

Chapter 3

The Tools of EU Action: To Which Extent Are EU Institutions Empowered to Tackle the Obesity Epidemic?

The preceding chapter has demonstrated how the EU¹ has become aware of the urgent need to tackle obesity, and how it has started to develop a strategy to address the issue. To ensure the effectiveness of this strategy, however, it is necessary to determine what regulatory tools the EU has at its disposal and how it can best use them.

The starting point of the discussion must be Article 5(1) TEU which states: ‘the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and

1. The readers who may not be familiar with European law should note that the Treaty of Lisbon, which entered into force on 1 Dec. 2009, has brought about a significant change in the structure of the EU. The original European Economic Community had been established by the Treaty of Rome in 1957. It was only in 1992 that the European Union came into being, following the adoption of the Treaty on the European Union (also referred to as ‘the Maastricht Treaty’). To explain the pre-Lisbon structure of the EU, the analogy of a Greek temple has often been used: one common roof (the EU) supported three pillars each representing a different area of EU activity. The first pillar was the (renamed) European Community. The EC therefore was a component part of the EU. The other two pillars consisted in the common foreign and security policy (pillar 2) and in justice and home affairs (pillar 3). The Treaty of Lisbon has put an end to the pillar structure. In the wake of Lisbon, the European Union (EU) has succeeded to and replaced the European Community. The pillars have been merged into the Treaties, that is, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). This book relies on the new numbering of Treaty articles introduced by the Lisbon Treaty. On the structure of the EU, see in particular J.-P. Jacqu , ‘La Complexit  d’un Trait  Simplifi : Le Trait  de Lisbonne et la Coexistence des Trois Trait s’, *Revue des Affaires Europ ennes* (2007–2008): 177. For general references on EU law, see the selected bibliography at the end of this chapter.

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proportionality'. The importance of this article cannot be overstated, as it sets out a two-step test to determine whether the EU is entitled to take a given course of action: it must first be ascertained that the EU has the powers to act (principle of conferral); if so, the EU must ensure that it exercises its powers in conformity with the twin principles of subsidiarity and proportionality. The EU may only act if a measure passes both tests.

The principle of conferral reflects the seminal judgment of the *Van Gend en Loos* case, where the Court of Justice stated that 'the [EU] constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, *albeit within limited fields*, and the subjects of which comprise not only Member States but also their nationals'.² In other words, if the TEU and TFEU (hereafter 'the Treaties')³ do not provide a legal basis for an EU intervention, action can only be taken by Member States. The EU legal order is a system of multi-level governance and the EU is constitutionally bound to respect the allocation of competence established in the Treaties between itself and its Member States. The principle of conferral has proven extremely difficult to apply in practice, as the discussion of the case law of the Court of Justice will illustrate. As far as obesity more specifically is concerned, this principle means that the EU cannot adopt all the measures which are necessary to prevent this multi-factorial condition: some measures will originate from the EU, whereas some others will have to be adopted by the Member States, at national or at local level, due to a lack of EU competence.

The difficulties do not stop at this first stage. Once it has been established that the EU has the competence to act, the second step consists in determining whether, and if so how, it should exercise its powers. The principles of subsidiarity and proportionality constrain EU action, by requiring, first, that the EU should act only when the objectives of a proposed action can be better achieved by the EU than by Member States and, secondly, that EU action should not go beyond what is necessary to achieve the objectives pursued.

The aim of this chapter is, first, to introduce the principles underlying EU action and, secondly, to determine how they come into play in matters of obesity prevention. Public health advocacy and lobbying strategies may only be effective if they rely on a thorough understanding of these issues. This chapter defines the meaning and scope of the principles of conferral, subsidiarity and proportionality. It concludes with a case study illustrating how difficult it may be to draw boundaries between legitimate and illegitimate EU action: schools as a priority setting.

2. Emphasis added. Case 26/62 *Van Gend en Loos* [1963] ECR 3. Art. 1(1) TEU reiterates and emphasizes this principle: 'By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called "the Union" on which the Member States *confer competences* to attain objectives they have in common.' (Emphasis added)

3. There have been five main Treaty reforms to date: the Single European Act 1986; the Treaty on the European Union 1992 (also referred to as the Maastricht Treaty); the Treaty of Amsterdam 1997; the Treaty of Nice 2001; and the Treaty of Lisbon 2007 which entered into force on 1 Dec. 2009.

I. THE RELEVANCE OF THE PRINCIPLE OF CONFERRAL
TO THE EU'S OBESITY PREVENTION STRATEGY

The question of EU competence is fundamental. It circumscribes EU intervention and thus determines its legality in all areas of policy making. It is all the more relevant when dealing with issues such as obesity prevention which require a coordinated action in a wide range of policy areas to be dealt with effectively.

A. THE PRINCIPLE OF CONFERRAL AND THE EU LEGAL ORDER

As stated above, the EU rests on the principle of conferral. If it is given the necessary powers to regulate certain fields of activity, these powers are circumscribed by the provisions of the Treaties. The general power to act rests with Member States, subject to the transfer of their sovereign rights, which they have operated to the benefit of the EU in defined areas only.⁴ Article 5 therefore provides that EU intervention is limited and specific.

The Treaties constrain EU action both from a substantive and from a formal point of view. The substance is governed by Articles 2 and 3 TEU and by Articles 2 to 6 TFEU. Article 2 TEU sets out the EU's 'basic values and objectives',⁵ whereas Article 3 TEU lists the tasks assigned to the EU. These provisions provide a basis to interpret the scope of the specific legal bases which are found later on in the Treaties.

The Treaty of Lisbon expressly classifies EU competences, thus limiting the risk for certain controversies between the Member States and the EU.⁶ Articles 2, 3, 4 and 6 TFEU expressly distinguish between exclusive, shared and supporting EU competences and give an indicative list of subjects falling within each competence heading. The exact scope of the competences is to be found in the third part of the TFEU.⁷ The difficulties therefore reside in the need to draw the boundaries separating what is permissible from what is not. The EU policies which are likely to be most relevant to obesity prevention include, as already mentioned in Chapter 2, the internal market, consumer protection, public health, the common agricultural policy, taxation, education, sport and transport.⁸

Apart from the substantive areas of EU action, the Treaties also define which instruments and procedures should be used for each of them. From a formal point of view, it empowers EU institutions to adopt measures which must comply with

4. Article 1(1) TEU reiterates this principle: 'By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called "the Union" on which the Member States *confer competences* to attain objectives they have in common.' (Emphasis added).

5. M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', *Common Market Law Review* 45 (2008): 617, at 653.

6. See in particular R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009), at 130.

7. Article 2(6) read together with Arts 26–212 TFEU.

8. The relevance of these areas to obesity prevention is assessed in more detail in subsequent chapters.

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its provisions.⁹ Furthermore, Article 288 TFEU lists the different categories of Union acts. It provides that ‘to exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions’. It then goes on to define each of these acts:

- Article 288(2): ‘a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States’. Regulations become part of the law of the Member States without being implemented at national level.
- Article 288(3) EC: ‘a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’. Directives must therefore be distinguished from regulations to the extent that they are not directly applicable and that they shall be implemented before the expiry of a specific deadline to become an integral part of the laws of each of the Member States.¹⁰ Member States are bound to implement directives within the specified time limit and failure to do so adequately may have consequences.¹¹
- Article 288(4) EC: ‘a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them’. This means that a decision does not have general application and should be distinguished on this point from both regulations and directives. It is however comparable to a regulation in that it is directly applicable.
- Article 288(5): ‘recommendations and opinions shall have no binding force’. Recommendations and opinions are two forms of non-binding measures which EU institutions may adopt; they only have persuasive value. EU institutions also rely on other non-binding measures than recommendations and opinions, even though they are not listed in the Treaties. They include communications, green papers, white papers, guidelines, etc.

The main distinction which Article 288 establishes is between binding and non-binding acts: regulations, directives and decisions are binding legislative

9. In other words, primary legislation (provisions of the TEU and the TFEU) takes precedence over secondary legislation (measures adopted on the basis of the Treaties), which means, for example, that a directive (secondary legislation) must not contravene any Treaty provision (primary legislation). On EU legislation, see A. Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (The Hague: Kluwer Law International, 2006).

10. On the distinction between regulations and directives, see Ch. 4 below.

11. The obligation to implement directives is a specific application of Art. 4(3) TEU (ex-Art. 10 EC) which requires that Member States cooperate with EU institutions to ensure that the obligations arising out of the Treaties are fulfilled: ‘pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives.’

instruments ('hard law'),¹² whereas recommendations and opinions are not ('soft law').¹³ This distinction is particularly important where the powers of the Union may be more or less extensive and their intensity may vary depending on each policy area. In areas of supportive competence, the EU may only adopt soft-law measures, whereas in areas of exclusive or shared competences, it may adopt a mix of both legislative and soft-law measures.¹⁴ It is therefore necessary to determine the nature of the powers which the Treaties have granted the EU in each of its fields of competence.

One of the corollaries of the principle of conferral is that binding acts adopted by EU institutions must state the reasons on which they are based.¹⁵ All regulations, directives and decisions must therefore have a legal basis which identifies the Treaty article(s) permitting that such action be taken. This requirement is intended to make EU institutions more accountable and the legislative process more transparent.¹⁶

If the EU is granted the necessary powers to adopt binding legislation in a given policy area, the legal basis relied upon will also determine the legislative procedure applies and must be followed. The TFEU distinguishes different legislative procedures, which give different powers to different institutions. In particular, the procedures vary depending on the role assigned to the European Parliament and the voting mechanisms applicable in the Council. This book is not the place to discuss at length the different procedures in existence. A few characteristic features of the EU legislative process are nonetheless underlined here for the readers who are not familiar with EU law.

Article 13(1) TEU refers to seven main EU institutions: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.¹⁷ All seven of them must act within the limits of their powers. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.¹⁸

12. Article 288 TFEU does not establish any hierarchy between various acts. They must nonetheless be distinguished, as they are of a different nature and their legal effects may differ.

13. All EU acts must be published in the *Official Journal of the European Union* (OJ).

14. As discussed in more detail below, it is not because they lack formal legal force that soft law instruments may not have significant effects in practice. See F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', *Modern Law Review* 56 (1993): 19, at 32.

15. Article 296 TFEU.

16. The legislative process can be traced back at <ec.europa.eu/prelex/apcnet.cfm?CL=en>.

17. The latter two, whose role is unlikely to be significant in relation to the development of the EU's obesity prevention strategy, are not considered any further in this book.

18. Article 13(4) TEU.

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The European Commission is entrusted with the development of EU policies. Its members must be independent from the Member States and must act in the interest of the EU.¹⁹ The Commission has a broad range of powers. First of all, it has the almost exclusive²⁰ right to make legislative proposals.²¹ It also has significant administrative powers, whereby it monitors the implementation and the outcome of its policies. Furthermore, it possesses executive powers, which enable the Commission to represent the EU in international negotiations and to play an important role in setting the EU budget. It also has powers to adopt delegated and implementing acts.²² These powers are intended to allow the EU to react quickly and flexibly to tackle changes, for example in market behaviour, and they are supposed to create incentives for the EU legislature to set broad targets only and to leave the details to the Commission. The Commission's delegated powers are however subject to scrutiny by the European Parliament and the Council or by the comitology procedure.²³

The Commission currently consists of twenty-seven Commissioners, one for each Member State.²⁴ As from 1 November 2014, the number of Commissioners will be reduced to two-thirds of the number of EU Member States with a view to facilitating decision making.²⁵ The Commission is subdivided into departments, so-called Directorates-General (DG), each of which deals with a specific policy field and is headed by one Commissioner.²⁶ The DG in charge of coordinating the Union's obesity prevention strategy is DG for Health and Consumer Protection (generally referred to as DG SANCO, for 'DG Santé et Consommateurs').

19. Article 17(3) TEU and Art. 245 TFEU.

20. It is worth noting, however, that the Lisbon Treaty has introduced the 'citizen's initiative': Art. 11(4) TEU empowers a group of 'not less than one million citizens who are nationals of a significant number of Member States' to invite the European Commission 'to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required'. Detailed provisions for this citizen's initiative will have to be elaborated by the European Parliament and the Council through Regulations (see Art. 11(4) TEU read in conjunction with Art. 24(1) TFEU).

21. Article 17(2) TEU. Arts 223, 256 and 281 TFEU provide exceptions to this rule. On the role of the European Commission in the EU law-making process, see A. Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (The Hague: Kluwer Law International, 2006), at 197.

22. Articles 290 and 291 TFEU. These articles distinguish delegated acts (which enable the Commission to 'supplement or amend certain non-essential elements' of legislative acts) and implementing acts (which facilitate the uniform implementation of EU acts); it is, however, difficult to draw a clear line between them. M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', *Common Market Law Review* 45 (2008): 617, at 649.

23. The comitology procedure is a tool which is intended to ensure that the Commission respects the interests of the Member States whilst legislating.

24. Article 17(4) TEU.

25. Article 17(5) TEU.

26. The Lisbon Treaty created the new post of 'High Representative of the Union for Foreign Affairs and Security Policy' whose incumbent is also a Vice-President to the Commission. As this post has no major significance for the purposes of this book, the implications of this double-seated Commissioner are not discussed here.

The Council, which is composed of representatives of the Member States,²⁷ has most importantly been entrusted with the adoption of EU legislation. However, even though the Council is the EU's main law-making body, it does not have the powers to initiate legislation; it may however request that a legislative proposal be put forward on a specific issue.²⁸ As discussed in Chapter 2 above, the Council has called on the Commission to develop proposals to combat overweight and obesity on several occasions, which has led the Commission to initiate a broad consultation of stakeholders and ultimately adopt the Obesity Prevention White Paper in May 2007.²⁹

With regard to voting procedures in the Council, these vary depending on the legal basis relied upon. In the first thirty years of the European Community, the rule was that without unanimous agreement in the Council, the legislative instrument proposed by the Commission would not be adopted, notwithstanding the policy area at stake.³⁰ In other words, each Member State had a veto over any legislative proposal it did not agree with. With the enlargement of the European Community to new Member States, the unanimity requirement soon turned out to be extremely cumbersome in practice and all meaningful legislative initiative blocked. The TEC was therefore revised in 1986 by the Single European Act and qualified majority voting (QMV) in Council was introduced. Following subsequent Treaty amendments, QMV has been extended to a range of policies and has now become the norm rather than the exception.³¹ Unanimity voting nonetheless remains in place for certain areas of EU competence.³² The procedure of QMV allows for the adoption of a legislative proposal if a certain majority of votes is cast in favour of the proposal in question.

Until 31 October 2014, a qualified majority is achieved if: (1) a simple majority of Member States casts; (2) at least 255 votes³³ in favour of the measure; and (3) if these Member States represent at least 62 % of the population of the Union. These three requirements, which have to be fulfilled cumulatively, constitute the

27. Article 16(2) TEU.

28. Article 241 TFEU. Writing in 1999, Westlake evaluated that 13% of Commission proposals originated from Member States' requests, 12% from programmes agreed with Council and 8% from Council's request. Cited in A. Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (The Hague: Kluwer Law International, 2006), at 201.

29. See Ch. 2 above.

30. An early exception to the unanimity rule could be found in the EEC Treaty: In 1966, majority voting was to be introduced for issues relating to the Common Agricultural Policy. This triggered a conflict with France which culminated in the so-called 'empty-chair policy' of President De Gaulle and which ended with the Luxembourg Accord. For further information, see P. Craig & G. De Búrca, *EU Law*, 4th edn (Oxford: Oxford University Press, 2007), at 8.

31. Article 238 TFEU provides that QMV is the rule, except when otherwise provided.

32. This is notably the case for taxation policy. The rather limited powers of the Union in this field are discussed in Ch. 7 below.

33. Each Member State has between four and twenty-nine votes, depending in part on the size of their population: see Art. 3(3) of the Protocol (N° 36) on Transitional Provisions, OJ 2008 C115/201.

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so-called triple threshold required for a measure to be adopted.³⁴ From 1 November 2014 on, ‘a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained’.³⁵ However, until 31 March 2017, each Member State can still request that measures be based upon the old QMV rules.³⁶ If, from that time on, the majority is relatively slim, dissenting countries can indicate their opposition to the act which is to be adopted. The Council then has to discuss the issue and do ‘all in its power to reach . . . a satisfactory solution to address concerns raised’ by the dissenting countries which includes the endeavour to create a broader majority in the Council.³⁷ This tool cannot hinder measures if the qualified majority as defined above has been achieved. However, it can delay the adoption of those measures, and the need to find a broader consensus might lead to amendments of the original act. Although Poland lobbied extensively for the inclusion of this mechanism, it yet needs to be established how powerful it will become in practice.³⁸

The advent of QMV reinforces the supranational nature of the Union’s legal order, insofar as Member States may end up being bound by an EU measure which they do not approve of and which they have voted against in Council.

