sup>37</sup> it is unsurprising that the CJEU's alcohol control case law under Article 34 TFEU is extensive. Restricting alcohol advertising makes it 'more difficult for new foreign products to break onto the market',<sup>38</sup> which is 'liable to impede access to the market'<sup>39</sup> more for imported products than for domestic products. Minimum unit pricing prevents 'the lower cost price of imported products being reflected in the selling price to the consumer'<sup>40</sup> which in itself is capable of hindering market access. Information disclosure measures that require physical changes in labelling or production impose dual regulatory burdens on alcoholic beverages, and there is 'no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State'.<sup>41</sup> Finally, while not all monopoly rules are caught by Article 34 – retail monopolies are permissible – the Court has consistently held that conditioning the importation of alcoholic beverages can create barriers to trade.<sup>42</sup>

Measures caught by Article 34 can be justified under Article 36 TFEU or the mandatory requirement doctrine.<sup>43</sup> They must pursue a legitimate objective of public interest and satisfy the principle of proportionality, which means that they must be appropriate for securing the achievement of the objective pursued and not go beyond what is necessary in order to attain it.<sup>44</sup> Early cases explicitly acknowledged the 'undeniable' link between alcohol advertising and consumption, and the Court has recognised that preventing alcohol-related harm is 'indisputably one of the grounds which may justify derogation from [Article 34] of the Treaty'.<sup>45</sup> Establishing a legitimate objective for alcohol control is therefore not contentious; establishing the proportionality of alcohol control measures that fall within the scope of Article 34 TFEU raises more complex questions.

### **a. Establishing appropriateness**

To establish a measure's appropriateness, the Court will enquire as to whether there is sufficient *evidence* to demonstrate that the means chosen will be suitable for achieving the objectives pursued. In earlier case law such as *Franzen*, the Court hardly engaged with evidence, insisting that it was for the Swedish government to demonstrate the proportionality of their licensing system, and that they had not done so in this instance.<sup>46</sup> Similarly, in *Bacardi France* (dealing with free movement of services) the Court was willing to accept that

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<sup>37</sup> A Biondi, 'Advertising alcohol and the free movement principle: the Gourmet decision' (2001) 26(6) European Law Review 616, 619

<sup>38</sup> B Baumberg and P Anderson, Health, alcohol and EU law: understanding the impact of European single market law on alcohol policies' (2008) 18(4) European Journal of Public Health 392, 393

<sup>39</sup> Case C-405/98 *Gourmet* [2001] ECLI:EU:C:2001:135, para 21.

<sup>40</sup> Case C-333/14 *Scotch Whisky* [2015] ECLI:EU:C:2015:845, para 32.

<sup>41</sup> Case C-120/78 *Cassis* [1979] ECLI:EU:C:1979:42, para 14.

<sup>42</sup> Case E-01/94 *Restamark* (Judgement 16 December 1994), para 50; Case C-170/04 *Rosengren* [2007] ECLI:EU:C:2007:313, para 36; Case C-189/95 *Franzen* [1997] ECLI:EU:C:1997:504, para 73.

<sup>43</sup> n41, *Cassis*, para 8.

<sup>44</sup> n40, *Scotch Whisky*, para 38.

<sup>45</sup> n42, *Franzen*, para 76.

<sup>46</sup> *ibid.*

rules restricting direct and indirect advertising for alcoholic beverages<sup>47</sup> were ‘appropriate to ensure their aim of protecting public health’<sup>48</sup> without any further discussion of the supporting evidence.

Recent case law however demonstrates a shift in the Court’s approach to evidence. In *Akohainen*, the Court still insisted that Finland had not demonstrated the proportionality of its licensing system,<sup>49</sup> however then proceeded to refer to the judgments in *Heinonen*<sup>50</sup> and *Gourmet*, acknowledging that those cases presented a variety of plausible arguments on the relative desirability of alcohol control measures. In doing so the Court showed a more nuanced appreciation of the way in which alcohol control policy is shaped by evidence and context.

In *Rosengren*, the Court went further, weighing the ban on personal importation of alcohol against the fact that the alcohol monopoly could theoretically refuse to import any beverage that it did not stock. It concluded that ‘in the light of the alleged objective ... limiting generally the consumption of alcohol in the interest of protecting the health and life of humans, that prohibition, because of the rather marginal nature of its effects in that regard, must be considered unsuitable for achievement of that objective’.<sup>51</sup> Thus, in *Rosengren* the Court directly engages with the supporting evidence, albeit that this led to a conclusion of inappropriateness in the circumstances.

*Scotch Whisky* confirms that the Court is now prepared to directly engage with public health evidence. The Court explicitly acknowledged that a minimum unit pricing measure ‘is part of a more general political strategy designed to combat the devastating effects of alcohol’ and that the measures ‘constitutes one of 40 measures whose objective is to reduce, in a consistent and systematic manner, the consumption alcohol’.<sup>52</sup> This awareness of the fact that single interventions may play a particular role within a more complex strategy led the Court to conclude that it was not unreasonable to consider that minimum unit pricing is suitable for reducing alcohol consumption.<sup>53</sup>

Despite the Court’s increased willingness to engage with the evidence base, the impact of measures suitable for reducing alcohol related harm must still be balanced against their impact upon trade. Unfortunately, the Court’s increased willingness to examine the evidence base for measures has not translated into it attaching greater weight to that evidence in the balancing exercise.

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<sup>47</sup> For an analysis of the services dimension of the *Bacardi France* and *Commission v France (loi évin)* cases, see: J Stuyck, ‘Case C-262/02, Commission v. France and Case C-429/02, Bacardi France SAS and Télévision française 1 SA (TF1) et al., judgments of the Grand Chamber of the Court of Justice of 13 July 2004’ (2005) 42 *Common Market Law Review* 783.

<sup>48</sup> Case C-429/02 *Bacardi France* [2004] ECLI:EU:C:2004:432, para 38.

<sup>49</sup> C-434/04 *Akohainen* [2006] ECLI:EU:C:2006:609, para 35.

<sup>50</sup> Case C-394/97 *Heinonen* [1999] ECLI:EU:C:1999:308.

<sup>51</sup> n42, *Rosengren*, para 47.

<sup>52</sup> n40, *Scotch Whisky*, para 38.

<sup>53</sup> *ibid*, para 36.

## **b. Establishing necessity**

To establishing the necessity of alcohol control measures the Court must ask whether effective attainment of the public health objective makes it necessary to tolerate the restriction on trade generated by the measure.

