

CELS
CENTRE for
EUROPEAN
LEGAL
STUDIES

Founding Editors

Alan Dashwood
Angela Ward

Editorial Advisory Board

Albertina Alborns-Llorens
John Bell
Alan Dashwood
Simon Deakin
David Feldman
Richard Fentiman
Angus Johnston
John Spencer

The Cambridge Yearbook
of European Legal Studies

The Cambridge Yearbook
of European Legal Studies

2009-2010, Volume 12



Edited by Catherine Barnard and Okeoghene Odudu

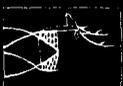
ISBN 978-1-84946-074-3



9 781849 460743



Hart Publishing



HART
PUBLISHING

and constitutional law impose obligations like 'procedural fairness' and 'non-discrimination' on certain private bodies when those bodies exercise power that implicates the public welfare: how can a legal order resolve the tensions between individual freedom and public welfare that arise when a private actor amasses significant political or economic power? How can the notion of abuse be developed and given substance? What conclusions, if any, can be drawn with respect to the historical connection between political freedoms and market ones? And what, indeed, *is* an 'anti-competitive effect'? If consumer surplus declines but *efficiency* is increased, are we to be concerned? These and other questions we reserve for another day.

With more questions than answers, at long last, we conclude. The point of this chapter is ultimately a very basic one. Antitrust decisions have—and have always had—constitutional consequences, and our antitrust priorities and principles are of constitutional significance. The competition laws have been seen on both sides of the Atlantic, at their inception and throughout their lifetime, as central elements of our society's response to power, our vision of the State and our conceptions of individual liberty. In the international competition of legal systems and legal norms, it is constitutionalism and antitrust that have spread—often together—where despotism and totalitarianism have failed. Averting our eyes to the social and political implications of antitrust legislation and enforcement does not eliminate the hard questions that have always plagued antitrust judges, enforcement agencies and social scientists: it just diminishes our ability to address and resolve them in a transparent and honest fashion.

If we find ourselves able to take the view that a properly-elucidated and clearly-defined efficiency standard is the best organizing principle for an antitrust law that will adequately reflect our values, protect our liberties—including our freedoms to conduct commerce and to enjoy its fruits—and preserve our vision of the State, then an efficiency-based antitrust policy represents an outcome to which I think we can look forward with great optimism. But to pretend that the broader issues are not even appropriate subjects for the antitrust discussion is, I think, disingenuous, and moreover very dangerous. Lawyers should not shrink from tackling hard decisions involving competing interests that cannot easily be quantified, even if our professional role in those decisions is usually to help frame the questions rather than to provide the answers. The task is clearly worthwhile. Those who have gone before us have developed conceptions of human rights, of political liberties and individual freedoms, that two or three hundred years ago would have been a groundless fantasy. Those ideas still fight for life, in the United States, in Europe and around the world. But we must not neglect the rest of the task. If we are able to meet the challenge, a meaningful, coherent vocabulary of economic constitutionalism will be among our most important legacies to the constitutions of the future.

8

Freedom of Commercial Expression and Public Health Protection in Europe

AMANDINE GARDE*

Abstract: This chapter focuses on the extent to which public health has been relied upon by the EU legislature or by Member States of the European Union to limit the freedom of commercial operators to promote their goods and services. First, it discusses why courts in the United States and in Europe have ruled that the freedom of commercial operators to advertise their goods and services should be protected, in light of the fundamental role advertising plays in a liberal market economy. It shows that freedom of commercial expression has been made conditional upon the disclosure of sufficient and reliable information to consumers, thus reflecting a model of consumer protection based on the well-informed and reasonably circumspect consumer. Secondly, it addresses the more controversial question of the extent to which public health may be invoked as an overriding requirement of public interest to curtail the right of commercial operators to promote their goods and services. The approach of the Court of Justice is compared with that taken by the US Supreme Court. This comparative approach highlights the differences between the two: the former is very reluctant to exercise its review powers, while the latter has made it excessively difficult for public authorities to impose any meaningful advertising restrictions. It is argued that neither court has been able to strike a suitable balance between, on the one hand, the need to review the validity of restrictions imposed by public authorities on commercial speech to ensure a high level of public health protection and, on the other hand, the need to ensure that courts do not substitute their assessment to that of the legislature in exercising their judicial review powers. A more balanced approach is required to ensure the adequate protection of consumer health.

* This chapter is a revised version of a seminar paper given in Cambridge on 11 November 2009. I am most grateful to the Centre of European Legal Studies for their kind invitation. I am also indebted to Catharine Barnard for her comments on an earlier draft.

I. INTRODUCTION

FREEDOM OF EXPRESSION is protected by several national constitutions and a range of international law instruments.¹ The notion of expression is broad, and the question of whether commercial expression should be protected at all and, if so, at what level has sparked lively controversies, particularly in the United States of America. Nevertheless, the question of protection of commercial expression has yet to be resolved satisfactorily.

One of the public interest reasons put forward to limit the freedom of commercial operators to advertise their goods and services is public health. Certain goods and services, such as illicit drugs, may be so dangerous that they are not allowed on the market and cannot, as such, be lawfully advertised. Beyond these products and services, the marketing of which does not benefit from constitutional protection at all, there are others the consumption of which is not recommended but which are not deemed sufficiently harmful to be banned from the market altogether. They include, most notably: tobacco, alcohol, medicines and medicinal treatments, unhealthy food and gambling services. Growing evidence that advertising and other forms of promotion do impact on lifestyle choices supports the argument that public authorities have an interest in regulating the advertising of such goods and services in the name of public health protection.

This chapter focuses on the extent to which public health has been relied upon by the EU legislature or by Member States of the European Union to limit the freedom of commercial operators to promote their goods and services. First, it discusses why courts in the United States and in Europe have ruled that the freedom of commercial operators to advertise their goods and services should be protected, in light of the fundamental role advertising plays in a liberal market economy. It shows that freedom of commercial expression has been made conditional upon the disclosure of sufficient and reliable information to consumers, thus reflecting a model of consumer protection based on the well-informed and reasonably circumspect consumer (section II.). Secondly, it addresses the more controversial question of the extent to which public health may be invoked as an overriding requirement of public interest to curtail the right of commercial operators to promote

¹ Relevant texts include (but are not limited to): the First Amendment to the US Constitution; § 2 of the Canadian Charter of Rights and Freedoms; Art 5 of the German Constitution; Art 11 of the French Universal Declaration of Human Rights; Arts 14 and 54 of the Polish Constitution; Art 10 of the European Convention on Human Rights and Fundamental Freedoms; Art 11 of the EU Charter on Fundamental Rights; Art 19 of the Universal Declaration of Human Rights; Art 19 of the International Covenant on Civil and Political Rights; Art 4 of the American Declaration of the Rights and Duties of Man; Art 9 of the African Charter on Human and Peoples' Rights; and Art 13 of the American Convention on Human Rights.

their goods and services. It focuses on how European Union institutions, and the Court of Justice of the European Union more specifically, have attempted to reconcile potentially competing interests. The approach is comparative, drawing on the case law of the US Supreme Court. As there is a significant body of legislation and case law relating to tobacco advertising, this example is used to illustrate the argument, even though the scope of application of the argument is much broader and it applies to other products and to services whose excessive consumption is detrimental to health (section III.).² This chapter argues that neither the Court of Justice of the European Union nor the US Supreme Court has struck a suitable balance between, on the one hand, the need to review the validity of restrictions imposed by public authorities on commercial speech to ensure a high level of public health protection and, on the other hand, the need to ensure that courts do not substitute their assessment for that of the legislature in exercising their judicial review powers.

II. THE INFORMATION PARADIGM AS A JUSTIFICATION FOR THE CONSTITUTIONAL PROTECTION OF THE FREEDOM OF COMMERCIAL EXPRESSION

The First Amendment to the US Constitution protects freedom of expression: 'Congress shall make no law ... abridging the freedom of speech, or of the press ...'. It nonetheless leaves the notion of 'expression' undefined. The question has therefore arisen of whether commercial expression, and advertising more specifically, falls within its scope. This question does not suggest an obvious answer, as the evolution of the case law of the US Supreme Court illustrates.

In the *Valentine v Chrestensen* case, which involved the validity of a New York ordinance banning the distribution of advertisements in the streets, the Supreme Court ruled that commercial free speech did not fall within the realm of protection of the First Amendment to the US Constitution:

[T]he Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue

² This chapter does not discuss the boundaries between commercial and other kinds of speech (and in particular mixed speech). It focuses exclusively on advertising and similar forms of promotion: a pure form of commercial speech. On this question, which has given rise to an extensive body of case law and legal writings, particularly in the US, see, among others: R Shiner, *Freedom of Commercial Expression* (Oxford, Oxford University Press, 2003); E Barendt, *Freedom of Speech*, 2nd edn (Oxford, Oxford University Press, 2005) 392-416; C Munro, 'The Value of Commercial Speech' (2003) 62 *CLJ* 134; M Hertig Randall, 'Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?' (2006) 6 *Human Rights Law Review* 53; J Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe* (Hamburg, Verlag Dr Kovac, 2008).

a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.³

Nevertheless, after a series of decisions tempering this statement,⁴ the Supreme Court reversed its position in its landmark *Virginia State Board of Pharmacy* judgment.⁵ In this case, consumers of prescription drugs sued the Virginia State Board of Pharmacy and its individual members, challenging the validity of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. The US Supreme Court upheld the complaint and ruled that the statute violated the First Amendment. Delivering the opinion of the Court, Blackmun J stated:

Our question is whether speech which 'does no more than propose a commercial transaction' is so removed from 'any exposition of ideas' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government', that it lacks all protection. Our answer is that it is not ...⁶

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we concluded that the answer to this one is in the negative.⁷

Two points emerge from these statements, which still provide the basis of the US Supreme Court's case law: the first one refers to the rationale for extending the protection of the First Amendment to commercial speech (A.), while the second refers to the condition laid down by the US Supreme Court that speech benefits from constitutional protection only if it is 'truthful' (B.).⁸

A. The rationale for the constitutional protection of the freedom of commercial expression

To justify its decision in the *Virginia State Board of Pharmacy* case, the US Supreme Court first focused on the individual parties to the transaction proposed in the commercial advertisement. It ruled that the fact that the advertiser's interest in a commercial advertisement was purely economic did not disqualify him from protection under the First Amendment.⁹ It also held that the protection enjoyed by advertisers seeking to disseminate

³ *Valentine v Chrestensen* (1942) 316 US 52, 54.

