Introduction

Public health, as traditionally understood, requires some degree of government action to protect the population from communicable diseases and pollution. Given the EU’s commitment to the free movement of people, it is appropriate that member states work together to identify and tackle communicable diseases with initiatives such as the Early Warning and Response System.

The EU’s health budget for 2007–13 was €321.5 million and has risen to €449.4 million for 2014–20. Much of this is spent on pan-European partnerships to deal with such issues as counterfeit medicines, radiation, organ donations and rare diseases (European Union 2011). Along with the European Health Insurance Card – which has become more controversial, thanks to concerns about ‘health tourism’ – these projects help member states achieve health goals that, by their nature, require collective action and international cooperation.

The case for EU action in relation to healthcare provision and the prevention of non-communicable diseases is less compelling. Member states have shown no great interest in integrating their health services, and the EU has no direct competence in this area. The UK government is satisfied with the current balance of competences that gives the EU a very limited role (HM Government 2013: 8). The bigger question is whether the EU has a role to play in ‘lifestyle regulation’ (Alemanno and Garde 2013: 7) to prevent
non-communicable diseases such as cancer and diabetes. These diseases have been the focus of the new public health movement that emerged in the 1970s, with particular attention being paid to four risk factors: smoking, drinking, diet and physical inactivity.

Many of the favoured policies of the new public health movement are anti-market, including tax rises, advertising bans, minimum pricing and prohibition. This brings the lifestyle regulation agenda into conflict not only with personal freedom but with free trade and the internal market. Nevertheless, the EU could be useful to supporters of lifestyle regulation in three ways. First, by rolling out public health legislation across all member states under the guise of internal market reform. Second, by funding pressure groups to encourage member states to act unilaterally. Third, by reinterpreting the EU’s ‘fundamental rights’ so they are used as a sword of the state rather than a shield for businesses and consumers.

**Competence and EU law**

Article 168 of the TFEU states that: ‘A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.’ Elsewhere, the EU says that it ‘may also adopt incentive measures ... which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States’.

The EU endorses the World Health Organisation’s broad definition of health as being ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’ (Official Journal of the European Union 2014: 86/1). Given this definition and the aspirational, but rather vague, assurances in Article 168, the EU might appear to have a great deal of scope for action, but this is not so. The important points to note are that the EU seeks a high level, but not necessarily the highest level, of
health protection; in other words, health concerns are important, but they need not take precedent over all other considerations. Moreover, EU policies must complement, not override, national policies. The EU can encourage member states to take action, and it can encourage member states to cooperate, but it cannot harmonise policies between member states in the name of public health. As Howells (2011: 217) notes, this means that the EU has 'the power to enact a range of soft measures: however, it must look elsewhere for justification of harmonising measures'. The internal market offers the best justification for such measures, despite the ‘inherent contradiction’ between the internal market’s objective of making trade easier and the public health objective of reducing the sale and consumption of ‘unhealthy’ products (ibid.: 218). Unless a public health policy can be justified on the basis of an appeal to the internal market, it is vulnerable to a legal challenge.

For example, setting limits on the amount of tar and nicotine in cigarettes has been justified on internal market grounds, since tobacco is widely traded across borders. Similarly, a ban on tobacco advertising in the print media has been justified on the grounds that a member state might prohibit the sale of a foreign magazine if it contains tobacco advertising.

In practice, these are anti-smoking policies, but it is imperative that internal market justifications can be found; several pieces of public health legislation have come undone without them. In 2000, the ECJ annulled the Tobacco Advertising Directive 98/43/EC, which implemented an almost total ban on tobacco advertising, because it could not be justified on internal market grounds. The ECJ ruled that bans on advertising in print and on television were legitimate (because they can cross borders), but bans on advertising and sponsorship in local markets (e.g. cinemas, billboards) could not (ibid.: 221). The subsequent Tobacco Advertising Directive (2003) was therefore less ambitious, excluding local advertising while banning tobacco advertising in print media, on
radio and on the internet (television advertising had already been banned in the TV Without Frontiers Directive of 1989).

