

The “Obesity Risk”: For an Effective Use of Law to Prevent Non-Communicable Diseases

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Introduction

At the end of 2003, the French Parliament was reflecting on whether it should regulate food marketing, particularly to children, whilst the European Commission had just published a proposal for an EU Regulation on nutrition and health claims made on food. Diet was becoming a major societal concern: the World Health Organization (WHO) had rung the alarm bell a few years before, referring to obesity as a global problem of ‘epidemic’ proportions, and the Global Diet and Physical Strategy was in the pipeline. I had then taken a break from my embryonic academic career to qualify as a solicitor, and it is in the Food Law Group of a major law firm that I first became aware of all these discussions. The firm I was then working for had been approached by large food business actors to run a seminar on ‘the obesity risk’. This is when I had my ‘Eureka’ moment. I realised that several of the interests I had nurtured over the years could come together, and three of them in particular: 1) my interest in European Union law, and more specifically how the EU balances trade concerns with other public imperatives; 2) my interest in children’s rights and social justice; and 3) my interest for the law as both a technical and a policy-oriented discipline. I had – at long last – found a topic which was new and exciting, offering opportunities for reflection on academic questions, as well as for policy engagement with a major and rapidly growing issue affecting us all, and our children, all over the world. Here was the opportunity to shape a new sub-discipline – even though at the time I was not familiar with the notion of ‘risk regulation’.

In this short note, I will briefly outline how I have been able to redefine my research interest and develop an expertise on the role that legal instruments may play in preventing obesity and other non-communicable diseases (NCDs). I will then share a few thoughts on the challenges researchers working on NCD prevention face and how these challenges may perhaps be addressed.

From employment law to obesity and NCD prevention

I have been extremely fortunate in receiving a good legal education. I obtained a joint degree from King’s College London and the University of Paris I Pantheon-Sorbonne. This sparked my interest in how two legal systems that come from different legal traditions deal with largely similar questions. I returned to King’s to pursue postgraduate studies in European Union law (with a specialisation in EU internal market, EU labour law, children’s rights and comparative law). I moved to Cambridge where the Faculty of Law offered me my first full-time academic post and ideal learning conditions. However, I strongly believed that lawyers should have a good sense, early on in their careers, of what practising law entailed. I therefore took the extremely difficult decision of leaving the sheltered and privileged environment of the University of Cambridge to embark on a two-year training contract at Simmons & Simmons and qualify as a solicitor. Importantly, Simmons had a major Food Law Group whose activities I could observe closely as I spent part of my training contract in their

Paris office. Without this experience, the chances are that I would not have realised that obesity could provide a far newer and more exciting angle for my research, whilst drawing on my existing knowledge of, and interest in, EU law, children's rights and social justice. In 2004, I completed my PhD on EU employment law, whilst starting to reflect on a new research project.

I successfully applied for a Jean Monnet post-doctoral fellowship at the European University Institute in Fiesole, Italy, where I spent ten months. I am deeply indebted to the EUI for giving me the space required to read extensively and re-orientate my research in a field where hardly any lawyers – at least in Europe – had yet ventured. In particular, I reflected on how EU internal market and consumer law was equipped to deal with growing rates of obesity.¹ Understanding the role that EU law could play in preventing obesity has unavoidably led me to reflect on how the EU tobacco control policy had developed. I started to draw some parallels, whilst being cognisant of the fact that food is significantly more complex to regulate than tobacco. The next step was therefore obvious: to extend the reflection to the main determinants of NCDs – adding alcohol to the scope of enquiry. This is where Alberto Alemanno and I started our ongoing collaboration. We first organised a joint conference which took place at HEC Paris in September 2012, and which led to a range of joint publications and policy initiatives.²

My involvement in policy work was facilitated by grants I obtained to engage with policy actors. Two specific projects are worth mentioning, as they were instrumental in shaping my academic interest and future work. Firstly, in 2008-2009, I was involved in a multi-disciplinary, international project for the European Commission on the costs of smoking, reflecting specifically on whether the EU and its Member States could learn from the US approach to tobacco litigation.³ Secondly, I was awarded a grant from the UK Economic and Social Research Council to work on a one-year project in 2013 on the regulation of food marketing to children which allowed me to spend some time at the WHO.⁴

In 2015, I set up the Law & NCD Unit which sits within the School of Law and Social Justice at the University of Liverpool. We are growing steadily, though we will never have enough members to deal with the challenges that stem from growing rates of NCDs worldwide.

