

# Using the Law to Prevent Obesity

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# Montevideo Conference, Oct. 2017

“WHO has a key role in providing sound advice about the interaction between the legal environment and NCDs. **We will promote policy expertise to develop NCDs responses in order to achieve the SDGs.** We call upon WHO with other relevant actors to **scale up and broaden work integrating legal issues into country support**, including supporting NCD interventions by providing evidence, **tracking legal challenges**, comparing laws and legal claims across jurisdictions, developing model laws and assisting countries in responding to legal challenges, including through support in implementing model laws, data and evidence gathering and tracking impact. We therefore encourage the UN Inter-Agency Task Force on NCDs to explore the possibility of establishing a UN Commission on NCDs and the Law.”

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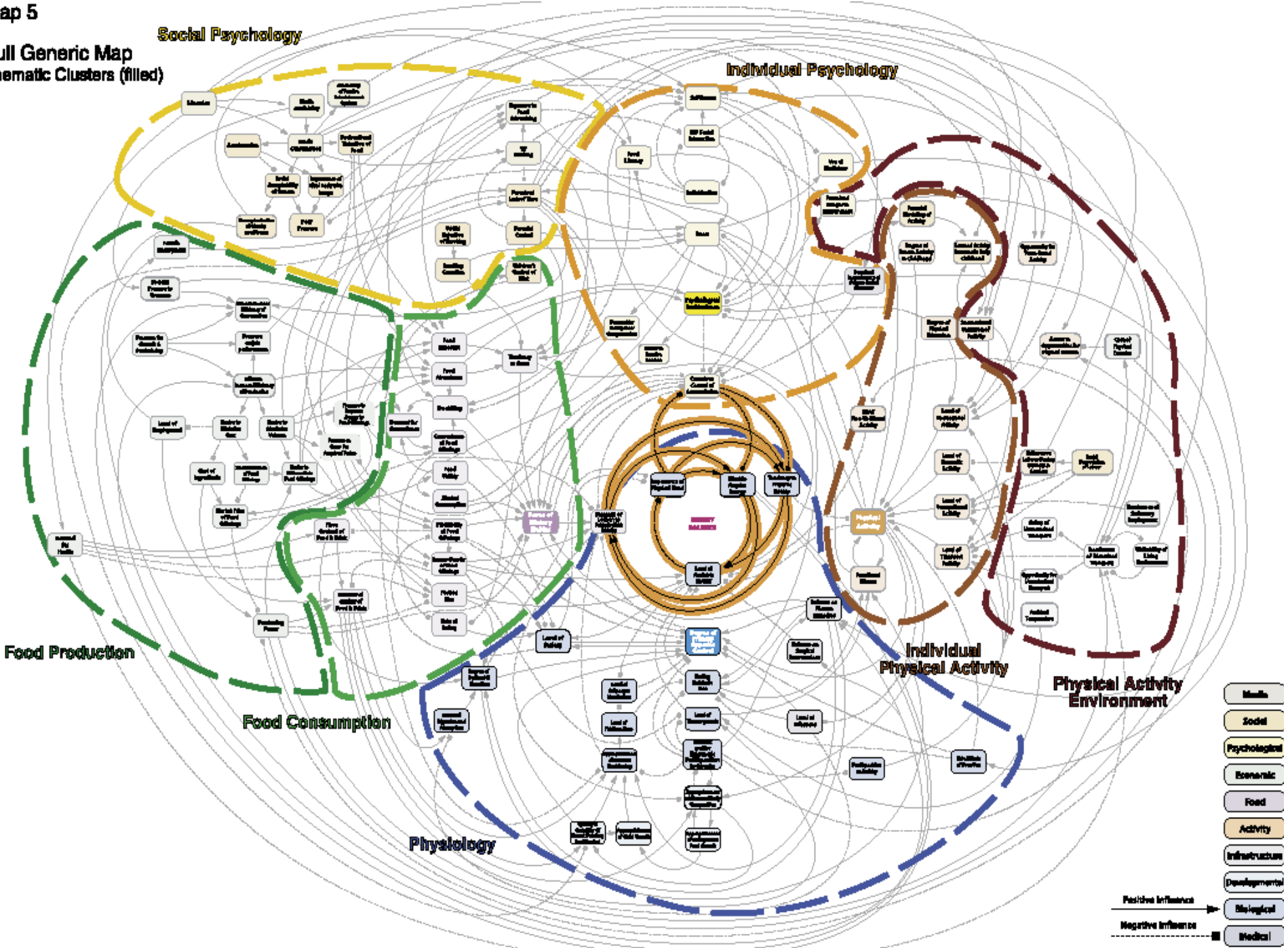
WHY?