The European Parliament, which is directly elected by European citizens to represent them, has seen its legislative role grow over time. Originally, the European Parliament was not intended to be a law-making body. Its role in the legislative process was merely consultative. The Council was under a duty to ask for its opinion, but this opinion had no binding force. In the wake of the five Treaty amendments which have taken place since 1986, the role of the European Parliament has become increasingly important and it has now become the Council’s co-legislator in a broad range of policy areas, including the core area of internal market law. When the TEU was first adopted in 1992, the co-decision procedure was introduced; it has then been gradually extended by subsequent Treaty amendments to become the norm. The Lisbon Treaty refers to this procedure as ‘the

34. Article 16(5) TEU read together with Art. 3(3) of the Protocol (N° 36) on Transitional Provisions, OJ 2008 C115/201.

35. Article 16(4) TEU. If the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, there are higher thresholds to be attained (Art. 238(2) TFEU).

36. Article 3(2) of the Protocol (N° 36) on Transitional Provisions, OJ 2008 C115/201.

37. Articles 1–3 of the Declaration (N° 7). As of 1 Apr. 2007, Arts 4–6 of the same declaration apply, setting out other thresholds.

38. The similar Ioannina compromise has hitherto rarely if ever been used. Declaration N° 7 adapts to the EU 27 the Ioannina Compromise of 1994, which had originally been adopted to cope with new majorities in the Council when Finland, Austria, Sweden and Norway were to join the EU. As Norway did not join the EU, this compromise has remained little more than a gentlemen’s agreement.

ordinary legislative procedure'.³⁹ Hence, the European Parliament now effectively enjoys a right of veto in several important areas when it is not able to find a common position with the Council.⁴⁰ This system reflects the idea that the citizens and the Member States are the 'Union's dual democratic basis of democratic legitimacy' and that both of them should be represented at EU level through the European Parliament and the Council, respectively.⁴¹ Nevertheless, there are still certain policy areas, in which the European Parliament is granted less power. Under so-called special legislative procedures, it may only need to be consulted,⁴² or give its consent to an act.⁴³ The European Parliament can request the Commission to make a legislative proposal.⁴⁴

The European Council, which is a different institution from the Council, consists of the Heads of State or Government of the Member States as well as its president and the president of the Commission.⁴⁵ Its role is to 'provide the Union with the necessary impetus for its development' and to 'define the general political directions and priorities thereof. It shall not exercise legislative functions'.⁴⁶ In other words, the European Council is responsible for developing the vision of the EU, not for its day-to-day business. Its powers are important, as they comprise issues such as the allocation of its members between Member States, proposing the Commission President and appointing the Commission after it has been approved by the European Parliament.⁴⁷ The European Council is headed by a Council President, a novelty introduced by the Lisbon Treaty which put an end to the rotating presidency. The term of office of the Council President is two years and a half, renewable once.⁴⁸

The Court of Justice of the European Union (CJEU) has a duty to 'ensure that in the interpretation and application of the Treaties the law is observed'.⁴⁹ It comprises three distinct courts: The Court of Justice, the Court of First Instance

39. Already after the amendments introduced at Amsterdam and Nice, the ordinary legislative procedure covered more than half of the Union's legislation. See A. Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (The Hague: Kluwer Law International, 2006), at 219, citing R. Corbett, F. Jacobs & M. Shackleton, *The European Parliament*, 6th edn. (John Harper Publishing, 2005), at 210. The functioning of this procedure is described in detail in Art. 294 TFEU.

40. Article 294(12) TFEU.

41. Article 10 TEU.

42. This is the case for harmonizing measures in the field of indirect taxation adopted on the basis of Article 113 TFEU. For more information on the taxation policy of the EU and its impact on obesity prevention strategies developed at EU and national levels, see Ch. 7 below.

43. This is the case for the flexibility clause contained in Art. 352 TFEU.

44. Article 225 TFEU.

45. Article 15(2) TEU.

46. Article 15(1) TEU.

47. Articles 14(2) and 17(7) TEU respectively. The Lisbon Treaty added another new competence which might become important for obesity prevention with regard to indirect taxation: according to Art. 48(7) TEU, the European Council is granted the power to authorize the Council to act on QMV instead of unanimity in this area. However, national parliaments can veto this decision.

48. Article 15 TEU. Its first incumbent is the former Belgian Prime Minister Herman Van Rompuy.

49. Article 19(1) TEU.

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(renamed the General Court following the entry into force of the Lisbon Treaty) and the Court for the EU's Public Service. The Court of Justice and the General Court are each composed of one judge per Member State. The Court of Justice is assisted by eight Advocates-General (AG).⁵⁰

The powers of the Court of Justice are varied. In particular, it can adjudicate where national judicial authorities have referred questions of EU law on which they need guidance to resolve a dispute.⁵¹ The Court of Justice can also hear direct actions brought by Member States or EU institutions: if the EU legislature adopts binding acts which fall outside the areas of EU competence or if it has done so without following the proper procedure, a Member State could lodge a judicial review action before the Court which is empowered to annul measures adopted in breach of Treaty provisions.⁵² The wide powers of the CJEU in relation to the annulment of EU measures make it the constitutional court of the EU acting as the guardian of the Treaties.⁵³

It is arguable that the introduction of QMV in Council, following the entry into force of the Single European Act, has reinforced the role of the CJEU in arbitrating disputes relating to the extent of EU competence. This is all the more so as subsequent Treaty amendments at Maastricht, Amsterdam, Nice and Lisbon have extended QMV to a broad range of EU policies. This is logical: before QMV was introduced, Member States could avoid to be bound by a given legislative act by simply vetoing its adoption, which is no longer possible now that QMV has become the rule for a growing range of acts. Hence, the only alternative left to this Member State is to challenge the validity of the unwanted act before the Court of Justice on one of the grounds listed in the Treaties and which include lack of competence, fundamental procedural shortcomings (adoption of the wrong legislative procedure, failure to state reasons, etc.) and breach of the general principles of EU law (including fundamental rights, as well as the subsidiarity and the proportionality principles, both discussed below).⁵⁴

The outer limits of EU competence have given rise to vivid controversies in practice. This is not surprising to the extent that the principle of conferral allows for the arbitration of the sharing of powers between Member States and the EU, and the extent to which the intervention of the latter has curtailed the sovereignty of the

50. However, the number of the Advocates General will be increased by three, if the CJEU so requests: see Declaration N° 38, OJ 2008 C115/335, at 350.

51. This procedure is referred to as the preliminary ruling procedure and is described in Art. 267 TFEU (ex-Art. 234 EC). For an example of preliminary ruling, see the *De Agostini* judgment discussed in Ch. 5 below.

52. Article 263 TFEU (ex-Art. 230 EC). This reflects the fact that the Union is based on the rule of law, as expressly stated in Art. 2 TEU. For an example of judicial review, see the *Tobacco Advertising* litigation discussed below.

53. On the Court more generally, see A. Arnall, *The European Union and Its Court of Justice*, 2nd edn. (Oxford: Oxford University Press, 2006).

54. On the general principles of EU law, see in particular T. Tridimas, *The General Principles of EC Law*, 2nd edn. (Oxford: Oxford University Press, 2007) and J. Usher, *General Principles of EC Law* (London: Longman, 1998).

former in certain defined areas. Although the Treaty of Lisbon has brought more certainty into the delimitation of powers between the EU and its Member States, interpretation of the Treaties will nonetheless continue to give rise to complex questions of where the boundary lies between legitimate and illegitimate EU action when sensitive questions of power allocation between different levels of governance arise. This is all the more so in areas such as obesity prevention which require a coordinated action in a broad range of policy areas.

B. THE PRINCIPLE OF CONFERRAL AND OBESITY PREVENTION

As previously observed, obesity is a multi-factorial condition which can only be effectively prevented if a multi-sectoral strategy is defined and implemented. The EU has an important contribution to make and cannot be excluded from, and may indeed be intrinsic to, the solution to the obesity crisis affecting all its Member States. Nevertheless, it is not empowered to act alone and adopt all the measures that are necessary in all the policy areas having an impact on lifestyles and living environments. It must act within the limits laid down in the Treaties. As the EU does not have general regulatory powers, the overall approach is bound to require the involvement of various regulatory levels: the EU as a regional actor, its twenty-seven Member States acting at national and at local levels, as well as relevant global actors such as the WHO and the FAO.

The Obesity Prevention White Paper explicitly (and rightly) recognizes the limits on EU competence by stating that ‘in several areas the main levels for action are national or local. EU public action in these areas will aim either at complementing and optimizing actions undertaken at other decision levels be they national or regional or at addressing issues which per se pertain to [EU] policies’.⁵⁵ Nevertheless, some EU policies will be relevant to public health and have an impact, even if this impact is incidental, on overweight and obesity prevention. Such policies cannot be overlooked. Consequently, the Commission distinguishes two roles for the EU in relation to overweight and obesity prevention:

- the first one is to support interventions taking place at national level; and
- the other is to develop EU policies in such a way that they are able to play a positive role in combating overweight and obesity.

The rest of this section attempts to delineate what action the EU can take to deal with the rising rates of overweight and obesity affecting its twenty-seven Member States, bearing in mind that the principle of conferral requires that the assessment must be carried out policy area by policy area.

55. Obesity Prevention White Paper, at 3.

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C. OBESITY PREVENTION AND PUBLIC HEALTH

As overweight and obesity are regarded as major public health concerns, a good starting point to assess the regulatory powers the EU enjoys is to consider the tools which it has at its disposal in the area of health policy. The role of the EU has evolved in this field. It was only when the TEU was adopted in 1992 that the EU was formally granted some competence to deal with health matters. Its powers were further extended by the Amsterdam Treaty. As discussed in detail below, EU competence in this field is mostly circumscribed to 'soft law' measures, that is measures which are persuasive rather than legally binding. This is not to say that the EU cannot adopt any binding legislation with a public health component. Public health requirements must indeed be taken into consideration in all areas of policy making,⁵⁶ including the areas of internal market, consumer, agricultural and transport policies, which are all relevant to the EU's obesity prevention strategy and in which the EU has the necessary powers to adopt binding legislation.

The insertion of a new title on health in the TFEU (then in the TEC) resulted from the growing perception that certain health concerns could not be resolved by Member States acting alone within their own frontiers. Title XIV, which is composed of a single article: Article 168 TFEU, deals exclusively with public health. As this article is complex and its importance to the developing strategy of the EU on obesity prevention cannot be overstated, it is quoted in full below.⁵⁷

Article 168 TFEU (ex-Article 152 EC):

- (1) A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health. The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.
- (2) The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas. Member States shall, in liaison with the Commission,

56. Article 168(1) TFEU, discussed more fully below.

57. On the scope of Art. 168 TFEU, see in particular: T. Hervey & J. McHale, *Health Law and the European Union* (Cambridge: Cambridge University Press, 2004), at 72; A.P. Van der Mei & L. Waddington, 'Public Health and the Treaty of Amsterdam', *European Journal of Health Law* 5 (1998): 129.

coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organization of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

- (3) The Union and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of public health.
- (4) By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:
 - (a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;
 - (b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;
 - (c) measures setting high standards of quality and safety for medicinal products and devices for medical use.
- (5) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonization of the laws and regulations of the Member States.
- (6) The Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.
- (7) Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.
- (8) The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

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Article 168 TFEU contains several elements deserving closer scrutiny. The analysis will focus on the following points:

- (1) the role of the EU encompasses not only disease prevention but also health promotion;
- (2) the EU is empowered to foster cooperation and lend support to Member States' actions, but legislative harmonization at EU level is largely excluded in the field of public health;
- (3) the EU is nonetheless under a duty to mainstream public health concerns into all EU policies, which requires an in-depth discussion of the relationship between health protection and other EU policies;
- (4) finally, the EU has a duty to foster international cooperation.

The budget of the EU represents only a fraction of levels of public spending in the Member States. Its redistributive interventions in the field of health are small-scale in the totality of health spending across the EU as a whole. They may nonetheless be significant.⁵⁸

1. From Disease Prevention to Health Promotion

Article 168(1) TFEU provides that EU action in the field of public health 'shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to physical and mental health'. Furthermore, 'such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and health education'. This provision therefore emphasizes that the scope of public health intervention at EU level should not only cover the prevention of diseases; it should also promote good health, specifically through health information and education.⁵⁹ The importance of health promotion is reflected in the Commission Public Health Programmes.⁶⁰ It is all the more fundamental in areas such as obesity prevention, given that the success rate of existing treatments to manage obesity is low (especially if evaluated in the longer term) and the cost relatively high, both in individual and societal terms.

It is however necessary that the EU's obesity prevention strategy also takes into account the real present and future costs of existing levels of obesity and related co-morbidities. It should not rely on the premise that somehow by 'preventing' obesity – by which we mean lowering the prevalence in the population – future health costs are avoided. Prevention measures may diminish the prevalence

58. T. Hervey & J. McHale, *Health Law and the European Union* (Cambridge: Cambridge University Press, 2004), at 39. See also B. Laffan & M. Shackleton, 'The Budget', in H. Wallace & W. Wallace (eds), *Policy-making in the European Union* (Oxford: Oxford University Press, 2000).

59. Gostin uses the term 'health communication': L.O. Gostin, *Public Health Law: Power, Duties and Restraints* (Berkeley: University of California Press, 2000).

60. See Ch. 2 above.

of obesity but it will not eliminate it, and many of the core costs – in health infrastructure terms – are necessary whether obesity rates are 5% or 50%. Promotion must always go hand in hand with obesity prevention and cure.

It is often assumed that one way to promote good health is to inform consumers of the food choices available to them and the advantages of a healthy lifestyle. The role which food information has been given in the EU legal order cannot be overstated. Chapter 4 below provides a fuller discussion of the assumption that citizens will make healthy choices if they have sufficient and truthful information at their disposal on the food they consume to do so. This approach places the primary responsibility for good health on each citizen. There is an expectation that each of us will act responsibly by processing the information we are provided with. This model therefore rests on the assumption that lifestyle habits may durably be changed.

Beyond its work on food labelling, the Commission has undertaken to finance public health campaigns aimed at raising awareness of the need both to increase physical activity levels and to eat more healthily.⁶¹ For example, as part of the campaign to reverse the decline in physical activity levels over the last decades,⁶² the Commission and the Union of European Football Associations (UEFA) launched, in August 2007, a joint television advertising campaign which aimed to encourage European citizens to make physical activity part of their daily lives.⁶³ The 30-second advert was supposed to encourage viewers to be physically active, using the slogan 'Go on, get out of your armchair'. This advert was aired free of charge in more than forty European countries during the half-time break of each of the 2007 season's 125 televised Champions League football games, and it was expected to reach between 80 and 100 million viewers during each match week of the Champions League. This was possible through a partnership with UEFA which offered up the thirty seconds of airtime that it retained for social initiatives.⁶⁴

Similarly, the Commission has allocated some of its resources to promote the consumption of nutritious food. For example, in November 2007, it entered into a partnership with Euro-Toques International, the European Chefs' association, and launched 'EU Mini-chefs', a website for children which aimed to contribute to the fight against child obesity by encouraging healthy eating and cooking.⁶⁵

61. 'In cooperation with the Member States and relevant stakeholders, the Commission will develop and support scientific information and education campaigns to raise awareness of the health problems related to poor nutrition, overweight and obesity. These campaigns will, in particular, be addressed to vulnerable groups, such as children': Obesity Prevention White Paper, at 6.

62. For a more detailed discussion of the role which the EU can play in increasing physical activity levels in Europe, see Ch. 8 below.

63. The advert *Go on Get out of your armchair* can be viewed at <ec.europa.eu/health/ph_determinants/life_style/nutrition/nutrition_uefa_en.html>.

64. Nevertheless, no monitoring was undertaken to assess the impact of this approach and no evidence has emerged of any greater involvement in physical activity as a result.