¹ *EU Law and Obesity Prevention* (Kluwer Law International, 2010).

² See in particular the edited collection that resulted from this workshop: *The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press, January 2015); as well as our first scoping article: 'The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets', *Common Market Law Review* 50 (2013) 1745; our report for the Swedish Institute of European Policy Studies (SIEPS) on 'Regulating Lifestyles in Europe How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?' (December 2013): <http://www.sieps.se/en/publications/reports/regulating-lifestyles-in-europe-how-to-prevent-and-control-non-communicable>; and our legal opinion for Action on Smoking and Health and Cancer Research UK on the compatibility of the proposed UK tobacco plain packaging scheme with EU law (November 2014): http://www.ash.org.uk/files/documents/ASH_955.pdf.

³ *A Study on Liability and the Health Costs of Smoking* (SANCO/2008/C6/046), December 2009: http://ec.europa.eu/health/sites/health/files/tobacco/docs/tobacco_liability_en.pdf

⁴ ESRC Grant ES.J020761.1.

Challenges to overcome to ensure the development and implementation of effective NCD prevention strategies

I initially had to face the scepticism of some law colleagues that research expertise in 'law and obesity prevention' should be embraced and that obesity was a serious topic of legal enquiry. This situation has now changed: such expertise is becoming more 'mainstream' and is not viewed much differently from the expertise on tackle climate change or other similarly pressing and complex societal issues. This should be welcomed. However, several difficult questions have come to the fore as the role of law in addressing obesity and NCDs is becoming ever more clearly acknowledged.

Working as a member of large interdisciplinary, objective-driven teams

It is clear that obesity and NCD prevention requires a multisectoral response – or a 'Health in All', horizontal policy approach across all relevant policy areas. Public health mainstreaming implies, at its core, that a high level of public health protection should not be pursued only via ear-marked, distinct policies, but must be incorporated in all policies. In particular, developing a robust childhood obesity prevention strategy will require that different policy sectors work together and address questions pertaining to the reformulation, the labelling and the marketing of foods, as well as food education, procurement and pricing strategies... So what does this entail for each individual researcher and how we conduct our research? It necessitates that we adopt an interdisciplinary outlook – an equally fulfilling and complex task. Fulfilling: because we are led to engage with a broad range of material spanning law and other disciplines – material we would not necessarily engage with would it not be for our attempt to try and address an inherently multifactorial problem. Complex: because nobody can have in-depth expertise in all the legal questions relating to obesity and NCD prevention. There is no such thing as 'obesity law' or 'NCD law'; rather, several branches of law are implicated in the attempt to effectively prevent obesity and NCDs. Researchers can only succeed in making a meaningful contribution to this objective if they are prepared to step outside their comfort zone and engage not only with colleagues from non-law backgrounds from public health, economics, marketing, psychology, anthropology... – this is a given when reflecting on NCDs – but also with colleagues from various sub-disciplines of law, including international trade and investment law, consumer law, constitutional and administrative law, human rights law, intellectual property law... This not only requires patience, but it also requires a good pinch of modesty: we must acknowledge the limits of the contribution that each one of us can make as individual researchers and work collectively to ensure that the whole is better than a sum of its parts.

Building legal capacity without oversimplifying inherently complex issues

There is growing recognition within the public health community that lawyers have a significant contribution to make to the obesity and NCD prevention agenda at all levels – local, national, European or global. This has been the case in the field of tobacco for some time, but as the thinking becomes more horizontal, a momentum seems to be developing that the policies that have worked for tobacco control may (or may not) also work to promote healthier diets and limit alcohol consumption. There has therefore been more and more demand for 'capacity building' workshops – to coin the phrase often used by the WHO itself – and legal training courses on obesity and NCD prevention. A key role for researchers interested in this policy area is to bridge the gap between

what participants to these workshops think the law is and what it actually is. The opportunities that the law offers to prevent NCDs are significant, but they can only be maximised if the constraints that law imposes on public authorities are effectively understood.⁵ Hence the importance of replacing any national NCD prevention strategy within, for example, the broader framework of international trade and investment law. Translating knowledge on the ground requires that the public health community is convinced of the complexity and the value that a law-based response can offer to the major public health challenges of the 21st century. Helping policy actors frame their policies and their advocacy is a key contribution which engaged academics can have in this field of policy.