**NCD is not exclusively a question of  
personal responsibility**



Map 5

Full Generic Map  
Thematic Clusters (filled)



# WHO Global NCD Action Plan 2013-2020

- Adopted **unanimously** on 27 May 2013 by the 194 States of the World Health Assembly
  - See WHA Resolution 66.10
- Builds on the UN Declaration of 2011
- Proposes **9 voluntary targets** and 25 indicators to be reached **by 2025**
- Implementation by Member States under review: progress to be assessed at UN High Level Meeting on NCDs in 2018

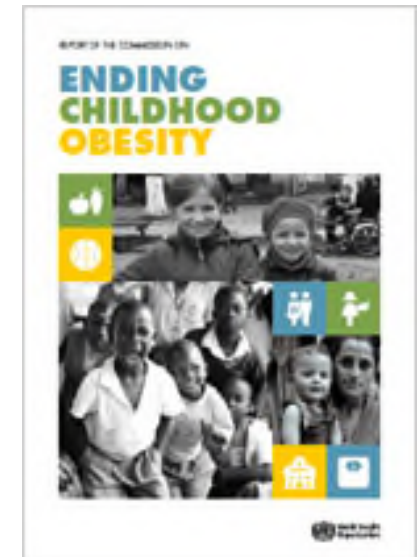


World Health Organization



**Governments can use their regulatory power to improve the food environment**, to enforce regulatory standards, to implement internationally-recognized standards such as the WHO International Code of Marketing of Breast-milk Substitutes, and the WHO Set of Recommendations on the Marketing of Foods and Non Alcoholic Beverages to Children.

**WE ARGUE THAT NOT ONLY THEY CAN BUT THEY SHOULD**



# The “Regulatory Mix”

- **Recognition that law can help change behaviour** (fiscal and other legislative measures) through the adoption of evidence-based, cost-effective, population wide and multisectorial intervention
  - **Law is part of a broader mix of policy interventions** (education measures, public health campaigns...)
- Law is **not a panacea** but it is **a key instrument** in the development and implementation of effective obesity prevention strategies



# Areas of possible regulatory intervention

- Provision of **consumer information** (disclosure requirements, regulation of food claims)
- Provision of **consumer education** via school curricula
- Regulation of **public procurement** (canteen menus)
- Imposition of **marketing restrictions** (unhealthy food, infant food)
- Use of **economic instruments** (taxation, subsidies)
- Product **reformulation** (trans fat elimination, salt and sugar reduction)
- Limiting **product size**
- **Licensing** requirements
- Imposition of **age limits** (sale of energy drinks)

## ADVANTAGES OF LAW

- Of general application
- Binding
- Generally adopted through a **democratic process** after consultation of relevant stakeholders
- Adopted **in the public interest**
- **Enforced** and accompanied by effective sanctions
- Subject to a requirement to state reasons and subject to **judicial review**

## LIMITS OF LAW

- **Lengthy, often resource intensive process**
- Laws may be **slow to react** to an already existing problem
- **Often jurisdiction-specific**

Laws generally apply in a **given jurisdiction** whereas industry often operates at regional or global level → **necessary to manage the risk of fragmentation**

- Overall, it has proven rather **difficult to galvanise political will to regulate to better prevent NCDs**
- **BUT** we may arguably witness a **growing momentum**

# The ambivalent status of the alcohol and food industries



# A Discredited Tobacco Industry

- **Article 5(3) FCTC:**
  - “In setting and implementing their public health policies with respect to tobacco control, **Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry** in accordance with national law.”

