

The legality of price-based regulatory interventions

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From evidence to policy

- Growing body of evidence
- A wide range of measures may be considered by governments to reduce affordability
- Some examples:
 - Tax increase
 - Imposition of a minimum price per unit
 - Ban on sales below cost
 - Ban on price promotions (e.g. ‘buy one get one free’)

Freedom to increase price...

- In the absence of common rules, governments retain their **freedom to tax and adopt other price-based measures** with a view to protecting public health
- **E.g. of the proposed UK soda tax:**
 - What products? “Pre-packaged soft drinks with added sugar of 5g or more per 100ml”
 - When liability arises? “At the point of production or importation, where the product is not intended for use in further manufacturing processes”
 - At what rate(s)? E.g. applicable rate depends on sugar content of a given soft drink
 - For what purpose(s)? To encourage product reformulation; and shift consumption patterns to reduce (childhood) obesity

... provided that the measures they adopt comply with international trade law

- **International trade law:**
 - EU Internal Market Law
 - World Trade Organization Law
- **Trade liberalisation** is intended to increase the availability of given goods and lower prices → relevant to NCD prevention
- **BUT oversimplification** to systematically vilify international trade rules for growing rates of NCDs
- **Question:** how can trade and health imperatives be reconciled?

Assessing the legality of trade restrictions

- On what **legal basis** does one claim a right to free movement?
[Different legal bases if the measure is a fiscal or a non fiscal restriction on trade]
- What **right(s)** does a claimant derive from that legal basis?
- Has the Member State **breached** the claimant's rights?
- If so, can the Member State **justify** its conduct?
 - What is the **legitimate objective** pursued?
 - Is the measure **proportionate**?
- If not, what are the **remedies** available?

Two key principles to briefly unpack

- Rules must be **origin-neutral**
- Trade-restrictive measures can be justified on grounds of public health if they are **proportionate**

Origin-neutral

- The measure must not be protectionist and grant a competitive advantage to domestic goods over imported goods
- It has to be **origin-neutral**
- The objective is to facilitate the free movement of goods by providing effective equality of opportunities for imported products:
 - equality of opportunities in law
 - equality of opportunities in fact

Article 110 TFEU

- “1. No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on **similar domestic products**. [**SIMILAR GOODS**]
2. Furthermore, no Member State shall impose on the products of other Member State any internal taxation of such a nature as to afford **indirect protection** to other products.” [**GOODS IN COMPETITION**]

NOTE that Article 110 also covers **products from third countries** **in free circulation in the Union**

Similar approach under WTO Law

Article III.2 GATT

“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to **like domestic products.**” **[FIRST SENTENCE: like products]**

“Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.” **[SECOND SENTENCE: directly competitive or substitutable products]**

https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf

Comparing goods

- Extensive interpretation of the notion of “similar goods” under Article 110(1) TFEU
- The question is whether the products “have **similar characteristics** and meet the **same needs** from the point of view of consumers [...] according to whether their **use** is similar or comparable”
 - Case 106/84 *Commission v Denmark* [1986]: wine deriving from grapes and wine deriving from other fruit → similar
 - Compare with: Case 243/84 *John Walker* [1986]: whisky v fruit liqueur wines → not similar
- For “**goods in competition**” under Article 110(2) TFEU, the question is **whether goods can be substituted (cross-elasticity of demand)**
 - Case 170/78 *Commission v UK I* [1980] and *II* [1983]

Case 170/78 *Commission v UK* [1980]

The UK imposed a tax on wine which was five times higher than the tax imposed on beer.

The tax was held to fall within the scope EU internal market law: the products were in competition and the tax contributed to the reinforcement of a competitive advantage which beer producers and manufacturers enjoyed on the British market, thus “crystallising” consumer habits.



Applying this rationale to the UK sugar tax

- **Quid of the proposed sugar tax?**
 - No distinction is made depending on whether the sugar is from cane or beetroot, white or brown...
- **Milk-based beverages may be in competition with sugary drinks:**
 - Referred to as “sweet milk” by industry itself
 - 8.1g of sugar per 100ml, 20g per serving for choc.
- **Would consumers switch to milk-based beverages if the price of sugary drinks increased?**
 - Industry statements: business has "flourished" since products have been used by schools as an alternative to pop;
- **If so, would the tax have a protective effect of the UK market? Unlikely**



Trade restrictive measures can be justified if they are proportionate

- Public health is a **legitimate objective**
- Any restriction must be **proportionate**

Proportionality as a key legal principle

A MEASURE MUST BE NECESSARY
(LEGITIMACY TEST)



AND IT MUST NOT EXCEED WHAT
IS REQUIRED TO ACHIEVE A GIVEN
OBJECTIVE (LESS RESTRICTIVE
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**

The proportionality test applied by the CJEU

- (a) The measure in question must be **appropriate and necessary** in order to achieve a **legitimate aim**;

- (b) **When there is a choice** between several **appropriate measures**, recourse must be had to **the least onerous or restrictive measure**; and

- (c) The disadvantages caused by the measure must not be disproportionate to the aims pursued (**proportionality *stricto sensu***).