More recently, anti-smoking campaigners have faced the same roadblock when trying to ban tobacco vending machines and tobacco retail displays in shops. Regardless of the arguments for and against these prohibitions, they have no bearing on cross-border trade, and the EU therefore has no power to harmonise the market.

The precedents of anti-tobacco legislation are germane to the issues of food and drink, because temperance and obesity campaigners explicitly seek to emulate many of the same policies (e.g. advertising bans, warning labels, product modification). The EU has been most active in tackling tobacco, but pressure to legislate on alcohol has been mounting, and food that is high in fat, sugar and salt is increasingly coming under fire from public health lobbyists around the world.

To date, EU action on food and alcohol has been relatively tame. The EU’s main piece of lawmaking with regards to food has been to bring about mandatory labelling (e.g. the 1979 Food Labelling Directive, the 1990 Nutrition Labelling Directive). Since these laws require ingredients and nutritional information to be clearly marked on food products in the same way across all member states, they can be seen as both pro-consumer and pro-internal market. These labels are not warnings, and they are not intended to deter purchase. It is conceivable that real warnings, including the kinds of graphic images seen on cigarette packets, could be mandated by the EU if it saw fit, but it has so far resisted calls for a ‘traffic light’ labelling system that marks food out as healthy or unhealthy.

In the field of alcohol, the EU has also held back from a legislative approach, with the exception of a few restrictions on marketing towards children, which are modest by British standards (European Parliament 2010). Instead, the Commission issued an Alcohol Strategy in 2006, which aims to spread ‘good practice’.
This document contains only a few specific recommendations, such as random breath tests to combat drink-driving, and it is largely concerned with gathering data and spreading information. Even if the Commission were inclined to do more, it is hide-bound by the principle of subsidiarity. It could not limit licensing hours or regulate the age at which citizens can buy alcohol, for example, because these are matters for member states and have no impact on cross-border trade. It can, and does, set minimum tax rates for alcoholic beverages, but these are set very low, partly because of the huge variation in incomes between member states.1

Public health campaigners, meanwhile, have developed a far tougher set of demands including minimum unit pricing (MUP), a policy that poses a direct threat to the internal market. Previous attempts by member states to introduce floor prices for tobacco and fuel have been overturned by European courts on the grounds that they represent quantitative restrictions on trade, but campaigners have been given a glimmer of hope by Article 36, which states that exceptions can be made for restrictions that are:

- justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

On the face of it, this provides extensive scope for heavy regulation (arguments can be made for almost anything on the grounds

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1 In theory, the EU could introduce a ‘sin tax’ or a minimum price on alcohol (or sugar, fat and soft drinks), but this would have to be set at the same level in each member state. If such a tax were to have any effect on consumption in rich countries such as Britain, it would have to be set at a rate that was punitively high in poorer countries such as Romania.
of health, morality or ‘public policy’), but whilst campaigners for minimum pricing hope to get an exemption on public health grounds, it is questionable whether European courts, which have ruled against floor prices for tobacco, will view alcohol as a more deserving case. The European Commission has explicitly told the Scottish government that its minimum pricing proposal is likely to be illegal and has urged it to pursue policies that are ‘less restrictive to intra-EU trade’ (European Commission 2012).

At the time of writing, no final decision has been made by the ECJ on minimum pricing, and it remains possible that the court will allow minimum pricing under Article 36. If this happens – or if the matter is batted back to the domestic judges who make a similar ruling – it would be a significant win for supporters of anti-market lifestyle regulation. It would also set a legal precedent for other interventions. Judicial activism of this kind arguably represents the most promising avenue for public health campaigners if they are to overcome the obstacle of free trade.