# **‘No conflicts of interest or undue influence from commercial operators’**

## **WHO Global Strategy on Diet and Physical Activity (2004)**

- **Main objective:** to challenge the food industry to do more to improve nutrition and help prevent obesity
- But **ambiguity** concerning the involvement it foresees for food businesses
- Encourages governments to establish mechanisms to promote their participation in activities related to diet, physical activity and health
- **PREMISE:** the food industry can play a positive role in preventing obesity worldwide, even though undefined



# IFBA Members



‘IFBA member companies represent the global leaders of the food and non-alcoholic beverage industry. We employ more than 3.5 million people worldwide and had combined annual revenues in 2015 of approximately USD 397 billion’

(NB: EU FOOD INDUSTRY employed 4.2 million people and had a turnover of EUR 1,244 billion in 2014)

## **IFBA – ‘Our Commitments’**

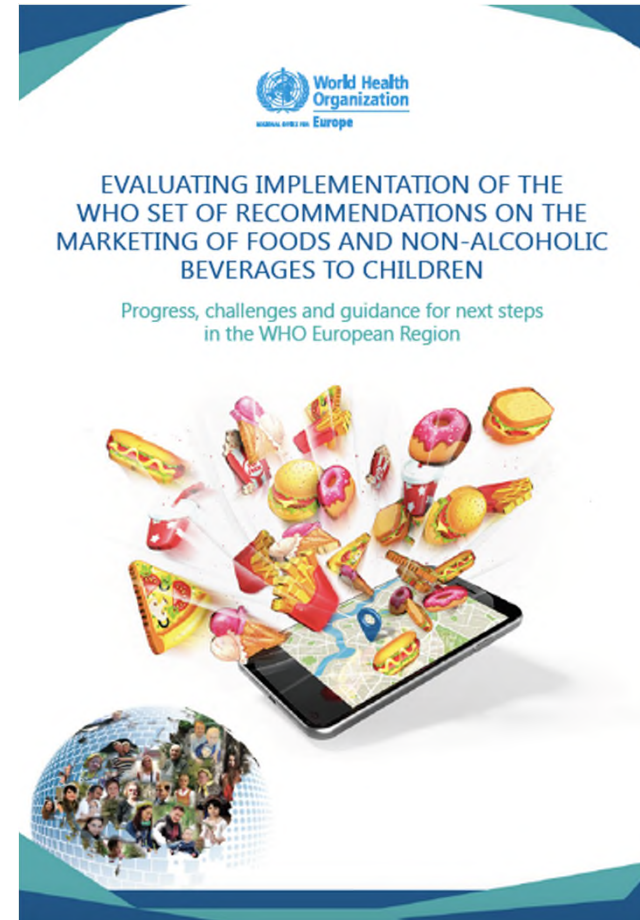
- **IFBA was formed in May 2008** ‘when CEOs of the world’s leading food and non-alcoholic beverage manufacturers signed a letter to WHO Director-General Dr Margaret Chan, committing their companies **to support the WHO’s 2004 Global Strategy on Diet, Physical Activity and Health**’
- **‘We are committed to do our part** and in 2008, our CEOs acknowledged **the private sector’s role** by pledging to **expand efforts already underway** at individual companies to realize “Five Commitments in Five Years” ‘

# Advertising responsibly to children

- IFBA members have **committed** to:
  - only advertise products to children under 12 years of age that meet specific nutritional criteria based on accepted national and international evidence and/or applicable national and international dietary guidelines; or
  - not advertise products to children under 12 years at all.
- ‘In addition, IFBA members agree not to engage in food or beverage product marketing communications to children in **primary schools**’

# Shifting investment

- From regulated to unregulated programme
- From regulated to unregulated media



# THE KEY QUESTION REMAINS

- To which extent can voluntary agreements with the food and alcohol industries be expected to protect health when their interests (and those of their shareholders) do not coincide with those of consumers?