⁴ See, in particular *New York Times v Sullivan* (1964) 376 US 254 and *Bigelow v Virginia* (1975) 421 US 809.

⁵ *Virginia Pharmacy Board v Virginia Consumer Council* (1976) 425 US 748.

⁶ *Ibid*, 762.

⁷ *Ibid*, 773.

⁸ The activity must also be 'lawful'.

⁹ *Virginia Pharmacy Board v Virginia Consumer Council* (1976) 425 US 748, 762.

prescription drug price information was also enjoyed by, and thus could be asserted by, the recipients of such information:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.¹⁰

The US Supreme Court then generalised the benefits of commercial free speech to society as a whole:

Even an individual advertisement, though entirely commercial, may be of general public interest ... Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added.

Moreover, there is another consideration that suggests that no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in a large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable ... It is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.¹¹

In other words, the US Supreme Court has extended the protection of the First Amendment to free speech due to the paramount role which advertising plays in a free market economy not only for economic operators, but also (and perhaps more importantly) for consumers and society as a whole. The free dissemination of commercial information allows businesses to promote their goods and services, while offering the possibility to consumers of being informed about the goods and services in question, which may in turn lead to increased competition between manufacturers and service providers. The underlying assumption is that if a product or a service is lawfully available on the market, consumers should be able to know about it so that they can decide which one to choose among competing products and services.

Similarly, under Article 10(1) of the European Convention on Human Rights and Fundamental Freedoms (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. ...

¹⁰ *Ibid*, 763.

¹¹ *Ibid*, 764 and 765.

The case law of the European Court of Human Rights has indicated that all forms 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.¹² At European Union level more specifically, the Court of Justice of the European Union has upheld the principle of freedom of expression as a general principle of EU law, the observance of which it ensures.¹³ The freedom of individuals 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.¹⁴ This is all the more necessary as advertising is paramount to the establishment and functioning of the EU internal market, the 'area where the free movement of goods, services, persons and capital is ensured'¹⁵; it allows commercial operators to break down barriers, thus granting more choice to consumers and ensuring that their consumption habits do not crystallise along national lines.¹⁶

This approach fits in with the model of consumer protection promoted by EU political institutions, which relies on the explicit assumption that consumers must be informed in order to be sufficiently confident to engage in cross-border transactions and take full advantage of the opportunities a wider market offers.¹⁷

¹² See, eg, *Markt Intern v Germany* Series A no 165 (1990) 12 EHRR 161, paras 25 and 26; *Groppera v Switzerland* Series A no 173 (1990) 12 EHRR 321, para 55; and *Casado Coca v Spain* Series A no 285 (1994) 18 EHRR 1, paras 35 and 36.

¹³ The Court of Justice of the EU 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 ECHR has special significance in that respect: 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, para 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 71; Case C-71/02 *Karner* [2004] ECR I-3025, para 48; and Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573, para 154. See also Art 11(1) of the EU Charter of Fundamental Rights, which provides: '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.' On the importance of the right to free expression in the EU legal order, see D Wyatt, 'Freedom of Expression in the EU Legal Order and in EU Relations with Third Countries' in J Beatson and Y Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford, Oxford University Press, 2000).

¹⁴ Opinion of A-G Fennelly in Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573, para 154.

¹⁵ Art 26 TFEU (ex Art 14 EC).

¹⁶ This was most vividly stated by A-G Jacobs in his seminal Opinion in Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec* [1995] ECR I-179.

¹⁷ S Weatherill, *EU Consumer Law and Policy*, 2nd edn (London, Elgar, 2005) 9. The Commission's Communication on the EU Consumer Policy Strategy for 2007–2013—incidentally

The information paradigm promoted both in the United States and in Europe may only be effective if the information is of sufficient quality to guide consumer choices and effectively allows them to 'protect' themselves. Consumer empowerment may therefore justify public intervention requiring the disclosure of a certain standard of information. As Blackmun J stated in the *Virginia Pharmacy* case,

[the greater objectivity and hardness of commercial speech] may make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.¹⁸

Requiring that consumers be provided with specific information about a product or a service is a regulatory technique that has enjoyed considerable popularity in the development of EU measures affecting the protection of consumers' interests. It places the onus on consumers to decide what is good for them and their families, expecting them to take their personal circumstances into account. The approach of improving transparency by providing enough relevant information has the advantage of minimising interference with individual choices. The provision of information is therefore seen as a compromise: protection is provided as a result of the introduction of duties on traders to inform consumers of the qualities of their goods and services, while avoiding intrusive controls, such as bans on particular types of contract, which may unduly diminish consumer choice.¹⁹ The rationale that well-informed consumers can be expected to manage their own affairs efficiently, provided that they are given the required information, has been applied to lifestyle choices. As regards food and dietary choices, for example, the assumption is that if consumers are aware of what each foodstuff contains, they should be trusted to apply their knowledge of nutrition and make appropriate choices. Rather than banning the marketing of a given foodstuff because of its high content of sugar, fat or salt, consumers are informed about this content, so that they can decide whether to buy it and integrate it into their diet. This reflects the view that in a society where individuals are autonomous and dislike limitations, they must take primary responsibility for the dietary choices they make on their own and their children's behalf. It also explains the focus which obesity prevention strategies in both the EU and the US have placed on the

entitled 'Empowering Consumers, Enhancing Their Welfare, Effectively Protecting Them'—states that 'empowered and informed consumers can more easily make changes in lifestyle and consumption patterns contributing to the improvement of their health, more sustainable lifestyles and a low carbon economy': COM(2007) 99 final, 11.

¹⁸ (1976) 425 US 748, fn 24.

¹⁹ Weatherill, above n 17, 84.

importance of providing information to consumers.²⁰ The regulation of how the information is provided and what it should contain allows public authorities to support individual purchasing decisions without interfering too much with consumers' personal freedom to buy what they want and with business operators' freedom to respond to, or even shape, consumer demand through advertising.²¹ The responsibility for healthy choices is therefore shared between, on the one hand, consumers, who are expected to process the information made available to them when purchasing goods and services, and, on the other, regulatory authorities, which must ensure that enough information is made available to consumers and that such information is neither false nor misleading.²² As commercial information is seen as a necessary channel through which relevant information on competing goods and services reaches consumers, one could argue that disclosure obligations resting on commercial operators promote free speech in that they reinforce the underlying assumption that commercial information guides consumer choices.²³

At the EU level, a range of legislative measures has been adopted in order to ensure that consumers are provided with the information they need to make informed purchasing decisions. Commercial operators are therefore required to disclose information which they are most unlikely to disclose on a voluntary basis but which is nonetheless considered important in order to guide consumer choices. For example, Directive 2001/37/EC obliges tobacco manufacturers not only to disclose the ingredients used in the manufacturing of cigarettes and other tobacco products, but also to affix health warnings to their products. Each unit packet of tobacco products intended to be smoked must carry a general warning ('Smoking Kills'/'Smoking can kill' or 'Smoking seriously harms you and others around you') covering at least 30–35 per cent of the front, and one of the 14 additional warning sets covering at least 40–50 per cent of the back. Non-combustible tobacco

²⁰ For the EU Strategy, see in particular the Commission's White Paper laying down a strategy for Europe on nutrition, overweight, and obesity related health issues, COM(2007) 279 final. For the US Strategy, see White House Task Force on Childhood Obesity, *Solving the Problem of Childhood Obesity within a Generation*, Report to the President, 11 May 2010, available at <www.letsmove.gov/tfco_fullreport_may2010.pdf>, accessed 12 July 2010.

²¹ Commission's White Paper, above n 20, 5.

²² One could argue that the food industry has a role to play in obesity-prevention strategies, not least by complying with disclosure requirements laid down by law and ensuring that the information it provides to consumers is not misleading, as discussed below.

²³ As Eric Barendt puts it, 'disclosure requirements are hardly controversial ... Since the best arguments for freedom of commercial speech are based on the interests of consumers in finding out attributes of the goods and services they want to buy, rather than speakers' rights, there is no good reason for holding that advertisers have any right not to provide information. The recipients' interests do justify a limit on the speakers' rights, for the latter are derivative from the former. Unlike free speech in the context of politics and the arts, they are primarily not the rights of the speaker, but of the consumer or client': E Barendt, *Freedom of Speech*, 2nd edn (Oxford, Oxford University Press, 2005) 412.

products shall carry the general warning 'This tobacco product can damage your health and is addictive'.²⁴ In 2002, British American Tobacco Limited and Imperial Tobacco Limited challenged the validity of the Directive. The Court of Justice dismissed the action on the ground that Article 95 EC (now Article 114 TFEU) constituted an adequate legal basis and that the EU legislature had not exceeded the limit on its discretion:

... those obligations in fact constitute a recognised means of encouraging consumers to reduce their consumption of tobacco products or guiding them towards such of those products as pose less risk to health.²⁵

Now that this Directive is in force in all the Member States, tobacco manufacturers are under a duty to fix warnings to their products. If they fail to do so, they are in breach of statutory requirements. This also means, by contrast, that if they label their products as required by law, they will probably have fulfilled their obligation to inform and are under no further obligation to warn against any damage which tobacco may cause.²⁶

Directive 2001/37/EC allows Member States to require additional warnings in the form of colour photographs and other illustrations.²⁷ For that purpose the Commission adopted rules for the use of pictorial warnings and established a library of 42 selected sourced documents.²⁸ There are three images for each health warning, and Member States can choose illustrations most suitable for consumers in their country.²⁹

²⁴ Directive 2001/37/EC, Art 5.