NCDs are complex & multifactorial



Full Generic Map
Thematic Clusters (filled)

Social Psychology

Individual Psychology

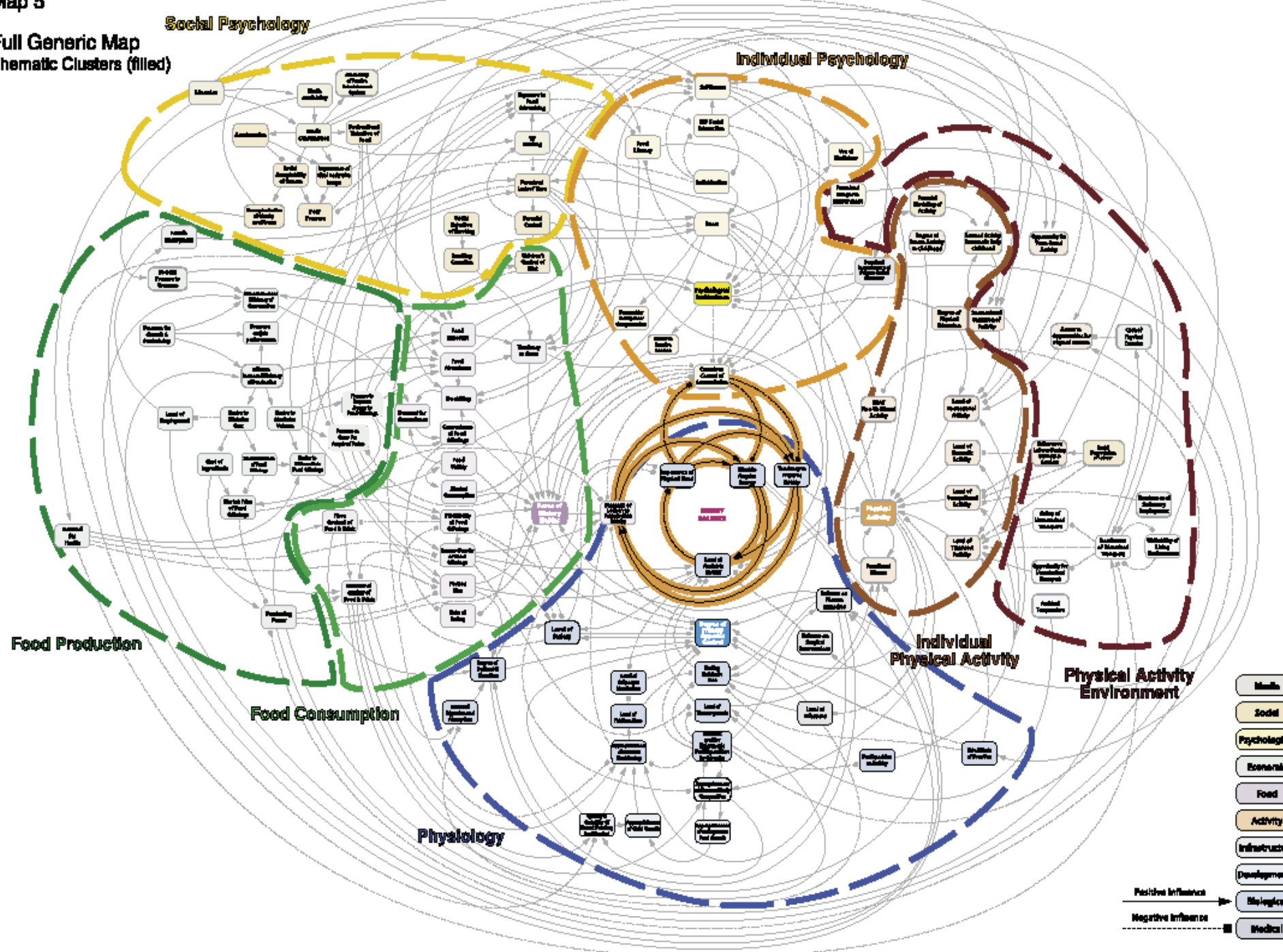
Food Production

Food Consumption

Individual Physical Activity

Physical Activity Environment

Physiology



The difficulties in justifying NCD prevention measures

- Any form of regulatory intervention has to acknowledge the **complexity** stemming from the **multifactorial** nature of NCDs
- No ‘magic bullet’: only **a coordinated multi-sectorial response** could help reverse current NCD trends
- **QUESTION: how much evidence** should Member States adduce to support their NCD prevention strategies – and price measures more specifically?
- **The exact relationship between a risk factor and the harm may be impossible to estimate with any degree of accuracy**
→ a **holistic approach** to the examination of NCD prevention measures is required
- The notion of **‘choice’**

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. As the Advocate General stated [...], the fact that the national legislation provides that the setting of an MPU will expire six years after the entry into force of the MPU Order, unless the Scottish Parliament decides that it is to continue, is a factor that the referring court may also take into consideration.’
(at par. 56 and 57)

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Concluding remarks

- **FRAME POLICIES EFFECTIVELY**
- **Oversimplifying a complex body of law is highly detrimental to public health**
- **Build legal capacity**
- **Difficulties:**
 - Many NCD-relevant specialisations within law
 - Law is jurisdiction-specific
- **Engage with lawyers and legal technicalities from the outset**
- Truly embrace **interdisciplinarity**
- One should be both **modest** and **courageous**

‘TO MAXIMISE OPPORTUNITIES, IT IS NECESSARY TO UNDERSTAND CONSTRAINTS’