Continuing despite fierce opposition from powerful vested interests

It is all the more necessary that policy actors become more familiar with the legal instruments that they have at their disposal to address obesity and NCDs, in light of how familiar tobacco, alcohol and food business actors are with the legal arguments they can invoke – more or less convincingly – against the use of law when such use may limit their profitability. In particular, industry operators have argued, when challenging various NCD policies in various parts of the world, that legally binding measures regulating the content, the labelling and presentation, or the advertising and promotion of their products infringe several of the fundamental rights they derive from human rights law, not least the freedom of expression and information (which includes commercial expression), the freedom to choose an occupation and the right to engage in work, the freedom to conduct a business and the right to property (which includes intellectual property). All these rights are protected by many (though not all) legal orders worldwide. Nevertheless, none of these rights are absolute: they may be restricted on grounds of public health protection. It is therefore important to ensure that obesity and NCD prevention strategies are developed so as to pre-empt as far as possible these arguments: supporting evidence needs to be framed in proportionality terms so that a regulatory authority demonstrates, firstly, how a given measure can contribute to the prevention of obesity and NCDs and, secondly, that this public health objective could not have been attained by relying on equally effective alternative measures that would have been less restrictive of the competing rights invoked by industry operators.⁶

The ‘human rights approach’ to obesity and NCD prevention, which the United Nations has recently started to promote, calls for an enquiry into how the right to health and other fundamental rights can be deployed to counter the arguments put forward by business actors. The paradigm is shifting: if fundamental rights have traditionally been relied upon in the first instance as a shield by industry operators to protect their interests from unwanted health-promoting measures, they can also and above all be invoked as a sword by public health actors to develop effective, evidence-based obesity and NCD prevention strategies with, at their heart, the imperative of ensuring a high level of public health protection in all policies. Human health protection will often prevail on the purely economic interest in the greatest possible inter-product and inter-brand competition, which has considerably greater importance in the value system under many legal systems worldwide.⁷ This is

⁵ See the SIEPS report mentioned above.

⁶ *Ibid.*

⁷ This was recently recognised by the CJEU in Case C-547/14 *Philip Morris* (see in particular paragraphs 156 and 157 of the Court’s judgment of 4 May 2016 and paragraph 193 of the Opinion of AG Kokott of 23 December 2015).

particularly true when children are the intended beneficiaries of health promoting measures: ‘in *all* actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best* interests of the child shall be a *primary* consideration’ (emphasis added).⁸ As the Committee on the Rights of the Child has clearly stated, ‘the best interest of the child as a primary consideration becomes crucial when states are engaged in weighing competing priorities, such as short term economic considerations and longer term development decisions. States should be in a position to explain how the right to have the best interests of the child has been respected in decision making, including how it has been weighed against other consideration’⁹ bearing in mind that the child’s best interests may not be considered on the same level as all other consideration’.¹⁰

Conclusion

Lawyers interested in obesity and NCD prevention can roll up their sleeves: there is plenty of work ahead! The more legal instruments are part of the global agenda to promote health in all policies at all levels, the more lawyers will be called upon to help competent regulatory authorities frame legal instruments in light of the rules constraining the adoption of legally binding rules within a given legal system. Maintaining academic rigour and integrity is paramount and is likely to become an ever more acute challenge as academic and public health institutions themselves find themselves under growing financial strain. This increases the onus on researchers to reflect on their ethics in at least two ways. Firstly, we must object in our research to any oversimplification in populist discourses of the inherently complex societal issues relating to obesity and NCD prevention. And we must do so irrespective of the fact that it is far more difficult to explain complex issues and embrace this complexity rather than play on fears of the ‘nanny state’. Secondly, we must ensure that our research is not financed by powerful business actors, either directly or indirectly, so as to stay clear of all actual or perceived conflicts of interest. And we must do so irrespective of institutional pressures to bring in ‘research income’.

I feel extremely privileged to have worked with a broad range of individuals from different walks of life. In the twelve years that I have nurtured an interest in obesity and NCD prevention, I have witnessed a few landslide victories for public health, and I expect many more to come. There is cause for some optimism. Obesity and NCDs are preventable, and the better and more systematic the framing of evidence, the more effective NCD prevention strategies are likely to be. Nothing will, however, replace political will.

⁸ This principle is at the heart of the UN Convention on the Rights of the Child, which has been ratified by all States in the world apart from the United States of America (Article 3(1)), and is also enshrined in the EU Charter of Fundamental Rights (Article 24).

⁹ General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, at paragraph 17.

¹⁰ General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, at paragraph 37.