²⁵ Case C-491/01 *BAT and Imperial Tobacco* [2002] ECR I-11453, para 131.

²⁶ German *Landgericht* Bielefeld, Decision of 15/01/2000, 8 O 411/99, (2000) *Neue Juristische Wochenschrift* 2514, §3 d) aa); *Landgericht* Arnberg, Judgment of 14 November 2003, 2 O 204/02, (2004) *Neue Juristische Wochenschrift* 232, §75. The fact that the damage caused by tobacco is known by the general public may further shape the scope of the duty to inform. In any event, even if tobacco companies failed to comply with labelling requirements, this would not necessarily mean that causation between the damage and their failure to inform would be established: Cour de Cassation, Première Chambre Civile, *Suzanne X*, 8 November 2007.

²⁷ Directive 2001/37/EC, Art 5(3).

²⁸ Decision 2003/641/EC, [2003] OJ L226/24.

²⁹ Discussions are currently taking place in the Commission's DG on Health and Consumer Protection as to whether the duty of tobacco manufacturers to affix health warnings to their products should not be strengthened in the sense of using pictorial warnings containing shock images in an attempt to persuade buyers to stop smoking. Some Member States, including Belgium, Romania, the UK and Latvia, require that such pictorial warnings be used. This could be extended to all Member States via EU legislation: see Sambrook Research International, *A Review of the Science Base to Support the Development of Health Warnings for Tobacco Packages*, Report prepared for DG SANCO, Brussels, 27 May 2010, available at <ec.europa.eu/health/tobacco/docs/warnings_report_en.pdf>, accessed 12 July 2010. As the WHO has stated, 'health warnings on tobacco packages increase smokers' awareness of their risk. Use of pictures with graphic depictions of disease and other negative images has greater impact than words alone, and is critical in reaching the large number of people worldwide who cannot read. Experience in Australia, Belgium, Brazil, Canada, Thailand and other countries, shows that strong health warnings on tobacco packages, particularly pictorial warnings, are an important information source for younger smokers and also for people in countries with

The question of what constitutes sufficient information is far from straightforward. The debates on the nutrition information consumers need to have at their disposal to make healthier dietary choices illustrate the difficulties facing public authorities. Article 3 of Directive 2000/13 enumerates the features that must be included on all food labels: the name of the product; the list of ingredients; the quantities of the product; the date of durability; storage conditions; the manufacturer's or packager's details; as well as information on origin and alcohol content where necessary. Although the list of ingredients provides a hint about the nutritional qualities of a foodstuff, EU law as it currently stands does not require producers to provide detailed nutrition information. Nutrition labelling is optional, except when a nutrition claim is made in the labelling, presentation or advertising of a pre-packaged foodstuff. Where a nutrition claim refers to sugars, saturated fatty acids, dietary fibre or sodium, the information provided must comprise the energy value and the amount of protein, carbohydrate, sugar, fat, saturated fatty acids, dietary fibre and sodium (Group 2). Otherwise, it need only comprise the energy value and amount of protein, carbohydrate and fat (Group 1).³⁰

All stakeholders agree that the current framework is no longer fit for purpose: in light of growing obesity rates, consumers need to pay particular attention to the dietary choices they make and must have at their disposal the nutrition information required to do so. There are, however, strong disagreements between the food industry, on the one hand, and consumer and public health advocates, on the other, regarding what nutrition information is necessary. After a consultation process of more than three years, the Commission published, on 30 January 2008, a Draft Regulation on the provision of food information to consumers, which proposes to introduce mandatory labelling of key nutritional elements which must appear in the principal field of vision.³¹ Determining how detailed the nutrition declaration should be requires that the advantages of information be weighed against the burden for commercial operators: how much would it cost the food industry, and what benefits would it bring European consumers, to have eight or more, rather than three, four or five, compulsory nutrients included on food labels? The Impact Assessment published alongside the Commission's proposal found that the cost to the industry as a whole for collecting the information on five elements would vary from €0.7 billion

low literacy rates. Pictures are also effective in conveying messages to children—especially the children of tobacco users, who are the most likely to start using tobacco themselves ... Policies mandating health warnings on tobacco packages cost governments nothing to implement. Pictorial warnings are overwhelmingly supported by the public and generally encounter little resistance, except from the tobacco industry itself' (WHO Report on the Global Tobacco Epidemic, The MPOWER Package, Geneva, 2008, 34 and 35).

³⁰ Directive 2000/13, Art 4.

³¹ COM(2008) 40 final.

to €2.3 billion, depending on the method of calculation used to determine food composition; whereas the cost would vary from €1.1 billion to €3.7 billion if nine elements were required. Moreover, the five nutritional elements that have been suggested as being included either alone or with other nutritional elements are those that were most often referred to in consultations as being of interest to the consumer and which have been identified by the World Health Organisation (WHO) as playing a major role in the development of obesity and non-communicable diseases.³² Article 29 of the Draft Regulation therefore provides for the mandatory disclosure of these five elements: energy value and the amounts of fat, saturates, carbohydrates (with specific reference to sugars) and salt.³³

B. The prohibition of false and misleading advertising

The model of consumer protection based on the information paradigm presupposes that the information which traders provide to consumers is reliable. The US Supreme Court has consistently held that the constitutional protection granted to commercial speech is subject to the condition that the information must not be false or misleading. Untruthful speech has never been protected for its own sake.³⁴

The notion of 'misleading information' is difficult to define: not only does it encapsulate inaccurate statements, but it also covers statements which convey an unreliable impression, leading consumers to buy a good or a service they may not have bought had they understood the significance of the statement in question. The EU legislature has therefore put flesh on the bones of the framework legislation on unfair commercial practices³⁵ by adopting a range of more specific, sectoral instruments. Two examples will illustrate the difficulties involved in defining 'misleading information'.

The use of the adjective 'light' on cigarettes and other tobacco products may be understood as suggesting that light cigarettes are less detrimental

³² SEC(2008) 94, 47.

³³ Art 29(1) of the Commission's Proposed Regulation: COM(2008) 40 final. The European Parliament recently voted in favour of mandatory nutrition disclosure. It confirmed the Commission's proposal that the nutrition declaration should comprise information on the amounts of energy, fat, saturates, sugars and salts should be mentioned, and proposed to add the amounts of protein, carbohydrates, fibre, and trans fats: Amendment 144, Resolution of 16 June 2010, P7_TA(2010)0222.

³⁴ See in particular *Virginia Pharmacy Board v Virginia Consumer Council* (1976) 425 US 748. This makes commercial speech a lesser form of expression than political or artistic speech. Ensuring that the stream of information flows clearly also helps to ensure fair competition: commercial operators should not be able to gain an advantage over their competitors by providing unreliable information.

³⁵ Directive 2005/29/EC on business-to-consumer unfair commercial practices, [2005] OJ L149/22, has significantly amended Directive 84/450/EEC on misleading advertising, [1984] OJ L250/17.

to health than regular cigarettes. Nevertheless, a range of studies has established that this belief is misconceived.³⁶ Consequently, several smokers or their estates have sued tobacco manufacturers, both in the United States where 'tobacco litigation' originated in the 1960s³⁷ and in Europe, for inducing them into believing that light cigarettes were less harmful than other cigarettes. Courts and juries in the US have proved to be quite receptive to arguments that the tobacco manufacturers' claims for 'light' cigarettes were misleading. For example, a jury decided in 2002 that Philip Morris had lied to the public in marketing its 'light' cigarettes as an alternative to quitting smoking. Their reasoning was based on internal industry documents revealing that cigarette manufacturers intentionally deceived the public by targeting smokers who felt anxious about their health but were too addicted to stop smoking. In a similar case, the jury awarded the survivors of a smoker \$160,000 in compensatory damages and \$150 million in punitive damages. An appellate court reversed the punitive damages award and remanded for a new trial on that issue, but the Oregon Supreme Court granted the plaintiffs permission for review.³⁸ In December 2008, the US Supreme Court rejected the attempt by Philip Morris to have all 'light' cigarette lawsuits dismissed, on the ground that these suits were not pre-empted by the Federal Cigarette Labelling and Advertising Act.³⁹

Several courts in Europe have also been called upon to adjudicate in similar cases. In Italy, a smoker initiated proceedings against BAT Italia for minimising the detrimental effects of light cigarettes on his health and for making him lose the opportunity freely to choose an alternative solution to his smoking problem. The case reached the *Corte di Cassazione* (the Italian Supreme Court in civil matters). The Court accepted that the wording 'light' was misleading. The claimant nonetheless lost the case on the ground that he should also have established the existence of a causal link between the misleading use of the word 'light' and the damage allegedly suffered.⁴⁰

To reduce the fragmentation of national rules, and therefore facilitate the functioning of the internal market, the EU legislature has adopted legislation prohibiting the use of adjectives such as 'light' in the marketing of tobacco products. In particular, Article 7 of Directive 2001/37/EC bans

³⁶ M Thun and D Burns, 'Health Impact of "Reduced Yield" Cigarettes: A Critical Assessment of the Epidemiological Evidence' (2001) 10 *Tobacco Control* i4–i11.