In early alcohol control cases, the Court's necessity review was 'light touch'.<sup>54</sup> In *Aragonesa*, restrictions on advertising in public places did 'not appear to be manifestly unreasonable as part of a campaign against alcoholism'.<sup>55</sup> In *Commission v France (loi Evin)* the Court found that 'although there are less restrictive measures ... there is not currently any measure which is less restrictive which can exclude or conceal indirectly television advertising for alcoholic beverages'.<sup>56</sup> The review of necessity was procedural, focusing on the viability of alternative alcohol control options. The Court asked whether the Member State was entitled, under its margin of discretion, to consider that restricting trade to the chosen extent was necessary to achieve the public health goals pursued.

However, the CJEU seems to have shifted from a procedural to a substantive review. In *Rosengren*, the Court examined the merits of monopoly rules on personal importing, distribution and age checks in depth, and concluded that the ban went 'manifestly beyond what is necessary for the objective sought',<sup>57</sup> and that 'it does not appear that there is, in all circumstances, an irreproachable level of effectiveness'.<sup>58</sup> Establishing irreproachable effectiveness of the chosen measure was not previously the objective of the necessity review. Member States have a margin of discretion in determining which measures are 'likely to achieve concrete results'<sup>59</sup> in pursuit of legitimate objectives, and may therefore give 'regard to the particular social circumstances and to the importance attached ... to [those] objectives'.<sup>60</sup> Thus, the purpose of the necessity review had been to ensure that Member States are not acting unreasonably in determining the balance to be struck between cross-border trade and public health interests. This flexibility is all the more essential given that Member States have now committed at WHO level to effective, evidence based alcohol control. However, the judgment in *Rosengren* appears to restrict this flexibility, suggesting that Member States must now show that their chosen measure is specifically worth the restriction it makes on trade, rather than showing that the measures strikes a better balance between public health and trade than any other.

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<sup>54</sup> A Alemanno and A Garde, 'The emergence of EU lifestyle risk regulation: new trends in evidence, proportionality and judicial review' in HW Micklitz and T Tridimas, *Risk and EU law* (Cheltenham: Edward Elgar 2015), 164.

<sup>55</sup> Joined Cases C-1/90 and C-176/90 *Aragonesa* [1991] ECLI:EU:C:1991:327, para 17.

<sup>56</sup> Case 262/02 *Commission v France (loi evin)* [2004] ECLI:EU:C:2004:431, para 34.

<sup>57</sup> n42, *Rosengren*, para 51.

<sup>58</sup> *ibid*, para 54.

<sup>59</sup> n49, *Ahokainen*, para 32.

<sup>60</sup> *ibid*.

The consequences of *Rosengren* unfolded in *Scotch Whisky*. The Court appeared to start from a presumption that alternative measures were more proportionate due to their being less restrictive of trade, and conducted an analysis of whether minimum unit pricing offered anything more towards the achievement of the legitimate objective than the alternatives.<sup>61</sup> The Court states at one point that they were examining the ‘question as to whether it is possible to prefer the adoption of [a minimum unit price] to fiscal measures’.<sup>62</sup> The shift of focus to the substantive necessity of the measures chosen, rather than the procedural necessity of striking the balance in the way chosen, eventually led the Court to conclude that perceived additional benefits of increased taxation over minimum unit pricing ‘not only cannot constitute a reason to reject such a measure, but is in fact a factor to support that measure being preferred to the measure imposing an MPU’.<sup>63</sup>

Ultimately, one might conclude that the Courts’s increased standard of necessity review in alcohol control cases has led to it inverting its enquiry – instead of asking whether there is a less trade-restrictive way to achieve a particular level of alcohol control effectiveness, it now appears to ask whether a measure is effective enough to warrant a particular level of trade restriction. This higher standard of interest balancing arguably makes it far more difficult to justify alcohol control measures that make greater restrictions on trade but offer greater public health benefits. This is because ‘as many factors may contribute to some health conditions, the causal link between a risk factor and the harm may be impossible to estimate with any degree of accuracy’.<sup>64</sup> This higher standard potentially even erodes Member States’ established discretion to ‘decide what degree of protection they wish to ensure, and the manner in which that degree can be achieved’<sup>65</sup> – an argument which is reinforced by the fact that in *Scotch Whisky* the issue of discretion was mentioned only in order to support the assertion that Member States might adopt taxation measures over minimum unit pricing.<sup>66</sup> Clearly, the Court’s increased awareness of the evidence base underlying the adoption of alcohol control measures is not matched by an increased awareness of why Member States might give greater weight to evidence of public health effectiveness in balancing trade and public health interests.

### **c. Issues arising from the Court’s review of the compatibility of alcohol control measures with the free movement of goods**

We can highlight two issues from the above analysis. First, it seems that Member States must now conclusively prove that the bold, evidence-based measures they have committed to pursue at WHO level are worth the restriction on intra-Union trade that they create, even though the Member States have agreed at WHO level that pursuit of such measures as part of a multisectoral approach is imperative to reducing the burden of alcohol related harm. The

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<sup>61</sup> n40, *Scotch Whisky*, paras 42-48.

<sup>62</sup> *ibid*, para 47.

<sup>63</sup> *ibid*, para 48.

<sup>64</sup> n54, Alemanno and Garde, 154.

<sup>65</sup> n49, *Ahokainen*, para 32

<sup>66</sup> n40, *Scotch Whisky*, para 43.

conflict of norms stems from the fact that a multisectoral strategy is a complex network of interdependent legal and non-legal measures,<sup>67</sup> some of which perform very specific roles, meaning that their specific effects on other interests such as free trade may be balanced by other policies within the overall strategy.<sup>68</sup> This makes it difficult to evidentially demonstrate that the projected public health effects of a particular alcohol control measure will be worth the immediately observable restriction on trade it creates.<sup>69</sup> Thus, Member States face the problem of being committed to adopting a plethora of interlinked, evidence-based alcohol control measures, but unable to prove that *every* measure they adopt will make a contribution to reducing alcohol related harm commensurate to the distortion of trade it creates. The consequence is that pursuit of the full range of measures suggested at WHO level may potentially be compromised by the preclusion of certain measures at EU level.

Second, in defense of the CJEU, it has little control over the ad-hoc manner in which alcohol control measures are challenged. Furthermore, European judges are not expert public health practitioners, nor do they have full knowledge of the circumstances driving alcohol policy in each Member State. They must therefore base their judgments on the evidence laid before them. For example, in *Scotch Whisky*, the Court concluded that increased taxation would be an effective alcohol control tool after analogously applying evidence presented to it on tobacco taxation. However it did not factor into its analysis that tobacco is a homogenous consumer product that is always harmful to health, and for which price increases are always desirable – whereas alcoholic beverages are an extremely heterogeneous set of products, consumption of which is not always harmful, and for which increasing prices in a blanket fashion through taxation is not always appropriate.<sup>70</sup> The Court is asked to review individual measures out of the international public health context in which they were adopted, against a legal standard that is designed to protect economic interests, and which frames the issues to be analysed in terms of a simple dichotomy between trade restriction and public health protection. It should not therefore be surprising that it is difficult for the Court to factor the WHO level commitments that the Member States have made into its analysis, and that this can therefore lead to outcomes that are disappointing from a public health perspective.