In their book *Regulating Lifestyles in Europe*, Alberto Alemanno and Amandine Garde argue that the EU’s ‘fundamental rights’ could be used as a ‘sword’ (of the state) rather than a ‘shield’ (from the state). They acknowledge that ‘virtually all NCD [non-communicable disease] policies aim to reduce the consumption of goods that are freely traded across the world’ (and therefore encroach upon international trade rules), but they suggest that various EU rights, including the right to health, the right to adequate food and the rights of children, could be invoked to trump trading rights (Alemanno and Garde 2013: 50). Couched in loose terms, these high-minded rights certainly lend themselves to judicial reinterpretation, and yet it remains doubtful whether a court of law will rule that ‘junk food’ advertising, for example, violates a citizen’s right to health. Legal precedents suggest that

2 The authors suggest that the ‘right to adequate food’ could be interpreted as a right to nutritious food, and that ‘junk food’ advertising somehow encroaches on that right (Alemanno and Garde 2013: 50). This requires two large leaps of logic and does
the ECJ is more likely to side with the advertiser in such a case, unless there were persuasive arguments that such a ban would improve the internal market.

Ad hoc prohibitions

The central importance of market harmonisation to the EU’s legal framework means that it is often easier to ban a product entirely than to enact more subtle regulation. This can be illustrated with two examples of tobacco legislation: the 1992 ban on snus and the looming ban on menthol cigarettes.

Snus is moist, fine-cut tobacco held in a small, tea bag-like pouch, which the user keeps under his or her top lip. It has been used in Scandinavia for hundreds of years, but it was virtually unknown in Britain until US Tobacco Inc. launched Skoal Bandits, a form of snus, in the mid-1980s. A legal loophole allowed the product to be sold to children in Britain and, despite there being little evidence that children were interested in the product, a media panic ensued. Action on Smoking and Health led a campaign to ban sales to minors. This soon morphed into a campaign for the product’s complete prohibition. In late 1989, Parliament banned the sale of ‘tobacco in fine cut, ground or particulate form or in any combination of those forms and which are for oral use other than smoking’. The Republic of Ireland did likewise.

These prohibitions attracted the attention of the EEC (as it then was), which expressed concern about the threat to market harmonisation of member states banning snus unilaterally. On 15 May 1992, Council Directive 92/41/EEC announced that ‘the only appropriate measure is a total ban’ on ‘new tobacco products for oral use’ across all member states (EEC 1992). The internal market provided the economic rationale for an outright

not appear to be legally robust. One could equally argue that ‘fat taxes’ and other policies that artificially inflate the price of food, including the CAP, are more meaningful violations of the right to adequate food.
ban, and concerns about snus causing oral cancer provided the scientific rationale. Both of these justifications soon fell apart.

First, in 1994, Sweden prepared for its accession to what had become the EU. With a long tradition of snus consumption, and with a quarter of the male population using the product, the prospect of a ban became a major talking point in the run-up to the accession referendum. Faced with the possibility that an arbitrary ban on an otherwise obscure tobacco product could jeopardise Swedish accession, EU officials swiftly abandoned their commitment to the single market and created an exemption. Sweden has been allowed to manufacture and sell snus within its own borders ever since.

Second, it had only ever been assumed that snus increased the risk of oral cancer (as many forms of smokeless tobacco do). It had never been proven. In the 1990s and 2000s, numerous epidemiological studies showed that there was, in fact, no link between oral cancer and snus use (Lewin et al. 1998; Schildt et al. 1998; Rosenquist et al. 2005; Boffetta et al. 2005; Luo et al. 2007). This evidence became so strong that the EU removed the cancer warning on Swedish snus products in 2001 because ‘scientific opinion no longer supports a strong warning’ (European Commission 1999).

Sweden’s exemption from the EU-wide ban on snus made a mockery of the internal market arguments, just as the scientific evidence undermined the public health arguments. The case for a ban was further weakened when it became clear that snus use was the primary reason why Sweden had the lowest rates of smoking and lung cancer in Europe (Rodu et al. 2002; Foulds et al. 2003; Rodu and Cole 2009). Far from being a gateway to smoking, as campaigners had feared during the Skoal Bandits scare, snus has proven to be a gateway from smoking.