³⁷ For a history of tobacco litigation in the US, see in particular M Miura, R Daynard and J Samet, 'The Role of Litigation in Tobacco Control' (2006) *Supplement Salud Pública de México* S121; M Molitoris, 'Tabakprozesse in den USA, Deutschland und Anderen Europäischen Ländern' (2004) *Neue Juristische Wochenschrift* 3662; and B Bitas and P Barros, 'Tobacco Control and the Role of Litigation: A Survey of Issues in Law, Policy, and Economics' (2008) SSRN Paper 1121000, 22.

³⁸ *Estate of Michelle Schwarz v Philip Morris Incorporated*, number S053644.

³⁹ On 16 March 2009, the Massachusetts Supreme Judicial Court gave the green light to the claimants who are suing Philip Morris in its light cigarette scam.

⁴⁰ *Corte di Cassazione, Sezione Unite Civili*, 15 January 2009, 794.

the use on the packaging of tobacco products of texts, names, trademarks and figurative or other signs suggesting that a particular tobacco product is less harmful than others.⁴¹ The Court of Justice upheld the validity of the Directive and Article 7 more specifically.⁴² It noted that this article had the purpose of ensuring that consumers are given objective information concerning the toxicity of tobacco products,⁴³ and that the EU legislature was entitled to ban the use of descriptors such as 'light' on cigarettes in that such descriptors are liable to mislead consumers:

In the first place, they might, like the word 'mild', for example, indicate a sensation of taste, without any connection with the product's level of noxious substances. In the second place, such terms such as 'low-tar', 'light', 'ultra-light', do not, in the absence of rules governing the use of those terms, refer to specific quantitative limits. In the third place, even if the product in question is lower in tar, nicotine and carbon monoxide than other products, the fact remains that the amount of those substances actually inhaled by consumers depends on their manner of smoking and that that product may contain other harmful substances. In the fourth place, the use of descriptions which suggest that consumption of a certain tobacco product is beneficial to health, compared with other tobacco products, is liable to encourage smoking.⁴⁴

The regulation of food claims raises similar difficulties. The advent of processed food has made it ever more difficult for consumers to know what they are eating. Making healthy choices has therefore become correspondingly more onerous. The increased reliance by consumers on nutrition and health claims⁴⁵ may be seen as a positive evolutionary step to the extent that such claims can provide them with more elements from which to compare products and make informed purchasing decisions, which may in turn contribute to public health objectives by encouraging food manufacturers to reformulate their products and produce more foods containing lower quantities of less healthy ingredients, and in particular saturated fat, sugar

⁴¹ [2001] OJ L194/26. Moreover, Directive 2003/33/EC, [2003] OJ L152/16, bans all forms of tobacco advertising and sponsorship with cross-border effects, as discussed below. Lastly, as regards other forms of advertising and sponsorship excluded from the scope of either Directive 2001/37/EC or Directive 2003/33/EC, it is arguable that Directive 2005/29/EC banning all unfair business-to-consumer commercial practices prohibits the advertising and sponsorship of 'light' or similar cigarettes, on the ground that such statements convey a misleading impression likely significantly to influence the economic behaviour of consumers and are therefore unfair (Arts 5 to 7).

⁴² Case C-491/01 *BAT and Imperial Tobacco* [2002] ECR I-11453.

⁴³ *Ibid*, para 135.

⁴⁴ *Ibid*, para 138.

⁴⁵ A nutrition claim 'suggests or implies that a food has particular beneficial nutritional properties due to the energy it provides (or does not provide) or the nutrients or other substances it contains or does not contain' (Art 2(4) of Regulation 1924/2006/EC), eg 'low fat' or 'high in fibre'. A health claim 'states, suggests or implies that a relationship exists between a food and health' (Art 2(5) of Regulation 1924/2006/EC), eg 'increases concentration' or 'good for heart health'.

and salt. On the other hand, nutrition and health claims are also a powerful marketing tool, and may give rise to difficulties when the claims in question mislead consumers rather than inform their choices. For example, what do claims such as 'low fat' or '50 per cent less fat' mean in the absence of common thresholds?

Since 1978, EU legislation has required that food labelling should not mislead consumers. Despite this requirement, however, there were no harmonised standards in Europe until Regulation 1924/2006/EC on nutrition and health claims made on food ('the Food Claims Regulation') was adopted in December 2006.⁴⁶ This Regulation, the dual objective of which is to facilitate free movement while providing a high level of consumer protection, sets common standards intended to assist European consumers in understanding the nutrition properties of certain foods. Most importantly, it requires that nutrition and health claims on foods placed on the EU market shall not be false, ambiguous or misleading.⁴⁷ Such claims should be based on, and substantiated by, generally accepted scientific evidence, with the burden of proof resting on the food business operators making the claims in question.⁴⁸ Moreover, nutrition or health claims may be made only if the presence, absence or reduced content of the substance in respect of which the claim is made has been shown to have a beneficial nutritional physiological effect.⁴⁹

This requires, first, that the average consumer can be expected to understand the beneficial effects as expressed in the claim and, secondly, that the amount of the product that can reasonably be expected to be consumed provides a significant quantity of the substance to which the claim relates.⁵⁰ In particular, certain claims will no longer be permitted if they rely on technical scientific terms of which consumers cannot be expected to have detailed knowledge, even though such claims are based on scientifically well-founded evidence.⁵¹ Claims that a product is '90 per cent fat free' are no longer allowed either: although perfectly correct, they are still misleading insofar as they suggest that the product in question has a low fat content, whereas 10 per cent fat is actually fairly high. The Regulation allows 'low fat' claims only for products containing no more than 3g of fat per 100g, or 1.5g per 100ml. In effect, to make a nutrition claim, a food business

⁴⁶ [2006] OJ L409/9, with a corrigendum published in January 2007, [2007] OJ L12/3.

⁴⁷ *Ibid*, Art 3.

⁴⁸ *Ibid*, Art 6. Food operators may be required to produce the scientific work and the data establishing compliance with the Food Claims Regulation.

⁴⁹ *Ibid*, Art 5.

⁵⁰ 'Five a Day' claims (namely, claims that consuming a given foodstuff contributes to the recommended daily intake of five portions of fruit and vegetable) are now also prohibited if they are made on products that need to be eaten or drunk in huge amounts before the equivalent quantity of vitamins or fibre as found in a piece of fruit is consumed.

⁵¹ Regulation 1924/2006/EC, Art 5(2).

operator must comply with the requirements laid down in the Annex of the Regulation.⁵² Consequently, the Food Claims Regulation has constrained the freedom of commercial operators to promote their foodstuffs in order to ensure that the information provided to consumers is of value to them and helps them make healthier choices.

The information paradigm, which emphasises the importance of consumer information for empowered consumer choices and therefore views consumer awareness as a public health tool, reflects a model of consumer protection placing the onus largely on individual consumers to 'protect' themselves. Nevertheless, courts on both sides of the Atlantic have accepted that commercial speech may have to be limited in certain cases, even though it does not contain any misleading information.

III. PUBLIC HEALTH PROTECTION AS A LIMIT ON THE FREEDOM OF COMMERCIAL OPERATORS TO PROMOTE THEIR GOODS AND SERVICES

The freedom of commercial operators to advertise their goods and services is not absolute (A.); it must be balanced against competing interests, including public health protection (B.).

A. The freedom of commercial expression is not absolute

Article 10(2) of the ECHR explicitly states that the right of commercial operators to promote their goods and services may be limited:

The exercise of [the freedoms to hold opinions and to receive and impart information and ideas], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This provision makes it clear that the protection of public health constitutes an overriding requirement of public interest justifying that some limits may

⁵² *Ibid*, Art 8(1). The Annex at present contains conditions for the use of 24 nutrition claims. As Regulation 1924/2006/EC is a horizontal instrument applying without prejudice to more specific provisions, there may be nutrition claims other than those listed in the Annex, including claims such as 'gluten-free', which are intended for a group of consumers with specific disorders and are dealt with in more specific legislation: see Art 5 of Directive 2009/39/EC, [2009] OJ L124/2, repealing Directive 89/398/EEC on foodstuffs intended for particular nutritional uses, [1989] OJ L186/27, as amended.

be set by law on the freedom of commercial operators to advertise their goods or services. Such restrictions must, however, be proportionate.

Even though the First Amendment to the US Constitution does not explicitly provide for derogations (on public health or other grounds), the US Supreme Court has laid down a test referred to as the *Central Hudson* test, which resembles the test laid down by Article 10(2) of the ECHR. The *Central Hudson* case involved a New York regulation imposing a complete ban on promotional advertising by electric utilities companies. The regulation rested on the finding that the interconnected utility system in New York State did not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the winter of 1973/74. Three years later, when the fuel shortage had eased, the New York Public Service Commission requested comments on its proposal to continue the ban on promotional advertising, and decided to extend the prohibition in 1977. *Central Hudson Gas & Electric Corporation* challenged the ban on the ground that it violated the First Amendment. After noting that commercial speech was at stake, the US Supreme Court ruled:

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.⁵³

This test has been relied upon in several subsequent rulings of the US Supreme Court concerning the compatibility of advertising restrictions with the First Amendment. It is clear that the protection of public health amounts to a 'substantial interest' of the State, as explicitly stated in cases involving restrictions on the advertising of gambling services,⁵⁴ alcoholic beverages⁵⁵ and tobacco products.⁵⁶

At EU level, some advertising restrictions imposed either by the EU legislature or by national authorities have been challenged as being contrary to the EU Treaties. In its case law, the Court of Justice has recognised, in line

⁵³ *Central Hudson Gas & Electric Corporation v Public Service Commission of New York* (1980) 447 US 557, 564.