The Member States' internal market obligations should be approached within the context of the commitments that Member States have now made at WHO level to pursuing a multisectoral and evidence-based approach to alcohol control. However the development of the CJEU's alcohol control case law has not been able to reflect the developing international public health context. Neither the Member States nor the CJEU can resolve this clash on their own – individual Member States are not in a position to determine how supranational legal frameworks make provision for the balancing of interests. EU regulatory intervention is

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<sup>67</sup> n5, Alemanno and Garde, 1752.

<sup>68</sup> *ibid.*

<sup>69</sup> A Garde, 'Freedom of Commercial Expression and Public Health Protection: The Principle of Proportionality as a Tool to Strike the Balance' in L Gormley and N Shuibhne, *From Single Market to Economic Union-Essays in Honour of John A Usher* (Oxford University Press 2012), 126.

<sup>70</sup> O Bartlett, 'Minimum Unit Pricing for Alcohol May Not be a Proportionate Public Health Intervention' (2016) 7(1) *European Journal of Risk Regulation* 218. See also A Alemanno's case annotation in *CMLRev* (2016) (forthcoming).

therefore required if the EU legal framework is going to support rather than hinder Member States' pursuit of their WHO commitments. The EU has a duty to help resolve issues that are generated by the cross border nature of the alcohol trade.

### **III. Regulating the cross-border trade of alcoholic beverages at EU level**

As public health policy within the European Union began to develop, the Member States agreed that the EU should be given the legal competence to act in the field of public health, to reflect the public health activities that had been taking place at European level for some time.<sup>71</sup> This competence, introduced in the Maastricht Treaty, was subsequently strengthened when demands were made of the EU to step up its efforts to contain BSE.<sup>72</sup> The latest revision of the EU Treaties specifically refers to the prevention of alcohol and tobacco related harm, whilst continuing to exclude 'any harmonisation of the law and regulations of the Member States'. However, beyond this supportive competence in the field of health, the EU also has a mandate to adopt a high level of public health protection in the development and implementation of all its policies, including in its internal market policy.<sup>73</sup> Thus, the EU can rely on Article 114 TFEU – the EU's general power to enact harmonisation measures which have as their object the establishment and functioning of the internal market – to adopt alcohol control measures with cross-border implications.

The EU legal mandate to ensure a high level of public health protection in all its policies, and therefore tackle cross-border issues arising from the consumption of alcoholic beverages, is supplemented by a firm political mandate from Member States. In 2001 the European Council asked the European Commission to develop a 'comprehensive Community strategy aimed at reducing alcohol-related harm',<sup>74</sup> and in particular pushed for the Commission to 'make full use of all Community policies'.<sup>75</sup> These calls were reiterated in particular with the Council's Conclusions on alcohol and young people in 2004<sup>76</sup> and those on alcohol and health in 2009.<sup>77</sup> More recently, the European Parliament joined the chorus with its Resolution on Alcohol Strategy in 2015,<sup>78</sup> which prompted yet another set of Conclusions from the Council.<sup>79</sup>

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<sup>71</sup> T Hervey, 'Mapping the contours of European Union health law and policy' (2002) 8(1) *European Public Law* 69, 72.

<sup>72</sup> S Greer, 'Uninvited Europeanization: neofunctionalism and the EU in health policy' (2006) 13(1) *Journal of European Public Policy* 134, 139.

<sup>73</sup> Article 168(5) TFEU. For an analysis of what actions might be permitted under such powers, see F Geber, 'Between a rock and a hard place: The controversial case of legislative harmonisation and national lifestyle policies' in A Alemanno and A Garde, n35; O Bartlett, 'The EU's competence gap in public health and non-communicable disease policy' (2016) 5(1) *Cambridge Journal of International and Comparative Law* (forthcoming).

<sup>74</sup> Council Conclusions on a Community strategy to reduce alcohol-related harm, OJ C 175/1, 20.6.2001, 2.

<sup>75</sup> Council Recommendation on the drinking of alcohol by young people, OJ L 161/38, 16.6.2001, 40.

<sup>76</sup> Council Conclusions on alcohol and young people, 9507/04 (Presse 163).

<sup>77</sup> Council Conclusions on alcohol and health, OJ C 302/15, 12.12.2009.

<sup>78</sup> Motion for a Resolution on Alcohol Strategy (2015/2543(RSP)) B-0357/2015, 22.4.2015.

<sup>79</sup> Council Conclusions on an EU strategy on the reduction of alcohol related harm, OJ C 418, 16.12.2015, p 6-8.

However, it is clear that, over the years, the EU has failed to effectively mainstream the protection of public health in its internal market policy in light with existing evidence (1) and has ‘instrumentalised’ the principle of subsidiarity to minimise its intervention in this controversial policy area where political will has been lacking (2).

### **1. The EU’s failure to fulfil its obligation to mainstream public health concerns into its internal market policy**

Article 168(1) TFEU requires that ‘A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’. This ‘mainstreaming’ obligation can also be found in Article 114(3) TFEU, and has been further reinforced following the entry into force of the Lisbon Treaty, with new Article 9 TFEU and Article 35 EU Charter. The purpose of these provisions is to ensure that any policy making in fields that could have either a positive or a negative impact on health are arranged in such a way as to have a positive impact upon health. Even though the threshold of what would constitute ‘a high level of public health protection’ remains undefined, these provisions nonetheless require the EU to place health concerns at the centre of the policy process and to give them sufficient consideration when balancing them against other interests, not least economic interests.

Mainstreaming is particularly important if the issue at hand is as complex as alcohol control and requires a multisectoral response to the problems excessive alcohol consumption raises. It should help ensure that a given issue is treated consistently across multiple policy fields, when input from multiple policy fields – and therefore Directorates-General of the Commission – is required.

Public health mainstreaming was first seriously addressed at EU level during the Finnish Council Presidency in 2006, with the introduction of Health in All Policies,<sup>80</sup> a strategic initiative that was intended to galvanise policy makers to consider health determinants controlled in sectors other than health. Health in All Policies was considered necessary on the grounds that:

- (a) the EU’s policies did not consider health appropriately, (b) the EU’s policy-making system did not utilize the available structures and mechanisms in the best possible way, from a public health point of view, and (c) simply, because an implementation shortfall was seen in how health was integrated in all community policies.<sup>81</sup>

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<sup>80</sup> For analyses of Health in All Policies, see: P Puska and T Stahl, ‘Health in all policies – the Finnish initiative: background, principles, and current issues’ (2010) 31 Annual Review of Public Health 315; M Koivulsalo, ‘The state of Health in All Policies in the European Union: potential and pitfalls’ (2010) 64 Journal of Epidemiology and Community Health 500.