# The need to avoid conflicts of interests

- **WHO Recommendation 6:** it is the responsibility of governments to act in the public interest, whilst **avoiding all conflicts of interest and undue influence from commercial operators**
- **WHO NCD Global Action Plan 2013-2020**
- **ECHO Report 2016:** ‘conflict of interest risks need to be identified, assessed and managed in a transparent and appropriate manner. Codes of conduct and independently audited assessments of compliance with government oversight are therefore important’
- **BUT notion still to be fleshed out by WHO!**



## Anand Grover, UN Special Rapporteur on the Right to Health, June 2014

‘Owing to the **inherent problems associated with self-regulation and public–private partnerships**, there is a need for States to adopt laws that prevent companies from using insidious marketing strategies. The responsibility to protect the enjoyment of the right to health warrants State intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people’s health. Therefore, **States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies**. Under the right to health, States are **especially** required to protect **vulnerable groups such as children** from violations of their right to health.’

# For a human- rights based approach to NCD prevention

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# The rights of the child negatively affected by unhealthy food marketing

- **UNICEF report (2018)**
  - A. Garde, S. Byrne, N. Gokani and B. Murphy (Law & NCD Unit)
- **Focuses on:**
  - **The right to the highest attainable standard of health**
  - The right to adequate food
  - The right to life, survival and development
  - The right to education
  - The right to information
  - The right to rest, leisure, recreation and cultural activities
  - **The right to privacy**
  - The right to non-discrimination



# Accountability

**A children's rights approach guarantees a degree of state accountability, making effective remedies more likely where rights are violated. This, in turn, facilitates the translation of the commitments and obligations established in the human rights treaties into operable, durable and realisable entitlements.**

# Respect, protect and fulfill

- **Respect:** States must refrain from interfering with the enjoyment of human rights
- **Protect:** States must protect individuals and groups against human rights abuses, including from non-state actors /third parties
- **Fulfill:** States must take positive/active measures to establish the necessary infrastructure to facilitate the enjoyment of human rights, including setting up institutions and procedures (allocation of resources, laws...) to ensure that the standards are met

## Art. 24 CRC: Right to Health

1. States Parties recognize **the right of the child to the enjoyment of the highest attainable standard of health** [...].
2. States Parties shall pursue **full implementation** of this right and, **in particular**, shall take appropriate measures:
  - (a) To diminish infant and child mortality;
  - (c) **To combat disease and malnutrition**, including within the framework of primary health care [...] through the **provision of adequate nutritious foods and clean drinking-water** [...];
  - (e) To ensure that all segments of society, in particular parents and children, are **informed**, have access to **education** and are **supported in the use of basic knowledge of child health and nutrition**, the advantages of breastfeeding [...]
4. States Parties undertake to promote and encourage **international co-operation** with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.



# Fleshing out the right to health

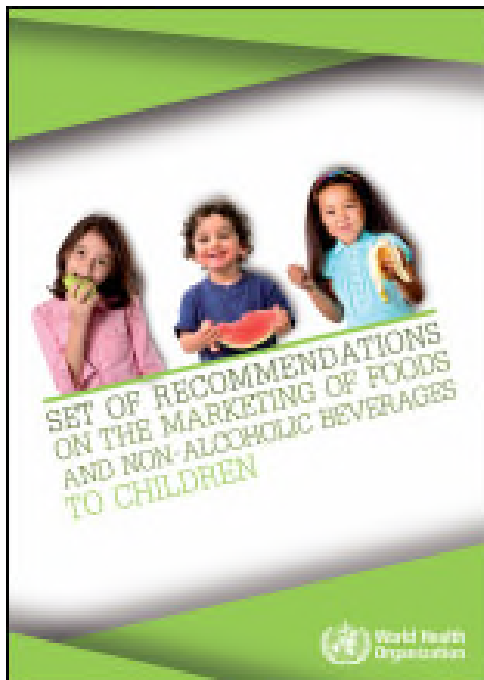
## General Comment 15 (2013)

Children's right to health interpreted as “**an inclusive right**, extending not only to timely and appropriate **prevention**, health **promotion**, curative, rehabilitative and palliative services, but also to a **right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinant of health.**”