65. This website was also used to promote the European Day for Healthy Food and Cooking, which was celebrated on 8 Nov. 2007, with around 4,000 chefs across the EU showing children how to cook and eat healthily in schools and restaurants. Finally, through EU Mini-chefs the

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It provided an internet forum on healthy food and cooking for parents, teachers and children, and included simple healthy recipes and cooking advice. This information campaign was aimed above all at children – a population group that must be encouraged to develop good eating habits at an early age. It was intended to convince them that eating healthily could be fun and inexpensive. The website was available in fourteen languages and included an interactive cooking game so that children could learn by playing.⁶⁶ More recently, the Commission launched the 'Eat it, Drink it, Move it' campaign intended to give European school children a chance to take part in educational activities and games, together with an interactive website, competitions and other events with the aim to change children's eating habits for the better.⁶⁷ More generally, the Commission produces information material on healthy lifestyles on a dedicated webpage⁶⁸ and via EU Tube, the YouTube space of the EU.⁶⁹

Information campaigns are one tool among others to attempt to address durably lifestyle habits leading to overweight and obesity. As discussed in more detail below, the Commission has also facilitated the exchange of best practice in relation to healthy lifestyle education. Even though information may have a role to play in influencing lifestyle choices in the long term, it will not suffice to reverse current trends.⁷⁰ Policy makers must also ensure that available choices themselves promote good lifestyle habits. This, in turn, requires that they design policies facilitating such choices by changing the obesogenic environment which we live in. The question thus arises what the EU is empowered to do beyond promoting good health through education and information campaigns to ensure that we live in environments where the healthy choice has become an easier choice than it is at present.

Commission and Euro-Toques International launched a drawing contest for European school-children. The competition's theme was: 'the pleasure of eating well in Europe'. The drawing that won the contest was used throughout the Union as the poster for the European Day of Healthy Food and Cooking.

66. During this day, the chefs either visited a local school to carry out workshops or invited a class into their restaurant for lunch and a chat on healthy cooking. This took place in the seventeen countries which are members of Euro-Toques International, a European community of chefs who promote the European cooking heritage and culture. The Euro-Toques International member countries are: Germany, Belgium, Bulgaria, Cyprus, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Sweden, Switzerland and San Marino. Around 1,000 schools and 20,000 children were expected to participate in the event.
67. The Campaign was launched on 28 Sep. 2009 and is supported by Belgian tennis champion Justine Henin and eight-year old Guinness record holder Rosolino Cannio. For more information, see <ec.europa.eu/agriculture/tasty-bunch/>.
68. <ec.europa.eu/health/ph_determinants/life_style/nutrition/nutrition_en.htm>.
69. <youtube.com/eutube>. The EU has underlined the importance of adapting the communication channels relied upon to the specific audience(s) targeted, with a preference for virtual tools for children and young people.
70. For a more thorough discussion on the role which information can play in the EU's obesity prevention strategy, see Ch. 4 below on food labelling.

2. The Union's Supportive Role in Health Matters

Article 168(5) TFEU excludes legislative harmonization at EU level in the field of public health, except in narrowly defined areas which are not directly relevant to obesity prevention.⁷¹ An isolated reading of this provision therefore suggests that EU action is limited in this field to the adoption of soft law measures. EU competence is supportive, that is designed to complement rather than replace Member State action.⁷² In other words, the Union is entitled to 'carry out actions to support, coordinate or supplement the actions of the Member States... at European level',⁷³ but it cannot harmonize them by legislative means.

Even though its scope is necessarily limited, the coordination and support role of the EU should not be underestimated. The wording of Article 168 TFEU itself shows that this role may take a variety of forms, as illustrated by the Commission's practice in matters relating to overweight and obesity prevention. Apart from the launch at European level of communication campaigns, the EU can play a role by financing research and by facilitating discussions and the exchange of best practice between all interested parties.

a. Obesity Prevention and the Financing of Research at EU Level

The importance of knowledge-based actions cannot be overstated. To ensure that the most effective obesity prevention strategies are put in place, research is paramount and, as Article 168(1) TFEU emphasizes, it should relate to the causes, the transmission and the prevention of major health scourges. This was reiterated in the Obesity Prevention White Paper:

The Commission intends to build on the strong foundations laid by previous research frameworks in the field of nutrition, obesity and the key diseases caused by unhealthy lifestyles such as cancer, diabetes and respiratory disease. The Commission has identified the need to know more about the determinants of food choices, and will establish, under the Seventh Framework Programme, major strands of research into consumer behaviour; the health impact of food and nutrition; drivers for preventing obesity in target groups such as infants,

71. Article 168(4) TFEU lists three exceptions to the exclusion of legislative harmonization: (a) measures on the quality and safety of organs and substances of human origins, blood and blood derivatives; (b) measures in the veterinary and phytosanitary fields which have as their direct object the protection of public health; and (c) measures setting high standards of quality and safety for medicinal products and devices for medical use.

72. On EU supportive (or complementary) competences, see R. Schütze, 'Co-operative Federalism Constitutionalized: The Emergence of Complementary Competences in the EC Legal Order', *European Law Review* 31 (2006): 167.

73. Article 6 TFEU. The same holds true of education, vocational training, youth and sport, as well as culture. See Art. 6(e) and (c) TFEU, and Arts 165 and 167 TFEU. The role of the EU in the field of education is discussed at the end of this chapter; its role in the field of sport is discussed in Ch. 8 below.

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children and adolescents, and into effective diet interventions. The programme will also address health determinants, disease prevention and health promotion as part of the theme ‘Optimizing the Delivery of Healthcare to European Citizens’.⁷⁴

As discussed in Chapter 1 above, the need to invest in good quality research is particularly pressing in relation to obesity. The urgency stems from the fact that policy makers face a dilemma: on the one hand, they must act rapidly to reverse current trends; on the other, our knowledge of the causes of obesity and the best approaches to its prevention still contains significant gaps which limit our understanding of the problem and therefore the confidence of policy makers that policies will be sound and effective.⁷⁵

All the EU Member States encounter similar problems, and pooling resources to increase the knowledge base makes great economic sense. EU intervention thus undeniably provides the added value which Article 168 TFEU requires.

The money spent on research at EU level comes from the general budget of the European Union, where it represents some 4% of total EU expenditure. The total amount is decided for each multi-annual ‘Framework Programme’ according to the ordinary legislative procedure, whereby the European Parliament and the Council decide jointly on the priorities and funding of the programme based on a proposal from the Commission.⁷⁶ The current programme, the Seventh Framework Programme (FP7), has a total budget of EUR 50.5 billion for the period 2007–2013,⁷⁷ which represents a substantial increase compared to the previous Framework Programme (FP6).⁷⁸

In light of the fact that obesity has become one of the most pressing public health issues in Europe, the research budget of the EU has contributed to several obesity-related projects since 1998,⁷⁹ and the EU has undertaken to continue to support obesity research under the FP7 which will provide further scientific data to advance our understanding of the interaction between food, nutrition and health.

74. Obesity Prevention White Paper, at 8.

75. See Ch. 1 above.

76. For details, see Art. 294 TFEU.

77. FP7 is aimed at helping to put into effect one of the EU’s main goals of increasing the potential for economic growth and of strengthening European competitiveness by investing in knowledge, innovation and human capital. It is organized in four specific programmes, corresponding to four major objectives of European research policy: Cooperation, Ideas, People and Capacities. Through these four specific programmes, the goal is to allow the creation of European poles of excellence within a wide array of scientific themes, ranging from information technologies, energy and climate change to health, food and social sciences. FP7 also finances direct research at the Commission’s own research institute, known as the Joint Research Centre. The activities are focused on three core areas, namely: (1) Food, Chemical Products and Health; (2) Environment and Sustainability; and (3) Nuclear Safety and Security.

78. 41% at 2004 prices, 63% at 2008 prices.

79. A (non-exhaustive) list of EU-funded projects relating to diabetes and obesity for the periods 1998–2002 (FP5) and 2002–2006 (FP6) is available at <cordis.europa.eu/lifescihealth/major/diabetes-eu-funding.html>.

Moreover, the EU also has a budget under its public health programme, which may be used to finance research concerning obesity prevention.

The projects mentioned in the box below illustrate how the EU has supported research on obesity prevention through research funding.⁸⁰ This list does not purport to be exhaustive.

EU Research Policy and Obesity Prevention

Understanding the Role of Genetics in the Obesity Epidemic:

The EU is funding a number of research projects that seek to understand the link between obesity, nutrition and genetic make-up, and when there is a genetic link to identify groups at risk. In particular, the DiOGenes (Diet, Obesity and Gene) project addresses the influence of gene-nutrient interaction on the development of obesity with a view to determining how much of the obesity crisis is down to diet and how much is written in people's genes. It is intended to carry out 'the most comprehensive study yet of dietary components and the genetic and behavioural factors influencing weight gain'.⁸¹

The EU is also supporting research exploring how our bodies metabolize food and how they deal with different types of nutrition. Such knowledge is intended to enhance diets and the nutritional value of food. For example, the NUGENOB (nutrient-gene interactions in human obesity) project addresses the question whether some people are more prone to obesity than others. It aims to improve our understanding of the interaction between fat intake and genetic variations and functions. After investigating the dietary and lifestyle habits of obese and lean volunteers from eight European cities, NUGENOB feeds the participants specially designed high-fat and low-fat diets. It monitors how their bodies respond and whether this relates to a genetic predisposition to obesity.⁸²

Once a person becomes chronically overweight, their brain interprets reduced food intake as a threat to survival, reducing metabolic rate, diverting energy to the maintenance of body composition and, thus, defending existing energy stores at a 'set point'. The main goal of the DIABESITY research project is to identify and validate new targets for obesity treatment and prevention to regulate this set point. In particular, through studies of human genetics in obese individuals, researchers from twenty-four European institutions are seeking to identify novel gene linkages with obesity and body composition.⁸³

80. For an overview of all the research projects funded in Key Action 1 'Food, Nutrition and Health' of the Programme Quality of Life and Management of Living Resources within the Fifth Framework Programme (1998–2002), see <ec.europa.eu/research/quality-of-life/ka1/home_en.htm>.

81. <www.diogenes-eu.org>.

82. <www.nugenob.com>.

83. <www.eurodiabesity.org>.

Obesity Prevention:

The EU-funded EXGENESIS (Health benefits of exercise: identification of genes and signalling pathways involved in effects of exercise on insulin resistance, obesity and the metabolic syndrome) project is working to provide a better understanding of the molecular mechanisms involved in the protective effects of exercise and a healthy diet. Recent scientific advances have highlighted the role of signalling pathways and changes in gene expression in muscle and other tissues through which the beneficial effects of exercise arise. The aim of EXGENESIS is to establish a major European consortium that can capitalize on these advances, converting them into new measures for prevention and treatment of type 2 diabetes. Results could include innovative medicines, or more efficient approaches towards healthier lifestyles, especially with respect to diet and exercise. EXGENESIS is a consortium of twenty-seven partners from thirteen Member States, supported through Priority 1 (Life Sciences, Genomics and Biotechnology for Health) of FP6.⁸⁴

A Specific Focus on Children and Adolescents:

In light with the recognition that childhood obesity tends to lead to adult obesity, the EU has funded projects focusing on children and adolescents.

What mothers eat during pregnancy and what they feed their babies is vital to their growth and well-being. Some may also be aware that nutrition in these early stages will influence their children's health and capabilities as adults. Recent studies have backed this view. In one study, improved early nutrition and infant weight led to a sharp reduction in high blood pressure among adults. Involving scientists from thirty-eight institutions in sixteen European countries, EARNEST (Early Nutrition Programming Project) is finding ways public health practices can influence foetal and infant nutrition to reduce the prevalence of certain conditions, including obesity, in later life and to improve the development of the brain and social skills. It is funded under the Food Quality and Safety Priority of the Sixth Framework Programme for Research and Technical Development of the European Union. The EU is contributing EUR 13.4 million towards a total cost of EUR 16.5 million.⁸⁵

The high-speed biological race towards adulthood that takes place during adolescence carries massive long-term implications. As a result, dietary and lifestyle choices made at this sensitive age can affect people for the rest of their lives. The HELENA (Healthy Lifestyle in Europe by Nutrition in Adolescence) project is intended to provide comparable data on food intake, dietary preferences and physical activity among European teenagers of both sexes. It will use this information to develop a lifestyle education programme for

84. <dundee.ac.uk/lifesciences/exgenesis/>.

85. <www.metabolic-programming.org>.

adolescents, as well as healthy new foods. The work takes place with the financial support of the European Union within the Sixth Framework Project. The EU is contributing nearly EUR 5 million towards a total cost of EUR 6.72 million.⁸⁶

It is of paramount importance that the research undertaken on behalf of the EU is sufficiently independent, objective and impartial to guarantee its value as a guide to develop effective obesity prevention policies. Several stakeholders have vested interests which arguably do not make them the ideal research partners in matters of obesity prevention. Subsequent chapters will illustrate some of the problems, which have been encountered in key areas, including nutrition labelling,⁸⁷ food marketing to children,⁸⁸ food reformulation⁸⁹ or food taxes.⁹⁰

b. Obesity Prevention and the Exchange of Best Practice at EU Level

Measures intended to facilitate the exchange of best practice can take a variety of forms. They include the establishment of discussion fora (through the establishment of networks of experts, the organization of conferences or the establishment of platforms for action), as well as the publication of guidelines and policy recommendations.⁹¹

The role of the exchange of best practice has grown in EU law with the advent of supportive (also referred to as complementary) EU competence. It is therefore not surprising that the two Public Health Programmes insist on the role the exchange of best practice can play in gathering and disseminating health information and measuring the effectiveness of certain actions. More specifically, the Obesity Prevention White Paper attaches great weight to soft law mechanisms. As discussed in Chapter 2 above, the Commission supports, in line with the recommendations of the WHO, a multi-stakeholder, partnership approach. Consequently, it has set up various discussion fora, including the EU Platform and the High Level Group, as part of the EU's developing obesity prevention strategy, thus inviting Member States and other stakeholders to meet on a regular basis with a view to sharing their experiences, voicing their doubts and discussing how policies could best evolve to tackle overweight and obesity. The EU added value of such an approach consists in particular in avoiding fragmentation by centralizing existing knowledge and policy responses relating to a public health concern which is

86. <www.helenastudy.com>.

87. See Ch. 4 above.

88. See Ch. 5 above.

89. See Ch. 6 above.

90. See Ch. 7 above.

91. On the EU's reliance on soft law, see L. Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004).

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common to all Member States. The Commission can act as a catalyst for the dissemination of knowledge and is in a better position than individual Member States to identify knowledge gaps, deepen our understanding of overweight and obesity and of the policy responses most likely to prevent them effectively and lead to the development of guidelines where consensus may be reached at EU level.⁹²

A Case Study: From the EPODE Programme to the EEN

The EPODE Programme (Ensemble Prévenons l'Obésité Des Enfants) is a community intervention action plan that sets out a prevention model based on the involvement of the local community for its benefit. Its key objective is to help prevent overweight and obesity trends in young children and adolescents and promote healthy lifestyles by conveying a broader vision of the benefits of a balanced diet and or regular physical activity.

This model is based on the sustainable mobilization of local key players (teachers, health care professionals, sports teachers, early years professionals, shopkeepers, restaurateurs) taking part in a health drive aiming at giving families the desire and means to adapt their lifestyles to a less obesogenic environment. The implementation of the EPODE Programme relies on five basic principles:

- the sustainable involvement of local stakeholders;
- the political support of elected officials;
- the involvement of scientists for content and assessment;
- a public-private sector partnership; and
- the expertise of Protéines, a project engineering social marketing agency.

The geographical scope of the EPODE programme has expanded. EPODE's long-term intervention pilot programme (the Fleurbaix Laventie Ville Santé study) was conducted between 1992 and 2004 in the two French Northern towns of Fleurbaix and Laventie with of a total population of 6,600 in 1991 and then became the EPODE programme in 2004. EPODE is now developed in France, in Belgium and in Spain.

In France, as of 2009, 167 towns (including the ten towns for the 2004 pilot project) are covered by the project, targeting around 1.2 million people.⁹³ In 2005, the Mayors of the towns participating in the EPODE programme created an association intended to extend the programme to towns interested and to create a network of the Mayors of EPODE towns united by the common goal of reversing childhood obesity trends and informing their inhabitants about the advantages of a healthy lifestyle.

92. For example, see Ch. 8 below for the EU Guidelines on Physical Activity published in November 2008.

93. <www.epode.fr>.

In Belgium, the project initially started with two pilot towns.⁹⁴ The programme was launched in January 2007 under the name of 'Via Sano'. Six new towns and municipalities in three different communities joined the Programme in 2008,⁹⁵ together with two new partners: the Belgian Society of Pediatrics and the Flemish Association of Diabetics.

In Spain, where the EPODE Programme was launched in March 2007 under the name 'Thao', five pilot towns were involved in the activities. In September 2008, more than twenty-five new towns had joined the Programme and the aim was for sixty Spanish cities to be implementing the Thao programme, targeting more than 120,000 children. The implementation of the Thao Programme is managed by the Agency Newton 21, with expertise in health and social marketing. New tools have been developed and a campaign has been organized by the current pilot-towns in order to advertise the programme and extend its geographical coverage.⁹⁶

Non-EU Member States have also expressed an interest in EPODE, notably in Canada and Australia.