<sup>81</sup> *ibid*, Puska and Stahl, 322.

Health in All Policies therefore offered the EU an ideal opportunity to recognise that complex economic policies could have significant health impacts which it should in turn consider as part of its obligation to ensure a high level of public health protection in all its policies. Unfortunately, the EU did not seize this opportunity.

#### **a. The EU Alcohol Strategy and the EU Forum**

The EU's Alcohol Strategy of 2006, which responded to the various calls for action discussed above, does not mention Health in All Policies, or indeed the EU's mainstreaming obligations. There is very little discussion as to how the Strategy could be used as a vehicle through which to mainstream alcohol control concerns into other relevant policy areas: the Strategy is vague at best in this regard,<sup>82</sup> and fails to provide any specific guidance as to how objectives related to the prevention of alcohol related harm could be integrated into other EU policymaking areas. Even though the Commission stated that the EU would add value to Member State actions and deal with issues that they cannot effectively handle on their own<sup>83</sup> through 'a coordinated strategy to reduce alcohol-related harm',<sup>84</sup> it did not take the opportunity to focus on ensuring coherence between the public health and internal market imperatives set out in the Treaties.

This is all the more disappointing as the EU Alcohol Strategy presented itself as a comprehensive plan to reduce alcohol related harm in Europe.<sup>85</sup> The main part of the Strategy is in reality an exercise in mapping good practice – nothing novel is suggested, rather a brief selection of measures that Member States are already undertaking is presented, organised into five focus fields.<sup>86</sup> In terms of the Strategy's suggestions for how the EU itself can act to reduce alcohol related harm, the options put forward are decidedly lacklustre and do not address the conflict between public health and free trade interests. The prospect of EU harmonisation in response to cross-border concerns is specifically excluded. The proposals mostly advocate reliance on self-regulatory mechanisms.

The EU Alcohol and Health Forum was set up in 2007 as the 'cornerstone'<sup>87</sup> of the EU Alcohol Strategy. Conceived of as a 'Forum for action',<sup>88</sup> the Forum is a gathering of a broad range of stakeholders, ranging from industry and hospitality operators to consumer and public health organisations. The founding Charter of the Forum requires its members to 'devote an

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<sup>82</sup> 'Where possible, the Commission will seek to improve the coherence between policies that have an impact on alcohol-related harm. A number of mechanisms are currently in place to ensure that health is taken into consideration in other Community policy areas': n 83, Commission Communication, 16.

<sup>83</sup> Commission Communication on An EU Strategy to support Member States in reducing alcohol [2006] COM(2006) 625 final, 17

<sup>84</sup> *ibid*, 5

<sup>85</sup> *ibid*, 17

<sup>86</sup> These focus fields cover the protection of young people, drink driving, the prevention of adult and work related harm, education on the risks of alcohol related harm, and the maintenance of a common evidence base: n83, Commission Communication, 7.

<sup>87</sup> Charter establishing the European Alcohol and Health Forum (European Commission 2007), 7.

<sup>88</sup> *ibid*, 2.

increasing level of effort'<sup>89</sup> to the commitments made within the Forum to reducing alcohol related harm, and to demonstrate how their commitments are contributing to reducing alcohol related harm in a 'transparent, participatory and accountable way'.<sup>90</sup> However, the Forum did not live up to these expectations and never was the driver of action that it purported to be. Supposedly comprised of 'experts from different stakeholder organisations and representative from Member States, other EU institutions and agencies',<sup>91</sup> in reality Forum membership comprises a disproportionately large number of industry operators,<sup>92</sup> who have sought to use their position to shift policymaking towards weak, smokescreen interventions.<sup>93</sup> Although the Forum was set up to cover a range of policy areas – from curbing underage drinking to commercial communications, education, enforcing age limits and changing consumer behaviour – 70% of active commitments on the Forum's database<sup>94</sup> relate only to education and responsible consumption. When one also considers that most Forum commitments are made by industry operators, it becomes clear that the Forum is not a vehicle for 'concrete and verifiable'<sup>95</sup> commitments, but rather the alcohol industry's vehicle for the promotion of ineffective information-based interventions and personal responsibility rhetoric.<sup>96</sup> Any hope that the Forum would be a way to 'step up actions relevant to reducing alcohol related harms'<sup>97</sup> was also misplaced. In 2012 a quarter of Forum members did not even submit a monitoring report on their commitments.<sup>98</sup> The reports have also consistently been ineffective in demonstrating the effectiveness of commitments.<sup>99</sup>

Overall, the Forum – and somewhat by extension, the Strategy, which placed considerable reliance upon the Forum – cannot be considered a success. It acted as a vehicle for the promotion of conflicts of interest rather than the promotion of action.<sup>100</sup> It therefore was no surprise that, in 2015, all the public health NGOs resigned from the Forum on the basis that it had failed to deliver the meaningful and durable contribution to addressing alcohol related harm that had been promised, precipitating its eventual collapse.<sup>101</sup> The lack of any ambition in the EU Alcohol Strategy to implement a Health in All Policies approach to alcohol control is astonishing. The fact that the Commission has recently refused to develop another EU Alcohol Strategy to replace the 2006 Strategy, which expired in 2013, means that it has

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<sup>89</sup> *ibid*, 3.

<sup>90</sup> *ibid*.

<sup>91</sup> n83, Commission Communication, 16.

<sup>92</sup> Around 30 at the Forum's peak.

<sup>93</sup> n35, Bartlett and Garde, 286 and 290-295.

<sup>94</sup> Available at <https://webgate.ec.europa.eu/sanco/heidi/eahf/>.

<sup>95</sup> n87, Forum Charter, 4.

<sup>96</sup> For an analysis of Forum commitments that illustrates these points, see n37, Bartlett and Garde, 290-295.

<sup>97</sup> n87, Forum Charter, 2.

<sup>98</sup> European Alcohol and Health Forum (COWI Consortium), *Fourth Monitoring Progress Report* (DG SANCO, October 2012), 8-9.

<sup>99</sup> Comparisons between the First and Fourth Monitoring Progress Reports show that the same monitoring problems have persisted over a number of years. See: C Celia et al, *European Alcohol and Health Forum First Monitoring Progress Report* (RAND Europe 2010), 4.

<sup>100</sup> n35, Bartlett and Garde, 299.