# WHO Recommendations 2010

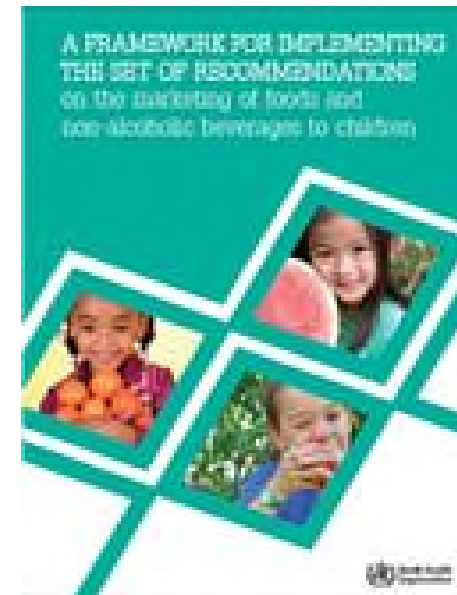
## Unanimously endorsed by Resolution WHA 63.14

**Overall objective:** to reduce the impact of marketing on children and therefore contribute to effective obesity prevention strategies



## Framework Implementation Report (2012)

**Puts some flesh on the bones of the Recommendations and identifies key considerations for States to take into account**



# From responsible pledges to lengthy and costly litigation

## PRE-LEGISLATIVE PHASE

- The adoption of pledges
- The fear of regulation
  - Ridicule
  - Misinformation
  - Personal attacks

## LITIGATION PHASE

- Judicial review challenges



# **Possible Legal Challenges: Many Grounds, Many Jurisdictions**

- **Possible EU and international trade challenges**
  - **Compatibility with EU internal market law**
  - **Compatibility with WTO law**
- **Possible constitutional challenges**
  - **Right to free (commercial) expression**
  - **Right to (intellectual) property**
- **Challenges at national, EU and WTO levels**

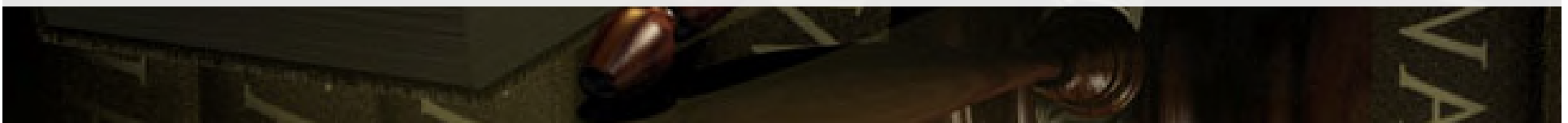
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HOW?



HOW CAN THE LAW BE EFFECTIVE?





# Build consensus across sectors

- **Multi-sectoral approach required within governments**
  - Ministry of Health as focal point
  - Ministry of Trade/Commerce/Business and Consumer Affairs
  - Ministry of Information/Media/Communications
  - Ministry of Education/Sports/Culture

# Build consensus across sectors

- And **beyond**
  - Role of **civil society** and **universities**
  - It is imperative to **involve lawyers** from the outset to ensure that laws and regulations adopted on food marketing are adequately **framed** and **litigation-proof**, i.e. that they are more likely to withstand the challenges mounted by the food industry before the competent courts

**For a proportionate response to  
the burden of NCDs**

# Commercial rights and public health

- Commercial rights can be restricted on grounds of public interests, including **public health**
- BUT restrictions are subject to a **balancing exercise**
  - **Burden of proof on Member States** to establish that the measures they have adopted are **proportionate**
- **BROAD MARGIN OF DISCRETION GRANTED TO REGULATORY AUTHORITIES IN EUROPE**
  - E.g. UK and Australian tobacco plain packaging schemes

# Proportionality as a key legal principle

A MEASURE MUST BE SUITABLE  
(LEGITIMACY TEST)



IT MUST NOT EXCEED WHAT IS  
REQUIRED TO ACHIEVE A GIVEN  
OBJECTIVE (NECESSITY TEST)



A careful balancing exercise should be undertaken between  
potentially competing rights and interests on the basis of existing  
evidence