In line with its commitment to involve all sectors of society, both in the public and private domains, in its obesity prevention strategy, DG SANCO supported the launch of the EPODE European Network (the EEN), with a view to extending these projects and to providing a more formal structure for sharing best practices, in particular to allow for a wider application of the EPODE Programme.

The EEN is financed by public-private partnerships. The EU Confederation of the Food and Drink Industries (CIAA) has undertaken to institutionally support the development of both the EPODE programme at national level via collaboration among national food and drink industry associations, individual companies and other relevant stakeholders. For example, Nestlé has undertaken to give EUR 250,000 to EPODE in France, EUR 126,000 to the Thao programme in Spain and EUR 150,000 to the EEN for the period 2008–2010. Nestlé employees also participated in EPODE events. The Ferrero Group, Mars Inc. and Carrefour have also contributed to the EEN and national programmes.

Notwithstanding the support which the EPODE Programme and the EEN have received to date, one is tempted to question certain of their features. In the first place, one should note that the EPODE Programme and the EEN only operate in selective locations and therefore cannot be considered as fully-fledged national strategic approaches. Secondly, the EPODE Programme and the EEN are heavily sponsored by funds originating from the major players in the food industry whose marketing for unhealthy food affect far more children than

94. <www.viasano.be>.

95. Marche-en-Famenne (community of Luxembourg), Lontzen, la Calamine, Raeren, Eupen (German speaking community), Jette (Brussels' area).

96. <www.thaosalud.com>.

the number of children benefiting from the EPODE Programme and the EEN. In particular, one may wonder whether it is appropriate to entrust the public relations company Protéines, whose clients include McDonald's, Kellogg's, Ferrero and Danone, with a public health mission that would arguably be better carried out by public authorities.⁹⁷

Even though they may be valuable, supportive measures are inherently limited. They are not legally binding and their implementation depends on the goodwill of stakeholders. It is true that the obligation resting on each EU Platform member to make commitments and their monitoring, with the risk of being excluded if one fails to put forward at least one commitment, is likely to increase the effectiveness of the EU Platform. Members are also keen to avoid adverse publicity which the participation in a public forum such as the EU Platform may entail. Nevertheless, there are certain fields of action for which a certain degree of coercion seems unavoidable to ensure that effective progress is made and that obesity trends have a chance to be reversed – and this is particularly true when conflicts of interest are unavoidable.⁹⁸ The EU Platform is nonetheless viewed as a laboratory for policy making, and it has served as the model for the EU Alcohol and Health Forum.⁹⁹

Exchanging best practice is intended to allow the EU either to act when it does not have any legislative powers at its disposal or to evaluate whether legislation is both feasible and desirable in areas where it does have such powers. Thus, exchanging best practice is either the only means of action available or a preliminary step to further integration. In any event, best practice must be determined on the basis of expert evidence and long-term experience, not on the basis of hunches and assumptions.¹⁰⁰

3. The Duty to Mainstream Health Concerns into All EU Policies

An isolated reading of Article 168(5) TFEU could convey a false impression of the extent of the powers which the Union has at its disposal in the area of public health,

97. For example, one can read on the Protéines website: 'How does McDonald's assimilate the nutritional balance of the 21st century food consumer? McDonald's optimizes its product offering, explains it to all of its audiences and creates new relationships with them', <proteines.fr/-content/?id_article=134&debut_articles=6>. Or: 'For Kinder, Nutella... more than ever, the right to enjoyment must be asserted in an age that too often prefers prohibition to education. Ferrero defends this right and replaces greed in its emotional, social and educational context', <proteines.fr/-content/?id_article=135&debut_articles=6>.

98. The issue is discussed more fully in Ch. 5 below on the regulation of food marketing to children.

99. The EU Alcohol and Health Forum was launched in June 2007, <ec.europa.eu/health/alcohol/forum/index_en.htm>.

100. In particular, it may be that what works in one Member State may not work as well in another Member State.

and obesity prevention more specifically. If Article 168(5) prevents the EU from adopting legislation as part of its health policy, Article 168(1) nonetheless mandates that ‘a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’.¹⁰¹ Health protection must therefore be considered in all fields of Union action, and health interests taken into account when pursuing potentially competing goals in other policy areas, some of which will grant them powers to adopt binding regulatory norms. In EU jargon, one would say that Article 168(1) requires that EU institutions should mainstream health concerns into all fields of EU competence.

Many of the Union’s policies and actions have an impact on health across Europe. As the Commission has pointed out, these policies are often developed with a different policy logic in mind and decision makers may not be well aware of their potential health effects.¹⁰² Moreover, as discussed in Chapter 1 above, obesity is a multi-factorial disease which cannot be remedied by health policy alone; there is a need for coordinated actions involving a variety of environmental, social or economic policies. Mainstreaming public health concerns into all EU policies is therefore crucial if overweight and obesity are to be addressed effectively.

a. Mainstreaming Public Health into all EU Policies

It is with a view to implementing the Union’s mainstreaming obligation that the Council emphasized, in its Conclusions of 8 June 1999, the necessity to integrate health protection requirements in all EU policies.¹⁰³ Since then, the EU has produced various documents on the need to develop a comprehensive and coherent public health policy.¹⁰⁴ As discussed in Chapter 2 above, several areas of EU action are relevant to obesity prevention; they include audiovisual policy, consumer policy, internal market policy, agricultural policy, transport policy . . . Their relevance results from the fact that obesity is interdisciplinary and requires a coherent multi-sectoral intervention if it is to be fully effective. It is therefore not surprising that since the Obesity Prevention White Paper was published in May 2007, one can find references to health concerns, and obesity prevention more specifically, in documents produced by other Commission DG than

101. It is noteworthy that the Lisbon Treaty has upheld the strengthened obligation brought about by the Amsterdam Treaty in Art. 152(1) EC and now contained in Art. 168(1) TFEU from a requirement to ‘contribute’ to ensuring a high level of human health protection under (what used to be) Art. 129 EC pre-Amsterdam to the duty to ‘ensure’ a high level of health protection in all [EU] activities.

102. See the Commission’s webpage on ‘Health in all policies’: <ec.europa.eu/health/ph_overview/other_policies/health_other_policies_en.htm>.

103. OJ 1999 C195/4.

104. Several of these measures are discussed in Ch. 2 above. See in particular the Council Resolution of 14 Dec. 2000, which stressed the importance of nutrition as a key determinant of human health and focused on integrating nutritional health not only into the programme of EU action in the field of public health, but also into other EU policies with an impact on nutritional health: OJ 2001 C20/1.

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DG SANCO.¹⁰⁵ To improve coordination and integration of health protection within the Commission services, a Health Inter-Service Group involving representatives from most Commission DG is chaired by DG SANCO, and meets every six months. This group allows different Commission services to present work in their areas of responsibility which could have a health impact, and also allows DG SANCO to share its own work with other Commission departments.

Mainstreaming public health concerns into all EU policies should involve a proactive approach rather than a reactive approach relying solely on the CJEU to review already adopted EU law and ensure that it complies with Article 168 TFEU. As Olivier De Schutter has remarked, ‘mainstreaming should be seen as operating *ex ante* rather than *post hoc*: it influences the way legislation and public policies are conceived and different alternative paths compared to one another; it does not simply require that such legislation and policies do not violate fundamental rights. It is pro-active, rather than reactive’.¹⁰⁶ More fundamentally, mainstreaming implies, at its core, that a high level of public health should not be pursued only via ear-marked, distinct policies, but must be incorporated in all the fields of law- and policy-making. One could therefore draw an analogy with Olivier De Schutter’s argument on fundamental rights: ‘fundamental rights, thus, should be seen, as an integral part of all public policy making and implementation, not something that is separated off in a policy or institutional ghetto. Mainstreaming is transversal or horizontal’.¹⁰⁷ Assessing the impact of policies on public health requires, in turn, that a careful balancing exercise is carried out between competing interests at every stage of the policy-making process, from the first Commission proposal, to the adoption by the Council and the European Parliament of the measure, to its application by all parties to which the measure in question is addressed. The practical difficulties involved in assessing how best a high level of public health protection could be ensured should not stop the EU from taking the mainstreaming obligation laid down in Article 168 TFEU seriously into account – the problem is to design an effective and transparent mechanism to ensure that this constitutional obligation is duly upheld.

b. The Role of Health Impact Assessments

To assist the development of evidence-based policies, the EU should rely more systematically on health impact assessments. This finds support not only in Article 168(1) and Article 114(3) TFEU which mandate a high level of health

105. See, for example, the first part of Ch. 7 below dealing with the CAP reform of the fruit and vegetable market.

106. O. De Schutter, ‘Mainstreaming Human Rights in the European Union’, in P. Alston & O. De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart Publishing, 2005), at 44.

107. *Ibid.*, citing C. McCrudden, ‘Mainstreaming Equality in the Governance of Northern Ireland’, *Fordham International Law Journal* (1999): 1696.

protection in all EU policies, but also in the 2004 Commission Report on *Enabling Good Health for All: A Reflection Process for a New EU Health Strategy*:

The time has come for health to be put at the centre of EU policy making.

If the EU is to help its citizens **achieve good health**, it must **address the behavioural, social and environmental factors that determine health**. This involves understanding better how different issues and policies affect health. To do this, *the EU needs an effective Health impact assessment system*. This could play an important role in both mainstreaming health and evaluating how other policies affect health. But how could such a system operate in practice?

We need to ensure that health is at the very heart of policy making at regional, national and EU level. We need to **promote health through all policies**. Policy measures as different as inner city development, regional transport infrastructure, applied research, air pollution, or international trade must take health into account. Health needs to be integrated into all policies, from agriculture to environment, from transport to trade, from research to humanitarian aid and development.¹⁰⁸

More recently, the Second Public Health Programme 2008–2013 reiterated the importance of health in all EU policies: ‘the Programme should support the mainstreaming of health objectives in all [EU] policies and activities, without duplicating work carried out under other [EU] policies’.¹⁰⁹

All major policy initiatives with a potential economic, social and/or environmental impact require an integrated impact assessment. This applies in particular to most legislation (proposed directives or regulations) and to White Papers, action plans, expenditure programmes and negotiating guidelines for international agreements.¹¹⁰ The aim of integrated impact assessments is to ensure that a proposal is sustainable by looking at the broad range of potential economic, social and environmental impacts. The Commission has published a series of impact assessment guidelines which are intended to give general guidance to the Commission

108. <ec.europa.eu/health/ph_overview/Documents/pub_good_health_en.pdf>, at para. 4.1. Emphasis in bold in the original text; emphasis in italics added. The importance of health impact assessments has since been reiterated by the Council in its Conclusions on Health in All Policies of 30 Nov. and 1 Dec. 2006, which, after citing Art. 152 EC (now Art. 168 TFEU), called upon the EU, its Member States and the European Parliament ‘to ensure the visibility and value of health in the development of EU legislation and policies by, *inter alia*, health impact assessments’, <ec.europa.eu/health/ph_projects/2005/action1/docs/2005_1_18_frep_a8_en.pdf>, at para. 13.

109. Decision 1350/2007 establishing a Second Programme of [EU] Action in the Field of Health (2008–2013), OJ 2007 L301/3, at Recital 12 of the Preamble. See also at para. 25: ‘the precautionary principle and risk assessment are key factors for the protection of human health and should therefore be part of further integration into other [EU] policies and activities.’

110. The Commission has completed over 400 impact assessments since 2002 when the impact assessment system was put in place. The list is available at <ec.europa.eu/governance/impact/ia_carried_out/ia_carried_out_en.htm>.

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services for assessing potential impacts of different policy options. The latest guidelines were issued in January 2009.¹¹¹

Unfortunately, public health is not singled out: it falls within the broader category of 'social impact'.¹¹² There is therefore a risk that a proposal with a broad range of social impacts fails to consider specifically potential health impacts.¹¹³ The constitutional obligation of EU institutions to ensure a high level of health in all EU policies warrants that health should become a separate requirement for consideration. Moreover, it is necessary to ensure that impact assessments are used to inform policy decisions, rather than to justify a preferred policy option determined independently from the impact assessment process.¹¹⁴ This is all the more important if policy is to rely on evidence rather than on assumptions or, even worse, prejudice.¹¹⁵

Monitoring the effectiveness of policies *ex post* is a valuable, even an essential, exercise. Nevertheless, anticipating the consequences of policies *ex ante* on the basis of solid impact assessments will increase their chances of success at a much earlier stage.

c. Public Health and EU Internal Market Policy

The rest of this section explores more specifically the relationship between the internal market and public health, insofar as this issue has given rise to vivid controversies and illustrates the practical difficulties involved in attempting to delineate the scope and the nature of EU powers. It will also provide an opportunity to present what the rationale for the internal market is, bearing in mind that it is a core EU policy and has an important role to play in the EU's developing obesity prevention strategy.

The internal market has always been central to the EU legal order. It is defined in Article 26(2) TFEU (ex-Article 14 EC) as an area in which the free movement of goods, services, people and capital shall be ensured in accordance with the provisions of the Treaties.¹¹⁶ Its rationale is that the broader the market, the more choice for consumers and the more opportunities for businesses. To ensure the establishment and functioning of the internal market, the EU has relied upon two complementary forms of integration.

111. <ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm>.

112. Public health is listed as a sub-category of possible social impacts: see the list in Table 2 of the 2009 Impact Assessment Guidelines, at 35.

113. A study conducted by the National Heart Forum found that in 2005 and 2006, 73 out of the 137 impact assessments carried out by the Commission did not mention the word 'health'. R. Salay & P. Lincoln, *The European Union and Health Impact Assessments: Are They an Unrecognized Statutory Obligation?* (London: National Heart Forum, September 2008), at 13.

114. Information Note from the President to the Commission, 'Better Regulation and Enhanced Impact Assessment', 28 Jun. 2007, SEC (2007) 926.

115. For a discussion on the widely held, but nonetheless mistaken, view that obesity and overweight are caused by a lack of goodwill, see Ch. 1 above *in fine*.

116. These freedoms are often referred to as the Four Freedoms or the Four Fundamental Freedoms.

In the first place, the TFEU contains general clauses requiring Member States to suppress obstacles to free movement. This approach relies on deregulation: the barriers to free movement imposed by Member States are dismantled to facilitate free movement. Nevertheless, free movement cannot be unlimited, and provision has been made in the TFEU to ensure that overriding requirements of public interest, including public health, are sufficiently protected. Member States may therefore invoke public health considerations to derogate from the principle of free movement, provided that the restrictions they impose on free movement are necessary and the least possible restrictive of trade. For example, the protection of children may justify restrictions regarding the timing and the content of advertising.¹¹⁷ This form of integration is often referred to as ‘negative integration’.

The second mechanism intended to facilitate free movement is referred to as ‘positive integration’. It consists in two phases: first the abolition of barriers to trade (deregulation), followed by the adoption of a common EU standard (re-regulation). For example, the free movement of foodstuffs is likely to be facilitated if one set of food labelling rules agreed at EU level replaces the twenty-seven different sets of rules applying to food labelling in the twenty-seven Member States. The harmonization process is however not always as straightforward as suggested. If EU legislation sometimes replaces national standards, it may sometimes replace national standards in part only (partial harmonization); or it may allow Member States to adopt more stringent standards than the standards laid down at EU level (minimum harmonization). It is therefore paramount to determine precisely the scope of EU acts – though this exercise may turn out to be extremely difficult in practice.¹¹⁸

Article 114 TFEU (ex-Article 95 EC) is the key provision granting the powers to the EU to adopt the measures necessary for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.¹¹⁹ From a formal point of view, measures may be adopted on the basis of Article 114 by QMV only, that is without the need for the unanimous agreement of the Member States. The ordinary legislative procedure also applies in that both the Council and the European Parliament must reach a common decision. From a substantive point of view, measures may be adopted on the basis of Article 114 only if they have as their object the establishment or functioning of the internal market. The former alternative concerns obstacles to trade between Member States; the latter alternative captures distortions of competition resulting from disparities between national laws.¹²⁰ This said the question remains of the exact contours of Article 114 TFEU.

117. See Art. 36 (goods) and Arts 52 and 62 (persons and services) TFEU as interpreted in Case C-34/95 *De Agostini* [1997] ECR I-3843. This question is discussed in detail in Ch. 5 below.

118. See Ch. 5 below for a discussion of the EU’s different harmonization techniques.

119. Article 114(1) TFEU.

120. See R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009), at 144.

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In particular, and bearing in mind that free movement is not unlimited, the question arises how health concerns and other concerns of public interest should be taken into account in the internal market harmonization process. Article 114(3) itself echoes Article 168(1) and states that the EU legislature, when acting on the basis of Article 114(1), should take as a base a high level of health and consumer protection. It is therefore necessary to determine how conflicts between free movement and public health or other overriding objectives of public interest should be resolved, bearing in mind that Article 168(5) excludes the legislative harmonization at EU level of national rules on public health.