<sup>101</sup> See the Open Letter to Commissioner Andriukaitis :

[http://www.eurocare.org/library/updates/ngos\\_resign\\_from\\_alcohol\\_and\\_health\\_forum\\_as\\_commission\\_ignores\\_member\\_state\\_and\\_european\\_parliament\\_calls\\_for\\_alcohol\\_strategy](http://www.eurocare.org/library/updates/ngos_resign_from_alcohol_and_health_forum_as_commission_ignores_member_state_and_european_parliament_calls_for_alcohol_strategy).

relinquished yet another opportunity to uphold its public health mainstreaming obligations with respect to alcohol control.

Whilst the EU Alcohol Strategy entrusts Member States with the adoption of comprehensive multi-sectoral strategies, it also explicitly acknowledges that:

Studies carried out at national and EU level show that in some cases, where there is a cross border element, better coordination at, and synergies established with, the EU level *might* be needed. Examples include cross-border sales promotion of alcohol that could attract young drinkers, or cross-border TV advertising of alcoholic beverages that could conflict with national restrictions. However, very few EU harmonizing rules have been adopted to date to combat alcohol-related harm.<sup>102</sup>

#### **b. The striking paucity of EU alcohol control harmonisation measures**

Ten years later, and despite growing awareness and commitments at international level, this is still the case.<sup>103</sup> For the purpose of this chapter, we will focus on three regulatory instruments adopted as EU internal market measures to demonstrate the EU's insufficient commitment to addressing the public health concerns resulting from the extensive cross-border trade in alcoholic beverages.<sup>104</sup>

The first area of EU regulatory intervention intended to reduce the harmful consumption of alcoholic beverages is the ban imposed on the use of nutrition and health claims on alcoholic beverages of more than 1.2% by volume of alcohol.<sup>105</sup> Claims are often used by industry operators as a means to promote the characteristics of the foods they have placed on the market, and therefore constitute a potentially powerful tool to distinguish their goods from competing goods and influence consumer behaviour. More specifically, claims may 'encourage consumers to make choices which directly influence their total intake of individual nutrients or other substances in a way which would run counter to scientific advice'.<sup>106</sup> It is therefore not surprising that the validity of Article 4(3), which significantly limits the freedom of alcohol manufacturers and distributors to promote their products using food claims, was challenged both during the legislative process that has led to the adoption of

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<sup>102</sup> At page 5. Emphasis added.

<sup>103</sup> J Cisneros Örnberg, 'Escaping Deadlock – Alcohol Policy-making in the EU' (2009) 16(5) *Journal of European Public Policy* 755.

<sup>104</sup> For a more comprehensive overview, one would also need to look at the taxation of alcoholic beverages and at the role the Common Agricultural Policy could play in this debate.

<sup>105</sup> Article 4(3) of Regulation (EC) 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ 2006 L 404/9. This provision exempts nutrition claims which refer to a reduction in the alcohol or energy content from the scope of the prohibition. The notion of 'food' is defined broadly in EU law and includes alcoholic beverages (Article 2 of Regulation 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002 L 31/1).

<sup>106</sup> Recital 9 of the Food Claims Regulation.

the Food Claims Regulation (i.e. *ex ante*)<sup>107</sup> and after its adoption in a judicial review action before the CJEU (i.e. *ex post*).

The question the CJEU was requested to answer was whether, by prohibiting the description of a wine as ‘easily digestible’ (*‘bekömmlich’*), Article 4(3) violated the freedom of a German winegrowers’ cooperative to choose an occupation and to conduct a business, under Articles 15 and 16 of the EU Charter.<sup>108</sup> In its judgment, the Court placed a strong emphasis on Article 35 of the EU Charter, which requires that ‘a high level of human health protection be ensured in the definition and implementation of all the European Union’s policies and activities’, to dismiss the claim and uphold the validity of Article 4(3). After referring to the EU’s mainstreaming obligation laid down in Article 9 TFEU,<sup>109</sup> the Court pointed out that ‘in view of the risks of addiction and abuse as well as the complex harmful effects known to be linked to the consumption of alcohol, in particular the development of serious diseases, alcoholic beverages represent a special category of foods that is *subject to particularly strict regulation*’.<sup>110</sup> Thus, even if the claim is ‘substantively inherently correct in that it indicates reduced acidity levels’, it nonetheless remains ‘incomplete’ in that it is ‘silent as to the fact that, regardless of a sound digestion, the dangers inherent in the consumption of alcoholic beverages are not in any way removed, or even limited’.<sup>111</sup> Consequently, the EU legislature was ‘fully entitled’ to take the view that such claims on alcoholic beverages are misleading and that they and that ‘the prohibition of such claims is warranted in the light of the requirement to ensure a high level of health protection for consumers’.<sup>112</sup> This case provides a rare example of the EU’s attempt to effectively mainstream public health concerns in its internal market policy in that it recognises that exposure to alcohol marketing, through health and nutrition claims or otherwise, does ‘increase the risks for consumers’ health inherent in the immoderate consumption of any alcoholic beverage’.<sup>113</sup> Subsequent case law unequivocally confirms that the CJEU will grant a broad margin of discretion to the EU when determining the extent to which public health concerns should justify a restriction to purely economic interests.<sup>114</sup>

The second instrument of relevance which the EU has adopted on the basis of its internal market harmonisation powers stands in stark contrast with the Food Claims Regulation in that it exempts alcoholic beverages from some of the mandatory disclosure requirements it imposes for other foods. Regulation 1169/2011 on the food information provided to

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<sup>107</sup> See in particular the proposal of the European Parliament at its first reading to delete the ban on nutrition and health claims made on alcoholic beverages: OJ 2006 C 117E.

<sup>108</sup> Case C-544/10 *Deutsches Weintor* [2012] ECLI:EU:C:2012:526.

<sup>109</sup> *ibid*, para 49.

<sup>110</sup> *ibid*, para 48. Emphasis added. As discussed below, the Food Claims Regulation provides the only example where the EU has effectively recognised that ‘alcoholic beverages represent a special category of foods that is *subject to particularly strict regulation*’.

<sup>111</sup> *ibid*, para 51.

<sup>112</sup> *ibid*, para 52.

<sup>113</sup> *ibid*.