Having banned the least harmful tobacco product, the EU has had several opportunities to repeal the prohibition, but it has chosen not to do so. On the most recent occasion, in 2012,
representatives of the European People’s Party explained that ‘it would be very harmful for the credibility of the European Institutions if the current rules would be liberalised’ (Liese and Seeber 2012). This gets to the heart of the matter. Although the ban cannot be justified on the grounds of health, the internal market or proportionality, it would be embarrassing for Brussels to admit its error.

Tales of the EU’s bureaucratic fervour are legion. From regulating the shape of cucumbers to making plans to ban unmarked olive oil bottles in restaurants, European institutions have a notorious penchant for petty micro-management, which was much in evidence during the protracted negotiations over the Tobacco Products Directive (TPD) of 2014. The European Commission wanted cigarette packets to be exactly 55 mm wide; it wanted all cigarettes to have a diameter of exactly 7.5 mm; it wanted flip-top lids to be mandatory on all cigarette packs; it wanted cylindrical rolling tobacco tins to be banned, but rectangular pouches to be allowed; packs of nineteen would be illegal, but packs of twenty would be approved; bottles of e-cigarette fluid would be limited to 10 ml, and so on.

Some of these trivial recommendations were enshrined in the final directive, and others were not, but in some respects it is the policies that were never put on the table that are most interesting. Bans on tobacco vending machines, on tobacco retail displays and on smoking in public places were high on the anti-smoking

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3 It is sometimes claimed that EU regulation of bananas and cucumbers is a fiction dreamt up by eurosceptics. This is not so. Commission Regulation (EEC) No. 1677/88 regulates the shape of cucumbers and Commission Regulation (EC) No. 2257/94 regulates the shape of bananas. The proposal to ban unmarked olive oil bottles was abandoned after it drew unfavourable media attention in 2013.

4 The political process behind the TPD was not pretty. Among other minor scandals, a public consultation was ignored after it found significant resistance to further regulation, and the EU’s Health Commissioner, John Dalli, was forced to resign after his friend allegedly tried to solicit a bribe from a snus manufacturer to overturn the ban on oral tobacco.
lobby’s list of priorities and had already been implemented in some member states, including Britain; yet none of these policies appeared in the TPD.\(^5\) Instead, the directive introduced an EU-wide ban on menthol cigarettes (to be implemented in 2022), despite no member state having seriously considered such a ban, much less having implemented one.

The explanation for this lies, once again, in the EU’s legal constraints. There are many disparities in the way that member states regulate shop displays and vending machines, but they do not compromise the internal market, because they have no impact on cross-border trade. The ‘mere finding of disparities between national rules is not sufficient’ to require harmonisation (Alemanno and Garde 2013: 64–5). Conversely, the sale of menthol cigarettes across all member states does not threaten the internal market, but neither does a total ban. Given the choice between banning them everywhere and permitting them everywhere, the European Commission, supported by the European Parliament, chose to ban. It also came close to passing a de facto ban on e-cigarettes, and it is reasonable to assume it would do the same with tobacco vending machines and tobacco retail displays if it had the power. As yet, however, it does not.

Officially, the 2014 TPD was created as a response to the ‘substantial differences between the member states’ laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco’ (European Parliament 2014: 2). In reality (and as its supporters openly stated) it was designed to reduce smoking prevalence by 2 per cent (Borg 2014). If market harmonisation was the true aim of the directive, it would legalise snus across the EU (or remove the Swedish exemption) and would not allow member states to have different packaging regulations. It does

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\(^5\) With no competence to bring about an EU-wide smoking ban, in 2009 the European Commission issued ‘Council recommendations on smoke-free environments’, which encouraged member states to ‘provide effective protection from exposure to tobacco smoke in indoor workplaces’ (European Commission, 2009).
neither. In the case of packaging, the new TPD explicitly removes a limitation enshrined in the previous TPD on what member states can do, thereby allowing further ‘substantial differences’ to emerge.