⁵⁴ *Posadas de Puerto Rico Associations v Tourism Company of Puerto Rico* (1986) 478 US 328.

⁵⁵ *Rubin v Coors Brewing Company* (1995) 514 US 476 and 44 *Liquormart v Rhode Island* (1996) 517 US 484.

⁵⁶ *Lorillard Tobacco Co et al v Reilly, Attorney General of Massachusetts, et al* (2001) 533 US 525.

with the principles stemming from the case law of the European Court of Human Rights, that commercial expression is a lesser form of expression than political or artistic expression. The exercise of freedom of expression may therefore be subject to certain restrictions in order to protect public health.⁵⁷ The duty of EU institutions to mainstream public health concerns into all EU policies,⁵⁸ coupled with the recognition that the imperative of free movement has never been unlimited, has led the Court of Justice to uphold the validity of the Tobacco Advertising Directive imposing a ban on all forms of cross-border advertising and sponsorship of tobacco products,⁵⁹ as well as restrictions imposed by Member States, in the absence of common rules, on the advertising of alcoholic beverages⁶⁰ or gambling services.⁶¹ This approach reflects the view that the marketing of certain goods (tobacco products, alcohol, medicines, unhealthy food) and services (medicinal treatments, gambling services) is a contributory factor in a range of chronic diseases.⁶²

The Court of Justice has stated that in order to restrict the freedom of commercial operators to promote their goods and services, the relevant public authority must establish that the 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.⁶³ Thus, assessing the extent to which public authorities may restrict the marketing of harmful goods and services with a view to protecting public health very much rests on determining how competing interests should be balanced against each other: on the one hand, the freedom of expression of commercial operators to promote their goods and services; and, on the other hand, the interest of public authorities to restrict such promotion to limit the consumption of certain goods and services and ensure a higher level of public health. The proportionality assessment is therefore crucial in assessing the lawfulness of regulatory measures imposed by a public body

⁵⁷ Political, journalistic, literary or artistic expression contribute to a larger extent, in a liberal democratic society, to the achievement of social goods such as, eg, 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 promotes only economic activity.

⁵⁸ Arts 168(1) and 114(3) TFEU (ex Arts 152(1) and 95(3) EC).

⁵⁹ Case C-380/03 *Germany v Council and the European Parliament* [2006] ECR I-11573, discussed below.

⁶⁰ Case C-405/98 *Gourmet* [2001] ECR I-1795 and Case C-429/02 *Bacardi France* [2004] ECR I-6613.

⁶¹ See in particular the Court's recent judgment in Joined Cases C-447 and 448/08 *Sjöberg and Gerdin*, judgment of 8 July 2010, nyr.

⁶² The evidence relating specifically to tobacco and food marketing is discussed below.

⁶³ See, to this effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, para 26; Case C-60/00 *Carpenter* [2002] ECR I-6279, para 42; Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 79; and Case C-71/02 *Karner* [2004] ECR I-3025, para 50.

with a view to restricting the promotion by commercial operators of the goods and services they have lawfully placed on the market.

B. The key role of the principle of proportionality

Proportionality refers to the intensity or scale of legislative action. 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'; New Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality adds that

Draft European 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 minimised and commensurate with the objective to be achieved.⁶⁴

The means must be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.⁶⁵

The rest of this chapter compares the approach of the Court of Justice of the EU with the approach of the US Supreme Court to the proportionality assessment in cases where public health protection has been invoked to justify restrictions on the freedom of commercial operators to advertise their goods and services. Overall, the Court of Justice has left a broad margin of discretion to EU institutions and Member States, while the US Supreme Court has adopted a much less lenient approach to advertising restrictions. This difference is vividly illustrated by the constitutional challenges mounted against advertising restrictions imposed on tobacco products and alcoholic beverages on both sides of the Atlantic.

1. The failure of the Court of Justice to engage with existing evidence

The *Tobacco Advertising* litigation offers some useful indications as to how the Court of Justice assesses the proportionality of EU law measures, and measures relating to advertising restrictions more specifically. Germany had challenged two Directives (adopted respectively in 1998⁶⁶ and in 2003⁶⁷) banning tobacco advertising and sponsorship on a variety of grounds. In the first case, the Court did not need to rule on whether the measure infringed the principle of proportionality, since it annulled the 1998 Directive in its

⁶⁴ Art 5 of the New Protocol.

⁶⁵ See, *inter alia*, Case 137/85 *Maizena and Others* [1987] ECR 4587, para 15; Case C-339/02 *ADM Ölmühlen* [1993] ECR I-6473, para 15; and Case C-210/00 *Käserer Champignon Hofmeister* [2002] ECR I-6453, para 59.

⁶⁶ Directive 98/43/EC, [1998] OJ L213/9.

⁶⁷ Directive 2003/33/EC, [2003] OJ L152/16.

entirety on the ground that the EU did not have the necessary powers to adopt the measure in question.⁶⁸ In the second case, however, the Court held that the EU legislature had not infringed the principle of conferral by adopting the 2003 Directive, and then moved on to assess the other arguments invoked by Germany, including whether the measure had been adopted in breach of the principle of proportionality.⁶⁹

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.⁷⁰ In its earlier ruling in the *Karner* case, the Court had added 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'.⁷¹ On this basis, the Court continued:

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.⁷²

In this judgment, the Court of Justice failed to perform the balancing exercise which the principle of proportionality requires. The same observation may be made for cases involving the compatibility of *national* measures imposing advertising restrictions with general free movement provisions. In the *Gourmet* case, the Court was called upon to assess whether the Swedish ban on alcohol advertising was contrary to the

⁶⁸ C-376/98 *Germany v Council and the European Parliament* [2000] ECR I-8419.

⁶⁹ Case C-380/03 *Germany v Council and the European Parliament* [2006] ECR I-11573.

⁷⁰ See, to this effect, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, para 58; Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paras 55 and 56; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, para 61; Case C-491/01 *BAT and Imperial Tobacco* [2002] ECR I-11453, para 123; and Case C-71/02 *Karner* [2004] ECR I-3025, para 51.

⁷¹ 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-12489, para 73; *Markt Intern v Germany* Series A no 165 (1990) 12 EHRR 161, para 33; and *VGJ Verein gegen Tierfabriken v Switzerland* Reports of Judgments and Decisions 2001-VI (2002) 34 EHRR 4, paras 69 and 70.

⁷² Case C-380/03 *Germany v Council and the European Parliament* [2006] ECR I-11573, paras 156–58.

provisions on the free movement of goods and on the freedom to provide services.⁷³ It held:

The decision as to whether the prohibition on advertising at issue in the main proceedings is proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-[Union] trade, calls for an analysis of the circumstances of law and of fact which characterise the situation in the Member State concerned, which the national court is in a better position than the Court of Justice to carry out.⁷⁴

As Andrea Biondi has noted,

the judicial solution of dumping everything on the national court is very disappointing ... The decision not to decide and leave it up to the national court is a clear indication of the unwillingness of the Court to interfere with Member States' policies in certain delicate areas.⁷⁵

If it is true that the *Gourmet* judgment originated from a preliminary reference, where the referring court should settle the dispute between the parties, it is arguable that the Court of Justice failed in this case to provide the guidance necessary to assist the national authorities in discharging their duty to ensure that EU law is upheld.⁷⁶ Nevertheless, in the internal market, where the free movement of goods and services is ensured, the discretion of Member States to impose restrictions on commercial operators' freedom to promote their goods and services should be constrained by a more rigorous proportionality assessment, particularly when evidence exists supporting the proposed course of action rather than an alternative one.⁷⁷

The Court's reasoning is strikingly brief in both these cases and, as such, differs markedly from the reasoning of Advocate-General Fennelly on exactly the same point in the first *Tobacco Advertising* case, that of Advocate-General Léger in the second *Tobacco Advertising* case, and that of Advocate-General Jacobs in *Gourmet*. Two points should be underlined. First, the structure of both the free movement provisions and Article 10 of the ECHR requires that the public authority wishing to impose advertising restrictions 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.

⁷³ Case C-405/98 *Gourmet* [2001] ECR I-1795.

⁷⁴ *Ibid*, para 33.

⁷⁵ A Biondi, 'Advertising Alcohol and the Free Movement Principle: The Gourmet Decision' (2001) 26 *EL Rev* 616, 620.

⁷⁶ In certain cases, the Court has provided more guidance as to how national court should assess the proportionality of a given restriction on fundamental freedoms. See, eg, Case C-438/05 *Viking* [2007] ECR I-10779.

⁷⁷ The issue is admittedly more difficult when morality, rather than public health, is at stake.

Secondly, the Court of Justice must scrutinise the evidence presented to ensure that the public health argument put forward to justify advertising restrictions is convincing and does not rely on assumptions or, worse, prejudice. Very often, such evidence will exist and will allow public authorities to restrict advertising for goods or services the excessive consumption of which is harmful.