PARAMOUNT TO DEFINE OBJECTIVES AND ADAPT MEANS TO THE  
END PURSUED

# Case C-333/14 *Scotch Whisky* [2015]

Picture courtesy of Creative Commons



**‘it does not seem unreasonable to consider** that a measure that sets a minimum selling price of alcoholic drinks, the very specific aim of which is to increase the price of cheap alcoholic drinks, **is capable of** reducing the consumption of alcohol, in general, and the hazardous or harmful consumption of alcohol, in particular, given that drinkers whose consumption can be so described purchase, to a great extent, cheap alcoholic drinks’ (at par. 36)

## Case C-333/14 *Scotch Whisky* [2015]

‘It is for the Member States to decide on the level of protection of human life and health which they propose to provide [...] while taking into consideration the requirements of the free movement of goods within the European Union’

‘It is **for the national authorities** to demonstrate that that legislation is consistent with the principle of proportionality’

‘**That burden of proof cannot extend to creating the requirement that**, where the competent national authorities adopt national legislation imposing a measure such as the MPU, **they must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions**’ (par. 52-55)

## Case C-333/14 *Scotch Whisky* [2015]

‘In that context, it is **for the national court** called on to review the legality of the national legislation concerned to determine the relevance of the evidence adduced by the competent national authorities in order to determine whether that legislation is compatible with the **principle of proportionality**[...]

In this case, in the course of such a review, the referring court may take into consideration the **possible existence of scientific uncertainty** as to the actual and specific effects on the consumption of alcohol of a measure such as the MPU for the purposes of attaining the objective pursued.’ (at par. 56 and 57)



# Why does proportionality matter?

- Proportionality is a principle of **good governance**
- **Ex ante:** a thorough proportionality assessment allows for a careful assessment of the pros and cons of an intervention (e.g. use of impact assessments) and therefore reduces the risk of successful challenges
- **Ex post:** industry operators will challenge a measure if it does not comply with the principle of proportionality (**judicial review**)
- **Annulment**
  - → **waste of time and resources**
  - → **regulatory ‘chill effect’ (or ‘domino effect’)**





# Addressing proportionality

- Necessary for States to **demonstrate** that their policies are in line with existing evidence and adopted to promote children's rights, bearing in mind the **complexity and multifactoriality** of 'lifestyle risk' interventions
- **The earlier, the better** (impact assessments, consultations...)
- **Regulatory tools to address childhood obesity can and should lawfully be adopted! THE LAW CAN INTERVENE**
- **BUT EVIDENCE WILL NEVER REPLACE POLITICAL WILL**
- **HENCE THE IMPORTANCE OF RELYING ON HR TO BUILD CONSENSUS BOTH WITHIN AND BEYOND GOVERNMENTS**

# The best interest of the child

**“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”**

- Article 3(1) CRC / Article 24 EU Charter should be interpreted **broadly** with a **child-focus**
- *Ex post* and *ex ante*
- “A primary consideration”
  - Recognition that there may be other considerations
  - CRC Committee: “the child’s best interests may not be considered on the same level as all other considerations”

# Not to be considered “on the same level as all other considerations”

- Article 3 include the ‘obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concerns or impact the child’ (Paragraph 14(c))
- The Committee states that a **CRIA** can foresee the proposed impact and effect of a given policy and should therefore be built into government processes at all levels to ensure compliance with the CRC

# LET'S SHIFT THE PARADIGM

Fundamental rights should be used not only as a 'shield' to oppose industry challenges, but also as a 'sword' to regulate food industry operators

## A BRIEF RECAP

- NCDs are preventable
- The law has an important role to play in ensuring an effective response to the growing burden of NCDs
- To maximise **opportunities**, understand **constraints**
- In particular, it is important to be mindful of:
  - EU and international trade rules
  - Rights of commercial operators
- Restrictions on trade and commercial rights will be upheld if they are **proportionate**
- So work with lawyers in your own jurisdiction

# THANK YOU FOR YOUR ATTENTION





# The Law & NCD Unit

- <https://www.liverpool.ac.uk/law/research/law-and-non-communicable-diseases/>