The boundaries between what falls within and what falls outside the scope of EU powers under Article 114 TFEU have proven extremely difficult to draw in practice, as the Court of Justice confirmed in its seminal *Tobacco Advertising* ruling in October 2000.

d. The Scope of EU Powers in the Case Law of the Court of Justice

The constitutional significance of the *Tobacco Advertising* case cannot be overstated.¹²¹ For the first time the Court annulled an EU measure for lack of EU competence. This judgment and subsequent case law are therefore discussed in some detail. This section concludes with a discussion of the extent to which analogies may be drawn between the regulation of tobacco advertising and the regulation of food advertising and what lessons can be learnt for the Union's developing obesity prevention strategy.

i. The First Tobacco Advertising Case

In July 1998, the European Parliament and the Council adopted, on the basis of what is now Article 114 TFEU, a directive approximating the laws, regulations and administrative provisions of the Member States and laying down a general prohibition on the advertising and sponsorship of tobacco products.¹²² Germany voted against the directive in Council; however, it was outvoted by the other Member States following a QMV in favour of its adoption. Germany subsequently challenged its validity, arguing – among others – that the EU did not have the required competence to adopt such a measure. More specifically, it contended that the 1998 directive was in reality a disguised public health measure whose effects on the internal market, if any, were purely incidental, thus preventing Article 114 TFEU from providing a proper legal basis.

The Court of Justice accepted Germany's argument and annulled the 1998 directive. It held that Article 114 TFEU was intended to improve the conditions for the establishment and functioning of the internal market, as opposed to vesting in the EU legislature a general power to regulate the internal market. This clearly

121. Case C-376/98 *Germany v. Council and the European Parliament* [2000] ECR I-8419 (hereafter '*Tobacco Advertising I*').

122. Directive 98/43, OJ 1998 L213/9.

confirms that the scope of Article 114 TFEU is not unlimited: this would not only be contrary to the express wording of the provisions but it would also be incompatible with the principle embodied in Article 5 TEU that the powers of the EU are limited to those specifically conferred upon it.¹²³ Thus, it is only if a measure genuinely seeks to improve the conditions for the establishment and functioning of the internal market that Article 114 TFEU can be invoked. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 114 TFEU as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court of Justice would then be prevented from discharging the function entrusted to it by Article 19 TEU of ensuring that the law is observed in the interpretation and application of the Treaties.¹²⁴

The Court of Justice then considered whether, on the facts of the case, the 1998 directive contributed: (1) to the elimination of obstacles to the free movement of goods and the freedom to provide services; or (2) to the elimination of distortions of competition. It concluded that it did not.

On the first limb of its analysis, the Court of Justice assessed the general prohibition of advertising of tobacco products. It accepted that Article 114 TFEU could be used to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. Nevertheless, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.¹²⁵ The Court accepted that the prohibition of tobacco advertising in press products could be justified on the ground that the different national rules in place could constitute a likely obstacle to trade between Member States in these products. By contrast, it did not accept that the prohibition on all forms of advertising laid down in Article 3 of the Directive could be validly adopted on the basis of Article 114 on the ground that they hindered intra-EU trade. In particular, the Court noted that advertising on posters, parasols, ashtrays and other articles used in hotels (i.e., static advertising), as well as advertising spots in cinemas, were not related to inter-State trade: there is neither an existing market nor a likely future market in such products.¹²⁶ Mere disparities in national rules are not sufficient to

123. At para. 83. As this judgment was issued before the Treaty of Lisbon entered into force, it refers to the principle of conferral as 'principle of attributed competence' which was embodied in Art. 5 TEC.

124. At para. 84.

125. At para. 86. On the comparison of the *Tobacco Advertising* judgment with previous rulings of the Court of Justice, see R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009), at 147.

126. The Court of Justice also noted that the 1998 directive did not ensure the free movement of products that complied with its provisions in light of the minimum harmonization clause which it contained in Art. 5 and which allowed Member States to extend stricter national health standards to imports from other Member States. On minimum harmonization, see Ch. 5 below. For a discussion of the relationship between minimum harmonization and general Treaty provisions, see M. Dougan, 'Minimum Harmonization and the Internal Market', *Common Market Law Review* 37 (2000): 853 and, more recently, M. Dougan, 'Minimum Harmonization

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empower the EU to adopt harmonizing legislation on the basis of Article 114 TFEU.

Secondly, as regards the elimination of distortions of competition, the Court of Justice held that the effects of the advantages accruing to agencies and manufacturers of advertising products established in Member States whose legislation was not restrictive were not appreciable. Those effects were not comparable to the distortions of competition caused by differences in production costs. Moreover, the imposition of a wide-ranging prohibition on the advertising of tobacco products was tantamount, in the Court's view, to limiting, in all the Member States, the means available for economic operators to enter or remain in the market. The Court nonetheless considered that the Treaty provisions on the internal market would have allowed the adoption of measures imposing a partial prohibition on certain forms of advertising and sponsorship of tobacco products. In relation to sponsorship specifically, it observed that differences between certain national regulations on tobacco advertising, such as the fact that sponsorship was prohibited in some Member States and authorized in others, had given rise to certain sports events being relocated, with considerable repercussions on the conditions of competition for undertakings associated with such events.¹²⁷

Finally, as regards the relationship between the internal market and public health, the Court of Justice clearly stated that the national measures to be harmonized by the 1998 directive were 'to a large extent' public health measures, and that legislative harmonization at EU level was explicitly excluded in this field.¹²⁸ It stressed that the legal basis should not be determined to 'circumvent the express exclusion of harmonization' under Article 168(5) TFEU.¹²⁹ Nevertheless, it also pointed out that such exclusion did not mean that harmonizing measures based on other Treaty provisions could not have an impact on public health, since the latter had to form a constituent part of other EU policies, as confirmed by the third paragraph of Article 114 TFEU.¹³⁰ If the conditions for recourse to this article had been fulfilled, it would have constituted an adequate legal basis. As stated above, this was however not the case on the facts, and the 1998 directive had to be annulled.¹³¹

after Tobacco Advertising and Laval Un Partneri', in M. Bulterman et al. (eds), *Views of European Law from the Mountain: Liber Amicorum for Piet Jan Slot* (The Hague: Kluwer Law International, 2009), at 3.

127. At paras 106–113.

128. At para. 76.

129. At para. 79.

130. At para. 78.

131. AG Fennelly emphasized that the content of a harmonization measure also had to be, in principle, influenced by substantive concerns such as public health, as required under Art. 114(3) and Art. 168(1) TFEU: 'the obvious concern with public health which motivated the initial, disparate national advertising restrictions in some Member States, and the policy chosen by the [EU] legislature, evidently on the basis of similar concerns, do not per se lead to any doubt, to my mind about the competence of the [EU] to adopt an internal market measure. That fact alone does not show either that the [EU] has invaded a domain reserved exclusively to the Member States or that the objective of the measure is health protection to the exclusion of all other aims' (at para. 66 of the Opinion).

This judgment should not be interpreted as suggesting that it is only if a measure has, as its primary objective, the proper functioning of the internal market, that it can validly be adopted on the basis of Article 114 TFEU. As stated above, the Union's harmonization powers are more extensive in the area of health than Article 168(5) may suggest. Provided that EU harmonizing measures adopted on the basis of Article 114 have an impact on the functioning of the internal market, then recourse to Article 114 is legitimate and such measures are valid.¹³² The mainstreaming obligation contained in both Article 114(3) and Article 168(5) TFEU confirms that, provided a measure is not exclusively concerned with public health protection and the EU legislature's intention is not to 'circumvent the express exclusion of harmonization' laid down in Article 168(5), then this measure may be adopted on the basis of Article 114 if the conditions for resorting to this article have been satisfied. This analysis has been confirmed in subsequent cases. For example, in *Alliance for Natural Health*, the Court observed that 'provided that the conditions for recourse to [Article 114 TFEU] as a legal basis are fulfilled, the [EU] legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made'.¹³³

ii. The Follow-Up to the *First Tobacco Advertising Case*
In May 2003, the European Parliament and the Council adopted another directive on the advertising and sponsorship of tobacco products which prohibits:

- first, the advertising of tobacco products in the press and other printed publications, in information society services (such as the Internet) and in radio broadcasts;¹³⁴
- secondly, the sponsorship of radio programmes by tobacco companies;¹³⁵ and
- thirdly, the sponsorship of events or activities having cross-border effects.¹³⁶

132. In other words, the centre of gravity approach [which means that recourse to a certain legal basis is barred if the main emphasis, the centre of gravity, of a measure lies on a point which is not covered by that specific legal basis] does not have any role to play in cases where the choice is between [EU] or Member State competence, as this approach is only relevant where there is a dispute as to whether a measure should have been adopted by reference to one or other of two possible competing legal bases. In *Tobacco Advertising I*, the issue was not so much whether a choice existed between two areas of EU competence within which the contested directive fell, but rather whether the EU was competent at all to adopt this directive. On this point, see paras 67–69 of AG Fennelly's Opinion.

133. Joined Cases C-154 and 155/04 *Alliance for Natural Health* [2005] ECR I-6451, at para. 30. See also B. De Witte, 'Non-Market Values in Internal Market Legislation', in N. Nic Shuibhne (ed.), *Regulating the Internal Market* (Cheltenham: Edward Elgar Publishing, 2006), at 61.

134. Directive 2003/33, OJ 2003 L152/16, in Arts 3 and 4.

135. *Ibid.*, in Art. 4.

136. *Ibid.*, in Art. 5.

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Only publications intended for professionals in the tobacco trade and publications from non-EU countries which are not principally intended for the EU market are exempted.¹³⁷

This second directive was also adopted by QMV on the basis of what is now Article 114 TFEU (ex-Article 95 EC). Once again, Germany, which was outvoted in Council, challenged its validity and argued (among other things) that it did not contribute to the elimination of obstacles to the free movement of goods or to the removal of appreciable distortions of competition. This time, the Court dismissed the action as unfounded and held that the conditions required for recourse to Article 114 TFEU as a suitable legal basis were in fact met.¹³⁸

The Court of Justice noted that the advertising and sponsorship of tobacco products were dealt with differently from one Member State to another, and that there was an appreciable risk that the differences would increase as a result of the enlargement of the EU to ten new Member States, thus warranting an EU intervention.¹³⁹

The Court then focused on whether Article 114 TFEU provided an adequate legal basis for such intervention. It ruled that the market in press products and the radio market were markets in which trade between Member States was relatively sizeable and was set to grow further as a result, in particular, of the link between the media in question and the internet, which is the cross-border medium *par excellence*.¹⁴⁰ The same finding was made as regards sponsorship of radio programmes by tobacco companies. Differences between national rules had already emerged on the date when the 2003 directive was adopted or were about to emerge and those differences were liable to impede the freedom to provide services by denying radio broadcasting bodies established in a Member State where a measure prohibiting sponsorship was in force the benefit of sponsorship from tobacco companies established in another Member State, where such a measure did not exist.¹⁴¹ Furthermore, those differences also meant that there was an appreciable risk of distortions of competition.¹⁴² Nevertheless, the Court of Justice added that it was not necessary also to prove distortions of competition in order to justify recourse to Article 114 TFEU once the existence of obstacles to trade had been established.¹⁴³ The requirements are alternative, not cumulative.

The Court of Justice finally turned to the more specific question whether Articles 3 and 4 of the 2003 directive were in fact designed to eliminate or prevent obstacles to the free movement of goods or the freedom to provide services or to remove distortions of competition. The adoption of a prohibition on the advertising of tobacco products in periodicals, magazines and newspapers, which is designed

137. *Ibid.*, in Art. 3(1).

138. Case C-380/03 *Germany v. Council and the European Parliament* [2006] ECR I-11573 (hereafter '*Tobacco Advertising II*').

139. *Ibid.*, at paras 46–51.

140. *Ibid.*, at para. 53. For a fuller discussion, see paras 54–64.

141. *Ibid.*, at para. 65.

142. *Ibid.*, at para. 66.

143. *Ibid.*, at para. 67.

to apply uniformly throughout the EU, is intended to prevent trade between Member States in press products from being impeded by the national rules of one or other Member State. Moreover, the fact that Article 3 of the 2003 directive expressly permits the insertion of advertising for tobacco products in certain publications, in particular in those which are intended exclusively for professionals in the tobacco trade, confirms that the directive is intended to facilitate free movement.¹⁴⁴ The Court of Justice concluded that Articles 3 and 4 of the 2003 directive did in fact have as their object the improvement of the conditions for the functioning of the internal market and, therefore, that they were able to be adopted on the basis of Article 114 TFEU. It added:

This conclusion is not called into question by the applicant's line of argument that the prohibition laid down in Articles 3 and 4 of the Directive concerns only advertising media which are of a local or national nature and lack cross-border effects.

Recourse to [Article 114 TFEU] as a legal basis does not presuppose the existence of an actual link with free movement between the Member States in every situation covered by the measure founded on that basis. As the Court has previously pointed out, to justify recourse to [Article 114 TFEU] as the legal basis what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market.¹⁴⁵

The Court of Justice has therefore confirmed that the scope of Article 114 TFEU is not unlimited. Nevertheless, despite the limits set in *Tobacco Advertising I*, subsequent cases suggest that the EU actually retains a broad margin of discretion under this provision – certainly broader than *Tobacco Advertising I* may have led us to believe.¹⁴⁶ The case law of the Court allows the EU to adopt a wide range of measures with public health implications as part of its internal market policy.¹⁴⁷

144. The Court of Justice noted that the 2003 directive did not contain a minimum harmonization clause as the 1998 directive did. 'Article 8 of the Directive provides that the Member States are not to prohibit or restrict the free movement of products which comply with the Directive. This article consequently precludes Member States from impeding the movement within the EU of publications intended exclusively for professionals in the tobacco trade, *inter alia* by means of more restrictive provisions which they consider necessary in order to protect human health with regard to advertising or sponsorship for tobacco products' (at para. 73). On this point, see M. Dougan, 'Minimum Harmonization after Tobacco Advertising and Laval Un Partneri', in M. Bulterman et al. (eds), *Views of European Law from the Mountain: Liber Amicorum for Piet Jan Slot* (The Hague: Kluwer Law International, 2009), at 3.

145. *Tobacco Advertising II*, at paras 79 and 80.

146. For a criticism of the case law, see D. Wyatt, 'Community Competence to Regulate the Internal Market', University of Oxford Faculty of Legal Studies Research Paper Series, Working Paper N° 9/2007, July 2007.

147. Even a total ban on the marketing of a product can be justified under Art. 114 TFEU. See Case C-210/03 *Swedish Match* [2004] ECR I-11893, in which Swedish Match unsuccessfully challenged the prohibition of the marketing in the UK of tobacco products for oral use stemming from Art. 8 of Directive 2001/37 on Tobacco Products (OJ 2001 L194/26), adopted on the joint

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iii. Obesity Prevention and the Competence of the EU to Facilitate the Proper Functioning of the Internal Market: the Problem of In-School Marketing

By analogy, some forms of food marketing regulation fall within the scope of EU competence, such as television, internet, radio and other forms of advertising which affect the functioning of the internal market. They can be adopted lawfully on the basis of Article 114 TFEU due to their cross-border effects. By contrast, other measures relating to the marketing of food are unlikely to be validly adopted under Article 114 TFEU, insofar as they neither affect trade between Member States nor lead to appreciable distortions of competition. The *Tobacco Advertising* judgments suggest that this would be the case, in particular for:

- static forms of food advertising (adverts in hotels, on billboards, parasols, ashtrays and similar items);
- spots in cinemas;
- sponsorship of events that do not have any cross-border appeal.

In these cases, the EU does not have the required powers to adopt harmonizing legislation and it is for each Member State to regulate such forms of food marketing, if they wish to do so. The freedom of Member States would only be constrained by the general Treaty provisions preventing Member States from hindering the free movement of goods and the free movement of services under Articles 34 and 56 TFEU, respectively.

It remains that determining the exact contours of EU competence may be extremely controversial. For example, one may wonder whether the EU could lay down common rules regulating in-school marketing.

Children are an increasingly important target group for advertisers; this is not surprising in light of the fact that two-thirds of the products that people use when they are children they continue to use when they become adults, and that children increasingly decide what their parents buy.¹⁴⁸ Consequently, schools, where they are gathered together, are seen as the ideal place for spreading advertising messages targeted at children. This is all the more so as schools themselves tend to guarantee the interest and quality of the messages. The difficulty encountered by schools in finding the necessary funding to carry out interesting activities outside the core curriculum explains why economic operators have managed to establish a strong presence in schools.