For example, the rationale for the Tobacco Advertising Directive is that consumption of tobacco products is dangerous to the health of smokers and—one could add—to 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.⁷⁸ The damage caused to health by smoking has not 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. It is useful at this stage to refer to the evidence gathered by the WHO, which supports comprehensive bans on tobacco advertising and all other forms of promotion:

The tobacco industry claims that its advertising and promotion efforts are not intended to expand sales or attract new users, but simply to reallocate market share among existing users. This is not true. Marketing and promotion increase tobacco sales and therefore contribute towards killing more people by encouraging current smokers to smoke more and decreasing their motivation to quit. Marketing also urges potential users—and young people specifically—to try tobacco and become long-term customers. Tobacco advertising targeting youth and specific demographic subgroups is particularly effective.

Marketing creates other obstacles that blunt tobacco control efforts. Widespread tobacco advertising 'normalises' tobacco, depicting it as being no different from any other consumer product. That makes it difficult for people to understand the hazards of tobacco use. Marketing falsely associates tobacco with desirable qualities such as youth, energy, glamour and sex appeal. It also strengthens the tobacco industry's influence over the media, as well as sporting and entertainment businesses, through billions of dollars in annual spending on advertising, promotion and sponsorship ...

A ban on marketing and promotion is a powerful weapon against the tobacco epidemic ...

⁷⁸ Recital 3 of the Preamble to the Tobacco Advertising Directive 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 Community annually, thereby avoiding a situation where young people begin smoking at an early age as a result of promotion and become addicted'.

To be effective, bans must be complete and apply to all marketing and promotional categories. If only television and radio advertising is blocked, the tobacco industry will move its budgets to other marketing avenues, such as newspapers, magazines, billboards or the Internet. If all traditional advertising is blocked, the industry will convert advertising expenditure to sponsorship of events popular among youth such as racing, sports, music festivals ...⁷⁹

Consequently, the Framework Convention on Tobacco Control, the first public health treaty ever adopted under the auspices of the WHO,⁸⁰ calls upon its Contracting Parties⁸¹ to recognise 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 on all tobacco advertising, promotion and sponsorship, including a cross-border ban on advertising, promotion and sponsorship originating from their territories.⁸²

The Court of Justice should review existing evidence, rather than simply rule that the EU legislature or national authorities should be granted a broad margin of discretion. Ensuring that the choices of the EU legislature or national authorities are reasonable in the light of existing evidence does not mean that the Court would be substituting its own assessment for theirs. If the EU legislature or Member States wish to adopt a cautious approach, the Court of Justice should respect their 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.

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 these cases have heralded a clear victory for public health over commercial expression. On the other hand, the insufficient and therefore unconvincing reasoning of the Court may cut both ways. Its lack of guidance on how the proportionality of a measure should be assessed could have perverse results on the legislative process more generally, in that it does not encourage the EU legislature or national authorities to justify their choices. In other words, the excessively loose standard of review

⁷⁹ WHO Report on the Global Tobacco Epidemic, The MPOWER Package, Geneva, 2008, 36–38, with references to a range of supporting studies, including studies carried out before the Tobacco Advertising Directive was adopted.

⁸⁰ For the text of the FCTC and other relevant information, see <www.who.int/tct/en>

⁸¹ 168 to date, including the EU and its 27 Member States.

⁸² Art 13, Framework Convention on Tobacco Control.

applied by the Court sends out the wrong message. A stricter standard of review would provide the necessary incentive for the EU legislature or national authorities 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 stigmatised.

The debates concerning the regulation of the marketing of unhealthy food to children illustrate these points. Over the last 15 years there has been growing concern that much of the food marketed to children is high in fat, salt and sugar, and has both immediate and long-term damaging effects on their health. The marketing of unhealthy food conditions and habituates children to an unhealthy diet, contributes to overweight and obesity, causing elevated blood pressure, cholesterol and blood sugar levels, and leads to type 2 diabetes. Nevertheless, food operators have objected that exposing children to food advertising does not lead to obesity as such, arguing that the main problem which children encounter is their lack of physical activity. Following the industry's claim that the relationship between eating patterns and television advertising is not established,⁸³ research has become more focused and has attempted to prove the causal link between food advertising and children's weight. Various regulatory authorities have commissioned independent research to explore whether a correlation exists between weight gain and children's exposure to food marketing. The evidence gathered so far suggests that such a correlation does exist, and it has identified the need to restrict the promotion of unhealthy food to children.⁸⁴ Consequently, in its *Global Strategy on Diet, Physical Activity and Health*, the WHO identified the regulation of the marketing of food to children as an area requiring further action and initiated wide-ranging consultations with Contracting Parties, with representatives of the food and advertising industries, and with public health and consumer advocates.⁸⁵ Similarly, the

⁸³ The food industry has claimed for years that if children who watch a lot of television are getting fat, it is due to their insufficient levels of physical activity, rather than to its intensive marketing of unhealthy foods. Even if sedentary lifestyles do play a role in the increase of obesity, this explanation nonetheless appears somewhat simplistic.

⁸⁴ For a review of the evidence, see in particular J Hatris, J Pomeranz, T Lobstein and K Brownell, 'A Crisis in the Marketplace: How Food Marketing Contributes to Childhood Obesity and What Can Be Done' (2009) 30 *Annual Review of Public Health* 211.

⁸⁵ *Global Strategy on Diet, Physical Activity and Health* (Geneva, WHO, May 2004), para 40(3): '[F]ood advertising affects food choices and influences dietary habits. Food and beverage advertisements should not exploit children's inexperience or credulity. Messages that encourage unhealthy dietary practices or physical inactivity should be discouraged, and positive, healthy messages encouraged. Governments should work with consumer groups and the private sector (including advertising) to develop appropriate multisectoral approaches to deal

European Commission specifically asked stakeholders for their views on how food advertising to children should be regulated in the consultation which led to its Obesity Prevention White Paper of May 2007.⁸⁶

The developing evidence base has led to a range of policy initiatives at different levels. At EU level, the Audiovisual Media Services Directive provides that

Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.⁸⁷

Despite its ineffectiveness,⁸⁸ this provision nonetheless recognises the need to restrict the exposure of children to unhealthy food marketing.

At the national level, following an extensive consultation process, the UK has adopted measures which go further than the minimum standard laid down at EU level by the Audiovisual Media Services Directive and which are more likely to reduce the marketing pressure on children. These measures, which came into effect on a phased basis from April 2007 to 1 January 2009, include a total ban on unhealthy food advertising in and around all children's television programming and on dedicated children's channels, as well as in youth-orientated and adult programmes which attract a significantly higher than average proportion of viewers under the age of 16.⁸⁹

with the marketing of food to children, and to deal with such issues as sponsorship, promotion and advertising.'

⁸⁶ COM(2007) 679 final. 'As far as advertising and marketing is [sic] concerned, it has to be ensured that consumers are not misled, and that especially the credulity and lacking media literacy of vulnerable consumers and, in particular children, are not exploited. This regards in particular advertising for foods high in fat, salt and sugars, such as energy-dense snacks and sugar-sweetened soft drinks, and the marketing of such products in schools': COM(2005) 637 final, para V.1.2.

⁸⁷ Art 9(2) of Directive 2010/13/EU, [2010] OJ L95/1.

⁸⁸ On the EU's obesity prevention strategy, and the failure of the EU to deal convincingly with the exposure of children to food marketing more specifically, see A Garde, *EU Law and Obesity Prevention* (The Hague, Kluwer Law International, 2010) ch 5. For sceptical views on the reliance of public authorities on self-regulatory standards to curb food marketing to children, see C Hawkes, 'Self-Regulation of Food Advertising: What It Can, Could and Cannot Do to Discourage Unhealthy Eating Habits Among Children' (2005) *British Nutrition Foundation: Nutrition Bulletin* 374; see also D Ludwig and M Nestle, 'Can the Food Industry Play a Constructive Role in the Obesity Epidemic?' (2008) 15 *Journal of American Medical Association* 1808, and L Sharma, S Terer and K Brownell, 'The Food Industry and Self-Regulation: Standards to Promote Success and Avoid Public Health Failures' (2010) 100 *American Journal of Public Health* 240.

⁸⁹ For details, see <www.ofcom.org.uk/consult/condocs/foodads_new/>, accessed 12 July 2010.

At the global level, on 21 May 2010 the 63rd World Health Assembly endorsed a set of recommendations on the marketing of foods and non-alcoholic beverages to children, calling on Contracting Parties to reduce both the exposure and the power of marketing.⁹⁰ The recommendations encourage the Contracting Parties—though it does not oblige them—to adopt approaches which are as comprehensive as possible, thus recognising that a comprehensive approach has the highest potential to achieve the desired objective. They also acknowledge the central role of State authorities in policy-making:

Government should be the key stakeholders in the development of policy and provide leadership through a multi-stakeholder platform for implementation, monitoring and evaluation. In setting national policy framework, governments may choose to allocate defined roles to other stakeholders, while protecting the public interest and avoiding conflict of interest.⁹¹

The fact that the marketing of unhealthy food to children has now been proven to contribute to an 'obesogenic' environment reinforces the basis for invoking public health arguments to limit the freedom of commercial operators to promote unhealthy food to children. Nevertheless, this does not mean that public authorities will not have to exercise their discretion in deciding how far food marketing should be restricted. Several questions have not been conclusively answered by existing evidence. In particular, there seems to be no agreement concerning the age until which children need specifically to be protected from unhealthy food marketing: age 12 (EU Company Pledge⁹²), age 13 (Danish National Code⁹³), age 14 (Australian Food and Beverage Industry's Initiative on Responsible Children's Marketing⁹⁴) or age 16 (Ofcom Regulations in the UK⁹⁵)?