<sup>114</sup> See in particular Case C-157/14 *Neptune Distribution Service* [2015] and Case C-547/14 *Philip Morris International* [2016].

consumers requires the disclosure of information intended to help consumers make ‘informed’ food choices, referring specifically to the list of ingredients and the nutrition declaration.<sup>115</sup> As such, it is very much in line with the information paradigm characterising EU consumer and health policy.<sup>116</sup> However, if Article 9(1)(k) does require, as its predecessor did,<sup>117</sup> that alcoholic beverages containing more than 1.2 % by volume of alcohol should indicate their actual alcoholic strength by volume,<sup>118</sup> Article 16(3) exempts them from the disclosure requirement that consumers should be informed of the list of ingredients. The Commission should have produced a report by 30 December 2014 on whether alcoholic beverages should in future provide information on their energy value, and the reasons justifying possible exemptions. It was also asked to consider the need for a definition of ‘alcopops’, which specifically target young people.<sup>119</sup> Leaving aside the fact that the Commission has not complied with this mandate, it would arguably have been far more preferable to presume that alcoholic beverages, whose harmful consumption poses a real public health threat, should have been covered in the first instance. Calling on industry operators to provide voluntary information,<sup>120</sup> will not lead to the level playing field required to promote a high level of public health protection, whilst it may in the longer term limit the freedom of Member States to do so at national level.

The third internal market measure of relevance is the Audiovisual Media Services Directive (AVMSD) which, among others, sets down minimum standards on audiovisual commercial communications, including advertising, teleshopping, sponsorship and product placement.<sup>121</sup> In particular, Article 9(1)(e) requires that ‘audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages’.<sup>122</sup> This provision is a missed opportunity, not least because it does not sufficiently protect children from exposure to alcohol marketing, insofar as most of the television programmes which children watch are not ‘aimed

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<sup>115</sup> Article 9(1)(b) and (l).

<sup>116</sup> M Friant-Perrot and A Garde, ‘From BSE to Obesity – EFSA’s Growing Role in the EU’s Nutrition Policy’, in A Alemanno and S Gabbi, *Foundations of EU Food Law and Policy: Ten Years of the European Food Safety* (Ashgate 2014).

<sup>117</sup> Directive 87/250/EEC on the indication of alcoholic strength by volume in the labelling of alcoholic beverages for sale to the ultimate consumer, OJ L 113/57, 30.4.1987.

<sup>118</sup> Article 28 specifies that the actual alcoholic strength must be indicated in accordance with Annex XII, except for products classified in CN code 2204 to which specific EU rules apply.

<sup>119</sup> Article 16(4). See also Recital 40 of the Preamble: ‘The Commission shall accompany that report by a legislative proposal, if appropriate, determining the rules for a list of ingredients or a mandatory nutrition declaration for those products.’

<sup>120</sup> Recital 42 Preamble.

<sup>121</sup> 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 in view of changing market realities, OJ L 95/1, 15.4.2010.

<sup>122</sup> On the evidence for the link between advertising and consumption of alcohol, see: *Does marketing communication impact on the volume and patterns of consumption on alcoholic beverages, especially by young people? – a review of longitudinal studies* (Science Group of the European Alcohol and Health Forum 2009).

specifically' at them and do not therefore have to be free from such marketing.<sup>123</sup> If the Commission has somewhat recognised this concern, it proposes to address it by adding a new Article 9(3) in the AVMSD which would read as follows:

Member States and the Commission shall encourage the development of self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications for alcoholic beverages. Those codes should be used to effectively limit the exposure of minors to audiovisual commercial communications for alcoholic beverages.<sup>124</sup>

Once again, the Commission merely reasserts its dogmatic belief in the virtues of self-regulation. To make matters worse, it simultaneously proposes to further liberalise a range of provisions, which could increase the exposure of children to alcohol marketing. Two points are worth noting here. Firstly, Article 23(1) would be amended to contain a daily limit on television advertising to replace the existing hourly limit: 'The daily proportion of television advertising spots and teleshopping spots within the period between 7:00 and 23:00 shall not exceed 20%'. This means that a broadcaster would have more flexibility to decide when to insert advertising and teleshopping spots in television programme within the limits set by the Directive. One could venture the hypothesis that this would lead to more marketing in programmes with high audience thresholds, and less in programmes with low audience thresholds – with an overall increase in exposure to marketing and alcohol marketing more specifically.<sup>125</sup> Secondly, product placement would be liberalised under Article 11. In the current version of the AVMSD, Member States have an option to ban product placement or not.<sup>126</sup> One positive change is that the ban on product placement would remain in 'children's programmes' (as is currently the case) and would be extended to 'programmes with a significant children's audience'. This takes into account the fact that children can be – and often are – exposed to marketing even in programmes that are not classified as children's programmes. Unfortunately, however, the notion of 'significant' seems to lay down a high threshold which will in turn allow industry operators to continue to promote their alcohol beverages when children are watching. This is particularly insidious in light of the report published alongside the proposed revision of the AVMSD that children are affected by embedded marketing even though they do not always recognise it and that they openly declare not to like it.<sup>127</sup> The fact that the AVMSD is a minimum harmonisation directive only

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<sup>123</sup> This has been recently confirmed by the study on the exposure of minors to alcohol advertising on TV and in online services, published on 4 March 2016: <https://ec.europa.eu/digital-single-market/en/news/study-exposure-minors-alcohol-advertising-tv-and-online-services>.

<sup>124</sup> Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU, COM(2016) 287/4.

<sup>125</sup> It is worth noting that the 20% limit does not apply to a) announcements made by the broadcaster in connection with its own programmes; 2) sponsorship; and 3) product placement. Exposure to various forms of marketing will therefore exceed 20% overall if programmes are sponsored and include product placement.

<sup>126</sup> On the regulation of product placement in the AVMSD, see A Garde, 'Towards the Liberalisation of Product Placement on UK Television?', *Communications Law* 16 (2011) 93.

<sup>127</sup> Study on the impact of marketing through social media, online games and mobile applications on children's behaviour, published on 25 May 2016:

partially alleviates these concerns, as Member States who will want to seize the opportunity to implement stricter provisions than those contained in the AVMSD may be challenged on the ground that these measures are not compatible with the general free movement provision on the free movement of goods. Furthermore, the freedom which Member States have to regulate audiovisual commercial communications more strictly is limited by the country of origin principle.<sup>128</sup> Overall, therefore, the Commission has not sufficiently taken on board all the evidence which has accumulated over the years on the exposure of children to alcohol marketing.

In light of existing evidence supporting strong alcohol policies, in light of the EU's public health mainstreaming obligations and in light of the Court's case law on the compatibility of national alcohol control measures with general free movement provisions, it is indeed extremely difficult to comprehend why the EU has not done more in areas with a clear cross-border effect, if this is not for its chronic lack of political will.