Notwithstanding the fact that in-school marketing is one of the fastest growing marketing techniques directed at children,¹⁴⁹ it is still relatively unregulated. This

legal basis of Arts 114 and 207 TFEU (the latter article refers to the Union's Common Commercial Policy).

148. On the regulation of food marketing to children, see Ch. 5 below.

149. In-school marketing can take a variety of forms. Most commonly, companies provide education packs to schools containing sponsored material mentioning the company and often containing free coupons or samples together with educational material. Alternatively, they may

is regrettable insofar as it may be particularly damaging to children's education, precisely because it takes place in an environment where they expect to learn what is best for them; they may get the impression that the school endorses this marketing technique, which makes it even more difficult for them to distinguish between advertising and education.¹⁵⁰ The fact that food business operators are well represented in schools also raises public health concerns, in light of the fact that unhealthy foodstuffs are advertised to children leading to mixed messages being sent regarding the importance of a healthy diet.¹⁵¹

Acceptance of the need to regulate in-school marketing is gaining ground. Some EU Member States have already intervened in this field. For example, vending machines selling unhealthy food to schoolchildren have been banned from French schools since 1 September 2005.¹⁵² Moreover, growing international pressure has provided the incentive to food business operators to limit, to some extent at least, the amount of in-school marketing they engage in. For example, eleven major food business operators, representing more than 50% of the food and beverage advertising expenditure in the EU, have undertaken not to make any communication related to their products in primary schools, except where specifically requested by, or agreed with, the school administration for educational purposes.¹⁵³ The importance of protecting children from harmful forms of marketing in the school environment has most recently been acknowledged by the WHO in its Resolution on marketing of food and beverages to children: 'settings where children gather should be free from all forms of marketing of [unhealthy] foods'.¹⁵⁴

Bearing in mind that in-school marketing affects all Member States, the question arises whether the EU could adopt harmonizing legislation on the basis of Article 114 TFEU. No other legal basis is available: Article 168 TFEU excludes

organize contests in the school environment, send free samples to schools or sponsor school equipment or school events.

150. On in-school marketing, see C. Hawkes, *Marketing Food to Children: the Global Regulatory Environment* (Geneva: WHO, 2004), at 32.

151. For particularly worrying examples of marketing in the classroom, see R. Watts & L. Hulbert, *Through the Back Door: An Exposé of Educational Material Produced by the Food Industry* (London: The Children's Food Campaign, December 2008), <www.sustainweb.org/pdf/Through_the_Back_Door.pdf>.

According to this report, UK companies alone spend an estimated GBP 300 million every year on advertising in the classroom.

152. Article 30 of Public Health Act 2004-806, 9 Aug. 2004.

153. These eleven companies are: Burger King, Coca-Cola, Danone, Ferrero, General Mills, Kellogg, Kraft, Mars, Nestlé, PepsiCo and Unilever. This undertaking, referred to as 'the EU Pledge', is not confined to schools. The EU Pledge is available at <www.eu-pledge.eu>. The EU Platform has also led to commitments by its members relating to food marketing restrictions, though most of them tend to be rather modest, as discussed more fully in Ch. 5.

154. Recommendation 5, World Health Assembly Resolution WHA63.14 (May 2010). Recommendation 5 further provides that 'such settings include, but are not limited to, nurseries, schools, school-grounds and pre-school centres, cultural activities that are held on these premises'.

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legislative harmonization in the field of public health; so does Article 165 TFEU in the field of education. As discussed above, a measure may only be adopted on the basis of Article 114 TFEU if it is actually intended to improve the conditions for the establishment and functioning of the internal market. Applying the case law of the Court of Justice, the measure must contribute: (1) to the elimination of obstacles to the free movement of goods and the freedom to provide services; or (2) to the elimination of distortions of competition. On the first point, the Court has accepted that Article 114 TFEU could be used to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. Nevertheless, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.¹⁵⁵ Mere disparities in national rules are not sufficient to empower the EU to adopt harmonizing legislation on the basis of Article 114 TFEU. At present, there is probably little cross-border movement of educational materials. Moreover, the sponsorship of school events tends to be organized at a local level. Nevertheless, one cannot exclude the appearance of a future EU market for certain types of educational material. If most of the material used in school will remain country- or even region-specific in light of local cultures, customs and traditions, one could envisage some exceptions to this rule: if all EU pupils are taught foreign languages as a result of European integration, one could conceive that textbooks may be produced on a larger scale for a wider European audience. If a business operator was to get involved in the production of, say, English language textbooks, we could argue that regulating how this involvement should take place could be done via harmonizing legislation adopted by the EU for all Member States on the basis of Article 114 TFEU.

As regards the elimination of distortions of competition, the effects of the advantages accruing to business operators established in Member States whose legislation is not as restrictive as in others must be appreciable to allow the EU to remove them on the basis of harmonizing internal market legislation. To date, however, it seems unlikely that the differences between certain national regulations on in-school marketing have given rise to considerable repercussions on the conditions of competition for undertakings associated with such marketing.¹⁵⁶ The answer may not be as straightforward as first appears. One could wonder whether the EU could not adopt some legislation concerning the regulation of the content of vending machines in schools. If certain Member States allow the sale of unhealthy food to children within school premises, whereas others ban it, the argument could perhaps successfully be made that food operators have an incentive to sell more in the former States than in the latter, giving rise to appreciable distortions of competition. The answer would depend on the degree of comparability of the content of vending machines in the different Member States.

155. Analogy with para. 86 of the ruling in *Tobacco Advertising I*.

156. Analogy with paras 106–113 of the ruling in *Tobacco Advertising I*.

The conclusion of the study on in-school marketing carried out for the Commission by GMV Conseil in 1998 that the EU has no competence to adopt harmonizing legislation may therefore need to be refined, depending on the marketing technique employed.¹⁵⁷ The EU's legislative competence in this field certainly remains limited, but it may not be inexistent. In any event, as Member States are all confronted to the need to regulate in-school marketing, there is a strong case that the Commission should support their action by coordinating research into the effects of this marketing technique on children and how best to address the issue, and by facilitating the exchange of best practice and monitoring its effectiveness.¹⁵⁸

This chapter has, so far, established that despite the restrictive wording of Article 168 TFEU, the EU has some competence to act in relation to obesity prevention, and even has a duty to do so in light of the scope of the epidemic and the EU's mandate to ensure a high level of public health protection in all its policies. Nevertheless, it must act in accordance with the rule that, if a measure is concerned with public health without pertaining to any other fields of EU competence, Article 168(5) TFEU prevents the EU from adopting legislative measures harmonizing the laws of the Member States. An intervention based on a soft law approach is however not excluded, through the adoption of EU recommendations and other guidelines for action.

4. Obesity Prevention and International Cooperation

Finally, Article 168 TFEU explicitly requires that the EU and its Member States foster international cooperation, in particular with the competent international organizations in the sphere of public health.¹⁵⁹ This is crucial in relation to obesity in light of the consensus that only a coordinated approach involving all levels of governance is likely to solve the problems associated with this health condition.

This book is not intended to examine the relations of the EU with the wider world.¹⁶⁰ The following paragraphs only purport to offer an overview of the relationship which the EU has developed with the WHO in an attempt to foster international cooperation on health matters, and on overweight and obesity prevention more specifically.

The European Commission has had long-standing bilateral relations with the WHO. Following the entry into force of the Amsterdam Treaty in 1999, and the

157. GMV Conseil, *Study on Commercial Practices in Schools* (Brussels: DG SANCO, European Commission, October 1998), <ec.europa.eu/dgs/health_consumer/library/surveys/sur03_en.html>.

158. See the Commission's Obesity Prevention Green Paper, COM (2005) 637 final, discussed in Ch. 2 above.

159. Article 168(3) TFEU.

160. P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004).

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development of an EU competence in the area of public health, this cooperation was strengthened:

The Commission and the WHO have roles and duties, which extend world-wide. Whilst their nature, means and procedures are different, they have nevertheless common interests in a large number of areas related to health. Above all they are both committed to striving for a high level of human health protection and health improvement. From their effective cooperation in this changed and changing world a lot of good can be derived not only for the Member States of the European Union which are all members of the WHO but also for the other countries which are represented at the WHO. Member States of the [EU] and those of the WHO have repeatedly stressed the need for such cooperation and the desire to avoid any unnecessary duplication in effort while pursuing common objectives.¹⁶¹

This statement was accompanied by the publication of a Memorandum organizing the bilateral cooperation of the EU and the WHO, setting out priorities and means of collaboration and highlighting the importance of exchanging best practice. With regard to obesity more specifically, both the WHO and the EU have called for the need to develop multi-level, multi-sectoral, multi-stakeholders evidence-based strategies and have organized regular joint meetings of senior officials representing both organizations to this effect. The cooperation extends to planning obesity prevalence surveys. The seventh official meeting of senior officials of the European Commission and the WHO held in October 2008 emphasized the importance of carrying out more work relating, in particular, to nutrition and food quality.¹⁶²

To ensure the exchange of best practice with regard to obesity the WHO has been granted observer status and attends EU Platform and High Level Group meetings.¹⁶³ Similarly, the EU has played an integral role in the development of the WHO European Charter on Counteracting Obesity, published in November 2006.¹⁶⁴

The existence of similar priorities has led to common projects, financed jointly by both organizations.¹⁶⁵ In particular, the EU and the WHO have invested to

161. See the exchange of letters between the WHO and the European Commission concerning the consolidation and intensification of cooperation, 2000, OJ 2001 C1/04, at 1.

162. For the minutes of the meeting held in Brussels on 23 and 24 Oct. 2008, see <ec.europa.eu/health/ph_international/int_organizations/docs/ev20081023_mi_en.pdf>.

163. On the roles of these fora, see Ch. 2 above.

164. At that time, only the EC rather than the EU as a whole had legal personality. Thus, only the EC could ratify international conventions. Following the entry into force of the Lisbon Treaty, the EU has replaced the EC and now enjoys legal personality (Art. 47 TEU). The EU also convened a public/private partnerships meeting during the Charter conference and flew in EU Platform members to participate in the events in Istanbul.

165. For example, on 28 Mar. 2007, DG SANCO and the Regional Office for Europe of the WHO held a joint signing ceremony in Brussels for a new round of collaborative projects covering European health policy priorities on environment and health, injuries, equity in health, health security, health services, alcohol and emergency medical services, to be implemented over a

collect reliable health-related information and set up databases of comparable data intended to inform policy making, not least the database on physical activity.¹⁶⁶

Furthermore, the EU and the Regional Office for Europe of the WHO both contribute to the European network for the promotion of health-enhancing physical activity (HEPA). HEPA Europe is a collaborative project which works for better health through physical activity among all people, by strengthening and supporting efforts to increase participation and improve the conditions for healthy lifestyles, in particular by promoting physical activity as a healthy means for sustainable transport. The objectives of HEPA Europe are:

- to promote a better understanding of HEPA and give a stronger voice to physical activity promotion in health policy and in other relevant sectors in Europe;
- to develop, support, and disseminate effective strategies and multi-sectoral approaches in the promotion of HEPA;
- to foster the preservation and creation of social and physical environments as well as values and lifestyles supportive of HEPA; and
- to improve coordination in physical activity promotion across sectors and administrative structures.

The focus is placed on population-based approaches for the promotion of HEPA, using the best available scientific evidence. All activities of HEPA Europe are based on WHO policy statements, such as the Global Strategy for Diet, Physical Activity and Health, the European Charter on Counteracting Obesity, and on corresponding statements from the European Commission. Network activities emphasize cooperation, partnerships and collaboration with other related sectors, networks and approaches. Membership is open to organizations and institutions active at the international, national or sub-national level willing to contribute to the goals and objectives of the network, including:

- government bodies such as ministries and agencies at the national and sub-national level involved with the promotion of HEPA (e.g., Ministries of Health, Sports, Education, Transport, agencies for health promotion, etc.);
- research and other scientific institutions;
- NGOs;
- other institutions or organizations active in a related field; and
- interested individuals (upon invitation from the Steering Committee).¹⁶⁷

Apart from the joint projects involving technical and financial cooperation as well as the exchange of best practice on issues of common interest, the representation of

period of three years. The overall budget of the package is EUR 4,232,963. The EU Public Health Programme covers 60% of the cost. The statement is available at <ec.europa.eu/health/ph_international/int_organizations/final_statement.pdf>.

166. See Ch. 8 below for more information.

167. <www.euro.who.int/hepa>.

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the EU in the WHO allows the Union to influence WHO policy and even ratify WHO instruments and thus participate in the development of international health law.¹⁶⁸ The Framework Convention on Tobacco Control of 2003 (the FCTC is the first ever global public health treaty)¹⁶⁹ and the International Health Regulations of 2005¹⁷⁰ provide good examples of what the WHO has achieved in recent years. In light of repeated calls for action on the part of a wide range of stakeholders, recommendations have just been adopted on the marketing of food and non-alcoholic beverages to children.

In Resolution WHA60.23 on 'Prevention and Control of Noncommunicable Diseases: Implementation of the Global Strategy', the World Health Assembly requested the Director-General to promote initiatives aimed at implementing the Global Strategy with the purpose of increasing availability of healthy food and promoting healthy diets and healthy eating habits and to promote responsible marketing including the development of a set of recommendations on the marketing of foods and non-alcoholic beverages to children, in order to reduce the impact of foods high in saturated fats, trans-fatty acids, free sugars or salt, in dialogue with all relevant stakeholders, including private sector parties, while ensuring avoidance of potential conflict of interest.

As a result, the WHO convened a Forum and Technical Meeting on marketing food and non-alcoholic beverages to children in Oslo in May 2006:

- the Forum reviewed the current state of knowledge regarding the influence of marketing, including advertising of foods and non-alcoholic beverages on children's dietary choices;
- it discussed the implications of this influence on children's nutritional status; and
- it reviewed national experiences and actions taken by various stakeholders to address the issue.

Forum participants included representatives of: health and consumer groups, food and advertising industry trade associations, ministries of health, UN agencies, European Commission and academics. A Technical Meeting was held after the Forum. It was attended by academics and representatives of ministries of health, UN agencies and the European Commission. During the Technical Meeting, working groups reviewed and discussed the current state of knowledge on the influences of marketing on dietary choices, the management and limitation of the negative influences of marketing and advertising of foods and non-alcoholic beverages on children's dietary choices; and the possible roles stakeholders could play. The WHO developed a set of recommendations on the marketing of food and non-alcoholic beverages to children which were endorsed at the Sixty-third World

168. On the effect of international conventions in the EU legal order, see P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2005), in particular Ch. 11.

169. <www.who.int/fctc/en/index.html>.

170. <www.who.int/features/qa/39/en/index.html>.

Health Assembly in May 2010 through Resolution WHA63.14, which calls on all 193 WHO Contracting Parties to reduce both the exposure of children to food marketing and the impact it has on them.¹⁷¹

Finally, the EU is a member of the Codex Alimentarius. The Codex Alimentarius was set up in 1963 as a joint instrument of the FAO and the WHO. Its primary purpose is to protect the health of consumers and to ensure fair practices in international food trade; to this effect, it develops food safety standards which serve as a reference for international food trade.¹⁷² The standards and guidelines of the Codex represent the consensus reached through discussion between its members,¹⁷³ which include the EU and its Member States. The EU and the Member States attempt to present joint comments on the issues discussed in Codex Committees which fall within the scope of EU competence. International NGOs from industry and food/health/consumer associations may ask to attend the annual meetings of Codex committees as observers.

Certain aspects of the work of the Codex Commission is relevant to the EU's obesity prevention strategy.¹⁷⁴ In particular, the Committee on Food Labelling develops guidelines on food claims. The General Guidelines on Claims, developed in 1979, establish general principles to ensure that no food is described or presented in a manner that is false, misleading or deceptive.¹⁷⁵ Specific claims are prohibited, notably those which:

- imply that any given food will provide an adequate source of all essential nutrients;
- imply that a balanced diet or ordinary foods cannot supply adequate amounts of all nutrients;
- cannot be substantiated; and
- imply the suitability of a food in the prevention, alleviation, treatment or cure of a disease, disorder or particular physiological condition, unless specifically allowed for by a Codex standard or guideline, or by national legislation.

171. For information on the consultation process and relevant documents, see <www.who.int/dietphysicalactivity/marketing-food-to-children/en/index.html>. The content of Resolution WHA63.14 is discussed more fully in Ch. 5 below.

172. For information on the Codex Alimentarius, see <www.codexalimentarius.net/web/index_en.jsp>. Although the implementation of the Codex Alimentarius is voluntary, the World Trade Organization (WTO) Agreement on Sanitary and Phytosanitary Measures considers that WTO members applying the Codex Alimentarius standards meet their obligations under this Agreement.