The TPD provides an indication of how European institutions could regulate food and drink if it were so inclined. For example, it could plausibly ban a particular form of alcohol, such as absinthe, across all member states, and it could ban advertising for certain food products on television. However, it could not ban food advertising in domestic venues, such as cinemas, and, as we have seen, it would be unlikely to accept floor prices on products that are sold across intra-EU borders.

**State-funded activists: pushing the envelope**

When lifestyle regulation policies cannot be justified on internal market grounds, the EU exerts its influence more subtly by encouraging member states to take action through their domestic parliaments. In addition to publishing guidance, such as the Alcohol Strategy (2006) and the Obesity Prevention White Paper (2007), European institutions fund activist groups in Brussels and elsewhere to formulate policy, organise conferences and influence the media. With very few exceptions, these groups are committed to the anti-market policies of restricting advertising, raising prices and limiting availability.

In the field of alcohol, the EU funds some surprisingly orthodox temperance organisations. For example, the European Commission paid Britain’s Institute of Alcohol Studies (IAS) to produce research for its Alcohol Strategy (European Commission 2006: 7). The IAS is descended from the overtly prohibitionist nineteenth-century group, the United Kingdom Alliance for the Suppression of the Traffic in All Intoxicating Liquors, which became the UK Temperance Alliance in the 1940s. Methodist teetotalism is in the organisation’s DNA (Rutherford 2012).
Similarly, the EU gives grants to ACTIVE (2012), which describes itself as ‘a non-governmental organisation gathering European youth temperance organisations working for a democratic diverse and peaceful world free from alcohol’. ACTIVE is the youth wing of the International Organisation of Good Templars, another nineteenth-century temperance outfit that espoused (and continues to espouse) total abstinence from alcohol. Like the IAS, ACTIVE does not openly call for prohibition, but its policy recommendations include a total ban on alcohol marketing, minimum pricing, a ban on home-brewing and the exclusive sale of alcohol through state monopolies (ACTIVE 2010).

The Commission funds many similar organisations, including Alcohol Action Ireland, the European Alcohol Policy Alliance (also known as Eurocare), the European Network for Smoking and Tobacco Prevention and the European Public Health Alliance. The latter, a left-leaning pressure group that receives most of its income from the EU, has been particularly vocal in its support for ‘fat taxes’, minimum pricing and plain packaging, despite these policies being inconsistent with the principles of the internal market.

The money of European taxpayers is used not only to promote anti-market policies in member states, but also to attack critics of these policies, including academics and privately funded think-tanks (Gornall 2014; Snowdon 2014). The EU’s generosity towards a select group of special interest groups ensures that supporters of lifestyle regulation can loudly promote anti-market policies, which the EU could neither implement nor endorse directly.

Implications of a ‘Brexit’

At first glance, the EU’s public health legislation appears to be incoherent. Policies that are keenly supported by health campaigners, such as smoking bans, are absent, while marginal issues such as menthol flavourings in cigarettes are addressed with outright
prohibition. The European Commission warns member states about the probable illegality of minimum pricing while funding groups that campaign for the policy. This confusing picture only comes into focus once it is understood that the EU does not officially produce public health legislation. It does what it can within ‘the art of the possible’. There are plenty of indications that European institutions are inclined towards bans and bureaucratic regulation, but they are often unable to do more than encourage ‘the exchange of best practice and self-regulation’ (Alemanno and Garde 2013: 100). In some instances, such as the challenge to minimum pricing and the free movement of alcohol and tobacco across borders, EU legislation actively hinders attempts at lifestyle regulation. The legal framework of the EU as it exists today means the public health lobby fights with one hand tied behind its back in Brussels.