The approach adopted by the Province of Quebec is instructive in this respect. The Canadian Supreme Court had to decide in the *Irwin Toy* case whether Quebec legislation—which was the first to ban, as of 1980, all forms of advertising to children under 13—was compatible with the Canadian Constitution. The Court confirmed that advertising, as commercial speech, was protected under the freedom of expression provision of the Canadian Charter. However, it held that the legislation in question could

⁹⁰ Resolution WHA63.14. Available at <www.who.int/dietphysicalactivity/marketing-food-to-children/en/index.html>, accessed 12 July 2010.

⁹¹ Recommendation 6.

⁹² Available at <www.eu-pledge.eu>, accessed 12 July 2010.

⁹³ Reported in the PolMark Report published in February 2010. The PolMark Project (PolMark standing for 'Policies on Marketing Food and Beverages to Children') has received €390,700 from the EU: <polmarkproject.net>, accessed 12 July 2010.

⁹⁴ Available at <www.afgc.org.au/industry-codes/advertising-kids.html>, accessed 12 July 2010.

⁹⁵ Available at <www.ofcom.org.uk/consult/condocs/foodads_new/>, accessed 12 July 2010.

be saved under section 1 of the Charter if the Government proved that the limitations on the rights were demonstrably justifiable as reasonable restrictions in a free and democratic society. Under section 1, the Government was required to show that the objective of the law related to a pressing and substantial objective, and that the means chosen to achieve that objective were proportionate to the objectives pursued. This required that the measures chosen were rationally connected to the objective and minimally impaired the guaranteed right. The judgment of the majority upheld the legislation primarily on a 'manipulation' thesis. The concern addressed was 'the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising', which 'accords with a general goal of consumer protection legislation or, in other words, to protect a group that is most vulnerable to commercial manipulation'. The judgment identified several issues, that is

the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority.⁹⁶

In order to establish a factual basis for this concern, the Court relied on the conclusions of the US Federal Trade Commission in relation to television advertising aimed at children aged under 7 years old, issued in 1970 when a similar debate was taking place in the United States.⁹⁷ However, as Iain Ramsay has observed, these findings did not in fact answer the question before the Court, since the US Federal Trade Commission's conclusions related to television advertising and to children aged under 7, whereas the Quebec legislation related to all forms of advertising and included children up to age 13. The Court cited no specific evidence to support these extensions.⁹⁸ As discussed above, the issue of when children are able to 'argue against' advertising is controversial. Consequently, the majority also argued that the Court should show deference to a legislative decision in the area of balancing competing economic and social interests where there was incomplete scientific evidence. It also noted that, since the ban could be rationalised as only partial—advertisers were still able to direct advertising

⁹⁶ *Irvin Toy Ltd v Attorney General of Quebec* [1989] 1 SCR 927.

⁹⁷ On the US debate, see I Ramsay, *Advertising, Culture and the Law* (London, Sweet & Maxwell, 1996), in particular the chapter on 'Capitalism, Advertising to Children and the First Amendment'; J Pomeranz, 'Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate' (2010) *Journal of Law, Medicine and Ethics* 98. On the situation in the US and in Canada, see B Jeffery, 'The Supreme Court of Canada's Appraisal of the 1980 Ban on Advertising to Children in Quebec: Implications for "Misleading" Advertising Elsewhere' (2006) 39 *Loyola Law Review* 237.

⁹⁸ I Ramsay, *Advertising, Culture and the Law* (London, Sweet & Maxwell, 1996).

to adults—the means chosen were not disproportionate to the objective to be achieved.⁹⁹

This example shows that public authorities should adduce existing evidence to justify the restrictions they have imposed on freedom of commercial expression. At the EU level, the Court of Justice should assess the evidence and decide, on its basis, whether the measure is necessary to protect children's health and not over-restrictive of the freedom of food operators to advertise their goods. It is only when the evidence is not conclusive that the Court should allow a margin of discretion to the relevant public authorities, provided that they have established that their intervention is reasonable.

2. The US Supreme Court's excessive reliance on the information paradigm

The US Supreme Court has proved much more willing to scrutinise legislative restrictions on advertising than the Court of Justice of the EU when public health considerations are invoked. Its approach finds two interesting illustrations in the 44 *Liquormart*¹⁰⁰ and *Lorillard*¹⁰¹ cases, dealing with restrictions imposed on the advertising of tobacco products and alcoholic beverages respectively. In both cases, the US Supreme Court accepted that the State had a substantial interest in protecting public health. It therefore focused its reasoning on the third and fourth limbs of the *Central Hudson* test (section III.A. above). It concluded that the states concerned in these cases had failed to establish that there was a 'reasonable fit' between the

⁹⁹ This does not address the problems associated with the exposure of children to food marketing during programmes which are not classified as children's programmes but which nonetheless are viewed by many children. This consideration is important in light of the fact that a large proportion of the time children spend watching television is outside designated children's viewing times (70% in the UK, for example, according to Ofcom's calculations).

¹⁰⁰ 44 *Liquormart v Rhode Island* (1996) 517 US 484. In this case, the US Supreme Court invalidated a total ban on advertisements providing information about the prices of alcoholic drinks. As part of its assessment, the Court clearly stated that advertising bans amounted to the manipulation of consumer choices by keeping them ignorant (517 US 484, 522). This statement reinforces the position which the Court had adopted in its earlier decision in *Virginia Pharmacy Board v Virginia Consumer Council* (1976) 425 US 748, in which it had held that if the State was free to require whatever professional standards it wished of pharmacists, and might subsidise them or protect them from competition in other ways, it might not do so by keeping the public in ignorance of the lawful terms that competing pharmacists were offering, and that the State could not suppress the dissemination of concededly truthful information about entirely lawful activity for fear of that information's effect upon its disseminators and recipients. For a comparison of this case with *Gourmet*, see Biondi, above n 75.

¹⁰¹ *Lorillard Tobacco Co et al v Reilly, Attorney General of Massachusetts, et al* (2001) 533 US 525. In this case, the question arose of the compatibility with the First Amendment of the regulations introduced by the state of Massachusetts restricting tobacco advertising and sales practices intended to recruit children as new customers. In particular, the regulations restricted outdoor advertising, point of sale advertising and certain sale practices (retail sales transactions, mail transactions).

legislative ends and the means chosen to attain those ends. To reach this conclusion, the Court reviewed the measures imposed by the states, insisting that the burden lay on them to establish that the restrictions were both necessary and proportionate *stricto sensu*. In so doing, the US Supreme Court did not hesitate to engage in the balancing exercise proportionality required and to challenge, if necessary, the assumptions on which the measures at stake were based.

In 44 *Liquormart*, more specifically, the US Supreme Court cited at length its previous ruling in *Victoria Board of Pharmacy*, noting that blanket advertising bans should not be approved unless the speech itself was flawed in some way, either because it was deceptive or because it related to unlawful activity. On this basis, it reviewed Rhode Island's legislation and unanimously concluded that 'because Rhode Island [had] failed to carry its heavy burden of justifying its complete ban on price advertising, that ban [was] invalid'. First, the Court held that the state had not shown how its legitimate objective of moderating alcohol consumption would be significantly advanced by the introduction of a price advertising ban (third part of the *Central Hudson* test: necessity). Secondly, the Court ruled that the state could have taken other measures which would have been less restrictive of commercial speech, including the imposition of higher prices through taxation or the adoption of educational measures intended to draw attention to the dangers of excessive drinking (fourth part of the *Central Hudson* test: proportionality *stricto sensu*).

The reasoning of the US Supreme Court relies on the strong premise that advertising informs. It could nonetheless be argued that the informational value of advertising is quite limited. Advertising is above all intended to persuade. As part of its commercial strategy a commercial operator will insist only on the positive aspects of the goods or the services it offers. Advertising is one-sided, and the requirements highlighted above to disclose certain information to consumers cannot compensate for this fact. For example, claiming that certain breakfast cereals are low in fat suggests that they are healthier than they really are, as they may contain some 40 per cent of added sugars. Moreover, in many cases, the commercial operator will appeal to the feelings of consumers rather than their rational abilities to think critically: a beautiful woman enjoying a glass of wine, a sporty man driving a powerful car, happy children eating a bar of chocolate and so on. In these cases, the informative value of advertising is very low indeed, even though this marketing technique may nonetheless prove very effective to induce consumption.

This issue is particularly important when marketing techniques target groups of particularly vulnerable consumers, such as children. The use of sports celebrities or character merchandising raises particular concerns in marketing campaigns directed at children for goods or services which are deemed 'harmful'. If we return to the example of food marketing, eight-time

Beijing Games Gold Medallist Michael Phelps signed a deal with Kellogg's to promote sugary breakfast cereals, and another one with McDonald's to serve as an ambassador actively recruiting Chinese children to become McDonald's customers.¹⁰² Similarly, character merchandising plays on children's fascination with a fantasy character, so as to induce them to buy, or to insist that their parents buy, the advertised good or service. The problem with this advertising technique is that the use of cartoon characters is in no way related to the actual content of the food.¹⁰³ It is therefore arguable that such marketing techniques rely on an exploitation of children's inexperience and credulity, by presenting a (generally unhealthy) foodstuff by referring to their familiar environment. Consequently, several authors have argued that such techniques, and food marketing to children more generally, are inherently misleading, due to the limited cognitive abilities of children to grasp the full commercial purpose of advertising.¹⁰⁴

Furthermore, the effectiveness of information provision in improving lifestyles largely relies on a motivated and educated public perfectly able to make rational, healthy choices. This is, however, misconceived (at least in part), even for adults. For example, the addictive substances present in cigarettes make it extremely difficult for the already-addicted smoker to quit smoking. Information is necessary as part of a comprehensive tobacco strategy, but it is unlikely to address the problems already-addicted smokers encounter.¹⁰⁵ Courts in the US have themselves cited the addictiveness of nicotine as a reason why smokers may not be found to have behaved unreasonably in continuing to smoke after they have become aware of the health risks smoking poses.¹⁰⁶ Similarly, in relation to dietary choices,

¹⁰² See the McDonald's interview of the champion on 18 August 2008 after he had won eight gold medals, in which he stated that his favourite food was a double cheeseburger and fries, available at <www.youtube.com/watch?gl=FR&cv=pCWpkB45je0>, accessed 12 July 2010.