173. Now 183: 182 member countries and one member organization (the EU).

174. The Codex Alimentarius Commission's strategic plan for 2008–2013 mentions explicitly the need to review and develop Codex standards and related texts for food labelling and nutrition, taking into account scientific and technological developments and the WHO Global Strategy on Diet, Physical Activity and Health (at para. 1.3), <[ftp://ftp.fao.org/codex/Publications/StrategicFrame/Strategic_En.pdf](http://ftp.fao.org/codex/Publications/StrategicFrame/Strategic_En.pdf)>.

175. CAC/GL 1-1979, Rev. 1–1991.

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The General Guidelines on Claims have been supplemented by the Guidelines for Use of Nutrition and Health Claims.¹⁷⁶

The cooperation of the EU with the WHO can therefore take a variety of forms. It has intensified in recent years so as to address overweight and obesity in line with the common principles for action which the two organizations have developed.¹⁷⁷

II. OBESITY PREVENTION AND THE EXERCISE OF EU POWERS: THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

Once it is established that the Union has the competence to act in a given policy area, the questions arise, firstly, whether it should exercise its powers and, secondly, how it should do so. These questions are embodied in the principles of subsidiarity and proportionality, respectively, which are constitutional principles of the EU legal order and which are, as such, subject to judicial review under Article 263 TFEU (ex-Article 230 EC). The principle of subsidiarity relates to the question whether or not the EU should exercise its regulatory powers, whereas the principle of proportionality relates to the question of the intensity of EU intervention. These two principles work in tandem.

The role of the principles of subsidiarity and proportionality in the EU legal order can be assessed from two points of view: during the legislative process

176. CAC/GL 23-1997, as amended in 2004 and 2009. EU legislation on nutrition and health claims was adopted in December 2006 and is discussed in Ch. 4 below. It is only in 2009 that health claims were finally included in the Codex Guidelines. They were originally included in the scope of the Guidelines for Use of Nutrition Claims. Nevertheless, disagreement among members of the Codex Committee on Food Labelling led to their removal (except those concerning nutrient function) from the draft Guidelines for Use of Nutrition Claims and to the deferral of discussion in order not to compromise the adoption of the draft. The disagreement centred on health claims referring to disease. There was consensus that disease/cure claims should be prohibited, but positions varied widely over permitting references to disease or disease reduction. After six years of further discussions, the Codex Committee on Food Labelling agreed, at its 31st Session in 2003, to forward draft guidelines on the use of health claims to the Codex Alimentarius Commission for official adoption. The draft guidelines would have defined and permitted nutrient function, other function and reduction of disease risk claims under certain conditions. However, the Commission did not accept the draft, which was then returned to the Food Labelling Committee for further consideration. The key area of disagreement was over the application of the guidelines to the use of health claims in food advertisements as well as on food labels. For more information, see the Commission's discussion paper on food labelling and advertising. Available at <europa.eu/comm/food/fs/ifsi/eupositions/ccfl/ccfl_cl2005_item8_en.pdf>.

177. Some discussion groups have also been set up to favour bilateral cooperation. This is notably the case of the Trans Atlantic Consumer Dialogue, the forum of US and EU consumer organizations which develops and agrees on joint consumer policy recommendations to the US government and the EU to promote the consumer interest in EU and US policy making. More information is available at <www.tacd.org/>.

(*ex-ante*) and once legislation has been adopted (*ex-post*). This section considers each of these two principles in turn from both points of view.

A. THE PRINCIPLE OF SUBSIDIARITY

Subsidiarity refers to the state of being subsidiary. In EU jargon, the concept of subsidiarity is designed to act as ‘a constitutional safeguard of federalism in limiting the exercise of powers granted to the European Union’.¹⁷⁸ To this effect, Article 5(1) TEU provides that ‘the use of Union competences is governed by the principles of subsidiarity and proportionality’. Article 5(3) TEU states that ‘under the principle of subsidiarity, 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 level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’.¹⁷⁹ It is relevant only in areas of shared and supporting competence between the EU and its Member States: in areas where the competence is exclusive either to the EU or to Member States, the principle does not apply.

Article 5(3) TEU expressly refers to the ‘Protocol on the Application of the Principles of Subsidiarity and Proportionality’.¹⁸⁰ This protocol, which is a revised version of the protocol that the Amsterdam Treaty had introduced,¹⁸¹ is intended to establish the conditions for the application of the principles of subsidiarity and proportionality with a view to defining more precisely the criteria for applying them and to ensure their strict observance and consistent implementation by all institutions.

Article 5 of the Old Protocol required that all measures be expressly justified with regard to the principles of subsidiarity and proportionality which meant that the Commission had to ‘justify the relevance of its proposals with regard to the principle of subsidiarity; wherever necessary, the explanatory memorandum accompanying a proposal will give details in this respect’.¹⁸² The Council and the Parliament had to consider the consistency of the Commission’s proposals with the principles of proportionality and subsidiarity.¹⁸³ Impact assessments had to be

178. R. Schütze, ‘Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?’, *Cambridge Law Journal* 68 (2009): 643. See fn. 2 of this article for selected academic references on the principle of subsidiarity.

179. See also the Preamble to the TEU which provides that ‘decisions are taken as closely as possible to the citizen’.

180. Protocol (N° 2) on the Application of the Principles of Subsidiarity and Proportionality (2008), OJ 2008 C115/201, at 206 (the New Protocol).

181. Protocol (N° 30) on the Application of the Principles of Subsidiarity and Proportionality (1997), OJ 2006 C321 E/308 (the Old Protocol).

182. Article 9 of the Old Protocol.

183. Article 11 of the Old Protocol.

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systematically relied upon to provide the necessary guidance on whether the principle of subsidiarity was duly upheld.

At the end of the day, the question remained who was to enforce this protocol. National courts did not (and still do not) have the powers to assess the legality of an EU act, as it would challenge the Court of Justice's position as 'Supreme Court of the EU'.¹⁸⁴ The Court of Justice has tended to scrutinize EU acts rather leniently as regards their compliance with the principle of subsidiarity. It has applied a 'manifest error' test. In the *Working Time Directive* case, for example, the UK challenged the validity of Directive 93/104, harmonizing certain aspects of the organization of working time.¹⁸⁵ One of the grounds for review was that 'the [EU] legislature neither fully considered nor adequately demonstrated whether there were transnational aspects which could not be satisfactorily regulated by national measures, whether such measures would conflict with the requirements of the [Treaties] or significantly damage the interests of Member States or, finally, whether action at [EU] level would provide clear benefits compared with action at national level'.¹⁸⁶ The Court rejected the UK's contention, stating that 'the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments . . . Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion'.¹⁸⁷ Consequently, even though the principle of subsidiarity is justiciable, the Court has so far refused to scrutinize its application in any detail.¹⁸⁸

Political institutions have therefore been the main guardians of the Union's compliance with the principle of subsidiarity. This has led certain commentators to express the view that subsidiarity has not been taken very seriously by European constitutionalism.¹⁸⁹

The New Protocol brings about a significant change, 'giving teeth to the principle of subsidiarity . . . by entrusting national parliaments with responsibility

184. Article 263 TFEU.

185. OJ 1993 L307/18.

186. Case C-84/94 *UK v. Council* [1996] ECR I-5755, at para. 46. Other aspects of this case (competence issue, scope of Art. 137 TFEU, meaning of health and safety at work, minimum harmonization) are discussed in Ch. 8 below.

187. Case C-84/94 *UK v. Council* [1996] ECR I-5755, at para. 58.

188. As Gérard Lyon-Caen stated, 'subsidiarity can cut both ways': G. Lyon-Caen, 'Subsidiarity', in P. Davies, A. Lyon-Caen, S. Sciarra & S. Simitis (eds), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton* (Oxford: Oxford Clarendon Press, 1996), at 49. For a more careful language, see the recent judgment of the Court in the *Roaming Regulation* case: 'the [EU] legislature could legitimately take the view that it had to intervene at the level of retail charges as well. Thus, by reason of the effects of the common approach laid down in Regulation 717/2007, the objective pursued by that regulation could best be achieved at [EU] level.' (Case C-58/08 *Vodafone and others* [2010] ECR I-xxx, judgment of 8 Jun. 2010, not yet reported, at para. 78.

189. G. Berman, 'Proportionality and Subsidiarity', in C. Barnard & J. Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Oxford: Hart Publishing, 2002), at 86.

for monitoring its application'.¹⁹⁰ To that end, it establishes a yellow-card mechanism.¹⁹¹ Under this system, each national parliament can produce a reasoned opinion stating if it considers that a European legislative proposal infringes the principle of subsidiarity. Where at least one-third of national parliaments objects, the proposal must be formally reviewed.¹⁹² After the review, the body that has produced the proposal must decide whether to maintain, amend or withdraw the draft, providing reasons for its decision.¹⁹³ If, however, it is decided to maintain the proposal, a simple majority of voting MEPs or 55% of Council members which believe that the proposal infringes the principle of subsidiarity are required to stop the legislative proposal.¹⁹⁴ The question of how powerful the yellow-card mechanism will be in practice remains to be seen. What happens if the initiator of an act amends the disputed act without addressing the issues raised in the reasoned opinions is unclear.¹⁹⁵ A literal reading of the New Protocol suggests that national parliaments will have no power under the yellow-card mechanism to stop the proposed measure on this ground.¹⁹⁶ Furthermore, it is unclear whether national parliaments will be able to deal with all measures which are communicated to them within the eight-week period allocated.¹⁹⁷ In any event, the New Protocol should nonetheless lead to a higher degree of scrutiny of the compliance of the EU legislature with the principle of subsidiarity not only *ex ante* but also *ex post*, as national parliaments have been granted the necessary powers to initiate an annulment action if they believe that the principle of subsidiarity has been infringed.¹⁹⁸

The Obesity Prevention White Paper has explicitly acknowledged that several of the measures required to prevent overweight and obesity may be more effective if they are adopted at a national or even at a local level – a view which the Committee of the Regions has explicitly reinforced.¹⁹⁹ The measures relating to

190. M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', *Common Market Law Review* 45 (2008): 617, at 659.

191. Articles 6 and 7 of the New Protocol. For more regarding the changes which the Lisbon Treaty has introduced with respect to the principle of subsidiarity, see S. Weatherill, 'Using National Parliaments to Improve Scrutiny of the Limits of EU Action', *European Law Review* 28 (2003): 909; R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', *Cambridge Law Journal* 68 (2009): 643; I. Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU', *Journal of Common Market Studies* 44 (2006): 281.

192. Article 7(2) of the New Protocol.

193. Article 7(2) of the New Protocol.

194. Article 7(3)(b) of the new Protocol.

195. See M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', *Common Market Law Review* 45 (2008): 617, at 660.

196. Under Art. 7(3)(b) of the New Protocol, the termination of the legislative procedure applies only if the initiator of an act maintains its original proposal without amendments.

197. Article 6(1) of the New Protocol.

198. Article 263 TFEU.

199. Committee of the Regions, Opinion of the Commission for Sustainable Development on 'A Strategy for Europe on Nutrition, Overweight and Obesity Related Health Issues', OJ 2008 C105/34.

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the establishment of an EU School Fruit Scheme provide a good example of how the principle of subsidiarity comes into play. Under this Scheme, which is discussed more fully in Chapter 7 below, Member States wishing to make use of the Scheme, at national or at regional level, must draw up a prior strategy and provide for the accompanying measures necessary to make the Scheme effective. Each national strategy, which is financed primarily by Member States, must lay down the manner in which a School Fruit Scheme can best be implemented and integrated into the school curriculum. The aim is to ensure that such a strategy is tailored to national preferences, in conformity with the principle of subsidiarity: EU intervention must cease where it does not add value to action defined at national or local level.²⁰⁰ More generally, the EU must determine, before adopting any measure, whether it should abstain from interfering with national choices, notwithstanding the fact that it may have the required competence to act under Article 5(1) TEU.

B. THE PRINCIPLE OF PROPORTIONALITY

Proportionality refers to the intensity or scale of EU action. It is only if its intervention is necessary that the EU should act. Article 5(4) TEU provides that ‘under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’, and the New Protocol adds that ‘draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved’.²⁰¹

The principle of proportionality requires that the means should be appropriate for attaining the objective pursued and should not go beyond what is necessary to achieve it. It therefore requires that account be taken of the means proposed to achieve the objective of a given measure and that their impact on competing interests be considered in the balancing exercise.²⁰² As discussed below, however, the Court of Justice leaves a broad margin of discretion to EU institutions exercising their law-making powers. It is therefore all the more important that the proportionality of a measure is assessed *ex ante* as part of the law-making process, in particular through the use of rigorous impact assessments.

The regulation of advertising provides a good example of how the Court has interpreted the principle of proportionality. This example is all the more valuable as it could be transposed to food advertising more specifically and therefore illustrates the importance of the proportionality principle in the development of the Union’s obesity prevention strategy.

200. On the School Fruit Scheme, see Ch. 7 below. On the role which schools can play as a priority setting in obesity prevention strategies, see the case study below.

201. Article 5(4) TEU read together with Art. 5 of the New Protocol.

202. See, *inter alia*, Case 137/85 *Maizena and Others* [1987] ECR 4587, at para. 15; Case C-339/02 *ADM Ölmühlen* [1993] ECR I-6473, at para. 15; and Case C-210/00 *Käserer Champignon Hofmeister* [2002] ECR I-6453, at para. 59.

Several stakeholders have called for a ban or at least the strict regulation of unhealthy food advertising to children as an important measure to reverse current overweight and obesity trends. As discussed more fully in Chapter 5 below, the food and advertising industries have objected to these proposals on several grounds. In particular, they have argued that obliging them to alter their marketing practices would limit their freedom to promote their goods and therefore negatively affect their fundamental right to free expression. It is therefore necessary to determine the extent to which the EU can invoke the protection of public health to regulate the marketing of unhealthy food to children and how it would balance competing claims. As discussed above, however, this question presupposes that the forms of marketing at stake have a cross-border effect granting the EU the necessary competence to act in the first place.

The *Tobacco Advertising* litigation offers some useful indications on how the Court of Justice assesses the proportionality of EU measures, and EU measures imposing advertising restrictions more specifically. As stated above, Germany had challenged the tobacco advertising directives of 1998 and 2003 on a variety of grounds. In the first case, the Court did not need to discuss the question whether the measure infringed the principle of proportionality, since it held that the EU lacked the competence to adopt the 1998 directive, and annulled the measure in its entirety. In the second case, however, the Court held that by adopting the 2003 directive the EU legislature had not infringed the principle of conferral. It was therefore necessary to assess the other arguments put forward by Germany, including whether the measure had been adopted in violation of the principle of proportionality.

The Court of Justice held, on the basis of its settled case law, that the principle of freedom of expression was a fundamental right protected as a general principle of EU law. Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, it draws upon the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights (ECHR) has special significance in that respect.²⁰³ Under Article 10(1) ECHR, ‘everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’. The case law of the European Court of Human Rights²⁰⁴ indicates that all forms

203. See, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, para. 41; Case C-274/99 P *Connolly v. Commission* [2001] ECR I-1611, para. 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, at para. 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, at para. 71; and Case C-71/02 *Karner* [2004] ECR I-3025, at para. 48.

204. For the readers who are not familiar with EU law, it is important to note that the European Court of Human Rights is a different entity from the CJEU. The European Court of Human Rights is seated in Strasbourg and is the Court of the Council of Europe. Its main task is to adjudicate violations of the ECHR. The CJEU is seated in Luxembourg and is the Court of the EU.

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of expression are protected under this provision, including commercial expression which consists in the provision of information, expression of ideas or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communications.²⁰⁵ Individuals' freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the EU context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on *any* topic, including the merits of the goods or services which they market or purchase. Commercial expression must therefore be protected in the EU legal order.

Nevertheless, the Court has also confirmed that the exercise of freedom of expression may be subject to certain restrictions in order to secure the enjoyment of rights by others or the achievement of certain objectives in the public interest, including public health protection. This is all the more justified as commercial expression is regarded as a lesser form of expression than political, journalistic, literary or artistic expression.²⁰⁶

To restrict the freedom of commercial operators to promote their goods and services, the relevant public authority must establish that such restriction is in accordance with the law, motivated by one or more of the legitimate aims under that provision and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.²⁰⁷

In its second *Tobacco Advertising* judgment, the Court of Justice recalled its settled case law that the Union's legislature must be allowed a broad margin of discretion in areas which entail political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.²⁰⁸ In its earlier ruling in the *Karner* case, the Court had added

205. See, for example, *Markt Intern v. Germany*, judgment of 20 Nov. 1989, Series A, N°. 165, at paras 25 and 26; *Groppera v. Switzerland*, judgment of 28 Mar. 1990, Series A, N°. 173, at para. 55; *Casado Coca v. Spain*, judgment of 24 Feb. 1994, Series A, N°. 285, at paras 35 and 36.