This mixed curse for anti-market campaigners is a mixed blessing for consumers. British drinkers and smokers have probably gained more than they have lost from EU membership. Tobacco and alcohol duty is exceptionally high in the UK, but it would probably be even higher if shoppers did not have the option of buying in other member states (Rabinovich 2009: 78). Moreover, at the time of writing, the existence of Article 14 of the TFEU has so far prevented the implementation of minimum pricing, which would make off-trade alcohol still more expensive.

In the field of lifestyle regulation, the British government is usually more draconian than the EU. In recent years, British (and Irish) politicians have prided themselves on ‘leading the way’ by introducing public health policies that have little appeal to mainland Europeans. Far from tempering the EU’s bureaucratic zeal, Britain has encouraged European institutions to embrace the kind of top-down lifestyle management that has become de rigueur in English-speaking countries since the 1990s. If the UK left the Union, British consumers might not have to abide by the EU’s petty regulation of e-cigarettes and might be able to
buy snus, but this would only happen if Westminster were more enlightened than Brussels. This seems a forlorn hope when one considers that the EU banned snus only after the UK banned it, and that the Department of Health initially favoured a system of medical regulation for e-cigarettes that was rejected by the European Parliament. Plain packaging for tobacco was rejected by MEPs in Brussels, but was supported by MPs in Westminster. The European Commission has warned member states against introducing minimum pricing, but Wales and Scotland are pursuing it nonetheless.

In short, British consumers of alcohol, tobacco and ‘unhealthy’ food would benefit from leaving the EU only if their own politicians were more liberal. There is little evidence that they are. This could change – the EU could acquire more powers, or British politicians could become less interventionist – but there is little reason to believe that Britain outside the EU would be a more liberal country in which to eat, drink and smoke.

**Conclusion**

Those who hope that Brussels will produce more restrictive laws on food, drink and tobacco are faced with as many challenges as opportunities. On the one hand, the EU offers public health lobbyists a chance to bring about legislation across most of Europe with greater ease than if they had to persuade 28 governments individually. The European Commission is unelected and there is a large bureaucracy to turn policy into law. Legislation must be passed by the European Parliament, but MEPs can only vote on what is put in front of them by bureaucrats, and legislation can be altered by committee after it has been approved. As with the World Health Organisation and the UN, political processes in the EU take place at a sufficiently safe distance from the electorate to be appealing to campaigners who are aware that their policies are often unpopular with the public (WHO Europe 2004).
On the other hand, European institutions have a very limited competence in the field of public health. The anti-market approach favoured by many campaigners clashes with the EU’s commitment to free trade between member states. Some health policies can be advanced under the guise of market harmonisation, but there are limits as to how far this approach can be taken.

The claim that ‘fundamental rights’ could be reinterpreted in such a way as to compel the EU to extend its competence into the domestic affairs of member states is speculative and unconvincing. If the lifestyle regulation agenda is to progress at EU level, perhaps the best hope for campaigners lies in the exemptions set out in Article 36 of the TFEU for ‘the protection of health’. If risky lifestyle products are considered to be special cases, they might be subject to a different set of rules. Minimum pricing will provide an important test case. If the ECJ (or a national court) rules in favour of the Scottish government on the basis of Article 36, British public health groups expect it to ‘set an important precedent that could encourage Member States to introduce further public health legislation’ (HM Government 2013: 40). It would be a groundbreaking victory for lifestyle regulation over the single market, with implications that extend far beyond the field of health (Article 36 also mentions ‘public morality’ and ‘public security’ as possible grounds for exemption). Theoretically, the internal market could become riddled with so many exemptions granted to special interest groups that it becomes like a Swiss cheese.

So far, however, the ECJ has been unwilling to sacrifice the internal market in the name of health-based lifestyle regulation. Judicial activism cannot be ruled out in the future, but in the meantime, those who seek to control what Europeans eat, drink and smoke must work around existing laws, with policies designed to reduce the sale and appeal of products being introduced – paradoxically – through legislation that is ostensibly aimed at facilitating trade.
References

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