¹⁰³ The technique has proven so effective that public authorities have started to use cartoon characters to promote healthy eating and physical activity to children. See, eg, the use of the Childhood Obesity Prevention clip featuring Shrek, posted on You Tube by the Ad Council, a private, non-profit organisation which produces, distributes and promotes public service campaigns on behalf of non-profit organisations and government agencies in the USA in areas such as improving the quality of life for children, preventative health, education, community well-being, environmental preservation and strengthening families, available at <www.youtube.com/watch?v=r-zEDb104NY>, accessed 12 July 2010. For an analysis of the use of licensed characters in food marketing to children, see J Harris, M Schwartz and K Brownell, 'Marketing Foods to Children and Adolescents: Licensed Characters and Other Promotions on Packaged Foods in the Supermarket' (2009) 13 *Public Health Nutrition* 409.

¹⁰⁴ Jeffery, above n 97; Pomeranz, above n 97.

¹⁰⁵ The Framework Convention on Tobacco Control recognises that 'cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classifications of diseases' (Preamble).

¹⁰⁶ *Standish-Parkin v Lorillard Tobacco Co et al* (2004) 12 AD3d 301, 786 NYS2d 13.

the reviews carried out to assess the role of information in behaviour change have concluded that information and education can contribute towards such change¹⁰⁷; however, information alone is unlikely to lead to change unless it can overcome counteracting psychological, behavioural, economic and environmental barriers. Achieving behaviour change is far from straightforward. Tackling obesity involves a variety of short- and longer-term goals, including what may be challenging alterations to diet, changes in how the retail sector influences shopping behaviour, increases in the amount of exercise engaged in, different choices of transport, and so on. Research shows that people and their environment interact to determine behaviour and the potential for behaviour change. There is also evidence that there are difficulties in making healthy choices in some environments more than in others. These studies illustrate the considerable psychological effort needed to combat the temptations of an unhealthy lifestyle, and how freedom of choice can sometimes, counter-intuitively, make it more difficult to resist temptation.¹⁰⁸ Moreover, a key feature of behaviours that promote public health is that they will deliver gains for the individual and for the population only if they are maintained in the long term.¹⁰⁹

These research findings should lead societies to question their frequent portrayal of obesity as an issue of personal willpower. It is often assumed that individuals are getting fat because they keep eating too much and fail to engage in enough physical activity. Obesity is a much more complex phenomenon than this simplistic approach suggests. The role of genes and the role of societal and environmental factors over which individuals have little control support the view that obesity is not exclusively a question of personal responsibility. Responsibility is shared between, on the one hand, individuals, who must adopt an adequate lifestyle to protect their health and that of their children, and, on the other hand, policy-makers and society, who must create environments that better suit human biology and support individuals in developing and sustaining healthy lifestyles, bearing in mind that the vast majority of the population is predisposed to gaining weight.¹¹⁰

¹⁰⁷ The results of the consumer survey carried out in 2008 by the European Union Food Information Council (EUFIC) confirm that higher socio-economic status impacts positively upon the search for nutrition information and the level of nutrition knowledge: K Grunert, I Fernández-Celemin, J Wills, S Storcksdieck and L Nureeva, 'Use and Understanding of Nutrition Information on Food Labels in Six European Countries' (2010) 18 *Journal of Public Health* 261.

¹⁰⁸ Stress and habit formation also impede the ability to resist temptation.

¹⁰⁹ Foresight Project Report, *Tackling Obesities: Future Choices* (London, Government Office for Science, October 2007) 64.

¹¹⁰ D King, Chief Scientific Adviser to the UK Government and Head of the Government Office for Science, *ibid.* Foreword. See also K Brownell, R Kersh, D Ludwig, R Post, R Puhl, M Schwartz and W Willett, 'Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue' (2010) 29 *Health Affairs* 378.

It has therefore become widely acknowledged that the responsibility for healthy diets cannot rest exclusively on individuals. Public authorities and other stakeholders must facilitate their choices by creating an environment where healthy choices become easier choices.¹¹¹ The anti-paternalism argument invoked by the US Supreme Court in a range of its decisions reviewing the compatibility of advertising restrictions with the First Amendment to the Constitution should therefore be tempered. Toxic environments may indeed require State intervention to help consumers protect themselves. This is all the more justified in light of the heavy burden associated with most chronic diseases resulting from unhealthy lifestyles.¹¹²

Lastly, the reasoning of the US Supreme Court may also be criticised for the cavalier use it has made of existing evidence. It has tended to rule that less restrictive measures would ensure a higher level of public health protection while being more respectful of commercial speech than advertising restrictions. It is true that pricing and education measures have the potential to curb smoking and reduce the disease-burden associated with it. Nevertheless, as the Framework Convention on Tobacco Control has explicitly stated, smoking is triggered by a range of factors, and

[s]trong political commitment is necessary to develop and support, at the national, regional and international levels, comprehensive multisectorial measures and coordinated responses ...¹¹³

Consequently, only multi-sectoral tobacco strategies, which should comprise, *inter alia*, comprehensive marketing bans on tobacco products, are likely to be effective. One type of measure should not exclude another; quite the contrary, one measure should reinforce the effectiveness of another. The US Supreme Court should not substitute its assessment for that of the legislature. It is too categorical to rule that 'speech prohibitions of this type [advertising bans] rarely survive constitutional review'¹¹⁴: the complexity of the problems modern societies have to face to ensure a high level of public health protection should be acknowledged rather than sacrificed on the

¹¹¹ At EU level, see in particular the Commission's White Paper laying down a strategy for Europe on nutrition, overweight, and obesity related health issues, COM(2007) 279 final. In the US, the idea that the Government should support healthy choices is slowly gaining ground: see White House Task Force on Childhood Obesity, *Solving the Problem of Childhood Obesity within a Generation*, Report to the President, 11 May 2010, <www.letsmove.gov/tfco_fullreport_may2010.pdf>.

¹¹² Eg, the costs attributed to overweight and obesity throughout the 25 EU Member States (without Bulgaria and Romania) have been estimated at €81 billion—an amount which is bound to increase given rising obesity trends: Impact Assessment Accompanying the Obesity Prevention White Paper of 30 May 2007, SEC(2007) 706/2, 34. In the US, medical spending on adults that was attributed to obesity amounted to approximately \$147 billion in 2008: White House Task Force on Childhood Obesity, above n 111, 3.

¹¹³ Art 4(2).

¹¹⁴ 44 *Liquormart v Rhode Island* (1996) 517 US 484.

basis of a flawed argument resting exclusively on the information paradigm as key to liberal market economies.

The comparison of the case law of the Court of Justice of the EU with the case law of the US Supreme Court highlights the very different stances that these two constitutional courts have adopted in relation to restrictions on commercial speech imposed for public health reasons. The former is very reluctant to exercise its review powers, and has failed to require that public authorities intending to curtail the freedom of commercial operators to promote their goods and services effectively discharge the burden of proving that their restrictive measures are necessary to protect public health and do not have any suitable, less restrictive alternatives. By contrast, the US Supreme Court has made it excessively difficult for public authorities to impose any meaningful advertising restrictions, on the ground that truthful information on which consumers are likely to rely to decide what they should buy should not be suppressed. A more balanced approach is required which combines the skill of the US Supreme Court in ensuring that public authorities discharge the burden of proving that restrictions to commercial speech are proportionate, with the caution of the Court of Justice in ensuring that it does not substitute its assessment for that of the legislature.¹¹⁵ It is only then that the discourse of both public authorities and commercial operators will be accurately scrutinised, consumer choices effectively supported and public health *adequately* protected.

¹¹⁵ The British High Court has arguably struck such a balance in its judgment in *R v British American Tobacco and others* [2004] EWHC 2493 (Admin).

9

Private Party Liability in EU Law: In Search of the General Regime

DOROTA LECZYKIEWICZ

Abstract: The emergence of private party liability in damages in EU law has been much discussed by academics, but it is clear from the case law of the Court of Justice that we do not yet have a principle of private party liability analogous to the principle of Member State liability. This chapter examines under what conditions it would be justified to claim that there was indeed a general principle of private party liability in EU law. Furthermore, the chapter explains that the introduction of the general principle of private party liability would require a thorough clarification of some of the most fundamental, yet still unclear, concepts of EU law, such as direct effect, the horizontal applicability of EU norms and the principle of effective judicial protection. It is argued that the jurisdiction of the Court of Justice to introduce a general regime of private party liability in damages is not without controversy and that the judicial creation of the principle will be legitimate only if adequate normative justification is provided for its presence in EU law. In this respect, it has to be recognised that EU competition law is not an adequate legal setting for the general regime to be born, because it does not bring to light tensions arising in other contexts.

I. INTRODUCTION

IN 2001 THE Court of Justice decided *Courage*,¹ a case in which the Court was asked to interpret Article 81 EC (now Article 101 TFEU) in order to determine whether 'a party to a prohibited ... agreement may rely upon that article to seek relief from the courts from the other contracting party', and whether a national rule which provides that courts should not allow a person to rely upon his own illegal actions as a necessary step to recovery of

¹ Case C-453/99 *Courage v Crehan* [2001] ECR I-6297 ('*Courage*').