## **2. The principle of subsidiarity as a cloak for the EU's chronic lack of political will to adopt an evidence-based EU alcohol policy**

The principle of subsidiarity has traditionally been invoked to guard against excessive EU regulatory intervention. In this instance, however, the EU has relied on this principle to significantly limit its regulatory intervention. The way the European Commission has interpreted the principle of subsidiarity in its EU Alcohol Strategy is to avoid using the Union's competences at all, insisting that 'there is no intention to substitute Community action to national policies ... in accordance with the principle of subsidiarity ... In particular the Commission does not intend as a consequence of this Communication to propose the development of harmonised legislation in the field of the prevention alcohol-related harm'.<sup>129</sup> We argue that this position is misconceived in that it ignores the fragmentation resulting from the Court's case law and the impact such fragmentation has had on Member States' freedom to adopt alcohol control policies.

The principle of subsidiarity constrains EU action by requiring that:

in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather,

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[http://ec.europa.eu/consumers/consumer\\_evidence/behavioural\\_research/impact\\_media\\_marketing\\_study/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/impact_media_marketing_study/index_en.htm).

<sup>128</sup> O Bartlett and A Garde, 'Time to seize the (red) bull by the horns: the EU's failure to protect children from alcohol and unhealthy food marketing' 38(4) *European Law Review* 498. Another missed opportunity is the exclusion of health from the scope of the Unfair Commercial Practices Directive: Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22, 11.6.2005, recital 9.

<sup>129</sup> n83, Commission Communication, 4

by reason of the scale or effects of the proposed action, but better achieved at Union level.<sup>130</sup>

Despite ‘its lack of conceptual contours’,<sup>131</sup> the principle of subsidiarity was never intended to be relied upon as a way out of the EU’s obligation to ensure that a high level of public health protection should be ensured in the development and implementation of all its policies, and more specifically its internal market policy. If it admittedly lays down a presumption in favour of decentralisation,<sup>132</sup> it does not lay down an irrefutable presumption. In fact, paragraphs 6 and 7 of the Protocol on Subsidiarity and Proportionality require that the EU should legislate only to the extent necessary and that EU measures should leave as much scope for national decisions as possible, whilst securing the aim of the measure and observing the requirements of the Treaty.<sup>133</sup> In other words, a rigorous subsidiarity analysis may not necessarily result in EU action being barred. The principle of subsidiarity may rather lead to an extension of the activities of the Union within the framework of its powers when circumstances so require’.<sup>134</sup>

As Lyon-Caen noted shortly after the principle of subsidiarity was first introduced in the EU Treaty, ‘subsidiarity can cut both ways’.<sup>135</sup> Furthermore, Article 3 of the Protocol also emphasises that:

Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.

The Court’s growing case law on the compatibility of national measures with EU free movement provisions strongly suggests that EU legislation is necessary if the EU is to achieve the dual objective of establishing and ensuring the functioning of the internal market, whilst ensuring a high level of public health protection. Internal market objectives are better served if cross-border issues affecting all Member States are regulated by the EU at EU-level. This is the case even if Member States have suffered from the lack of harmonised rules to varying degrees, depending in particular on the extent to which they have attempted to

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<sup>130</sup> Article 5(3) TEU.

<sup>131</sup> For a criticism of the wording of Art. 5(3), see R. Schütze, *European Constitutional Law* (CUP, 2012), 178.

<sup>132</sup> M Pollack ‘The end of creeping competence? EU policy-making since Maastricht’ (2000) 38(3) *Journal of Common Market Studies* 519, 520

<sup>133</sup> Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ 2010 C 83/206.

<sup>134</sup> European Parliament Resolution of 13 September 2012 on the 18<sup>th</sup> report on Better Legislation – Application of the Principles of Subsidiarity and Proportionality (2010) (INI (2011) 2276), at paragraph 15. See further I. Maletic, ‘The role of the principle of subsidiarity in the EU’s lifestyle risk policy’, in A. Alemanno and A. Garde, n35, 197.

<sup>135</sup> G. Lyon-Caen, ‘Subsidiarity’, in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* (Oxford: Clarendon Press 1996), 49.

develop comprehensive, multisectoral and evidence-based alcohol control policies. Writing in relation to tobacco products, the Court recently stated:

Even if the second of those objectives might be better achieved at the level of the Member States, the fact remains that pursuing it at that level would be liable to entrench, if not create, situations in which some Member States permit the placing on the market of tobacco products containing certain characterising flavours, whilst others prohibit it, thus running completely counter to the first objective of Directive 2014/40, namely the improvement of the functioning of the internal market for tobacco and related products.

The interdependence of the two objectives pursued by the directive means that the EU legislature could legitimately take the view that it had to establish a set of rules for the placing on the EU market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level.<sup>136</sup>

It is immensely concerning that the Commission purports to respect the principle of subsidiarity – a legal principle subject to judicial review – to hide its utter lack of political will to adopt evidence-based standards with a view to addressing inherently cross-border issues that the free movement of goods and services has increased rather than alleviated and that the Court's case law has put in sharp focus. Why would the fact that drinking patterns vary from one Member State to another, in itself, lead to the conclusion that regulating the labelling and the marketing of alcoholic beverages is more effectively done at national rather than at EU level? The fragmentation of the internal market will only be increased if Member States are left to regulate the labelling and marketing of alcoholic beverages at national level. As discussed above, such measures are classified for the purposes of Article 34 TFEU as either product requirements or certain selling arrangements that may not apply equally in law and in fact, leaving it to the CJEU to determine whether these measures are proportionate. As the Council Conclusions of December 2015 specifically emphasise, 'an EU strategy can further support and complement national public health policies',<sup>137</sup> calling specifically on the Commission to 'focus on initiatives on the reduction of alcohol-related harm with a cross-border dimension and an EU added value as a follow-up to the first EU Alcohol Strategy'.<sup>138</sup>

By failing to apply the internal market logic to alcoholic beverages as it has in relation to tobacco products, the EU has instrumentalised the principle of subsidiarity to reach pre-determined outcomes.<sup>139</sup> This can only lead to increased regulatory fragmentation within the EU, thus depriving Member States from the certainty they should be able to hope for as to the compatibility of their alcohol control measures with EU free movement rules, thus making it

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<sup>136</sup> Case C-547/14 *Philip Morris International*, paras 221 and 222. See also *Estonia v European Parliament and Council* [2015] ECLI:EU:C:2015:403, paras 47 and 48.

<sup>137</sup> n79, Council Conclusions, para 13.

<sup>138</sup> *ibid*, para 21.

<sup>139</sup> n5, Alemanno and Garde.

more difficult for them to uphold the international commitments they have made to reduce the burden of NCDs, and in particular the harmful consumption of alcoholic beverages.