206. Article 10(2) ECHR as interpreted by the ECtHR. Political, journalistic, literary or artistic expression contribute to a larger extent, in a liberal democratic society, to the achievement of social goods such as, for example, the enhancement of democratic debate and accountability or the questioning of current orthodoxies with a view to furthering tolerance or change. By contrast, commercial expression only promotes economic activity.

207. See, to this effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, at para. 26; Case C-60/00 *Carpenter* [2002] ECR I-6279, at para. 42; Case C-112/00 *Schmidberger* [2003] ECR I-5659, at para. 79; and Case C-71/02 *Karner* [2004] ECR I-3025, at para. 50.

208. See, to this effect, Case C-84/94 *United Kingdom v. Council* [1996] ECR I-5755, at para. 58; Case C-233/94 *Germany v. Parliament and Council* [1997] ECR I-2405, at paras 55 and 56; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, at para. 61; *British American Tobacco (Investments) and Imperial Tobacco*, at para. 123; Case C-71/02 *Karner* [2004] ECR I-3025, at para. 51.

that it would be reluctant to intervene with the margin of discretion left to competent authorities in relation to the commercial use of freedom of expression, ‘particularly in a field as complex and fluctuating as advertising’.²⁰⁹ On this basis, the Court stated in *Tobacco Advertising II*:

In the present case, even assuming that the measures laid down in Articles 3 and 4 of the Directive prohibiting advertising and sponsorship have the effect of weakening freedom of expression indirectly, journalistic freedom of expression, as such, remains unimpaired and the editorial contributions of journalists are therefore not affected. It must therefore be found that the [EU] legislature did not, by adopting such measures, exceed the limits of the discretion which it is expressly accorded. It follows that those measures cannot be regarded as disproportionate.²¹⁰

The Court’s reasoning is strikingly brief and, as such, differs markedly from the reasoning of Advocate General Fennelly on exactly the same point in the first *Tobacco Advertising* case and that of Advocate General Léger in the second *Tobacco Advertising* case. Two points should be underlined. First, it is the public authority wishing to impose advertising restrictions that should bear the burden of establishing that the measure is necessary and that no measures exist which are less restrictive of trade and of the freedom of commercial operators to promote their goods and services. Secondly, the Court of Justice must scrutinize the evidence presented to ensure that the public health argument put forward to justify advertising restrictions is convincing and does not rely on mere assumptions. Very often, such evidence will exist and will support the case put forward by public authorities wishing to restrict the advertising of certain goods or services whose excessive consumption is detrimental to good health.

For example, the rationale for the Tobacco Advertising Directive is that consumption of tobacco products is dangerous for the health of smokers and – one could add – for people around them; that the advertising and sponsorship of tobacco products promote such consumption; and that the prohibition of those forms of expression will result in a reduction in tobacco consumption and, thus, improved public health.²¹¹ The damage caused to health by smoking has not

209. Case C-71/02 *Karner* [2004] ECR I-3025, para. 51. The Court of Justice mentioned Case C-245/01 *RTL Television* [2003] ECR I-0000, para. 73; judgments of the ECHR of 20 Nov. 1989, *Markt Intern Verlag GmbH and Klaus Beermann*, Reports of Judgments and Decisions Series A N°. 165, at para. 33; and of 28 Jun. 2001, *VGT Verein gegen Tierfabriken v. Switzerland*, Reports of Judgments and Decisions 2001-VI, at paras 69–70.

210. *Tobacco Advertising II*, at paras 156–158.

211. Recital 3 of the Preamble provides that ‘the legislation of the Member States to be approximated is intended to protect public health by regulating the promotion of tobacco, an addictive product responsible for over half a million deaths in the EU annually, thereby avoiding a situation where young people begin smoking at an early age as a result of promotion and become addicted’.

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been disputed in the *Tobacco Advertising* cases and Germany underlined its own desire to reduce consumption among its population. There has, however, been considerable debate over whether the prohibition of most forms of promotion of tobacco products can achieve a reduction in consumption of tobacco, rather than simply affecting competition between tobacco brands. The Court could have referred to the existing evidence supporting comprehensive bans on tobacco advertising and all other forms of promotion.²¹² In particular, it should have referred to the FCTC which calls upon its Contracting Parties²¹³ to recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products, and to undertake, in accordance with their constitutions or constitutional principles, a comprehensive ban of all tobacco advertising, promotion and sponsorship, including a cross-border advertising, promotion and sponsorship originating from their territories.²¹⁴

The Court of Justice should review existing evidence, rather than simply rule that the EU legislature has a broad margin of discretion. Ensuring that the choices of the EU legislature are reasonable in light of existing evidence does not mean that the Court would substitute its own assessment. If the EU legislature wishes to adopt a cautious approach, the Court should respect its decision. Nevertheless, this does not mean that it should feel exempted from its duty, as the EU's constitutional court, to review the proportionality of legislative measures: the burden of proving that a public health measure is proportionate rests on legislative authorities, and the Court must ensure that they have discharged this burden. Discretion is not to be equated with arbitrariness.²¹⁵

Furthermore, it is arguable that the application of a stronger standard of review by the Court of Justice will reinforce the constitutionality of advertising bans and ultimately lead to a higher level of public health protection. In light of the fact that the Court has allowed freedom of commercial expression to be restricted for public health reasons in several cases, it is tempting to suggest that the Court's case law has heralded a clear victory for public health over commercial expression. On the other hand, its insufficient and therefore unconvincing reasoning may cut both ways. Its refusal to engage fully with the proportionality assessment of restrictions imposed for public health reasons could have perverse results on the legislative

212. WHO Report on the Global Tobacco Epidemic, The MPOWER Package, Geneva, 2008, at 36–38, with references to a range of supporting studies, including studies carried out before the *Tobacco Advertising* Directive was adopted.

213. 168 to date, including the EU and its twenty-seven Member States.

214. Article 13.

215. For a comparison with the approach of US courts in similar cases, see A. Garde, 'Freedom of Commercial Expression and Public Health Protection in Europe', in C. Barnard & O. Odudu (eds), *Cambridge Yearbook of European Legal Studies* 12 (2009–2010), forthcoming: December 2010. See also J. Pomeranz, 'Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate', *Journal of Law, Medicine and Ethics* 38 (2010): 98.

process more generally, in that it does not encourage the EU legislature to justify its legislative choices. In other words, the excessively loose standard of review applied by the Court sends out the wrong message. A stricter standard of review would provide the necessary incentive for the EU legislature to improve *ex ante* mechanisms and ensure that the legislative measures they adopt are both as protective of public health and as respectful of fundamental rights as possible. The less the legislature does consider the balance and engage in a thorough assessment of competing interests, the stronger the possibility for commercial operators to claim that their freedom of expression has been unduly restricted and that they have been unfairly stigmatized.

Overall, the review exercised by the Court of Justice on the exercise of EU powers is rather minimal: if the Union's legislature has not manifestly exceeded the limits on its discretion, the Court will not annul the measure in question for infringement of the principles of subsidiarity or proportionality. It is therefore all the more important that stakeholders involved in policy making ensure that these principles are fully taken into account and complied with before legislation is adopted and that full impact assessments are carried out at the earliest possible stage in the legislative process and new evidence given due consideration during this process.

A Case Study: Schools as a Priority Setting

As discussed in Chapter 2 above, the European Commission has identified schools as a priority setting for overweight and obesity prevention strategies:

Childhood is an important period to instil a preference for healthy behaviours, and to learn the life skills necessary to maintain a healthy lifestyle. Schools clearly play a crucial role in this respect. This is also an area where there is already firm evidence of the effectiveness of intervention: studies show that locally focused actions, with very wide ownership, targeting 0–12 year olds will be effective in changing behaviour in the long run. Work should focus on nutrition education, and on physical activity.²¹⁶

Priority Groups and Settings: Schools bear a great responsibility in ensuring that children not only understand the importance of good nutrition and exercise but can actually benefit from both. They can be assisted in this through appropriate partnerships with private parties, including the business community. Schools should be protected environments and such partnerships should be undertaken in a transparent and non-commercial way.²¹⁷

216. Obesity Prevention White Paper, at 8.

217. Obesity Prevention White Paper, at 11.

These statements are in line with the position of the WHO which has called upon State Parties to develop and implement school policies and programmes that promote healthy diets and increase levels of physical activity:

School policies and programmes should support the adoption of healthy diets and physical activity. Schools are encouraged to provide students with daily physical education and should be equipped with appropriate facilities and equipment. Governments are encouraged to adopt policies that support healthy diets at school and limit the availability of products high in salt, sugar and fats.²¹⁸

The WHO has taken a range of global initiatives in the field of school health, several of which are specifically intended to counteract current overweight and obesity trends. In particular, it has published the School Policy Framework with a view to building upon existing knowledge and experience and to adding a global policy tool that focuses on governmental action to improve dietary patterns and increase physical activity in the school setting through changes in environment, behaviour and education.²¹⁹ Effective school interventions require the development of coherent and comprehensive policies containing several strands. The WHO has identified a range of policy options presented in the following categories:

- school recognition;
- school curriculum;
- food services environment;
- physical environment;
- health promotion for school staff; and
- school health services.²²⁰

The Global Strategy on Diet, Physical Activity and Health has also emphasized the importance of the active involvement of a range of stakeholders in achieving its objectives.²²¹ In light of the diversity of actions required to ensure that schools promote healthy lifestyles, this requirement is particularly relevant. The WHO has therefore identified governments (at national, regional and local level); teachers and other school staff; students; parents and families; the community at large (including international organizations, NGOs and the private sector) as having a role to play in making schools healthier.²²²

218. *Global Strategy on Diet, Physical Activity and Health* (Geneva: WHO, May 2004), at para. 49.

219. *School Policy Framework: Implementation of the WHO Global Strategy on Diet, Physical Activity and Health* (Geneva: WHO, 2008), <www.who.int/dietphysicalactivity/SPF-en-2008.pdf>.

220. *Ibid.*, at 8–24.

221. *Global Strategy on Diet, Physical Activity and Health* (Geneva: WHO, May 2004), at paras 34 and 44.

222. *School Policy Framework: Implementation of the WHO Global Strategy on Diet, Physical Activity and Health* (Geneva: WHO, 2008), at 25–32.

It is therefore necessary to determine the scope and nature of EU action in the school setting in light of the constitutional principles of conferral, subsidiarity and proportionality underpinning all intervention by the EU. To which extent can the EU contribute to the policy options identified by the WHO to promote healthy schools?

The starting point should be that the EU only has limited powers to contribute to the overall strategy required in the school setting. This clearly stems from Article 165 TFEU on education policy (ex-Article 149 EC):

1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity.

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

2. Union action shall be aimed at:
 - developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,
 - encouraging mobility of students and teachers, by encouraging *inter alia*, the academic recognition of diplomas and periods of study,
 - promoting cooperation between educational establishments,
 - developing exchanges of information and experience on issues common to the education systems of the Member States,
 - encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe,
 - encouraging the development of distance education,
 - developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organizations in the field of education, in particular the Council of Europe.
4. In order to contribute to the achievement of the objectives referred to in this Article:
 - the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt

- incentive measures, excluding any harmonization of the laws and regulations of the Member States,
- the Council, on a proposal from the Commission, shall adopt recommendations.

Article 165 TFEU is comparable to Article 168 TFEU on public health, to the extent that it explicitly excludes the legislative harmonization of national rules by the EU. Consequently, some of the key areas identified by the WHO will require action at national or local level. This is particularly true of the question of school curricula. The WHO has clearly indicated that both health education and physical education classes could be used to encourage healthy eating and physical activity. Nevertheless, determining the content of such classes, their frequency and their method of delivery is not within the Union's legislative competence. The same is true regarding the provision of school meals: both their organization and their nutritional content will have to be determined by national or local public authorities.

If Article 165 TFEU excludes all forms of legislative intervention, it nevertheless lays down the basis for an EU education policy through soft law mechanisms, including recommendations. In light of the fact that schools have been identified as priority settings to fight overweight and obesity across all EU Member States, the Union could finance research projects and facilitate the exchange of best practice on issues of common interest. Moreover, the Commission published a report on in-school marketing in 1998 laying down some criteria which schools and national policy makers should bear in mind when addressing the issue – though these criteria would gain in being more specific, as discussed above.

Several EU Platform commitments concern schools.²²³ For example, Media Smart is a media literacy programme for primary school children aged between 6 and 11 years old running from 2006 to 2010 in eight EU Member States.²²⁴ It is intended to teach children to think critically about advertising and provides free materials for schools using real examples of adverts.²²⁵ It is funded by the World Federation of Advertisers (WFA). The WFA is the organization representing the common interests of marketers worldwide. Through its network of fifty-five national advertiser associations on five continents and approximately fifty of the world's top 100 marketers, the WFA represents around 90% of global marketing communications, almost USD 700 billion annually. The

223. The EU Platform even devoted a full discussion session at its plenary meeting of July 2008 to Lifestyles and Education: see E. Millstone, EU Platform Working Paper on Lifestyles and Education, June 2008, <ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/docs/ev_20080702_wp_en.pdf>

224. Belgium, Finland, Germany, Hungary, the Netherlands, Portugal, Sweden and the UK.

225. For more information, see <ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/database/dsp_detail.cfm>.

purpose of the WFA is ‘to champion responsible and effective marketing communications worldwide’.²²⁶ Nevertheless, Media Smart has not gathered unanimous acceptance. In particular, the feedback from teachers who have used the material indicates somewhat mixed results and questions its long-term impact.²²⁷

More generally, even though a large share of EU Platform actions relates to lifestyle and education, one may question the consistency, and therefore the effectiveness, of the messages sent to children: on the one hand, children receive nutrition education ‘aimed at achieving a voluntary change in nutrition related behaviour to improve the nutritional status of the population’; on the other hand, they receive conflicting information if food advertising is not strictly regulated and if school vending machines selling unhealthy food are allowed on school premises. The risk is compounded by the fact that food commercial communications are not systematically regulated by law and are often left to self-regulation. It is interesting to note that the resistance to reducing marketing to children has been enormous; the contrast with the enthusiasm for providing ‘consumer education’ to children is striking. Cynically, one could argue that this notion of consumer education is a means to control the messages sent to children as part of a damage limitation strategy and to align the brands concerned with a ‘virtuous’ image of health promotion, with a halo effect.

The argument becomes more powerful when one considers the enthusiasm with which food business operators have sponsored a few school sport events – a convenient way to ensure that public attention focuses on their positive role in promoting physical activity rather than on their reluctance to curb food marketing to children. It remains that food marketing affects all European children, while the sponsorship of sport events only benefit a few. Vigilance is warranted to avoid convenient distraction from the wider issues. Therefore, the food industry should not be seen as the main actor in school obesity prevention programmes. The responsibility for developing a consistent, comprehensive approach to this public health issue lies above all with public authorities – the fact that their resources are sometimes inadequate should not modify this fundamental principle of risk management. If the importance of teaching children how to think critically and to apply their critical skills to commercial communications cannot be underestimated, the support of the Commission for projects such as Media Smart is rather difficult to grasp.

Apart from the exchange of best practice which the EU can facilitate on the basis of Articles 165 and 168 TFEU on education and public health, respectively, the question arises of the extent to which the EU could adopt legislative measures on the basis of other Treaty provisions to ensure that schools promote healthy

226. <www.wfanet.org/>.

227. E. Millstone, EU Platform Working Paper on Lifestyles and Education, June 2008, at 14.

lifestyles. The discussion on in-school marketing has shown that the EU may be able to regulate, on the basis of Article 114 TFEU, the extent to which food business operators should be granted access to schools. Schools must remain ‘non-commercial’, as the Obesity Prevention White Paper itself has acknowledged. Moreover, the EU has adopted a School Fruit Scheme and a School Milk Scheme allowing for the free distribution of fruit, vegetables, milk and other dairy products in schools as part of the Common Agricultural Policy.²²⁸

It is striking that the EU’s obesity prevention strategy must develop in a particularly complex regulatory environment. Not only does it require that a distinction be drawn between the areas where the EU has powers to intervene and those where action is left to Member States, but also between areas where the EU is entitled to adopt legally binding measures from those where it may only adopt persuasive soft law measures. Once it is established that the EU has legislative competence in a given field, it is then necessary to determine whether it should exercise its competence or whether action would be more effective at national level (subsidiarity assessment). It is only then that the intensity of EU action may be discussed (proportionality assessment). The second part of this book applies these principles to specific EU policies and discusses how a coherent and effective obesity prevention strategy could develop within this constitutional framework.

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228. See Ch. 7 below.

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