### **Conclusion: the EU's failure to engage with evidence**

The necessity of engaging with evidence when making policy on public health issues such as alcohol control is emphasised throughout the literature.<sup>140</sup> Alcohol control will not be fully effective if the evidence on, amongst other things, how consumers behave in purchasing situations<sup>141</sup> and the socio-economic environment in which alcohol consumption takes place,<sup>142</sup> are not taken into account when developing and implementing policy. The desirability of factoring the latest evidence into public health policymaking is also reflected in Article 114(3), where internal market legislative proposals relating to health must 'take as a base a high level of protection, taking account in particular of any new development based on scientific facts'.

It is therefore all the more regrettable that the Commission has largely failed to engage with this large evidence base which suggests that measures affecting the price,<sup>143</sup> availability and accessibility<sup>144</sup> of alcoholic beverages, as well as their advertising,<sup>145</sup> will have the most impact in decreasing rates of excessive consumption. It is striking that the EU Alcohol Strategy prioritised the types of policy measures that have been found to have the least impact, namely information and education,<sup>146</sup> or harm reduction policies (which do not aim to reduce consumption of alcohol but its associated harms).<sup>147</sup>

A comprehensive statement of the evidence base, funded by the Commission, was produced specifically to support the EU Alcohol Strategy.<sup>148</sup> However, as one of the authors noted in evidence given to the European Union Committee of the House of Lords on the EU Alcohol Strategy, 'a lot of that evidence did not get through into the strategy itself'.<sup>149</sup> This is all the

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<sup>140</sup> See for instance: R Brownson et al, 'Understanding Evidence-Bases Public Health Policy' (2009) 99(9) *American Journal of Public Health* 1576; R Room et al, 'Alcohol and public health' (2005) 365(9458) *Lancet* 519; P Anderson et al, 'Effectiveness and cost-effectiveness of policies and programmes to reduce the harm caused by alcohol' (2009) 373 *Lancet* 2234.

<sup>141</sup> J Janson and D Kysar, 'Taking Behaviouralism Seriously: Some Evidence of Market Manipulation' (1999) 112(7) *Harvard Law Review* 1420; A Alemanno and A Sibony, *Nudge and the Law: A European Perspective* (Oxford: Hart 2015).

<sup>142</sup> M Marmot, *The Health Gap: The Challenges of an Unequal World* (London: Bloomsbury 2015); J van Oers et al, 'Alcohol consumption, alcohol-related problems, problem drinking, and socioeconomic status' (1999) 34(1) *Alcohol and Alcoholism* 78.

<sup>143</sup> A Wagenaar et al, 'Effects of beverage alcohol price and tax levels on drinking: a meta analysis of 1003 estimates from 112 studies' (2009) 104(2) *Addiction* 179;

<sup>144</sup> C Campbell et al, 'The effectiveness of limiting alcohol outlet density as a means of reducing excessive alcohol consumption and alcohol-related harms' (2009) 37(6) *American Journal of Preventive Medicine* 556.

<sup>145</sup> L Smith and D Foxcroft, 'The effect of alcohol advertising, marketing and portrayal on drinking behaviour in young people: systematic review of prospective cohort studies' (2009) 9 *BMC Public Health* 51.

<sup>146</sup> n136, Anderson.

<sup>147</sup> A Ritter and J Cameron, 'A review of the efficacy and effectiveness of harm reduction strategies for alcohol, tobacco and illicit drugs' (2006) 25 *Drug and Alcohol Review* 611.

<sup>148</sup> n1, Anderson and Baumberg.

<sup>149</sup> Home Affairs, Health and Education Sub Committee of the European Union Committee of the House of Lords, *A new EU Alcohol Strategy? – Evidence* (House of Lords, 2015), 78.

more curious in light of the fact that during the drafting process for the Strategy there were multiple references to evidence-based policy making and many evidentially effective interventions were on the table.<sup>150</sup> The fact that the final consensus on the main themes and content of the Strategy,<sup>151</sup> as well as the final text, bore little relation to earlier work on the Strategy strongly suggests that a significant ‘watering down’ influence was exerted on the Commission’s work, highlighting its failure to engage properly with evidence – or perhaps its failure to resist those who lobby against an evidence-based approach.

Most of the evidence on self-regulation and partnership with the alcohol industry points to its inefficacy, due to the inherent conflicts of interest, and merely supports the use of self-regulatory mechanisms if it is part of a wider legislative approach to alcohol control.<sup>152</sup> The Commission however has relied almost exclusively on the self-regulation and Forum commitments to drive the work of the EU Strategy, being so blind as to praise its work in assessments of the progress of the Strategy,<sup>153</sup> and ignore the conflicts of interest such governance mechanisms unavoidably promote.<sup>154</sup>

Nobody would dispute the complexity of designing an effective EU alcohol policy. What is more controversial is that the EU has hardly engaged with this complexity, despite its strong mandate to do so, and the plethora of evidence at its disposal. This will unavoidably make it much more difficult for Member States to uphold their commitment to reducing the burden of NCDs by 2025.<sup>155</sup> Nothing will ever replace the political motivation and courage which are currently lacking. The suggestion that the Commission should adopt evidence-based policies, which limit the purely economic private interests of alcoholic beverage operators, in order to comply with its Treaty obligations to ensure a high level of public health protection for all, is unlikely to meet with any sympathy in Brussels.

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<sup>150</sup> See: Draft Minutes of the Meeting of the WORKING GROUP ON ALCOHOL AND HEALTH, 9th and 10th June 2004, Luxembourg; Discussion Paper on the EU Strategy on Alcohol (DG SANCO, March 2005),.

<sup>151</sup> M Renstrom, ‘Commission activities to prevent alcohol-related harm’ (Bridging the Gap, 3<sup>rd</sup> Meeting, Barcelona 2006).

<sup>152</sup> n34, Moodie et al; S Casswell, “Vested interests in addiction research and policy. Why do we not see the corporate interests of the alcohol industry as clearly as we see those of the tobacco industry?” (2013) 108(4) *Addiction* 680; A Gilmore et al, “Public health, corporations and the New Responsibility Deal: promoting partnerships with vectors of disease?” (2011) 33(1) *Journal of Public Health* 2.

<sup>153</sup> Assessment of the added value of the EU strategy to support Member States in reducing alcohol-related harm (DG Health and Consumers 2012), available online at [http://ec.europa.eu/health/alcohol/docs/report\\_assessment\\_eu\\_alcohol\\_strategy\\_2012\\_en.pdf](http://ec.europa.eu/health/alcohol/docs/report_assessment_eu_alcohol_strategy_2012_en.pdf) (last accessed 23 April 2016), 15.

<sup>154</sup> n35, Bartlett and A Garde.

<sup>155</sup> By approving the WHO Global NCD Action Plan for 2013-2020, Member States have undertaken to attain nine voluntary global targets, including that of a 25% relative reduction in premature mortality from NCDs and that of at least a 10% relative reduction in the harmful use of alcohol by 2025.